IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LOREN J. LARSON JR., Appellant, v. SUPERIOR COURT, Appellee.	Court of Appeals No. A-13449 Trial Court No. 4FA-18-02677 CI MEMORANDUM OPINION No. 6899 — October 7, 2020

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael P. McConahy, Judge.

Appearances: Loren J. Larson Jr., *in propria persona*, Wasilla, for the Appellant. Anna Jay, Assistant Attorney General, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Mannheimer, Senior Judge,[*] and Clark, District Court Judge.[**]

Judge MANNHEIMER.

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[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

[**] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

In 1998, Loren J. Larson Jr. was convicted of a double homicide, and this Court affirmed his convictions on direct appeal. *See Larson v. State (Larson I)*, unpublished, 2000 WL 19199 (Alaska App. 2000). In 2001, Larson filed a petition for post-conviction relief in which he asserted that he was entitled to a new trial because of juror misconduct. Larson alleged that certain jurors discussed the merits of Larson's case before the jury began its formal deliberations, that certain jurors lied during jury selection, and that certain jurors were biased against Larson because he did not testify at his trial.

To support these claims, Larson relied on post-trial juror affidavits. The superior court dismissed Larson's application for post-conviction relief because the court concluded that, under Alaska Evidence Rule 606(b), these juror affidavits were not admissible, and thus Larson had failed to set forth a *prima facie* case for relief.

In *Larson v. State* (*Larson II*), 79 P.3d 650, 659 (Alaska App. 2003), this Court agreed that the juror affidavits were barred by Evidence Rule 606(b), and we therefore affirmed the superior court's dismissal of Larson's post-conviction relief action.

In the years since then, Larson has pursued numerous other collateral attacks on his convictions. All of these collateral attacks were either directly based on his claims of juror impropriety, or based on assertions that the superior court or this Court unlawfully hampered Larson's litigation of these juror impropriety claims. [1]

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[1] *See Larson v. State (III)*, 254 P.3d 1073 (Alaska 2011); *Larson v. State (IV)*, unpublished, 2013 WL 4012639 (Alaska App., June 2013); *Larson v. State (V)*, unpublished, 2013 WL 6169314 (Alaska App., November 2013); *Larson v. State (VI)* (an unpublished order issued by this Court in File No. A-10981 on January 14, 2014, in which we denied Larson's petition for rehearing of this Court's decision in *Larson V*); *Larson v. Schmidt (Larson VII)*, unpublished, 2013 WL 6576742 (Alaska App., December 2013); *Larson v.*

(continued...)

The present appeal involves Larson's latest attempt to re-open the litigation of his juror misconduct claims. But in order to explain how the present case arose, we must go back ten years — to 2010.

Larson's 2010 motion for relief from judgement under Civil Rule 60(b)

In June 2010, Larson filed a motion under Alaska Civil Rule 60(b), seeking relief from the judgement that the superior court entered against him in the 2001 post-conviction relief case (*i.e.*, the order denying Larson's petition for post-conviction relief).

In this 2010 motion for relief from judgement, Larson once more argued that he was entitled to post-conviction relief because the jury's verdicts in his underlying criminal case were flawed by juror misconduct. This time, Larson claimed that some of the jurors in his case committed misconduct (1) by falsely asserting that they would keep an open mind until they had heard all of the evidence, (2) by failing to set aside their preliminary opinions as to Larson's guilt or innocence, and (3) by drawing an adverse inference from the fact that Larson failed to take the stand at his murder trial. These claims either directly mirrored or were related to the claims that Larson raised in his 2001 application for post-conviction relief.

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[1] (...continued)
State (VIII), unpublished, 2016 WL 191987 (Alaska App. 2016); *Larson v. State (IX)* (an unpublished order issued by this Court in File No. A-12725 on November 21, 2016, in which we denied an original application for relief filed by Larson — litigation that is discussed in more detail later in this opinion); *Larson v. State (X)* (an unpublished order issued by this Court in File No. A-12725 on November 9, 2017, in which we denied Larson's petition for rehearing of our decision in *Larson IX*); *Larson v. Schmidt (Larson XI)*, unpublished, 2018 WL 3572449 (Alaska App., July 2018). and *Larson v. State (XII)*, unpublished, 2018 WL 6200315 (Alaska App., November 2018).

