

1
2
3
4 IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 05 2012 02:13 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

5 * * *

6
7 KUPA'A KEA, aka, PAUL, aka, KUPAA W. KEA, aka,
8 MIGUEL HERNANDEZ, aka, PAUL KEA,
9 aka KUPAA A A, aka, KUPA KE-A, aka,
10 KUPO KE-A, aka, KUPOA KEA, aka,
11 KUPOA KE-A, aka, KUPAA WIW-OLE-NAI KE-A,
12 aka, KUPAA KE-A, aka, KRUMS, aka,
13 KUPAA WIWIOLENA'I KE-A, aka,
14 KUPAA KE, KEA KUPA,

No. 61160

Appellant,

vs.

12 THE STATE OF NEVADA,

13 Respondent.
14 _____/

15 SUPPLEMENT TO FAST TRACK STATEMENT

16 COMES NOW KUPA'A KEA and files this Supplement to Fast Track Statement to correct
17 errors in the Fast Track Statement and to properly format the Fast Track Statement and to include
18 appealable issue.

19 1. Name of Party filing this fast track statement: KUPA'A KEA.

20 2. Name, law firm, address and telephone number of attorney submitting this
21 Supplement to Fast Track Statement: Kathrine I. Berning, Fry & Berning, LLC, 195 Casazza Drive
22 Reno, Nevada 89502, telephone number (775) 329-8646.

23 3. Trial counsel is the same as the appellate counsel.

24 4. Judicial district, county, and district court docket number of lower court proceeding:
25 Second Judicial District Court, Washoe County, Department 9, Case No. CR12-0110.

26 5. Name of judge issuing decision: Honorable Scott Freeman.

27 6. Length of trial: the Appellant entered a guilty plea to two counts of Battery with a
28 Deadly Weapon Causing Substantial Bodily Harm.

1 7. Convictions appealed from: two counts of Battery with a Deadly Weapon Causing
2 Substantial Bodily Harm.

3 8. Sentence for each count: Two (2) consecutive terms of a minimum thirty-five (35)
4 months to one hundred fifty-six (156) months for the two counts of Battery with a Deadly Weapon
5 Causing Substantial Bodily Harm.

6 9. Date of decision: June 1, 2012.

7 10. Date of written judgment: June 5, 2012.

8 11. This is not an appeal from an order granting or denying a petition for a writ of habeas
9 corpus.

10 12. The time has not been tolled by the filing of any motion.

11 13. Date Notice of Appeal filed: June 26, 2012.

12 14. Statute governing time limit for filing notice of appeal: Nevada Rules of Appellate
13 Procedure (NRAP) Rule 4(b)(1)(A).

14 15. Statute, rule or other authority granting Supreme Court to review judgment appealed
15 from: NRS 177.015(3).

16 16. Nature of Disposition below: Judgment after entry of plea.

17 17. Pending and prior proceedings in this court: none.

18 18. Pending and prior proceedings in other courts: none.

19 19. Proceedings raising same issues: none.

20 20. Procedural history: On January 23, 2012, the State filed an information charging
21 KUPA'A KEA with two counts of Battery with a Deadly Weapon Causing Substantial Bodily Harm.
22 See, Appellant's Index, pp. 1-2. On February 7, 2012, the Appellant signed a guilty plea
23 memorandum wherein the State agreed to dismiss a drug charge in another case, forego filing
24 additional charges and the Appellant agreed to plead guilty to the two counts of Battery with a
25 Deadly Weapon Causing Substantial Bodily Harm. Both sides were free to argue. See, Appellant's
26 Index, 4-9. On February 8, 2012, the Appellant pled guilty to the charges. See, Appellant's Index,
27
28

1 pp. 12-21. At sentencing, the Appellant acknowledged that prison was appropriate, but asked for
2 less that the maximum sentence based upon his drug addiction and issues with his early life. See,
3 Appellant's Index, p. 81. The district court sentenced the Appellant to 35-156 months on each count
4 to run consecutively. See, Appellant's Index, pp. 83-84.

5 21. Statements of Facts: This is an appeal from a judgment of conviction pursuant to a
6 guilty plea. The Appellant was sentenced to 35-156 months on each count to run consecutively.
7 See, Appellant's Index, pp. 83-84.

8 The Appellant lived in an abusive environment as he was growing up. See, Appellant's
9 Index, pp. 57-58. His mother moved to the East Coast thereby abandoning him and also giving his
10 sister, Momi, guardianship while he was being detained in Rite of Passage here in Nevada. See,
11 Appellant's Index, p. 58. His grade school teacher, Ms. Hardaway and his principal, Ms. Ford, tried
12 to befriend him, seeing him as a child who slipped through the cracks. See, Appellant's Index, p.
13 59. The Appellant turned to alcohol and methamphetamine to mask the abandonment and pain he
14 felt. See, Appellant's Index, pp. 59-60. Mr. KEA is eighteen years old, and according to Ms.
15 Mahaffey, the psychologist who evaluated him, his character and personality are not yet totally
16 formulated. See, Appellant's Index, pp. 60-62. The Appellant stated that he wants to cut the gang
17 ties. See, Appellant's Index, pp. 62 & 64. The report of the psychologist noted that young people
18 are less culpable because of their psychosocial immaturity. See, Appellant's Index, p. 64. The
19 Appellant requested two concurrent sentences of 24 to 72 months. See, Appellant's Index, p. 64.

