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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Appellant and Plaintiff,	)	Supreme Court No. 20200008
vs.	)	20200009
	)	20200010
	)	District Court No. 09-00-K-01151
M.J.W.,	)	09-01-K-00169
	)	09-03-K-00305
Appellee and Defendant.	)	

Appeal from Certificates of Rehabilitation and
Orders Sealing Criminal Records
entered December 9, 2019
East Central Judicial District in Cass County, North Dakota
The Honorable Tristan J. Van de Streek, Presiding

APPELLANT'S BRIEF

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[¶3] **JURISDICTIONAL STATEMENT**

[¶4] The State's right to appeal is provided by N.D.C.C. § 29-28-07(4): "An appeal may be taken by the state from … [a]n order made after judgment affecting any substantial right of the state." The district court issued an order after judgment in each of the three consolidated cases. (Index # 28, 09-00-K-01151; Index # 24, 09-01-K-00169; Index # 47, 09-03-K-00305.)

[¶5] Each order affected a substantial right of the State. See generally State v. Rueb, 249 N.W.2d 506, 508–09 (N.D. 1976) ("The modification order of the court is an order made after judgment and the total effect of the order involves a substantial right of the State."); State v. Vavrosky, 442 N.W.2d 433, 434–35 (N.D. 1989). That is because each order prohibited the State from disclosing its own records; the orders sealed the "prosecution records" related to the Defendant's convictions. (Index # 28, 09-00-K-01151; Index # 24, 09-01-K-00169; Index # 47, 09-03-K-00305.)

[¶6] Perhaps more importantly, each order implicated an issue involving "compliance with procedures" - a factor this Court has recognized as triggering appealability under the "affecting any substantial right" provision. State v. Vavrosky, 442 N.W.2d 433, 434–35 (N.D. 1989). In particular, the district court interpreted the procedures set forth in N.D.C.C. § 12-60.1-02(1)(a), i.e., whether it precluded a defendant's petition to seal a criminal record if the factors (defendant pled or was found guilty of a misdemeanor and "has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or

probation") were unmet or whether it merely set a waiting period for a defendant to satisfy before filing a petition to seal. This Court, accordingly, should conclude, as it previously has, that "[b]ecause it is the procedure we are concerned with, as distinguished from the individual judgment of the trial judge, we hold that Section 29-28-07(4), N.D.C.C., authorizes this appeal." Id.

[¶7] Bolstering appealability is the Legislature's express prohibition of only an individual's right to appeal a denial of sealing. Under N.D.C.C. § 12-60.1-04(6), "an individual may not appeal a denial of a petition from a district judge[.]" In contrast, the statute does not indicate that the state may not appeal a grant of a petition. That is significant because the Court has recognized the state's right to appeal under the "affecting any substantial right" provision in N.D.C.C. § 29-28-07(4) tracks with the defendant's right to appeal under the "nearly identical" language in N.D.C.C. § 29-28-06(5). State v. Walker, 2010 ND 214, ¶ 19, 790 N.W.2d 484. The Legislature is presumed to know how this Court has interpreted N.D.C.C. § 29-28-07(4) and N.D.C.C. § 29-28-06(5). See Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 2001 ND 139, ¶ 26, 632 N.W.2d 407 ("We presume the legislature is aware of judicial construction of a statute, and from its failure to amend a particular statutory provision, we may presume it acquiesces in that construction."). The Legislature is also presumed to act with a purpose and to not enact superfluous laws. See Tillich v. Bruce, 2017 ND 21, ¶ 9, 889 N.W.2d 899 ("We construe statutes in a way which does not render them meaningless because we presume the Legislature acts with purpose and does not

perform idle acts.") (citation omitted). Thus the Legislature must have construed N.D.C.C. § 29-28-06(5) as a general statute permitting a defendant's appeal of a denial of sealing and chose to enact a more specific provision, namely N.D.C.C. § 12-60.1-04(6), prohibiting such appeal by a defendant and leaving intact the state's right to appeal under N.D.C.C. § 29-28-07(4).