Larson asserted that he had not received a fair opportunity to litigate these claims in the 2001 post-conviction relief litigation, because the superior court had refused to consider the juror affidavits that Larson submitted in support of his claim for relief. Larson argued that, despite the provisions of Evidence Rule 606(b), these juror affidavits were admissible because they were offered to prove that certain jurors knowingly concealed their biases or prejudices during jury selection at Larson's trial.[2]

Based on this assertion of procedural error, Larson asked the superior court to renew its consideration of his underlying claims of juror misconduct: to examine the transcript of the jury selection at his criminal trial, and to compare the jurors' answers during jury selection with the contents of various post-trial juror affidavits. Larson asserted that the contents of the post-trial juror affidavits proved that two of the jurors gave "deceitful" answers to Larson's attorney during jury selection.[3]

(We described Larson's Rule 60(b) motion in *Larson v. State (Larson V)*, unpublished, 2013 WL 6169314 at *4 (Alaska App. 2013).)

When Larson filed this 2010 motion for relief from judgement, he labeled it with the file number of his 2001 post-conviction relief case (No. 4FA-01-00511 CI). However, the Fairbanks clerk's office re-designated Larson's motion as being filed in his underlying criminal case, File No. 4FA-96-03495 CR.

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[2] *See Poulin v. Zartman*, 542 P.2d 251, 264–65 (Alaska 1975) (on rehearing, 548 P.2d 1299 (Alaska 1976)). In *Poulin*, the Alaska Supreme Court noted that even though Evidence Rule 606(b) normally bars jurors from impeaching their verdict after the trial, the law makes an exception for "juror affidavits [that] show a bias or prejudice which was falsely denied during voir dire." *Id.* at 264. However, the supreme court clarified that this exception does not apply to biases or prejudices that jurors may develop toward the litigants during the trial, even though these biases or prejudices may affect the way that the jurors vote. *Ibid*. This type of bias or prejudice "inheres in the verdict", *id*. at 264–65, and thus it cannot serve as a basis for attacking the verdict. *Id.* at 265.

[3] *Larson V*, 2013 WL 6169314 at *4.

At the time, Larson did not object to this re-designation of his motion, and the litigation of Larson's Rule 60(b) motion went forward in the context of his underlying criminal case. Nevertheless, it was obvious, from the *content* of Larson's Rule 60(b) motion, that he was asking the superior court to let him re-open the collateral attack on his murder convictions that he had raised in his 2001 post-conviction relief case.

The superior court denied Larson's Rule 60(b) motion because the court concluded (on two different bases) that Larson was legally barred from re-opening his juror misconduct claims.

Although Larson had framed his motion as a request for relief from judgement under Civil Rule 60(b), the superior court viewed Larson's motion as the equivalent of another petition for post-conviction relief — because Larson was essentially asking the superior court to assess Larson's reformulated claims of juror misconduct and to grant him a new trial in his underlying criminal case. The superior court noted that this Court has held that a criminal defendant is not allowed to collaterally attack a criminal conviction by filing a motion for relief from the criminal judgement under Civil Rule 60(b). *See McLaughlin v. State*, 214 P.3d 386, 387 (Alaska App. 2009).

The superior court then ruled that, if Larson's motion was treated as another petition for post-conviction relief based on claims of juror misconduct, Alaska law barred Larson from pursuing this litigation. Under AS 12.72.020(a), defendants are barred from

pursuing successive petitions for post-conviction relief,[4] and they are also barred from seeking post-conviction relief based on claims that have already been litigated.[5]

For these reasons, the superior court denied Larson's 2010 motion for relief from judgement.

Larson's appeal of the superior court's denial of his 2010 motion for relief from judgement under Rule 60(b)

Larson appealed the superior court's denial of his Rule 60(b) motion. But in that appeal, Larson did not object to the fact that his motion was litigated in the context of his underlying criminal case rather than in the context of his 2001 post-conviction relief case. Indeed, in his appeal, Larson conceded that the superior court had been *correct* to deny his Rule 60(b) motion.

Larson's argument on appeal was that, even though the superior court correctly denied his motion for relief from judgement under Rule 60(b), the court committed error by failing to recognize that Larson had simply chosen the wrong procedural vehicle to raise his claims of juror misconduct. According to Larson, the superior court committed plain error by failing to *sua sponte* (1) convert Larson's Rule 60(b) motion into a petition for writ of habeas corpus under Civil Rule 86, and then (2) allow Larson to litigate his claims of juror misconduct in a habeas corpus format.

In other words, Larson implicitly acknowledged that his Rule 60(b) motion was essentially a renewed collateral attack on his underlying criminal convictions — and that the superior court was correct when it ruled that this renewed attack that could not be raised in a Rule 60(b) motion: *see McLaughlin v. State*, 214 P.3d 386, 387 (Alaska

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[4] AS 12.72.020(a)(6).

[5] AS 12.72.020(a)(5).

App. 2009). But Larson argued that, once the superior court realized what he was trying to do — *i.e.*, realized the nature of his claims and the nature of the relief he sought — the superior court should have *sua sponte* converted his Rule 60(b) motion into a petition for writ of habeas corpus under Civil Rule 86. *See Larson V*, 2013 WL 6169314 at *5.

