

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN QUISANO,

No. 66816

Appellant,

E-File

v.

THE STATE OF NEVADA,

Respondent.

FILED

JUN 26 2015

TRACIE K. LINDEMAN,
CLERK OF SUPREME COURT

BY *Tracie K. Lindeman*
DEPUTY CLERK

SUPPLEMENTAL FAST TRACK STATEMENT

1. **Name of party:** Jonathan Quisano.

2. **Attorney submitting this fast track statement:**

NORMAN J. REED, #3795

NANCY LEMCKE, #5416

Clark County Public Defender's Office

309 S. Third St., Ste. 226

Las Vegas, Nevada 89155

(702) 455-4685

3. **Appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of**

lower court proceedings: Eighth Judicial District, County of Clark, District

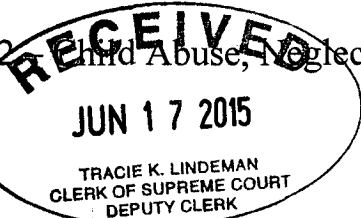
Court Case No. C294266.

5. **Name of judge issuing order appealed from:** Valorie Adair.

6. **Length of trial.** N/A.

7. **Conviction(s) appealed from:** Ct. 1 – Voluntary Manslaughter,

Ct. 2 – Child Abuse, Neglect or Endangerment with Substantial Bodily Harm.



1 8. **Sentence for each count:** \$25 Admin. fee; \$150 DNA analysis
2 fee; genetic testing; Ct 1 – 48-120 months in prison; Ct. 2 – 72-230 months in
3 prison consecutive to Ct. 1; 488 days CTS.
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5 9. **Date district court announced decision:** 10/07/14.
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7 10. **Date of entry of written judgment:** 10/08/14.
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9 11. **Habeas corpus:** N/A.
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11 12. **Post-judgment motion:** N/A.
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13 13. **Notice of appeal filed:** 10/30/14.
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15 14. **Rule governing the time limit for filing the notice of appeal:**
16 NRAP4(b).
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18 15. **Statute which grants jurisdiction to review the judgment:**
19 NRS 177.015.
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21 16. **Disposition below:** Judgment upon entry of plea of guilt.
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23 17. **Pending and prior proceedings in this court:** N/A.
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25 18. **Pending and prior proceedings in other courts:** N/A.
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27 19. **Proceedings raising same issues.** Appellate counsel is unaware
28 of any pending proceedings before this Court which raise the same issues as
the instant appeal.

 20. **Pursuant to NRAP 17, is this matter presumptively assigned
to the Court of Appeals? Identify issues or circumstances that override**

1 any presumptive assignment to the Court of Appeals or require retention
2 by the Supreme Court. Issues should be identified and explained with
3 specific reference to arguments in the Fast Track Statement. Appellant
4 does not oppose assignment to the Court of Appeals.
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7 21. **Procedural history.** Appellant JONATHAN QUISANO was
8 originally charged and plead not guilty in a two-count Information charging
9 child abuse murder and an alternative count of child abuse, neglect or
10 endangerment. (ROA 462-64) [Amended due to typographical error the next
11 day.](ROA 465-67). The matter proceeded to trial on/about June 9, 2014,
12 with a pre-trial evidentiary hearing. (ROA 1278-1513). Before the hearing
13 was completed and before jury selection began, the case negotiated. On June
14 10, Mr. Quisano plead no contest to a Second Amended Information charging
15 Voluntary Manslaughter, and Child Abuse, Neglect or Endangerment with
16 Substantial Bodily Harm. (ROA 998-99). After completion of a pre-sentence
17 report, the sentencing ultimately occurred on October 7, 2014. (ROA 1514-
18 42) The lower court sentenced Mr. Quisano to the maximum allowed under
19 the recommendation of prosecutor. (ROA 1166-7)
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24 22. **Statement of facts.** Appellant Jonathan Quisano plead guilty
25 (via *Alford v. North Carolina*) to Voluntary Manslaughter and Child
26 Abuse/Neglect Resulting in Substantial Bodily Harm in connection with the
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1 death of his 3 year-old son, Khayden. (ROA 998-99). Khayden died as a
2 result of blunt force trauma to his head. (ROA 1022-39).
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4 On June 6, 2013, Mr. Quisano called his common-law wife, Christina
5 Rodrigues, and reported that the couple's son, Khayden, had fallen from the
6 family's sofa onto the tile floor and hit his head. Mr. Quisano was concerned
7 because Khayden was unconscious and unresponsive. Ms. Rodriguez called
8 911. Emergency personnel responded and transported Khayden to the
9 hospital, where he was diagnosed with a skull fracture and related head
10 trauma. (ROA 1022-39). Khayden's fracture was consistent with the fall Mr.
11 Quisano described. (ROA 1022-39). When Khayden later succumbed to his
12 injuries, prosecutors charged Mr. Quisano with Murder by Child Abuse. He
13 ultimately plead guilty pursuant the negotiations outlined above.
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18 At sentencing, Ms. Rodrigues, who testified at the preliminary hearing
19 and had been noticed as a witness in the government's case-in-chief, gave a
20 victim impact statement. (ROA 1514-42; 1170-78). In that statement, she
21 asked the court for leniency in sentencing Mr. Quisano, a man with no
22 criminal history (other than a DUI conviction). Over defense objection, the
23 prosecutor questioned her using an affidavit of a Department of Family
24 Services official. (ROA 1174-75). In that undisclosed affidavit, the DFS
25 official quoted Ms. Rodriguez as expressing a desire that Mr. Quisano go to
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1 prison. (ROA 1174-75). The prosecutor argued that prior disclosure of the
2 DFS Affidavit was not required as "It's not part of discovery. This is a
3 victim-impact statement." (ROA 1176). The Court overruled the defense
4 objection, and allowed the prosecutor to examine Ms. Rodrigues about the
5 contents of the affidavit. (ROA 1176-80). Also over defense objection, the
6 prosecutor elicited testimony from Mrs. Quisano that was outside the scope of
7 the statutory authority. (ROA 1514-42; 1170-78). Thereafter, the court
8 sentenced Mr. Quisano to the maximum allowed pursuant to the prosecutor's
9 recommendation. (ROA 1166-7).