[¶8] If the Court concludes the State has no right to appeal the orders, the State will ask this Court to issue a supervisory writ directing the district court to correctly interpret N.D.C.C. § 12-60.1-02(1)(a) and, accordingly, to withdraw its previous orders and issue orders denying the Defendant's petitions to seal. See State, ex rel. Harris v. Lee, 2010 ND 88, ¶ 6, 782 N.W.2d 626. If appellate jurisdiction does not exist, exercise of supervisory jurisdiction would be warranted because "issues of vital concern regarding matters of important public interest are presented[.]" Indeed, the sealing statute implicates defendants' opportunities to preclude disclosure of their criminal records and prosecutors' ability to disclose their own records. Further, the district court has issued conflicting decisions on how the sealing statute should be interpreted. (Tr. of Hearing, Dec. 9, 2019, "Tr." 10:21-25.)

[¶9] STATEMENT OF THE ISSUE

[¶10] Whether the district court misinterpreted N.D.C.C. § 12-60.1-02(1)(a) as permitting the filing of a petition to seal a criminal record when the defendant was charged with a new crime within three years from the date of release from incarceration, parole, or probation for the offense sealing is sought.

[¶11] STATEMENT OF THE CASE

[¶12] The district court granted the Defendant's petitions to seal criminal records in three cases the State opposed. In each case, the Defendant was charged with a new crime within three years from the date of release from incarceration, parole, or probation.

[¶13] The State argues that the district court misinterpreted N.D.C.C. § 12-60.1-02(1)(a). The statue only authorizes a petition to seal when a defendant pled or was found guilty of a misdemeanor and "the individual has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or probation." N.D.C.C. § 12-60.1-02(1)(a). The State requests this Court reverse the district court's sealing orders.

[¶14] **STATEMENT OF THE FACTS**

[¶15] **A. Cass Co. 09-00-K-01151 ("2000 Case")**

[¶16] On June 21, 2000, the Defendant pleaded guilty to possession of a controlled substance and carrying a concealed weapon, both of which were class A misdemeanors. (Index # 8, 09-00-K-01151.) The court imposed concurrent sentences including one-year imprisonment, credit for three days previous custody time (spent from April 14, 2000, to April 17, 2000), the imposed imprisonment suspended, and one year unsupervised probation. (Index # 2, 7, & 8, 09-00-K-01151.)

[¶17] **B. Cass Co. 09-01-K-00169 ("2001 Case")**

[¶18] On January 18, 2001, the Defendant was charged with simple assault, a class B misdemeanor. (Index # 1, 09-01-K-00169.) Five days later, the Defendant pleaded guilty to the charge. (Index # 4, 09-01-K-00169.) The court imposed a sentence including thirty days imprisonment with all the time suspended and twelve months unsupervised probation. (Index # 4 & 16, 09-01-K-00169.)

[¶19] **C. Cass Co. 09-03-K-00305 ("2003 Case")**

[¶20] On January 27, 2003, the Defendant was charged with three misdemeanor offenses, simple assault – domestic violence, theft, and simple assault. (Index # 1, 09-03-K-00305). On July 7, 2003, the Defendant pleaded guilty to the theft and simple assault charges. (Index # 22, 09-03-K-00305.) The court imposed concurrent sentences including thirty days imprisonment with all

but one day suspended, credit for one day served, the balance of time suspended, and one year unsupervised probation. (Index # 22, 09-03-K-00305.)

[¶21] **D. <u>Two Additional Cases</u>**

[¶22] Between May 28, 2003, and October 13, 2003, inclusive, the Defendant was charged with violating an order prohibiting contact. (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305.) On October 13, 2003, the Defendant was convicted of the charge. (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305.)

[¶23] Between March 28, 2004, and August 2, 2004, inclusive, the Defendant was again charged with violating an order prohibiting contact. (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305.) On August 2, 2004, the Defendant was convicted of the charge. (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305.)

