IN THE SUPREME COURT OF THE STATE OF NEVADA

LONNIE LYNN SWEAT Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEFANY MILEY DISTRICT JUDGE Respondents, And THE STATE OF NEVADA, Real Party In Interest.	CASE NO: 71110

ANSWER TO PETITION
FOR WRIT OF MANDAMUS/PROHIBITION

COMES NOW, the State of Nevada, Real Party In Interest, by STEVEN B. WOLFSON, District Attorney, through his Deputy, RYAN J. MACDONALD, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus/Prohibition in obedience to this Court's order filed October 13, 2016 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 14th day of November, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Ryan J. MacDonald*
RYAN J. MACDONALD
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Nevada Bar #012615
Office of Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

This original petition for a writ of prohibition or mandamus challenges an order of the district court denying Petitioner Lonnie Sweat's motion to dismiss a criminal charge on double jeopardy grounds. A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320; see also Glover v. Dist. Ct., 125 Nev. ___, ___, 220 P.3d 684, 692 (2009) (stating that "writ of prohibition will issue to interdict retrial" if retrial would subject defendant to double jeopardy). Both mandamus and prohibition are extraordinary remedies, and the decision to consider a petition for such relief rests entirely within the discretion of this Court. State v. Dist. Ct. (Riker), 121 Nev. 112, P.3d 1070, 1074 (2005).

On May 9, 2016, Sweat was charged by way of Criminal Complaint with Battery Constituting Domestic Violence (Category C Felony). PA 1. Sweat's preliminary hearing was originally scheduled for May 24, 2016, however it was continued to June 7, 2016. On June 7, 2016, pursuant to negotiations with the State, Sweat agreed to waive his right to a preliminary hearing on the Felony Domestic Violence Count. In District Court, Sweat would plead to Battery Resulting in Substantial Bodily Harm with the State making no recommendation at sentencing. In addition, Sweat would plead guilty to an added Count 2, misdemeanor Battery Constituting Domestic Violence and receive credit for time served on Count 2. PA 8.

The following are relevant portions of the colloquy which took place during the Justice Court's canvass of Sweat:

MR. EICHACKER: With the Court's permission, today Mr. Sweat will be unconditionally waiving his right to a preliminary hearing. He'll go to District Court and plead guilty to a battery resulting in substantial bodily harm and to a batter domestic violence misdemeanor. The State will make no recommendation at sentencing. And I believe that's it.

THE COURT: All right. Do you want him to plead to the misdemeanor here?

MR. SMITH: I prefer he plead to the misdemeanor today.

MR. EICHACKER: Okay, I need to do an admonishment.

MR. SMITH: And we can just give him credit for time served.

THE COURT: I'll trail that for you to do the admonishment.

(Other matter on calendar heard.)

THE COURT: …It's an unconditional waiver. You're going to plead in District Court to battery with substantial bodily harm. The State will make no recommendation up **there and here you'll plead to a misdemeanor with credit for time served; do you understand that?**

THE DEFENDANT: Yes.

…

THE COURT: When you get up to District Court you can go through with the negotiations. **If you decide you don't want to you can still take the felony charge to trial, you just won't come back here for a preliminary hearing and your plea to the misdemeanor domestic violence charge will stand; do you understand?**

THE DEFENDANT: **Yes.**

PA 23-24.

The Court then added a Count 2 misdemeanor Battery Constituting Domestic Violence and accepted Sweat's no-contest plea. The Court then sentenced him to credit for time served. Id. Sweat also executed an Admonishment of Rights. RPIA 1-2

ARGUMENT

The Double Jeopardy Clause protects against three separate abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. Williams v. State, 118 Nev. 536, 548 (2002). Sweat in this instance claims that by accepting a negotiation offered by the State in Justice Court in which he agreed to plead guilty to a Misdemeanor Battery Constituting Domestic Violence in Justice Court and a Felony in District Court, he may withdraw from that agreement and prevent the State from prosecuting him on the original charges. Thereby, essentially successfully duping the State into providing Sweat with a misdemeanor conviction with no additional punishment in a case where it was contemplated by both parties he would

be pleading to a felony. Based upon the arguments below, Sweat's argument is clearly in error.

I
SWEAT WAS PROSECUTED FOR TWO SEPARATE OFFENSES

As noted above, the Justice Court orally amended the Criminal Complaint to include a Count 2 – Battery Constituting Domestic Violence. Sweat waived his right to a preliminary hearing on Count 1 and entered a guilty plea to Count 2. In effect, Sweat's waiver and guilty plea was a concession that he was charged with two separate and distinct offenses. While this issue doesn't seem to have been addressed in the current factual scenario of a negotiated plea agreement contemplating pleas in two separate courts, the United States Supreme Court has provided some guidance.

In United States v. Broce, 488 U.S. 563, 109 S.Ct. 757 (1989), per a negotiated agreement with the prosecution, two defendants pleaded guilty to two counts of Conspiracy. Subsequently, both defendants attempted to withdraw their pleas arguing that only one conspiracy existed and that double jeopardy required that the conviction and sentence on the second count be set aside. Id. at 565. The lower court found there was factually only a single conspiracy and therefore dismissed the second count. Id. at 568-569.

