

IN THE UTAH COURT OF APPEALS

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| HARRY MILLER, Petitioner/Appellant, v. STATE OF UTAH, Respondent/Appellee, | Appeal No. 20080921-CA District Court Case No. 080907781 |
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AMICUS CURIAE BRIEF

FOR ROCKY MOUNTAIN INNOCENCE CENTER

REQUEST TO PARTICIPATE AT ORAL ARGUMENT

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Reason for Amicus Curiae Brief

Amicus Curiae Rocky Mountain Innocence Center (“RMIC”) files this brief to assist the court in applying the correct analytical framework under the “Postconviction Determination of Factual Innocence” statute, Utah Code section 78B-9-401. The innocence statute became effective in 2008 and has not been interpreted by Utah appellate courts. For that reason, this court’s interpretation of the statute will be influential with district courts regardless of the outcome of this appeal.

At the outset, it is important to understand that the purpose of the innocence statute is not to compensate those wrongly convicted for their time in prison. Nothing can compensate for that. The primary purpose of the statute is to provide courts with jurisdiction (i) to entertain factual innocence claims, (ii) to create a record for the review of factual innocence claims, and (iii) in the vast majority of cases, to determine whether a prisoner should be released from prison. Utah Code Ann. §§ 78B-9-402 to -404 (2008).

In enacting the innocence statute, the legislature recognized the criminal justice system sometimes sends innocent people to prison. The innocence statute is designed to ensure that factually innocent prisoners have a forum to present their innocence claims, even when they lack objective DNA evidence described in the DNA testing statute, Utah Code section 78B-9-300. Because many innocence claims do not involve objective DNA evidence, a crucial aspect of the innocence statute is its requirement that “the court shall order a hearing if it finds there is a bona fide issue as to whether the petitioner is factually innocent of the charges of which the petitioner was convicted.” Utah Code Ann. § 78B-9-402(6)(b)(i) (emphasis added). A hearing at which prisoners can present evidence of factual innocence fulfills the primary purpose of the innocence statute.

A secondary purpose of the innocence statute is to provide an “assistance payment” to a factually innocent petitioner who was wrongfully incarcerated. Utah Code Ann. § 78B-9-405. The focus of this appeal is unusual because Harry Miller is no longer in prison. Nonetheless, this case is about whether Mr. Miller can prove that he was wrongfully convicted and not about whether he qualifies for an “assistance payment.”

The posture of this case should not influence this court’s interpretation of the statute. The innocence statute applies not only in unusual cases like this one, but also in the majority of innocence cases in which a factually innocent prisoner without objective DNA evidence seeks release from prison. While this may be an obvious point, it is a point worth making in light of the State’s assertion that “[t]he purpose of the statute is to financially compensate one who can provide by clear and convincing evidence that he is factually innocent and was wrongly imprisoned.” (State’s Brief at 14.)

RMIC first will outline the relevant procedural history and then describe the analytical framework within which factual innocence claims should be analyzed.

Relevant Procedural History

In 2002, a jury wrongfully convicted Mr. Miller of aggravated robbery when his trial counsel failed to develop and present alibi evidence showing that Mr. Miller was in Louisiana at the time of the crime. (R2 135-39.)¹ The trial court sentenced Mr. Miller to five years to life in prison. On appeal, Mr. Miller moved for a Rule 23B remand to permit the trial court to determine whether his trial counsel had been constitutionally ineffective in failing to present the testimony of alibi witnesses. (R2 164-67.) During the

¹ Following the practice of the parties, RMIC will refer to the record in the underlying criminal case using “R2” and the record in this case using “R.”

Rule 23B remand hearing, Mr. Miller presented an affidavit of Beverly Kolder and an affidavit and the live testimony of Berthella Miller. The Kolder and Miller affidavits were offered to show that Mr. Miller, a recent stroke victim, had insufficient time to travel from Louisiana to commit the crime and then back to Louisiana after the crime. (R. 14-24.) After considering that evidence, the trial court ruled that (i) trial counsel's performance in failing to present Ms. Kolder and Ms. Miller as witnesses was not constitutionally deficient and (ii) even if counsel's performance had been constitutionally deficient, "there is no reasonable probability of a different outcome at trial."² (R. 26.)