[¶24] **E. <u>District Court's Sealing Orders</u>**

[¶25] The Defendant filed petitions to seal criminal records in the 2000, 2001, and 2003 Cases (which the State opposed) and the two additional cases (which the State did not oppose). (Index # 11, 09-00-K-01151; Index # 6, 09-01-K-00169; Index # 30, 09-03-K-00305.) Based on the parties' request, each of the cases was joined for a hearing in December 2019. (Index # 17, 09-00-K-01151; Index # 09-01-K-00169; Index # 36, 09-03-K-00305.)

[¶26] At the hearing, the Defendant asserted "that there has to be three or five years of a crime-free life before the petition can be filed[.]"

(Tr. 12:7-11.) When asked about the State's right to appeal, the Defendant asserted that the State does have the right to appeal. (Tr. 12:12-23.)

[¶27] The district court acknowledged that in a previous case it had ruled against a petitioner based on the same procedural issue – whether "the time periods in [N.D.C.C. 12-60.1-02] actually precluded filing." (Tr. 10:21-25.) Noting the rule of lenity, the court decided in favor of the Defendant on the procedure to be followed: "I'm going to read 12-60.1-02, subsection 1 and 2 in the way suggested in [the Defendant's] brief." (Tr. 17:3-5.) The court granted the Defendant's petitions to seal. (Index # 28, 09-00-K-01151; Index # 24, 09-01-K-00169; Index # 47, 09-03-K-00305.) In each sealing order, the court found that the "Defendant has not been charged with a new crime for fifteen years, well longer than the three-years required to petition for record sealing for misdemeanor offenses." (Index # 28, 09-00-K-01151; Index # 24, 09-01-K-00169; Index # 47, 09-03-K-00305.)

[¶28] **STANDARD OF REVIEW**

[¶29] Whether a district court misinterpreted a statute involves a question of law. See generally Kortum v. Johnson, 2008 ND 154, ¶ 14, 755 N.W.2d 432 (indicating "[q]uestions of statutory interpretation are questions of law"). Questions of law are fully reviewable. See Wheeler v. Gardner, 2006 ND 24, ¶ 10, 708 N.W.2d 908.

[¶30] **LAW & ARGUMENT**

[¶31] **I. The district court misinterpreted N.D.C.C. § 12-60.1-02(1)(a) as permitting the filing of a petition to seal a criminal record when the defendant was charged with a new crime within three years from the date of release from incarceration, parole, or probation for the offense sealing is sought.**

[¶32] Under N.D.C.C. § 12-60.1-02(1)(a), a person "may file" a petition to seal a criminal record if the individual pled guilty to a misdemeanor offense "and the individual has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or probation." As will be explained below, the Defendant was charged with new crimes within the three years from the dates of his release from incarceration or probation in his 2000, 2001, and 2003 Cases. Before addressing application of the statute though, multiple points relating to interpretation of the statute should be analyzed.

[¶33] **A. <u>While the phrase "may file" under N.D.C.C. § 12-60.1-02(1) is permissive, it is the only authority for sealing and thus must be satisfied</u>.**

[¶34] The Defendant has previously argued that N.D.C.C. § 12-60.1-02(1) provides that a person "may file" a petition, and "may" is permissive, not restrictive. But N.D.C.C. § 12-60.1-02(1) is the only authority permitting a person to file a petition to seal. No other provision in N.D.C.C. ch. 12-60.1 (the chapter under which the Defendant petitioned and the district court acted) authorizes a person to file a petition. Nor has the Defendant pointed to any provision elsewhere authorizing a person to file a petition. If the Defendant argues that there need not be any express authority to petition to seal, then N.D.C.C. § 12-60.1-02(1) is superfluous; under his argument, he may file a petition if he meets the statutory criteria or he may file a petition if he does not meet the statutory criteria. That is contrary to logic and this Court's precedent. <u>See</u> <u>Tillich v. Bruce</u>, 2017 ND 21, ¶ 9, 889 N.W.2d 899 ("We construe statutes in a way which does not render them meaningless because we presume the Legislature acts with purpose and does not perform idle acts.") (citation omitted).

