2023 WL 2818798
Only the Westlaw citation
is currently available.

Court of Appeals of Alaska.

Loren J. LARSON Jr., Appellant,
v.
STATE of Alaska, Appellee.

Court of Appeals No. A-13849
|
April 7, 2023

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Paul R. Lyle, Judge. Trial Court No. 4FA-16-02876 CI

Attorneys and Law Firms

Loren J. Larson Jr., in propria persona, Wasilla, Appellant.

Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

OPINION

Judge TERRELL.

***1** In 1998, Loren J. Larson Jr. was convicted of a double homicide, and this Court affirmed his convictions on direct appeal.[1] In 2001, Larson filed an application for post-conviction relief in which he asserted that he was entitled to a new trial because of juror misconduct.[2] The superior court dismissed this application because all of Larson's claims of juror misconduct were based on juror affidavits that were inadmissible under Alaska Evidence Rule 606(b), and this Court affirmed the dismissal on appeal.[3] In the years since then, Larson has pursued numerous collateral attacks on his convictions based on these same claims of juror misconduct.[4]

1 *Larson v. State*, 2000 WL 19199 (Alaska App. Jan. 12, 2000) (unpublished).

2 *Larson v. State*, 79 P.3d 650, 652 (Alaska App. 2003).

3 *Id.* at 652-53.

4 *See Larson v. Superior Court*, 2020 WL 5946629, at *1 & n.1 (Alaska App. Oct. 7, 2020) (unpublished) (collecting Larson's numerous post-conviction litigation efforts related to juror misconduct allegations).

This appeal is from the dismissal of a successive application for post-conviction relief alleging ineffective assistance of counsel in Larson's first post-conviction relief action.[5] Larson argued that his attorney in his first post-conviction relief action was ineffective because

the attorney decided not to file a petition for rehearing with this Court after we issued our opinion affirming the superior court's dismissal of the application, instead of allowing Larson to make this decision himself. According to Larson, the decision regarding whether to file a petition for rehearing belongs to the defendant, not the attorney. The superior court rejected this claim, concluding that the decision whether to file a petition for rehearing is a tactical decision that belongs to the attorney and not the defendant.

5 *See Grinols v. State*, 74 P.3d 889 (Alaska 2003) (holding that criminal defendants have a right to challenge the effectiveness of their post-conviction relief counsel in a subsequent application for post-conviction relief). Although SLA 2007, ch. 24, § 36(c) provides a deadline of July 1, 2008 for *Grinols* applications from post-conviction relief actions that became final before July 1, 2007, the State did not argue in the superior court that Larson's application was untimely. The State did argue that Larson's application was barred by AS 12.72.020(a)(5) and (6), which prohibit successive litigation, and by *res judicata*. But Larson asserted that he was unaware of the availability of a petition for rehearing when he filed his earlier actions and that he therefore was unable to bring this claim previously. The superior court resolved the issue on the merits, rather than resolving these procedural issues. We do so as well.

We have never directly addressed whether the defense attorney or the defendant has the final decision on whether to file a petition for rehearing following an appellate decision, but we have considered analogous situations. In *McLaughlin v. State*, we held that it is the decision of the attorney, not the defendant, whether to file a petition for review in this Court following a non-final, adverse trial court decision.[6] We based our decision in part on the text of Alaska Rule of Professional Conduct 1.2(a), which provides that the defendant must make the ultimate decision regarding "a plea to be entered, whether to waive jury trial, whether [they] will testify, and whether to take an appeal."[7] Because Alaska Appellate Rule 402 provides for petitions for review only in circumstances "not appealable under [Appellate] Rule 202," we concluded that the decision whether to file a petition for review could not be considered a decision "whether to take an appeal" and therefore that the decision to file a petition for review was a decision for the attorney.[8]

6 *McLaughlin v. State*, 173 P.3d 1014, 1015-17 (Alaska App. 2007).

7 *Id.* at 1015-16.

8 *Id.*

*2 In addition to this textual analysis, we noted that our conclusion was consistent with the division of authority that exists between the attorney and the defendant in related contexts.[9] While the defendant has the final decision whether to file an appeal, the attorney has the final decision regarding what arguments to raise on appeal.[10] And in a trial court,

the attorney, not the defendant, has the final decision on whether to call or cross-examine a witness and whether to file a motion.[11] We concluded that it would be inconsistent to hold that the defendant has the right to file a petition for review of a specific trial court decision when the attorney would have the final decision whether to challenge that decision in an appeal once the case became final.[12] We explained,

> Whether to petition for review is generally a complicated strategic and tactical decision that is best left to the attorney. In general, if a client is convicted, the attorney can then challenge any ruling made by the trial court. Allowing a client to independently file a petition for review would raise the distinct possibility that such a procedure would cause the client to undermine his counsel's trial tactics and would cause an undue burden on his attorney, the courts, and the State.[13]

9 *Id.* at 1016.

10 *Id.* (discussing *Jones v. Barnes*, 463 U.S. 745, 750-51, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Tucker v. State*, 892 P.2d 832, 836 & n.7 (Alaska App. 1995); *Coffman v. State*, 172 P.3d 804, 807-08, 810-12 (Alaska App. 2007)).

11 *Id.* (discussing *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *Martin v. State*, 797 P.2d 1209, 1217 (Alaska App. 1990)).

12 *Id.*

13 *Id.* at 1016-17.

In *Smith v. State*, we considered a situation where we had reversed on one claim and rejected the other claims Smith raised in his direct appeal.[14] The State then filed a petition for hearing in the Alaska Supreme Court, and the supreme court reversed our decision, affirming the superior court.[15] In an application for post-conviction relief, Smith challenged his attorney's decision to file only an opposition to the State's petition for hearing and not to file a cross-petition for hearing challenging our rejection of his other appellate claims.[16] As in *McLaughlin*, we concluded that the decision whether to file a cross-petition for hearing in the supreme court belongs to the attorney and not the defendant.[17]

14 *Smith v. State*, 185 P.3d 767, 768 (Alaska App. 2008) (citing *Smith v. State*, 1999 WL 494991, at *9 (Alaska App. July 14, 1999) (unpublished), *rev'd*, 38 P.3d 1149 (Alaska 2002)).

15 *Id.* at 768 (citing *Smith*, 38 P.3d at 1161).

16 *Id.*

17 *Id.* at 769-70.

We based our decision in *Smith* on the complexity of the tactical decision whether to file a cross-petition for hearing. We explained that, at the time of the State's petition for hearing, Smith's attorney had already won reversal of Smith's convictions and a retrial with significantly weaker evidence. Under these circumstances, a competent attorney might reasonably conclude that it was best to argue there was no reason for the supreme court to grant discretionary review in the case, rather than arguing for the supreme court to grant review on additional issues, which might make the court more likely to grant review in the case. [18]

18 *Id.*

As in *McLaughlin*, we noted that our decision was consistent with the principle that, although the defendant has the right to determine whether to file an appeal, the tactical decision of what arguments to raise on appeal is for the attorney. We explained, "The decision that Smith's appellate counsel had to decide in determining whether to file a cross-petition for hearing is remarkably similar to the decision that counsel has to make in deciding which issues to raise on appeal — would raising this additional issue help or hinder the client?" [19]

19 *Id.* at 770.