We rejected Larson's arguments and affirmed the superior court's denial of Larson's 2010 motion for relief from judgement. *Larson V*, 2013 WL 6169314 at *6–9.

A few days after this Court issued our decision in *Larson V*, Larson filed a petition for rehearing. In his petition for rehearing, Larson argued that our decision in *Larson V* was based on a misunderstanding or mischaracterization of his basis for seeking appellate relief. Larson declared that his claim for relief was not directly based on his allegations of juror misconduct at his criminal trial. Rather, Larson asserted, he was seeking *procedural* relief (*i.e.*, the opportunity to renew the litigation of his juror misconduct claims) because the superior court committed procedural error by failing to give him advance warning that the court intended to dismiss his 2001 petition for post-conviction relief.

This Court denied Larson's petition for rehearing in an unpublished order issued on January 14, 2014 (*Larson VI*). (We have appended a copy of this order to this opinion.) In this January 2014 order, we explained that the superior court was not required to give advance notice of its intent to dismiss Larson's petition for post-conviction relief.

It is true, as Larson argued in his petition for rehearing, that when a defendant files a petition for post-conviction relief and the trial court concludes that the petition fails to set forth a *prima facie* case for relief, the court must give the defendant advance notice of this fact, and the court must give the defendant an opportunity to

supplement or amend their petition. *State v. Jones*, 759 P.2d 558, 565 (Alaska App. 1988), relying on the then-current version of Alaska Criminal Rule 35.1(f)(2).

But as we explained in *Tall v. State*, 25 P.3d 704 (Alaska App. 2001), this duty of advance notice applies only when the trial court concludes *on its own initiative* that the defendant's petition fails to set forth a *prima facie* case for relief. The duty of advance notice does not apply in cases where the court's action is prompted by a government motion to dismiss the petition for failing to state a *prima facie* case, so long as the government explains its reasons for believing that the defendant does not have a valid claim for relief, and so long as the defendant has an opportunity to respond to the government's arguments. *Tall*, 25 P.3d at 707–08.

In Larson's 2001 post-conviction relief case, the State filed a motion to dismiss Larson's petition, and this motion was explicitly based on the argument that Alaska Evidence Rule 606(b) barred the admission of the post-trial juror affidavits that Larson relied on to support his assertions of juror misconduct. Larson's attorney filed an opposition to the State's motion to dismiss, arguing that the juror affidavits *were* admissible.

After the superior court received these competing pleadings, the court held oral argument on the State's motion to dismiss. At that oral argument, Larson's attorney told the court that he was "fully prepared" to argue the admissibility of the juror affidavits — and he proceeded to do so at some length.

Following this oral argument, the superior court took the matter under advisement. Five months later (in December 2001), the court issued a written order dismissing Larson's petition for post-conviction relief on the ground that Evidence Rule 606(b) barred the admission of the juror affidavits that Larson was relying on.

Based on this procedural history, this Court concluded in *Larson VI* that Larson's case was governed by the holding in *Tall*. That is, we concluded that Larson's

post-conviction relief attorney was fully apprised of the State's reason for seeking dismissal of Larson's 2001 petition for post-conviction relief, and that Larson's attorney had a fair opportunity to respond to the State's argument (both in writing and at oral argument). Thus, the superior court was not required to give Larson's attorney any additional advance warning that, if the court concluded that the juror affidavits were not admissible under Evidence Rule 606(b), the court would dismiss Larson's petition for post-conviction relief.

The current litigation: Larson's 2018 civil complaint for a declaratory judgement

In December 2018 (more than five years after this Court affirmed the superior court's denial of Larson's Rule 60(b) motion in *Larson V* and *Larson VI*), Larson filed a civil complaint in which he asked the superior court to issue a declaratory judgement overturning its own ruling on the Rule 60(b) motion. Larson argued that the superior court should overturn its earlier decision because (according to Larson) the Fairbanks clerk's office acted illegally in its handling of his Rule 60(b) motion.

As we described earlier in this opinion, when Larson filed his 2010 motion for relief from judgement under Civil Rule 60(b), Larson labeled it with the file number of his 2001 post-conviction relief case. But the Fairbanks clerk's office re-designated Larson's motion as being filed in his underlying criminal case, and the motion was then litigated in that procedural context.

In his 2018 civil complaint, Larson contended that the clerk's office had no authority to re-designate his Rule 60(b) motion as having been filed in his underlying criminal case, rather than in his 2001 post-conviction relief case.

Larson further contended that he was prejudiced by the clerk's action because, according to Larson, the fact that his motion was litigated in the context of his underlying criminal case (as opposed to his 2001 post-conviction relief case) meant that the superior court's denial of the Rule 60(b) motion created different *res judicata* consequences for Larson in any future effort to raise his jury misconduct claims.