[¶35] **B. <u>The only reasonable interpretation of "criminal record" under N.D.C.C. ch. 12-60.1 is the court and prosecution records relating to one case, not multiple cases</u>**.

[¶36] The Defendant has previously contended that "criminal record" means all the records from his multiple different cases. (Index # 11 at ¶ 15, 09-00-K-01151; Index # 6 at ¶ 15, 09-01-K-00169; Index # 30 at ¶ 15, 09-03-K-00305.)

The Defendant's contention misconstrues the significance of the plural form of "records" in the phrase "'[c]riminal record' means court and prosecution records[.]" N.D.C.C. § 12-60.1-01(2) (emphasis added). The plural form of "records" was necessary because it referred to two records – the "court" record (as defined in N.D.C.C. § 12-60.1-01(1)) and the "prosecution" record. Other definitions in the statute support the conclusion that criminal record means one criminal case. For instance, "[c]ourt record" includes "any document … in connection with a judicial proceeding" and "any index… relating to a judicial proceeding." N.D.C.C. § 12-60.1-01(1). If the Legislature had intended "court record" to encompass "any" judicial proceeding, it would have done so; indeed, within the very same sentence, it used the word "any" when describing the documents within a judicial proceeding. Id.; see generally Van Klootwyk v. Baptist Home, Inc., 2003 ND 112, ¶ 18, 665 N.W.2d 679 (noting the Legislature "certainly could have expressed" that the time limit for obtaining an expert opinion applies to any malpractice action and pointing out the Legislature's separate express statute of limitations for such actions). Similarly, "'[p]rosecutor' means the office or agency with jurisdiction over the offense[.]" N.D.C.C. § 12-60.1-01(5) (emphasis added). Other sections in N.D.C.C. ch. 12-60 further support the conclusion that criminal record means just one case. Under N.D.C.C. § 12-60.1-03(1), a petition to seal "must be filed in the existing criminal case for the criminal offense." (emphasis added). Under N.D.C.C. § 12-60.1-04(1)-(2), the factors the court must consider and the determinations the court must make

refer at least seven times to "the offense" and two times to "the underlying crime."

[¶37] Besides being contrary to the plain language and harmony of the statute and chapter, the Defendant's interpretation would create conundrums. It's true that some peculiarities exist under any reasonable interpretation of the statute's plain language. For example, a person does not qualify for authorization to file a petition if the person is simply charged with a new crime - regardless of whether a guilty plea or finding of guilt later occurs - during the three years from his release from incarceration, parole, or probation. See N.D.C.C. § 12-60.1-01(1). That is the plain, unambiguous language in the statute, and it cannot be avoided. Riemers v. Jaeger, 2018 ND 192, ¶ 11, 916 N.W.2d 113 ("When the wording of the statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

[¶38] But the truly unworkable issues arise under the Defendant's interpretation. Indeed, under his interpretation, a criminal record could span multiple jurisdictions. For instance, a defendant could have convictions in a municipal court, multiple North Dakota counties, a Minnesota county, and a federal court. A North Dakota state district court would not have jurisdiction to order sealing of records relating to all those convictions. Moreover, calculation of the three-year period would be based entirely upon matters – including probation, imprisonment, and parole periods – from other jurisdictions.

[¶39] Given the statutory scheme, the only reasonable conclusion is that "criminal record" means the court record and the prosecution record for one case.

See Public Serv. Comm'n v. Minnesota Grain, Inc., 2008 ND 184, ¶ 9, 756 N.W.2d 763 ("Statutes are construed as a whole and are harmonized to give meaning to related provisions."); see also N.D.C.C. § 1-01-35 ("Words used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears.") (emphasis added).

