

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUL 30 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Mack Zana
Appellant,

vs.
State of Nevada
Respondent.

Supreme Court No. 80571

District Court No. A-19-804193-W
05C218103

APPELLANT'S INFORMAL BRIEF

INSTRUCTIONS: If you are an appellant proceeding pro se (without an attorney) in the Nevada Supreme Court, you must file either (1) a brief that complies with Nevada Rule of Appellate Procedure (NRAP) 28(a), or (2) a completed copy of this informal brief form, *see* NRAP 28(k), with the Nevada Supreme Court on or before the due date, *see* NRAP 31. In civil appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court may dismiss your appeal. In postconviction criminal appeals, if you do not file one of these documents by the due date, the Nevada Supreme Court or Nevada Court of Appeals may decide your appeal on the record without briefing.

HOW TO FILL OUT THIS FORM: This form must be typed, unless you are incarcerated, in which case it must be clearly handwritten. You do not need to refer to legal authority or the district court record. If you are completing your brief on this form, write only in the space allowed on the form. **Additional pages and attachments are not allowed.** If typing an informal brief, you may either use the lined paper contained in this form or an equivalent number of pages of your own paper. Your brief will be stricken if you fail to follow the directions in this form and the Nevada Rules of Appellate Procedure.

WHERE TO FILE THE BRIEF: You may submit your brief for filing in person or by mail.

To file your brief in person: Briefs may be submitted for filing Monday through Friday, 8:00 a.m. to 4:00 p.m.

Carson City: Bring the brief to the Clerk's Office at the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada, 89701.

Las Vegas: Place your brief in the Clerk's Office Drop Box at the Las Vegas courthouse for the Nevada Appellate Courts, 408 East Clark Avenue, Las Vegas, Nevada, 89101.

20-27739

To file your brief by mail: Mail the brief to the Clerk of the Supreme Court of Nevada, 201 South Carson Street, Carson City, Nevada 89701. **Your brief must be postmarked on or before the due date.**

You must file the original brief and 1 copy with the clerk of the Nevada Supreme Court. If you want the clerk to return a file-stamped copy of your brief, you must file the original form and 2 copies and include a self-addressed, stamped envelope. Documents cannot be faxed or emailed to the Supreme Court Clerk's Office.

Copies of the brief must be mailed or delivered to the other parties to this appeal or to the parties' attorneys, if they have attorneys. You must also include a proper certificate of service or complete the certificate that is attached to the informal brief form.

CAUTION: Pro se parties are prohibited from representing other parties. A pro se party may not complete a brief on behalf of other parties. Pro se parties may collaborate on their briefs, however, provided that if one brief is submitted on behalf of multiple pro se parties, each party must sign and date the brief to confirm that he or she has participated in the preparation of the brief and, by his or her signature, joins in the arguments and representations contained therein.

1. Judgment or Order You Are Appealing.

2 2/7/20 - Findings of Fact, Conclusions of Law and Order

3 Notice of Appeal.

4 2/6/20

6 Pro Bono Counsel. Would you be interested in having pro bono counsel
7 assigned to represent you in this appeal? ☒ Yes ☐ No

9 Statement of Facts

10 A. Castaneda: In May 2019 appellant became aware of Castaneda v. Nevada
11 and brought forth his Petition within a reasonable amount of time, approximately
12 6 months later. (See affidavit in Petition) Castaneda applies to appellant as it
13 was the first time the State's highest court interpreted and clarified NRS 200.730.
14 Castaneda did not announce a new rule of law and therefore, under Colwell v.
15 Nevada and Clem v. Nevada, applies to appellant and is appropriate for habeas relief.
16 "When a decision merely interprets and clarifies an existing rule and does not
17 announce an altogether new rule of law, the court's interpretation is merely a restatement
18 of existing law."

19 "If a rule is not new, then it applies even on collateral review of final cases."

20 Colwell v. Nevada

21 "What Castaneda's challenge asks us to do is to read NRS 200.730 and
22 determine the unit of prosecution it allows..."

23 "Since the text of NRS 200.730 does not unambiguously establish whether
24 Castaneda was properly prosecuted on a per-image basis, we turn to other
25 legitimate tools of statutory interpretation..."

26 "...neither the text of NRS 200.730 nor its legislative history answers
27 the unit-of-prosecution question this case poses."