The Supreme Court reversed and reinstated the defendants' convictions and sentences for the second count of Conspiracy. It held that a "guilty plea is more than

a confession which admits that the accused did various acts…It is an admission that he committed the crime charged against him." Id. at 569 (internal citations and quotations omitted). Moreover, "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the [charging document]; he is admitting guilt of a substantive crime." Id. Sweat also cannot challenge the additional offense based upon the existing record. Id. at 576.

In this case, Sweat's plea of guilty to the added Count 2 of the Criminal Complaint was an admission that he committed that specific charge against him. Moreover, that guilty plea in conjunction with his waiver on Count 1 served as a concession that Count 2 constituted a separate and distinct offense. "Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." Id. at 571 (emphasis added). While in this case Sweat has not admitted to committing two separate crimes, as he only followed through with his agreement to plead to one, he has admitted to at least being charged with two separate crimes. The added Count 2 had "facial allegations" of a distinct offense. Id. As such, Sweat is not currently facing prosecution for an offense of which he has already been convicted. Sweat had the opportunity to reject the State's offer and demanded a trial on the felony count. Instead, at that time he chose to accept the State's offer of pleading to an added

misdemeanor Count 2 in Justice Court and waive his preliminary hearing on the original Count 1. As such, he relinquished his entitlement to challenge the separate counts as a violation of double jeopardy. See Id.

II
SWEAT HAS WAIVED ANY DOUBLE JEOPARDY CLAIM

While double jeopardy is a constitutional right, a defendant in a criminal proceeding can agree to waive said right. See Ricketts v. Adamson, 483 U.S. 1, 107 S. Ct. 2680 (1987). The defendant in Ricketts had entered into an agreement with the prosecution to testify against two other defendants in a murder case in exchange for a plea to a lesser offense. He testified during trial and was subsequently adjudicated, sentenced and began serving a prison term of 48-49 years. Id. at 3. The convictions for the two defendants he had testified against were then reversed. Id. at 4.

The State sought Ricketts' testimony a second time for the retrial of the other two defendants. However, Ricketts refused to testify and even invoked his Fifth Amendment privilege against self-incrimination when placed on the witness stand. Id. at 5. Thereafter, the State filed a new information charging Ricketts with the original charge of First Degree Murder. He was convicted at trial and given the death penalty. Id. at 7.

The defendant challenged his conviction federally. An en banc 9th Circuit Court of Appeals reversed his conviction on the grounds that it violated double jeopardy. Id. The Supreme Court reversed the 9th Circuit and held:

> The State submits, however, that respondent's breach of the plea arrangement to which the parties had agreed removed the double jeopardy bar to prosecution of respondent on the first-degree murder charge. We agree with the State.

Id. at 8. It's also important to note that the Court did not find it significant that "double jeopardy" was not specifically waived by name in the agreement. Id.

The Court went on to state:

> At the plea hearing, the trial judge read the plea agreement to respondent, line by line,[1] and pointedly asked respondent whether he understood the provisions…The terms of the agreement could not be clearer: in the event of respondent's breach occasioned by refusal to testify, parties would be returned to the status quo ante, in which case respondent would have no double jeopardy defense. The approach taken by the Court of Appeals **would render the agreement meaningless**: first-degree murder charges could not be reinstated against respondent if he categorically refused to testify after sentencing even if the agreement specifically provided that he would so testify, because under the Court of Appeals view, he never waived his double jeopardy protection.

Id. at 11-12 (emphasis added).

Here, the record makes it clear that the agreement between the parties was that Sweat would waive his right to a preliminary hearing on the original felony charge

[1] While no written plea agreement was filed at this point, the State submits that is irrelevant. The terms of the agreement and Sweat's understanding of those terms were clearly laid out on the record.

and plead guilty to an added count of Battery Constituting Domestic Violence in Justice Court, after which he would plead guilty to an amended count of Battery Resulting in Substantial Bodily harm in district court. The record further makes it clear that the agreement was that should he change his mind regarding the negotiations, he may take the original felony charge to trial and the misdemeanor conviction would stand. PA 23-24. Sweat made it abundantly clear that he understood and agreed with the negotiations. This, just as in Ricketts, carried with it a clearly implied double jeopardy waiver should double jeopardy even be implicated. To hold otherwise would "render the agreement meaningless" and allow Sweat to achieve a clear windfall of walking away with nothing more than a misdemeanor conviction with a sentence of credit for time served by making a personal decision to back out of negotiations. "The Double Jeopardy Clause…does not relieve a defendant from the consequences of his voluntary choice." Id. at 11 (quoting United States v. Scott, 437 U.S. 82, 88-89 (1978)).

CONCLUSION

As Sweat was charged with separate and distinct offenses, continued prosecution will not violate the Double Jeopardy Clause. Moreover, even if the Court finds that double jeopardy is implicated in this case, Sweat has clearly waived his double jeopardy protections. Sweat should not get a complete and total windfall of only being convicted of a misdemeanor by making the choice of breaching an

agreement with the State and failing to follow through with negotiations. Based on the foregoing arguments, this Court's extraordinary intervention is not warranted and Sweat's petition should be DENIED.

Dated this 14th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 14, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

KENTON G. EICHACKER
Deputy Public Defender

RYAN J. MACDONALD
Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JUDGE STEFANY MILEY
Eighth Judicial District Court, Dept. 23
Regional Justice Center
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BY */s/ E. Davis*
Employee, District Attorney's Office

RJM//ed