

2010

Korte H. Wamsley v. The State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KORTE H. WAMSLEY, JR.,	:	
Petitioner/Appellant,	:	
vs.	:	
STATE OF UTAH,	:	Appellate Court No. 20100617
Respondent/Appellee.	:	

BRIEF OF APPELLANT

THIS APPEAL IS FROM A DISMISSAL OF THE TRIAL COURT OF A PETITION FILED UNDER THE POST CONVICTION REMEDIES ACT, U.C.A. §78B-9-101 ET SEQ. WHEREIN THE TRIAL COURT DISMISSED THE PETITION, PURSUANT TO A SUA SPONTE MOTION, THAT IT WAS TIME BARRED PURSUANT TO THE STATUTE OF LIMITATIONS PROVISION OF THAT ACT, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH C. FRATTO, JR., PRESIDING.

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FILED

UTAH APPELLATE COURTS

MAR 21 2011

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal of an order of dismissal on statute of limitation grounds on a petition filed under the Post Conviction Remedies Act. The Court has jurisdiction pursuant to U.C.A. §78A-4-103(2)(j).

ISSUE ON APPEAL AND STANDARD OF REVIEW

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DISMISSED THE PETITIONERS CLAIM ON A STATUTE OF LIMITATIONS GROUND WITHOUT DETERMINING IF THERE WAS EVIDENCE OF FACTUAL INNOCENCE AND WHETHER THE INTERESTS OF JUSTICE EXCEPTION TO THE STATUTE OF LIMITATIONS APPLIED?

Standard of Review: The first standard of review regards the dismissal under the sua sponte motion by the trial court. In the case of Miller v. State, ¶ 6, 2010 UT

App. 25 226 P.3d 743 this Court stated, Whether a trial court properly granted a Rule 12(b)(6) motion to dismiss “is a question of law that we review for correctness, affording the trial court’s decision no deference.” (*Citations omitted*)

The second standard of review regards the interest of justice claim. In *Adams v. State*, ¶ 8, 2005 UT 62, ¶ 8, 123 P.3d 400, the Court ruled that the finding of interest of justice is a legal determination. “Because ‘legal determinations concerning the proper interpretation of [a] statute which grants the trial court discretion are reviewed for correctness,’ we apply a de novo standard here.”

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U. S. CONSTITUTION

FIFTH AMENDMENT - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EIGHTH AMENDMENT - Further Guarantees in Criminal Cases

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CODE

28 U.S.C. §2255 Federal Custody; Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Utah Code Annotated

§76-5-404.1. Sexual abuse of a child -- Aggravated sexual abuse of a child.

See attached Addendum A.

§78B-9-105. Burden of proof.

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section **78B-9-106**, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the

following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection **78B-9-104(1)(f)** is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section **78B-9-303**; or

(b) factual innocence under Section **78B-9-401**.

(5) Sections **77-19-8**, **78B-2-104**, and **78B-2-111** do not extend the limitations period established in this section.

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

(1) 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.

(2) (a) The petition shall contain an assertion of factual innocence under oath by the petitioner, and shall aver, with supporting affidavits or other credible documents, that:

(i) newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent;

(ii) the specific evidence identified by the petitioner in the petition establishes innocence;

(iii) the material evidence is not merely cumulative of evidence that was known;
(iv) the material evidence is not merely impeachment evidence; and
(v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent.

(b) The court shall review the petition in accordance with the procedures in Subsection (9)(b), and make a finding that the petition has satisfied the requirements of Subsection (2)(a). If the court finds the petition does not meet all the requirements of Subsection (2)(a), it shall dismiss the petition without prejudice and send notice of the dismissal to the petitioner and the attorney general.

(3) (a) The petition shall also contain an averment that:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the exercise of reasonable diligence; or

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

(b) Upon entry of a finding that the petition is sufficient under Subsection (2)(a), the court shall then review the petition to determine if Subsection (3)(a) has been satisfied. If the court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss the petition without prejudice and give notice to the petitioner and the attorney general of the dismissal, or the court may enter a finding that based upon the strength of the petition, the requirements of Subsection (3)(a) are waived in the interest of justice.

(4) If the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence. The court shall review the evidence and may dismiss the petition at any time in the course of the proceedings, if the court finds that the evidence of factual innocence relies solely upon the recantation of testimony or prior statements made by a witness against the petitioner, and the recantation appears to the court to be equivocal or self-serving.

(5) A person who has already obtained postconviction relief that vacated or reversed the person's conviction or sentence may also file a petition under this part in the same manner and form as described above, if no retrial or appeal regarding this offense is pending.

