

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

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3
4 LONNIE LYNN SWEAT,)

5 Petitioner,)

6 v.)

7 THE HONORABLE STEFANY MILEY,)
8 EIGHTH JUDICIAL DISTRICT COURT)
9 JUDGE,)

10 Respondents,)

11 and)

12 THE STATE OF NEVADA,)
13 Real Party In Interest.)

No.)
(District Ct. No. 16-31552-1))
(Justice Ct. No. 16F07438X))
Tracie K. Lindeman
Clerk of Supreme Court

14 **PETITION FOR WRIT OF PROHIBITION/MANDAMUS**

15
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Petitioner,

v.

Respondents.

and

THE STATE OF NEVADA,
Real Party In Interest.

No.
(District Ct. No. C-16-315552-1)
(Justice Ct. No. 16F07438X)

PETITION FOR WRIT OF PROHIBITION/MANDAMUS

COMES NOW the Petitioner, LONNIE LYNN SWEAT, by and through Deputy Public Defender, KENTON EICHACKER, and respectfully petitions this Honorable Court for a Writ of Mandamus ordering the District Court to dismiss the remaining felony charge against Mr. Sweat.

This Petition is based upon the Memorandum of Points and Authorities, declaration of counsel.

DATED this 24th Day of August, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Kenton Eichacker
Kenton Eichacker #13114
Deputy Public Defender

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Kenton Eichacker, under the pains and penalties of perjury, makes the following declaration:

2. That declarant is authorized to file the instant Petition for Writ of Prohibition/Mandamus;

4. That any inconvenience and/or prejudice to the State is minimal when balanced against Mr. Sweat's Due Process right to have this matter appropriately determined;

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. (NRS 53.045).

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2 **POINTS AND AUTHORITIES**

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4 **I.**
STATEMENT OF THE ISSUES

5 Did the District Court violate the Petitioner's Constitutional rights by denying the
6 Defendant's motion to dismiss the based on a violation of the defendant's double jeopardy
7 rights?
8

9 **II.**
STATEMENT OF FACTS

10 On May 10, 2016 Mr. Lonnie Sweat was arraigned on a charge for Battery Constituting
11 Domestic Violence (NRS 200.481, 200.485.1C, 33.018 – NOC 50239) based on a single event
12 occurring on May 7, 2016. Mr. Sweat received the Criminal Complaint and the matter was set
13 for a Preliminary Hearing. (App. pp. 001-003)
14

15 On June 7, 2016 Mr. Sweat unconditionally waived his right to a Preliminary Hearing.
16 Negotiations were entered into where Mr. Sweat would plead to a fictitious charge in District
17 Court to a Battery Resulting in Substantial Bodily Harm (NRS 200.481 – NOC 50214) and Mr.
18 Sweat would plead to a misdemeanor Battery Constituting Domestic Violence charge in Justice
19 Court. On June 7, 2016, the Honorable Judge Tobiasson adjudicated Mr. Sweat guilty of a
20 misdemeanor Battery Constituting Domestic Violence. Mr. Sweat was sentenced that same day
21 and the misdemeanor was closed. Mr. Sweat was told when he gets to District Court he can go
22 through with the negotiations, but if he decides he doesn't want the negotiations he can go still
23 go to jury trial (PHT, page 4, lines 2-5). However, Mr. Sweat was told that if he did not go
24 through with the negotiations, he would not return to Justice Court for a Preliminary Hearing
25 and that his misdemeanor domestic violence charge would stand (PHT, page 4, lines 5-7).

26 On June 15, 2016 Mr. Sweat decided that he did not want to go forward with the
27 negotiations. The State then filed an Amended Information with the Court charging Mr. Sweat
28 with one count of felony Battery Constituting Domestic Violence. (App. pp. 013-015).