*3 The same considerations that were present in *McLaughlin* and *Smith* exist here too. The attorney who represented Larson in his first post-conviction relief action submitted an affidavit explaining why he decided not to file a petition for rehearing in this Court. The attorney explained that, based on the language we used in our opinion, he did not believe that a petition for rehearing would be successful. But he believed that he could write a compelling petition for hearing (for review by the supreme court) by focusing on some of the language that we had used in our opinion, and he worried that we might change some of this language if he filed a petition for rehearing in this Court. He therefore believed that the best course of action was not to file a petition for rehearing. The decision Larson's attorney faced after we rejected Larson's appeal in his first post-conviction relief action is representative of the types of decisions that must be made when deciding whether to file a petition for rehearing and shows the complexity of these tactical decisions.

Additionally, the decision whether to file a petition for rehearing is a continuation of the decision of which issues to raise on appeal. Alaska Appellate Rule 506(a) allows for an appellate court to rehear a decision only if:

> (1) The court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling; or
>
> (2) The court has overlooked or misconceived some material fact or proposition of law; or
>
> (3) The court has overlooked or misconceived a material question in the case.

Rule 506(a) expressly provides, "A rehearing will not be granted if it is sought merely for

the purpose of obtaining a reargument on and reconsideration of matters which have already been fully considered by the court." It would be inconsistent to say that the attorney, not the defendant, has the final decision of which issues to raise on appeal but that the defendant has the final decision whether to argue that the court overlooked or misconceived the facts or law when resolving those issues.

A rule that the attorney, not the defendant, has the final decision whether to file a petition for rehearing is also consistent with the rule that trial counsel, and not the defendant, has the final decision over whether to file a motion. And a contrary rule allowing the defendant to demand a petition for rehearing be filed could "cause an undue burden on his attorney, the courts, and the State."[20]

20 *McLaughlin v. State*, 173 P.3d 1014, 1017 (Alaska App. 2007).

We recently held in *Mack v. State* that the defendant has the final decision whether to file a petition for hearing with the Alaska Supreme Court after losing their appeal in this Court.[21] But "the petition for hearing is an important part of the appellate process in Alaska, and it serves as the final opportunity in state court for the defendant to have their claims heard."[22] It "provides the last pathway to ensure that the defendant's substantial rights were observed during the trial and sentencing phases of the proceedings."[23] This is unlike a petition for rehearing, which is not a vehicle for rearguing a case.[24]

21 *Mack v. State*, 523 P.3d 1235, 1251-53 (Alaska App. 2023).

22 *Id.* at 1244.

23 *Id.* (quoting *State v. Uchima*, 147 Hawai'i 64, 464 P.3d 852, 863 (2020)).

24 Alaska Appellate Rule 304 provides that a petition for hearing may be granted if "[t]he decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the supreme court of the state of Alaska, or with another decision of the court of appeals" — a ground which is similar to the grounds for granting a petition for rehearing. But the rule also provides that a petition for hearing may be granted if "[t]he intermediate appellate court has decided a significant question concerning the interpretation of the Constitution of the United States or the Constitution of Alaska, which question has not previously been decided by the Supreme Court of the United States or the supreme court of the state of Alaska"; "[t]he intermediate appellate court has decided a significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the supreme court of the state of Alaska"; or "[u]nder the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the

> present case, and appears reasonably necessary to further the administration of justice." And the rule states that these grounds for granting a petition for hearing are "neither controlling nor fully measuring that court's discretion" and instead "indicate[ ] the character of reasons which will be considered."

*4 We therefore conclude that the decision whether to file a petition for rehearing rests with the attorney, not the defendant. As such, Larson's claim that his attorney should have given him this choice fails.

The superior court also considered whether Larson's attorney was ineffective in deciding not to file a petition for rehearing. The court concluded that the attorney made a reasonable tactical decision not to file a petition for rehearing and, therefore, he provided competent representation.[25] It is unclear whether Larson is also challenging this ruling on appeal. To the extent that Larson is appealing the superior court's ruling that his attorney was not ineffective in declining to file a petition for rehearing, we agree with the superior court that Larson's attorney made a reasonable tactical decision and, therefore, acted competently.

25 *See* *State v. Jones*, 759 P.2d 558, 569-70 (Alaska App. 1988) (holding that, when an attorney has made a tactical choice, the defendant must show that the tactic itself was unreasonable — that is, that no reasonably competent attorney would have adopted the tactic under the circumstances).

Finally, Larson argues that he received inadequate notice of one of the rationales the superior court used to dismiss his application. Specifically, the superior court noted that the affidavit of Larson's attorney failed to address one of the arguments that Larson made about why a petition for rehearing should have been filed, and the superior court concluded that Larson's application therefore failed to present a prima facie case on this argument. But the State never argued in its motion to dismiss that the attorney's affidavit was inadequate. We need not resolve whether Larson was denied adequate notice on this issue because the superior court went on to conclude that Larson still would not have presented a prima facie case even if the affidavit were adequate. Thus, any lack of notice was harmless.

The judgment of the superior court is AFFIRMED.

All Citations

--- P.3d ----, 2023 WL 2818798

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LOREN J. LARSON, JR., Applicant,	)	
v.	)	
STATE OF ALASKA	)	CASE NO. 4FA-16-02876 CI
Respondent.	)	

ORDER DISMISSING AMENDED APPLICATION FOR POST-CONVICTION RELIEF

In January 2016, Mr. Larson filed an application for post-conviction relief alleging his post-conviction relief counsel (James H. McComas, Esq.) provided ineffective assistance of counsel while representing him on the appeal from the superior court's denial of Larson's first application for post-conviction relief, which was filed in 2001. In June 2017, Larson filed a motion to stay this case pending the outcome of two pending matters: (1) His appeal in *Larson v. State*, Court of Appeals Case No. A-12725 and, (2) his then-recently filed Motion for Relief from Judgment in *Larson v. State*, Superior Court Case No. 4FA-01-00511 CI. The stay was granted on July 7, 2017 and lifted on January 14, 2020, after the relief Larson sought in those cases was denied.

Larson filed an amended application on April 30, 2020. The State filed a motion to dismiss the application in July 2020. Larson opposed the motion in October 2020. The State did not file a reply.

The State asserts three independent reasons why Larson's application should be dismissed, any one of which would suffice to support dismissal: (1) The application is barred by the statute of limitations set out in AS 12.72.020(a)(5) and AS 12.72.020(a)(6); (2) Larson has

failed to plead a *prima facie* case for ineffective assistance of counsel; and (3) The issues Larson seeks to litigate are barred under the doctrine of *res judicata*. These reasons are addressed seriatim.