(6) 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**.

(7) Except as provided in Subsection (9), the petition shall be in compliance with and governed by Rule 65C, Utah Rules of Civil Procedure, and shall include the underlying criminal case number.

(8) 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.

(9) (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.

(b) The assigned judge shall conduct an initial review of the petition. If it is apparent to the court that the petitioner is either merely relitigating facts, issues, or evidence presented in previous proceedings or presenting issues that appear frivolous or speculative on their face, the court shall dismiss the petition, state the basis for the dismissal, and serve notice of dismissal upon the petitioner and the attorney general. If, upon completion of the initial review, the court does not dismiss the petition, it shall order the attorney general to file a response to the petition. The attorney general shall, within 30 days after receipt of the court's order, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.

(c) After the time for response by the attorney general under Subsection (9)(b) has passed, the court shall order a hearing if it finds the petition meets the requirements of Subsections (2) and (3) and finds there is a bona fide and compelling issue of factual innocence regarding the charges of which the petitioner was convicted. No bona fide and compelling issue of factual innocence exists if the petitioner is merely relitigating facts, issues, or evidence presented in a previous proceeding or if the petitioner is unable to identify with sufficient specificity the nature and reliability of the newly discovered evidence that establishes the petitioner's factual innocence.

(d) 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.

(10) 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.

(11) 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.

(12) A petition to determine factual innocence under this part, or Part 3, Postconviction Testing of DNA, shall be filed separately from any petition for postconviction relief under Part 1, General Provisions. Separate petitions may be filed simultaneously in the same court.

(13) The procedures governing the filing and adjudication of a petition to determine factual innocence apply to all petitions currently filed or pending and

any new petitions filed on or after the effective date of this amendment.

§78A-4-103. Court of Appeals jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(j) cases transferred to the Court of Appeals from the Supreme Court.

Utah Rules of Civil Procedure

Rule 12. Defenses and objections.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

This is an appeal of a dismissal by the trial court of a petition filed under the Post Conviction Remedies Act UCA §78B-9-101 et seq. The trial court, pursuant to a sua sponte motion, dismissed the petition on the grounds that it was time

barred pursuant to the statute of limitations provision of that act. The order was entered on July 14, 2010, and the Petitioner filed a notice of appeal on July 22, 2010.

STATEMENT OF THE FACTS

The Petition was originally charged in September 2005. The Petitioner filed a discovery request for all evidence the State had regarding the charges set forth in the information on September 9, 2005. The discovery request specifically requested any exculpatory evidence in the possession of the State, (which would include any law enforcement entity working for the State). The State produced a quantity of evidence to defense counsel; and upon the advice of his counsel, presumably based upon the evidence received pursuant to his discovery request, the Petitioner then entered a plea of guilty to two counts of sexual abuse of a child a second-degree felony under UCA §76-5-404.1. The Petitioner specifically entered the plea as an *Alford Plea*, pursuant to *North Carolina v. Alford* 400 U.S. 25, 25, 91 S.Ct. 160, 161 (U.S.N.C. 1970), and has maintained his position of innocence steadfastly through the proceedings.

Sometime later, during a collateral juvenile court proceeding, the Petitioner discovered that the State had withheld critical evidence regarding other, similar, allegations made by the alleged victim that could also not be substantiated by any hard evidence. This information sparked the Petitioner to look at other areas of evidence, and he determined that there was significant evidence to persuade a

handwriting expert that the statements supposedly written by the alleged victims were written and signed by the Petitioner's ex-wife. The information revealed in discovery pursuant to this juvenile court proceeding was substantial and would have altered the path of the entire prosecution. The Petitioner would never have pled guilty, and the petitioner believes that the outcome of any trial would have been favorable. It was after this information was made known that the Petitioner filed the action in Post Conviction Remedies which is the subject of this appeal. The trial court received the petition for Post Conviction Remedies and filed a sua sponte motion to dismiss as being time-barred.

This Court first addressed this matter in 2009 in the unpublished opinion of *Wamsley v. State*, 2009 UT App 332, wherein the court reversed the trial courts summary dismissal of the Post Conviction Remedies claim as time barred. The Court remanded for a hearing on the statute of limitation issue.

