

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

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3
4 ANTHONY CASTANEDA)

5 Appellant,)

6 v.)

7
8 THE STATE OF NEVADA,)

9 Respondent.)

No. 64515

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11 **SUPPLEMENTAL POINTS AND AUTHORITIES AND**
12 **CORRECTION OF THE RECORD**

13 On April 7, 2015, this Court heard oral argument in the above entitled case.
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15 During the argument, two issues arose which warrant the filing of Supplemental
16 Points and Authorities and Correction of the Record: (1) the Honorable Justice
17 Pickering posed a question regarding Perez v. State, a case which had not been
18 addressed in the parties' written briefs; (2) a factual error in Appellant's Opening
19 Brief was discovered as a result of the oral argument which warrants correction of
20 the record.
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23 **I. PEREZ V. STATE IS NOT CONTROLLING AUTHORITY IN THE**
24 **INSTANT CASE**

25 During oral argument, the Honorable Justice Pickering asked whether the
26 Nevada Supreme Court was bound by its ruling in Perez v. State, 129 Nev. Adv.
27 Op. 90, 313 P.3d 862 (2013), to find the State's expert witness notice was
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1 adequate in this case. Counsel for Mr. Castaneda responded that the Perez case
2 dealt with the topic of “grooming”, a secondary issue, whereas the subject of
3 Ehlers’ testimony was knowledge and intent, the ultimate issues in the case. While
4 this response was accurate, it was far from complete. The applicability of Perez
5 was not briefed by either party prior to oral argument, so counsel was not fully
6 prepared to respond to the Court’s inquiry. Therefore, it is necessary to provide
7 supplemental briefing to address this issue that was raised *sua sponte* by the Court
8 at oral argument.
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12 The Perez Court ruled that a district court did not abuse its discretion by
13 admitting expert testimony on “grooming” where the notice indicated that the
14 expert would “testify as to grooming techniques used upon children” and included
15 a CV, but did not include any reports related to the litigation because none were
16 prepared. 129 Nev. Adv. Op. at --, 313 P.3d at 870. In finding no abuse of
17 discretion, this Court noted that “Perez’s brief argument does not allege that the
18 State acted in bad faith or that his substantial rights were prejudiced because
19 the notice did not include a report or more detail about the substance of Dr.
20 Paglini’s testimony.” 129 Nev. Adv. Op. at --, 313 P.3d at 870(emphasis added).
21

25 The outcome in Perez is not controlling for several reasons. First, the
26 arguments and request for relief are different. Unlike the appellant in Perez,
27 Castaneda did not argue that the State should be *precluded* from presenting its
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1 expert; rather, Castaneda argued that he was entitled to present his own expert in
2 **rebuttal**. This would remedy the State's failure to adequately disclose the
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4 substance of its expert testimony and allow Castaneda to advance his theory of
5 defense. There was no discussion of a "rebuttal" witness in Perez, or the
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7 defendant's rights in that regard.

8 Second, Perez concerns a State witness being admitted, while the Castaneda
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10 case concerns a defense witness being *excluded*. The complete exclusion of a
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12 witness is among the most severe remedies available to a court. Castaneda's
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14 request for a rebuttal witness was a far more reasonable alternative to the relief
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16 sought in Perez, and any minor "prejudice" the State may have suffered would
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18 have been cured by a brief continuance.¹ Furthermore, the exclusion of a defense
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20 witness impacts the substantial due process rights of a criminal defendant,
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22 including the right to present a theory of defense. The court's decision in Perez did
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24 not hamper the defendant's ability to present evidence or his theory of defense.
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26 The court's decision in Castaneda's case did. It also set up the State's burden-
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28 shifting closing argument, the theme of which was, "no evidence".

26 ¹ It should also be noted that, like the defendant in Perez, the prosecutors in
27 Castaneda's case made no showing of prejudice. If any part of Perez applies to the
28 instant matter, it should be that a witness should not be excluded from a trial
without a showing of prejudice. That was the burden Perez was held to; the State
should be held to the same burden.