After the Rule 23B remand hearing, the State stipulated to summary reversal in the appellate court on the ground that "the interest of justice dictate that [Mr. Miller] receive a new trial." (R. 30.) However, the prosecutor did not proceed to trial, but instead moved to dismiss all charges. (R. 3.) On July 6, 2007—more than 4 years after the jury convicted Mr. Miller—the trial court dismissed all charges "in the interest of justice." (State's Brief at Addendum F.)

On May 7, 2008, Mr. Miller filed his petition under the factual innocence statute. (R. 1-5.) In its support, Mr. Miller provided copies of the Kolder and Miller affidavits previously submitted during the Rule 23B remand hearing. (R. 31-48.) The State moved to dismiss the petition under Rule 12(b)(6) on the ground that the petition describes only evidence the trial court considered during the Rule 23B remand hearing. The State argued that the trial court had already ruled that that evidence failed to demonstrate a reasonable probability of a different outcome at trial. (R. 64, 73-79.)

² In this proceeding, the same trial court found that "the evidence makes it unlikely that Petitioner committed the crime." (R. 172.)

The trial court granted the State's motion to dismiss. The court first ruled that the evidence described by Mr. Miller was not "newly discovered" under section 402(a)(vi)(A)³ because he was aware of the Kolder and Miller affidavits at the time of the Rule 23B remand hearing. (R. 172.) The trial court then ruled that Mr. Miller could not satisfy the "ineffective assistance" exception under section 402(a)(vi)(B) because the court had previously ruled that Mr. Miller's trial counsel was not constitutionally ineffective. (*Id.*) Importantly, the trial court did not consider whether the "interest of justice" exception in section 402(2)(a)(vi)(C) applied because "Petitioner has not met other prongs of Section 78B-9-402." (*Id.* (emphasis added).)

³ Utah Code section 402(2)(a) provides:

A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted, if the person asserts factual innocence under oath and the petition alleges:

- (i) newly discovered material evidence exists that establishes that the petitioner is factually innocent;
- (ii) the petitioner identifies the specific evidence the petitioner claims establishes innocence;
- (iii) the material evidence is not merely cumulative of evidence that was known;
- (iv) the material evidence is not merely impeachment evidence;
- (v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent; and
- (vi) (A) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence;

(B) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence; or

(C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in the interest of justice.

The court cited two “other prongs” that Mr. Miller had not satisfied: (i) section 402(2)(a)(iii)’s requirement that the new evidence not be “merely cumulative of evidence that was known” and (ii) section 404(1)(b)’s requirement that a petitioner establish “factual innocence by clear and convincing evidence.”⁴ (*Id.*) The trial court ruled that Mr. Miller had not satisfied the “no cumulative evidence” requirement because he “presented his alibi defense at trial,” and the evidence described in the petition “would have served only to bolster his testimony, not present a wholly new assertion.” (*Id.*) The trial court then ruled that Mr. Miller had not shown that the evidence described in the petition “would ‘establish’ that he was innocent.” (*Id.*)

Finally, the trial court made an internally inconsistent ruling: “Although the evidence makes it unlikely that Petitioner committed the crime, the Court reviewed this evidence as part of a remand from the court of appeals and determined that there was ‘no reasonable probability of a different outcome at trial even if [the new witnesses] had testified.’” (*Id.* (alteration in original) (emphasis added).) It is unclear how evidence that makes it “more likely than not” Mr. Miller was innocent could fail to create a reasonable probability that a jury would not have found him guilty beyond a reasonable doubt.⁵

⁴ “In any hearing conducted under this part, the Utah attorney general shall represent the state. The burden is upon the petitioner to establish the petitioner’s factual innocence by clear and convincing evidence.” Utah Code Ann. § 78B-9-404(1).

⁵ The State quotes only the last part of the trial court’s statement—“no reasonable probability of a different outcome at trial if [the new witnesses] had testified”—which concerns only the court’s ruling after the Rule 23B remand hearing. (State’s Brief at 35.) The State then argues that Mr. Miller “did not establish on appeal, and has not established in this proceeding, that the 23B findings were clearly erroneous.” (*Id.*) Of course, Mr. Miller did not establish that the findings were clearly erroneous on appeal because the State agreed to summary reversal before the appellate court could reach the merits. And Mr. Miller did not establish that the findings were clearly erroneous in this proceeding because the trial court dismissed his petition at the pleading stage.