The superior court ultimately issued a summary order dismissing Larson's complaint for declaratory judgement, apparently under the rationale advanced by the State in its motion to dismiss the complaint: that the relief Larson was ultimately seeking — the opportunity to re-open the litigation of his jury misconduct claims — was foreclosed by the doctrine of *res judicata*, given Larson's numerous past efforts to litigate his jury misconduct claims.

Larson now appeals the superior court's dismissal of his 2018 civil complaint.

Why we affirm the superior court's dismissal of Larson's civil complaint

We agree with the superior court that, even assuming that the Fairbanks superior court clerk's office should have accepted Larson's motion for relief from judgement the way he labeled it (*i.e.*, as being filed in his 2001 post-conviction relief case rather than in his underlying criminal case), Larson is not entitled to relief from the superior court's denial of his 2010 motion for relief from judgement.

First, we have significant doubts as to whether it was proper for Larson to use a civil complaint as a procedural method for attacking the superior court's denial of his Rule 60(b) motion. Larson filed this civil complaint in late 2018 — seven years after the litigation of his 2010 motion for relief from judgement, and almost five years after

this Court affirmed the superior court's denial of that motion in *Larson V* and *Larson VI* (the rehearing of *Larson V*).

As we have already explained, Larson did not object at the time to the clerk's re-designation of his 2010 motion. Nor did Larson object to the clerk's action when he appealed the superior court's denial of his motion — the appeal that resulted in this Court's decisions in *Larson V*, 2013 WL 6169314, and *Larson VI* (unpublished order dated January 14, 2014 in File No. A-10981). But now, years after Larson exercised his right of direct appeal, Larson is attempting to use a civil complaint for declaratory judgement as a means of raising a new claim of error with respect to the litigation of his 2010 motion for relief from judgement.

We could find no Alaska appellate decision dealing with the question of whether a party can use a complaint for declaratory judgement as a means of pursuing a late-filed appeal, or as a means of supplementing the claims litigated in an earlier appeal. However, Alaska law contains several appellate decisions declaring that a party is not allowed to use trial court remedies, or to use alternative appellate procedures, as a means of pursuing a late-filed appeal, or as a means of re-opening an appeal that has already been litigated to conclusion.

See Cook v. Cook, 249 P.3d 1070, 1083 (Alaska 2011), and *Burrell v. Burrell*, 696 P.2d 157, 163 (Alaska 1984) (Civil Rule 60 is not a substitute for filing a timely appeal, nor does it allow re-litigation of issues that have been resolved by the judgment being attacked); *Lambert v. State*, 45 P.3d 1214, 1217–18 (Alaska App. 2002) (a defendant cannot use an original application for relief under Appellate Rule 404 as a substitute for an appeal); *Higgins v. Briggs*, 876 P.2d 539, 543 (Alaska App. 1994) (a defendant cannot use a petition for post-conviction relief as a substitute for an appeal).

But even assuming that Alaska law allows Larson to use a civil complaint for declaratory judgement as a procedural vehicle for raising a claim of error that he

could have raised when he litigated his direct appeal of the superior court's denial of his 2010 motion for relief from judgement, we agree with the superior court that Larson failed to set forth a prima facie case that he was prejudiced by the clerk's re-designation of his Rule 60(b) motion for relief from judgement.

Regardless of whether Larson's Rule 60(b) motion was litigated in the context of Larson's underlying criminal case or in the context of his 2001 post-conviction relief case, the substance of Larson's claim for relief was the same. Larson's claim was premised on the assertion that the superior court committed procedural errors during the litigation of Larson's 2001 petition for post-conviction relief — and that, because of these alleged procedural errors, he should be allowed to re-open his claims of juror misconduct at his criminal trial.

But as we have already noted, this Court rejected one of Larson's claims of procedural error in *Larson VI* (the unpublished order from January 2014 that is appended to this opinion). Specifically, we rejected Larson's contention that, during the litigation of Larson's 2001 petition for post-conviction relief, the superior court was required to give Larson's attorney advance notice of its intention to dismiss Larson's petition. Thus, further litigation of this claim is barred by the doctrine of *res judicata*.

Likewise, the doctrine of *res judicata* bars Larson from re-litigating his underlying claims of juror misconduct.

As we explained earlier in this opinion, in the years since this Court issued our decision in *Larson II*, 79 P.3d 650 (Alaska App. 2003) (affirming the superior court's denial of Larson's 2001 application for post-conviction relief), Larson has pursued numerous other collateral attacks on his convictions. All of these collateral attacks were either directly based on Larson's claims of juror impropriety, or based on assertions that the superior court or this Court unlawfully hampered Larson's litigation of these juror impropriety claims.