I. The Court Assumes the Application is Timely for the Purpose of this Motion

Larson claims his application is timely filed because he has a constitutional right to file a subsequent application for post-conviction relief if he alleges that his attorney in his first application for post-conviction relief was ineffective. *Grinols v.* State, 74 P.3d 889 (Alaska 2003) permits the filing of a second application for post-conviction relief where the attorney in the first application is alleged to have provided ineffective assistance of counsel, but AS 12.72.025 requires the subsequent application to be "filed within one year after the court's decision on the prior application is final under the Alaska Rules of Appellate Procedure."

AS 12.72.025 was enacted in 2007 and was effective on July 1, 2007. Individuals whose initial applications were denied before July 1, 2007 were given until July 1, 2008 to file their second application. *See Gregory v. State*, 2019 WL 2156635 at *2 (Alaska App. 2019) (unpublished) (citing 24 SLA 2007, §§ 25, 36(c), 39).

James McComas, Esq. represented Larson throughout his first post-conviction relief case—before the superior court and on appeal to the Alaska Court of Appeals and the Alaska Supreme Court. Larson claims that McComas provided him with ineffective assistance of counsel before the court of appeals "by failing to discuss with Larson the rights Larson had to seek rehearing to the Court of Appeals to provide answers for [certain] issues [raised on appeal that] the Court did not decide." Amended Application at 2. Larson's appeal of the denial of his first post-conviction relief application was decided by the court of appeals in October 2003, more than 13 years before Mr. Larson filed his application in this case. *See Larson v. State*, 79 P.3d

650 (Alaska App. 2003). Thus, if Larson believed that McComas was ineffective in 2003, he had until July 1, 2008 to file this application. Larson's application in this case was filed on December 29, 2016; facially, it is late-filed by more than eight years.

Larson claims that his application is timely because he did not know until January 2016 that McComas could have filed a petition for rehearing on issues that were raised on appeal but not addressed by the court of appeals. He claims to have first learned of the ability to petition for rehearing when the court of appeals decided one of his previous cases—*Larson v. State*, 2016 WL 191987 (Jan. 13; Alaska App. 2016) (unpublished). It appears that Larson is raising the issue of "equitable tolling."

The court of appeals has "left open the possibility that an attorney's ineffective assistance could provide a constitutional basis for allowing a late-filed application for post-conviction relief. But to succeed on such a claim, the applicant must still exercise due diligence." *Davis v. State*, 2020 WL 9174632 at *1 (Alaska App. 2020) (unpublished).

Neither party has cited AS 12.72.025 in their briefing. Larson has not explicitly raised the issue of equitable tolling. The State filed no reply on its motion to dismiss and so has not addressed Larson's claim that he was unaware that McComas could have filed a petition for rehearing of the court of appeals 2003 decision.

The court declines to address the timeliness of Larson's application in deciding this motion to dismiss because the facts are not adequately developed[1] and neither party has briefed

[1] Larson's factual claim to have been unaware of the option of petitioning for rehearing until January 2016 may be strained. Larson has filed numerous cases collaterally attacking his convictions over the last 20 years. He has petitioned for rehearing while being self-represented in at least one of his earlier cases. *See Larson v. Superior Court*, 2020 WL 5946629 at *1 n.1 (Alaska App. 2020) (unpublished) (listing Larson's "numerous . . . collateral attacks on his convictions" including *Larson v. State (VI)*, a case in which Larson filed a petition for rehearing that was denied by the court of appeals in January 2014.). Larson may have an explanation for why he should not be charged with earlier knowledge that a petition for rehearing can be filed before the court of appeals. Larson has also failed to explain why he waited until December 29, 2016 to file his present application after first learning of his ability to do so nearly one year earlier (on January 13, 2016). *Davis*, 2020 WL 9174632 at *1 ("[T]o succeed on

the issue of equitable tolling. Thus, for the purpose of this motion, the court assumes, without deciding, that Larson's application is timely filed. This assumption is made without prejudice to the State moving to dismiss on this basis in the future, if necessary.

II. Larson has Failed to Plead a *Prima Facie* Case for Ineffective Assistance of Counsel

Larson does not claim that McComas was ineffective while litigating his first application for post-conviction relief in the superior court. Nor does Larson claim that McComas was ineffective in pursuing the appeal of the denial of his first application through the issuance of the court's decision in *Larson v. State*, 79 P.3d 650 (Alaska App. 2003) *(Larson II)*.[2] Furthermore, Larson does not allege that McComas was ineffective in preparing the petition for hearing to the Alaska Supreme Court seeking review of *Larson II*. His ineffective assistance claim is a narrow one.

Larson claims that McComas was ineffective for failing to file a petition for rehearing in *Larson II* asking the court of appeals to expressly address issues that Larson raised on appeal but that the court of appeals did not mention in its opinion.[3] Larson also seeks very narrow relief—

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such a claim, the applicant must still exercise due diligence."). Nevertheless, as noted above, the parties have not developed the facts on the statute of limitations issue in the current motion practice.

[2] *Larson v. State (Larson II)*, 79 P.3d 650 (Alaska App. 2003) is the designation the court of appeals has assigned to its 2003 decision in Larson's appeal of the denial of his first petition for post-conviction relief. *See e.g., Larson v. Superior Court*, 2020 WL 5946629 at *1 (Alaska App. 2020) (unpublished).

[3] To be more precise, Larson claims that McComas was ineffective "by failing to discuss [with Larson] the rights Larson had to file a Petition for Rehearing." Amended Application at 16. Larson claims that McComas never told him that a rehearing on these issues was available and, that if he had done so, "Larson would have insisted that a petition for rehearing be filed." Amended Application at 3. McComas's affidavit does not address whether he spoke to Larson about filing for rehearing. [Exhibit 12 at 16-19] Larson cannot establish a *prima facie* showing of ineffective assistance of counsel by proving only these two factual assertions.

