

2008

Miller v. State of Utah : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

W. Andrew McCullough; Counsel for Petitioner.

Erin Riley; Scott Reed; Mark L. Shurtleff; Attorney General; Counsel for Respondent.

Recommended Citation

Brief of Appellee, *Miller v. State of Utah*, No. 20080921 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/1265

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Case No. 20080921-CA

IN THE
UTAH COURT OF APPEALS

Harry Miller,
Petitioner/Appellant,

vs.

State of Utah,
Respondent/Appellee.

Brief of Appellee

Appeal from an order granting State's motion to dismiss postconviction petition for determination of factual innocence, in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Sheila K. McCleve presiding.

W. ANDREW MCCULLOUGH
6885 South State St., Suite 200
Midvale, Utah 84047

ERIN RILEY (8375)
SCOTT REED (4124)
Assistant Attorneys General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

Counsel for Petitioner/Appellant

Counsel for Respondent/Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUE	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS.....	4
SUMMARY OF THE ARGUMENT	13
ARGUMENT	14
I. THE PETITIONER DOES NOT MEET THE REQUIREMENTS OF THE FACTUAL INNOCENCE STATUTE	14
A. The Statutory Requirements	14
B. The petitioner does not meet the statutory requirements to establish factual innocence.....	17
1. Petitioner’s evidence is not newly discovered.	18
2. Petitioner’s counsel was not ineffective.	20
3. The evidence presented by petitioner does not prove that he is factually innocent.	21
C. The petitioner bears the burden of proving by clear and convincing evidence that he is factually innocent.	23
II. THE FACT THAT THE CONVICTION WAS REVERSED ON APPEAL AND THE CASE DISMISSED DOES NOT ESTABLISH PETITIONER’S INNOCENCE AND DOES NOT EXCUSE HIM FROM ANY OF THE STATUTORY REQUIREMENTS	24

A. The fact that the conviction was reversed on appeal and the case has been dismissed is not sufficient to meet the requirements of the factual innocence statute.	24
B. The fact that a conviction was reversed on appeal and the case has been dismissed does not excuse petitioner from any of the statutory requirements.	28
C. The fact that petitioner’s evidence could have been presented at a retrial does not establish that he does not have to meet the requirements of the factual innocence statute.	30
III. THE DISTRICT COURT CORRECTLY DETERMINED THAT ANOTHER EVIDENTIARY HEARING DUPLICATING THE 23B HEARING WAS NOT NECESSARY	32
CONCLUSION.....	36

ADDENDA

Addendum A: District Court Ruling Granting the State’s Motion to Dismiss	
Addendum B: Postconviction Determination of Factual Innocence – Utah Code Ann. § 78B-9-401 through 78B-9-405 (West 2008).	
Addendum C: Utah Rule of Civil Procedure 65C	
Addendum D: Trial court’s Findings and Conclusions	
Addendum E: Stipulated motion for summary reversal	
Addendum F: Motion to dismiss	
Addendum G: 23B motion for remand	
Addendum H: Senate floor debate on factual innocence statute	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Coffin v. United States</i> , 156 U.S. 432, 15 S.Ct. 394 (1895).....	23
---	----

STATE CASES

<i>Chen v. Stewart</i> , 2004 UT 82, 100 P.3d 1177.....	35
<i>City of Salt Lake v. Salt Lake County</i> , 925 P.2d 954 (Utah 1996).....	29
<i>Constr. and Development, L.L.C. v. Old Standard Life Ins. Co.</i> , 2005 UT App 307, 117 P.3d 1082.....	34
<i>Harline v. Barker</i> , 912 P.2d 433 (Utah 1996).....	33
<i>Kell v. State</i> , 2008 UT 62, 194 P.3d 913	2
<i>Oman v. Davis School Dist.</i> , 2008 UT 70, 194 P.3d 956	33
<i>State v. Baker</i> , 2008 UT App 8	36
<i>State v. Keeler</i> , 238 Kan. 356, 710 P.2d 1279 (1985)	31
<i>State v. Paul</i> , 860 P.2d 992 (Utah App. 1993)	29

STATE STATUTES

Utah Code Ann. § 76-1-403(West 2008).....	31
Utah Code Ann. § 76-1-501 (West 2008).....	23
Utah Code Ann. § 76-6-302 (1999).....	2
Utah Code Ann. § 78A-4-103(West 2008).....	1
Utah Code Ann. §§ 78B-9-401 through 405 (West 2008)	<i>passim</i>

STATE RULES

Utah R. Civ. P. 65C	ii
---------------------------	----

OTHER WORKS CITED

Exoneration and Assistance Bill: Senate Floor Debate on S.B. 16.....	14
Norman J. Singer, <i>Sutherland Statutory Construction</i> § 46.01 (5th ed. 1992).....	30

Case No. 20080921-CA

IN THE
UTAH COURT OF APPEALS

Harry Miller,
Petitioner/Appellant,

vs.

State of Utah,
Respondent/Appellee.

Brief of Appellee

STATEMENT OF JURISDICTION

This is an appeal from an order granting the State's motion to dismiss a post-conviction petition for determination of factual innocence (addendum A).

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(f) West (2008).

STATEMENT OF THE ISSUE

1. Did the court err by granting the state's motion to dismiss the postconviction petition for determination of factual innocence without holding an evidentiary hearing that would have duplicated a prior 23B factual hearing?

Standard of Review. "We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the

lower court's conclusions of law." *Kell v. State*, 2008 UT 62, ¶ 8, 194 P.3d 913 (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules relate to this appeal:

- **Post-Conviction Determination of Factual Innocence** - Utah Code Ann. § 78B-9-401 through § 78B-9-405 (West 2008). The text is contained in Addendum B.
- **Utah Rule of Civil Procedure 65C** - the text is contained in Addendum C.

STATEMENT OF THE CASE

On February 18, 2003, the State charged petitioner Miller with one count of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999)§ (R2. 3).¹ A jury convicted Miller as charged, and the trial court sentenced him to a prison term of five years to life (R2. 83, 136). Miller filed a timely appeal to the Utah Supreme Court (R2. 139). That court transferred the case to the Utah Court of Appeals (R2. 154).

While his appeal was pending, Miller filed a motion under rule 23B, Utah Rules of Appellate Procedure, to remand his case to supplement the record with evidence to support his appellate claim of ineffective assistance of trial counsel (R2. 160-212). Specifically, Miller asserted that his counsel failed to conduct a reasonable

¹ This brief refers to the record in this civil case, no. 080907781, as "R," and to the record in the criminal case, no. 031901163FS, as "R2."

investigation of his alibi and that, but for his counsel's alleged failure, the jury would have acquitted him (R2. 164-67).

On remand, the trial court held an evidentiary hearing at which Miller, Miller's trial counsel, Miller's former appellate counsel, and Miller's niece, Berthella, testified (R2. 610 & 611). The trial court made findings of fact and concluded that Miller's trial counsel was not ineffective (addendum D, R13-26).

Nevertheless, on appeal, the parties agreed that there was an error in the trial proceedings and that the interests of justice dictated that Miller receive a new trial (addendum E, R27-29). They therefore filed a stipulated motion for summary reversal. *Id.* The Utah Court of Appeals granted the motion and remanded the case to the Third District Court for a new trial (R30).

In the district court, the prosecution filed a motion to dismiss the case and the trial court dismissed all charges "in the interest of justice." (addendum F). Miller was released from custody the same day (R137).

The following year, Miller filed his petition for determination of factual innocence (R1-54). The State filed its answer to the petition (R61-63) and a motion to dismiss (R64-134). Miller filed a memorandum in opposition to the motion to dismiss (R135-158). The State filed a reply (R161-166). On September 30, 2008, the court entered an order granting the State's motion to dismiss (R171-173). Miller timely appealed (R180).

STATEMENT OF FACTS

The Robbery

On the morning of December 8, 2000, Julia Smart was robbed at knifepoint outside a Stop 'n Go on 610 North 400 West in Salt Lake City (R2. 158:49, 52–54). The assailant took her purse and attempted to take her car (R2. 158:54–56). When he was unable to shift the car from park into reverse, he left the car and fled on foot (R2. 158:61).

Julia described her assailant as a black man, approximately five feet eight inches tall, with a medium build (R2. 158:62). He had a goatee with graying towards the bottom, high cheekbones, and “very distinctive” eyes (R2. 158:62). She described his skin color as not dark black, “but an average black man” (R2. 158:62).²

When the assailant first accosted Julia, he grabbed her and mumbled something she could not understand (R2. 158:52–53). He mumbled a couple of more times before Julia understood that he was saying, “I’ll cut you” (R2. 158:53). Julia looked down and saw that he had a knife pointed at her throat (R2. 158:54). Julia released her grip on her purse and the assailant took it (R2. 158:54). He then turned and jumped into the driver’s seat of Julia’s car, which she had left running (R2. 158:54–55).

² A police report filed after the incident stated that Julia had described her assailant as eighteen to twenty-one years old (R2. 158:63). At trial, Julia did not remember telling the police this and believed it was a mistake (R2. 158:53).

Julia ran into the Stop 'n Go and reported the robbery to the store clerk (R2. 158:55). The clerk immediately called the police (R2. 158:55, 91). Julia and the clerk then returned to her car to find the robber "fumbling" around inside it (R2. 158:55). He was "messing with the lights and the windshield wiper blades and the buttons on the dashboard" in an apparent attempt to get the car into reverse (R. 158:55). During this time, Julia stood on the passenger side of the car and observed the person who robbed her through the windshield (R2. 158:56–58). She had no trouble seeing him because it was dawn, and the Stop 'n Go was well lit from overhead lights outside the store and on the gas pumps (R2. 158:59). Julia estimated that she stood outside her car watching him for two to five minutes (R2. 158:59). She stated, "He was in my car for quite a while" (R2. 158:59).

The Stop 'n Go clerk, Ron Nissen, also observed the robber fumbling about in Julia's car (R2. 158:91–94). Ron noted that the lighting outside was "pretty good" (R2. 158:93). He observed the robber from the front of the car and then moved around to the driver's side and watched him from three feet away for about a minute (R2. 158:57, 92–93). At one point, they looked at each other through the driver's side window, and Ron said, "I don't know why you're doing this, but it's not going to get you anywhere, you're just going to get caught" (R2. 158:94). At that point, the robber jumped out of the car and ran off (R2. 158:94).

The subsequent police investigation yielded no immediate results (R2. 158:61). During the months following the robbery, Julia did not go back to the Stop 'n Go and would not look others in the face for fear that she would see the robber again (R2. 158:68). A few times after the robbery, she thought she saw the man who robbed her, but she never reported the sightings to the police because she "wasn't ever 100 percent sure" (R2. 158:68).

Two Years Later

On February 14, 2003, as part of a separate investigation of a different crime, police showed Julia a photo lineup containing Miller's photo (R2. 158:94). She immediately expressed excitement and surprise and identified Miller as the man who robbed her (R2. 158:64, 83). Later, on April 24, 2003, Julia attended a live lineup at the Salt Lake County Jail (R2. 158:65). Julia again identified Miller as the man who robbed her (R2. 158:66).

Ron Nissen also identified Miller in a photo line-up (R2. 158:94-95).

Miller's Alibi

At trial, Miller testified that in December 2000 he was living and working in Louisiana (R2. 158:45-46, 103). Miller and the State stipulated to the following facts:

1. That Harry Miller was employed by the Ten M. Corporation on [sic] Donaldsonville, Louisiana, from the end of May 2000 until February 2002. Further, that Harry Miller was on medical leave from November 25, 2000 until December 13, 2000.

2. On November 25, 2000, Harry Miller was admitted into the River West Medical Center for a cerebrovascular accident with Boca's aphasia (commonly known as a stroke) and released from the River West Medical Center.

(R2. 40; 158:110).

Miller's stroke caused the entire right side of his body to go "dead" on him (R2. 158:105). He had trouble speaking and had to move in with his sister until he recovered (R2. 158:105-06). Miller claimed that on December 8, 2000, the date of the robbery, his speech was still "mumbled," and he had a nurse who visited him to help him learn to speak (R2. 158:108).

Miller admitted that he had lived in Salt Lake City from 1989 to 1999 (R2. 158:103). He also admitted that his brother, Wilbert, lived in Salt Lake City and that he had occasionally lived with his brother (R2. 158:107). Wilbert was present at Miller's trial but Miller did not call him as a witness (R2. 158:107).