Summary of the Argument

First, the correct standard in determining whether the allegations in Mr. Miller's petition warrant a hearing is whether the petition presents a "bona fide issue" concerning factual innocence. It is not, as the State asserts, "whether the petition proved by clear and convincing evidence that he was factually innocent." (State's Brief at 17.) This court should spell out that the "clear and convincing" standard applies to evidence presented at a hearing to determine innocence, and the "bona fide issue" standard applies to allegations in a petition to determine whether a hearing is required in the first place.

Second, the trial court misinterpreted the requirement that evidence described in a petition cannot be "merely cumulative of evidence that was known." The trial court ruled that because Mr. Miller presented an alibi defense at trial, any newly discovered evidence supporting that alibi defense would be "merely cumulative." The court's interpretation of the term "cumulative" is too broad. Mr. Miller's alibi defense, which was not developed at trial, was that he was in Louisiana at the time the crime was committed. On the trial court's interpretation, any newly discovered evidence that demonstrates Mr. Miller was in Louisiana during the commission of the crime would be "merely cumulative" and therefore could not be used to prove factual innocence, even if Mr. Miller were currently in prison. This court should reject that narrow interpretation of "cumulative" and adopt the following standard: Evidence is cumulative if it is the same evidence in a different form; but it is not cumulative if it is different evidence that supports the same theory.

Third, the trial court should have determined whether the "interest of justice" exception applies. In reviewing a petition, trial courts must make the following determinations: (i) whether the petition describes evidence that is "new" in that it neither

was known nor should have been discovered during a prior proceeding; (ii) if not, whether prior counsel was constitutionally ineffective in failing to discover and present the evidence in a prior proceeding; and (iii) if not, whether the court nonetheless should order an evidentiary hearing to determine factual innocence in the interest of justice. Here, the trial court ruled that the evidence described in Mr. Miller's petition was not "newly discovered." Assuming this ruling is correct, the trial court erred in its interpretation of the two exceptions.

The trial court first ruled that it need not determine whether Mr. Miller's counsel was constitutionally ineffective because it had already found that trial counsel was not constitutionally ineffective in the Rule 23B hearing. The court failed to consider, however, whether Mr. Miller's counsel during the Rule 23B hearing was constitutionally ineffective. This court should clarify that the "constitutionally ineffective" exception can be satisfied by any prior counsel's deficient performance.

The trial court next declined to consider whether the "interest of justice" exception applies on the ground that the following two rulings had made it unnecessary: (i) the petition described evidence that was "merely cumulative" and (ii) the allegations failed to establish factual innocence. Because those two rulings applied incorrect standards, they cannot justify the trial court's failure to make an "interest of justice" determination. This is especially true in this case, where (i) the trial court found that "the evidence makes it unlikely that Petitioner committed the crime;" (ii) the State previously agreed that Mr. Miller deserved a new trial "in the interest of justice;" (iii) the trial court dismissed all charges against Mr. Miller "in the interest of justice," and (iv) the evidence of factual innocence is overwhelming.

This court should reverse the order dismissing the petition, clarify the standards the trial court should apply under the innocence statute, and order the trial court to determine whether a hearing to determine factual innocence is in the “interest of justice.”

Argument

RMIC agrees with the State that the innocence statute is not satisfied by the mere fact that a petitioner’s “conviction has been overturned.” (State’s Brief at 25.) Thus, to the extent Mr. Miller argues that he need not satisfy the provisions of the innocence statute, RMIC disagrees. For this reason, RMIC will not address the arguments presented by the State on pages 24 to 32 of its brief.

RMIC will address the other arguments presented by the State and outline the analytical framework in which trial courts should review factual innocence petitions.

I. The “Bona Fide Issue” Pleading Standard That Determines Whether a Hearing Is Required Is Distinct From the “Clear and Convincing” Burden of Proof Standard That Applies in the Hearing

The State describes the wrong standard for determining whether Mr. Miller’s petition warrants a hearing to determine factual innocence. The district court did not consider whether the petition presented a “bona fide issue,” but instead ruled that the petition does not describe evidence that “would ‘establish’ he was innocent.” Based upon that description, the State characterizes this appeal as follows: “This case is about whether the petitioner proved by clear and convincing evidence that he was factually innocent.”⁶ (State’s Brief at 17.) However, this case never proceeded beyond the

⁶ The State elsewhere describes the trial court’s ruling as reflecting the fact that Mr. Miller failed “to prove factual innocence.” (State’s Brief at 14 (emphasis added).) The State later considers dispositive that in light of evidence suggesting that Mr. Miller was in Louisiana at the time of the crime, Mr. Miller “could conceivably have gotten on an airplane, come out to Utah, and robbed a stranger for a few dollars.” (*Id.* at 22

pleading stage because the trial court granted the State's motion to dismiss under Rule 12(b)(6). If the State is correct that the trial court applied the "clear and convincing" burden of proof, then the trial court erred.

