No. 19-918

In the

Supreme Court of the United States

Anthony J. Lucero,

Petitioner,

vs.

James R. Koncilja; Koncilja & Koncilja, P.C.,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to Rule 14 of

Supreme Court of the United States

Rules effective July 1, 2019

Preface: Petitioner reiterated his multiple complaints against Respondents throughout each of these court cases, as referenced below.

1. As former attorneys for Petitioner Lucero, did Respondents Konciljas violate Petitioner's U.S. 14th Amendment *due process* rights by not investigating Plain Petitioner's severe, near-death work-related multiple injuries *before* filing a complaint in district court - which complaint included all parties except for the two parties that were the ones culpable for Petitioner's multiple injuries?

2. Did Respondents further violate Petitioner's U.S. 14th Amendment rights to *due process* by failing to proceed with any normal legal action at all such that the Pueblo District Court ruled *against* (Petitioner) Lucero with a *Notice of Dismissal for Failure to Prosecute* - which laxness by Respondent attorney Koncilja closed the legal doors on Petitioner's efforts to seek redress for his multiple life-threatening work injuries?

3. Was Petitioner prejudiced *and* his *due process* rights repeatedly violated by Colorado state courts and U.S. Federal courts when those courts did not legally ***notice*** that Petitioner had filed a timely - completed in all ways - *Motion for Default Judgment* against Respondents, when Respondents were forty-three **(43) days <u>late</u>** in filing an initial responsive pleading to Petitioner's *Amended Complaint?*

4. Does *claim preclusion* and/or *res judicata* apply to this case at bar, which has ***never been at issue*** before or after

Petitioner Lucero had hired, then removed Denver attorney Paul Gordon from the case against Konciljas - since Lucero himself, proceeding *pro se*, has filed different, expanded complaints against Defendants?

5. Why do higher courts not concur that Pueblo District Court Judge Crockenberg was extremely biased when he ruled 26 (twenty-six) times against Petitioner Lucero and in favor of Respondents Konciljas when, e.g., Respondents were 43 days late in answering Lucero's Complaint against Konciljas and Petitioner therefore had filed a complete *Motion for Default Judgment*, but Judge Crockenberg ruled that Respondents' 43 days lateness in answering was not late (with absolutely *no excusable neglect* proffered by Konciljas), also e.g., when Judge Crockenberg denied Petitioner extra time with three rulings (twice before expiration of 60 day limit!) to file a *Certificate of Review* against Respondents Konciljas?

6. Was it not clear that there was additional judicial bias by Federal Magistrate Judge Tafoya against Petitioner when, e.g., the judge failed *repeatedly* to rule for Petitioner, e.g., a.) pursuant to Civ. Procedure 4(d)(2) *Motion to Recover Service Expenses* against Respondents, never understood that it's clearly the absolute responsibility of the Federal court to order Defendants to pay Petitioner service expenses, b.) ruled for Defendants' overtly frivolous *red herring* motion to stay a ruling on Petitioner's above motion for recovery until Defendants' Fed. R. Civ. P. 12(b)(1) motion was decided, c.) actually illegally aided Respondents Konciljas by changing, *sua sponte,* their 12(b)(1) motion to a more appropriate 12(b)(6) motion, and most significantly d.) failed to recognize, receive and rule on Petitioner's

dispositive *Plaintiff's Motion for Judgment on the Pleadings, Pursuant* to Fed. R. Civ. P. 12(c)?

7. Although there is no mention at all of the term *State Actor* or its synonyms in any of Petitioner's state or federal law books, e.g., not in Hess' *Colorado Handbook on Civil Litigation*, nor *Federal Court of Appeals Manual, Sixth Edition*, nor *Black's Law Dictionary, Abridged 10th Ed.*, **can** Petitioner be held legally responsible for not discussing and amending his briefs on that *State Actor* topic in his motions until after U.S. Assistant attorney Pestal [in Lucero v. U.S. (V.A.)] referenced the *State Actor* term in court and Federal Magistrate Judge allowed Petitioner at that time to amend his motions – since from the beginning Petitioner Lucero had described the state favoritism and complicity with Defendants as state actions?

8. Pursuant to the *Federal Rules of Civil Procedure*, Rule 15 *Amended and Supplemental Pleadings*, and with permission of Magistrate Judge, could not Petitioner rightly amend his pleadings to include the blatant judicial bias of Colorado Judge Crockenberg and Magistrate Judge Tafoya toward Petitioner?

9. Were not all of Plaintiff's rulings based on procedural matters and never decided on the merits, since his **injuries in fact from 2006** have never been tried?

