

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

2
3 JONATHAN QUISANO,

4 Appellant,

5 v.

6 THE STATE OF NEVADA,

7 Respondent.

) No. 66816

) **E-File**

) Electronically Filed
) Mar 24 2015 08:27 a.m.
) Tracie K. Lindeman
) Clerk of Supreme Court

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9 **FAST TRACK REPLY**

10 1. **Legal argument, including authorities:**

11 ***A DISCOVERY VIOLATION OCCURRED WHEN THE STATE FAILED***
12 ***TO PROVIDE THE DEFENSE WITH AN AFFIDAVIT USED TO***
13 ***CROSS-EXAMINE A WITNESS THAT TESTIFIED AT THE***
14 ***SENTENCING HEARING.***

15 Brady and its progeny apply to sentencing hearings just as much as a
16 trial. It matters not that a defendant pleads guilty or goes to trial. The State is
17 obligated to turn over discoverable evidence-especially when it is used against
18 a defense witness at a sentencing hearing. The defendant was seriously
19 prejudiced by this willful discovery violation and the undisclosed evidence led
20 the court to believe that the Defendant's wife's statement was not to be
21 considered. Thus, a new sentencing hearing is appropriate.

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24 The State first argues that Brady v. Maryland, 373 U.S. 83(1963), does
25 not apply to the affidavit used to cross-examine Ms. Rodrigues. They argue
26 that because the evidence is not "Brady" material, and because the State is not
27 that because the evidence is not "Brady" material, and because the State is not
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1 required to disclose impeachment evidence before a plea of guilty is entered,
2 no error occurred. (State's Brief at pp. 4-5). Yet, a prosecutor is required to
3 disclose evidence that is material to either guilt or punishment. Roberts. v
4 State, 110 Nev., 1121, 881 P.2d 1(1994), citing, Brady, 373 U.S. at 83. "It is a
5 violation of due process for the prosecutor to withhold exculpatory evidence,
6 and his motive for doing so is immaterial." Wallace v. State, 88 Nev. 549,
7 551-52, 501 P.2d 1036(1972). The prosecutor represents the state and has a
8 duty to see that justice is done in a criminal prosecution.

12 NRS 174.235(1)(a) requires the prosecution attorney to provide copies
13 of witness statements. This statute includes affidavits, as that is a written or
14 recorded statement of a witness. The witness, Ms. Rodrigues, was on the
15 State's witness list. Certainly, the State should have disclosed this information
16 under both Brady and the statute. It matters not that the witness testified at a
17 sentencing hearing rather than trial.

20 The evidence (affidavit) was material. The Supreme Court held that, in
21 all cases except the prosecutor's knowing use of perjured testimony, evidence
22 is "material" if there is a reasonable probability that, had the evidence been
23 disclosed, the result of the proceeding would have been different." United
24 States v. Bagley, 473 U.S. 674, 682(1985). A "reasonable probability" is a
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1 probability sufficient to undermine confidence in the outcome. Bagley, 473
2 U.S. at 678.
3

4 In the case at bar the affidavit was both discoverable and material. This
5 is a statement of a witness, and documentation in the possession of the State.
6
7 Discovery applies to sentencing proceedings. The affidavit is material as the
8 prosecution used this evidence against the one and only witness that testified
9 at the sentencing hearing. Thus, it is likely that the outcome of the sentencing
10 hearing—the defendant receiving the maximum possible sentence—would
11 have been different. Bagley, supra.
12

13 Thus, Mr. Quisano has established that a willful discovery violation
14 occurred. The failure to disclose the material evidence severely prejudiced
15 him. Thus, he respectfully requests that the appeal be granted and that Mr.
16 Quisano be sentenced again.
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18

19 Respectfully submitted,

20 PHILIP J. KOHN
21 CLARK COUNTY PUBLIC DEFENDER

22 By /s/ Norman J. Reed
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VERIFICATION

1. I hereby certify that this fast track reply 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 fast track reply has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track reply complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and does not exceed 5 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track reply and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track reply, or failing to raise material issues or arguments in the fast track reply, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track reply is true and complete to the best of my knowledge, information and belief.

DATED this 23rd day of March, 2015.

PHILIP J. KOHN
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