The State fails to distinguish between the pleading standard described in section 402 and the burden of proof standard described in section 404. Section 402 is titled, "Petition for determination of factual innocence -- Sufficient allegations -- Notification of victim." Utah Code Ann. § 78B-9-402. That section outlines the standards by which courts evaluate the allegations in petitions and determine whether to order a hearing to determine factual innocence. *Id.* Section 402(6)(b)(i) states that a court "shall order a hearing if it finds there is a bona fide issue as to whether the petitioner is factually innocent." *Id.* § 78B-9-402(6)(b)(i) (emphasis added).

The court has previously stated that the term "'bona fide' is defined as being 'made in good faith without fraud or deceit'" or as being "'in or with good faith; honestly, openly, and sincerely; without deceit or fraud.'" State v. One 1979 Pontiac Trans Am, 771 P.2d 682, 689 (Utah Ct. App. 1989) (quoting Webster's Third New Int'l Dictionary, 250 (1986) and Black's Law Dictionary, 160 (5th ed. 1979), respectively)). Under the test for accord and satisfaction, the Utah Supreme Court has stated that a "bona fide dispute" exists where there is "a good-faith disagreement over the amount due under the contract." Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶14, 84 P.3d 1154.

(quoting Pet'r. Brief at 24).) The State then equates "conceivability" with the lack of "clear and convincing evidence" and concludes that Mr. Miller "has failed to meet his burden of proof to establish by 'clear and convincing evidence' that he is factually innocent." (*Id.* at 23.)

The “bona fide” or “good faith” standard is akin to the standards in Rule 11 of the Utah Rules of Civil Procedure, a lesser standard than that required to avoid dismissal under Rule 12(b)(6). However, because petitions under the actual innocence statute are also governed by non-conflicting parts of Rule 65C, the “bona fide issue” standard is interpreted in light of the “frivolous on its face” standard in Rule 65C(g), which is defined, in relevant part, as “the facts alleged do not support a claim for relief as a matter of law” or “the claims have no arguable basis in fact.” Utah R. Civ. P. 65C(g)(2).

It is not an accident that the “bona fide issue” standard governs whether the trial court must hold a hearing. It addresses the problem that “after trial, convicted criminal defendants seeking to prove their innocence through newly discovered non-DNA evidence have trouble obtaining access to full-fledged evidentiary hearings in state courts.” Daniel S. Medwed, Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts, 47 Ariz. L. Rev. 655, 686 (2005). Illustrating this problem, one study found that courts in San Diego ordered hearings in only 6 of 312 cases. Stephen J. Perrelo & Albert N. Delzeit, Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study, 19 T. Jefferson L. Rev. 283 (1997).

In contrast to the “bona fide issue” standard to obtain a hearing, the innocence statute articulates a “clear and convincing” standard for evaluating the evidence presented at a hearing. Section 404 is titled, “Hearing upon petition -- Procedures -- Court determination of factual innocence.” Utah Code Ann. § 78B-9-404. That section’s first sentence confirms that it governs hearings, not petitions: “In any hearing conducted under this part, the Utah attorney general shall represent the state.” Id. § 78B-9-

404(1)(a). The next sentence describes a petitioner's burden of proof at the hearing:

"The burden is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence." Id. § 78B-9-404(1)(b).

With the "bona fide issue" standard to be entitled to a hearing and the "clear and convincing" standard to prove innocence at the hearing, the innocence statute enhances "the possibility that (a) actually innocent prisoners will receive evidentiary hearings in newly discovered evidence cases and (b) only valid claims of innocence eventually obtain relief." Medwed, 47 Ariz. L. Rev. at 689. For that reason, properly distinguishing between section 402's pleading standard and section 404's burden of proof is crucial to carrying out the purpose of the innocence statute. To satisfy the "bona fide issue" standard, a petitioner need not establish, or demonstrate, or prove anything by clear and convincing evidence.