In closing argument, the State pointed out that, although Miller was living in Louisiana at the time of the robbery, nobody could account for his whereabouts between November 28, 2000, and December 13, 2000 (R2. 158:134). The State explained that this time gap allowed Miller time to travel to Salt Lake City to visit his brother, commit the robbery, and return to Louisiana (R2. 158:114-15). The State also noted that the effects of Miller's stroke were likely mild as he was released from the hospital after only four days (R2. 158:114-15).

The jury convicted Miller (R2. 83). Miller appealed, and his case was remanded to the trial court to supplement the record with evidence relevant to Miller's claim of ineffective assistance of counsel (R2. 252–54).

The Rule 23B Hearing

On September 26, 2005, the trial court held a rule 23B hearing at which the court heard testimony from Miller's attorneys and scheduled a continuation of the hearing to hear testimony from Miller's niece, Berthella (R2. 610:50; 611:8). Berthella traveled to Utah by bus and appeared at the hearing at which Miller also testified (R2. 611).

At the September 26th hearing, Miller's first appellate attorney, Kent Hart, testified that after receiving the case from trial counsel and reviewing it, he decided to further investigate Miller's alibi claim (R2. 610:9). He discovered hospital records in the case file that showed that Miller was picked up from the hospital by his niece, Berthella Miller, and his employer, Lisa Snyder (R2. 610:10). Nothing in the records indicated that Berthella and Ms. Snyder had any role in caring for Miller other than picking him up from the hospital (R2. 610:17). Mr. Hart located Ms. Snyder's number and called her (R2. 610:19–20). She gave him a telephone number for Berthella Miller (R2. 610:11). Mr. Hart then called Berthella Miller, who stated that she had helped care for Miller after his stroke (R2. 610:11).

Mr. Hart also discovered in the hospital records a treatment plan by a home healthcare agency (R2. 610:13). He did not discover which agency had administered the plan or which nurses had cared for Miller (R2. 610:13). Instead he turned the case over to outside counsel (R2. 610:13).

After Mr. Hart's testimony, the State and Miller stipulated to the admission of affidavits from Melissa Landry, the records custodian of River West Home Healthcare, and Beverly Kolder, a nurse from River West Home Healthcare who visited Miller (R2. 610:22-23). The parties also stipulated to the admission of Miller's medical records from River West Home Healthcare, which were attached to Ms. Kolder's affidavit (R2. 610:23). Those records established that Ms. Kolder had visited Miller on December 7, 2000 at 11:00 a.m. and December 14, 2000 (R2. 610:23; Defense Exhibit 3). The records also established that Miller had missed visits on December 4, 2000, December 6, 2000, and December 11, 2000 (R2. 610:24; State's Exhibits 2-3).

The State then presented testimony from Miller's trial counsel, John O'Connell, Jr. (R2. 610:27). Mr. O'Connell stated that Miller had suggested an alibi defense, but that he was only able to provide the name of the company he was working for and the name and a partial address for his sister, Paula Miller (R2. 610:28). Miller did not tell Mr. O'Connell about his niece, Berthella. In addition, Miller could not remember the name of the hospital or the home healthcare agency

that treated him, nor could he remember the name of the nurses who cared for him (R2. 610:30–31, 36). Mr. O’Connell testified that Miller’s “memory of this whole time was not the best,” and he could not recall Miller naming any other alibi witnesses besides Paula (R2. 610:31).

Mr. O’Connell mailed a letter to Paula’s partial address (R2. 610:28–29). Paula responded to the letter and was initially very cooperative (R2. 610:29). She provided contact information for Miller’s former employer, tracked down the hospital where he was treated, and agreed to testify at trial that she had cared for him during the two weeks he recovered from his stroke (R2. 610:30). With Paula’s help, Mr. O’Connell was able to obtain Miller’s hospital records (R2. 610:42). Mr. O’Connell was not able to determine from those records which home health care agency Miller had used (R2. 610:36).

At some point before the trial, Paula changed her mind (R2. 610:30). She refused to travel to Utah to testify and was “very emphatic about it” (R2. 610:30). Mr. O’Connell asked Paula, “Can you tell me of anybody else or anyone who could [come out], instead of bringing you out, can you provide me with somebody else who could do it?” (R2. 610:30). Paula replied that she could not (R2. 610:30).

Mr. O’Connell decided not to try to force Paula to come out by subpoena because he believed that Miller’s “alibi at the time was pretty strong” (R2. 610:44).

He was also concerned that Paula might become a hostile witness if he forced her to travel to Utah for the trial (R2. 610:45).

At the continuation of the evidentiary hearing, Miller testified that he told Mr. O'Connell about Berthella and the visits from the home healthcare nurse (R2. 611:5-6). He admitted, however, that at the time of trial he did not know Berthella's phone number and did not know where Berthella was living (R2. 611:9). He also did not know the nurse's name or the name of the home health care agency that treated him (R2. 611:6-7).

Berthella also testified (R2. 611:13). She asserted that she was living with Paula and Miller after Miller's stroke (R2. 611:13-14). Berthella admitted, however, that she had previously told counsel for the state that at the time Miller had his stroke, she was not living with Paula, and that she lived a couple of minutes away (R2. 611:23). Berthella stated, "[a]t that time I had moved out. And I said I had moved out but I were [sic] living with her." (R2. 611:23). When asked again if she had previously said that she was not living with Paula when Miller was recovering from his stroke, Berthella said, "I think so. I don't know. I been having so many questions asked. But I was living there at the time, then I moved out." (R2. 611:23).

Berthella testified that she saw Miller every day after work while he was recovering from his stroke (R2. 611:15). But on cross-examination, she admitted that she sometimes worked a double shift and that it was possible that while Miller was

recovering from his stroke, she might have been at work from four in the morning until eleven at night (R2. 611:27). She admitted therefore that on at least one day she might not have seen him because she was at work until late at night (R2. 611:28).

Eight months before the hearing, Berthella signed an affidavit in which she attested to the date Miller was admitted to the hospital, the date she brought him home from the hospital, the time period he lived with Paula, and the date Miller returned to work. She could not, however, remember any of those dates at the hearing (R2. 611:15-16, 24-26). When questioned about her memory lapse at the hearing, she replied, "I didn't remember. I'm sorry. I didn't remember." (R2. 611:25).

The trial court entered its findings of fact and conclusions of law (R13-26). It ruled that John O'Connell was not deficient for failing to locate Miller's home healthcare records or Miller's niece, Berthella (R24-25). It determined that Miller and his sister had not provided Mr. O'Connell with enough information to locate the records or to contact Berthella and had not told him of Berthella's importance (R24-25). Specifically, it found that neither Miller nor his sister had provided Mr. O'Connell with the name of the home healthcare agency that cared for Miller or the names of any nurses that visited him (R15). It also found that the agency and nurses were not identified in Miller's hospital records (R15). The court further found that while Berthella was mentioned briefly in the hospital records, neither Miller nor his

sister told Mr. O'Connell of Berthella's whereabouts or that she had helped care for Miller (R19-20).

The court ruled that Miller suffered no prejudice from his counsel's conduct. It determined that "in light of the other facts and evidence establishing defendant's guilt, including the credibility of the two eye witnesses who testified at trial, there is no reasonable probability of a different outcome at trial" (R25-26). It noted that Miller's home healthcare records did not establish a complete alibi and that Miller "could have traveled by airplane from Louisiana to Utah . . . in time to rob Julia Smart . . ." (R17, 24).³

The court also found that "[B]ecause of her inconsistent statements and lack of memory about crucial information, testimony from Berthella Miller at the evidentiary hearing was not credible," and that "[t]estimony from Berthella Miller fails to establish a reasonable probability of a different outcome at trial." (R24).

SUMMARY OF THE ARGUMENT

Petitioner failed to meet the requirements of the Postconviction Determination of Factual Innocence statute, because his evidence was not newly discovered, his counsel was not ineffective, and his evidence failed to prove that he was factually innocent. The burden of proof is upon the petitioner to establish his factual

³ The court's findings, which the State drafted, mistakenly stated that Miller could have traveled from Louisiana to Utah in December 2005 rather than December 2000 (R17).

innocence by clear and convincing evidence. Petitioner's proffered evidence was insufficient to meet that burden. The district court correctly determined that it was not necessary to hold an evidentiary hearing when the evidence petitioner relied on in his petition for factual innocence was the same evidence already presented at the 23B hearing.

ARGUMENT

I.

THE PETITIONER DOES NOT MEET THE REQUIREMENTS OF THE FACTUAL INNOCENCE STATUTE

Petitioner claims that his evidence shows that he is factually innocent (pet.'s brief at 10). He also alleges that the law should be read to give every chance to an innocent person to be compensated for unjustified imprisonment (pet.'s brief at 17). But the first and most important requirement of the factual innocence statute is that the person must be able to prove factual innocence - and petitioner has failed to meet that requirement.

A. The Statutory Requirements

In 2008 the legislature passed the Postconviction Determination of Factual Innocence statute. Utah Code Ann. §§ 78B-9-401 through 405. The purpose of the statute is to financially compensate one who can prove by clear and convincing evidence that he is factually innocent and was wrongly imprisoned. *Id.*, and see addendum H, *Exoneration and Assistance Bill: Senate Floor Debate on S.B. 16, 2008 Utah*

Leg. Gen. Session, Jan. 22, 2008 (statement of Senator Gregory Bell, chief sponsor of the bill (0:11 – 15:28). The statute imposes specific, narrow, requirements that must be met in order for a petitioner to be entitled to financial compensation. A petitioner must assert under oath that he is factually innocent. Utah Code Ann. § 78B-9-402(2)(a). In addition, “[t]he burden is upon the petitioner to establish the petitioner’s factual innocence by clear and convincing evidence.” Utah Code Ann. §78B-9-404(1)(b).

A person may petition for a hearing to determine factual innocence only if the petition alleges the following information:

- (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.

Utah Code Ann. § 78B-9-402(2)(a).

Once the petition is filed, the State must answer or otherwise respond. Utah Code Ann. § 78B-9-402(6)(a). After the pleadings are closed, “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).⁴ If there is no bona fide issue as to whether the petitioner is factually innocent, a hearing is not required. Here, the district court determined that the petitioner had “not made the required showing for a hearing.” (R172).

In making its determination of factual innocence, the court may consider various types of evidence.

- (2) The court may consider:
 - (a) evidence that was suppressed or would be suppressed at a criminal trial; and
 - (b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.
- (3) In making its determination the court shall consider, in addition to the evidence presented at the hearing under this part, all the evidence presented at the original trial and at any postconviction proceedings in the case.

Utah Code Ann. §78B-9-404(2)&(3).

⁴ “If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing.” Utah Code Ann. § 78B-9-404(6)(b)(ii).

If the court determines by clear and convincing evidence that the petitioner is factually innocent, it shall order that the conviction be vacated and expunged. Utah Code Ann. §78B-9-404(4). After considering all of the evidence, if the court does not determine by clear and convincing evidence that the petitioner is factually innocent it shall deny the petition. Utah Code Ann. §78B-9-404(5).

B. The petitioner does not meet the statutory requirements to establish factual innocence.

This case is not about whether petitioner was entitled to a new trial. This case is about whether the petitioner proved by clear and convincing evidence that he was factually innocent. To be entitled to compensation under the factual innocence statute, a petitioner must be able to prove by clear and convincing evidence that he was wrongly convicted and sent to prison for a crime that he can prove he did not commit. Utah Code Ann. § 78B-9-402 through 405. Petitioner does not meet those requirements.

The petition does not allege newly discovered material evidence. All of the evidence petitioner relies upon was known to petitioner or his counsel at the time of trial, and petitioner's counsel has already been found not to be ineffective. In addition, some of the evidence petitioner relies upon is merely cumulative of evidence presented at trial. Finally, even if petitioner's evidence were newly

discovered, when it is viewed with all the other evidence, it does not demonstrate that the petitioner is factually innocent.

1. Petitioner's evidence is not newly discovered.

After the petition was filed, the State filed an answer and a motion to dismiss. The State argued that petitioner failed to assert newly discovered material evidence in support of his petition, as required under Utah Code Ann. §78B-9-402(2)(a)(1). Petitioner's memorandum in support of his petition refers to the affidavit of Beverly Kolder, a registered nurse involved in providing home health care to petitioner in Louisiana (R51-52). It also refers to "additional testimony as to an alibi defense," but it never specifies what that additional testimony is (R50-51).

In his opposition to the State's motion to dismiss, petitioner attempted to expand his assertions. He stated that the new evidence which establishes his innocence consists of 1) the affidavit of Beverly Kolder, a registered nurse who provided home health care to petitioner in Louisiana on December 7th and 14th, 2000 (R137-138); 2) the testimony of Berthella Miller⁵ that she had seen petitioner every day during the three weeks he was out of work (R138); and 3) that petitioner was in court in Louisiana on December 5, 2000 for fishing without a license (R138).

