

IN THE SUPREME COURT OF THE STATE OF NEVADA

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BRIAN KERRY O'KEEFE,)
Appellant,)
 -VS-)
THE STATE OF NEVADA,)
Respondent,)

Case No. 77797-COA

CASE OF FIRST IMPRESSION - ADVERSE COLLATERAL CONSEQUENCES
 Burglary Conviction used to impeach 2009, Parole Denied 2018
 Daily Consequences Crime Score / Risk Assessment Elevated

FILED

OCT 03 2019

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

PETITION FOR REHEARING WHERE BASED ON THE 6 COUNT
INFORMATION THE COURT OVERLOOKED THE RESULT OF
FACTUAL INNOCENCE CAUSED BY THE EFFECT OF SIMPLE
USE OF FORCE BY THE JURY VERDICT OF MISDEMEANOR
BATTERY ON COUNT 1 AFFECTING COUNT 6 (F) BURGLARY
TANTAMOUNT TO ACTUAL INNOCENCE WARRANTING REVIEW

COMES NOW, Brian O'Keefe, Appellant proper in solitary confinement, to humbly file this action under NRS 40 et seq. where the honorable court overlooked the misrepresentation and true effect of the simple use of force (intent) misdemeanor battery jury verdict returned. O'Keefe's petition primarily focused on the outcome of the trial, irrelevant to the occupancy claim, and the consequences of the misdemeanor verdict in relationship to sustaining the Count 6 (F) Burglary charge, ultimately resulting in a verdict of fundamental manifest injustice. The decision of both the district court, with this court's affirmance, demonstrates a decision contrary to the Nevada Supreme Court's decision, White v. State of Nevada, *infra* (2014). The relevancy of the way O'Keefe presented his primary claim of misdemeanor verdict only returned, with the occupancy status as a secondary claim and fact of in personam jurisdiction, was purposed on the fact the trial did occur with the improper charge made, made irrelevant by (M) verdict. Ultimately, the result of actual innocence found by actual innocence overcomes all procedural bars.

ISSUES OVERLOOKED: A.) EFFECT OF COUNT 1 (M) BATTERY CANNOT CONSTITUTE FELONIOUS CONDUCT BY LAW;
 B.) ACTUAL INNOCENCE AS FACTUAL INNOCENCE FOUND BY DISTRICT COURT WARRANTING FULL MERITS REVIEW;
 C.) OCCUPANCY CLAIM, RIGHT OF IN PERSONAM JURISDICTION AS FACTUAL ERROR WITHIN SCOPE OF CORAM NOBIS.
DOUGLAS HANES T. KERNER, 404 U.S. 519, 520 (1972) (pro se leniency); Nev. Const., art. I § 2 (Paramount allegiance to U.S. Law)

LCC LL FORM 28.014

19-41108

● ISSUES OVERLOOKED

A. COUNT 1 (M) VERDICT RETURNED - Protected Liberty Interest

• INVOKE UNITED STATES OF AMERICA v. GARCIA, 2019 U.S. DIST. LEXIS 1207 (Jan. 3, 2019, Filed) (embodied in Schlup)

[M]isdemeanor conduct... cannot constitute "felonious criminal conduct". The court's "ORDER OF AFFIRMANCE" (CBA No. 77797-FILED Sep 20 2019) thereby represents a miscarriage of justice that continues the lower district court's manifest injustice by failing to address this point-of-error being the sole purpose of redress, and staff attorneys continue to overlook the fact that the verdict was without any felonious use of force or intent, where the affirmance order however identifies on page 2, that no guilty verdict was returned on the first five counts, but then stops, and fails to address Count 6 was the felony Burglary charge underpinned by Count 1 (F) BATTERY WITH INTENT TO COMMIT A CRIME of the same INFORMATION, case 04C202793.