This court should (i) reject the State's attempt to import the "clear and convincing" standard into the pleading requirements and (ii) stress that the "clear and convincing" standard applies to evidence presented at a hearing to determine innocence. In contrast, the "bona fide issue" standard is used to evaluate allegations presented in a petition to determine whether the trial court must order a hearing in the first place.

II. Evidence Is Cumulative Where It Is the Same Evidence In a Different Form, Not Where Different Evidence Supports the Same Theory

The trial court applied the wrong standard in determining whether the petition describes evidence that is "merely cumulative" of evidence presented at trial. Section 402 requires a petitioner to describe evidence that "is not merely cumulative of evidence

that was known.” Utah Code Ann. § 78B-9-402(2)(a)(iii). Here, the evidence described in the petition was not “merely cumulative” of evidence Mr. Miller presented at trial.

At trial, Mr. Miller and the State stipulated that Mr. Miller was on leave from his job in Louisiana at the time of the crime. (R. 2.) That was trial counsel’s attempt at presenting an alibi defense. Beverly Kolder and Berthella Miller did not testify at trial. (R. 31-48.) After Mr. Miller was convicted, Mr. Miller presented the affidavits of Beverly Kolder and Berthella Miller at a Rule 23B hearing to determine whether Mr. Miller’s trial counsel had been constitutionally ineffective. (R. 8.) These same affidavits are described in and attached to the petition. (R. 49, 172.) The trial court refused to consider the affidavits on the ground that “Petitioner has not shown that the evidence, upon which he seeks to rely, is not cumulative of evidence presented at trial. Petitioner presented his alibi defense at trial. These additional witness[es] would have served only to bolster his testimony, not to present a wholly new assertion.” (R. 172.)

The district court’s interpretation of “cumulative” would overly restrict factual innocence claims and thereby undermine the purpose of the innocence statute. To illustrate, consider what took place here. At trial, Mr. Miller testifies that he was in Louisiana at the time of the crime, but provides no other evidence in support of an alibi. Mr. Miller is convicted with very weak, but not legally insufficient, evidence and is sentenced to life in prison. Years after the conviction, several people come forward with credible evidence that Mr. Miller was in Louisiana at the time of the crime. Under the broad interpretation of “cumulative,” all of the newly discovered evidence would be cumulative of Mr. Miller’s testimony at trial because the new evidence “would have served only to bolster his testimony, not to present a wholly new assertion.” (R. 172.)

In fact, if newly discovered DNA evidence were to demonstrate that Mr. Miller was in Louisiana at the time of the crime, that evidence would also merely “bolster” Mr. Miller’s testimony and would not present a “wholly new assertion.” Under the broad interpretation of “cumulative,” then, a petition describing such DNA evidence would fail as a matter of law. Nor could the “interest of justice” exception solve this problem under the trial court’s interpretation. The trial court ruled that it need not consider the “interest of justice” exception because the evidence in the petition was cumulative of evidence presented at trial. (R. 172.) Such results would undermine the innocence statute’s purpose of providing wrongly convicted prisoners a mechanism to regain their freedom regardless of when they discover new evidence of their factual innocence. It makes no sense to interpret the “cumulative” requirement to preclude such claims.

Instead, this court should adopt the definition of “cumulative” in the Post-Conviction Remedies Act (“PCRA”), from which the language in the innocence statute was copied. Compare Utah Code Ann. § 78B-9-104(e)⁷ with Utah Code Ann. § 78B-9-402(2). In interpreting the term “cumulative” in the PCRA, this court has held that third-party testimony that a witness had admitted to lying at trial is cumulative of a letter in

⁷ Utah Code section 78B-9-104(e), with emphasis added, provides:

... newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

- (i) neither the petitioner nor petitioner’s counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;
- (ii) the material evidence is not merely cumulative of evidence that was known;
- (iii) the material evidence is not merely impeachment evidence; and
- (iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

which the same witness recanted her testimony. Loose v. State, 2006 UT App. 149, ¶¶11-12, 37, 135 P.3d 886. In other words, the testimony was cumulative because it merely restated what the recantation letter said. Id. at ¶37.

The definition of “cumulative” in Loose is “the same evidence in a different form.” In contrast, the definition employed by the trial court was “different evidence that supports the same theory” or, as the trial court put it, the same “assertion.” (R. 172.)