⁵ Petitioner refers to the testimony of "Defendant's sister." (R138). However, petitioner's sister did not testify. It appears that petitioner is actually referring to the testimony of his niece, Berthella Miller.

None of this evidence is “new.” To support his ineffective assistance of counsel claim in the prior 23B remand, petitioner consistently argued that defense counsel knew of the home health visits and of other alibi witnesses, in order to argue that counsel should have investigated further and produced the witnesses at trial (R83-94). At the 23B evidentiary hearing, petitioner testified that he told his trial attorney about his niece, Berthella, and about the home health care people who visited him (R128-129). In petitioner’s rule 23B motion for remand, he stated that “although trial counsel had in his file, and Miller communicated to trial counsel the existence of court records showing Miller’s presence in court in Louisiana on December 5th, 2000, trial counsel did not attempt to introduce said records at trial.” (addendum G, pp. 6-7). Petitioner’s claim that he has presented newly discovered material evidence is contrary to his previous position that this evidence is not new.

In addition, petitioner’s evidence fails as a matter of law to meet the statutory definition of newly discovered evidence. As the district court correctly noted in its ruling, petitioner’s claims do not meet subsection (vi)(A), requiring newly discovered evidence. Petitioner’s claims do not qualify as newly discovered evidence because petitioner was aware of the substance of the evidence at the time of trial. Petitioner knew that he was treated in Louisiana by a home health care nurse. He also knew whether his niece Berthella cared for and/or lived with him

following his stroke. He also knew that he went to court in Louisiana on December 5, 2000, for the charge of fishing without a license.

Because petitioner knew all of this information prior to trial, it is not “newly discovered.” It does not meet the requirements of Utah Code Ann. §78B-9-402(2)(a)(vi)(A), that “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.”

2. Petitioner’s counsel was not ineffective.

Even if evidence does not qualify as newly discovered, it may meet the factual innocence statutory requirements if counsel were ineffective for failing to uncover it. A person may petition the court for a hearing to establish factual innocence if the petition alleges that “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).

Petitioner does not meet this requirement, because following the 23B hearing, the district court found that trial counsel was *not* ineffective (R24-26). Therefore, petitioner does not meet the requirement of Utah Code Ann. §78B-9-402(2)(a)(vi)(B),

that “a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence.”

3. The evidence presented by petitioner does not prove that he is factually innocent.

The factual innocence statute provides that a court may waive the requirements of subsections (2)(a)(vi)(A) or (B) in the interests of justice. Utah Code Ann. §78B-9-402(2)(a)(vi)(C). In other words, a court could decide to allow a petitioner to proceed in the interests of justice, even if he did not present newly discovered evidence, and counsel was not found ineffective. However, the district court specifically decided not to waive these requirements (R172). The interests of justice did not require that these subsections be waived because petitioner also could not establish that his evidence was not merely cumulative, or, when viewed with all the other evidence, that it demonstrated that he was factually innocent. §§ 78B-9-402(2)(a)(ii), (iii) & (v).

The district court found that petitioner had not shown that the evidence was not merely cumulative of evidence already presented at trial (R172). Petitioner already presented an alibi defense at trial. As set out in the fact section above, petitioner testified at trial that at the time of the crime he was living and working in Louisiana (R2.158:45-46, 103). The parties stipulated that petitioner was employed in Louisiana from May 2000 until February 2002, that he had a stroke on November

25, 2000, and that he was on medical leave from November 25, 2000 until December 13, 2000 (R2.40; 158:110). Petitioner also testified at trial that after his stroke his speech was still “mumbled” and that he had a nurse who visited him to help him learn to speak (R2. 158:108). The district court found that petitioner had not shown that the evidence presented in support of his factual innocence petition was not merely cumulative of evidence already presented at trial (R172). Therefore, petitioner failed to meet section 78B-9-402(2)(a)(iii).

More importantly, petitioner failed to identify specific evidence that established his innocence, and when viewed with all the other evidence, the evidence he presented does not demonstrate that he is factually innocent. The district court stated that it had “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.’” (R172).

In his brief, petitioner acknowledges that “[i]t still may be true that Defendant could conceivably have gotten on an airplane, come out to Utah, and robbed a stranger for a few dollars, nowhere near enough to pay for the airplane ticket; but at this point, everyone must concede that this does not make sense.” (pet.’s brief at

24).⁶ Petitioner himself acknowledges that he could have committed this crime. Petitioner has failed to meet his burden of proof to establish by “clear and convincing evidence” that he is factually innocent. He is therefore not entitled to relief under the factual innocence statute.

C. The petitioner bears the burden of proving by clear and convincing evidence that he is factually innocent.

Petitioner claims that “the State must bear some burden to overcome the presumption of innocence.” (pet.’s brief at 25). However, petitioner is not entitled to a presumption of innocence. The presumption of innocence only applies in a criminal action. “A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt.” Utah Code Ann. § 76-1-501 (West 2008); *see also Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). A petition for post-conviction determination of factual innocence is not a criminal proceeding. It is a civil action. The rules of civil procedure apply. Utah Code Ann. § 78B-9-402(4). Therefore, the presumption of

⁶ The State does not concede that petitioner committing this crime does not make sense. Petitioner apparently believes that the crime would make sense only if there had been several hundred dollars in the victim’s purse. But how much money a robber steals does not establish whether the crime made sense or not. A robber seldom knows beforehand how much money he is going to get when he steals a woman’s purse. Petitioner also ignores the fact that, in addition to stealing the victim’s purse, he also tried to steal her car - perhaps in order to drive back to Louisiana.

innocence does not apply to a petitioner who has filed a petition for the determination of factual innocence.

The factual innocence statute provides that “[t]he burden is upon the petitioner to establish the petitioner’s factual innocence by clear and convincing evidence.” Utah Code Ann. § 78B-9-404(1)(b).

The petitioner brings this civil action by filing a petition for the determination of factual innocence. It is entirely his burden to establish his factual innocence by clear and convincing evidence. Utah Code Ann. § 78B-9-404(1)(b).

II.

THE FACT THAT THE CONVICTION WAS REVERSED ON APPEAL AND THE CASE DISMISSED DOES NOT ESTABLISH PETITIONER’S INNOCENCE AND DOES NOT EXCUSE HIM FROM ANY OF THE STATUTORY REQUIREMENTS

- A. The fact that the conviction was reversed on appeal and the case has been dismissed is not sufficient to meet the requirements of the factual innocence statute.**

Petitioner asserts that it “approaches the absurd to read this statute not to favor compensation where the conviction has been reversed on appeal, and the case has been dismissed.” (pet.’s brief at 19-20). The statute must be read according to its terms. Nothing in the language of the statute establishes that a person is entitled to compensation merely because a conviction has been reversed on appeal or because a case has been dismissed.

The statute is clearly not meant to require the State to pay money to every petitioner whose conviction has been overturned. As the sponsor of the legislation, Senator Bell, stated in his summation when presenting the bill: “The mere fact that the prisoner has been released from jail does not establish the right to have a claim under this fund.” (addendum H, *Exoneration and Assistance Bill: Senate Floor Debate on S.B. 16*, 2008 Utah Leg. Gen. Session, Jan. 22, 2008 (statement of Senator Gregory Bell, chief sponsor of the bill) (15:28)).

Cases are frequently reversed or dismissed for reasons that have nothing to do with whether the defendant is factually innocent. For example, cases may be reversed because of erroneous jury selection or instruction, prosecutorial misconduct, discovery violations, ineffective assistance of counsel, or errors in the admission or exclusion of evidence or testimony. Similarly, a case may be dismissed rather than being retried for numerous reasons that have nothing to do with whether the defendant is factually innocent. For example, a case may not be retried because of witness unavailability, because the victim does not want to go through another trial, or because the defendant has already served most of the originally imposed sentence. The fact that a case is reversed or dismissed does not establish that the defendant is innocent. Recognizing this fact, the legislature placed a high burden of proof – clear and convincing evidence – on those seeking compensation under the factual innocence statute.

When the State chose not to retry the case, it filed a motion to dismiss. The motion to dismiss stated that the District Attorney moved to dismiss “in the interests of justice.” (addendum F). Petitioner asserts that “the State refused to take this case to retrial, based on newly discovered weaknesses in the evidence.” (pet.’s brief at 22-23). The statute sets out what is required to prove factual innocence and entitle a petitioner to compensation. Weakness in the evidence is not sufficient to meet the statutory requirements. Weakness in the evidence does not prove factual innocence and does not entitle a petitioner to financial compensation.

Petitioner also contends that the credibility of the two eyewitnesses who testified at trial was “seriously questioned by both sides.” (pet.’s brief at 23). This statement is not accurate. Nevertheless, even if true, the fact that eyewitness testimony is questioned does not establish factual innocence. Again, the statute sets out the necessary prerequisites for establishing factual innocence in order to be entitled to compensation. Questioning the credibility of witnesses is not one of them.

In addition, the credibility of the victim’s eyewitness testimony has never been questioned by the State. In support of his position that the credibility of the other eye witness was questioned, petitioner refers to an e-mail from the deputy district attorney which stated: “I have some concern that a third person identified your client as a former customer.” (R156). All this establishes is that the deputy

district attorney had a question about the testimony. It does not establish that the identification of petitioner as the robber was incorrect.

The eyewitness picked petitioner from a photo line-up. He also stated that he recognized petitioner as a “customer who came into the store once in a while.” (R154). Petitioner apparently believes that the eyewitness must be mistaken, because at the time of the crime, petitioner was living in Louisiana. However, petitioner admitted at trial that he previously lived in Salt Lake (R2. 158:103). Petitioner may have been a customer in the store when he lived in Salt Lake, or while he was in Salt Lake visiting his brother. In the alternative, the eyewitness may have correctly identified petitioner as the robber, even if he was mistaken about petitioner being a customer who came into the store. The fact that the deputy district attorney had some questions about this witnesses identification of petitioner as a customer does not establish that petitioner is innocent.

The fact that the case was reversed on appeal does not establish that the petitioner is innocent. The fact that the State stipulated that there was an error in the trial proceedings, which justified a remand for a new trial, does not establish that the petitioner is innocent. The fact that the State chose not to proceed with the re-trial also does not establish that the petitioner is innocent. None of these facts meets the requirements of the factual innocence statute.

B. The fact that a conviction was reversed on appeal and the case has been dismissed does not excuse petitioner from any of the statutory requirements.

Petitioner argues that “he is not specifically restrained by the language of §78B-9-402((2)(a).” [sic] (pet.’s brief at 21). Petitioner reasons that he should not be required to “show that the information regarding innocence was unknown to him or to his counsel at the time of the original trial [because] the results of that trial did not stand[.]” (pet.’s brief at 21).

The factual innocence statute states that it applies to “[a] person who has been convicted of a felony offense.” Utah Code Ann. § 78B-9-402(2)(a). Petitioner was convicted of a felony offense. The statute does not include any exceptions or special rules for petitioners whose convictions were reversed on appeal or whose cases were dismissed rather than being retried.

The plain language of the statute establishes that the statute applies to everyone who files a petition for determination of factual innocence, regardless of the current status of their conviction. Under the plain language of the statute, there is no reason why petitioner would or should be excused from meeting any of the statutory requirements.

Petitioner has stated no authority for his claim that parts of the statute do not apply to him, merely because his case was remanded for a new trial, and then no new trial was held. As stated above, there are numerous reasons why a conviction

might be reversed that have nothing to do with factual innocence. The fact that a conviction was reversed does not establish that parts of the factual innocence statute no longer apply.

To the contrary, the factual innocence statute applies to any “person who has been convicted of a felony offense.” Utah Code Ann. §78B-9-402(2)(a). Therefore any person who was ever convicted of a felony offense in the State of Utah, and who can meet the requirements of the statute, may file a petition for determination of factual innocence at any time. Defendants still in custody may file a petition, whether or not their convictions were affirmed on appeal. Persons who have completed their sentence and been released from prison may file a petition. Persons whose convictions were reversed or remanded on appeal may file a petition. Even persons who have already obtained postconviction relief that vacated or reversed their conviction may file a petition. Utah Code Ann. §78B-9-402(2)(b).

