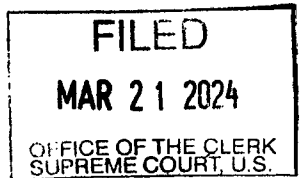


No. **23 - 7260**



IN THE
SUPREME COURT OF THE UNITED STATES

Mark Zana — PETITIONER
(Your Name)

VS.

State of Nevada — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Judicial District Court, Clark County, Nevada
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Zana #1013770
(Your Name)
Lovelock Correctional Center
1200 Prison Road
(Address)

Lovelock, NV 89419
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. Whether Petitioner's conviction and continued incarceration, under Nevada Revised Statute 200.730, are inconsistent with the due process clause of the Federal Constitution's Fourteenth Amendment?

2. Whether the due process clause of the Federal Constitution's Fourteenth Amendment requires the state court to apply its interpretation and clarification of a state criminal statute, retroactively, to Petitioner's case on collateral review?

3. Whether Petitioner's case presents an issue of retroactivity?

4. Whether the Nevada Supreme Court's interpretation and clarification of NRS 200.730, in Castaneda, was the correct statement of law at the time Petitioner's conviction became final?

5. Whether multiple convictions and sentences for a single violation of a state criminal statute constitutes double jeopardy violations and due process violations?

6. Whether Nevada can, consistently with the Federal Due Process Clause, convict Petitioner for conduct that its criminal statute, as properly interpreted, does not permit?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Eighth Judicial District court appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 10/5/23.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: 2/2/24, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Double Jeopardy: United States Constitution Amendment Five
Nevada Constitution Articles 1 and 8

Due Process: United States Constitution Amendment Fourteen

Nevada Revised Statute 200.730:

Possession of visual presentation depicting sexual conduct of person under 16 years of age. A person who knowingly and willingly has in his possession for any purpose any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate sexual conduct.

STATEMENT OF THE CASE

In 2016 the Nevada Supreme Court interpreted and clarified Nevada Revised Statute (hereinafter NRS) 200.730, for the first time, in Castaneda. That court determined the legislative intent of NRS 200.730 to be for a single charge to be brought when multiple images of child pornography are found at one time and place. Since that court did not make a new rule of law, retroactivity is not an issue. Castaneda v. Nevada, 373 P.3d 109 (2016)

"...Castaneda's simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730."

Colwell confirms that Castaneda applies to Petitioner on collateral review.

"When a decision merely interprets and clarifies an existing rule and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law."

"Retroactivity is an issue only when a rule is new. If a rule is not new, then it applies even on collateral review of final cases."

Colwell v. Nevada, 118 Nev. 807; 59 P.3d 463 (2002)

The state court erroneously denied Petitioner's Motion to Correct an Illegal Sentence stating Castaneda does not apply retroactively to Petitioner and that Petitioner is not on collateral review. The state court's decision is in direct conflict with this court's decisions in Fiore, Wall, and Najera. Wall and Najera substantiate that Petitioner is clearly on collateral review.

"Collateral review is review other than review of a judgment in the direct appeal process." Wall v. Kelly, 562 U.S. 545, 131 S. Ct. 1278, 179 L. Ed. 2d 252 (2011)

1 "The United States Supreme Court has defined 'collateral
2 review' as judicial review of a judgment in a proceeding
3 that is not part of direct review, including motions to
4 reduce sentence under state law." Najera v. Murphy, 462 Fed. Appx. 827 (2012)

5 In Fiore this court determined that if a state court merely interpreted
6 and clarified a state statute and did not make a new rule of law, it applies
7 retroactively.

8 "... 1993 decision was not new law, the state's highest court
9 has specified that its 1993 interpretation of the state statute
10 merely clarified the statute, and was the law of the state,
11 as properly interpreted, at the time that the accused's
12 conviction became final; however, in such circumstances,
13 the accused's conviction and continued incarceration on
14 the state charge violate the due process clause of the
15 Federal Constitution's Fourteenth Amendment."

16
17 "... Scarpone 'merely clarified' the statute and
18 was the law of Pennsylvania - as properly interpreted -
19 at the time of Fiore's conviction. Because Scarpone
20 was not new law, this case presents no issue of retroactivity."

21 Fiore v. White, 531 U.S. 225, 148 L. Ed. 2d 629, 121 S. Ct. 712 (2001)

22 The state court erroneously denied Petitioner's motion stating

23 Castaneda was decided more than seven years prior and that

24 timebars and procedural bars are mandatory. Passanisi clearly

25 disproves this claim by the state as does NRS 176.555.

26 NRS 176.555: The district court has inherent

27 authority to correct an illegal sentence at any time.

1 "A district court has inherent authority to correct an
2 illegal sentence at any time."

3 "Thus, the time limits and other restrictions with
4 respect to a petition for post-conviction relief
5 do not apply to a sentence based on a claim that
6 the sentence was illegal."