Rule 403 of the Federal Rules of Evidence⁸ defines “cumulative” even more narrowly than this court did in Loose: “Evidence is ‘cumulative’ when it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates.” United States v. Williams, 81 F.3d 1434, 1443 (7th Cir.1996) (emphasis added). The Utah Supreme Court has articulated a similarly narrow definition of “cumulative” in Rule 403 of the Utah Rules of Evidence.⁹ State v. Knowles, 709 P.2d 311, 312 (Utah 1985) (holding “verbatim restatements of the informant’s in-court testimony” to be cumulative).

Consistent with this, this court has stated that “[e]vidence is cumulative if it is ‘of the same character as existing evidence and . . . supports a fact established by the existing

⁸ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403.

⁹ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Utah R. Evid. 403.

evidence (esp[ecially] that which does not need further support).” State v. Wengreen, 2007 UT App 264, ¶24, 167 P.3d 516 (quoting Black’s Law Dictionary 458 (abr. 7th ed. 2000)).

A fact that indicates innocence needs further support as long as that fact is susceptible to further support. Here, the fact that Mr. Miller was in Louisiana at the time of the crime requires further support because, according to the State in its brief, that fact has not been established. (State’s Brief at 23-24.) Therefore, the evidence described in the petition is not “merely cumulative” of the evidence Mr. Miller presented at trial.

This court should reject the broad definition of “cumulative” and adopt the more narrow definition that is consistent with the purpose of the innocence statute: Evidence is cumulative if it is the same evidence in a different form, but it is not cumulative if it is different evidence that happens to support the same theory or “assertion.”

III. The Trial Court Should Have Determined Whether the “Interest of Justice” Required a Hearing to Determine Factual Innocence

The trial court also applied the wrong standards under section 402(2)(a)(vi), which defines what constitutes “newly discovered evidence” and then sets forth two exceptions to the requirement that some evidence described in a petition must be “newly discovered.” The exceptions are (i) prior counsel was constitutionally ineffective and (ii) it is in the interest of justice to determine factual innocence. Utah Code Ann. § 78B-9-402(2)(a)(vi)(B)-(C). Assuming the trial court correctly decided that the petition does not describe “newly discovered evidence,” which is not entirely clear,¹⁰ the trial court erred in its interpretation of the two exceptions.

¹⁰ As the State notes in its brief, the petition describes “additional testimony as to an alibi defense.” (State’s Brief at 18.)

A. The Trial Court Applied the Wrong Standard in Analyzing the “Ineffective Assistance” Exception

Section 402(2)(a)(vi)(B) describes the first exception to the “newly discovered evidence” requirement: “[A] court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence.” Utah Code Ann. § 78B-9-402(2)(a)(vi)(B). This exception can be satisfied by the constitutionally deficient performance of any prior counsel.

The trial court ruled that because it had previously found during the Rule 23B remand hearing that Mr. Miller’s trial counsel had not been constitutionally ineffective, Mr. Miller could not satisfy the “ineffective assistance” exception. (R. 172.) The trial court did not consider whether Mr. Miller’s counsel during the Rule 23B remand hearing was constitutionally ineffective. (R. 171-73.) Therefore, the trial court’s ruling concerning the “ineffective assistance” exception is incomplete.

The State suggests in its brief that the “ineffective assistance” exception applies only where a prior court has already found that prior counsel was constitutionally ineffective. (State’s Brief at 20.) This court should reject the State’s suggestion and clarify that a trial court entertaining an innocence petition may be the same court that finds prior counsel’s performance to have been constitutionally ineffective. Section 402(2)(a)(vi)(B) requires that “a court has found ineffective assistance of counsel,” a requirement that includes a prior court’s determination that counsel was constitutionally ineffective, just as the State notes. This language does not require a prior court to make the finding, however, but only that the “ineffective assistance” finding be made prior to application of the “ineffective assistance” exception.

B. The Trial Court Must Determine Whether The “Interest of Justice” Exception Applies

The trial court erred in failing to determine whether the “interest of justice” exception applies in this case. The “interest of justice” exception provides that a court may “waive[] the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in the interest of justice.”¹¹ Utah Code Ann. § 78B-9-402(2)(a)(vi)(C). The trial court refused to consider whether that exception applied because “Petitioner has not met other prongs of Section 78B-9-402.” (R. 172.) The “other prongs” were the “not merely cumulative” requirement in section 402(2)(a)(iii) and the “clear and convincing evidence” standard in section 404(1)(b). As demonstrated above, however, the trial court misapplied these standards, and therefore, they cannot provide a basis for its failure to consider the “interest of justice” exception. For that reason, this court should reverse and remand to allow the trial court to consider a factual innocence determination is in the “interest of justice.”