13 Notably, prior to Mr. Quisano's entry of his guilty plea, the defense
14 filed a Motion to Compel Discovery. (ROA 792-816). In that Motion, the
15 defense requested production of any/all statements of all witnesses the
16 government intended to call at trial, as well as impeachment information for
17 those individuals. (ROA 807-812). Since Ms. Rodrigues was one of the
18 individuals noticed on the government's witness list (ROA 617), she was one
19 of the individuals for whom the defense sought the prior statement and
20 impeachment information. (ROA 807, 811). The prosecution responded by,
21 *inter alia*, citing the Clark County District Attorney's open file policy. (ROA
22 828-835). The trial court granted the defense discovery requests, ordering the
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1 disclosure of witness statements and impeachment information. (ROA 1250-
2 1253).
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4 23. **Issue on appeal.** See Question #24.

5 24. **Legal argument, including authorities:** The trial court erred by
6 allowing the prosecutor to question Ms. Rodriguez at sentencing using a
7 document not previously provided to the defense. **NRS 174.234**, which
8 governs discovery production in criminal cases, obligates prosecutors to
9 notify the defense, not less than 5 judicial days prior to trial, of any witness he
10 intends to call in his case in chief. Similarly, **NRS 174.235(1)(a)** requires the
11 government to provide: "Written or recorded statements or confessions made
12 by the defendant, or any written or recorded statements made by a witness the
13 prosecuting attorney intends to call during the case in chief of the state..."
14 **NRS 174.235(1)(c)** further obligates the government to disclose to the defense
15 "books, papers, documents, tangible objects, or copies thereof, which the
16 prosecuting attorney intends to introduce in the case in chief of the state."
17 **NRS 174.305** provides that, when a party fails to comply with the provisions
18 of **NRS 174.235**, the trial court may "permit inspection of the materials not
19 previously disclosed, grant a continuance, or prohibit the party from
20 introducing in evidence the material not disclosed, or it may enter such other
21 order as it deems just under the circumstances."
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1 Prosecutors noticed Ms. Rodrigues as a case-in-chief witness.
2 Accordingly, she was the subject of the defense request(s) for prior
3 statements. The court granted the request and ordered prosecutors to turn over
4 any written or recorded statement statements made by Ms. Rodrigues and the
5 other noticed witnesses. The prosecutor failed to honor this directive, and
6 instead withheld the DFS affidavit containing Ms. Rodrigues's statements.
7 Accordingly, the prosecutor violated the trial court's discovery Order, as well
8 as **NRS 174.235**.
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12 Admittedly, the matter did not proceed to trial, and Ms. Rodrigues, as
13 the mother of the deceased, provided a victim impact statement at sentencing.
14 However, the term 'case in chief,' as set forth in **NRS 174.235**, includes each
15 party's evidentiary presentation at a penalty hearing. Floyd v. State, 118
16 Nev. 156 (2002). Accordingly, the prosecutor violated the lower court's
17 discovery Order as well as **NRS 174.235** by withholding the statement of a
18 witness who exercised her statutorily conferred right to testify at the instant
19 sentencing hearing.
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23 Notably, even if prosecutors ultimately decided not to call Ms.
24 Rodrigues at either the trial or sentencing phases of Mr. Quisano's
25 proceeding(s), they nonetheless were obligated to disclose the affidavit at
26 issue. Prosecutors may not lawfully withhold inculpatory material and
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1 information simply because they do not intend to present the material or
2 information during the government's case in chief. State v. Harrington, 9
3 Nev. 91, 94 (1873); People v. Carter, 312 P.2d 665, 675 (Cal.1957); People
4 v. Bunyard, 756 P.2d 795, 809 (Cal. 1988). Any holding to the contrary
5 would allow prosecutors to engage in unfair surprise by withholding
6 inculpatory material from the government's case in chief, only to surprise the
7 defense by using it in rebuttal.
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11 Additionally, the instant prosecutor's invocation of, and defense
12 counsel's subsequent reliance upon, the Clark County District Attorney's
13 Office 'open file policy,' compels the conclusion that use of the prosecutor's
14 use of the document at issue here required prior disclosure. Historically, the
15 Clark County District Attorney's Office has employed an 'open file' policy in
16 which prosecutors allow defense counsel to review the discovery contained in
17 the government's trial file. Once this open file policy is invoked, as was the
18 case here, the defense may rely on that representation and assume that the
19 prosecutor has provided all relevant discovery. See, e.g., Strickler v. Green,
20 527 U.S. 263, 283, n. 23 (1999) ("If a prosecutor asserts that he complies with
21 *Brady* through an open file policy, defense counsel may reasonably rely on
22 that file to contain all materials the State is constitutionally obligated to
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1 disclose...” See also Amando v. Gonzalez, No. 11-56420 at 27 (9th Cir.
2 2013).