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3 **III.**
4 **WHY A WRIT OF MANDAMUS SHOULD ISSUE IN THIS CASE**

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7 **A. A WRIT OF MANDAMUS IS THE PROPER REMEDY**

8 Pursuant to NRS 33.170, “a writ of mandamus shall issue in all case where there is not a
9 **plain, speedy and adequate remedy** in the ordinary course of law.”¹ Generally this means that
10 a writ of mandamus is available to compel the performance of an act which the law requires as a
11 duty resulting from an office, trust or station² or to control an arbitrary or capricious exercise of
12 discretion.³

13 Here, Mr. Sweat has no plain, speedy, or adequate remedy in the ordinary course of law
14 for the District Court’s wrongful denial of the Defendant’s Motion to Dismiss. When the
15 District Court denied the Defendant’s motion to dismiss the charges based on contract
16 principles, the District Court exercised discretion it did not have. The court’s failure to hold the
17 State to its legal obligations under the Blockburger and Salazar line of cases violated Mr.
18 Sweat’s Due Process rights under the 14th and 5th Amendments to the United States Constitution,
19 and Article One, Section Eight of the Nevada Constitution.

20 Under Nevada law, this case should have been dismissed on July 27th, 2016. Should this
21 Court refuse to hear and grant this Writ, Mr. Sweat will be forced to proceed to trial on felony
22 charges that should have been dismissed. Regardless of what happens during trial, the damage
23 to Mr. Sweat’s Due Process rights would become irrevocable. The entire purpose of a Writ of
24 Mandamus is to avoid such an outcome.

25
26 **B. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT’S MOTION**
27 **TO DISMISS.**

28 The Double Jeopardy clause of the Fifth Amendment to the United States Constitution
guarantees that no person shall be “subject for the same offense to be twice put in jeopardy of
life or limb.” U.S. CONST. amend. V.

¹ NRS 33.170 (emphasis added).

² See NRS 34.160

³ See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

1 I. MR. SWEAT'S MISDEMEANOR CHARGE OF BATTERY CONSTITUTING
2 DOMESTIC VIOLENCE AND FELONY BATTERY CONSTITUTING DOMESTIC
3 VIOLENCE FOR A SINGLE INCIDENT ARE REDUNDANT AND VIOLATE
4 DOUBLE JEOPARDY.
5

6 No person shall be "subject for the same offense to be twice put in jeopardy of life or limb."
7 U.S. Const. Amend. V. The Double Jeopardy clause applies to the States through the Due
8 Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056
9 (1969). The theory that a person should not be tried or punished for the same crime twice dates
10 back to common law England. *United States v. Wilson*, 420 U.S. 332, 339-40, 95 S. Ct. 1013,
11 1020, 43 L. Ed. 2d 232 (1975). When a defendant has been convicted and punished for a
12 specific crime, principles of fairness and finality demand he not be subjected again for the same
13 offense to the strains of trial and punishment. *Ohio v. Johnson*, 467 U.S. 493, 498-99, 104 S.Ct.
14 2536, 2541 (1984); *Serfass v. U.S.*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062 (1975); *Wilson*, 420
15 U.S. at 343.

16 Nevada follows the test set forth in *Blockburger v. U.S.*, 284 U.S. 299 (1932), to determine
17 whether an accused may be convicted of multiple convictions for the same act or transaction.
18 *Salazar v. State*, 119 Nev. Adv. Rep. 26; 70 P. 2d 749, 751 (2003). Under *Blockburger*, a
19 defendant cannot be convicted of both a greater and a lesser included offense. *McIntosh v. State*,
20 113 Nev. 224 (1997) (citing *Givens v. State*, 99 Nev. 50, 56, 657 P.2d 97, 101 (1983)).

21 Even where duplicitous charges amount to separate offenses under *Blockburger*, such
22 charges cannot stand if they are "redundant convictions that do not comport with legislative
23 intent." *Salazar*, supra, at 751 (internal citations omitted). In determining whether convictions
24 are redundant:

25 The issue... is whether the gravamen of the charged offenses is the same such
26 that it can be said that the legislature did not intend multiple convictions... The
27 question is whether the material or significant part of each charge is the same
28 even if the offenses are not the same. ***Thus, where a defendant is convicted of
two offenses that, as charged, punish the exact same illegal act, the convictions
are redundant.***

1 *Salazar*, supra, at 751 (emphasis added).