As a result of this litigation, the doctrine of *res judicata* now bars further litigation of all the claims of juror misconduct that Larson proposed to raise or re-open in his 2010 motion for relief from judgement, and in his 2018 complaint for declaratory judgement.

As the Alaska Supreme Court noted in *Larson v. State (III)*, 254 P.3d 1073, 1077 (Alaska 2011), "[t]o the extent Larson seeks a binding judicial determination against the State as an indirect attack on his original conviction or a denial of his subsequent post-conviction-relief petition [from 2001], ... the doctrine of res judicata applies." Likewise, as this Court noted in *Larson v. Schmidt (Larson XI)*, unpublished, 2018 WL 3572449 at *1 (Alaska App. 2018), "At this point, all of Larson's claims have either been expressly resolved against him or they are otherwise barred by the doctrine of *res judicata* (because they could have been raised before)."

Thus, when Larson filed his civil complaint in December 2018, asking the superior court to revisit its denial of Larson's 2010 motion for relief from judgement, Larson was in effect asking the superior court to revisit claims of error that had already been rejected on appeal, or claims of error which were so closely related to previously rejected claims that they, too, were *res judicata*. This was true no matter whether Larson litigated his Rule 60(b) motion in the context of his underlying criminal case or in the context of his 2001 post-conviction relief case.

Accordingly, the superior court could properly deny Larson's civil complaint.

Larson's assertion that he was entitled to the assistance of counsel when he litigated his Rule 60(b) motion for relief from judgement in 2010

In Larson's reply brief in this case, Larson asserts that he was entitled to the assistance of counsel at public expense when he litigated his Rule 60(b) motion for relief from judgement in 2010 — and that, because Larson never waived this purported right to counsel, and no counsel was appointed to assist him, the superior court's denial of that Rule 60(b) motion was a nullity.

Larson did not mention this claim in his opening brief — and, normally, that would be a sufficient reason for this Court to deny the claim summarily.[6] But if Larson is correct that he was entitled to the assistance of counsel, and if he neither waived nor received this assistance, then the superior court did not have jurisdiction to litigate the Rule 60(b) motion.[7] We could still refuse to hear Larson's claim in the present appeal, but he would likely renew it — thus leading to further litigation.

Rather than prolong the litigation of this issue, we have decided to address Larson's claim here.

In one of Larson's earlier cases — *Larson VIII*, unpublished, 2016 WL 191987 (Alaska App. 2016) — this Court addressed a separate post-conviction relief action that Larson filed in 2011. In that 2011 litigation, Larson asserted that the superior court committed error by dismissing Larson's 2001 petition for post-conviction relief on grounds that had not been raised in the State's motion to dismiss. Larson further asserted that the superior court's action departed so egregiously from the requirements of due

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[6] *See Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397, 402 n. 7 (Alaska 1995); *Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 411 (Alaska 1990); *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211, 213 n. 4 (Alaska 1982).

[7] *See Flanigan v. State*, 3 P.3d 372, 376 (Alaska App. 2000).

process that the superior court's judgement was "void". According to Larson, the fact that the superior court's judgement was void meant that the judgement was attackable under Civil Rule 60(b)(4) — and that Larson's attack on the judgement was exempt from the normal restrictions of *res judicata*.

This Court rejected Larson's argument that the superior court's judgement was attackable under Civil Rule 60(b)(4). We concluded that even if the superior court committed the procedural error that Larson complained of, this would not render the court's judgement void for purposes of Civil Rule 60(b)(4), since Larson had been informed that his application for post-conviction relief was subject to dismissal for failure to state a prima facie case, and since Larson had the opportunity to be heard on that question. *Larson VIII* at *1.

In *Larson VIII*, we also rejected Larson's argument that he was entitled to the assistance of counsel at public expense when he litigated his "void judgement" claim under Civil Rule 60(b)(4). We held that, even though Larson was relying on Civil Rule 60(b)(4) as his basis for seeking relief, Larson's 2011 litigation was (legally speaking) a successive application for post-conviction relief. Under AS 18.85.100(c)(1), a defendant does not have the right to counsel at public expense when pursuing a successive application for post-conviction relief. Thus, Larson was not entitled to counsel at public expense when he litigated his Rule 60(b)(4) claim. *Larson VIII* at *1.

But after we issued our decision in *Larson VIII*, Larson filed a petition for hearing in the Alaska Supreme Court, asking the supreme court to review our decision. And during the litigation of that petition for hearing, the resolution of Larson's right-to-counsel claim became less clear.

In conjunction with his petition for hearing to the supreme court, Larson asked the supreme court to appoint counsel to assist him in the litigation of his petition. A single member of the supreme court granted this request and appointed the Public

Defender Agency to represent Larson. The Agency objected to this appointment, arguing that the Agency had no statutory authority to represent Larson because he was pursuing a successive petition for post-conviction relief.