[¶40] **C. The "from" in N.D.C.C. § 12-60.1-02(1)(a) is a preposition indicating the starting point of the three-year period during which a misdemeanant must be charge-free to qualify for petitioning to seal.**

[¶41] The Defendant has suggested that the "from" preceding "date of release" in N.D.C.C. § 12-60.1-02(1)(a) is synonymous with "since" and thus provides for a three-year waiting period to occur anytime after release from incarceration, parole, or probation. But that suggestion ignores the plain meanings of "from" and "since." "From" may serve only as a preposition and indicates the specific starting point in time for a process. Merriam-Webster Online Dictionary, (March 12, 2020) <https://www.merriam-webster.com/dictionary/from> (indicating "from" is a preposition and defining it in pertinent part as "used as a function word to indicate a starting point of a physical movement or a starting point in measuring or reckoning or in a statement of limits"); Dictionary.com, (March 12, 2020) <https://www.dictionary.com/browse/from> (indicating "from" is a preposition and defining it in pertinent part as "used to specify a starting point in an expression of limits").

[¶42] In contrast, "since" may be used as an adverb, conjunction, or preposition. Merriam-Webster Online Dictionary, (March 12, 2020) <https://www.merriam-webster.com/dictionary/since>; Dictionary.com, (March 12, 2020) <https://www.dictionary.com/browse/since>. As a preposition, "since" may be synonymous with "from." Merriam-Webster Online Dictionary, (March 12, 2020) <https://www.merriam-webster.com/dictionary/since> (defining the preposition "since" as "in the period after a specified time in the past" or "from a specified time in the past"); Dictionary.com, (March 12, 2020) <https://www.dictionary.com/browse/since> (defining the preposition "since" as "continuously from or counting from" or "between a past time or event and the present"). But as an adverb modifying an individual's conduct, "since" provides a far less exacting definition than "from"; "since" may then mean anytime after. Merriam-Webster Online Dictionary, (March 12, 2020) <https://www.merriam-webster.com/dictionary/since> (defining in pertinent part the adverb "since" as "after a time in the past" or "subsequently"); Dictionary.com, (March 12, 2020) <https://www.dictionary.com/browse/since> (including "subsequently" in the definition of the preposition "since").

[¶43] The case the Defendant has previously relied upon helps illustrate this distinction between the preposition "from" and the adverb "since." In State v. C.W.N., the court interpreted Minnesota's sealing statute, which provided that a petition may be filed if the misdemeanant has not been convicted of a new crime "for at least two years since discharge of the sentence[.]" 906 N.W.2d 549, 552

(Minn. Ct. App. 2018) (referencing Minn. Stat. § 609A.02(3)(a)(3)) (emphasis added). The issue presented was whether the "since" required the petitioner to be conviction-free for the two years immediately following discharge of sentence or merely provided for a two-year waiting period occurring anytime after the discharge of sentence. Id. at 553. The court recognized that "since" has three potential meanings: an adverb meaning "from then until now or between then and now"; a preposition meaning "continuously from"; or a conjunctive meaning "during the period subsequent to the time when." Id. The court concluded that the "since" was an adverb and thus provided for a conviction-free waiting period occurring anytime after discharge of the sentence. Id. "[T]he [Minnesota] legislature could have used more restrictive language, but it did not." Id.

[¶44] Our Legislature, unlike Minnesota's, chose the more restrictive word "from" for North Dakota's sealing statute. N.D.C.C. § 12-60.1-02(1)(a) ("An individual may file a petition to seal a criminal record if… [t]he individual … has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or probation[.]"). There is no grammatically correct way to interpret "from" as an adverb permitting an interpretation of N.D.C.C. § 12-60.1-02(1)(a) as providing for a three-year waiting period occurring any time after release from incarceration, parole, or probation. Under the plain meaning of "from," a misdemeanant must be charge-free for the three years following incarceration, parole, or probation release.

[¶45] **D. <u>The Defendant was charged with new crimes in the three years from the date of his release from incarceration or probation in the 2000 Case.</u>**

[¶46] In the 2000 Case, the Defendant's sentence included probation and recognized credit for three days previous custody. (Index # 8, 09-00-K-01551.) To file a petition to seal, the Defendant thus had to show he "has not been charged with a new crime for at least three years from the date of release from incarceration … or probation." N.D.C.C. § 12-60.1-02(1)(a).