1 "....determining the appropriate unit of prosecution presents an issue
2 of statutory interpretation..." Castaneda v. Nevada

3 "Constitutional due process requires the availability of habeas relief when
4 a state's highest court interprets for the first time and clarifies the provisions of
5 a state criminal statute to exclude a defendant's acts from the statute's reach
6 at the time the defendant's conviction became final." Clem v. Nevada

7 12 images were found on two computers in one room, at one time in appellant's
8 home; just like Castaneda. The state prosecuted the images as a group and did
9 not attempt to show, other than that there were 12 different images, individual
10 distinct crimes of possession; just like Castaneda. The state did not attempt
11 to distinguish the offenses by showing that the crimes were separated by
12 time or location or by demonstrating that appellant formed a new intent
13 as to each image; just like Castaneda. Therefore, appellant should have been
14 charged with one count not 12; just like Castaneda. Unlike Castaneda,
15 appellant was only convicted of 6 and not all 12 counts. Thus, appellant's
16 remaining 6 counts of possession should be vacated.

17 B. Actual Innocence: In appellant's case, unlike Castaneda, the state failed
18 to provide any evidence that anyone in any of the 12 images was under the age
19 of 16. Without this crucial evidence, appellant merely possessed pornography
20 not child pornography which is not a crime. On August 6, 2007 the trial
21 judge stated "State will need an expert to testify to a reasonable degree of
22 medical certainty that the persons depicted are under the age of 16."
23 Also, "the state better have an expert distinguish the age differences." The state's
24 expert testified "I have no medical basis to determine that." referring to
25 the ages of the people in the images. The state's expert admitted he was merely
26 speculating and could not testify to any degree of medical certainty.
27 Several jurors on four separate occasions conducted outside investigations

1. to help them determine the ages of the people in the 12 images due to the state's
2. Failure to provide any evidence. The FBI reviewed the 12 images and were unable
3. to identify anyone in the images as under the age of 18. If appellant was
4. correctly charged with one count, it is more likely than not that no
5. reasonable juror would have convicted appellant on the single count due
6. to insufficient evidence. Thus, appellant is actually innocent and the
7. remaining 6 counts of possession should be vacated.

8. C. Impediments: Impediments external to appellant prevented his compliance
9. with procedural rules and as such, dismissal of his Petition would unduly
10. prejudice him. The legal basis for claims 1, 2 and 3 were not reasonably available
11. to appellant until the Castaneda decision. Appellant only became aware of
12. Castaneda in May 2019 (See affidavit in Petition) and then brought forth
13. his Petition within a reasonable amount of time, approximately 6 months
14. later. As outlined in Koerschner v. Warden, appellant has inadequate
15. access to the courts and legal assistance at Lovelock Correctional Center
16. which is the reason for the delay in filing this Petition. These impediments are
17. external to appellant, are beyond his control and are why he was unaware
18. of Castaneda until 2019. Furthermore, the conflict of interest created by
19. his appellate counsel prevented appellant from raising the current ineffective
20. assistance of counsel claims in his first petition. Appellant's counsel
21. drafted and filed his first petition with baseless and naked allegations
22. in an effort to conceal his own ineffective assistance.

23. D. Discovery, Evidentiary Hearing and Appointment of Counsel:

24. Like Berry, appellant has made a colorable showing he is actually innocent
25. and requests the ordering of discovery and an evidentiary hearing so he may
26. pass through the Schlup gateway and have his procedurally defaulted claims
27. heard on their merits. Appellant requests counsel be appointed for the

1. reasons enunciated in Koerschner and so that a meaningful litigation of
2 the Petition can occur. The appointment of counsel is also needed due to
3 the District Court not taking appellant's pro se Petition seriously as
4 the Court's decision contains numerous material falsehoods belied by the
5 record. (See Motion for Sanctions Against the State) This would not
6 occur if appellant were represented by counsel.