LIST OF PARTIES

Rule 14 (1)(b)(i)

The case caption contains the list of all parties in this case at hand.

CORPORATE DISCLOSURE

Rule 14(1)(b)(ii): No Corporate disclosure is necessary.

Rule 14(1)(b)(iii): List of all Proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court.

Anthony Lucero v. Kone, Inc., Strobel Construction Unlimited, Inc., Sedlak Electric Company, Heating and Plumbing Engineers, Inc. and John Doe Construction 1 – 5, 2008CV1751, Pueblo County District Court. No judgment entered as change of venue to El Paso County Dist. Ct. (Attorney James R.Koncilja representing Anthony Lucero.)

Lucero v. Kone, Inc., Strobel Construction, Sedlak Electric, Heating and Plumbing, and TRG Construction, John Doe Construction 1 – 5, Defendants. 2010CV4, El Paso County District Court. Judgment entered June 14, 2010. (Attorney James R.Koncilja representing Anthony Lucero.)

Anthony Lucero v. James Koncilja; and Koncilja and Koncilja, P.C., 2011CV839, Judgment entered 6 August 2012. (Attorney Paul Gordon representing Anthony Lucero.)

Anthony Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C., 12CA1914, Judgment entered 11 July 2013. (Attorney Paul Gordon representing Anthony Lucero.)

Anthony Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C., 2013SC675; Judgment entered 28April 2014. **[Case never reached point of being "at issue".]** (Anthony Lucero, *pro se*).

Anthony Lucero v. James Koncilja; and Koncilja and Koncilja, 2013CV254; Pueblo County District Court Judgment entered 2 May 2014. Lucero filed C.R.C.P. 60(a)(b)(1)(2)(3)(5). Judgment entered 5 November 2014. (Anthony Lucero, *pro se*).

Anthony Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C., 2014CA2489. Judgment entered 25 February 2016. Petition for Rehearing. Judgment entered 29 April 2016.

Anthony Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C., 2016SC336; Judgment entered 22August2016; *Petition for Rehearing*. Judgment entered, 26Sepember2016, *Renewed Petition for Rehearing*, Judgment entered 13October2016.

Anthony J. Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C., D.C. No. 1:17-CV-01374. Judgment entered September 6, 2018.

Anthony J. Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C., U.S. Ct. of Appeals for the Tenth Circuit. Judgment entered August 6, 2019.

Anthony J. Lucero v. James R. Koncilja; and Koncilja and Koncilja, P.C. Filed Petition for Writ of Certiorari with Supreme Court of the United States: postmarked on November 4, 2019, received by Clerk of Court on November 8, 2019. Was given 60 days from Clerk's letter, dated November 13, 2019, to revise *Petition for Writ of Certiorari* and refile. Lucero's petition is postmarked and mailed on Monday, January 13, 2020.

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CITED AUTHORITIES &

CONSTITUIONAL PROVISION

United States Constitution

14th Amendment, Due process of law clause.

JURISDICTION

The U.S. Court of Appeals entered its final decision on August 6, 2019. This petition has been filed within 90 days; the Clerk of the U.S. Supreme Court added 60 days to that date.

STATEMENT OF THE CASE

This is a long-standing legal malpractice case where State Actor Respondent Konciljas, as well as the numerous courts that heard my case, all denied my 14th Amendment to the Constitution.

This case initially arose from Petitioner's near-death work-related accident that occurred on November 18, 2006, at the Wyndham Hotel & Resort in Colorado Springs. Working as a hotel maintenance engineer, Petitioner Lucero, fell about 18 feet into an unguarded, unmarked elevator shaft, landing at about 34 m.p.h. onto the steel apparatus on top of that elevator one floor below because of hotel safety laxness and contractor negligence in creating that dangerous situation. There is investigative videos and medical evidence from the hospital, doctors, insurance-hired investigators and nurses that prove the large extent of his injuries, including internal organs, knees, wrists, head, ears, etc.

Petitioner Lucero hired Respondent James Koncilja and his firm to file a Workers' Compensation claim and bring a civil lawsuit against Wyndham Hotel. However, Respondent failed to do or have done any physical investigation of the accident scene, nor discover that Wyndham had been doing major remodeling work with multiple contractors without obtaining any permits. Nor did Respondent do any interrogatories, depositions of the workers or the companies responsible for Petitioner's injuries. He sued the wrong companies and failed to respond to those who were wrongfully sued. Consequently, Lucero's case was dismissed because of Respondents' failure to prosecute. At the same time, Respondent had been acting as my attorney in my Worker's Compensation case.