1 Finally, and most importantly, Castaneda demonstrated substantial prejudice
2 resulting from the Court's decision to exclude his expert, even going so far as to
3 include an offer of proof with a point-by-point refutation of Detective Ehlers'
4 testimony. See AA 306-311. By contrast, no prejudice was demonstrated by the
5 appellant in Perez, a fact this Court found dispositive. Id. at 870.
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8 Perez is not controlling in this case. Castaneda suffered substantial prejudice
9 when the court excluded his rebuttal expert and the court's abuse of discretion
10 requires reversal.
11

12 **II. APPELLANT'S STATEMENT THAT DETECTIVE EHLERS DID**
13 **NOT TESTIFY AT THE PRELIMINARY HEARING WAS**
14 **INCORRECT, HOWEVER; THIS DOES NOT CHANGE THE**
15 **ANALYSIS OF THE CASE.**

16 On page ten, lines five through eight of the Opening Brief, counsel
17 erroneously represented that Det. Ehlers had not testified at the preliminary
18 hearing in this case. The information contained in the brief was repeated at oral
19 argument. However, counsel has now discovered that this representation was
20 incorrect and should be withdrawn.
21

22 When the statement was written in the Appellant's Opening Brief, counsel
23 was not aware that the preliminary hearing had been bifurcated and transcribed
24 into two separate volumes. The expert testifying on the first day was indeed
25 Detective Ramirez. (Appellant's Appendix, Vol. I, 27-66). However, as noted by
26 the State during the oral argument on this case, Detective Ehlers testified during
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1 the continuation of the preliminary hearing, three days after the first day of
2 testimony. (Appellant's Appendix, Vol. I, 67-86). Counsel regrets the error and
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4 respectfully requests redaction of this sentence from the Opening Brief.

5 Following discovery of this error, counsel reviewed Det. Ehlers' preliminary
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7 hearing testimony and determined that, while the error was regrettable, it did not
8 alter the merits of appellant's position. During his testimony, Det. Ehlers briefly
9 discussed the carved images in the unallocated space. This testimony was
10 consistent with Det. Ramirez's testimony, as discussed in the Opening Brief at
11 page ten. (I 84, pages 70-72).

12
13 While Det. Ehlers testified at the preliminary hearing that a carved image
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15 "was viewed or was upon that computer at one time and was possibly or probably
16 deleted," he did **not** state that deliberate human intervention caused the deletion. In
17 contrast to his trial testimony, Det. Ehlers testified at the preliminary hearing that
18 the carved images likely resulted from **incomplete downloads**:

19
20 . . . or as in this case, it was being downloaded from a
21 website, **did not completely download**, so that all of the
22 files, information being file header, signature, kind of the
23 entire item of it was not transferred over and then placed
24 into this unallocated area, which is basically free space it
25 can be written to later. Happens a lot while downloading
items where you don't get the whole thing.

26 (AA I 84, p. 71).

27 Thus, the fact remains that Detective Ehlers never expressed the opinion
28 that the carved files located on Castaneda's computer showed evidence of

1 deliberate human action (and therefore, knowledge and intent) before trial,
2 whether in a written report, the State's Notice of Expert Witnesses, or the
3 preliminary hearing.
4

5 Ehlers' conclusions at trial stemmed from the State's questions on direct
6 examination about the definitions of computer terms like "access date" and
7 "carved files," whether Ehlers searched for the presence of computer viruses, and
8 if there were virus scanners or other automated security software on the computers
9
10 See, e.g., (AA 1106-1108). Defense counsel followed up on the State's questions
11 about computer terminology and the effect of viruses, virus scanners, and other
12 automated programs during cross-examination. See, e.g., (AA 1110-1169).
13
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15 The defense was surprised by Ehlers' conclusions at trial due to insufficient
16 notice, because the opinions were inconsistent with the State's other expert, Det.
17 Ramirez, and because the conclusions were inaccurate based on generally accepted
18 scientific principles. See AA at 306-307. After reviewing Ehlers' testimony both at
19 trial and preliminary hearing, Castaneda's position on appeal remains unchanged:
20 a rebuttal expert was necessary to ensure a fair trial and the opportunity to present
21 a defense. The court abused its discretion and a new trial is required.
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24

25 Respectfully submitted,

26 PHILIP J. KOHN

27 CLARK COUNTY PUBLIC DEFENDER

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