Larson's formulation of his ineffective assistance of counsel claim appears to be premised on the assumption that Larson rather than McComas controlled the appellate strategy. Larson had sole discretion to decide whether to appeal the denial of his first petition for post-conviction relief to the court of appeals. After he made that decision, however, "tactical decisions regarding [appellate] strategy[] are inferentially left to the discretion of the attorney." *Jackson v. State*, 1998 WL 395225 at *3 n. 3 (Alaska App. 1998) (unpublished) (citing Alaska Rule of Professional Conduct 1.2(a)); *see also Coffman v. State*, 172 P.3d 804, 810 (Alaska 2007) ("The normal rule under Alaska law . . . is that a defendant's appellate attorney has the responsibility of deciding which issues to raise on appeal." (citing *Tucker v. State*, 892 P.2d 832 (Alaska App. 1995)). Once Larson decided to appeal, the appellate strategy was left to McComas's discretion. A lawyer has a duty to consult with his client, but Larson's ineffective

the opportunity to file a petition for rehearing with the court of appeals to address the issues that the court of appeals did not expressly address in *Larson II*. Amended Application at 16 ("Larson should now receive an opportunity to file one [*i.e.* a petition for rehearing in *Larson II*] in the Appellate Court.").[4]

In order to establish a *prima* facie claim that a post-conviction relief attorney was ineffective, applicants must meet a four-factor test, which was set out in *Grinols v. State*, 10 P.3d 600, 619-20 (Alaska App. 2000): (1) The applicant must demonstrate their "diligence in raising the claim of ineffective representation"; (2) The applicant must show that their lawyer's performance fell "below the acceptable minimum of skill expected of criminal law practitioners"; (3) The applicant must demonstrate that the legal issue raised "is meritorious—that if the underlying issue had been litigated, the defendant would have won";[5] and (4) "The defendant must establish that, with this [underlying] issue resolved in the defendant's favor, there is a reasonable possibility that the outcome of the defendant's original trial court proceedings would have been different."[6] *Grinols*, 10 P.3d at 619-20. Summarizing this four-factor test, the court in *Grinols* concluded:

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assistance claim against McComas cannot be established merely by showing that McComas did not mention the possibility of rehearing and that Larson would have insisted on filing for rehearing if he had. Even assuming the truth of these two allegations, Larson must also show that the issues he believes should have been raised on rehearing were meritorious, that McComas's failure to seek rehearing was not supported by sound tactical considerations, and that there was a reasonable possibility that the outcome of his first post-conviction relief application would have succeeded if rehearing had been sought in *Larson II*. Thus, Larson's claim is evaluated on the basis of McComas's alleged incompetence for failing to seek rehearing, not merely on his alleged failure to discuss the possibility of rehearing with Larson.

[4] The superior court could not grant Larson this relief even if he were successful on his amended application. Trial courts have no authority to order appellate courts to re-open appeals. Since the court is dismissing the amended application for failing to set out a *prima facie* claim, remedy is not an issue that needs to be further addressed.

[5] This *Grinols* factor also addresses a layered claim of ineffective assistance of counsel—*i.e.*, a claim that the post-conviction relief attorney "incompetently failed to prove the incompetence of their trial, attorney". *Grinols*, 10 P.3d at 620. Larson is not claiming his trial attorney was ineffective. Larson's first application for post-conviction relief exclusively asserted claims concerning juror misconduct.

[6] The factual assertions related to this four-factor test must be proved by clear and convincing evidence. AS 12.72.040.

> A defendant must prove that, because of the incompetence of their post-conviction relief counsel, they were denied a fair and meaningful opportunity to litigate their claims. The defendant must also prove that their collateral attack on their underlying conviction would have succeeded if those claims had been properly litigated.

Grinols, 10 P.3d at 620-21. The four-factor test in relation to Larson's ineffective assistance of counsel claim is addressed next.

1. Larson's Diligence

In *Gregory*, *supra*, the court noted that the diligence factor predates the statute of limitations set out in AS 12.72.025. In *Davis*, *supra*, the court held that even where equitable tolling might apply to extend the statute of limitations, "the applicant must still exercise due diligence." *Davis*, 2020 WL 9174632 at * 1. As noted above in section I, the court assumes Larson's application is timely for the purpose of this motion.

2. Attorney Incompetence

The second factor requires Larson to establish that McComas's failure to file a petition for rehearing "fell below the acceptable minimum skill expected of criminal law practitioners." *Grinols*, 10 P.3d at 619. "The law presumes that attorneys are competent, and a defendant must affirmatively rebut this presumption of competence. It is the defendant's burden to negate the possibility that the attorney chose, for valid tactical reasons, not to raise the issue, or to argue it in a different way." *Grinols*, 10 P.3d at 619. "The defendant has the burden of proving his counsel's lack of competence by clear and convincing evidence." *Tall v. State*, 25 P.3d 704, 708 (Alaska App. 2001). Larson has failed to present a *prima facie* case on this factor.

McComas supplied an affidavit concerning his performance in Larson's first application for post-conviction relief. In his affidavit (which was prepared in January 2017) McComas reports that he was contacted by an attorney (Gavin Kentch, Esq.) about a possible claim that he

was ineffective in representing Larson. McComas's affidavit addresses seven questions put to him by Kentch. Before answering those questions, however, McComas addresses a "recurring component" in the first six of Kentch's questions—why he did not file a petition for rehearing in the court of appeals in *Larson II*.

McComas did not file a petition for rehearing on the issues Larson raises for three closely-related reasons. First, he thought the decision of the court of appeals "provided the perfect vehicle to take to the Alaska Supreme Court. There would be no better case factually or legally for [Larson] on pre-deliberation [juror] misconduct". Second, he thought that "the lengths the lower [appellate] court went to [in] trying to justify affirmance could potentially draw the [Alaska] Supreme Court's review and ire" on a petition for hearing. Third, he "did not want to give the [court of appeals] any opportunity to soften or rephrase the language of its decision." McComas concluded "then and now, [that] a rehearing petition would have been completely futile" given the reasoning of the court of appeals in *Larson II*, on page 656 (79 P.3d at 656). McComas believed that if the court of appeals would not reverse the superior court's ruling on Larson's juror misconduct claims for the reasons stated in *Larson II*, the court of appeals "was not about to grant relief to [Larson] on some other lesser basis."[7]

In addressing his strategy for the petition for hearing to the Alaska Supreme Court, McComas stated: "[I]t was then, and is now, my opinion that by far the best chance of obtaining the rare opportunity for discretionary review depended on a strong presentation of our primary argument – that juror testimony is admissible to prove pre-deliberation juror misconduct, laced with contrasting, and appalling, permission-to-cheat assertions of the lower [appellate] court." [Exhibit 12 at 6]

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[7] All quotations in this paragraph are from Exhibit 12 at 4.

McComas's affidavit establishes beyond peradventure that his decision not to file a petition for rehearing in the court of appeals on issues of lesser importance was based on "sound tactical considerations".[8] Given the reasoning of the court of appeals in *Larson II*, McComas concluded that there was a poor prospect of obtaining a different result from the lower appellate court on a petition for rehearing on the relatively minor issues Larson was asking about through Kentch. At the same time, he believed Larson's prospect for gaining the attention of the Alaska Supreme Court on a petition for hearing—thus obtaining discretionary review by the highest court—was enhanced if rehearing was *not* sought in the court of appeals.

Larson offers no evidence in his application or in his opposition to the State's motion to dismiss "to rebut the strong presumption"[9] that McComas had "valid tactical reasons" for foregoing rehearing in the court of appeals.

3. Meritorious Issues

As stated above, this factor requires Larson to "establish that the omitted legal issue is, in fact, meritorious—that if the underlying issue had been litigated, the defendant would have won." *Grinols*, 10 P.3d at 619.