On reconsideration, an equally divided supreme court (by a vote of 2 to 2) affirmed the Public Defender Agency's appointment. The two members of the supreme court who voted to affirm the Agency's appointment seemingly were of the opinion that, because Larson relied on Civil Rule 60(b)(4) as the legal basis for seeking relief, his action could properly be characterized as a continuation of his first petition for post-conviction relief (the one he filed in 2001) — and that Larson was therefore entitled to be represented by counsel at public expense. *See Grinols v. State*, 74 P.3d 889, 895 (Alaska 2003) (holding that the Alaska Constitution guarantees a defendant the assistance of counsel to litigate a first petition for post-conviction relief).

Having received this ruling, Larson then asked the supreme court to vacate this Court's decision in *Larson VIII*, and to remand his case to the superior court so that he could re-litigate his motion for relief from judgement — this time, with the assistance of counsel. Larson argued that if he was entitled to the assistance of counsel to litigate his Civil Rule 60(b)(4) claim in the *supreme court*, then he must likewise have been entitled to the assistance of counsel when he litigated his Rule 60(b)(4) claim in the superior court.

But at this point, things took a different turn. The State of Alaska actively opposed Larson's request that his case be remanded to the superior court for re-litigation of his "void judgement" claim. The State offered a detailed account of the years of litigation in Larson's case, and the State urged the supreme court not to let "form ... triumph over substance" — in other words, not to let Larson pursue what was essentially a successive claim for post-conviction relief simply because Larson had chosen to label his pleading as an attack on a void judgement under Civil Rule 60(b)(4).

See Powell v. State, 460 P.3d 787, 792–93 (Alaska App. 2020); *McLaughlin v. State*, 214 P.3d 386, 387 (Alaska App. 2009).

In response, the supreme court issued a one-page order in which the court — without explanation — denied Larson's request for a remand to allow him to re-litigate his claim with the assistance of counsel. Larson then filed a motion for full-court reconsideration of this order. Four weeks later, the supreme court re-affirmed its decision not to remand Larson's case to the superior court — again, without explanation. And on September 30, 2016, the supreme court dismissed Larson's petition for hearing (*i.e.*, Larson's request for supreme court review of the decision issued by this Court in *Larson VIII*).

One week later (in early October 2016), Larson filed an original application for relief in this Court. This original application led to our decision in *Larson IX* (unpublished order dated November 21, 2016 in File No. A-12725).

In this original application for relief, Larson raised essentially the same "right to counsel" argument that he had made earlier to the supreme court when he asked the supreme court to remand his case to the superior court, with directions to allow Larson to re-litigate his Rule 60(b)(4) motion with the assistance of counsel.

More specifically, in *Larson IX*, Larson again argued that if he was entitled to the assistance of counsel when he litigated his earlier petition for hearing in the *supreme court*, then he must likewise have been entitled to counsel when he litigated his Rule 60(b)(4) claim in the superior court, and when he litigated his appeal of the superior court's ruling in this Court.

But this time, instead of seeking to vacate the *superior court's* ruling (which is the relief that Larson requested from the supreme court), Larson asked this Court to vacate our *own* decision in *Larson VIII*, 2016 WL 191987 — *i.e.*, our affirmance of the superior court's denial of Larson's 2011 motion for relief from

judgement. In other words, Larson asked this Court to re-open the appellate proceedings in *Larson VIII* and to allow Larson to re-litigate that appeal, this time with the assistance of counsel.

In an order dated November 21, 2016, this Court denied Larson's original application for relief. We did so because we concluded, based on the supreme court's handling of the right-to-counsel issue, that Larson did not have a right to counsel at public expense when he litigated his 2011 motion for relief from judgement under Civil Rule 60(b)(4).

As we noted in our November 21, 2016 order, the supreme court never explained why it denied Larson's request for a remand to the superior court to allow him to re-litigate his Civil Rule 60(b)(4) claim with the assistance of counsel. For this reason, this Court was "unable to ascertain the supreme court's exact reasons for denying the requested remand." But we declared that, whatever the reasons, it was clear that "the supreme court reconsidered and rejected its initial 2-to-2 conclusion that Mr. Larson's Civil Rule 60(b)(4) claim was, legally speaking, a continuation of his *first* petition for post-conviction relief — the one that was dismissed in 2001":

> If the supreme court had intended to stand by its apparent earlier decision that Mr. Larson was entitled to court-appointed counsel because he couched his claim for relief in terms of Civil Rule 60(b)(4), then the supreme court would have granted Larson's request to vacate the superior court's underlying decision, and it would have remanded his case to the superior court for re-litigation of his claim. Because the supreme court did not do this, we must infer that it no longer believed that Mr. Larson had a right to court-appointed counsel to litigate his claim.