When engaging in statutory construction, “[w]e look first to the plain language of the statute to discern the legislative intent.” *City of Salt Lake v. Salt Lake County*, 925 P.2d 954, 957 (Utah 1996)(citations omitted). “Where statutory language is plain and unambiguous, appellate courts cannot look beyond the language to divine legislative intent, but must construe the statute according to its plain language.” *State v. Paul*, 860 P.2d 992, 993 (Utah App. 1993)(citing *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989)); see also Norman J. Singer, Sutherland

Statutory Construction § 46.01 (5th ed. 1992)(if statutory meaning is clear, court's sole function is to enforce statute according to its terms).

Applying the fundamental rules of statutory interpretation, petitioner cannot establish that any of the statutory requirements do not apply to him, merely because his conviction was reversed and his case dismissed. The statutory reading petitioner urges upon this Court is contrary to the statute's plain and unambiguous language. Therefore, petitioner's claim that he should not be required to show that the information regarding innocence was unknown to him or to his counsel at the time of the original trial because the results of that trial did not stand, should be rejected.

C. The fact that petitioner's evidence could have been presented at a retrial does not establish that he does not have to meet the requirements of the factual innocence statute.

In support of his position that he should not be required to show that the information regarding innocence was unknown to him or his counsel at the time of trial, petitioner argues that if he had gone to retrial, he could have introduced all available evidence of his innocence, regardless of when and how it was discovered (pet.'s brief at 21). In other words, at a retrial, petitioner could have introduced evidence that does not qualify as newly discovered under the factual innocence statute. The State agrees (so long as the evidence met admissibility requirements). If a retrial had been held, petitioner may have been convicted again. On the other

hand, if a retrial had been held and petitioner had been acquitted, he would be in the same position he is in right now. An acquittal upon retrial would not necessarily establish that the petitioner was innocent.

When a jury does not convict, they find the defendant “not guilty,” they do not make a finding of “innocent.” Just as innocent people might be convicted, guilty people might be acquitted. A person may be acquitted not because they were innocent, but because there was reasonable doubt or insufficient evidence. *See* Utah Code Ann. § 76-1-403(2) (“There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction.”).

“In ordinary law usage, the term *not guilty* is often considered to be synonymous with *innocent*. In American criminal jurisprudence, however, they are not totally synonymous. ‘Not Guilty’ is a legal finding by the jury that the prosecution has not met its burden of proof. A ‘Not Guilty’ verdict can result from either of two states of mind on the part of the jury: that they believe the defendant is factually innocent and did not commit the crime; or, although they do not necessarily believe he is innocent, and even ‘tend’ to believe he did commit the crime, the prosecution’s case was not sufficiently strong to convince them of his guilt beyond a reasonable doubt.”

State v. Keeler, 238 Kan. 356, 362, 710 P.2d 1279, 1285 (1985) (quoting Bugliosi, *Not Guilty and Innocent: The Problem Children of Reasonable Doubt*, Vol. 20, No. 2, Court Review 16 (1983)).

If petitioner had gone through a retrial and had been acquitted, he could have filed a petition for determination of factual innocence. However, he still would have had to meet the statutory requirements in order to be entitled to financial compensation under the factual innocence statute. Therefore, the fact that the case was dismissed, rather than going to retrial, does not excuse petitioner from having to meet all of the requirements of the factual innocence statute.

III.

THE DISTRICT COURT CORRECTLY DETERMINED THAT ANOTHER EVIDENTIARY HEARING DUPLICATING THE 23B HEARING WAS NOT NECESSARY

In granting the State's motion to dismiss the factual innocence petition, the district court noted that it had already reviewed the evidence in the 23B remand and had "determined that there was 'no reasonable probability of a different outcome at trial even if [the new witnesses] had testified.'" (R172, quoting R25-26).

The petitioner claims that the district court should have held an evidentiary hearing in his factual innocence case, and that the court erred by relying on its previous findings following the 23B hearing (pet.'s brief at 9-10, 16-17). However, in support of his factual innocence petition, the petitioner relied on the evidence already presented during the 23B hearing. In the memorandum in support of his petition for factual innocence, the petitioner referred to the affidavit of Beverly Kolder, filed in support of his 23B motion (R51-52). Petitioner also attached to his

petition a copy of the court's Findings of Fact and Conclusions of Law following the 23B evidentiary hearing (R13-26). In his opposition to the State's motion to dismiss, petitioner referred to additional evidence presented in the 23B action (R138, 143-146).

Petitioner has failed to establish or even assert that he has any additional facts, testimony or evidence to present that was not already presented at the 23B hearing. Therefore, it was entirely appropriate for the district court to consider the evidence and findings from the 23B hearing. And there was no reason to hold a duplicate hearing. Petitioner has no right to relitigate factual determinations already made. *Cf. Harline v. Barker*, 912 P.2d 433, 443 (Utah 1996) ("The *minimum* reach of issue preclusion beyond precise repetition of the first action is to prevent relitigation by mere introduction of cumulative evidence bearing on a simple historical fact that has once been decided.") (citation omitted); *Oman v. Davis School Dist.*, 2008 UT 70, ¶ 31, 194 P.3d 956 (citing *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983) ("[I]ssue preclusion 'prevents the relitigation of issues that have been once litigated and determined in another action *even though the claims for relief in the two actions may be different.*'"))

The facts upon which petitioner bases his factual innocence petition were already fully litigated in the 23B evidentiary hearing. Petitioner had his day in court in the 23B hearing, where he was given all of the process to which he was due, and

the factual issues were completely, fully, and fairly litigated. *Cf. 3D Constr. and Development, L.L.C. v. Old Standard Life Ins. Co.*, 2005 UT App 307, ¶ 20, 117 P.3d 1082 (citing *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 391 (Utah App 1987)).

Petitioner alleges that he was entitled to *de novo* review, and not “improper deference to a previously discredited ruling.” (pet.’s brief at 22). However, it was not improper for the court to look to its previous 23B ruling, and the court’s 23B ruling has not been discredited.

Petitioner claims that the “parties have stipulated” that the court’s previous ruling following the 23B hearing “stopped short of doing justice.” (pet.’s brief at 22). That is incorrect. The parties made no such stipulation. The language in the stipulation submitted on appeal simply states that “in the interests of justice, and to expedite the disposition of this case, the parties file this Stipulated Motion for Summary Reversal.” (addendum E, R27). It further states that “[w]hile preparing for oral argument, the parties came to an agreement about the disposition of the appeal. Specifically, they agreed that there was an error in the trial proceedings and that the interests of justice dictate that the defendant receive a new trial.” (addendum E, R28). Petitioner already received all of the benefit he was entitled to from that agreement and stipulation. Petitioner’s case was remanded for a new trial, and the district attorney chose not to proceed to trial. Petitioner was therefore

released from custody. As argued above, those facts do not establish that petitioner is innocent.

Petitioner argues that the 23B ruling was “harsh and illogical.” (pet.’s brief at 24). He also argues that the district court erred when it determined that there was “no reasonable probability of a different outcome at trial if [the new witnesses] had testified.” (pet.’s brief at 27, quoting (R172)). Petitioner attacks the 23B court’s findings and argues that the evidence presented at the 23B hearing “clearly did justify a reversal.” (pet.’s brief at 24-25). The State disagrees. A lower court’s findings of fact will not be set aside unless they are clearly erroneous. *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177. Petitioner did not establish on appeal, and has not established in this proceeding, that the 23B findings were clearly erroneous.

The district court heard all of the evidence and made findings of fact and conclusions of law following the 23B hearing. The district court found that “[e]vidence from the home health care nurse concerning the dates of her visits to defendant would have narrowed the window of time that defendant could have been gone from Louisiana, but would not have provided an alibi for the date of the crime on December 8, 2000.” (R24). The district court also made findings about the credibility of Berthella Miller. It found that “[b]ecause of her inconsistent statements and lack of memory about crucial information, testimony from Berthella Miller at the evidentiary hearing was not credible.” (R24).

The district court concluded that, “in light of the other facts and evidence establishing defendant’s guilt, including the credibility of the two eye witnesses who testified at trial, there is no reasonable probability of a different outcome at trial even if Beverly Kolder and/or a representative of River West Home Health Care and Berthella Miller had testified.” (R25-26).

Petitioner has not presented any legally appropriate basis for holding a second hearing to present exactly the same evidence. “[O]nce a party has had his or her day in court and lost, he or she does not get a second chance to prevail on the same issues.” *State v. Baker*, 2008 UT App 8 at ¶ 2.

The district court correctly determined that another evidentiary hearing was not necessary, and petitioner has failed to establish that the court’s decision was incorrect.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted May 7, 2009.

MARK L. SHURTLEFF
Utah Attorney General

ERIN RILEY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on May 7, 2009, two copies of the foregoing brief were ☐ mailed

☐ hand-delivered to:

W. Andrew McCullough
6885 South State St., Suite 200
Midvale, Utah 84047

A digital copy of the brief was also included: ☐ Yes ☐ No

Addenda

Addendum A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

HARRY MILLER,

Petitioner,

v.

STATE OF UTAH,

Respondent.

RULING AND ORDER

FILED DISTRICT COURT
Third Judicial District

Case No. 0809677830 2008

Judge ~~Sheila K. McClellan~~ SALT LAKE COUNTY

Date: September 26, 2008

Deputy Clerk 

This matter is before the Court on Respondent's Motion to Dismiss. Having considered the memoranda, the Court finds that the Motion should be GRANTED.

Petitioner seeks a determination that he was actually innocent of the charges against him, which were ultimately dismissed. Actual innocence hearings are governed by Utah Code Annotated §78B-9-402 which provides:

(2) (a) 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.

In his Petition, Petitioner asserts that the following new evidence exists which establishes that he is factually innocent. (1) the Affidavit of Beverly Kolder, a registered nurse who provided Petitioner home health care in Louisiana on December 7, 2000 and December 14, 2000 and (2) the Affidavit of Berthella Miller. The Court finds that Petitioner has not made the required showing for a hearing.

First, it is apparent from the record that Petitioner cannot meet either subsection (vi)(A) or (vi)(B). Specifically, Petitioner was aware of the substance of this evidence at the time of trial and it was all presented to his appellate counsel for purposes of making ineffective assistance of counsel claims on appeal. Additionally, the Court found that trial counsel was *not* ineffective. 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.

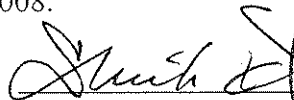
Petitioner has not shown that the evidence, upon which he seeks to rely, is not cumulative of evidence presented at trial. Petitioner presented his alibi defense at trial. These additional witness would have served only to bolster his testimony, not to present a wholly new assertion.

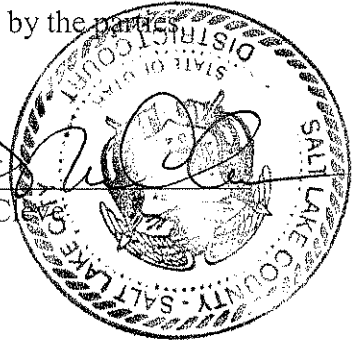
Finally, Petitioner cannot show that this evidence would “establish” that he was innocent. Although the evidence makes it unlikely that Petitioner committed the crime, the Court reviewed this evidence as part of a remand from the court of appeals and determined that there was “no reasonable probability of a different outcome at trial even if [the new witnesses] had testified.”

For the foregoing reasons, the State’s Motion to Dismiss is GRANTED. This Ruling and Order shall

serve as the final order on this matter. No further order need be prepared by the parties.

DATED this 30 day of September, 2008.


Judge Sheila K. McClellan
District Court Judge



Addendum B

Westlaw

Page 1

U.C.A. 1953 § 78B-9-401

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 4. Postconviction Determination of Factual Innocence

§ 78B-9-401. Title

This part is known as "Postconviction Determination of Factual Innocence."

CREDIT(S)

Laws 2008, c. 358, § 5, eff. May 5, 2008.

HISTORICAL AND STATUTORY NOTES

Laws 2008, c. 123, § 10, provides:

"Section 10. Coordinating S.B. 278 with S.B. 16--Technical renumbering.

"If this S.B. 278 and S.B. 16, Exoneration and Innocence Assistance, both pass, it is the intent of the Legislature that the following sections in S.B. 16 be re-numbered as follows:

"(1) Section 78-35a-300.5 be renumbered to 78B-9-300;

"(2) Section 78-35a-401 be renumbered to 78B-9-401;

"(3) Section 78-35a-402 be renumbered to 78B-9-402;

"(4) Section 78-35a-403 be renumbered to 78B-9-403;

"(5) Section 78-35a-404 be renumbered to 78B-9-404; and

"(6) Section 78-35a-405 be renumbered to 78B-9-405."

U.C.A. 1953 § 78B-9-401, UT ST § 78B-9-401

Current through 2008 Second Special Session, including results from the November 2008 General Election.