Larson claims that McComas was ineffective for failing to file for rehearing on five points that were raised in his appeal and that the court of appeals did not address in *Larson II*. Since Larson asserts that McComas was ineffective for failing to seek rehearing on these issues, a brief review of Appellate Rule 506 is necessary.

Appellate Rule 506(a) sets out three grounds for rehearing: (1) the court overlooked, misapplied, or failed to consider applicable legal authority, or (2) the court overlooked or misconceived a material fact or proposition of law, or (3) the court overlooked or misconceived a

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8 *Tall*, 25 P.3d at 708 (quoting *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988).

9 *Tall*, 25 P.3d at 708.

material question in the case. The rule states that rehearing "will not be granted if it is sought merely for the purpose of obtaining reargument on and reconsideration of matters which have already been fully considered by the court."

With Appellate Rule 506(a) in mind, Larson's claims of omission are reviewed below.

A. McComas should have sought rehearing on Larson's claim that the juror affidavits were admissible because their exclusion violated the "plainest principles of justice."

This claim is set out in Section II of Larson's Amended Application at 2-4. McComas's affidavit does not address this claim because it was not a question put to him by Kentch. Larson's application thus fails to set out a *prima facie* showing on this point. *See Harvey v. State*, 2004 WL 60771 at *4 (Alaska App. 2004) (unpublished) ("Our subsequent decisions interpreting *Jones*[10] have clarified that even when the defendant obtains an affidavit or a deposition from their trial attorney, the defendant's proof remains incomplete if the attorney is not confronted with, and asked to explain, the defendant's specific claims of incompetence." (citations omitted)).

Moreover, the claim is without merit even if it is considered. The phrase in the title of this subsection—"plainest principles of justice"—is taken from *McDonald v. Pless*, 238 U.S. 264, 269 (1915), a case quoted in Argument IV of Larson's opening brief in *Larson II*. [Exhibit 5, at 43-44] In that section of the brief, McComas argued that the juror misconduct at Larson's trial deprived Larson of due process. [Exhibit 5, at 45-46]

Contrary to Larson's allegation, the court of appeals did not fail to address this claim. It was expressly rejected in *Larson*, 79 P.3d at 659, under the heading "*Evidence Rule 606(b) does not deny Larson his constitutional right to due process of law*". Since rehearing under Appellate Rule 506(a) is not available merely to reargue issues already fully considered by the court, it is

[10] *State v. Jones*, 759 P.2d 558 (Alaska App. 1988).

unlikely that Larson would have obtained rehearing on this issue, much less won the issue.[11] McComas had no legitimate reason under Appellate Rule 506 to seek rehearing on this issue. Larson has thus failed to rebut the strong presumption that his lawyer acted competently in not seeking rehearing on this issue.

Larson has not made a *prima facie* showing that this claim is meritorious.

B. McComas should have sought rehearing on Larson's claim that juror Angaiak was biased against Larson.

Larson's claim on this point is found at pages 5 through 12 of his Amended Application. He claims that juror Angaiak was biased against him because she said she could not serve for work-related reasons, initially equivocated on whether she could be fair, and later joined with the other jurors who were discussing the case before deliberations began. Larson claims that McComas was ineffective for not seeking rehearing on this claim.

McComas addresses this issue twice in his affidavit. [Exhibit 12 at 7-9 and 15-16] His affidavit questions the premise of the allegation that the court of appeals did not address this claim. McComas notes that the claim concerning Angaiak was raised in section V of his brief. [Exhibit 5 at 50 n.12] Section V of the brief addressed the superior court's refusal to allow McComas to depose jurors to explore their actual bias before the trial court dismissed Larson's

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[11] In this section of his amended application, Larson relies upon the Alaska Supreme Court's decision in *Alvarez-Perdomo v. State*, 454 P.3d 998 (Alaska 2019). He claims the juror misconduct in his case constitutes structural error at his trial requiring automatic reversal of his convictions. To the extent that Larson is arguing that McComas was ineffective for failing to argue that there was structural error in his trial, that argument must be rejected. First, McComas was not asked about structural error in Larson's trial and his affidavit does not address it, which is fatal to the *prima facie* showing that Larson is required to make on this issue. *Harvey*, 2004 WL 60771 at *4. Furthermore, *Alvarez-Perdomo* was decided in 2019, 16 years after McComas represented Larson in *Larson II*. McComas cannot be charged with the knowledge of a case not decided at the time he represented Larson. Finally, *Alvarez-Perdomo* does not apply to the facts in Larson's case. *Alvarez-Perdomo* held that structural error is committed when a trial judge compels a criminal defendant to testify at his trial. *Alvarez-Perdomo*, 454 P.3d at 1008. Larson argues that the juror misconduct at his trial "forced Larson to testify without Larson knowing it." Amended Application at 4. Larson was not forced to testify at his trial; he exercised his Fifth Amendment privilege to remain silent. The holding in *Alvarez-Perdomo* does not establish that there was structural error in Larson's trial.

Larson also makes a passing reference to his wife not being present during trial in this section of his amended application. This reference is related to one of Larson's juror misconduct claims and is addressed below in section III.3.D.

first application for post-conviction relief. Two jurors, Hayes and Angaiak, were held up as examples of why depositions for actual bias were needed. [Exhibit 5, *id.*]

The court of appeals addressed this claim in *Larson II*, 79 P.3d at 659-60, under the heading "*Larson's claim that he should have been allowed to proceed on his assertions of juror bias*". *Larson II*, 79 P.3d at 659-60. Although the court of appeals did not mention juror Angaiak in this portion of its decision, the court did cite juror Hayes as one example of a juror Larson thought he should have been given the opportunity to depose about actual bias. *Id.* at 660.

Again, since rehearing under Appellate Rule 506(a) is not available merely to reargue issues already fully considered by the court, it is unlikely that Larson would have obtained rehearing on this issue, much less won.

To the extent that Larson is claiming that his bias claim against juror Angaiak should have been raised as an entirely separate claim in a petition for rehearing in *Larson II*, McComas correctly explains in his affidavit that he could not raise the Angaiak bias claim as a "free-standing claim" because Larson's trial lawyer did not preserve an objection to her empanelment. [Exhibit 12 at 7 n. 2]

Moreover, McComas correctly explains in his affidavit that the rejection of the juror bias claims in *Larson II* "rested on the conclusion [of the court of appeals] that adequate bias evidence would depend on admissions of misbehaving jurors, or on statements by other empaneled jurors impeaching them", which "ultimately collapses into the ARE 606(b) issue." [Exhibit 12 at 8] In other words, the evidence needed to establish juror bias was the testimony of the jurors themselves, which the court of appeals held was inadmissible. *Larson II*, 79 P.3d at 657.

