



## DECLARATION OF WILLIAM M. WATERS

1. I am an attorney duly licensed to practice law in the State of Nevada and the Deputy Public Defender assigned to represent JOSHUA SHUE on appeal currently pending before this Court.

2. Appellant filed his Notice of Appeal in the instant case on February 12, 2015. AA II 337.

3. Appellant filed his Opening Brief on July 20, 2015. Respondent filed its Answering Brief on November 4, 2015. Appellant filed his Reply on December 4, 2015.

3. Since the completion of briefing, this Court issued a published decision in Castaneda v. State, 132 Nev. Adv. Op. 44 (June 6, 2016).

4. In Castaneda, this Court reversed the defendant's conviction for 14 felony charges of possession of child pornography after finding "simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730." Id.

5. After reviewing Castaneda, Declarant noticed Appellant's case presented an identical issue which he had not included in his Opening Brief.

6. Appellant desires an opportunity to supplement his Opening Brief to include the Castaneda issue which was not addressed in his Opening Brief.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 30th day of June, 2016.

/s/ William M. Waters  
WILLIAM M. WATERS

## **POINTS AND AUTHORITIES**

Appellant was convicted after jury trial of 10 counts of possession of child pornography based upon multiple images found on his computer.<sup>1</sup> AA II 330. Appellant was also convicted of 29 counts of use of child in production of pornography.<sup>2</sup> Id. Essentially, the State alleged Appellant surreptitiously filmed his girlfriend's children while they used the bathroom and thereafter possessed the video images.<sup>3</sup> AA I 1-13.

On direct appeal to this Court Appellant argued in section II of his Opening Brief that, assuming he actually filmed the children, he could not be convicted of multiple counts of use of minor in production of pornography because multiple counts applied to a single video.<sup>4</sup> Appellant did not argue he should not have been convicted of multiple counts of possession based upon the fact that all images were located on a single computer. There was no legal authority for this proposition at the time Appellant filed his Opening Brief.

However, on June 16, 2016, this Court issued a published decision in Castaneda v. State, 132 Nev. Adv. Op. 44 (June 16, 2016). In Castaneda, this Court held “simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730.” Castaneda represented a departure from the commonly accepted belief regarding double jeopardy and unit of prosecution jurisprudence. Appellant's case presents an identical factual scenario to Castaneda.

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<sup>1</sup> NRS 200.730.

<sup>2</sup> NRS 200.710.

<sup>3</sup> The State also charged Appellant with two counts of possession based upon photographic images of an unknown male located on the same computer where the videos of his girlfriend's children were located. AA I 12-13. The State did not allege Appellant created the images of the unknown male.

<sup>4</sup> Appellant filed his Opening Brief on July 20, 2015.

Here, Appellant allegedly simultaneously possessed the 10 images of alleged child pornography in the same location, his computer.<sup>5</sup>

Because Appellant was convicted for multiple category A and B felonies, and was given a life sentence in prison, Appellant's case was exempt from the Fast Track briefing rules. *See* Nevada Rule of Appellate Procedure ("NRAP") 3C(a)(3)(A). Instead, Appellant's Opening Brief was governed by NRAP 28. Under Fast Track Rule 3C(g)(1)(A), a party can request this Court allow him to file a Supplemental Fast Track Statement "when appellate counsel differs from trial counsel and can assert material issues that should be considered but were not raised in the fast track statement." Additionally, pursuant to NRAP 3C(j):

Leave to amend fast track statements and responses, or supplemental fast track statements and responses shall be granted only upon motion to the court. A motion to amend shall justify the absence of the offered arguments in the initial or supplemental fast track statement or response. The motion shall be granted only upon demonstration of extreme need or merit.

The Nevada Rules of Appellate Procedure does not contain a comparable rule for briefs which are not governed by the fast track rule. Essentially, there is no rule explicitly allowing a party to supplement an Opening Brief. Nevertheless, this Court has noted "the courts, whose judicial functions involve hearing and resolving legal controversies, possess the authority to take any actions that are inherent or incidental to

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<sup>5</sup> Appellant argued in his Opening Brief that the images were not child pornography because they did not depict sexual conduct as defined in NRS 200.700(3). *See* Appellant's Opening Brief p. 50-58. Appellant steadfastly maintains the images did not constitute child pornography but in the event this Court disagrees, Appellant would like this court to consider whether he should be guilty of 10 counts of possession when the images were all located on the same place on a single computer.

that function.” City of Sparks v. Sparks Mun. Court, 129 Nev. Adv. Op. 38, \_\_\_, 302 P.3d 1118, 1128 (2013).

Castaneda was not controlling law at the time Appellant filed his Opening brief and therefore, Appellant did not include the Castaneda issue in his brief. However, Appellant’s case involves an issue identical to that found in Castaneda. Appellant is likely to prevail on this issue if he is allowed to supplement his Opening Brief. If Appellant had not been convicted of an A or B felony, he would have a right to ask this Court to amend his Fast Track Brief. *See* NRAP 3C(j). However, because Appellant was convicted of a **more** serious offense, his appeal was governed by NRAP 28, which does not have a comparable rule concerning supplemental briefs. Simple notions of fairness and judicial expediency should favor allowing appellants to supplement their opening briefs when this Court issues new rules of law, directly controlling, after an Opening Brief has been filed but before this Court issues its disposition in the appellant’s case. Accordingly, Appellant respectfully requests this Court grant him leave to file a supplement to his Opening Brief in conformance length limitations within NRAP 3C(g)(1)(A).

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### CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court allow him to supplement his previously filed Appellant's Opening Brief to include an argument based upon this Court recently issued decision in Castaneda v. State, 132 Nev. Adv. Op. 44 (June 16, 2016).

Respectfully submitted,  
PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By /s/ William M. Waters  
WILLIAM M. WATERS, #9456  
Deputy Public Defender

### CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 1<sup>st</sup> day of July, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT  
STEVEN S. OWENS

WILLIAM M. WATERS  
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Joshua Caleb Shue  
NDOC No. 1133873  
High Desert State Prison  
P.O. Box 650  
Indian Springs, NV 89070

BY /s/ Carrie M. Connolly  
Employee, Clark County Public  
Defender's Office