7 Passanisi v. Nevada, 108 Nev. 318, 321, 831 P.2d 1371, 1372 (1992)

8 The material facts of Fiore and Petitioner's case are identical.

9 Nevada's highest court merely clarified NRS 200.730 in Castaneda,
10 and was the law of the state, as properly interpreted, at the time
11 Petitioner's conviction became final. Because Castaneda was
12 not new law, Petitioner's case presents no issue of retroactivity.

13 Nevada can't, consistently with the Federal Due Process Clause
14 and Double Jeopardy Clause, convict Petitioner of and sentence
15 him to multiple counts for a single violation of NRS 200.730.

16 The material facts of Castaneda and Petitioner's case are
17 identical. Multiple images were found at one time and place, thus
18 constituting a single violation of NRS 200.730.

19 Castaneda was charged and convicted of 15 counts. He was
20 sentenced to one count with the remaining 14 counts run concurrently.
21 The Nevada Supreme Court vacated 14 of his 15 convictions on appeal.
22 That court determined there was sufficient evidence to sustain
23 the single conviction due to Castaneda's statement to police,
24 "sorry, those are kids", and verification from the F.B.I.
25 that they were under the age of sixteen.

26 Petitioner was charged with 12 counts and convicted of only 6 of
27 those 12 counts. Petitioner was sentenced to 2 of those 6 counts, consecutively,

1 in violation of his double jeopardy protections and due process rights.
2 In both cases, the state prosecuted the images as a group and failed
3 to show or prove individual distinct crimes of possession. The state did not
4 attempt to distinguish the offenses by showing that the crimes were
5 separated by time or location or by otherwise demonstrating that
6 Petitioner formed a new intent as to each image. Thus, Petitioner's
7 simultaneous possession at one time and place of the 12 images
8 constituted a single violation of NRS 200.730.

9 The state provided no evidence, whatsoever, to prove anyone in the
10 images was under the age of 16. No verification from the F.B.I. The
11 state's expert witness testified at trial that he was merely speculating
12 as to the ages of the individuals. No one in the 12 images was obviously
13 under the age of 16. The state failed to provide any evidence to sustain
14 a conviction under NRS 200.730.

15 Lack of evidence supporting a conviction of a criminal offense is
16 a violation of the Due Process Clause of the Federal Constitution's
17 Fifth and Fourteenth Amendments. As such, Petitioner's remaining
18 6 convictions under NRS 200.730 must be vacated as his conviction
19 fails to satisfy the Federal Constitution's demands.

20 The precedents set forth by this court in Fiore, Wall, and Najera
21 along with the precedents set by the Nevada Supreme Court in Castaneda,
22 Colwell, and Passanisi make clear that Petitioner's conviction and
23 continued incarceration on this charge violates his double jeopardy
24 protections and due process rights. This court has held that the Due
25 Process Clause of the Fourteenth Amendment forbids a state to
26 convict a person of a crime without proving the elements of that
27 crime beyond a reasonable doubt.

1 On 9/14/23 Petitioner Filed a Motion to Correct an Illegal
2 Sentence in the Eighth Judicial District Court (here to EJDC) of
3 Clark County, Nevada.

4 On 10/5/23 the EJDC denied the motion in full.

5 On 11/6/23 Petitioner Filed a motion for rehearing.

6 On 11/28/23 the EJDC denied rehearing.

7 On 12/12/23 Petitioner Filed a notice of appeal with the
8 Nevada Supreme Court.

9 On 12/27/23 the Nevada Supreme Court denied review.

10 On 1/25/24 Petitioner Filed a motion for rehearing.

11 On 2/2/24 the Nevada Supreme Court denied rehearing.

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1 REASONS FOR GRANTING THE PETITION

2 This petition should be granted due to the national importance of
3 maintaining and securing uniformity of the decisions made and precedents
4 set by this court and the lower courts.

5 The state court's denial of Petitioner's Motion to Correct an Illegal
6 sentence is erroneous due to that court ignoring clearly established
7 precedent set by this court. The state court incorrectly determined
8 Castro does not apply retroactively to Petitioner and that Petitioner
9 is not on collateral review.

10 This court's definition of collateral review in Wall v. Khol and Najera v.
11 Murphy substantiates that Petitioner is clearly on collateral review. Flore
12 and Colwell confirm retroactivity is not an issue since the Nevada Supreme
13 Court merely interpreted and clarified the state statute for the first time,
14 in Castro, and did not make a new rule of law.

15 These facts substantiate that Castro was the correct statement
16 of law at the time Petitioner's conviction became final.

17 Flore determined the Federal Due Process Clause requires the
18 state to apply the standards set forth in Castro to Petitioner
19 retroactively.

20 This petition should be granted due to Petitioner's conviction and
21 continued incarceration being inconsistent with the due process clause
22 of the Federal Constitution's Fourteenth Amendment and the double
23 jeopardy protections afforded by the United States Constitution.

24 Failure to grant this petition will encourage and embolden the
25 lower courts to disregard the decisions made and precedents set
26 by this court in the future. Thus eroding the authority of this
27 court and the United States Constitution.