Where O'Keefe attached the "Joc" and INFORMATION, 0202793, listing all six counts, this became "prima facie evidence" and clear proof of actual innocence,¹ not opposed by the state.² Moreover, the lower court recognized this material fact that only a simple use of force verdict was returned thereby becoming a true dispositive fact for appellant's claim of error. The result ultimately became the legal fact of actual innocence by factual innocence.³

B. ACTUAL INNOCENCE AS FACTUAL INNOCENCE FOUND BY DIST. COURT: As the Supreme Court explained petitioners can overcome any procedural default, by demonstrating actual innocence of the crime underlying his conviction. see "Schlup", 513 U.S. at 313-15; McQuiggin v. Perkins, 133 S.Ct. 1924, 1928 (2013). A claim of actual innocence under "Schlup" is not itself a constitutional claim, but instead a gateway through which a petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

- FN1 O'Keefe Filed October 30, 2018 had attached the 6 count information with certified "Joc".
- FN2 STATE filed no opposition triggering NRCivP 8(d), EDCR 2.20, 3.20, assenting-silence doctrine.
- FN3 The lower district court recognized and noted actual innocence as factual innocence. This applies to any type of action filed. This becomes the gateway activated warranting review to have his alleged "naived" claim of miscarriage of justice heard on merits.

B. 1.) "WAIVER" OF CLAIM NOT APPLICABLE (ACTUAL INNOCENCE GATEWAY ACTIVATED BY COURT)

- WARRANTS REVIEW OF CONSTITUTIONAL CLAIM [defaulted] • see McCleskey v. Zant, 491 U.S. 467, 494 (1991)

Again, the law is clear that a fundamental miscarriage of justice resulting truly in a void judgment can be raised any time either directly or collaterally, as here! Remedial and equitable law, here as "habeas corpus" in a criminal case allow such, on a judgment that petitioner is no longer in custody on.

This court already acknowledges that pursuant to NRS 34.720 that provisions NRS 34.720 to 34.830 inclusive, only apply to petitions under NRS 34.724 where petitioner is under sentence. Therefore, specifically, the affirmance order issued here overlooks that provision NRS 34.810 includes waiver and is not applicable to O'Keefe's habeas corpus petition.

Moreover for a claim to be waived, it must be done voluntarily, with knowledge of the existing right and the intention to forgo it. O'Keefe did no such thing but trusted the new sentencing judge, Stewart Bell, who was bamboozled by the state in believing O'Keefe pled guilty to one count of felony burglary. Otherwise, Judge Bell would have committed an act and participated in an act of collusion, malfeasance and moral turpitude.

On 12/21/2004, Judge Bell sentenced me for the trial judge (Sally Lehnert) where as far as he knew, it was a simple matter of one count of felony burglary. The state then used this void judgment to impeach O'Keefe in 2009 and deny parole in 2010.

B. 2.) NEW DECISION OF "WHITE v. NEVADA" (2014)

Until this case truly, only then, did O'Keefe realize that since the wrongful charge was made and trial occurred, the disposition and verdict returned was all that legally mattered. Misdemeanor conduct cannot sustain burglary convictions on appeal. Becomes a fundamental miscarriage of justice.
FBI STATE ADMITS NOTICE was placed on Nevada Offender Tracking INFORMATION SYSTEM ("NOTIS") that O'Keefe pled guilty to a count of felony burglary only masking counts 1 & 5.

C. OCCUPANCY (SECONDARY) CLAIM, RIGHT OF IN PERSONAM JURISDICTION BECOMES ABSOLUTE FACTUAL ERROR GIVING RISE TO CORAM NOBIS WHERE THE S.C.N. HAS NOT DEFINED AND LIMITED EXPRESSLY THE EXTENT OF FACTUAL ERRORS WITHIN THE SCOPE OF CORAM NOBIS

Pursuant "Trujillo", the Nevada Supreme Court specifically delineated that at common-law most of the errors of fact involved in PERSONAM JURISDICTION, regarding the status of the party. Moreover, the court articulated they in no manner foreclosed all the possible factual errors that would give rise to totally support issuing a writ of coram nobis. But as indicated, the realm of errors is limited to facts not known by the court, were not withheld by the defendant, and would have prevented entry of the judgment.

Here, the court had no clue that we lived together and more importantly the court was under the impression, as a state court impediment, O'Keefe pled guilty not knowledgeable of all the true facts of the case, only filling in for Judge Lochner for sentencing.

The state has admitted this fact, of cohabitation, in many documents and it was specifically made a matter of the court record by O'Keefe's public defender as a matter of public record and the record of the trial. Additionally, the state triggered the assenting-silence doctrine by not opposing O'Keefe's petition in the first-instance where the district court **"NOTED"** this for the record. The lower court, before issuing his decision memorializing his decision in this action on 3/25/2019, should have granted a hearing, where O'Keefe could have provided cohabitation evidence in person. O'Keefe requested this, in fact, as a prayer relief in petition filed. One's personal right to his domicile becomes a fact of personal jurisdiction.