Furthermore, the court of appeals expressly held that the juror bias claims were premised "on the speculation that any adverse opinion expressed by jurors during [Larson's] trial must have been rooted, not in the events of the trial, but rather in those same jurors' pre-existing bias against him before the trial began. . . . Larson presented no evidence to suggest that this was true." *Larson II*, 79 P.3d at 660.

Larson has failed to show that he would have been afforded a rehearing—and would have won—the Angaiak bias claim as "free-standing" claim for two reasons. First, Larson does not claim McComas was ineffective in his briefing to the court of appeals and the Angaiak claim was not raised in the briefing as a free-standing claim. Therefore, the issue could not have been raised as a free-standing claim on rehearing. Second, even if the Angaiak claim had been raised as a free-standing claim in the brief, any objection to her remaining on the jury was waived by trial counsel, the court of appeals had held in *Larson II* that the evidence needed to establish her bias was inadmissible,[12] and had also held that the bias claim itself was premised on speculation.[13] Given these rulings in *Larson II*, McComas would have had no basis to seek rehearing merely to reargue a point based on evidence that the court of appeals had already held to be inadmissible.

Larson has failed to show that rehearing on this issue would have been successful. The claim of which Angaiak's actions were a part was, in fact, addressed in *Larson II*, and rehearing was not available to reargue the issue. If the Angaiak claim had been raised as a free-standing issue, rehearing could not have been sought because *Larson II* held the evidence supporting the claim was inadmissible. Larson has failed to overcome the presumption that McComas acted competently in not seeking rehearing on this issue.

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12 *Larson II*, 79 P.3d at 657.

13 *Larson II*, 79 P.3d at 660.

C. McComas should have sought rehearing on the basis that *Larson's* sworn statements were *prima facie* evidence that jurors lied or concealed bias against him during voir dire.

This claim is raised on pages 12-14 of the amended application. However, this court is unable to locate where this argument was made in briefing to the court of appeals in *Larson II*. McComas was not asked about this issue by Kentch and his affidavit does not address it. Larson has failed to make out a *prima facie* case on this claim. *Harvey v. State*, 2004 WL 60771 at *4.

As noted above, Larson does not claim that McComas ineffectively briefed the appeal in *Larson II*. He asserts ineffectiveness only for McComas's failure to seek rehearing on issues that McComas raised in the briefing and that the court of appeals did not address in its opinion in *Larson II*.

Since this issue was not addressed by McComas in the briefing—and because Larson does not claim McComas's appellate briefing was ineffective for omitting any issue on appeal—McComas could not have been ineffective for failing to seek rehearing on an issue he properly did not brief. In addition, rehearing is available under Appellate Rule 506 only for issues overlooked or misconceived by the court; it is not a vehicle for raising new issues. *Watts v. Seward School Board*, 423 P.2d 678, 679 (Alaska 1967) (Issues raised for the first time on rehearing will not be considered).

Moreover, even if the issue were briefed, and even if McComas could have (and failed) to seek rehearing on the issue, Larson has failed to show that he would have obtained rehearing and won on this issue. Why? Because Larson's argument that he could prove juror bias based on what *he* heard jurors say *during voir dire* suffers from the same unsupported speculation the court of appeals identified in *Larson II*: Larson's argument is premised on the speculation that statements jurors made *during* the trial were "rooted . . . in those same jurors' pre-existing bias

against him before the trial began" rather than in events that transpired during the trial itself. *Larson II*, 79 P.3d at 660. ". . . Larson presented no evidence to suggest that this was true." *Id.*

Larson has not established that this claim is meritorious. This issue was not raised on appeal, Larson does not claim that McComas was ineffective for omitting the issue in his opening brief on appeal, and rehearing is plainly unavailable on an issue first raised on rehearing.

D. McComas should have sought rehearing on the issue that jurors used the absence of Larson's wife from trial as evidence of his guilt.

This claim is raised on page 15 of the Amended Application. It was raised by McComas in his brief along with other evidence of juror misconduct. [Exhibit 5 at 15]

In his brief, McComas argued that some jurors inferred Larson's guilt from the fact that his wife did not attend the trial. The court of appeals described this evidence as jurors' "holding Larson's wife's failure to attend the trial against him". *Larson II*, 79 P.3d at 657.

McComas was asked by Kentch why he did not seek rehearing on the court's "arguable misstate[ment]" of Larson's claim. [Exhibit 12 at 11] McComas responded that the "under-characterization" of the claim made "no legal difference" to the outcome of the case: "The whole issue is—How can we make these juror statements admissible? I believed then, and I believe now, that 'Hungry is he who fishes for minnows, while whales swim by." [Exhibit 12 at 12] He called the arguable difference in the court's characterization of the evidence "picayune", and reiterated his initial point (addressed above in section II.2) that he did not wish to give the court of appeals an opportunity to soften or rephrase its language, thus lessening Larson's chances to obtain review from the Alaska Supreme Court. [Exhibit 12, at 12]

Larson has not established that he would have obtained rehearing and won on this issue for two reasons. First, the court of appeals actually addressed the issue of Larson's wife's absence in *Larson II*, 79 P.3d at 657. Second, the difference between Larson's characterization

of the issue (jurors inferring guilt from Larson's wife's absence) and the court's characterization of the issue (jurors' holding Larson's wife's absence "against him") is nominal. The appellate court's characterization of the evidence sufficiently demonstrates the court's understanding that Larson was claiming the jurors used his wife's absence from the trial to find Larson guilty. Thus, the difference in the characterization of the evidence is not significant enough to establish that the court of appeals misconceived or misconstrued a "material fact" for the purpose of seeking rehearing under Appellate Rule 506(a)(2).

Larson has not established that this issue was meritorious. And McComas had a sound tactical reason not to pursue this issue on rehearing: The issue was too minor to make a difference on the primary issue on appeal—the admissibility of the juror affidavits. It cannot be gainsaid that this issue, even if successful, would not have changed the admissibility ruling.[14]

E. McComas should have sought rehearing on the issue that a juror tried to re-create the sound of a .22 caliber weapon

This issue is raised on page 16 of the Amended Application, but Larson mischaracterizes the juror affidavit on which it was based. The juror said he *discussed* the noise a .22 caliber weapon would make based on his personal experience with such weapons—*not* that he re-created the noise for the other jurors. [Exhibit 6 at 32, ¶ 6] In addition, the juror was unsure if the issue was discussed before jury deliberations started, but he was sure it was discussed during jury deliberations. [*Id.*]

McComas raised the weapon noise issue in his brief. [Exhibit 5 at 14-15] He asserted that one of the jurors explained to other jurors how much noise a .22 weapon would make.

[14] McComas's tactical decision is well supported by the observations set out in *Coffman*, 172 P.3d at 810: "The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. . . . [M]ultiplying assignments of error will dilute and weaken a good cause and will not save a bad one." (quoting *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983) (other citation omitted)). *Coffman* also noted "that the process of winnowing out weaker arguments on appeal, and focusing on those arguments more likely to prevail, is the hallmark of effective appellate advocacy." *Coffman*, 172 P.3d at 811 (citing *Smith v. Murray*, 477 U.S. 527, 536 (1986)).