2 II. THE CHARGE OF MISDEMEANOR BATTERY CONSTITUTING
3 DOMESTIC VIOLENCE AND FELONY BATTERY CONSTITUTING DOMESTIC
4 VIOLENCE SATISFY THE SAME ELEMENTS TEST OR BLOCKBURGER TEST
5 AND THUS VIOLATES THE DOUBLE JEOPARDY CLAUSE

6 The United States Supreme Court narrowed its holding to limit the double jeopardy
7 prohibition on prosecutions from state and municipal governments arising from the same
8 incident(s) to only barring prosecutions in which the charged offenses cannot survive the “same
9 elements test,” or the “Blockburger test.” *United States v. Dixon*, 509 U.S. 688, 696 (1993). As
10 the Court explains, this test “inquires whether each offense contains an element not contained in
11 the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and
12 successive prosecution.” *Id.*

13 In the instant case Mr. Sweat is charged with a Battery Constituting Domestic Violence
14 felony offense pursuant to NRS 200.481, 200.485.1C, 33.018 for the incident that occurred on
15 May 7th, 2016 arrest. However, Mr. Sweat already pled guilty to a misdemeanor Battery
16 Constituting Domestic Violence for the same incident that occurred on May 7th, 2016 pursuant
17 to NRS 200.481, 200.485.1C, 33.018 where he was sentenced to credit for time served and the
18 matter was closed.

19 Pursuant to NRS 200.481, 200.485.1C, 33.018 the elements of a Battery Constituting
20 Domestic Violence misdemeanor offense are that it is unlawful for: 1) a person, 2) commit a
21 battery, 3) on any other person to whom the person is related by blood or marriage, any other
22 person with whom the person is or was actually residing, any other person with whom the
23 person has had or is having a dating relationship, any other person with whom the person has a
24 child in common, the minor child of any of those persons.

25 Pursuant to NRS 200.481, 200.485.1C, 33.018 the elements of a felony Battery
26 Constituting Domestic Violence are that it is unlawful for: 1) a person, 2) commit a battery, 3)
27 on any other person to whom the person is related by blood or marriage, any other person with
28 whom the person is or was actually residing, any other person with whom the person has had or

1 is having a dating relationship, any other person with whom the person has a child in common,
2 the minor child of any of those persons and 4) having been previously convicted two prior
3 Battery Constituting Domestic Violence misdemeanors within in seven years.

4 The only element that differs between a Battery Constituting Domestic Violence
5 misdemeanor and a Battery Constituting Domestic Violence felony is the presence of additional
6 misdemeanor convictions. Accordingly, pursuant to the "*Blockburger* Test" because every
7 element of a Battery Domestic Violence misdemeanor offense is necessarily contained within a
8 Battery Domestic Violence felony offense, prosecution on the Battery Domestic Violence felony
9 is barred by the Double Jeopardy Clause once Mr. Sweat pled to the Battery Domestic Violence
10 misdemeanor offense.
11

12 Even if this court finds that because of the added element of a previous felony
13 conviction that this case does not pass the *Blockburger* test, such charges cannot stand if they are
14 "redundant convictions that do not comport with legislative intent." *Salazar*, supra, at 751
15 (internal citations omitted). In determining whether convictions are redundant:

16 The issue... is whether the gravamen of the charged offenses is the same such
17 that it can be said that the legislature did not intend multiple convictions... The
18 question is whether the material or significant part of each charge is the same
19 even if the offenses are not the same. **Thus, where a defendant is convicted of
two offenses that, as charged, punish the exact same illegal act, the
convictions are redundant.**

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21 *Salazar*, supra, at 751 (emphasis added). Thus if the court finds that this case does not meet
22 *Blockburger* scrutiny it must dismiss this case as redundant.

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CONCLUSION

Mr. Sweat having to answer for the charge of Felony Battery Constituting Domestic Violence, after previously being adjudicated and sentenced for a misdemeanor Battery Constituting Domestic Violence conviction for the same incident, violates the U.S. and Nevada Constitutions. NRS 178.391 states: "No person can be subject to a second prosecution for a public offense for which he has *once been prosecuted and duly convicted* or acquitted". Mr. Sweat's case meets all the criteria under the *Blockburger* analysis and violates the Double Jeopardy Clause. Even if this honorable court does not find that it meets the *Blockburger* test this court must dismiss this charge as redundant under *Salazar*.

Based upon the foregoing, the defense respectfully requests that this court issue the writ of mandamus ordering the lower court to dismiss the case against Lonnie Lynn Sweat.

DATED this ____ day of August, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Kenton G. Eichacker
KENTON G. EICHACKER, #13114
DEPUTY PUBLIC DEFENDER

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