This case becomes a true matter and case of first impression warranting review.

CONCLUSION & PRAYER: GRANT RETEARING and request state to answer or, in the alternative, reverse affirmance issued and remand to the district court for a hearing on claims, despite knowing Nevada law requires felonious force, intent.

AFFIDAVIT OF Brian Kerry O'Keefe #90244

STATE OF NEVADA)

CJA Case No. 77797

COUNTY OF Clark)

SS:

PETITION FOR REHEARING / RECONSIDERATION

Currently

Case No. 78550 SCA

Judge Wiese granted writ to produce.

Hearing 9/27/2019.

I, Brian Kerry O'Keefe, the undersigned, do hereby swear that all the following statements are true and correct, to the best of my own knowledge and of my own volition.

ACTIVE COLLATERAL CONSEQUENCES
BY THIS CASE C202793

1. My name is Brian Kerry O'Keefe.

who was ordered produced for an evidentiary hearing from Lovelock on 8/24/2019. I've been in solitary confinement now 38 days. High Desert State Prison Solitary Confinement

2. I am over 18 years of age, I reside at Lovelock Correctional Center, 1200

P.O. BOX 650 INDIAN SPRINGS NV. 89070-0670
Prison Road, Lovelock, Nevada 89419.

I am fully competent to make this affidavit and I have personal knowledge of the facts stated herein.

3. O'Keefe suffers solitary confinement based on INFORMATION C202793 despite acquittals. No access to phone currently, and law library. Trying to get mail by brass slip out is like winning lottery. Completed this Petition for Rehearing on knowledge acquired. All 6 boxes of legal stuff still.

4. Cases C202793, Count 6 (F) Burglary conviction is a voidable judgment where improper use of void judgment opens the door and gives new cause subsequent all. State utilized this improper conviction, knowing it was bad, impeaching O'Keefe with C202793 Count 6 Burglary Conviction at trial. (08CZ50630) O'Keefe is currently incarcerated on CZ50630 where now additionally the case was used by Parole Commissioner to Deny my Parole on August 21, 2018. This changed my sentence from a 10-25 to a 13-25 with the three year dump. Pursuant to Sibron v. New York 392 U.S. 40, 55 (1968) improper collateral consequences are being invoked by state as manifest injustice.

5. Judge Stewart Bull was informed he was only sentencing me for a single Count of (F) Burglary not realizing it was actually Count 6 of INFORMATION (C202793). Trial heard by Judge Sally Cochran. State committed fraud upon the Court then placed on "NOTICE" I pled guilty to Burglary. I declare under penalty of perjury that the foregoing is true and correct, and

that this document is executed without benefit of a notary pursuant to NRS 208.165 and/or 28 U.S.C.A § 1746 as I am a prisoner to state custody.

Dated this Friday 27th day of September, 2019

6. New authority of WHITE v. Nev. (2014) confirms that feigning use of force or intent is required to sustain a, here Count 6 Burglary Charge. Where it was improper to charge O'Keefe with a count of Burglary based on him living in the residence being admitted in evidentiary prior hearings by state in the first instance, is made irrelevant based on the jury returning only a simple use of force (m) battery pursuant to NRS 200.161(1)(a) involving actual innocence!

Brian O'Keefe #90244

(see #6)
(Below)

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing
(check appropriate box)

☐ Opening Brief

☐ Reply Brief

☐ Motion: _____

☒ Petition: FOR REHEARING 40A

☐ Other: _____

to the below address(es) on this 28th day of September, 2019, by
SUNDAY
placing same in the hands of prison staff for posting in the U.S. Mail, per

Nev.R.App.P. 25: Paid by First Class (Stamp) Postage

Supreme Court / COA of Nevada

Office of the Clerk

201 S. Carson St.

Ste. 201

Carson City, Nevada 89701-4702

Attorney For _____

☐ and

_____, Nevada 89____

Brian L. O'Leary
High Desert 5-7- Brian L. O'Leary # 90244
Lovecluck Correctional Center
P.O. BOX 650 1200 Prison Road
Indian Springs NV. Lovecluck, Nevada 89419
89070-6670 Appellant In Pro Se