20 22. Issues on Appeal: **The Appellant's sentence violates the Eighth Amendment**
21 **proscription against punishments that are disproportionate to the crime committed.**

22 23. Legal Argument: The Eighth Amendment declares: "Excessive bail shall not be
23 required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause
24 prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime
25 committed. Solem v. Helm, 463 U.S. 277, 286, 103 S.Ct. 3001, 3006(1983). In Pickard v. State,
26 94 Nev. 681, 585 P.2d 1342 (1978) the court observed: "Punishment may be constitutionally
27
28

1 impermissible under the Eighth Amendment not only because of its nature or mode, but also because
2 of its severity or harshness.” The United States Supreme Court, in Coker v. Georgia, 433 U.S. 584,
3 592, 97 S.Ct. 2861, 2865, 53 L.Ed.2d 982 (1977), reaffirmed its prior holding in Gregg v. Georgia,
4 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), that “a punishment is ‘excessive’ and
5 unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and
6 hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is
7 grossly out of proportion to the severity of the crime.

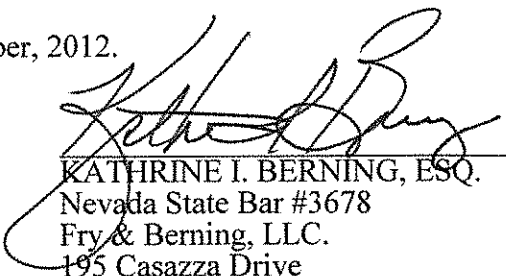
8 While the Second Judicial District Court did not impose the maximum sentence in the instant
9 case, the sentence is too harsh when one considers the age of the Appellant, his psychosocial
10 immaturity, the fact that he is less responsible for his actions because of his age, his abandonment
11 by his family at an early age, his taking responsibility for his actions, his divorcing himself from the
12 gang influence even though it was his surrogate family, and his substance abuse. This was the
13 Appellant’s first felony conviction. To send an eighteen year old to prison for a minimum of 70
14 months, almost six (6) years is harsh. The Appellant understands what he did and has taken
15 responsibility for it. To order the Appellant to spend more than 24 - 72 months in prison is
16 purposeless and needless imposition of pain and suffering.

17 24. Preservation of issues: The issue of the severity of the Appellant’s sentence was
18 discussed at the Appellant’s sentencing. See, Appellant’s Index, pp. 52-66, 77-81.

19 25. This is not a case of first impression.

20 Pursuant to NRS 239B.030 the undersigned hereby affirms that this document does not
21 contain a Social Security Number.

22 Dated this 5th day of September, 2012.

23
24 
25 KATHRINE I. BERNING, ESQ.
26 Nevada State Bar #3678
27 Fry & Berning, LLC.
28 195 Casazza Drive
Reno, Nevada 89502
Telephone (775) 329-8646

1
2 CERTIFICATE OF SERVICE BY MAIL

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Fry &
4 Berning, LLC, and that on this date I deposited in the United States mail, at Reno, Nevada, with
5 postage thereon prepaid, a true and correct copy of the attached Supplement to FAST TRACK
6 APPEAL STATEMENT, addressed as follows:

7 Mr. Kupa'a Kea JID 1086980
8 P.O. Box 7007
9 Carson City, NV 89702


10 Mr. Terrance McCarthy, Esq., DDA
11 Appellate Division
12 P.O. Box 30083
13 Reno, Nevada 89520-3083

14 Catherine Cortez Masto
15 Attorney General for State of Nevada
16 100 N. Carson Ctreet
17 Carson City, NV 89701

18 Tracie K. Lindeman, Clerk of the Court
19 Supreme Court of Nevada
20 201 South Carson Street, Suite 201
21 Carson City, Nevada 89701-4702

22 Ms. Jennifer Noble, Esq., Appellate Deputy Attorney
23 P.O. Box 30083
24 Reno, Nevada 89520-3083

25 DATED this 5th day of September, 2012.

26 
27 BARRY BLOUGH, Paralegal to
28 KATHRINE I. BERNING, ESQ.

1 **AFFIDAVIT OF KATHRINE I. BERNING**

2 County of Washoe)
3 State of Nevada)ss.

4 I, KATHRINE I. BERNING, under penalty of perjury I state that the following assertions
5 are true:

6 1. That I am an attorney duly authorized to practice law in the State of Nevada, and am
7 the attorney of record for Appellant, KUPA'A KEA in Case Number 61160;

8 2. That I had been appointed to represent Mr. KEA through the Alternate Public
9 Defender's office in conjunction with the BELL CONFLICT GROUP;

10 3. That, even though I drafted many Supreme Court appeals documents several years
11 ago, prior to my representation of Mr. KEA, I had never prepared nor filed a Fast Track Appeal
12 Statement with Supreme Court for the State of Nevada;

13 4. That my client filed a Notice of Appeal with the Second Judicial District Court on
14 June 26, 2012;

15 5. That, due to a procedural oversight on my part, I was not aware at the time that I
16 filed a Fast Track Appeal Statement to the Court when there were several key deficiencies
17 present in the document;

18 6. It was not my intention to knowingly submit a document that was missing the
19 required information as outlined in the Nevada Rules of Appellate Procedure;


20 7. I respectfully request that I be allowed to submit a Supplemental Fast Track
21 Appeal Statement that will correct the deficiencies that are present in the initial Fast Track
22 Appeal Statement;

23 8. Deputy District Attorney JENNIFER NOBLE, ESQ., does not oppose my filing a
24 Supplement and she has graciously agreed to file a Supplement to her Fast Track Response.

25 Dated this 4th day of September, 2012.

26 Subscribed and sworn to before me this
27 4th day of September, 2012.

28 *[Signature]*
 NOTARY PUBLIC

[Signature]
 KATHRINE I. BERNING
 **BARRY L. BLOUGH**
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 09-10029-2 - Expires May 27, 2013