IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, AND THE HONORABLE WILLIAM A. MADDOX, DISTRICT JUDGE,

Respondents.

and

JOHN THOMAS KEPHART,

Real Party In Interest.

No. _____/

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Overview

This writ petition asks the Court to order the district court to admit Kephart's prior convictions for domestic battery to enhance his most recent conviction for domestic battery to a felony.

On January 11, 2017, the State charged Kephart with one count of felony domestic battery in an Information Superseding Indictment (Petitioner's

Appendix, 1-3). Before trial, Kephart objected to the admission of his prior domestic battery convictions, which he had incurred in 2010, to enhance his new offense to a felony, and moved the district court to dismiss the Information. *Id*. at 4-42.

The case proceeded to trial and a jury convicted Kephart of one count of domestic battery. *Id.* at 43. After trial, the State opposed Kephart's objection to admission of his prior domestic battery convictions and to dismiss the Information. *Id*. at 44-49. Kephart filed a reply to the State's opposition. *Id*. at 50-53.

The district court granted Kephart's motion to exclude his prior convictions, and ordered that neither of Kephart's 2010 convictions for domestic battery could be used to enhance his 2017 domestic battery conviction to a felony. *Id.* at 98-104. The district court permitted the State to seek this Court's review of its order before sentencing Kephart. *Id*. at 90-91. Accordingly, the district court has not entered a judgment of conviction.

The State respectfully requests this Court to order the district court to admit Kephart's 2010 prior convictions for domestic battery at the sentencing proceeding in this case to enhance Kephart's conviction as a felony.

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Routing Statement

A petition for a writ of mandamus invokes the original jurisdiction of the Nevada Supreme Court. Nev. Const. art. 6, sec. 4; *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705 (2009). This writ petition does not fall under one of the categories presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). Accordingly, this Court retains this writ petition under NRAP 17(a)(1) (The Supreme Court shall hear and decide "proceedings invoking the original jurisdiction of the Supreme Court" except as provided in NRAP 17(b)).

Procedural history

After the State charged Kephart with one count of domestic battery, Kephart moved the district court to exclude admission of his two prior domestic battery convictions as a sentencing enhancement and to dismiss the Information Superseding Indictment (Petitioner's Appendix, 4-42).

Before trial began, the district court denied the motion to dismiss and held Kephart's motion to exclude his prior convictions in abeyance until the jury reached a verdict. *Id*. at 100-01. The district court gave the State leave to respond to Kephart's if the jury returned a guilty verdict. *Id*.

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The case proceeded to trial and a jury convicted Kephart of one count of domestic battery. *Id*. at 43. The State filed its written opposition to Kephart's motion to exclude his prior convictions, and Kephart filed a reply to the State's opposition. *Id.* at 44-49, 50-53.

On February 13, 2017, the district court heard argument on Kephart's motion, and granted the motion; on February 28, 2017, the district court filed its order that neither of Kephart's 2010 convictions for domestic battery could be used to enhance his 2017 domestic battery conviction to a felony. *Id*. at 54-97, 98-104. The district court permitted the State to seek this Court's review of its order before sentencing Kephart. *Id.* at 90-91. Accordingly, the district court did not enter a judgment of conviction.

The State filed a notice of appeal. On March 24, 2017, this Court ordered the State to show cause why the appeal should not be dismissed for lack of jurisdiction. *State v. Kephart*, Docket No. 72481 (Order Dismissing Appeal, June 6, 2017). On June 6, 2017, the Court dismissed the appeal, ruling that the district court order excluding the use of the prior convictions could be reviewed on appeal from a final judgment but not on appeal from an order excluding those convictions. *Id*.

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Facts

On May 19, 2010, Kephart pleaded no contest to first-offense domestic battery in the Union Township Justice Court in Winnemucca, Nevada (Petitioner's Appendix, 11-12). Kephart signed the judgment of conviction. *Id.* at 12. Before entering his plea, Kephart initialed and signed an admonishment of rights form, which informed him of the rights he was waiving and the consequences of his plea. *Id*. at 25-27. The admonishment form told Kephart in bold print that the "State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense." *Id*. at 25. The form informed Kephart that if he incurred a third offense within seven years he would be convicted as a felon. *Id*. at 26. Kephart's counsel signed the admonishment form, stating that counsel had reviewed the form with Kephart and had discussed the rights Kephart was waiving and the consequences of his plea with him. *Id*.

