



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
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CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

January 8, 2021

Mark Zana, #1013790
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419-5110

Re: Zana vs. State, Supreme Court Case No. 80571

Dear Mr. Zana:

A decision has been reached in your case and the remittitur has issued. The time for filing a rehearing petition has expired. Therefore, we are returning the document, unfiled. A copy of the most recent docket sheet is enclosed for your convenience.

Sincerely,

Sandy Young

Sandy Young
Deputy Clerk

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CLERK OF SUPREME COURT
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No. 80571-

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

Mark Zana
Appellant

Pro se Petition For
Panel Rehearing

- vs. -

State of Nevada
Respondent

Petitioner respectfully requests this court reconsider his appeal due to the court overlooking material facts and points of law when it failed to consider or address Koerschner v. Warden (508 F. Supp. 2d 849; 2007 U.S. DIST. LEXIS 65237) which was cited in petitioner's appeal and petition.

This court ruled petitioner failed to demonstrate the prison lacked inmate law clerks or failed to provide adequate means of accessing legal research material. These statements are contradicted by the record.

Koerschner specifically addresses Lovelock Correctional Center's (here forward referred to as LCC) failure to provide adequate ~~access~~ access to the courts or to persons trained in the law. Koerschner states;

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Koerschner

1 "Simply providing a prisoner with books in his
2 cell gives the prisoner no meaningful chance to
3 explore the legal remedies that he might have. Legal
4 research often requires browsing through various
5 materials in search of inspiration. New theories may
6 occur as a result of a chance discovery of an
7 obscure or forgotten case. Certainly a prisoner,
8 unversed in the law and the methods of legal research,
9 will need more assistance than the trained lawyer
10 exploring his case. It is unrealistic to expect a
11 prisoner to know in advance exactly what materials
12 he needs to consult."

13 Due to petitioner's constitutionally inadequate access, it
14 is equally unrealistic to expect petitioner to have been aware of
15 Castaneda in 2016. As Koerschner confirms, petitioner has
16 inadequate access to the courts or to persons trained in the law. These
17 deficiencies are impediments external to petitioner and why he was
18 unaware of Castaneda in 2016. Once aware of Castaneda,
19 petitioner filed his petition within a reasonable amount of
20 time, one year. These facts are documented in the affidavit
21 included in the petition and appeal. Koerschner further determined;

22 "Interest of justice warranted appointment of counsel
23 under 18 U.S.C.S. § 3006A(A)(2) in inmate's habeas
24 action given serious, and potentially constitutionally
25 suspect, limitations placed on his access to courts
26 due to prison's 'paging system' that operated
27 together with limited assistance of other inmates, who

might only read at a ninth grade level."

This court views inmate law clerks at LCC as persons trained in the law, which they are not. The only qualifications to become an inmate law clerk are they read and write at a ninth grade level (which is neither tested nor verified) and have no disciplinary infractions in the preceding 12 months. They receive no training in the law. This is why Koerschner found LCC's paging system combined with limited assistance from untrained inmate law clerks to be constitutionally inadequate and thus appointed him counsel. This court failed to consider these facts or address Koerschner and thus overlooked material facts and points of law crucial to explaining why this petition is untimely.

Through Koerschner petitioner has established impediments external to him which prevented him from complying with the state's one year time frame for presenting his claims related to Castaneda. These impediments provide a factual and legal basis for why this claim was not reasonably available to petitioner in 2016. This is an external impediment that precedent says will overcome procedural bars, time bars, and laches assertions. Failure to grant petitioner's appeal based on these facts would constitute a fundamental miscarriage of justice.

Petitioner's counsel was ineffective at the jury misconduct hearing held after trial but before sentencing. (See hearing transcripts, which were quoted from extensively in the petition and appeal.) Petitioner is entitled to effective assistance of counsel at that point in his case due to it not being a post-

1 conviction proceeding. This court failed to consider these
2 facts even though petitioner cited ineffective assistance of
3 counsel before, during, and after trial in his petition and
4 appeal. At that evidentiary hearing, counsel failed to correctly
5 present and argue crucial material facts of petitioner's jury
6 misconduct claim exactly as was done on direct appeal.
7 At that hearing, had counsel correctly presented and argued
8 the facts of that claim, the outcome of that hearing would have
9 resulted in a new trial for petitioner. Furthermore, these are
10 new facts in support of the jury misconduct claim never previously
11 presented in any court and are not merely a re-argument of
12 the same facts. Counsel's deficient performance and ineffective
13 assistance resulted in petitioner's sixth amendment rights and
14 right to a fair trial being violated. These constitutional violations
15 constitute good cause and prejudice substantial enough to over-
16 come procedural bars, time bars, and the state's laches claim.
17 Failure to grant petitioner's appeal on these facts would
18 constitute a fundamental miscarriage of justice.