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8 Statement of District Court Error

9 A. Castaneda Applies to Appellant: The Court's explication of Castaneda
10 is flawed. Castaneda did not announce a new rule of law and the Court
11 admits this on page 10, line 23. The Court erred in determining Castaneda
12 "altered" the unit of prosecution of NRS 200.730. Castaneda merely
13 interpreted and clarified the plain language of NRS 200.730 for the first
14 time. Castaneda furnishes the proper statement of law at the date appellant's
15 conviction became final. Therefore on collateral review under Colwell, if a
16 rule is not new it applies to appellant. The Court improperly discounted
17 Castaneda, which is sufficient in form and content to merit discovery and an
18 evidentiary hearing on appellant's gateway actual innocence claim.
19 The Court erred in determining "Petitioner does not claim or set forth
20 sufficient facts for a claim of actual innocence or of legal innocence."
21 Ground 1 of the Petition is a claim of actual innocence supported by
22 Castaneda and the record. The record substantiates that the State provided
23 no evidence that anyone in the 12 images was under the age of 16. The trial
24 judge required the State to provide an expert to testify to a reasonable
25 degree of medical certainty and distinguish the age differences. The
26 State failed to do this as their expert admitted he could not testify to
27 any degree of medical certainty and was merely speculating. The

1 facts and the record substantiate that the state failed to provide any
2 evidence of anyone in the images being under the age of 16 and
3 thus, appellant has provided sufficient facts for the claim of actual
4 innocence.

5 B. New Grounds for Relief: The District Court erred in determining the
6 petition to be "successive as it fails to allege new or different grounds for relief."
7 Grounds 1, 2, 3 and 7 were never previously raised and are, in fact, new and
8 different grounds for relief. The Court also erred in determining grounds 2,
9 3 and 7 to be waived or "inappropriate in a post-conviction proceeding"
10 as this is belied by Clem which requires the availability of habeas
11 relief in cases like appellant's due to the Castaneda decision.

12 "Constitutional due process requires the availability of habeas relief
13 when a state's highest court interprets for the first time and clarifies
14 the provisions of a state criminal statute to exclude a defendant's
15 acts from the state's reach at the time the defendant's conviction became
16 final." Clem v. Nevada

17 The court's statement that "said claims should have been brought
18 up in the first petition" substantiates appellant's claims of ineffective
19 assistance of counsel.

20 C. Misapprehension of Material Facts: The Court erred in determining
21 the facts of ground 4 to be substantially the same or that it is a more
22 detailed and precisely focused argument. Ground 4 is a completely
23 different argument providing facts not previously considered by this
24 court. On direct appeal the Nevada Supreme Court misapprehended
25 material facts of the jury misconduct claim due to ineffective assistance
26 of counsel and the state misrepresenting the facts. As such, these new
27 facts represent a new legal issue worthy of review on their merits.

1 Due to the misrepresentation of the facts, this Court failed to consider
2 material facts and points of law. Neither this Court, the State nor
3 appellant's counsel made any mention of or reference to the fact that
4 every juror testified to juror Thurmon successfully accessing numerous
5 pornographic websites, comparing models from those sites to the 12
6 images and sharing his findings with the entire jury. (pages 11-13 of
7 Memorandum of Law in Petition). In their ruling, the Nevada Supreme
8 Court only discussed a single failed attempt to locate one website
9 mentioned at trial and based their decision entirely on that narrative.
10 These facts meet all of the factors in Meyer, establish prejudicial jury
11 misconduct and represent a clear violation of the Confrontation
12 Clause as appellant did not have the opportunity to confront the
13 numerous pictures juror Thurmon viewed online to help him
14 determine a material issue at trial, the ages of the people in the
15 12 images. This is an error of constitutional dimensions that
16 worked to appellant's actual and substantial detriment in affecting
17 the State proceeding. These facts show prejudice and warrant the
18 granting of a new trial under the 6th Amendment. This Court
19 granted such relief in Beaman v. Nevada for similar jury misconduct.
20 D. Good Cause and Prejudice: The Court erred in determining good cause
21 does not exist and that appellant failed to overcome the rebuttable
22 presumption of prejudice. Castaneda, Koerschner and the affidavit in
23 the Petition provide good cause for the delay in filing this Petition
24 and are sufficient to overcome all procedural bars as appellant
25 was prejudiced by numerous constitutional violations. Like
26 Berry, appellant has made a colorable showing of actual innocence
27 sufficient to overcome all procedural bars, allow him to pass through

1. the Schlup gateway and have his procedurally defaulted claims
2. heard on their merits.