On July 29, 2010, Kephart pleaded guilty to domestic battery in the same justice court in Winnemucca, Nevada. *Id*. at 29-30. Kephart was originally charged with a second-offense domestic battery. *Id*. at 31-32, 37, 39, 40. Apparently, the prosecutor did not believe he could prove the prior

domestic battery conviction—according to the court minutes. *Id*. at 34. Accordingly, the State reached a plea agreement with Kephart where he agreed to plead guilty to domestic battery, and the State agreed to treat the charge as a first offense. *Id*. at 27-30, 72-73. Kephart initialed and signed the same advisement of rights form as he did in his previous case. *Id.* at 22-24, 37-39. He also initialed and signed the same admonishment of rights form, which informed him of the rights he was waiving and the consequences of his guilty plea. *Id*. at 40-42. As before, the admonishment form informed Kephart in bold print the State would use the conviction and any similar prior conviction to enhance the penalty for any subsequent offense. *Id*. at 40. The form informed Kephart that a third offense within seven years would result in a felony conviction. *Id*. at 41.

A jury convicted Kephart of a third domestic battery offense on January 18, 2017. *Id.* at 43. On February 28, 2017, the district court granted Kephart's motion to exclude his prior convictions for felony enhancement purposes. *Id.* at 98-104. The district court vacated the sentencing date to permit the State to seek appellate review. *Id*. at 90-91.

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Argument

A. Because the State agreed only to treat Kephart's second domestic battery conviction as a first offense for purposes of sentencing on the second conviction, and did not agree that his prior convictions could not be used as a future sentencing enhancement, this Court should issue a writ of mandamus to the district court ordering that court to consider Kephart's prior convictions for sentencing enhancement.

1. Standard of review

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* NRS 34.160; *Humphries v. Eighth Judicial Dist. Court*, ___ Nev. ___, ___, 312 P.3d 484, 486 (2013). A writ of prohibition may issue to confine the district court to the proper exercise of its prescribed jurisdiction when the court has acted in excess of its jurisdiction. NRS 34.320.

Where there is no "plain, speedy, and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; NRS 34.330; *see Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, ___ Nev. ___, ___, 335 P.3d 1234, 1238 (2014). A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted.

Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Determining whether to consider a petition for extraordinary relief is solely within this Court's discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851. The Court may consider a writ petition when an important issue of law needs clarification and considerations of sound judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, ___ Nev. __, 335 P.3d 199, 202 (2014).

An appeal is generally an adequate remedy precluding writ relief. *Pan*, 120 Nev. at 224, 88 P.3d at 841; *see also Bradford v. Eighth Judicial Dist. Court*, Nev. ___, ___, 308 P.3d 122, 123 (2013). Accordingly, this Court generally declines to consider writ petitions challenging interlocutory district court orders. *Oxbow Constr.*, ___ Nev. at ___, 335 P.3d at 1238; NRS 177.045 ("Upon the appeal, any decision of the court in an intermediate order or proceeding, forming a part of the record, may be reviewed."). The State does not have the right to appeal from "a final judgment or verdict in a criminal case." NRS 177.015(3).

In the context of writ petitions, this Court reviews district court orders for an arbitrary or capricious abuse of discretion. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Questions of law are reviewed *de novo*, even in the

context of writ petitions. *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

2. Reasons for considering the writ.

The Court's intervention is appropriate in this case for the following reasons. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. *Castillo v. State*, 106 Nev. 349, 352, 729 P.2d 133, 11325 (1990). There is no statute or rule that provides for an appeal from a district court order excluding the use of prior convictions for felony enhancement purposes. This Court so held in its order dismissing the State's appeal when the State attempted to appeal from the district court order denying admission of Kephart's prior convictions. *State v. Kephart*, Docket No. 72481 (Order Dismissing Appeal, June 6, 2017). The Court observed that the district court order "is an intermediate order that can and should be reviewed on appeal from a final judgment." *Id*. However, "[t]he defendant only may appeal from a final judgment or verdict in a criminal case." NRS 177.015(3). Thus, it appears that the State cannot obtain this Court's review of the district court order regarding Kephart's prior convictions by appealing from the final judgment of conviction. The

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Court, therefore, should entertain the State's challenge to the district court order in this writ petition.

The Court should consider this writ because, as explained below, the district court is obligated to consider Kephart's prior convictions. The district court has no discretion under NRS 200.485 and our case law not to consider the prior convictions for enhancement purposes.

The Court should also entertain this writ petition because of the importance of holding defendants who commit domestic battery accountable for their crimes. The Legislature has determined that this kind of battery is a serious crime, such that one who commits three of these offenses within seven years is subject to felony prosecution. *See* NRS 200.485(1)(c); NRS 193.130(2)(c). The harmful effects of domestic battery to individuals and families are well known. The Court should therefore reach the merits of the writ petition.

3. Reasons for granting the writ

The district court excluded Kephart's prior convictions for enhancement purposes because it found Kephart was not on notice that his July 29, 2010 conviction would be used for felony enhancement purposes (Petitioner's Appendix, 88-89, 103). Specifically, the district court noted that

Kephart was not represented by counsel when he incurred his second conviction, and there was no written plea agreement or other evidence to indicate whether the July 29, 2010 conviction would be used in the future for felony enhancement purposes. *Id*. The district court erred in fact and law.