The matter then went to the trial court on remand, and a hearing was scheduled for June 16, 2010. The trial court in this case set the hearing on a sua sponte notice that the petition for remedies under the Post Conviction Remedies Act was time-barred. (R 536/2) The court then stated that under Utah Code Annotated §78B-9-105 that the burden is on the Petitioner to disprove preclusion by a preponderance of the evidence. Petitioner's counsel then told the court that they had filed a request for discovery in that this was an essential part of the case to establish factual innocence. Petitioner's counsel specifically requested the ability

of a handwriting analyst (George Throckmorton), who they had retained, to examine two documents, which were in the possession of the State, which were the basis of the charge and the impetus for the guilty plea. (R. 536/3)

The trial court then asked if the request for discovery does not go to whether or not it's time-barred, to which the Petitioner answered that is necessary in order to establish the factual innocence, which would establish that the claim was not time-barred. (R. 536/4) The court then asked to hear from respondent's counsel who argued that the Post Conviction Remedies Act had a one-year statute of limitations and that the Petitioner was therefore time-barred by that statute.

Petitioner's counsel then argued that the statute had been tolled by a State action in violation of the state constitution (specifically a *Brady* violation) (R. 536/10-11). Petitioner's counsel also argued that the trial court is allowed to weigh the statute of limitations under in-the-interest-of-justice theory. (R. 536/12) Finally, Petitioner's counsel argued that the statute limitations did not commence until December 2008; and, therefore, the filing, which was in June of 2009, was within the statutory period.

The court then ruled that the petition was not timely and was time-barred. (R. 536/63)

SUMMARY OF ARGUMENTS

The trial court, pursuant to a sua sponte motion, dismissed the Petitioner's claim under the Post Conviction Remedies Act on the grounds that the petition was

time-barred pursuant to the statute of limitation language of that act. Despite a request from Petitioner's counsel that the court allows some testing of documents that were in the sole possession of the prosecution, and request that evidence be submitted regarding the factual innocence of the Petitioner, the trial court dismissed the case. In Post Conviction Remedies Act cases, there is generally a one-year statute of limitations. However, that one-year period can be extended under two different grounds. First, if there is significant and material newly discovered evidence, the one-year period is tolled. Second, if there is an allegation of factual innocence, the trial court can waive the statute limitations if there is a showing of interest of justice. Utah appellate courts have routinely held that significant evidence of innocence meets this interest of justice criteria. In the present case, the Petitioner alleged that the primary document relied on in the plea of guilty had been forged. Furthermore, there was significant evidence withheld by the prosecution regarding the credibility of the main state's witness. The absence of both of those factors played heavily on the Petitioner's decision to plead guilty.

The trial court erred in dismissing the petition on a sua sponte motion without allowing the Petitioner to conduct nonintrusive testing and present evidence supporting the interest of justice or newly discovered evidence issues. Based upon the trial court's refusal to allow the Petitioner to present evidence to support his Post Conviction Remedies Act request, the trial court has substantially

and inappropriately affected the Petitioner's statutory and constitutional due process rights.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE PETITIONER'S CLAIM ON A STATUTE OF LIMITATIONS GROUND WITHOUT DETERMINING IF THERE WAS EVIDENCE OF FACTUAL INNOCENCE AND WHETHER THE INTERESTS OF JUSTICE EXCEPTION TO THE STATUTE OF LIMITATIONS APPLIED.

This action is before this Court to determine whether the Petitioner, or any individual in the position of the Petitioner, has a right to analyze and present evidence and have the trial court determine if there is an interest of justice saving provision in a Post Conviction Remedies action, or whether the trial court can sua sponte rule without presentation of evidence that the one-year statute of limitations bars all claims under the Post Conviction Remedies Act. The relevant provisions of that act include the following:

§78B-9-107. Statute of limitations for postconviction relief

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution

As relevant to the case at bar, the act provides for a one-year statute of limitations from the date that the Judgment, Sentence and Conviction is entered or from the date that the new and significant evidence of innocence is discovered, or reasonably could have been discovered. There is a tolling provision for periods of time that the Petitioner was prevented from discovering the evidence due to a constitutional violation of the State.

In the case at bar, the Petitioner acknowledges that the petition for Post Conviction Remedies was not filed within one year from the sentence. The Petitioner alleged, however, that the matter was filed within one year of the discovery of new evidence and/or that there was a tolling provision due to *Brady* violations by the State which prevented the Petitioner from discovering that relevant evidence.

The other provision that the petition relied upon is contained in U.C.A. 1953 § 78B-9-402(3)(b) which provides in relevant part:

If the court finds that the requirements of Subsection (3)(a) have not been satisfied, it may dismiss the petition without prejudice and give notice to the petitioner and the attorney general of the dismissal, or the court may enter a finding that based upon the strength of the petition, the requirements of Subsection (3)(a) are waived in the interest of justice.

