THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No. 72481

Appellant,

vs.

JOHN THOMAS KEPHART,

Respondent.
_____/

REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

The Court has authorized Respondent to reply to the State's "Response to Order to Show Cause" (Response).

The district court characterized its order as a "suppression" order to give the State a right of immediate appeal

The State is correct when it writes: "there never was any motion that was properly characterized as a 'motion to suppress.'" Response at 1. Defense counsel's motion on the use of prior misdemeanor convictions to enhance the domestic battery charge was styled: "Objection to Admission of Prior Convictions as a Felony Enhancement and Motion to Dismiss." See RA 1-39.[1],[2] The State responded to this motion, RA 40-45, and

[1] "RA" stands for Respondent's Appendix (OSC) that is being filed with this reply. Pagination conforms to NRAP 30(c).

defense counsel filed a reply. RA 46-49. It was the district court that retitled the motion and requested relief, and it did so to allow the State to immediately appeal.

At the outset of the hearing on the motion the district court said: "This is [the] time and place set for a hearing in regards to prior convictions. I suppose it could make a difference how it's characterized: as a ruling on evidence, or as a suppression motion." The court explained, "I say that, because I think the State has a right to appeal from a suppression motion immediately. I don't know that you have a right to appeal from a ruling on evidence until after sentencing." RA 53 (Transcript of Proceedings: Motion). At the conclusion of the hearing the district court returned to this, stating:

> You know, this is really difficult. I came here today with the intent of suppressing. When I say "suppressing," that's why I asked that question, because I think there's different rules in terms of the State's right to appeal, depending on whether it's an exclusion or suppression.

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[2] Although the title contained the phrase "Motion to Dismiss," that form of relief was not actually requested in the motion or the reply. See RA 1 (requesting court to "deny the admission" of prior domestic battery misdemeanor convictions) and RA 48 (same).

> I will treat it as a suppression hearing. The reason I'm doing that is because I am going to grant the suppression. ... .

RA 83. The district court directed defense counsel to prepare the written order. RA 91.

If this Court concludes that the district court's decision to treat the motion as a suppression motion was correct, then it must dismiss this appeal for lack of jurisdiction under *State v. Braidy*, 104 Nev. 669, 671, 765 P.2d 187, 188 (1988) (concluding that "where an oral ruling is rendered by the district court, the [statutory period of time to file a notice of appeal] begins on the date the ruling is orally pronounced.").

Even if the district court erred in characterizing its order as a "suppression" order this appeal should be dismissed

At the hearing, the State left the characterization of the motion to the district court. See RA 57 ([prosecutor]: "I'm not sure how to approach the evidentiary-versus-suppression issue, so I guess I'll leave that to Your Honor."). Now the State asserts that this appeal "is more akin to an order granting a motion to dismiss." And analogizes to its right to appeal from an order granting a motion to dismiss part of an information. Response at 2 (citing *State v. Kosek*, 112 Nev. 244, 911 P.2d 1196 (1996)).

In *Kosek*, the district court had dismissed one count of a three-count criminal information. 112 Nev. at 244, 911 P.2d at 1196. This Court said that NRS 177.015(1)(b), which allows the State to appeal from "an order of the district court granting a motion to dismiss," allowed an appeal "whether that order dismisses fewer that all or all of the *counts* brought against the defendant." 112 Nev. at 245, 911 P.2d at 1197 (italics added). In contrast, here no substantive count was dismissed by the district court. Instead the district court granted defense counsel's "motion to *exclude* the prior First Domestic Battery conviction for felony *enhancement* purposes." RA 100 (italics added).

The district court's order *excluding* the prior misdemeanor convictions is akin to an order granting a motion to *strike* a sentencing enhancement, from which no statutory right to appeal exists. "The right to appeal is statutory. Where no statute or rule provides for an appeal, no right to appeal exists." *State v. Shade*, 110 Nev. 57, 63, 867 P.2d 393, 396 (1994) (citations omitted). Because no statutory right to appeal from an order striking sentencing enhancements exists, this appeal must be dismissed. If the State wishes to pursue its challenge to the district court's order, it may do so by writ; where the issue would be framed: "Did

the district court manifestly abuse its discretion in striking (or excluding the use of) prior misdemeanor convictions for felony enhancement purposes?"

This Court does not need to address the State's invitation to overrule State v. Braidy, *but if it does, the State has offered no compelling reason to disrupt* Braidy's *holding*

If this Court concludes either that the State's analogy to an appeal from an order granting a motion to dismiss is apt, or that Respondent's position that no appeal lies from an order striking (or excluding) prior misdemeanor convictions for felony enhancement purposes is correct, then it need not address the State's invitation to overrule *State v. Braidy*. This is so because if the Court allows the appeal to proceed (under the State's argument), or dismisses the appeal (under Respondent's argument) the question whether to overrule *Braidy* becomes moot; and "[t]his Court will not render advisory opinions on moot or abstract questions." *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981).

If this Court concludes that the district court's decision to treat the motion as a suppression motion was correct, then the Court should

dismiss the appeal under *Braidy*. The State invites this Court to overrule *Braidy* arguing that it invites confusion because:

- it "is not always clear when a court has actually ruled";
- it "will result in the sort of piecemeal litigation that this Court has condemned in other circumstances"; and
- it "would seem to preclude the district court from reconsidering."

Response at 3-4. But *Braidy's* rule advances the legislative intent to "expedite" state appeals under NRS 177.015(2). The State's concerns listed above can be addressed: (1) counsel should request clarification of the court's ruling if it is unclear before concluding the hearing; (2) a timely filing of a notice of appeal from an oral pronouncement of an order (even) "tentatively granting a motion" does not preclude the State from voluntarily dismissing its appeal if circumstances change, while a timely filing of a notice of appeal "avoid[s] unnecessary delay," *Braidy*, 104 Nev. at 671, 765 P.2d at 188; and (3) if the district court has ruled and has clarified its ruling, what is to be reconsidered? (As a practical matter, if either counsel felt they had additional facts or authority that the district court should consider *before* ruling, they can ask for time to present those facts or that authority.) And, of course, the State's concerns can be

can be measured by the Court's experience in the decades since *Braidy* was decided in 1988.

Finally, the State suggests that this Court should find that the district court's oral ruling was not "the appealable event" because the district court had directed the preparation of a proposed order, giving the State time to make objections. Response at 5. The State is conflating the jurisdictional event of filing a timely notice of appeal with the merit challenge to the district court's order. The two are not the same; one follows the other.

Conclusion

In conclusion, this Court should dismiss this appeal.

Dated this 19th day of April 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of April 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof to:

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John Reese Petty
Washoe County Public Defender's Office