Under our DUI jurisprudence, the Court has held that NRS 484.3792 is clear and unambiguous: "any two prior offenses may be used to enhance a subsequent DUI so long as they occurred within 7 years of the principal offense and are evidenced by a conviction. The statute does not limit offenses that may be used for enhancement to those designated as a 'first offense' or a 'second offense.'" *Speer v. State*, 116 Nev. 677, 679-80, 5 P.3d 1063, 1064 (2000). A second DUI conviction may not be used to enhance a third DUI conviction if the second conviction was obtained under a plea agreement that specifically permitted the defendant to plead guilty to a first-offense DUI and specifically limited the use of the conviction for enhancement purposes. *Id*. at 680, 5 P.3d at 1065; *accord, State v. Smith*, 105 Nev. 293, 298-99, 774 P.2d 1037, 1041 (1989) (holding that a second DUI conviction could not be used to enhance a subsequent DUI conviction to a felony when the second conviction was obtained pursuant to a guilty plea agreement that specifically permitted the defendant to plead guilty to a first-

offense DUI and limited the use of that conviction for enhancement purposes). The rule is based "solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties relating thereto." *Id.* at 680, 5 P.3d at 1065.

The rule is not applicable where "there is no plea agreement limiting the use of the prior conviction for enhancement purposes." *Id*. Neither are DUI prior convictions invalid for enhancement purposes merely because the defendant was not informed that they could be used as an enhancement in the future. *See Dixon v. State,* 103 Nev. 272, 274 n.2, 737 P.2d 1162, 1164 n.2 (1987) (holding that Dixon's prior DUI convictions were not invalid because he was not adequately informed of the consequences of his California guilty pleas because he did not know Nevada would later make third offenses felonies, since the "'consequences'" of which an accused must be informed do not include such collateral matters as this.").

The Court's rationale regarding the use of prior convictions in DUI cases for enhancement purposes applies to domestic battery cases as well. NRS 200.485 clearly and unambiguously provides that two prior domestic battery offenses may be used to enhance a subsequent domestic battery so long as they occurred within 7 years of the principal offense. The statute

does not limit offenses that may be used for enhancement to those designated as a "first offense" or a "second offense." Accordingly, there is no reason to treat a second-offense domestic battery, which is reduced to a first offense for purposes of sentencing, as a first offense for all future purposes—unless the parties have agreed to do so. This is certainly the case where, as here, a second-offense domestic battery is treated as a first offense, but the defendant is also advised that all his prior convictions may be used for future enhancement purposes.

Here, Kephart was convicted of domestic battery on May 19, 2010 (Petitioner's Appendix. 11-12). The admonishment of rights form he initialed and signed informed him in bold print that the "State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense." *Id*. at 25. The form informed Kephart that if he were convicted three times within seven years he would be facing a felony conviction. *Id*. at 26. Kephart's counsel signed the admonishment form, and attested he had reviewed the form with Kephart. *Id*.

Kephart was convicted of domestic battery again on July 29, 2010. *Id*. at 29-30. He was originally charged with a second-offense domestic battery.

Id. at 31-32, 37, 39, 40. Since there was a proof problem, the State allowed Kephart to plead to first-offense domestic battery. *Id*. at 29-30, 34, 72-73. Kephart initialed and signed the same admonishment of rights form as he had done in his first case. *Id*. at 40-42. Thus, that form informed him again in bold print that the State would use this and any similar prior conviction to enhance any subsequent domestic battery conviction. *Id*. at 40. And the form informed Kephart that three domestic battery offenses within seven years would result in a felony conviction. *Id*. at 41.

A jury in Reno convicted Kephart of a third domestic battery offense on January 18, 2017. *Id.* at 43. Kephart has thus been convicted three times of domestic battery within seven years. He and the State never entered an agreement before his first or second convictions that any of his convictions would not be used for enhancement purposes in future prosecutions for domestic battery. To the contrary, Kephart was specifically told in both his first and second prosecutions that the State would use any of his convictions "to enhance the penalty for any subsequent offense." *Id*. at 25, 40. He was told in both of his prior proceedings that a third offense within seven years would result in a felony conviction. *Id*. at 26, 41. The record thus repels the district court's finding that there was no evidence of a plea agreement or

other evidence regarding whether the State would use Kephart's prior convictions for enhancement purposes in the future.

Even if there were no evidence of what the parties intended regarding Kephart's prior convictions for enhancement purposes in the future, the district court still erred. The only way Kephart can prevail is by showing that the parties specifically agreed not to use his prior convictions. *See Smith, supra; Speer, supra.* It is not sufficient to merely argue that there was a lack of evidence as to how the parties intended to use the prior convictions in a future case.