The Petitioner argued that under the interests of justice provision that the statute limitations period should have been waived due to the fact that the primary item of evidence was a forged document that was not as it was purported to be.

There is a significant question whether or not the trial court can properly submit a case for a sua sponte motion for summary dismissal. In the case of *Kell v. State*, 2008 UT 62, ¶ 46, 194 P.3d 913, the Court held, “It is error for a trial court to sua sponte grant summary judgment on an issue when neither party has sought summary judgment on that issue.” Based upon that issue alone, this court could reverse the trial court’s dismissal. If, however, the Court declines to do so, the Court would then address the issue of the propriety of the trial court’s dismissal on the statute limitations grounds.

Both State and Federal appellate courts have addressed the issue of the statute limitations with regards to Post Conviction Remedies Acts (and in some cases federal habeas claims). Most of these decisions address cases brought under the claim of factual innocence.

The State argued during the hearing that the Petitioner did not file the petition in question under the factual innocence portion of the Post Conviction Remedies Act. It is important for the Court to note that the original petition was filed by the Petitioner in a pro se capacity, and therefore the Court should allow some leeway regarding the form of the petition. It is also important to note that the

Petitioner specifically referred to the factual innocence statute in the body of the petition. (See Addendum B/Page 13) The trial court in its oral ruling, stated,

The court is also finding if the petition was to include the post-conviction determination of factual innocence under 78 (b)-9-401, that same statute of limitations would apply and that Mr. Walmsley would have the same burden and the court makes the same finding that the plaintiff, Mr. Walmsley has not met his burden of disproving preclusion by a preponderance of the evidence and that the petition is barred, time-barred. (R 536/63)

The trial court, therefore, never made a finding that the petition did not include a factual innocence claim, and therefore this matter is properly before this court on the interests of justice exception to the statute of limitations.

Addressing first the Utah State Appellate Court's position on the Post Conviction Remedies Act, both this Court as well as the Utah Supreme Court have routinely held that claims of factual innocence should be allowed regardless of the statute limitations where there is an interest of justice element. In the case of *Adams v. State*, 2005 UT 62, ¶ 16, 123 P.3d 400, the Utah Supreme Court addressed the issue of interests of justice under the Post Conviction Remedies Act. In that case the Court reversed the trial court's determination that a claim was time-barred and stated, "An analysis of what constitutes an exception in the 'interests of justice' should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing." The Court went on to say that it did not "establish as a hard and fast rule that a petitioner must be able to demonstrate both that his claim is meritorious and that he was justified in raising it

late.” Although both of those elements can be considered by the trial court, the absence of one does not automatically result in a time-barring of the claim. Rather the courts are to weigh both of the issues and make a determination as to whether the interest of justice saves a claim that would otherwise be time barred. The Court specifically noted that, “a claim of actual innocence supported by DNA evidence may require virtually no justification for a late filing; on the other hand, an entirely frivolous claim would not meet the ‘interests of justice’ exception even with the best possible excuse for late filing.”

In the case of *Bluemel v. State*, 2007 UT 90 173 P.3d 842, the Court further explained that the interest of justice analysis “should involve examination of both the meritoriousness of the petitioner’s claim in the reason for the untimely filing” and again reiterated that a claim of actual innocence supported by significant evidence would require little or no justification for a late filing. The *Bluemel* decision is particularly instructive to the case at hand because this case involved a reversal of a trial court’s denial of a Post Conviction Remedies Claim where there was a plea of guilty¹ being challenged by the petitioner as well as ineffective assistance of counsel claims. (Id. at ¶ 20)

¹ See *State v. Merrill*, 2005 UT 34, 114 P.3d 585, where the Court recognized that the Post Conviction Relief Act was a viable option for someone who had pled guilty where the Court stated, “Immediately following §77-13-6(2)(b), which imposes the thirty-day filing limit, §77-13-6(2)(c) preserves the right of a defendant to pursue challenges to the lawfulness of his guilty plea under both the Post-Conviction Relief Act (“PCRA”) and Utah Rule of Civil Procedure 65C, provisions

Perhaps the most instructive Utah case concerning the burdens of proof and required allegations under the Post Conviction Remedies Act is the case of *Miller v. State*, 2010 UT App. 25, 226 P.3d 743. In that case, this Court reversed a summary judgment order for the respondent on the grounds that the trial court had misapplied the law with regards to the Post Conviction Remedies Act. This Court first stated that a petition filed under the Post Conviction Remedies Act “must evidence ‘a bona fide issue as to whether the petitioner is factually innocent.’” (Id at ¶15) In analyzing that evidence, the court must “accept the factual allegations in the petition as true and consider them and all reasonable inferences to be drawn from them in light most favorable to the petitioner.” (Id at ¶16)

