

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN QUISANO,
Appellant,

vs,

THE STATE OF NEVADA,
Respondent.

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Tracie K. Lindeman
Clerk of Supreme Court
CASE NO. 66816

**OPPOSITION TO MOTION TO STRIKE
STATE'S PETITION FOR REVIEW**

COMES NOW, the State of Nevada, Respondent, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Opposition to Motion to Strike State's Petition for Review and supporting points and authorities. This opposition is based on the following memorandum and all papers and pleadings on file herein.

Dated this 21st day of March, 2016.

Respectfully submitted,

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

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

On March 18, 2016, Quisano filed a motion to strike the State's Petition for Review which the State now opposes. Quisano argues that because the State was the prevailing party in the appeal, the State was not "aggrieved" by the decision and therefore cannot seek review in this Court under NRAP 40B. The State maintains that "aggrieved" within the context of seeking a Petition for Review, broadly refers to any party which is prejudiced or harmed, even if in part, by a decision of the Court of Appeals and does not preclude the prevailing party from seeking relief.

NRAP 40B(a) provides that, "[a] party aggrieved by a decision of the Court of Appeals may file a petition for review" This language is non-jurisdictional and should be "liberally construed to secure the proper and efficient administration of the business and affairs of the courts and to promote and facilitate the administration of justice by the courts." NRAP 1(a), (b). The purpose of the Petition for Review procedure is to provide this Court with a means to oversee the decisions of the Court of Appeals, to ensure uniformity and consistency of its decisions, and to review issues of first impression and statewide importance. NRAP 40B(a); see also NRAP 17(a)(13), (14).

NRAP 40B does not speak in terms of a "prevailing" or "losing" party, but instead simply refers to a "party aggrieved." A common sense, plain language definition of "aggrieved" is, "having legal rights that are adversely affected; having

been harmed by an infringement of legal rights.” Black’s Law Dictionary 77 (9th ed. 2009). While usually an “aggrieved” party will be the one that “lost” the appeal, this is not always so. Most appeals involve multiple issues. It is rare that all issues in an appeal will be resolved entirely in the favor of one party or the other. Precluding the prevailing party from seeking a petition for review on an issue, would undermine this Court’s ability to oversee the Court of Appeals and ensure uniformity of case law.

In the instant case, although the Opinion of the Court of Appeals ultimately affirmed the Judgment of Conviction, it did so only after declaring a new rule of law on an issue of first impression and general statewide importance. The Court of Appeals held that the prosecutor’s discovery policy in this case constituted an “open-file” policy which as a matter of law extends to impeachment material for victim-impact speakers at sentencing after a guilty plea. Opinion, pp. 3, 12-22. The judgment was affirmed because there was no prejudice, but this does not alter the Court’s conclusion that the duration of “open-file” extends through sentencing and that the prosecutor engaged in misconduct. Id. It is this holding which constitutes a new rule of law and which justified publication of the decision as an Opinion. NRAP 36. The State is “adversely affected” by this unfavorable ruling and is “harmed” in future cases which will be decided upon this new precedent. Such prejudice is sufficient to be “aggrieved” for purposes of seeking a petition for review.

Quisano's reliance upon laws which pertain to standing to appeal in administrative land use cases is unavailing. Kay v. Nunez, 122 Nev. 1100, 1106-1107, 146 P.3d 801, 805-806 (2006). To seek judicial review of a local zoning and land use planning decision, a person must be "aggrieved," which means they must have a "special or peculiar injury" such that their personal or property right has been adversely and substantially affected. Id. Also, a person is aggrieved if they appeared, either in person, through an authorized representative or in writing, before the administrative body on the matter which is the subject of the decision. Id., *citing* NRS 278.3195(1)(d). Obviously, these definitions only have application in the area of administrative land use decisions and are not useful in determining when a party may seek a petition for review under NRAP 40B.

In a more analogous case, the Oregon Supreme Court considered whether the State could seek a petition for review of a decision of the Court of Appeals as to one of the court's holdings, even though the State had obtained the disposition that it sought in that court:

The state does not challenge the Court of Appeals' disposition of the case, but rather challenges that court's rationale for its disposition of petitioner's second claim for relief. ORS 2.520 provides that 'any party *aggrieved* by a decision of the Court of Appeals may petition the Supreme Court for review.' (Emphasis supplied.) In this case, the state is 'aggrieved' by the conclusion of law reached by the Court of Appeals that is discussed in this opinion because, if incorrect, the rationale of the lead opinion in the Court of Appeals will force the state to defend the merits of many future claims for post-conviction relief that it should not be required to defend.

Palmer v. State, 318 Ore. 352, 355 n. 5, 867 P.2d 1368, 1369 n. 5 (1994). Likewise, where the Court of Appeals held that the trial court erred in admitting the results of a blood alcohol test but affirmed the DUI conviction on grounds the error was harmless, the State was nonetheless permitted to petition for review as an “aggrieved” party. State v. Snyder, 337 Ore. 410, 97 P.3d 1181 (2004). Thus, the State may be aggrieved by a holding contained in a court decision, notwithstanding having prevailed on the merits.

A petition for review does not present a question of jurisdiction or “standing to appeal” as Quisano would suggest, but only one of discretion. The Supreme Court shall fix the jurisdiction of the court of appeals and provide for the review, where appropriate, of appeals decided by the court of appeals. Nev. Const. Art. 6, § 4. The Court of Appeals shall hear and decide all cases assigned to it by this Court. NRAP 17(b). Supreme Court review is not a matter of right but of judicial discretion. NRAP 40B(a). Review of decisions of the Court of Appeals by the Nevada Supreme Court is an extraordinary remedy outside the normal process of appellate review, which is not available as a matter of right. NRAP 40B(b).

In such circumstances, “aggrieved” is not the equivalent of standing to initiate a new appeal. Rather, in a “push-down” model such as ours, the instant appeal originated in the Nevada Supreme Court and was assigned to the Court of Appeals for decision. No new appeal or case number is created when an appeal is routed to

the Court of Appeals nor when it returns upon a petition for review. It is all one and the same appeal. In this context, a party “aggrieved” is simply a party harmed or prejudiced in some manner by the decision. “Aggrieved” should be broadly construed in furtherance of the purpose of the rule to facilitate this Court’s oversight of significant decisions of the Court of Appeals. The State is aggrieved by the Opinion in this case because it will be forced to defend the merits of many future claims against its discovery policy based on the precedent now set by the Court of Appeals.

WHEREFORE, the State respectfully requests that the motion to strike be denied.

Dated this 21st day of March, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 21, 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

NORMAN J. REED
Deputy Public Defender

STEVEN S. OWENS
Chief Deputy District Attorney

BY /s/ E.Davis
Employee, District Attorney's Office

SSO//ed