Based on this interpretation of the supreme court's actions, this Court re-affirmed what we had said in *Larson VIII*, 2016 WL 191987 at *1 — that is, we again

held that Larson was not entitled to the assistance of counsel at public expense when he litigated his Rule 60(b)(4) motion for relief from judgement in 2011. And based on this conclusion, we denied Larson's original application for relief. *See Larson IX* (the unpublished order dated November 21, 2016 in File No. A-12725).

Thus, this Court has already twice held that Larson had no right to the assistance of counsel at public expense when he litigated his Rule 60(b)(4) motion in 2011 — because Larson's 2011 litigation was, in effect, a successive application for post-conviction relief, and because, under Alaska law, a defendant is not entitled to the assistance of counsel at public expense to pursue a successive application for post-conviction relief.

Based on our decisions in *Larson VIII* and *Larson IX*, and based on the supreme court's handling of Larson's petition for hearing in *Larson VIII*, we reject Larson's *current* "right to counsel" claim — *i.e.*, his claim that he was entitled to the assistance of counsel at public expense when he litigated his 2010 motion for relief from judgement under Civil Rule 60(b)(6). That litigation was likewise, in effect, a successive application for post-conviction relief.

Conclusion

The judgement of the superior court is AFFIRMED.

Appendix

This Court's order denying rehearing in *Larson v. State (V)*,
2013 WL 6169314 (Alaska App. 2013)

In the Court of Appeals of the State of Alaska

Loren J. Larson, Jr.,	)	
	)	Court of Appeals No. **A-10981**
Appellant,	)	
v.	)	**Order**
	)	Petition for Rehearing
State of Alaska,	)	
	)	
Appellee.	)	Date of Order: **January 14, 2014**
	)	

Trial Court Case # 4FA-96-03495 CR

[Before: Mannheimer, Chief Judge, Bolger, Supreme Court Justice [*], and Coats, Senior Judge [**].]

The Appellant, Loren J. Larson Jr., petitions us to reconsider our decision in this case: *Larson v. State*, Alaska App. Memorandum Opinion No. 5986 (November 20, 2013), 2013 WL 6169314.

The basic question presented in this appeal is whether the superior court committed error by dismissing Larson's motion for relief from judgement brought under

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[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 24(d).

[**] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Alaska Civil Rule 60(b). Larson's underlying claim was that the jury's decision in his criminal case was flawed by juror misconduct.

In his briefs to this Court, Larson conceded that he was wrong to have sought relief under Civil Rule 60(b) — but he argued that the superior court should have discerned his procedural error and, acting *sua sponte*, should have treated Larson's pleading as a petition for writ of habeas corpus.[1]

In our decision, we noted that Larson had "essentially concede[d] … that it was improper for [him] to raise his claim of jury misconduct in a motion for relief from judgement under Civil Rule 60(b)."

We then acknowledged Larson's argument "that it should have been clear to the superior court, from the contents of Larson's motion for relief from judgement, that even though Larson had chosen the wrong procedural vehicle for his claim of jury misconduct, Larson would obviously be entitled to relief — in the form of a writ of

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[1] Here is how Larson described his claim on page 1 of his opening brief:

> All of the legal knowledge [that] appellant had at the time he filed his motion ... indicated that Civil Rule 60(b)(6) was the proper procedure for him to use.
>
> Appellant's legal knowledge has been expanded over the last two years[,] and he has filed his Civil Rule 60(b)(6) claim as a Civil Rule 86 [petition for writ of] Habeas Corpus.
>
> The superior court should have been able to [discern] from the pleadings in appellant's motion [for relief from judgement] that appellant was entitled to relief under Civil Rule 86 Habeas Corpus[.]

And here is how Larson described this same aspect of his case on page 1 of his reply brief:

> Appellant is a [*pro se*] litigant [who acknowledges] in his opening brief that he has filed an Alaska Civil Rule 86 [petition for writ of] Habeas Corpus in the superior court to more properly bring his claim that he is held under a void judgment [because of juror misconduct].

habeas corpus under Alaska Civil Rule 86 — if his claim was proved." But we concluded that the superior court did not commit plain error by failing to re-designate Larson's pleading as a petition for writ of habeas corpus — because there were three plausible reasons why Larson would not be entitled to habeas corpus relief.

In his petition for rehearing, Larson takes a new and different approach to this litigation. He now declares that his trial court pleading *was* a proper motion for relief from judgement — but not relief from the judgement in his criminal case. Instead, Larson argues that he was actually seeking relief from the judgement in his later post-conviction relief case.