The Court went through a thorough analysis of all of the factual allegations made by Miller and stated “accepting all of these allegations as true and ‘considering them at all reasonable inferences to be drawn from them in the light most favorable to Miller,’” the Court reversed the trial court’s dismissal under a summary judgment motion. (Id at ¶16)

It is instructive to note that in the *Miller* case, the Court was dealing with a summary judgment motion which would be akin to the sua sponte motion by the trial court in the present case. In *Miller*, the court stated:

that embody the elements of the traditional writ of habeas corpus. Utah Code Ann. §77-13-6(2)(c) (Supp. 2004).”

We conclude that Miller's petition succeeds in presenting such an issue, especially because Miller's commission of the underlying offense, although not impossible, is highly debatable because of both physical and temporal limitations. Most notably, Miller's stroke limited his physical mobility such that he could get around only with assistance, and testimony indicates Miller had only slightly more than twenty-four hours to fly from his recovery bed in Louisiana to Utah in order to commit an act of physical violence against a complete stranger. These facts, together with the reasonable inferences drawn therefrom, viewed in a light most favorable to Miller, *see St. Benedict's Dev. Co.*, 811 P.2d at 196, raise a bona fide issue as to Miller's factual innocence.^{FN7} Having determined that Miller's petition satisfies the requirements of the Factual Innocence Statute, we reverse the trial court's grant of the State's rule 12(b)(6) motion to dismiss and remand so that Miller may receive the factual innocence hearing to which he is statutorily entitled.

FN7. We note that Miller still faces a heavy burden of proof at the factual innocence hearing, *see Utah Code Ann. §78B-9-404(1)(b)* (2008), and our decision expresses no opinion as to whether Miller will be able to meet that burden; rather, we hold simply that he must be given an opportunity to do so. (*id* at ¶ 18)

If we now review the numerous federal decisions on Post Conviction Remedies and habeas claims, we see a similar standard and burden of proof. Although there is a one-year limitation period enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that bars habeas relief and access to federal courts for prisoners whose convictions and sentence have been final for more than one year (28 U.S.C. §2255), there is a split among the circuits whether the Constitution requires consideration of otherwise time-barred claims when there are credible allegations of actual innocence.

In the case of *David v. Hall*, 318 F.3d 343, 347 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003), the Court held that prisoners “who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming.” Likewise, in *Whitley v. Senkowski*, 317 F.3d 223 (2nd Cir. 2003), the Court required that the district court at least review the evidence and determine whether there is, in fact, a showing of actual innocence before invoking the Statute of Limitations bar to a Post Conviction Remedies claim.

The Court in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005) held that “equitable tolling of the one- year limitations period based on a credible showing of actual innocence is appropriate.” And the Tenth Circuit issued a similar holding in *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) where the Court held that equitable tolling is appropriate “when a prisoner is actually innocent” and “diligently pursue[s] his federal habeas claims”

However, in *Escamilla v. Jungwirth*, 426 F.3d 868 (7th Cir. 2005), the Court held that “[p]risoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action.” Although statutorily prohibitive in the federal arena, that standard would not be problematic to the Petitioner in the case at bar since the Utah Post Conviction Remedies statute provides for the interest of justice exception. In the case of *Araujo v. Chandler*, 435 F.3d 678 (7th Cir. 2005), the Court held that although

actual innocence did not save the petition for Post Conviction Remedies, the court noted that the contention that actual innocence is a freestanding exception to the AEDPA's limitations period is "an argument which has caused the courts a good deal of consternation."

Thus, the Sixth, Seventh, Eighth and Tenth circuits have adopted either a full or restricted actual innocence exception to the limitations period which allows access to courts for federal prisoners with credible claims of actual innocence despite the fact that there is no "interests of justice" exception in the statute. Courts which have restricted the exception require that either the prisoner diligently pursue his claims and/or that there be some action on the part of the respondent to have prevented diligent pursuit of the claims.

Clearly the difference between the circuits and the Utah law is that the Utah law has a specific provision that provides for the elimination of the statute limitations in in-the-interest-of-justice situations. Although the Utah law clearly differentiates between these other circuit opinions, they are included in this brief by Petitioner in an effort to provide fair treatment of all of the circuits under the constitutional claims.