Copr © 2008 Thomson Reuters/West. No claim to orig. U.S. govt. works.

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw

Page 1

U.C.A. 1953 § 78B-9-402

► This document has been updated. Use KEYCITE.

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

- ▣ Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

- ▣ Part 4. Postconviction Determination of Factual Innocence

→ § 78B-9-402. Petition for determination of factual innocence--Sufficient allegations--Notification of victim

As used in this part:

(1) "Factually innocent" means a person did not:

- (a) engage in the conduct for which the person was convicted;
- (b) engage in conduct relating to any lesser included offenses; or
- (c) commit any other felony arising out of or reasonably connected to the facts supporting the indictment or information upon which the person was convicted.

(2)(a) 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

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

U.C.A. 1953 § 78B-9-402

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.

(b) A person who has already obtained postconviction relief that vacated or reversed the person's conviction may also file a petition under this part if no retrial or appeal regarding this offense is pending.

(3) If some or all of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing pursuant to Section 78B-9-301.

(4) The petition shall be in compliance with Rule 65C, Utah Rules of Civil Procedure, and shall include the underlying criminal case number.

(5) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel shall cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which is the subject of the petition.

(6) (a) A person who files a petition under this section shall serve notice of the petition and a copy of the petition upon the office of the prosecutor who obtained the conviction and upon the Utah attorney general. The attorney general shall, within 30 days after receipt of service of the notice, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.

(b) (i) After the time for response by the attorney general under Subsection (6) (a) has passed, 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.

(ii) If the parties stipulate that the evidence establishes that the petitioner is factually innocent, the court may find the petitioner is factually innocent without holding a hearing.

(7) The court may not grant a petition for a hearing under this part during the period in which criminal proceedings in the matter are pending before any trial or appellate court, unless stipulated to by the parties.

(8) Any victim of a crime that is the subject of a petition under this part, and who has elected to receive notice under Section 77-38-3, shall be notified by the state's attorney of any hearing regarding the petition.

U.C.A. 1953 § 78B-9-402

CREDIT(S)

Laws 2008, c. 358, § 6, eff. May 5, 2008.

HISTORICAL AND STATUTORY NOTES

Laws 2008, c. 123, § 10, provides:

"Section 10. Coordinating S.B. 278 with S.B. 16--Technical renumbering.

"If this S.B. 278 and S.B. 16, Exoneration and Innocence Assistance, both pass, it is the intent of the Legislature that the following sections in S.B. 16 be re-numbered as follows:

"(1) Section 78-35a-300.5 be renumbered to 78B-9-300;

"(2) Section 78-35a-401 be renumbered to 78B-9-401;

"(3) Section 78-35a-402 be renumbered to 78B-9-402;

"(4) Section 78-35a-403 be renumbered to 78B-9-403;

"(5) Section 78-35a-404 be renumbered to 78B-9-404; and

"(6) Section 78-35a-405 be renumbered to 78B-9-405."

U.C.A. 1953 § 78B-9-402, UT ST § 78B-9-402

Current through 2008 Second Special Session, including results from the November 2008 General Election.

Copr © 2008 Thomson Reuters/West. No claim to orig. U.S. govt. works.

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw

Page 1

U.C.A. 1953 § 78B-9-403

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

▣ Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

▣ Part 4. Postconviction Determination of Factual Innocence

→ § 78B-9-403. Requests for appointment of counsel--Appeals--Postconviction petitions

(1) Subsections 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.

(2) Subsection 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

CREDIT(S)

Laws 2008, c. 358, § 7, eff. May 5, 2008.

HISTORICAL AND STATUTORY NOTES

Laws 2008, c. 123, § 10, provides:

"Section 10. Coordinating S.B. 278 with S.B. 16--Technical renumbering.

"If this S.B. 278 and S.B. 16, Exoneration and Innocence Assistance, both pass, it is the intent of the Legislature that the following sections in S.B. 16 be renumbered as follows:

"(1) Section 78-35a-300.5 be renumbered to 78B-9-300;

"(2) Section 78-35a-401 be renumbered to 78B-9-401;

"(3) Section 78-35a-402 be renumbered to 78B-9-402;

"(4) Section 78-35a-403 be renumbered to 78B-9-403;

"(5) Section 78-35a-404 be renumbered to 78B-9-404; and

"(6) Section 78-35a-405 be renumbered to 78B-9-405."

U.C.A. 1953 § 78B-9-403, UT ST § 78B-9-403

Current through 2008 Second Special Session, including results from the November 2008 General Election.

Copr © 2008 Thomson Reuters/West. No claim to orig. U.S. govt. works.

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw

Page 1

U.C.A. 1953 § 78B-9-404

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 4. Postconviction Determination of Factual Innocence

→ § 78B-9-404. Hearing upon petition--Procedures--Court determination of factual innocence

(1)(a) In any hearing conducted under this part, the Utah attorney general shall represent the state.

(b) The burden is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence.

(2) The court may consider:

(a) evidence that was suppressed or would be suppressed at a criminal trial; and

(b) hearsay evidence, and may consider that the evidence is hearsay in evaluating its weight and credibility.

(3) In making its determination the court shall consider, in addition to the evidence presented at the hearing under this part, all the evidence presented at the original trial and at any postconviction proceedings in the case.

(4) If the court, after considering all the evidence, determines by clear and convincing evidence that the petitioner:

(a) is factually innocent of one or more offenses of which the petitioner was convicted, the court shall order that those convictions:

(i) be vacated with prejudice; and

(ii) be expunged from the petitioner's record; or

(b) did not commit one or more offenses of which the petitioner was convicted, but the court does not find by clear and convincing evidence that the petitioner did not commit any lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence of the petitioner as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(5)(a) If the court, after considering all the evidence, does not determine by clear and convincing evidence that the petitioner is factually innocent of the offense or offenses the petitioner is challenging and does not find that Subsection

U.C.A. 1953 § 78B-9-404

(4)(b) applies, the court shall deny the petition regarding the offense or offenses.

(b) If the court finds that the petition was brought in bad faith, it shall enter the finding on the record, and the petitioner may not file a second or successive petition under this section without first applying to and obtaining permission from the court which denied the prior petition.

CREDIT(S)

Laws 2008, c. 358, § 8, eff. May 5, 2008.

HISTORICAL AND STATUTORY NOTES

Laws 2008, c. 123, § 10, provides:

"Section 10. Coordinating S.B. 278 with S.B. 16--Technical renumbering.

"If this S.B. 278 and S.B. 16, Exoneration and Innocence Assistance, both pass, it is the intent of the Legislature that the following sections in S.B. 16 be renumbered as follows:

"(1) Section 78-35a-300.5 be renumbered to 78B-9-300;

"(2) Section 78-35a-401 be renumbered to 78B-9-401;

"(3) Section 78-35a-402 be renumbered to 78B-9-402;

"(4) Section 78-35a-403 be renumbered to 78B-9-403;

"(5) Section 78-35a-404 be renumbered to 78B-9-404; and

"(6) Section 78-35a-405 be renumbered to 78B-9-405."

U.C.A. 1953 § 78B-9-404, UT ST § 78B-9-404

Current through 2008 Second Special Session, including results from the November 2008 General Election.

Copr © 2008 Thomson Reuters/West. No claim to orig. U.S. govt. works.

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw

Page 1

U.C.A. 1953 § 78B-9-405

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

Chapter 9. Post-Conviction Remedies Act (Refs & Annos)

Part 4. Postconviction Determination of Factual Innocence

→ § 78B-9-405. Judgment and assistance payment

(1)(a) If a court finds a petitioner factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or under this part, and if the petitioner has served a period of incarceration, the court shall order that, as provided in Subsection (2), the petitioner shall receive for each year or portion of a year the petitioner was incarcerated, up to a maximum of 15 years, the monetary equivalent of the average annual nonagricultural payroll wage in Utah, as determined by the data most recently published by the Department of Workforce Services at the time of the petitioner's release from prison.

(b) As used in this Subsection (1), "petitioner" means a United States citizen or an individual who was otherwise lawfully present in this country at the time of the incident that gave rise to the underlying conviction.

(2) Payments pursuant to this section shall be made as follows:

(a) The Office of Crime Victim Reparations shall pay from the Crime Victim Reparations Fund to the petitioner within 45 days of the court order under Subsection (1) an initial sum equal to either 20% of the total financial assistance payment as determined under Subsection (1) or an amount equal to two years of incarceration, whichever is greater, but not to exceed the total amount owed.

(b) The Legislature shall appropriate as nonlapsing funds from the General Fund, and no later than the next general session following the issuance of the court order under Subsection (1):

(i) to the Crime Victim Reparations Fund, the amount that was paid out of the fund under Subsection (2)(a); and

(ii) to the Commission on Criminal and Juvenile Justice, as a separate line item, the amount ordered by the court for payments under Subsection (1), minus the amount reimbursed to the Crime Victim Reparations Fund under Subsection (2)(b)(i).

(c) Payments to the petitioner under this section, other than the payment under Subsection (2)(a), shall be made by the Commission on Criminal and Juvenile Justice quarterly on or before the last day of the month next succeeding each calendar quarterly period.

(d) Payments under Subsection (2)(c) shall:

(i) commence no later than one year after the effective date of the appropriation for the payments;

(ii) be made to the petitioner for the balance of the amount ordered by the court after the initial payment under Subsection (2)(a); and

(iii) be allocated so that the entire amount due to the petitioner under this section has been paid no later than ten years after the effective date of the appropriation made under Subsection (2)(b).

(3)(a) Payments pursuant to this section shall be reduced to the extent that the period of incarceration for which the petitioner seeks payment was attributable to a separate and lawful conviction.

(b)(i) Payments pursuant to this section shall be tolled upon the commencement of any period of incarceration due to the petitioner's subsequent conviction of a felony and shall resume upon the conclusion of that period of incarceration.

(ii) As used in this section, "felony" means a criminal offense classified as a felony under Title 76, Chapter 3, Punishments, or conduct that would constitute a felony if committed in Utah.

(c) The reduction of payments pursuant to Subsection (3)(a) or the tolling of payments pursuant to Subsection (3)(b) shall be determined by the same court that finds a petitioner to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part.

(4)(a) A person is ineligible for any payments under this part if the person was already serving a prison sentence in another jurisdiction at the time of the conviction of the crime for which that person has been found factually innocent pursuant to Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part, and that person is to be returned to that other jurisdiction upon release for further incarceration on the prior conviction.

(b) Ineligibility for any payments pursuant to this Subsection (4) shall be determined by the same court that finds a person to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part.

(5) Payments pursuant to this section:

(a) are not subject to any Utah state taxes; and

(b) may not be offset by any expenses incurred by the state or any political subdivision of the state, including expenses incurred to secure the petitioner's custody, or to feed, clothe, or provide medical services for the petitioner.

U.C.A. 1953 § 78B-9-405

(6) If a court finds a petitioner to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part, the court shall also:

(a) issue an order of expungement of the petitioner's criminal record for all acts in the charging document upon which the payment under this part is based; and

(b) provide a letter to the petitioner explaining that the petitioner's conviction has been vacated on the grounds of factual innocence and indicating that the petitioner did not commit the crime or crimes for which the petitioner was convicted and was later found to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part.

(7) A petitioner found to be factually innocent under Title 78B, Chapter 9, Part 3, Postconviction DNA Testing, or this part shall have access to the same services and programs available to Utah citizens generally as though the conviction for which the petitioner was found to be factually innocent had never occurred.

(8) Payments pursuant to this part constitute a full and conclusive resolution of the petitioner's claims on the specific issue of factual innocence.

CREDIT(S)

Laws 2008, c. 358, § 9, eff. May 5, 2008.

HISTORICAL AND STATUTORY NOTES

Laws 2008, c. 123, § 10, provides:

"Section 10. Coordinating S.B. 278 with S.B. 16--Technical renumbering.

"If this S.B. 278 and S.B. 16, Exoneration and Innocence Assistance, both pass, it is the intent of the Legislature that the following sections in S.B. 16 be re-numbered as follows:

"(1) Section 78-35a-300.5 be renumbered to 78B-9-300;

"(2) Section 78-35a-401 be renumbered to 78B-9-401;

"(3) Section 78-35a-402 be renumbered to 78B-9-402;

"(4) Section 78-35a-403 be renumbered to 78B-9-403;

"(5) Section 78-35a-404 be renumbered to 78B-9-404; and

"(6) Section 78-35a-405 be renumbered to 78B-9-405."