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4 Indeed, this was the Nevada Supreme Court’s holding in McKee v.
5 State, 112 Nev. 642, 644 (1996). In McKee, the prosecution withheld an
6 inculpatory photo of the defendant. After the defendant testified, the
7 government disclosed the photo and sought to admit it through another
8 witness. Id. The trial court allowed introduction of the photo. Id. The
9 Nevada Supreme Court reversed, holding that, given the prosecutor’s earlier
10 assurance of an ‘open file policy,’ the defense was entitled to assume the
11 government had provided all relevant inculpatory and exculpatory evidence in
12 the case. Id. Accordingly, the prosecution’s introduction of the undisclosed
13 inculpatory photo at trial amounted to unfair surprise. Id.

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17 This is precisely what happened here. Not only did both **NRS 174.234**
18 and the lower court’s discovery Order require disclosure of the instant
19 affidavit, but the prosecutor’s assurance of an ‘open file policy’ compelled the
20 disclosure, as well. The prosecutor’s invocation of an ‘open file policy’
21 misled the defense into believing that the government had provided all
22 relevant discovery. As such, the introduction of the undisclosed affidavit
23 amounted to unfair surprise. And the surprise revolved around the critical
24 issue of Mr. Quisano’s sentence. As this Court is well-aware, a testifying
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1 victim-impact speaker can have large sway over a sentencing authority. But
2 for the unfair surprise and resulting prejudice occasioned by the DFS
3 affidavit, the sentencing result may have been very different. Thus, under
4 McKee, the instant discovery violation requires reversal.¹

6 25. **Preservation of issues:** A) Objections by defense counsel.
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8 (ROA 1176-78); B) Repeated objections by defense counsel. (ROA 1173-75);
9 C) Sentencing counsel preserved this issue by oral motion. (ROA 1515).

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19 ¹ Notably, this Honorable Court asked the parties to discuss both McKee,
20 supra, as well as Furbay v. State, 116 Nev. 481 (2000). In Furbay, the
21 Nevada Supreme Court rejected the defense contention that prosecutors were
22 required to disclose reports authored by a police officer who testified at
23 Furbay's penalty hearing. However, Furbay is not dispositive of the issue
24 currently before this Court. First, the Furbay prosecutor, unlike the instant
25 prosecutor, did not offer assurances of an 'open file policy.' The Furbay
26 Court distinguished Furbay from McKee on this basis. Second, unlike the
27 case at bar, there is no evidence that Furbay sought and obtained a discovery
28 order directing production of the very material withheld from the defense.
Third, there is no evidence that the witness at issue in Furbay, unlike Ms.
Rodrigues, had been noticed as a prosecution case-in-chief witness, such that
the discovery obligations conferred by NRS 174 applied. Thus, unlike
McKee, Furbay is not dispositive of the issue(s) at bar.

1 26. **Issues of first impression or of public interest:** Issue C is an
2 issue of first impression as there is no published case addressing SCR 230. It
3 is also of public interest as the sentencing judge addressed public access to
4 courtrooms through the media.
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7 Respectfully submitted,

8 PHILIP J. KOHN
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VERIFICATION

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


2. I further certify that this supplemental fast track statement 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 contains 2,142 words.

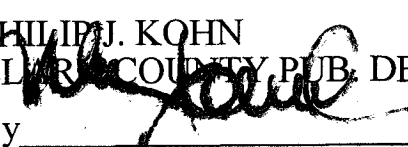
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or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

DATED this 15th day of June, 2015.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.

By 
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Deputy Public Defender

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CLARK COUNTY PUB. DEF.

By 
NANCY LEMCKE, #5416
Deputy Public Defender

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