Several courts have recognized that denying federal habeas relief from one who is actually innocent would be constitutionally problematic. *See Wzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218 (11th Cir. 2000) (noting that barring a habeas petitioner who can demonstrate actual innocence "raises concerns because of the

inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence" (footnotes omitted)). In the case of *Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997), the Court noted serious Eighth Amendment and due process concerns if AEDPA's procedural limitations barred a habeas petitioner claiming actual innocence from collateral review) Likewise, the Court in *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997), held "Where no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent ... we would be faced with a thorny constitutional issue." Also, *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998), noting that where a petitioner claims actual innocence, the limitations period "raises serious constitutional questions" which "possibly renders the habeas remedy inadequate and ineffective". See also *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1190 (ED Mich. 2001) (holding that the use of AEDPA's one-year limitations period "to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause ... as well as the Eighth Amendment's ban on cruel and unusual punishment").

Justice John Paul Stevens, in the case of *Schlup v. Delo* 513 U.S. 298, 324-325, 115 S.Ct. 851, 866 (U.S.Mo., 1995), most eloquently described this whole debate when he stated,

Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.” *In re Winship*, 397 U.S. 358, 372, 90 S.Ct. 1068, 1077, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).

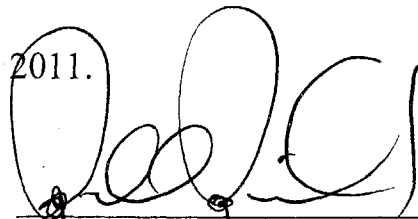
The use of a statute of limitations to deny judicial review of actual innocence claims also violates the Fifth Amendment’s due process clause, which the Supreme Court has recognized as protecting notions of fundamental fairness designed to prevent a miscarriage of justice. *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Against this backdrop of state and federal case law regarding factual innocence claims, it is even more compelling that the trial court in the present case allow some non intrusive testing paid for by the Petitioner, and a presentation of evidence for the purpose of determining whether there is a statutory bar, or an interests of justice exception. Unfortunately, the trial court would allow neither. The court filed the sua sponte motion to dismiss and made a determination of dismissal solely on the basis of an erroneous reading of the limitation portions of the Post Conviction Remedies Act.

CONCLUSION

The Utah Post Conviction Remedies Act clearly allows for an interests-of-justice exception to the one-year statute of limitations. The trial court erred in ruling that the Petitioner was barred from proceeding with his claim due to this statute of limitations. The trial court did not allow counsel to present the factual innocence claims, did not allow for some easily obtainable review of evidence by George Throckmorton, and rather summarily dismissed the petition. Furthermore, the trial court did not allow the petitioner to submit evidence regarding the *Brady* violation and thus did not address properly the claim of newly discovered evidence. Based upon these errors, the Petitioner respectfully requests this court to reverse the dismissal, allow the requested discovery, and then hold an evidentiary hearing to determine the strength of the factual innocence claim.

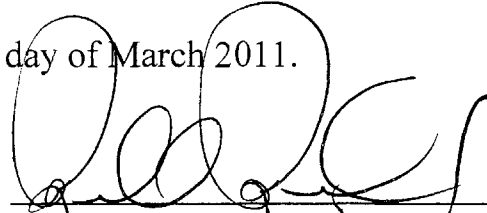
DATED this 21st day of March 2011.



RANDALL W. RICHARDS
Attorney for Petitioner/Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant together with a CD of the same to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor , PO Box 140854 Salt Lake City, Utah 84114-0180, postage prepaid this 21st day of March 2011.

A handwritten signature in black ink, appearing to read 'Randall W. Richards', is written over a horizontal line.

RANDALL W. RICHARDS
Attorney at Law

EXHIBIT A

76-5-404.1. Sexual abuse of a child Aggravated sexual abuse of a child.

(1) As used in this section, "child" means a person under the age of 14.

(2) A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(3) Sexual abuse of a child is punishable as a second degree felony.

(4) A person commits aggravated sexual abuse of a child when in conjunction with the offense described in Subsection (2) any of the following circumstances have been charged and admitted or found true in the action for the offense:

(a) the offense was committed by the use of a dangerous weapon as defined in Section **76-1-601**, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnaping;

(b) the accused caused bodily injury or severe psychological injury to the victim during or as a result of the offense;

(c) the accused was a stranger to the victim or made friends with the victim for the purpose of committing the offense;

(d) the accused used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense;

(e) the accused, prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense;

(f) the accused committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;

(g) the accused committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;

(h) the offense was committed by a person who occupied a position of special trust in relation to the victim; "position of special trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, babysitter, adult scout leader, natural parent, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent;

(i) the accused encouraged, aided, allowed, or benefited from acts of

prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person; or

(j) the accused caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

(5) Aggravated sexual abuse of a child is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (5)(b), (5)(c), or (6), not less than 15 years and which may be for life;

(b) except as provided in Subsection (5)(c) or (6), life without parole, if the trier of fact finds that during the course of the commission of the aggravated sexual abuse of a child the defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual abuse of a child, the defendant was previously convicted of a grievous sexual offense.