U.C.A. 1953 § 78B-9-405, UT ST § 78B-9-405

U.C.A. 1953 § 78B-9-405

Current through 2008 Second Special Session, including results from the November 2008 General Election.

Copr © 2008 Thomson Reuters/West. No claim to orig. U.S. govt. works.

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Addendum C

Utah Rules of Civil Procedure, Rule 65C

C

West's Utah Code Annotated Currentness

State Court Rules

▣ Utah Rules of Civil Procedure (Refs & Annos)

▣ Part VIII. Provisional and Final Remedies and Special Proceedings

→ RULE 65C. POST-CONVICTION RELIEF

(a) Scope. This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Title 78B, Chapter 9, Post-Conviction Remedies Act.

(b) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(c)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(c)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(c)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(c)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(c)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(c)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(d)(1) affidavits, copies of records and other evidence in support of the allegations;

(d)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the peti-

Utah Rules of Civil Procedure, Rule 65C

tioner's case;

(d)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(d)(4) a copy of all relevant orders and memoranda of the court.

(e) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(g)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(g)(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(g)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(g)(2)(B) the claims have no arguable basis in fact; or

(g)(2)(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(g)(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(g)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(h) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(i) Answer or other response. Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus

Utah Rules of Civil Procedure, Rule 65C

time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(j) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(j)(1) consider the formation and simplification of issues;

(j)(2) require the parties to identify witnesses and documents; and

(j)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(k) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) Discovery; records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) Orders; stay.

(m)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(m)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(m)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the

Utah Rules of Civil Procedure, Rule 65C

Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

CREDIT(S)

[Adopted effective July 1, 1996; amended effective November 1, 2008.]

ADVISORY COMMITTEE NOTE

This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dismiss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary procedures set forth as a means of balancing the requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

The requirement in paragraph (l) for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used determining motions for discovery.

CROSS REFERENCES

Petition for determination of factual innocence, see § 78B-9-402.

Petition for relief under Post-Conviction Remedies Act, see Rules Civ. Proc., Form 47.

Postconviction Remedies Act, replacement of prior remedies, see § 78B-9-102.

Postconviction testing of DNA, see § 78B-9-301.

LIBRARY REFERENCES

Criminal Law ¶1570 to 1600, 1610 to 1616, 1650 to 1669.

Westlaw Key Number Searches: 110k1570 to 110k1600; 110k1610 to 110k1616; 110k1650 to 110k1669.

UNITED STATES SUPREME COURT

Application,

Antiterrorism and Effective Death Penalty Act (AEDPA), application for federal habeas corpus review is not an application for state postconviction or other collateral review, see *Duncan v. Walker*, U.S.N.Y.2001, 121 S.Ct. 2120, 533 U.S. 167.

Habeas corpus, pending application for state collateral review, tolling of federal time limits, time between lower state court's decision and filing of notice of appeal to higher state court, see *Carey v. Saffold*, U.S.Cal.2002,

Addendum D

FEE 07/10/16

SALT LAKE COUNTY

By [Signature]
Deputy Clerk

MATTHEW D. BATES - #9861
ERIN RILEY - #8375
Assistant Attorneys General
MARK L. SHURTLEFF - #4666
Utah Attorney General
160 E. 300 S., 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180
Attorneys for Plaintiff/Appellee

**IN THE THIRD JUDICIAL DISTRICT COURT SALT LAKE
COUNTY, STATE OF UTAH**

STATE OF UTAH, Plaintiff/Appellee, vs. HARRY MILLER, Defendant/Appellant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER Case No. 031900163 JUDGE SHEILA K. McCLEVE
--	--

Pursuant to Rule 23B, Utah Rules of Appellate Procedure, the Utah Court of Appeals remanded this case for an evidentiary hearing on the following claims of ineffective assistance of counsel:

1. Trial counsel's failure to present the testimony of Berthella Miller, Beverly Kolder, and/or a designated representative of River West Home Health Care relating to Appellant Harry Miller's alibi defense;
2. Trial counsel's failure to file a written notice of his intention to claim an alibi defense and provide the names and addresses of alibi witnesses pursuant to Utah Code section 77-14-2; and
3. If trial counsel's performance is found to be deficient, the prejudicial effect, if any, of the deficient performance on the outcome of the trial.

In compliance with that order, an evidentiary hearing was conducted on September 26, 2005. Due to the unavailability of a witness, the hearing was continued and concluded on October 14, 2005. At the hearing, defendant Miller was represented by his counsel, Mr. Patrick Lindsay. The State was represented by assistant attorneys general Matthew Bates and Erin Riley.

At the hearing, defendant Miller waived his attorney/client privilege as to his claims of ineffective assistance of counsel (R. Vol. I, p. 6). The Court then heard testimony from defendant, defendant's trial counsel Mr. John O'Connell Jr., original appellate counsel Mr. Kent Hart, and defendant's niece, Ms. Berthella Miller. In addition, exhibits were admitted, including the affidavits of Beverly Kolder and Melissa Landry, and the parties entered a stipulation as to the admissibility of the medical records (R. Vol. I., p. 16, 22-24).

The Court notes that pursuant to Utah Rule of Appellate Procedure 23B(e), the burden of proving a fact is upon the proponent of the fact. The standard of proof is a preponderance of the evidence.

Following the evidentiary hearing, the parties submitted written memoranda summarizing their views of the facts and the law concerning the issues. Based on

the testimony, evidence, and memoranda, the Court now enters the following factual findings:

**BEVERLY KOLDER AND/OR A REPRESENTATIVE OF RIVER
WEST HOME HEALTH CARE**

1. It was apparent from the hospital records that trial defense counsel John O'Connell obtained prior to trial, that defendant received home health care following his hospital stay (R. Vol. I, p. 36).
2. The name of the home health care agency was not included in the hospital records (R. Vol. I, p. 36).
3. Defense counsel knew that a home health care nurse had visited defendant, but he did not know the name of the home health care nurse (R. Vol. I, p. 36).
4. Defendant could not remember the name of the hospital where he was treated (R. Vol. I, p. 30).
5. Defendant did not know or could not remember the name of the home health care agency (R. Vol. I, p. 30; Vol. II, p. 6-7).
6. Defendant did not know or could not remember the name of any of the nurses or therapists who visited him (R. Vol. I, p. 30-31; Vol. II, p. 6).
7. Defendant's sister, Paula Miller, also did not know or did not tell defense counsel the name of the home health care agency (R. Vol. I, p. 36).

8. Paula provided defense counsel with the name of the hospital where defendant was treated (R. Vol. I, p. 31).
9. Defense counsel's investigator contacted the hospital, provided them with a waiver from defendant, and the hospital sent defendant's hospital records to defense counsel prior to trial (R. Vol. I, p. 31).
10. Initial appellate counsel, Mr. Hart, did not remember seeing in the hospital records any reference to the exact home health care agency that provided treatment for defendant. He also did not remember seeing the name of the nurse who participated in that treatment (R. Vol. I, p. 19).
11. Before conflicting out of the case, Mr. Hart was not able to ascertain anything further about the location of the home health care records or possible records relating to it (R. Vol. I, p. 13).
12. Home health care nurse Beverly Kolder visited defendant on the 7th and 14th of December, 2000. Her visit on the 7th of December concluded at 11:02 a.m. (R. Vol. I, p. 23-24, exhibits 2 & 3).
13. A speech therapist attempted to visit defendant on 4th, 6th, and 11th of December 2000, but defendant was not at home (R. Vol. I, p. 24, exhibits 2 & 3).

14. The crime for which defendant was convicted occurred in Salt Lake City on December 8, 2000 (R. Vol. I, p. 23).
15. Defendant could have traveled by airplane from Louisiana to Utah on December 7, 2005, in time to rob Julia Smart on December 8, 2005.

BERTHELLA MILLER

16. Defendant had a sister in Louisiana named Paula, who he lived with following his stroke (R. Vol. I, p. 30, 38, Vol. II, p. 7-8).
17. Defendant could provide his trial defense counsel, John O'Connell, Jr., with only a partial address for his sister Paula (R. Vol. I, p. 28).
18. Defense counsel sent a letter to Paula at the partial address (R. Vol. I, p. 28).
19. Paula apparently received the letter because she then contacted defense counsel (R. Vol. I, p. 29).
20. Defense counsel spoke with Paula and asked her to come to Utah to testify at trial (R. Vol. I, p. 29).
21. Originally, Paula was cooperative and was willing to come and testify (R. Vol. I, p. 29, 30).

22. Paula helped counsel locate defendant's employer and the hospital (R. Vol. I, p. 29). Paula provided defense counsel with the name of the hospital where defendant was treated (R. Vol. I, p. 31).
23. Defense counsel's investigator then contacted the hospital, provided them with a waiver from defendant, and they sent the hospital records to defense counsel (R. Vol. I, p. 31).
24. The hospital records showed Paula Shepherd as the contact person for defendant and listed a phone number, which was actually a neighbor's phone number (R. Vol. I, p. 32, 46-47).
25. At some point close to trial, Paula became very emphatic that she was not going to come out to Utah to testify (R. Vol. I, p. 30).
26. Defendant testified at the evidentiary hearing that he knew his sister Paula had refused to come testify at his trial (R. Vol. II, p. 8).
27. Defense counsel testified that he did not subpoena Paula because she was in another state, and he believed defendant's alibi was pretty strong based on the fact that he had had a stroke and had been in the hospital in Louisiana (R. Vol. I, p. 44-45, 47). In addition, he did not want to bring out a witness who

did not want to come, when he wanted that witness to say nice things about his client. He was afraid she might make it worse (R. Vol. I, p. 45, 47-48).

28. Defendant's niece, Berthella Miller, was living with Paula and defendant following defendant's stroke (R. Vol. II, p. 13-14).
29. Defendant testified at the evidentiary hearing that he told his defense counsel about his niece Berthella (R. Vol. II, p. 5).
30. Defense counsel testified at the evidentiary hearing that defendant did not tell him about his niece, Berthella (R. Vol. I, p. 30).
31. The Court finds defense counsel's testimony credible.
32. At the time of trial, defendant did not know Berthella's address or telephone number and did not know where Berthella was living (R. Vol. II, p. 9).
33. Berthella was listed in the hospital medical records as being one of the people who picked defendant up from the hospital upon his release. However, it only listed her first name and no telephone number (R. Vol. I, p. 43). In addition, there was nothing in the record to indicate that she would be caring for defendant upon his release (R. Vol. I, p. 17, 43).

34. When defense counsel asked Paula "Can you tell me of anybody else or anyone who could, instead of bringing you out, can you provide me with somebody else who could do it?" Paula told him no (R. Vol. I, p. 30).
35. Defense counsel also testified that defendant did not remember the names of anyone else who would have been able to corroborate his alibi in Louisiana, besides his sister Paula (R. Vol. I, p. 31)
36. Mr. Hart obtained Berthella's telephone number from Mr. Miller's employer, Ms. Snyder (R. Vol. I, p. 11).
37. After four months of trying and three continuances, defendant's appellate counsel was able to bring Berthella to Utah to testify at a rule 23B hearing on October 14, 2005.
38. Berthella could not remember how long defendant lived there (R. Vol. II, p. 14).
39. Berthella could not remember when defendant came to live at Paula's, except that it was after he had been in the hospital (R. Vol. II, p. 15).
40. Berthella testified that she saw defendant every day and night during that time period (R. Vol. II, p. 15, 20).

41. However, Berthella also acknowledged that she had previously told counsel for the state that at the time defendant had his stroke, she was not living with Paula, that she lived a couple of minutes away. Berthella testified that "[a]t that time I had moved out. And I said I had moved out but I were [sic] living with her." (R. Vol. II, p. 23).
42. When asked again if she had previously said that she was not living with Paula when defendant was recovering from his stroke, Berthella said: "I think so. I don't know. I been having so many questions asked. But I was living there at the time, then I moved out." (R. Vol. II, p. 23).
43. Berthella admitted that she sometimes worked a double shift and that she sometimes worked weekends (R. Vol. II, p. 27). It was possible that during the period when defendant was recovering from his stroke, she might have been at work from four in the morning until eleven at night. Therefore, there might have been a day where she did not see him because she was at work (R. Vol. II, p. 28).
44. Berthella did not remember the date or the day of the week that defendant had his stroke, or the date that she picked him up from the hospital (R. Vol. II, p. 24)

45. Berthella could not remember how long defendant lived with Paula following his stroke (R. Vol. II, p. 26).
46. Berthella could not remember when defendant went back to work, except that he had his stroke, was at home for a little while and then went back to work (R. Vol. II, p. 16)
47. At the time, Berthella and defendant worked at the same place (R. Vol. II, p. 16).
48. Berthella was never at home when the home health care nurse came to visit defendant (R. Vol. II, p. 18-19).
49. Berthella knew that an attorney had called and asked Paula to come and testify at the trial, but that Paula would not come (R. Vol. II, p. 30).
50. Berthella testified that defendant was her uncle, that she liked being with him, that it made her a little sad that he was in jail, and that she would like to see him get out (R. Vol. II, p. 31).
51. Berthella testified that when defendant left the house she remembered him saying that he was coming back to Salt Lake—but she did not remember when that was (R. Vol. II, p. 34).