3. E. Specific Claims of Ineffective Assistance of Counsel: The Court
4. erred in determining appellant's ineffective assistance of counsel claims
5. were general, bare and naked. Appellant's Petition (citing Castaneda,
6. Colwell, Clem and Warner) along with statutory law and the
7. record goes into great detail supporting each claim. The Court's
8. mistaken determination that Castaneda does not apply is why the Court
9. believes appellant's claims of ineffective assistance of counsel are
10. invalid. Appellant has clearly shown that Castaneda does apply and
11. substantiated appellant's claim of ineffective assistance of counsel.

12. F. Ordering of Discovery: The Court demands specific names, details
13. of a search warrant the State never provided, descriptions of videos,
14. details of files taken from appellant by the Court, etc... yet refused
15. to order discovery. Failure by the Court to order discovery is the
16. reason appellant is unable to provide the specific information the
17. Court complained was missing. As such, the ordering of discovery and
18. an evidentiary hearing are needed to fulfill the Court's demands for
19. specific information appellant does not have access to.

20. G. Material Facts Belied by the Record: On page 19, lines 16-17 the
21. Court erred in stating appellant failed to provide dates of when his
22. request for the cellphone warrant was ignored. Page 22, lines 16-20
23. of the Petition specifically list May 11, 2006 as that date. A second
24. request for that warrant was made again on May 23, 2006 and was
25. again ignored, thus substantiating appellant's claim of prosecutorial
26. misconduct. The Court erred again when stating appellant failed to show
27. that defense counsel never received said warrant and how it would be

1. used. Page 17, lines 16-23 of the Petition states trial counsel never obtained that
2 warrant and how it would be used. These 2 and the 16 other examples of material
3 falsehoods provided by the State were ignored by the Court even though they substantiate
4 the prosecutorial misconduct claim. (See Motion for Sanctions Against the State)
5 H. Laches: The Court erred in alleging Laches applies. Appellant has
6 substantiated numerous constitutional violations of his due process
7 rights and right to a fair trial through the Castaneda decision, jury
8 misconduct and ineffective assistance of counsel. All of which
9 prejudiced appellant. Castaneda, Colwell, Clem and the Schlup gateway
10 all dispatch Laches. Clem requires habeas relief in cases such as
11 appellant's due to the Castaneda decision. Colwell establishes that
12 Castaneda applies. Castaneda and the Schlup gateway excuse all
13 procedural bars.
14 I. Cumulative Error: The Court erred in determining there were no
15 errors to cumulate. Castaneda and the record substantiate all
16 claims of cumulative error. Also, the issue of innocence or guilt
17 was close and appellant is facing a substantial prison sentence.
18 J. Appointment of Counsel: The Court erred in determining the appointment
19 of counsel to be unnecessary without considering or addressing
20 Kuerschner v. Warden. Appellant's claims are complex, discovery
21 is needed, Colwell and Clem establish Castaneda applies and, like
22 Berry, appellant has made a colorable showing that he is actually
23 innocent. These facts provide good cause and show prejudice, which
24 excuse all procedural bars. The Court's decision in Kuerschner establishes
25 appellant has inadequate access to the Courts and legal assistance. The
26 appointment of counsel is needed due to the Court not taking appellant's
27 pro se Petition seriously as its decision contains numerous

1. material falsehoods belied by the record which would not occur if
2 appellant were represented by counsel. (Please see appellant's
3 Motion for Sanctions Against the State)

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7 DATED this 13th day of April, 2020.

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Mark Zana
Signature of Appellant

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Mark Zana
Printed Name of Appellant

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed informal brief form upon all parties to the appeal as follows:

☐ By personally serving it upon him/her; or

☒ By mailing it by first-class mail with sufficient postage prepaid to the following address(es) (list names and address(es) of parties served):

Supreme Court of Nevada
201 S. Carson Street
Suite 201
Carson City, NV 89701-4702

Clark County District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, NV 89155-2212

DATED this 13th day of April, 2020

Mark Zana
Signature of Appellant

Mark Zana
Print Name of Appellant

1200 Prison Road
Address

Lovelock, NV 89419
City/State/Zip

N/A
Telephone

4-13-20

Supreme Court Clerk,

Please return a file stamped copy
of the enclosed Appellant's Informal Brief
in the enclosed self-addressed, stamped
envelope.

Thank you.

— Mark Zana

Mark Zana #1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