19 This court stated petitioner had not explained why his jury
20 misconduct claim could not have been raised in a timely post-
21 conviction habeas petition. First, petitioner explained how his
22 counsel worked against his interests by filing a bare and naked
23 first petition. Second, petitioner cited Keerschner which explains
24 that petitioner does not have adequate access to the courts or to
25 persons trained in the law which accounts for this second petition.
26 As Keerschner explains;

27 "Certainly a prisoner, unversed in the law

1 and methods of legal research, will need more
2 assistance than the trained lawyer exploring his
3 case. It is unrealistic to expect a prisoner to
4 know in advance exactly what materials he
5 needs to consult."

6 These impediments external to petitioner are why he
7 needed additional time to discover, research, prepare, and
8 present his jury misconduct claim at this time. Had petitioner
9 received effective assistance of counsel he would not be raising
10 this claim at this time. To dismiss this claim would unduly
11 punish petitioner for circumstances beyond his control, reward
12 his attorney for violating petitioner's sixth amendment rights,
13 and encourage further official lawlessness.

14 This court's determination that petitioner failed to make a
15 colorable showing of actual innocence is belied by the record.
16 The record confirms that, even in the light most favorable to the
17 state, the state never presented any facts or evidence that
18 anyone in the images was under the age of 16. Without this
19 evidence there's no violation of law. This isn't a claim of in-
20 sufficient evidence, the record confirms that no evidence
21 to support these charges was ever presented. As such, it is
22 more likely than not that no reasonable juror would convict
23 petitioner if he were correctly charged with one count of
24 possession of child pornography. Therefore, petitioner is
25 actually innocent of those counts and has been exposed to double
26 jeopardy according to Castaneda. These facts constitute
27 a fundamental miscarriage of justice.

1 There is no prejudice to the state in their ladies claim as
2 the images and remaining complaining witnesses remain available.
3 Unlike in petitioner's first trial, the state could track down the
4 models from the images to verify their ages. The state
5 consciously chose not to do this at petitioner's first trial. Also,
6 had the state correctly charged petitioner with one count
7 of possession and severed those charges from the other
8 unrelated charges as petitioner requested prior to trial,
9 we would not be arguing these facts today. To dismiss
10 petitioner's claims would reward the state for their
11 violations of petitioner's rights and encourage further
12 official lawlessness.

13 Koerschner is precedent which confirms petitioner should
14 be appointed counsel. Petitioner respectfully requests counsel
15 be appointed to him based on these facts.

16 In summary, petitioner has demonstrated he is actually
17 innocent, has suffered double jeopardy, received ineffective
18 assistance of counsel, and was exposed to jury misconduct
19 resulting in the violation of his right to a fair trial. Petitioner
20 has constitutionally inadequate access to the courts or persons
21 trained in the law which are impediments external to him and why
22 his petition and jury misconduct claim are untimely. Petitioner
23 has demonstrated good cause and prejudice to excuse all
24 procedural bars, timebars, and laches claim. Failure to
25 grant petitioner's appeal and petition would constitute
26 a fundamental miscarriage of justice.

27 Thank you for your consideration.

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this petition for panel rehearing upon all parties as follows:

- By mailing it by first-class mail with sufficient postage prepaid to the following address:

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

Dated this 29th day of December, 2020

Mark Zera
Mark Zera
1200 Prosser Road
Lovelock, NV 89419

Clerk of the Court,

Please return a file stamped copy of the
enclosed Petition for Panel Rehearing to the address
below.

Thank you!

Mark Zana

Mark Zana

Mark Zana #1063790

Lovelock Correctional Center

1200 Prison Road

Lovelock, NV 89419

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