

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE DALLAS CRAIG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51975

**FILED**

JUL 09 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
\* DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Dale Dallas Craig's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On March 22, 2006, in two separate judgments of conviction, the district court convicted Craig of trafficking in a controlled substance, possession of a controlled substance, possession of a controlled substance with the intent to sell, felony failure to stop on the signal of a police officer, and being an ex-felon in possession of a firearm. The district court sentenced Craig to serve various consecutive and concurrent terms of imprisonment, amounting to life with the possibility of parole.

Craig appealed from both judgments of conviction. We consolidated the appeals, ordered the judgments of conviction affirmed in part, and remanded the case to the district court with instructions to determine whether two of the convictions were redundant and, if so, to amend the appropriate judgment of conviction accordingly. Craig v. State,

Docket Nos. 47149 & 47150 (Order Affirming in Part and Remanding, January 24, 2007). The remittitur issued on February 20, 2007. Thereafter, the district court determined that the conviction for possession of a controlled substance with the intent to sell was redundant and entered an amended judgment of conviction on August 8, 2007.

On March 7, 2008, Craig filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The petition collaterally attacked both judgments of conviction. The district court appointed counsel to represent Craig. The State filed a motion to dismiss the petition, Craig filed an opposition, and the State filed a reply. The district court heard argument on the motion to dismiss, found that the petition was untimely filed, determined that Craig had not demonstrated good cause for the delay, and denied the petition. This appeal followed.

Craig contends that the district court erred in determining that his petition was procedurally barred. Craig concedes that his petition was untimely filed, but argues that his reliance on the advice of counsel and the amended judgment of conviction provided good cause to excuse the delay and that he is actually innocent.

An untimely habeas petition is procedurally barred unless the petitioner shows good cause for the delay. NRS 34.726(1). To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with procedural default rules, NRS 34.726(1)(a); Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), and “dismissal of the petition as untimely will unduly prejudice the

petitioner,” NRS 34.726(1)(b). A colorable showing of actual innocence may excuse a failure to demonstrate good cause under the fundamental miscarriage of justice standard. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

#### Advice of Counsel

Craig claims that he relied upon the advice of counsel, who told him in writing that he had until March 2, 2008, to file his petition. In a letter informing Craig of our decisions regarding his direct appeals, counsel stated that

a petition for post-conviction relief must be filed within one year of the final pleading resolving the appeal, called the remittitur. For the purposes of calculating your deadline, I recommend that you file your petition, if you choose, no later than one year from the date the Nevada Supreme Court decision was filed. The date the remittitur was filed in your case was on March 2, 2007. That gives you approximately seven to eight months to prepare and file your Writ. Remember, you have one year, to be safe I recommend that you file your Writ by February 27, 2008.

Although counsel’s letter erroneously advised Craig to file his petition by February 27, 2008,<sup>1</sup> Craig failed to follow this advice. We further note

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<sup>1</sup>Because the remittitur issued on February 20, 2007, Craig had until February 20, 2008, to file his habeas petition. See NRS 34.726(1).

that nothing in the record on appeal indicates that counsel advised Craig “to file his petition by leaving it in [the] prison library.” See Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002) (refusing to extend the prison mailbox rule to the filing of post-conviction habeas petitions). And we conclude from these circumstances that Craig has not demonstrated that counsel’s advice interfered with his ability to file a timely habeas petition.

#### Amended Judgment

Craig claims that his reliance on the date of the amended judgment of conviction provides good cause for his delay in filing the habeas petition. Craig asserts that he relied upon Collier v. Bayer, 408 F.3d 1279, 1283 (9th Cir. 2005) (finding “nothing in either the plain language of [NRS] 34.726 or the Nevada courts’ interpretation of that statute to suggest that an amended judgment would not entitle [a petitioner] to a new one year time period to pursue habeas relief”). And Craig argues that even if Sullivan v. State, 120 Nev. 537, 96 P3d 761 (2004), applied to his case, the fact that he relied upon Collier would constitute good cause for the late filing.

We are not bound by, nor persuaded by, the decision in Collier. See Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), aff’d, 489 U.S. 538 (1989). Nothing in NRS 34.726(1) suggests that amending the judgment of conviction to correct an error to the benefit of the petitioner restarts the one-year filing period for a habeas petition challenging the validity of a judgment of conviction. In Sullivan,

we suggested that the entry of an amended judgment of conviction may provide good cause “if the claims presented in a petition filed within one year of the entry of the amended judgment challenge the proceedings leading to a substantive amendment to the judgment and could not have been raised in prior proceedings.” 120 Nev. at 541, 96 P.3d at 764.

Here, Craig did not raise any claims challenging the amendments contained within the amended judgment of conviction. Under these circumstances, Craig has not demonstrated that the amended judgment of conviction provided good cause to excuse the delay in filing his petition.

#### Actual Innocence

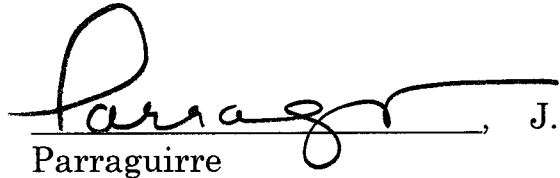
Craig claims that he has demonstrated in his petition and the accompanying documents that he is actually innocent of the alleged charges. However, the only document Craig cites to in his fast track statement is an unsworn declaration that he filed in the district court with a motion for reconsideration. In the declaration, Craig asserts simply that he was falsely convicted and stands innocent of all of charges against him.

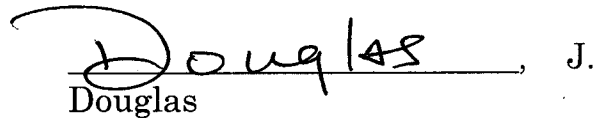
“To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial.” Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schulp v. Delo, 513 U.S. 298, 324 (1995)). To demonstrate that he is actually innocent of the underlying crime, a petitioner must show that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” Id. (quoting Schulp, 513 U.S. at 327).

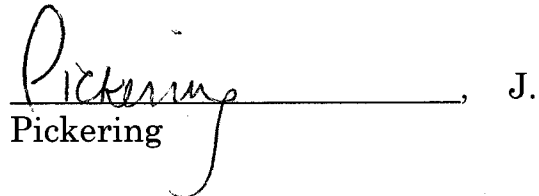
As Craig has not presented any new reliable evidence in support of his claim of actual innocence, we conclude that he has not made a colorable showing of actual innocence that would excuse the untimely filing of his habeas petition.

Having considered Craig's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

cc: Hon. John P. Davis, District Judge  
Robert E. Glennen III  
Attorney General Catherine Cortez Masto/Carson City  
Nye County District Attorney/Pahrump  
Nye County District Attorney/Tonopah  
Nye County Clerk