52. Defendant never asked his defense counsel if he had asked Berthella to come and testify at trial (R. Vol. II, p. 8)
53. Berthella made inconsistent statements and had a poor memory of defendant's stroke. The Court therefore finds that her testimony was, at best, not reliable and that she would not have been a credible witness at defendant's trial.

NOTICE OF INTENTION TO CLAIM ALIBI DEFENSE

54. Trial defense counsel did not provide written notice of intention to claim an alibi defense and did not provide the names and addresses of alibi witnesses (R. Vol. I, p. 48-49).
55. At trial, no alibi witnesses testified other than defendant (R. Vol. I, p. 37).
56. At the evidentiary hearing, defense counsel testified that he did not file written notice of alibi because he knew he was not going to call any alibi witnesses other than defendant (R. Vol. I, p. 37).
57. Pursuant to Utah Code Ann. ' 77-14-2(3) (West 2004), "the defendant may always testify on his own behalf concerning alibi."

PREJUDICE

58. Evidence from the home health care nurse concerning the dates of her visits to defendant would have narrowed the window of time that defendant could have been gone from Louisiana, but would not have provided an alibi for the date of the crime on December 8, 2000.
59. Evidence from the home health care nurse fails to establish a reasonable probability of a different outcome at trial.
60. Because of her inconsistent statements and lack of memory about crucial information, testimony from Berthella Miller at the evidentiary hearing was not credible. If her testimony had been presented at trial, it would have been weighed against all of the other facts, testimony, and evidence presented at trial, including the credible testimony of the victim and the second eye-witness.
61. Testimony from Berthella Miller fails to establish a reasonable probability of a different outcome at trial.

RULE 23B(e) FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

62. Based on the evidence and the above findings of fact, the Court finds that defense counsel was not deficient in failing to present the testimony of

Beverly Kolder and/or a designated representative of River West Home Health Care, because defendant failed to provide him with information to locate this witness, and because evidence from this witness does not establish an alibi for the date of the crime.

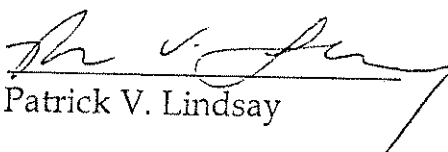
63. Based on the evidence and the above findings of fact, the Court finds that defense counsel was not deficient in failing to present the testimony of Berthella Miller because counsel was unaware that Berthella had any relevant information, defendant failed to tell him that Berthella might have been a helpful witness, and defendant failed to provide him with information to locate this witness.
64. Based on the evidence and the above findings of fact, the Court finds that defense counsel was not deficient in failing to file a written notice of intention to claim an alibi defense because he presented no alibi witnesses at trial other than defendant.
65. Based on the evidence and the above findings of fact, the Court finds that even if the alleged deficiencies are assumed arguendo, defendant was not prejudiced. The Court finds that in light of the other facts and evidence establishing defendant's guilt, including the credibility of the two eye

witnesses who testified at trial, there is no reasonable probability of a different outcome at trial even if Beverly Kolder and/or a representative of River West Home Health Care and Berthella Miller had testified.

66. Based on the evidence and the above findings of fact, the Court finds that even if trial counsel was deficient for failing to file a written notice of intention to claim an alibi defense, defendant was not prejudiced.

DATED this 1 day of February 2006.


JUDGE SHEILA K. McCLEVE

Approved as to form: 
Patrick V. Lindsay

Addendum E

ORIGINAL

MATTHEW D. BATES (9861)
Assistant Utah Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Defendants
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

FILED
UTAH APPELLATE COURTS

JAN 18 2007

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

Plaintiffs,

vs.

HARRY MILLER,

Defendants.

STIPULATED MOTION FOR
SUMMARY REVERSAL

Case No. 20040150-CA

Pursuant to Rule 10, Utah Rules of Appellate Procedure, in the interests of justice, and to expedite the disposition of this case, the parties file this Stipulated Motion for Summary Reversal.¹

On December 16, 2003, a jury convicted defendant of aggravated robbery, a first degree felony. The court sentenced him to an indeterminate prison term of five years to

¹ Under rule 10, motions for summary disposition that are not based on jurisdiction must be filed within 10-days of filing the docketing statement. But this Court may suspend the time limit in rule 10 "[i]n the interest of expediting a decision." Utah R. App. P. 2.

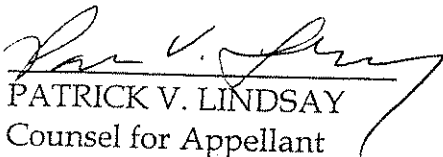
life on February 9, 2004. Defendant timely appealed, and he has remained incarcerated during the appeal.

On appeal, defendant has asserted that his trial counsel was ineffective for not obtaining additional evidence to support his alibi. He presented evidence to that effect in the district court during a temporary remand under rule 23B, Utah Rules of Appellate Procedure. The parties have now completed briefing, and this Court set the case for oral argument on Monday, January 22, 2006.

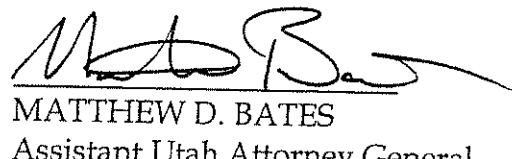
While preparing for oral argument, the parties came to an agreement about the disposition of the appeal. Specifically, they agreed that there was an error in the trial proceedings and that the interests of justice dictate that defendant receive a new trial.

WHEREFORE, to expedite the resolution of this case, the parties move this Court for an order canceling oral argument, reversing defendant's conviction for aggravated robbery, and remanding the case to the district court for a new trial.

DATED this 18 day of January 2007,


PATRICK V. LINDSAY
Counsel for Appellant

MARK L. SHURTLEFF
Utah Attorney General


MATTHEW D. BATES
Assistant Utah Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on this 17th day of January 2007, the foregoing **STIPULATED MOTION FOR SUMMARY REVERSAL** was hand-delivered to defendant's counsel of record as follows:

Patrick V. Lindsay
290 West Center St.
Provo, Utah 84603

A handwritten signature in black ink, appearing to read "Patrick V. Lindsay", written over a horizontal line.

IN THE UTAH COURT OF APPEALS

FILED
UTAH APPELLATE COURTS
JAN 22 2007

-----ooOoo-----

State of Utah,

Plaintiff and Appellee,

v.

Harry Miller,

Defendant and Appellant.

ORDER OF DISMISSAL

Case No. 20040150-CA

Before Judges Bench, McHugh, and Thorne.

This matter is before the court upon the Parties' stipulated motion for summary reversal, filed January 18, 2007. The parties agreed that there was an error in the trial proceedings and that the interests of justice dictate that defendant receive a new trial.

Therefore, IT IS HEREBY ORDERED that oral argument scheduled for January 22, 2007, at 9:30 a.m. is canceled.

IT IS HEREBY FURTHER ORDERED the this case is remanded to the Third District Court, Salt Lake Department for a new trial.

Dated this 20th day of January, 2007.

FOR THE COURT:


Carolyn B. McHugh, Judge

Addendum F

LOHRA L. MILLER
District Attorney for Salt Lake County
KENT MORGAN, 3945
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900
3003811

FILED
THIRD DISTRICT COURT
07 JUL -5 PM 3:31
SALT LAKE DEPARTMENT
BY W
DEPUTY CLERK

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-VS-

HARRY MILLER,

Defendant.

MOTION TO DISMISS

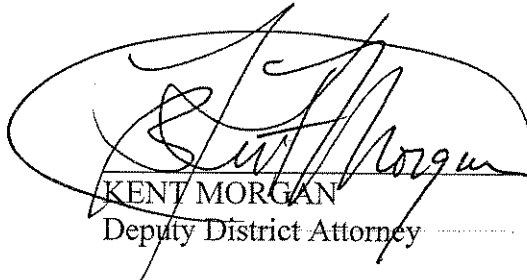
Case No. 031901163 FS

Hon. Sheila K. McCleve

KENT MORGAN, attorney for plaintiff, moves this court for an order dismissing the above-entitled matter in the interests of justice.

DATED this 3rd day of July, 2007.

LOHRA L. MILLER
District Attorney


KENT MORGAN
Deputy District Attorney

ORIGINAL

LOHRA L. MILLER
District Attorney for Salt Lake County
KENT MORGAN, 3945
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900
3003811

FILED DISTRICT COURT
Third Judicial District

JUL 06 2007

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-VS-

HARRY MILLER,

Defendant.

ORDER OF DISMISSAL

Case No. 031901163 FS

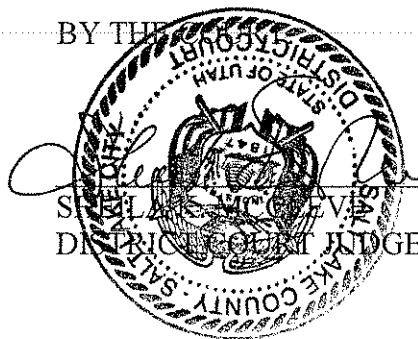
Hon. Sheila K. McCleve

Based upon the motion of the Plaintiff and in the interests of justice,

IT IS HEREBY ORDERED that the information in the above-entitled matter be dismissed.

DATED this 6 day of July, 2007.

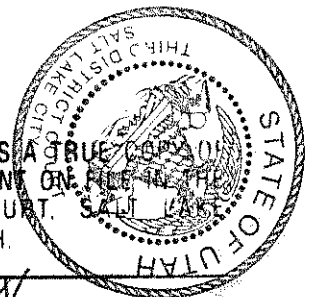
BY THE



DISTRICT COURT JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF
AN ORIGINAL DOCUMENT ON FILE IN THE
THIRD DISTRICT COURT, SALT LAKE
COUNTY, STATE OF UTAH.
DATE: _____

DEPUTY COURT CLERK



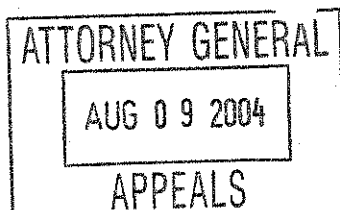
CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS and ORDER OF DISMISSAL was delivered to Gretchen Havner, Attorney for Defendant Harry Miller at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the 5 day of July, 2007.

A handwritten signature in black ink, appearing to be "JES", is written over a horizontal line.

Addendum G

response on
8/25/04



COPY

MARGARET P. LINDSAY (6766)
PATRICK V. LINDSAY (8309)
ALDRICH, NELSON, WEIGHT & ESPLIN
Attorneys for Appellant
43 East 200 North
P.O. Box "L"
Provo, UT 84603
Telephone: (801) 373-4912

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

HARRY MILLER,

Defendant/Appellant.

RULE 23B MOTION
FOR REMAND

Case No. 20040150-CA

Comes now, Harry Miller, by and through counsel, and pursuant to Rule 23B of the Utah Rules of Appellate Procedure, hereby requests that this Court remand this case to the Fourth District for a hearing in order that there might be an adequate record on appeal regarding Nelson's claim of trial counsel's ineffectiveness. Nelson includes with this motion a memorandum of points and authorities, supporting affidavits, and a proposed order for remand.

DATED this 5 day of August, 2004.


MARGARET P. LINDSAY


PATRICK V. LINDSAY

8/19/04
CWD

MARGARET P. LINDSAY (6766)
PATRICK V. LINDSAY (8309)
ALDRICH, NELSON, WEIGHT & ESPLIN
Attorneys for Appellant
43 East 200 North
P.O. Box "L"
Provo, UT 84603
Telephone: (801) 373-4912

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

HARRY MILLER,

Defendant/Appellant.

:
:
: MEMORANDUM OF POINTS
: AND AUTHORITIES IN
: IN SUPPORT OF 23B MOTION
:
: Case No. 20040150-CA
:
:
:

Comes now, appellant, by and through counsel, and pursuant to Rules 23 and 23B of the Utah Rules of Appellate Procedure, hereby submits a Memorandum of Points and Authorities in support of appellant's motion to remand for a hearing on appellant's claims of ineffectiveness by trial counsel.