[¶47] The phrase "from the date of release from incarceration, parole, or probation" could be interpreted in multiple ways. At least three interpretations should be considered: (1) using whichever is the latest release date among "incarceration, parole, or probation" as the applicable point to start the three-year period; (2) using a disjunctive "or" such that a defendant must satisfy only one of three potential release periods, i.e., three years from incarceration, three years from parole, or three years from probation; and (3) using a conjunctive "or," such that a defendant must satisfy each of the three periods, assuming each occurred.

[¶48] The first option (using the latest release date) does have some policy appeal, but the circumstances show the Legislature opted against it. An offender would not have to meet a qualifying ground for petitioning to seal until he was completely done with the correctional system. In other

words, the offender would have full opportunity for rehabilitation before risking his eligibility to seek sealing. On the other hand, including the phrase "whichever is latest" was an express recommendation made to the Legislature - as the Defendant himself previously pointed out. (Index # 11, 09-00-K-01151; Index # 6, 09-01-K-00169; Index # 30, 09-03-K-00305 at ¶ 19, n.2.) Further, in other statutes, the Legislature has included the very phrase "whichever is latest" when addressing a period involving incarceration, parole, or probation. See N.D.C.C. § 62.1-02-01(1)(a) (calculating an offender's firearm prohibition based on "the date of release from incarceration, parole, or probation, whichever is latest"). What's more is that N.D.C.C. § 12-60.1-02(2)(a) even references N.D.C.C. § 62.1-02-01, indicating the sealing chapter does not apply to a felony offense during the period in which the offender is prohibited from possessing a firearm. The Legislature's opting to not include the phrase "whichever is latest" in N.D.C.C. § 12-60.1-02(1)(a) thus supports the conclusion that it was not intended to apply. See generally Van Klootwyk v. Baptist Home, Inc., 2003 ND 112, ¶ 18, 665 N.W.2d 679 (noting the Legislature "certainly could have expressed" that the time limit for obtaining an expert opinion applies to any malpractice action and pointing out the Legislature's separate express statute of limitations for such actions).

[¶49] The second option (using a disjunctive "or" such that an offender must satisfy only one of three potential release periods) leads to an

unreasonable and absurd result. It's true that the word "or" is customarily disjunctive, ordinarily separating "mutually exclusive" alternatives. See State v. Martin, 2011 ND 6, ¶ 9, 793 N.W.2d 188 ("[W]e conclude interpreting 'or' as indicating mutually exclusive alternatives is unreasonable."); Sloven v. Olson, 98 N.W.2d 115, 121 (N.D. 1959) (recognizing the interpretation of "or" in the "disjunctive in that it expresses mutually, exclusive alternatives"); see also Christl v. Swanson, 2000 ND 74, ¶ 12, 609 N.W.2d 70 ("[the term 'or,' which is disjunctive in nature and ordinarily indicates an alternative between different things or actions"). But sometimes "or" must be interpreted as conjunctive, i.e., as separating nonexclusive items. See De Sylva v. Ballentine, 351 U.S. 570, 573 1415 (1956) (interpreting "or" as conjunctive in a federal statute relating succession of copyright renewal interests); Martin, at ¶¶ 7-9 (interpreting "or" as conjunctive in N.D.C.C. § 42–01–07, which provided that the remedies against a public nuisance are "indictment, filing an information, bringing a criminal action before a district judge, a civil action, or abatement"); Chemehuevi Tribe of Indians v. Fed. Power Comm'n, 420 U.S. 395, 418 (1975) (interpreting "or" as "and" in a statute involving the Federal Power Commission's licensing authority); see generally Steven Wisotsky, How to Interpret Statutes – Or Not: Plain Meaning and Other Phantoms, J. App. Prac. & Process 321, 326-27 (2009).