After retrieving all my legal files from Respondent, Petitioner hired attorney Paul Gordon to bring a civil action

against Respondent Koncilja. Gordon started a civil action just on the basis of the documents that Lucero dropped off at his office a few days earlier. Like Respondent Koncilja, Gordon did not interview (or even meet) Lucero about the circumstances of the accident; he also failed to do any investigative work, no interrogatories, no depositions, and failed to file or mention to Lucero that a *certificate of review* is required in a legal malpractice case. Because of Gordon's legal malpractice, Lucero's case was also ultimately dismissed.

After obtaining all my legal files from Gordon, I discovered in those files on August 13, 2012, that in my Workers' Compensation case Respondent Koncilja had created and filed fraudulent medical documents had seriously harmed me financially, physically, and emotionally.

The evidence of Respondents having created and had filed fraudulent medical documents that hurt me very much over a period of years – was the impetus for my filing, *pro se*, a new civil action against Respondent Koncilja. In attorney Gordon's action against Respondents, none of the claims were ever adjudicated; in fact, **the case had never been "at issue."** So, I filed a lawsuit against attorney Gordon and another lawsuit against Respondents Konciljas with some of the non-adjudicated issues plus many more that had never been tried. In fact, the Summons and Complaint that was (finally and officially) served on Respondent Koncilja by a deputy Sheriff on December 10, 2014, was not and is not now vulnerable to Claim Preclusion. If any of the court or Court Judges actually looked at the old and new complaints, they would see that **complaint issues #12 through #18 are entirely new**, while others were changed or deleted entirely – but never adjudicated, nor was it possible to previously adjudicate those. Why? Because the previous case was dismissed on

procedural grounds, not substantive reasons, as well as the facts that the case(s) were never **at issue.**

This Court may have no idea how difficult it is for someone to find a highly qualified attorney to study all the evidence and court filings so as to be able to stand out and write a *certificate of review* for not just a *pro se* litigant, but even a greater challenge if the last name is "Koncilja." However, if you've read any of my motions, you know that I was able to obtain a *certificate of review* from a very successful attorney who had over 30 years of civil case experience. I did file that *certificate* in my case against attorney Paul Gordon, and it passed an *in camera review* with District Court Judge David Crockenberg. About the same time I filed my malpractice case against Gordon, I also filed my case against Respondent Konciljas.

I had to file when I did because of time bars, and I didn't find the above referenced expert attorney who could or would issue a certificate until January 2015, and didn't file it with Judge Crockenberg until February 7, 2015. Upon Gordon's attorney's motion, Judge Crockenberg did an *in camera review* of the attorney and the *certificate* shortly thereafter.

That's why I ***twice*** motioned Judge Crockenberg for additional time for filing a *certificate of review* in Respondent Koncilja's case. My motions were both done **before the 60-day time limit.** If you count the number of times I used the phrase ***abuse of discretion*** in reference to Judge Crockenberg' s actions in my C.R.C.P. 60(b) motion or inactions, you would find that it occurred about **19 – 26 times.**

Crockenberg denied all three of my motions for extension of time to file a *certificate of review.* Why, since everyone knows that extensions of time are so readily available? Stephen Hess, author of the *Colorado Handbook on Civil Litigation* wrote that extensions of time are so

readily granted that some attorneys ask on the last day – and it's granted. **I waited months and the court never granted it to me.** I found a respected attorney with 30 years' experience to write a certificate of review against Paul Gordon and then Respondent, but ***the attorney needed extra time to research and write another for Respondents Konciljas***! He's a successful attorney who needed time to finish a trial, read my documents about Respondents Koncilja, and then draw his conclusions about Respondent's legal malpractice to write a *certificate of review*. Respondent Koncilja asked for a 25-day extension of time to file an answer my thoroughly written *Motion for Default Judgment* and **four days later** Judge Crockenberg granted it. Did Respondent respond to my motion for default judgment? **No!** Respondents argued for claim preclusion and no certificate of review with no authority proffered, and wrote that my motion for default judgment was "harsh"? Dare I say it? Crockenberg was biased and **repeatedly abused his judicial discretion** to sabotage every step of my case against Respondent Koncilja. Crockenberg knew I would be successful in my litigation against Koncilja if I were allowed even two weeks' additional time.

Respondents Konciljas were obviously "**State Actors**" because of the intimacy with which the judges ruled in favor of whatever Respondents wished. Did I actually see them shake hands on "sweetheart deals"? No, but by the logic of **inductive** and even **deductive reasoning**, Respondents were indeed *state actors*.