According to Larson's petition for rehearing, his basis for seeking relief was not the alleged juror misconduct at his criminal trial. Rather, Larson asserts, he was seeking relief from the superior court's dismissal of his petition for post-conviction relief — on the ground that the superior court failed to give him advance warning that the court intended to dismiss his petition.

Larson points out that when he initially filed his motion for relief from judgement, he labeled it with the file number from his post-conviction relief action (4FA-01-511 CI), not the file number from his underlying criminal case (4FA-96-3495 CR) — and then, apparently, someone from the clerk's office re-labeled Larson's pleading by writing the criminal case number. Larson asserts that he purposely used the file number of his post-conviction relief case because he was seeking relief from the judgement in that case, and not his underlying criminal case.

But after the superior court began using the criminal case number instead of the post-conviction relief case number, there is nothing in the record to indicate that Larson ever objected or pointed out the discrepancy. Instead, the record shows that Larson himself labeled his subsequent pleadings with the criminal case number.

More importantly, and leaving aside the issue of which file number should have been used to label the pleadings, there is no merit to Larson's underlying claim for relief — his assertion that the superior court violated his rights by not giving him advance warning that the court intended to dismiss his petition for post-conviction relief.

It is true, as Larson notes, that when a defendant files a petition for post-conviction relief and the trial court concludes that the petition fails to set forth a *prima facie* case for relief, the court must give the defendant advance notice of this fact, and the court must give the defendant an opportunity to supplement or amend the petition. *Jones v. State*, 759 P.2d 558, 565 (Alaska App. 1988), relying on the then-current version of Alaska Criminal Rule 35.1(f)(2).

But in *Tall v. State*, 25 P.3d 704 (Alaska App. 2001), this Court held that a court's duty to give advance notice of its intention to dismiss a petition for post-conviction relief only applies when the court concludes *on its own initiative* that the defendant's petition fails to set forth a *prima facie* case for relief. This duty does not apply in cases where the court's action is prompted by a government motion to dismiss the petition, where the government explains its reasons for believing that the defendant does not have a valid claim for relief, and where the defendant has an opportunity to respond to the government's arguments. *Id.*, 25 P.3d at 707-08.

As this Court explained in *Tall*,

> Former [Alaska] Criminal Rule 35.1 derives from the Uniform Post-Conviction Procedure Act of 1966. Subparagraphs (f)(2) and (f)(3) of the former rule track almost verbatim the language of the Uniform Act, § 6(b) and (c). In Idaho, where the 1966 Uniform Act was also adopted, the Idaho Supreme Court, in *State v. Christensen*, [632 P.2d 676 (Idaho 1981),] interpreted the notice requirement to "govern[] only those situations where the trial court on its own initiative determines to dismiss the [application]." In

> reaching this conclusion, the court reasoned that, when dismissal is based on a motion by the State, "the motion itself serves as notice that summary dismissal is being sought."
>
> We find *Christensen* persuasive and decline to read [Alaska] Criminal Rule 35.1(f)(3) to require advance notice by the court of its intent to dismiss a post-conviction relief application when the court grants a dismissal in response to a motion by the State and for the reasons advanced in that motion.

Tall, 25 P.3d at 707 (some footnotes omitted).

Larson's case is governed by our holding in *Tall*. The State filed a motion to dismiss Larson's petition for post-conviction relief, and this motion was explicitly based on the argument that Evidence Rule 606(b) barred the admission of the post-trial juror affidavits that Larson wished to present in support of his assertions of jury misconduct. Larson filed an opposition to the State's motion, arguing that the juror affidavits *were* admissible. On July 12, 2001, after receiving these competing pleadings, the superior court held oral argument on the State's motion. At that oral argument, Larson's attorney (James McComas) told the court that, even though discovery was not yet complete, he was "fully prepared" to argue the admissibility of the juror affidavits — and he proceeded to do so at some length.

Following this oral argument, the superior court took the matter under advisement. Five months later (on December 10, 2001), the court issued a written order dismissing Larson's petition for post-conviction relief on the ground that Evidence Rule 606(b) barred the admission of the juror affidavits that Larson was relying on.

Thus, as was true in *Tall*, Larson and his post-conviction relief attorney were apprised of the State's reason for seeking dismissal of Larson's petition for post-conviction relief, and Larson and his attorney had the opportunity to respond to the

State's argument, both in writing and at oral argument. Under these circumstances, the superior court was not required to give Larson advance warning that, upon consideration, it concluded that the State's argument was correct, and that Larson's petition for post-conviction relief should be dismissed on this basis.

For these reasons, Larson's petition for rehearing of our decision in *Larson v. State*, Alaska App. Memorandum Opinion No. 5986, is DENIED.

Entered at the direction of the Court.

Clerk of the Appellate Courts

Marilyn May

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