[Exhibit 5 at 15] McComas also discussed this issue in his affidavit. [Exhibit 12 at 13] He explained that he did not seek rehearing on this issue because the ruling on the jurors' discussion about the loudness of the .22 caliber weapon was *correct*.

Here is what the court of appeals held about the "weapon noise" issue in *Larson II*:

> Larson also offered juror affidavits to prove . . . that one or more jurors reached their decision by relying on information beyond the evidence presented at trial—specifically, jurors' personal knowledge of how loud a shot from a .22 caliber rifle would be . . . . One could potentially argue that these jurors' personal knowledge constituted "extraneous prejudicial information". However, the Alaska Supreme Court rejected this interpretation of Rule 606(b) in *Titus v. State*, 963 P.2d 258 (Alaska 1998).
>
> In *Titus*, the supreme court held that a juror's "pre-existing ... knowledge of a general nature" does not constitute "extraneous prejudicial information" for purposes of Rule 606(b). *Id.* at 262. The court declared that "a juror who discusses his or her general knowledge during deliberations, such as a familiarity with x-ray technology, has not introduced extraneous prejudicial information into the jury room". *Id.* Accordingly, even if Larson's jurors discussed their personal knowledge of the characteristics of .22 caliber firearms . . . , this would not fall within the exceptions listed in Rule 606(b).

Larson II, 79 P.3d at 654.

Larson has failed to make a *prima facie* showing that this issue is meritorious for two reasons. First, the premise of Larson's application is that McComas was ineffective for failing to seek rehearing on issues McComas raised in his brief that the court of appeals *did not* address. But as demonstrated immediately above, the court of appeals plainly addressed this issue in *Larson II*. Second, the juror's affidavit, McComas's brief, and the above-quoted portion of *Larson II* fully support McComas's conclusion in his affidavit that the court of appeals correctly decided the issue. [*See* Exhibit 6 at 32, ¶ 6; Exhibit 5 at 15; Exhibit 12at 13, ¶ 11.A.1.] There was no basis to seek rehearing.

McComas had a sound tactical reason for not seeking rehearing on the weapon noise issue: Rehearing is not available to reargue issues already raised and fully addressed by the appellate court. Nor does Larson claim that McComas's briefing on the issue was deficient: The court of appeals did not misconceive the issue as presented by McComas.

4. Reasonable Possibility of a Different Outcome

Larson has failed to make a *prima facie* showing to rebut the presumption that McComas acted competently in not seeking rehearing in *Larson II.* McComas's affidavit demonstrates that he had sound tactical reasons for not seeking rehearing on each issue that Kentch asked him to address in his affidavit. McComas was not asked to address two of the issues raised by Larson in his amended application; on those issues Larson has failed as a matter of law to establish a *prima facie* case.[15] Four of the issues Larson claims were not addressed by the court of appeals were in fact addressed by the court of appeals, thus rendering rehearing unavailable under Appellate Rule 506.[16] One the issues Larson claims McComas should have sought rehearing on was not raised by McComas in his opening brief, but Larson does not claim McComas was ineffective for not raising that issue in his opening brief, and so, McComas could not be ineffective for not seeking rehearing on that issue.[17]

In the context of this case, factor 4 of the *Grinols* test requires Larson to show that "there is a reasonable possibility that the outcome of [the appeal of his first post-conviction relief case] would have been different" and would have led to a reversal of the trial court's denial of his first application once one or all of the issues he raises in the instant application are resolved in his favor.

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15 *See* sections II.3.A. and II.3.C., *supra.*

16 *See* section II.3.A., II.3.B. II.3.D., and II.3.E., *supra.*

17 *See section* II.3.C., *supra.*

Because Larson has failed to make a *prima facie* showing under *Grinols* factor 2, and failed to make *prima facie* showing that any claim he raises is meritorious under *Grinols* factor 3, he cannot make a *prima facie* showing under factor 4. He has failed to demonstrate that a different outcome was reasonably possible in *Larson II* if McComas had filed a petition for rehearing on the issues Larson raises in his amended application.

III. *Res Judicata*

The court of appeals recently held that all of Larson's juror misconduct claims are *res judicata*. *Larson v. Superior Court*, 2020 WL 5946629 at *6 (Alaska App. 2020) (unpublished) ("[T]he doctrine of *res judicata* bars Larson from relitigating his underlying claims of juror misconduct.").

Larson does not claim that McComas was ineffective when he prosecuted Larson's first post-conviction relief application in the trial court.

Larson does not claim McComas was ineffective in his opening or rely brief on the appeal of the denial of his first post-conviction relief application.

He claims McComas was ineffective only for failing to seek rehearing on five discrete issues after *Larson II* was decided. Because Larson has failed to make a *prima facie* showing that McComas provided ineffective assistance of counsel by not seeking rehearing, his juror misconduct claims remain barred from relitigation by the doctrine of *res judicata*.

IV. Conclusion

The Amended Application for Post-Conviction Relief is dismissed.

Dated: April 26, 2021

PAUL R. LYLE
Superior Court Judge

I certify that on 4/27/2021
copies of this form were sent to:
L. Larson Jr - mail
D. Buettner - email
CLERK: MA

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LOREN J. LARSON, JR.,	)	
Applicant,	)	
v.	)	
STATE OF ALASKA	)	CASE NO. 4FA-16-02876 CI
Respondent.	)	

ORDER DENYING MOTION FOR RECONSIDERATION & MOTION TO AMEND APPLICATION

The motion for reconsideration of the Order Dismissing Amended Application for Post-Conviction Relief entered on April 26, 2021 is denied.

Ineffective Assistance for Attorney's Failure to Consult

Mr. Larson claims that the April 26, 2021 dismissal overlooked his argument that Mr. McComas was ineffective by failing to consult with Larson about the possibility of filing a petition for rehearing with the court of appeals, and by overlooking the fact that Larson would have insisted on filing for rehearing. This argument was not overlooked. The order dismissing the amended application assumed that McComas failed to raise the issue of rehearing and accepted as true that Larson would have insisted that rehearing be sought. Order at 4 n. 3. As explained in the order, those facts, standing alone, are insufficient to establish a *prima facie* case of ineffective assistance of post-conviction relief counsel.

Harvey v. State, 285 P.3d 295 (Alaska App.2012) is inapposite. McComas did not fail to advise Larson of the right to appeal *Larson II* to the Alaska Supreme Court. (In fact, McComas filed a petition for hearing with the high court). Rather, McComas, exercising his professional

discretion, decided not to file what is essentially a motion for reconsideration, and he did so for sound tactical reasons. *See* Order at pages 6-8. *Harvey* does not hold that attorneys are ineffective if they do not discuss with their clients and file every conceivable motion that their clients may wish to pursue. Filing a petition for rehearing is a tactical decision left to the discretion of the attorney. *See* Order at p. 4 n. 3.