Retiring Judge Reyes' decision of November 5, 2014, was similarly an abuse of that court's discretion.

V. ARGUMENT

Did the district court *abuse its discretion* deliberately and persistently such that Petitioner Lucero was clearly deprived of his 14th Amendment due process rights, as described in the Colorado and United States Constitution, and related case law?

Appellate review of the denial of a C.R.C.P. 60(b) motion is limited to whether the trial court abused its discretion. *Front Range Partners v. Hyland Hills Metropolitan Park & Recreation Dist.*, 706 P.2d 1279 (Colo. 1985). A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. *See Colorado National Bank v. Friedman*, 846 P.2d 159 (Colo. 1993).

If this Court were to review Petitioner's C.R.C.P. 60(b) motion within the *record on appeal*, you would see that Petitioner refers to ***abuse of discretion*** by the court on nineteen occasions. The **record on appeal** page numbers are in brackets: starting with **Page numbers:** 4 (3X) [404], 5 – 7 [405 – 407], 9 at [409], 11 [411], 15-16 [415 – 416], and page 19 [419]. For example, on page [405] of the *Motion for Relief from Order Granting Defendant's Motion to Dismiss,* the phrase, "abuse of discretion" is within that in the last paragraph, and on [409] in the section entitled Court Bias and Abuse of Discretion. The Judges Crockenberg and Judge Reyes judgments are *void* because they violated the due process of law and abused their discretion. This should have been recognized by State and Federal Courts.

When Judge Victor Reyes wrote his succinct Order, just a few words, one of the few words was "Denied." Judge

Reyes had been a criminal judge, but Judge Crockenberg and Reyes had recently switched courts. Reyes had worked as a criminal judge for many years and had worked with Joe Koncilja on a daily basis. When Judge Reyes wrote his quite short order, he was only a few weeks from retiring. Reyes offered no "findings of fact and conclusions of law" in Lucero's case against State Actors Jim Koncilja and Koncilja & Koncilja, P.C. I am not a mind-reader, so I don't know what was in Judge Reyes' heart, but I do believe he did not review Petitioner Lucero's Rule 60(b) motion very much – for many reasons, including, perhaps even for the reason that he gave, writing that the remedy "was to file a Notice to Appeal." It takes so long to proceed through the higher courts, so Petitioner tried to have, wanted to have rulings made at the trial court level.

As for the Judge Crockenberg court, yes it's patently obvious that he did *abuse the discretionary power of the court* on numerous occasion.

Was the district court correct in denying Petitioner's Motion for Default Judgment when Petitioner dutifully conferred with Respondent Koncilja who then rushed to file an Answer, of sorts, on the same day that Petitioner filed his Motion for Default Judgment, i.e., ***62 days after service*** on Respondent of the Summons and Complaint?

On February 10, 2014, Petitioner filed *Motions for Default Judgment pursuant to C.R.C.P. 55(b), §§ 1-14, and for the Granting of* Petitioner's *Claims for Relief Pursuant to C.R.C.P. 8(d) & C.R.S. 13-63-101 (2013)"* with requisite affidavits and evidence submissions.

Respondents did not file any motion for enlargement of time to file an *Answer* brief. Defendants filed an *Answer* on February 10, 2014, <u>on the same day</u> that Plaintiff filed his *Motion for Default Judgment* ... and <u>after</u> Plaintiff called Defendants to fulfill his duty to confer. Defendants

did not, and have not, ever called Plaintiff to *confer* regarding that or any other motion!

Respondent's *Answer* was filed on February 10, 2014, **62 days after** being effectively served with Plaintiff's *Alias Summons* on December 10, 2013. It is a fact that Defendants' *Answer* proffered no excusable neglect for late filing.

C.R.C.P. Rule 12(a) is very clear: "A defendant shall file his answer or other response within 21 days after service of the summons and complaint on him." The word *shall*, as used in Colorado rules and statutes, and certainly in this case, is not *permissive*, but rather mandatory or *obligatory*.[1] It has long been upheld in Colorado that the word *shall* in common usage is equated with *must* or *will*.[2]

> **One day late :Default judgment for filing:** AA Construction Company v. Joseph B. Gould, 470 P.2d 916 (Colo. App. 1970).
>
> "**Right to file an answer brief is lost** where no request for extension of time is made within the time

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[1] There is a presumption that the word "shall", when used in a statute, is mandatory. Williams Natural Gas Co. v. Mesa Operating Limited P'ship, 778 P.2d 309 (Colo. App. 1989); Pearson v. District Court, 18th Jud. Dist., 924 P.2d 512 (Colo. 1996).