[¶50] Interpreting "or" as conjunctive is necessary when an unreasonable, unjust, or absurd result would occur if the disjunctive was used. See State v. Martin, 2011 ND 6, ¶¶ 7-9, 793 N.W.2d 188 ("In this case, the phrases separated by the word 'or' do not have separate and independent significance, and we conclude interpreting 'or' as indicating mutually exclusive alternatives is unreasonable."); see also Industrial Contractors Inc. v. Workforce Safety & Ins., 2009 ND 157, ¶ 11, 772 N.W.2d 582 ("'We presume the Legislature did not intend an unreasonable result or unjust consequence.") Morton County Soc. Serv. Bd. v. Cramer, 2010 ND 58, ¶ 16, 780 N.W.2d 688 ("[W]e will construe statutes in a practical manner, giving consideration to the context of the statute and its purpose, if adherence to the strict letter of the statute would lead to an absurd or ludicrous result.").

[¶51] The unreasonableness of a disjunctive "or" is easily illustrated. For instance, an offender would not satisfy grounds to seek sealing if he: (1) was not charged with a new crime during the three-year period from incarceration release, (2) was not charged with a new crime during the three-year period from parole release, and (3) was not charged with a crime during the three-year period from probation release. That is because if "or" is disjunctive, he could only satisfy grounds if he was not charged with a new crime during just one of the three mutually exclusive periods. That would be unreasonable and absurd; an offender who complied with the

entire correctional process (i.e., was not charged with any crimes during any of the three-year periods) would be ineligible for sealing, while an offender who was charged with crimes during two of the three-year periods (and not during one of the three periods) would be eligible for sealing. Another example showing the unreasonableness of using a disjunctive "or" would be a person who does not get charged with a crime during the three-year period from incarceration release but does get charged with crimes during the later three-year period from probation release. Assuming conviction of the new crimes, such offender demonstrates a lack of rehabilitation from the old crime. Yet, if "or" is interpreted as disjunctive, the offender would be eligible for sealing the old crime.

[¶52] The third option (using a conjunctive "or," such that a Defendant must satisfy each of the three periods) avoids the unreasonableness of the second option and recognizes the Legislature's choice to reject the first option. An offender who is not charged with a new crime during any of the three-year periods best demonstrates rehabilitation. And recognizing rehabilitation is at the core of the statutory scheme. See N.D.C.C. § 12-60.1-04(9) ("if a court grants a petition to seal a criminal record, the court shall state in the court order that the petitioner is sufficiently rehabilitated[.]"). That offender is deserving of a "second chance" for "turn[ing] his life around" and having no "new encounters with law enforcement." See Hearing on H.B. 1265 Before the House Standing

Committee, 66th Legis. Sess. (Jan. 16, 2019) (remarks of Rep. Roers Jones) ["Hearing on H.B. 1265"]; Hearing on H.B. 1265, supra (remarks of Jackson Lofgren).

[¶53] Applying "or" as conjunctive shows that the Defendant does not meet the qualifying grounds for a petition to seal. The Defendant's incarceration ended on April 17, 2000. (Index # 2 & 7, 09-00-K-01151.) The period of three years from the date of his release from incarceration ended on April 17, 2003. During that period, the Defendant was charged with new crimes on January 27, 2003 (2003 case). (Index # 1, 09-03-K-00305). For what it's worth, the Defendant would not meet the qualifying criteria even if a disjunctive "or" was used. During the three years from the date of his release from probation (June 21, 2001, to June 21, 2004), the Defendant was charged with new crimes on January 27, 2003 (2003 Case) and with a new crime between May 28, 2003, and October 13, 2003, inclusive. (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305.) In sum, the Defendant was charged with a new crime within three years from the date of his release from incarceration and within three years from the date of his release from probation; he cannot meet the grounds for a petition to seal the 2000 Case. The district court erred in concluding otherwise.

[¶54] **E. <u>The Defendant was charged with new crimes in the three years from the date of his release from probation in the 2001 Case.</u>**

[¶55] In the 2001 Case, the Defendant's sentence included twelve months probation but no incarceration. (Index # 4 & 16, 09-01-K-00169.) To file a petition to seal, the Defendant thus had to show he "has not been charged with a new crime for at least three years from the date of release from … probation." N.D.C.C. § 12-60.1-02(1)(a).