Juror Pounding on a Table

The order dismissing the amended application addressed the claim that a juror tried to re-create the sound of a .22 caliber firearm. The issue Larson raises on reconsideration concerns a juror pounding on a table to recreate decibels. To the extent that this is a different issue, it was not raised in Larson's amended application or in the pleadings on the State's motion to dismiss. This issue cannot be raised for the first time on reconsideration. New legal grounds for recovery first raised in a motion for reconsideration are waived. *McCarter v. McCarter*, 303 P.3d 509, 513 (Alaska 2013); *Clemensen v. Providence Alaska Medical Center*, 203 P.3d 1148, 1153 (Alaska 2009). In *Katz v. Murphy*, 165 P.3d 649, 661 (Alaska 2007), the supreme court held:

> Alaska Civil Rule 77(k), which governs motions for reconsideration, does not allow the moving party to raise new grounds as a basis for reconsideration; instead the rule only allows reconsideration of points that were overlooked or misconceived despite having been properly raised.

Issues raised for the first time on reconsideration are untimely. *Katz*, 165 P.3d at 662 n. 47 (citing *Stadnicky v. Southpark Terrace Homeowner's Ass'n, Inc.*, 939 P.2d 403, 405 (Alaska 1997) and *Neal & Co., Inc. v. Ass'n of Vill. Council Presidents Reg'l Hous. Auth.*, 895 P.2d 497, 506 (Alaska 1995)). Larson claims he raised this issue in his *initial* application, but Larson's initial application is not before the court. Larson filed an amended application that did not include this particular claim.

The Absence of Larson's Wife from Trial

The order dismissing the amended application did not overlook the issue of Larson's wife's absence from the courtroom during his trial. The order addresses this issue at page 14-15. Larson's motion for reconsideration merely re-argues the point.

The Motion to Amend the Application

The motion for an opportunity to correct deficiencies and amend application is also denied. Mr. Larson amended his application on April 30, 2020 after having been granted a stay and extensions of time to file an amended application that, together, spanned more than three years.

Conclusion and Order

The motion for reconsideration and to further amend the application is denied.

Dated this 11th day of May, 2021 at Fairbanks, Alaska.

Paul R. Lyle
Superior Court Judge

I certify that on 5/24/2021 copies of this form were sent to:
DA, L. Larson
Clerk:

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

LOREN J. LARSON, JR.,	)	
Applicant,	)	
v.	)	
STATE OF ALASKA	)	CASE NO. 4FA-16-02876 CI
Respondent.	)	

ORDER GRANTING, IN PART, MOTION TO CORRECT INFORMATION IN THE ORDER DENYING MOTION FOR RECONSIDERATION
(Case Motion No. 7)

The order denying Larson's motion for reconsideration states that Larson's amended application for post-conviction relief failed to raise the issue of a *juror pounding on the table* during jury deliberations in an attempt to re-create the sound of a .22 caliber firearm. Larson claims he plainly raised this issue on page 16 of his amended application.

Larson is correct that he raised this issue. Amended Application at 16. The order dismissing his amended application concluded that Larson mischaracterized the evidence he based his claim upon: The juror affidavit the court cited states that the juror *discussed* the noise that a .22 caliber firearm would create. [Exhibit 6 at 32, ¶ 6] Larson's amended application, however, cited Exhibit 6, page *34*, in which a juror stated that another juror pounded on the table to re-create the noise of a .22 caliber firearm.

The court's order denying reconsideration and its order dismissing Larson's amended application at pages 15-18 are hereby corrected to acknowledge that Larson raised the "juror pounding on the table to recreate the noise of a .22 caliber firearm" issue in his amended application for post-conviction relief. The order dismissing the amended application and the order

denying reconsideration of the dismissal are otherwise affirmed for two closely related reasons: **First**, a juror pounding on the table to recreate the noise of a .22 caliber weapon falls well within the scope of the court of appeals ruling in *Larson II* that a "juror's 'pre-existing . . . knowledge of a general nature' does not constitute 'extraneous prejudicial information' for purposes of [Evidence] Rule 606(b)." *Larson v. State,* 79 P.3d 650, 654 (Alaska App. 2003) *(Larson II)* (quoting *Titus v. State*, 963 P.2d 258, 262 (Alaska 1998)). **Second**, because the "juror pounding on the table" issue is subsumed within the scope of the just-quoted portion of *Larson*, Larson's amended application still fails to make a *prima facie* showing that this issue is meritorious for the reasons stated on pages 16-17 of the order dismissing Larson's amended application, as follows:

> Larson has failed to make a *prima facie* showing that this issue is meritorious for two reasons. First, the premise of Larson's application is that McComas was ineffective for failing to seek rehearing on issues McComas raised in his brief that the court of appeals *did not* address. But as demonstrated immediately above, the court of appeals plainly addressed this issue in *Larson II.* Second, the juror's affidavit, McComas's brief, and the above-quoted portion of *Larson II* fully support McComas's conclusion in his affidavit that the court of appeals correctly decided the issue. [*See* Exhibit 6 at 32, ¶ 6; Exhibit 5 at 15; Exhibit 12at 13, ¶ 11.A.1.][1] There was no basis to seek rehearing.
>
> McComas had a sound tactical reason for not seeking rehearing on the weapon noise issue: Rehearing is not available to reargue issues already raised and fully addressed by the appellate court. Nor does Larson claim that McComas's briefing on the issue was deficient: The court of appeals did not misconceive the issue as presented by McComas.

Order Dismissing Amended Application for Post-Conviction Relief at 16-17.

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[1] Exhibit 6, p. 34 ¶ 2 should also be added to this evidence citation.

The motion to correct the information in the court's order denying reconsideration is granted, in part, as stated above. The order dismissing Larson's amended application for post-conviction relief and the order denying reconsideration of that order are otherwise affirmed.

Dated this 28th day of June 2021 at Fairbanks, Alaska.

Paul R. Lyle
Superior Court Judge

I certify that on 6/29/21
copies of this form were sent to.
Larson, Buethner
Clerk: BP

In the Supreme Court of the State of Alaska

Loren J. Larson, Jr.,
Petitioner,

v.

State of Alaska,
Respondent.

Supreme Court No. **S-18760**

Order
Petition for Hearing

Date of Order: **10/31/2023**

Court of Appeals No. **A-13849**
Trial Court Case No. **4FA-16-02876CI**

Before: Maassen, Chief Justice, and Carney, Borghesan, Henderson, and Pate, Justices.

On consideration of the Petition for Hearing filed on **7/11/2023**, and the Response filed on **8/14/2023**,

IT IS ORDERED:

The Petition for Hearing is **DENIED**.

Entered at the direction of the court.

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

cc: Court of Appeals Judges
Trial Court Clerk – Fairbanks

Distribution:

Mail:
Larson, Jr. , Loren J.

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