(6) If, when imposing a sentence under Subsection (5)(a) or (b), a court finds that a lesser term than the term described in Subsection (5)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) for purposes of Subsection (5)(b), 15 years and which may be for life; or

(b) for purposes of Subsection (5)(a) or (b):

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(7) The provisions of Subsection (6) do not apply when a person is sentenced under Subsection (5)(c).

(8) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

EXHIBIT B

Korte H. Wamsley, Jr.
113 N. 2775 W.
West Point, UT 84015
(801) 560-2230

FILED DISTRICT COURT
Third Judicial District

JUN 22 2009

By [Signature] SALT LAKE COUNTY
Deputy Clerk

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

KORTE H WAMSLEY, JR.)	PETITION FOR RELIEF UNDER THE
Plaintiff)	POST CONVICTION REMEDIES ACT
VS.)	Utah Code Ann. §78B-9-101, et seq.
)	Utah Rules of Civil Procedure 65C
STATE OF UTAH)	Case No. <u>090910731</u>
Respondant)	Judge <u>Fralto</u>

Comes now Korte H Wamsley, Jr., and Petitions the Court to vacate the Alford Plea and overturn the subsequent felony convictions entered into by the Third District Court, West Jordan Department, in and for Salt Lake County, State of Utah, Case number 051400719. The plea and convictions were entered into on June 8, 2007, however the time to seek relief has been tolled for reasons provided throughout this petition. Relief is being sought under Utah Code Ann. §78B-9-101, et seq. for the following:

Utah Code Ann. §78B-9-104 The Plea itself is illegal due to its very nature and the circumstances surrounding it. Acceptance of the Plea by the Court also violated the Utah Rules for Criminal Procedures and the Plaintiff's Constitutional Rights. Neither was the Plea entered knowingly and voluntarily by the Plaintiff, evidence of which is presented with this Petition. Because the Plaintiff was incarcerated immediately after sentencing in the Salt

Lake County Jail, which does not have a law library, and because he could not get his attorney to respond to him while incarcerated, as is shown throughout the Memorandums of Points and Authorities, he was denied access to information regarding the plea's legality as well as access to the courts to contest it.

Utah Code Ann. §78B-9-402 and Utah Code §78B-9-104(e) New evidence is being submitted with this Petition that proves charges against the Plaintiff never should have been filed to begin with. The entire case was one of malicious prosecution that capitalized on the willingness of the State's supposed "Witnesses" to commit forgery and perjury, violating the Utah Rules for Criminal Procedures, and the Constitutional Rights of the Plaintiff. As of December, 2008, the Plaintiff also received new documents proving that the prosecutor illegally withheld evidence from the trial court. This evidence tolls the time allowed to enter this Petition, as dictated by Utah Code Ann. §78B-9-107(2) and Utah Code Ann. §78B-9-107(4)(b).

Since the Plaintiff is not able to afford counsel, he is acting *pro se* and asks the court to also apply all Utah Statutes they determine provide relief, and of which he may not be aware. The Plaintiff is submitting all required evidence as noted throughout the Memorandums of Points and Authorities that follow. For purposes of the court record, the Plaintiff first submitted a Petition on April 21, 2009 to the court of original jurisdiction, as required by the code, but did so under the criminal case number. The trial court dismissed that Petition on May 28th, 2009, since it was not filed as a "new action". (Exhibit A)

MEMORANDUM OF POINTS AND AUTHORITIES RE: ILLEGALITY OF PLEA

1. Under Rule 11(e)(4)(B) of the Utah Rules for Criminal Proceedings, for a plea to be entered, there must be a factual basis for the plea. A factual basis establishes that the charged crime was actually committed by the Plaintiff. The Alford plea was not entered due to sufficient evidence, and the court put this on record during the Plea Colloquy. (Exhibit B – June 8th Plea Colloquy, page 4, line 25 – page 5, line 7).

A trial court's failure to comply strictly with this rule in accepting a guilty or no contest plea is good cause as a matter of law, for the withdrawal of that plea, as was ruled on in State v. Gibbons, 740 P.2d 1309, as well as State v. Smith, 812 P.2d 470. According to these rulings, when a violation of this rule deprives a defendant of a constitutional right, which is clearly the case as outlined in the Plea submitted by the Plaintiff (Exhibit C), from pages 2 through 4, it is grounds for habeas corpus or other collateral relief.