The district court noted Kephart's testimony that he "was not on notice that the next Domestic Battery conviction would result in a felony" and that he was not presented by counsel. *Id*. at 102, 104.

Kephart's testimony, however—to the extent the district court relied on it—does not support the district court order. First, the State was not required to tell Kephart about the legal consequences of his prior convictions should he incur another conviction in the future. *Dixon, supra*. Furthermore, NRS 200.485 put Kephart on notice that his prior convictions could be used to enhance a future sentence. Accordingly, Kephart's subjective belief regarding the consequences of his prior convictions is

irrelevant—just as when a defendant claims his plea was involuntary because he had a different understanding of the consequences of his plea from what the objective facts of the plea canvass or plea agreement demonstrate. *See e.g., Rouse v. State*, 91 Nev. 677, 541 P.2d 643 (1975) (holding that the "mere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate a guilty plea as involuntary or unknowing."); *Rezin v. State*, 93 Nev. 55, 57, 559 P.2d 822, 824 (1977) ("The failure of the subjective expectation on the part of the defendant to occur subsequent to the entry of such a plea is not sufficient grounds upon which to rescind it."); *State v. Langarica,* 107 Nev. 932, 822 P.2d 1110 (1991).

The issue here is whether the State and Kephart agreed that the State would not use Kephart's prior convictions, when he entered his pleas in his first two cases, in a future prosecution. If there were no agreement, the State is free to use the prior convictions in the present case. *Speer, supra*. It is undisputed there was no such agreement.

Furthermore, Kephart testified he believed the State permitted him to plead to a first-offense domestic battery for the second offense because the State did not want to take the case to trial. *Id*. at 72. He pleaded guilty to a

first offense to take advantage of the lesser penalty, and because he did not want to go to trial. *Id*. at 75. Thus, Kephart's motive to plead guilty to the second offense had nothing to do with precluding the State from using his convictions in a future prosecution. Although Kephart testified he thought if he were prosecuted for a third offense it would be treated as a second offense, he never explained what substantiated his belief, and he admitted he may have read the admonishment form. *Id*. at 73, 76. He testified he "kind of" understood the form's advisement that the State would use his prior convictions to enhance future domestic battery convictions. *Id*. at 78. Thus, the objective evidence in this case demonstrates that Kephart knew the State could use his prior convictions for purposes of enhancement at sentencing.

Conclusion

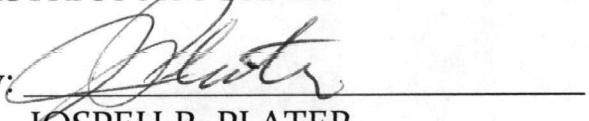
Kephart's subjective thoughts about the legal consequences of his prior convictions are not relevant. The relevant question is whether there was an agreement not to use Kephart's prior convictions for sentencing enhancement. It is undisputed there was no such agreement. The State was not required to inform Kephart that his prior convictions could be used to enhance another future conviction. Nevertheless, NRS 200.485 put Kephart on that notice. And the rights advisement form that Kephart initialed and

signed gave him actual notice that his prior convictions could be used for enhancement purposes.

Accordingly, the State respectfully requests the Court to issue a writ of mandamus to the district court and order the district court to consider Kephart's prior convictions for enhancement purposes, or, in the alternative, to issue a writ of prohibition, directing the district not to preclude admission of Kephart's prior convictions for the reasons the district court cited.

DATED: June 28, 2017.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: 

JOSPEH R. PLATER
Appellate Deputy

AFFIDAVIT OF JOSEPH R. PLATER

STATE OF NEVADA

COUNTY OF WASHOE

I, JOSEPH R. PLATER, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. That your affiant is a duly licensed attorney in the State of Nevada and is counsel of record for Petitioner.

2. That your affiant has read the foregoing Petition and he believes that it correctly describes the procedural history of this case.

3. That his Petition is brought in good faith and not for purposes of delay or any other improper reason.

JOSEPH R. PLATER

Subscribed and sworn to before me
on this 28th day of June, 2017
by Joseph R. Plater.

C. THEUMER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 16-1804-2 - Expires January 5, 2020

Notary Public

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 petition has been prepared in a proportionally spaced typeface using Word 2013 in 14 Constantia font.

2. I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity

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with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 28, 2017.

By: _____

JOSEPH R. PLATER
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Nevada Bar No. 2771
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on July 3, 2017, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

John Reese Petty
Chief Deputy Public Defender
Washoe County Public Defender's Office
350 S. Center St., #6
Reno, NV 89501

I further certify that on this date, a copy of this document was hand-delivered to the Chambers of Chief Judge Patrick Flanagan, for the Respondent, the Honorable William A. Maddox and the Second Judicial District Court.

Destinee Allen
Washoe County District Attorney's Office