STATEMENT OF RELEVANT FACTS

The information filed in this matter lists the offense date as December 8, 2000 (R. 3-4). In December of 2003, Miller was convicted by a jury in Third District Court of

aggravated robbery, a first degree felony (R. 83). In February of 2004, Miller was sentenced to five years to life at the Utah State Prison (R.136-138)..

The basis for the conviction was an allegation by Julia Smart that she was accosted at knife point by a man who took her purse, and attempted to take her car at a convenience store (R. 158 at 52-55). Ron Nissen, the clerk at the convenience store, did not see the robbery, but after Smart told him she'd been robbed, he called the police and went out and watched the man try to unsuccessfully drive off in Smart's car and then watched as the man ran off (R. 158 at 91-95). Two years and a couple months later, through a photo and live line-up, Smart identified Miller as the man who had robbed her (R. 158 at 63-67, 81-83). Almost three years after the robbery in question, Nissen, through a photo line-up, identified Miller as the robber (R. 158 at 94-96). Both Smart and Nissen also identified Miller in court during the trial as the perpetrator of the robbery (R. 158 at 64, 67, 95-96).

Trial counsel presented an alibi defense to the jury. Miller, the only witness called by trial counsel, testified that he was living in Donaldsville, Louisiana at the time of the crime, and had been since 1999 (R. 158 at 103). Miller testified that from 1989-1999 he had lived in Salt Lake City (R. 158 at 103). Miller also testified that he worked for 10M Vending Machine from 2000 to February 2002 when he returned to Salt Lake City by bus which was a three day trip (R. 158 at 103-05).

Miller testified that on the day after Thanksgiving he had a stroke and was hospitalized for four days and had to take some time off work (R. 158 at 105-06, 108). He further testified that a nurse would come by after and help him with his speech that was affected by the stroke (R. 158 at 108).

The State and defense counsel also agreed upon a stipulation which was read into the record that Miller was employed by the 10M Corporation in Donaldsville, Louisiana from the end of May 2000 until February 2002 and that Miller was on medical leave from November 25th, 2000 until December 13th, 2000 (R. 158 at 110). The stipulation also stated that on November 25th of 2000 Miller was admitted into the River West Medical Center for a cerebrovascular accident with Broca's aphasia, commonly known as a stroke, and released from there November 28th, 2000 (R. 158 at 110).

At trial, Miller was represented by John O'Connell Jr.

ARGUMENT

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to be represented by competent legal counsel. In order to establish ineffective counsel, "it is the Defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hunt*, 781 P.2d 473, 477 (Utah App. 1989).

When claiming ineffective assistance of trial counsel on direct appeal it is the appellant's obligation "to provide an adequate record on appeal" and without such a record the appellate court "must assume the regularity of the proceedings below." *State v. Litherland*, 2000 UT 76 at ¶11, 12 P.3d 92 (citations omitted). However, the Utah Supreme Court also recognized in *Litherland* that "counsel's ineffectiveness may have caused , exacerbated, or contributed to the record deficiencies." 2000 UT 76 at ¶12.

Accordingly, Rule 23B of the Utah Rules of Procedure is "specifically designed to address the inadequate record dilemma" by allowing appellant to move for a temporary remand for supplementation of the record when aware of nonspeculative facts not "fully appearing on the record... which if true could support a determination that counsel was ineffective." *Litherland*, 2000 UT 76 at ¶14, 16 (quoting Utah R. App. P. 23B). *See also*, *State v. Johnston*, 2000 UT App 290 at ¶ 7, 13 P.3d 178. In other words, "where some crucial factual information is absent from the record," a Rule 23B remand is appropriate. *Johnston*, 2000 UT App at ¶ 9 (quoting *State v. Tennyson*, 850 P.2d 461, 468 n.5 (Utah App. 1993)).

Miller asserts that he is faced with an inadequate record dilemma like that contemplated by the Utah Supreme Court in *Litherland*. Miller asserts that his trial counsel rendered a deficient performance in the following areas which prejudiced him at trial and that the appellate record is currently inadequate to establish this ineffectiveness and the resulting prejudice:

One, trial counsel failed to procure and present to the jury essential alibi witnesses who would have verified Miller's testimony of his presence in Donaldsville, Louisiana, at the time of the offense in Utah although he knew from Miller, and/or with due diligence in investigating, should have known said witnesses were available and essential. For example, Miller's niece, Berthella Miller, would have testified that she was living with Miller and her Aunt, Miller's sister, in her aunt's home during the time period in question, that she saw Miller daily while he was recuperating from the stroke, and that he did not leave the state nor does she believe he was capable of leaving the state during the time period in question.¹

Two, trial counsel failed to procure and/or introduce documents/records into evidence at trial that would have similarly greatly bolstered and been essential to Miller's defense.

For example, although trial counsel had in his file, and Miller communicated to trial counsel the existence of court records showing Miller's presence in court in Louisiana on December 5th, 2000, trial counsel did not attempt to introduce said records at

¹ Paula Miller, Miller's sister, was another possible essential witness whose testimony would have been similar to Berthella Miller's. Trial counsel stated during sentencing that he had tried to procure Paula Miller as a witness for Miller's trial but that she wouldn't come then because she had a son in criminal trouble at the time and needed to be there to support him (R. 159 at 3). Although trial counsel did obtain a continuance when having trouble obtaining hospital information from Louisiana, counsel did not attempt to get a continuance of the trial in order to find a date which Paula Miller could/would attend (R. 25-27).

trial even though there would have been no reasonable strategic decision for not doing so. The court hearings in Louisiana involved charges for commercial fishing without a license, a crime for which there would have been very little, if any, risk of prejudicing the jury compared to the weight of the evidence showing Miller's presence in Louisiana just three days prior to the offense in this case. A certified copy of said record would have been admissible at trial.

Another example is the records of River West Home Health showing that Miller was visited by a Home Health employee on November 29, 2000 and December 1st, 7th, and 14th, 2000. Trial counsel knew, or should have known of the existence of said records/testimony as evidenced by Miller's testimony during trial that he had a nurse come by the house to help with his speech (R. 158 at 108). Said records, which would have been admissible under the business record exception to the hearsay rule, or through testimony of a Home Health employee(s). Said evidence would have been invaluable to Miller's alibi defense as it would have showed Miller's presence in Louisiana, by an independent unbiased source, one day prior and six days after the offense in question, and would also likely have shown Miller's physical condition following the stroke and his capability, or lack thereof, to travel long distances.

Three, trial counsel failed to file a written notice of his intention to claim an alibi defense pursuant to Utah Code Annotated § 77-14-2 which would have been necessary to introduce said witnesses and evidence above.

Miller asserts that he was prejudiced by this deficient performance because he was denied an opportunity to adequately present an alibi defense because witnesses and evidence were not properly investigated and/or procured and/or introduced at trial. Finally, Miller asserts that a Rule 23B remand is the only way to cure the deficiency in the record created by his trial counsel's ineffectiveness. Without a remand Miller will be greatly limited in his arguments on appeal and prejudiced by this Court's inability to address all of his claims.

CONCLUSION

Appellant respectfully requests that, based upon the deficiencies in the record on appeal caused by trial counsel's ineffectiveness, this Court remand this matter to the Third District Court for an evidentiary hearing and the entry of findings of fact relating to the alleged claims of ineffectiveness by trial counsel.

DATED this 5th day of August, 2004.


MARGARET P. LINDSAY


PATRICK V. LINDSAY

Addendum H

22 January 2008

Hearing Excerpts In Re: *SB 16, Exoneration and Innocence Assistance*

Sen. Bell (0:11): This is an exciting bill Mr. President. Um, I'm very pleased to be able to present it to the uh, body this year. It passed uh, unanimously through our judiciary uh, interim committee. Uh, we had compelling testimony concerning this bill. Uh, as you know, with the emergence of DNA uh, evidence, we've been able to uh, more accurately uh, marshal evidence and therefore convict people properly, but also to exonerate people. And this state has uh, has embraced exoneration through DNA evidence. This uh, is a little different bill in that it follows the pattern of the DNA exoneration and adds an element of compensation. Uh, what this bill does is state that a person who is found factually innocent, not technically, but factually innocent of a charge uh, after the uh, person has been found guilty, will be exonerated, meaning uh, it'll be ruled as though the uh, the uh, crime had never been uh, the, the accused had never been convicted. And so the conviction will be overturned. A problem has arisen nationally as people have been exonerated and, and think about this, what could happen. Well uh, the example we had was a policeman who had, in Rhode Island who had some connection with the victim of a murder, was somehow found to be guilty of the murder. Well later the boyfriend of the victim came forward, confessed to the crime, it was corroborated and it was very clear that the man who had uh, lost his ability to be a police officer, lost his uh, uh livelihood, had spent several years in jail uh, was, was factually innocent. This is not a technical, constitutional type of, of a reversal, but, but a factual innocence test. And so as he came and testified to us, we saw the justice of, of this kind of thing and there's a, a project nationally to get these kinds of uh, bills adopted

throughout the nation and the, the leading person here is a young woman whose mother was convicted of murder and served uh, twenty, over twenty-five years for the murder. And uh, as a sixty-six, sixty-seven year-old woman, was freed from prison. Well, people like that across the nation uh, obviously are outraged and they, they uh, can stage a pretty compelling case to a state for why they should be compensated. And so they've sued or they've gone to the legislature. Legislatures in some cases have awarded multi-million dollar awards. You can imagine a young person who's been deprived of earning capacity, of family, of reputation, of education, of these uh, benefits we all take for granted and then are cast back out in society without resources, without the ability to make a living, without retirement. Uh, they can make a compelling case to the legislature and have been awarded multi-million dollar awards. Well, the problem with that is that there's no uh, equality or equivalency if you will, there's no system by which these folks are compensated. And so trying to get ahead of the curve, and we're talking a fractional number of cases here. Uh, we have adopted in this bill a uh, compensatory system and it's, it's fairly modest, but what it is, is uh, establishing the annual average wage, which is about thirty-five thousand dollars for uh, the average annual uh, income of a worker in the state of Utah. And one who is uh, who qualifies for this, um, let's see, will receive um, that amount of wage, about thirty-five to forty thousand dollars for each year spent in prison and a, a like amount for each year spent on death row, uh, to the maximum of fifteen years, is my memory. Uh, so, we felt like this was a modest uh, but foresighted, farsighted way in which to address these problems. It will be equivalent across the board so that uh, one person who makes some uh, very attractive claim to a legislature doesn't hit the lottery while someone who doesn't have those resources is left without. It also uh,

avoids lawsuits because persons who were wrongly convicted who can show prosecutorial misconduct or something, are foreclosed from that because this would be, basically a worker's compensation-type compensation system rather than a hit-the-lottery system. So uh, that's my explanation of the bill and I'd be happy to answer any questions, Mr. President.

Sen. Bell(15:28): Mr. President uh, in summation let me just mention two further points that have been raised in the debate. Um, first of all, the burden is clearly, if you look at line 271, the burden is on the uh, petitioner. So the fact, the mere fact that the uh, the prisoner has been released from jail does not establish the right to have a, a claim under this fund. Uh, the burden, in line 275, is upon the petitioner to establish the petitioner's factual innocence by clear and convincing evidence. That is a very, very high standard. And the court, considering all the evidence and circumstances, then has to make a determination that the prisoner is factually innocent. He can't be on jail for some, in jail for something else. Uh, he has to be factually innocent of this claim. It's a very high standard and so we, we anticipate it will be sparingly used. The second thing, I think I need to uh, to correct an impression I left relative to um, Senator Hickman's question. And that is uh, on line 321 uh, while on line 316, the victim reparation office has to, to disperse these amounts, we're required to, to appropriate non-lapsing funds from the general fund uh, the next session after an award to keep the, the fund whole. Um I, I think it's interesting though that the payout uh, is not a lottery-type payout. If someone got a ten year uh, payout of, of uh, let's say three hundred fifty thousand dollars, you only get up to twenty percent of that front-end and the rest of it is dispersed over a, a

period of years so that it becomes a stream of, of minimal income. So, you know, this, I know we're kind of goosey about this sort of, of thing, but when you think about an innocent person having suffered on death row or otherwise, having deprived their life, liberty and, and happiness, it's, it's just a minimal kind of thing as a protection to this state against lawsuits and uh, and, and really uh, some claims that could be multi-million dollar claims. So with that summary, Mr. uh President, I would uh, move that Senate Bill 16 pass.

Transcribed by:
Michelle Petersen,
Legal Secretary
Attorney General's Office