There is reason to believe that the trial court would find that the “interest of justice” exception applies. First, the State agreed during an appeal from Mr. Miller’s conviction that “the interest of justice dictate that [Mr. Miller] receive a new trial.” (R. 30.) Second, in the trial court, the prosecutor did not proceed to trial, but instead moved to dismiss all charges, which the trial court did, not because there was insufficient

¹¹ The State describes the trial court’s refusal to consider the “interest of justice” exception as the trial court “specifically decid[ing] not to waive these requirements.” (State’s Brief at 21.) The language in the trial court’s order suggests otherwise: “Although the Court could waive either or both of these requirements in the interest of justice, the Court finds that Petitioner has not met other prongs of Section 78B-9-402.” (R. 172.) The trial court made no finding concerning the “interest of justice” exception, but instead found that the petition failed as a matter of law for independent, or “other,” reasons.

evidence or on the sole ground that the State had requested dismissal, but “in the interest of justice.” (State’s Brief at Addendum F.) Third, even before a hearing in this case, the trial court found that “the evidence makes it unlikely that Petitioner committed the crime.” (R. 172.) This last statement by the trial court suggests that even if the State is correct that a hearing would “duplicate” the Rule 23B remand hearing,¹² the result of a hearing in this case may well be different.

Perhaps more important than these three considerations, however, is that the evidence of factual innocence is overwhelming. As Mr. Miller describes in his brief, in light of the alibi evidence it is barely conceivable that he committed the crime: After suffering a stroke that made it nearly impossible for him to travel alone, Mr. Miller would have had to leave his job in Louisiana, travel 1800 miles to Utah without any of his caretakers, immediately commit a random crime against a stranger for almost no gain, and then almost immediately travel 1800 miles back home. (Pet’r. Brief at 11-12.) In response, the State points out that Mr. Miller “could conceivably” have committed the crime, hardly a firm basis for dismissing Mr. Miller’s petition as a matter of law without any hearing. (State’s Brief at 22.)

In light of these considerations, the trial court should have the opportunity to consider the “interest of justice” exception.

¹² The State also argues that Mr. Miller has “no right to relitigate factual determinations already made” by citing ordinary issue preclusion case law. (State’s Brief at 33.) Of course, whether Mr. Miller has that right under the innocence statute depends upon whether the trial court finds that it is in the interest of justice to allow Mr. Miller to relitigate a factual determination in a new setting designed to determine factual innocence instead of whether trial counsel’s performance was constitutionally deficient.

Conclusion

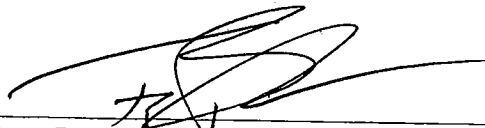
This court should clarify the standards in the innocence statute regardless of the outcome of this appeal. The trial court misunderstood the “bona fide issue” standard, the “merely cumulative” standard, the “ineffective assistance” exception, and the scope of its ability to consider the merits of a petition in the “interest of justice.” This court should take this opportunity to provide guidance to district courts in applying the innocence statute to ensure that it serves its purpose of providing factually innocent prisoners access to courts and, for all but frivolous petitions, a hearing to establish their innocence.

Request to Participate at Oral Argument

Because this court will be interpreting the innocence statute for the first time, and RMIC’s brief provides perspective and arguments that were not advanced by either party, RMIC requests that it be provided independent time during any oral argument to respond to the court’s questions concerning the arguments raised by RMIC.

Respectfully submitted July 15, 2009.

SNELL & WILMER



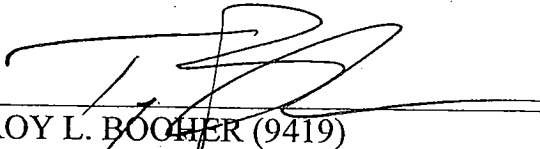
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Certificate of Service

I hereby certify that on the 15th day of July, 2009, I did cause two true and correct copies of the foregoing **AMICUS CURIAE BRIEF** to be served via first class mail, postage prepaid, upon the following:

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