[¶56] The Defendant's probation ended on January 23, 2002 (one year after his sentencing date). (Index # 4 & 16, 09-01-K-00169.) The period of three years from the date of his release from probation would be January 23, 2002, to January 23, 2005. During that period, the Defendant was charged with new crimes on January 27, 2003 (Index # 1, 09-03-K-00305); a new crime between May 28, 2003, and October 13, 2003, inclusive (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305); and a new crime between March 28, 2004, and August 2, 2004, inclusive (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305). Because the Defendant was charged with a new crime within three years from the date of his release form probation, he cannot meet the grounds for a petition to seal the 2001 Case. The district court erred in concluding otherwise.

[¶57] **F. <u>The Defendant was charged with new crimes in the three years from the date of his release from incarceration or probation in the 2003 Case.</u>**

[¶58] In the 2003 Case, the Defendant's sentence included one day incarceration and one year of probation. (Index # 22, 09-03-K-00305.) To file a petition to seal, the Defendant thus had to show he "has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or probation." N.D.C.C. § 12-60.1-02(1)(a).

[¶59] Applying "or" as conjunctive shows that the Defendant does not meet the qualifying grounds for a petition to seal. The Defendant was released from incarceration between January 29, 2003 (the arrest warrant issuance date) and July 7, 2003 (the sentencing date on which he received one day credit). (Index # 3 & 22, 09-03-K-00305.) The Defendant was charged with a new crime between March 28, 2004, and August 2, 2004, inclusive. (Index # 13, 09-00-K-01151; Index # 8, 09-01-K-00169; Index # 32, 09-03-K-00305.) The Defendant was necessarily charged with a new crime during the three years from the date of his release from incarceration. He does not meet the qualifying grounds for a petition to seal. The district court erred in concluding otherwise.

[¶60] **CONCLUSION**

[¶61] The Defendant was charged with new crimes during the three years from the dates of his release from incarceration or probation in his 2000, 2001, and 2003 Cases. The district court erred in concluding the Defendant met the grounds for filing a petition to seal under N.D.C.C. § 12-60.1-02(1)(a), which is the sole existing authority for petitioning to seal. The State asks this Court to reverse the district court's orders sealing the Defendant's convictions.

Dated this 30th day of March, 2020.

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[¶62] **CERTIFICATE OF COMPLIANCE**

[¶63] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is twenty-seven pages.

Dated this 30th day of March 2020.

Reid A. Brady, #05696
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Attorney for Appellant

[¶64] **CERTIFICATE OF SERVICE**

[¶64] A true and correct copy of the foregoing document was sent to the appellee by mail on the 30th day of March, 2020, to: M.J.W. at 395 Portsmouth Drive, St. Charles, MO 63303

Reid A. Brady

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Appellant and Plaintiff,	)	Supreme Court No. 20200008
vs.	)	20200009
	)	20200010
	)	District Court No. 09-00-K-01151
M.J.W.,	)	09-01-K-00169
	)	09-03-K-00305
Appellee and Defendant.	)	

Appeal from Certificate of Rehabilitation and
Orders Sealing Criminal Records
entered December 9, 2019
East Central Judicial District in Cass County, North Dakota
The Honorable Tristan J. Van de Streek, Presiding

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)
COUNTY OF CASS)

[¶1] Amanda Ross being first duly sworn on oath, deposes and states that she is of legal age and that on this date she deposited in the United States Mail at Fargo, North Dakota, a true and correct copy of the following documents in the above-entitled action:

APPELLANT'S BRIEF

[¶2] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

M.J.W.
395 Portsmouth Dr.
St. Charles, MO 63303

Dated this 30th day of March, 2020.

Amanda Ross

Subscribed and sworn to before me this 30th day of March, 2020.

TRICIA SKODJE
Notary Public
State of North Dakota
My Commission Expires Nov. 20, 2023

Notary Public