[2] It is a well settled rule of statutory construction that all words and phrases used in a statute shall be understood and construed according to the approved and common usage of the language and that some **meaning shall** be given to every word used. Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 P. 665 (1889); People v. J.J.H., 17 P.3d 159 (Colo. 2001).

limit the brief was due, except upon a showing that failure to act was the result of excusable neglect." [3]

District Court is without discretionary power to deny a motion for default judgment where opposing party ... fails to comply ...within a specified time ... fails to establish that such failure was a result of excusable neglect. [4]

"The trial court erred in setting aside the **default judgment...**" because the "failure to timely respond because of his own carelessness and negligence did not constitute excusable neglect." *Goodman Assoc., LLC v.WP Mtn. Props., LLC,* 222 P.3d 310 (Colo. 2010).

Order of default judgment affirmed by Colorado Court of Appeals where Defendant was **11 days late in filing an answer** and did **not assert an excusable neglect.**[5] In this instant case, Respondents were not 11 but 62 days late and had no excusable neglect.

Did the State and Federal Appellate Court judges violate the due process rights of Petitioner when they made numerous statements that were quite contrary to the *record on appeal,* and when they never referenced any document or evidence on that *record* or suggested any evidence to justify their statements while proffering case laws that were unfailingly not on-point with this case at bar?

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[3] *Fraka v. Malernee,* 129 Colo. 87, 267 P.2d 651 (1954)
[4] *Sauer v. Heckers,* 34 Colo. App 217, 524 P.2d 1387 (1974)
[5] *Terri Dunton v. Whitewater West Recreation Ltd,* 942 P.2d 1348 (Colo. App. 1997).

The Court of Appeals did not give any references as to where their sources of information could be found. Many of the statements they made were incorrect, truly incorrect; "riddled with factual errors." If they were to read the documents in the *record on appeal,* their statements would be more accurate.

The factual errors are too numerous to mention in this limited space, but, e.g., it is a part of the exhibits that Respondent Koncilja failed to respond to court orders, did not file responsive briefs, and without any discovery whatsoever, the firm did not prepare Lucero's case for trial. It is a false statement, a factual error, to write that Lucero's *pro se* lawsuit advanced the same complaints as Gordon's. If that Court were to compare the complaints, it would be obvious that Lucero's Complaints against Koncilja, #12 – #18 were entirely new, and there are many other changes. None of the other complaints had ever been adjudicated. Gordon lost Lucero's case on procedural grounds, e.g., for never having told Lucero – who was ignorant of the law at that time – that a *certificate of review* would be necessary. The *only* thing that precluded Lucero from filing a *certificate* in his *pro se* case against Koncilja was the need for the expert attorney to have several weeks to digest the documents – and finish up a trial – to write a *certificate* for Koncilja. Judge Crockenberg absolutely knew from Lucero's other recent *certificate* that Lucero was quite capable of filing one against Koncilja.

Re: the Appellate Court case submissions: I print out all the cases and read them, not just the Westlaw or Lexis-Nexis annotations since they frequently do not tell the whole story. An example of all the Court's inappropriate case law submissions: *Negron v. Golder*, 111 P. 3d 538 (2005): all the issues had been decided against Negron in the federal case. Therefore, Negron was subject to *Collateral Estoppel.* Not true in Lucero's case: new complaints and others never adjudicated.

Canton Oil v. Dist. Court, 731 P.2d 687 (1987) had to do with a juror who wanted to save those whom she thought were Jews. What a strange case! It had to do with abuse by a juror, and yes it did necessitate a retrial, but absolutely immaterial to Lucero's case at bar.

With the Appellate Court's submission of *E.B. Jones Const. v. City & County of Denver*, 717 P.2d 1009 (CA 1986), the judgement was void because of due process of law violations. The issue was decided against Denver because they had failed to preserve the issues.

Did Petitioner correctly fulfill the requisite criteria for successfully filing a C.R.C.P. 60 (b) motion? Yes, several of the Rule 60 sections do apply to this case, and it was necessary to bring these matters first to the district court's attention, since it takes "forever" to wade through the higher courts. I erroneously believed that the trial court would be fair. What is quite notable is that is patent that my due process rights were repeatedly violated. My authority is the United States Constitution, the Bill of Rights, the *Constitution of the State of Colorado, Article II, Bill of Rights, Section 25:* Due Process of law.

Anthony J. Lucero 1/13/2020