2. Again, in pleas under North Carolina vs. Alford, where a defendant necessarily does not admit to all elements of the charged crimes, *the record must be sufficient* to satisfy the trial court and/or a reviewing court that the State's case is strong enough to warrant acceptance of the plea when the Defendant has not admitted guilt. Prosecutor Sean Torriente's Certificate of Prosecuting Attorney claiming, "There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense for which the plea is entered..." is not factual or sufficient grounds for the court to accept an Alford Plea.

Prosecutor Sean Torriente, at sentencing on Oct. 10, 2007, and now on permanent Court record, made a public statement, "that this case isn't about credibility" after his witness, Korynne Wamsley, disclosed to the court that it was "hard" for her "not to lie" and that she lies because she's "just used to it;" that she lies "without even knowing it" because she has "lied so

many times.” (Exhibit D, Sentencing Colloquy, Page 8). The State had nothing but Witness statements on which to base this case. The very fact that Mr. Torriente admitted before the Court that “this case isn’t about credibility”, when that is all his charges were based on, was sufficient to prove to the Court that the State’s case had no merit and there was, in fact, *insufficient* evidence. Actually, by stating this, Mr. Torriente is admitting he had no evidence at all. Adding to this that Mr. Torriente’s second “victim/witness”, Kaitlin Wamsley, is now on the court’s record as accusing four separate and distinct individuals of sexually abusing her (Exhibit E, Page 4 of Bar Complaint plus Bar Complaint Exhibits M and N) and, on December 9, 2008, was recently discovered to have accused a fifth individual of having sexually abused her at the same time she was accusing the other four, (Exhibit F - DCFS Statement), we see even further why Mr. Torriente admits his case “is not about credibility”. The Plea, without a factual basis, is completely invalid.

3. The trial court relied on the Preliminary Hearing for its evidence without reviewing it (Exhibit B - Page 6, lines 16 – 20). As provided in this Petition, a copy of the Bar Complaint clearly shows the witnesses were lying, and the Preliminary transcript captures these lies. (Exhibit E). This removes the supposed factual basis on which the court accepted the plea (Exhibit B – Page 6, lines 16 – 20). In State vs. McEwan, 2000 UT APP 118, the court ruled, “When a defendant enters a guilty plea but does not admit guilt, to ensure the plea is knowing and voluntary, ‘the record must reveal either facts that would support the prosecution of a defendant at trial or facts that would suggest a defendant faces a substantial risk of conviction at trial.’...Moreover, for pleas entered after State v. Gibbons...the trial court must determine that this burden has been met at the plea hearing before it accepts the guilty plea.” The plea colloquy clearly shows this was not done merely by using the Preliminary as evidence.

4. Under Rule 11(e)(5) the defendant must be advised that there is the possibility of the imposition of consecutive sentences. The defendant was never advised of this (Exhibit B).
5. In State v. Gibbons, 740 P.2d at 1313 the court ruled, "It is not sufficient to assume that defense attorneys make sure that their clients fully understand the contents of the affidavit. The duty to ensure that defendants know and understand the rights they are surrendering when pleading guilty rests not on the parties, but on the trial court." The trial court clearly relied on the defendant knowing these rights through his defense counsel. (Exhibit B).
6. The Alford Plea entered by the Plaintiff contained a promise of value that was used to coerce the Plaintiff into entering it. The Plea (Exhibit C) clearly states on page 4, "Defendant will not serve prison time," and this arrangement was approved by the court and such approval added to the Plea on page 5 and incorporated into the Sentence (Exhibit D – Sentencing Colloquy, Page 20). At the time of sentencing a 90 day review was established, purportedly because the Court, "Would be interested in knowing what sex offender treatment may be available at that time or what other appropriate arrangements such as work release may be available." (Exhibit D – Sentencing Colloquy, Page 21) After Sentencing, but prior to this 90 day review, which occurred on January 14, 2008, Mr. Yengich claimed that the court ordered him to enter a motion on behalf of the Plaintiff (Exhibit G – e-mail from Ron) requesting transfer to a State Adult Correctional Facility. The Plaintiff had been unable to get his attorney to respond to his efforts to contact him since Sentencing, and had no knowledge that such a motion had been entered (Exhibit H - letter from Korte, e-mail to Ron). He was neither consulted nor did he concur with this action (Exhibit I – e-mail from Plaintiff's wife stating Plaintiff did not accept Motion). The court's direction in telling Mr. Yengich to enter the Motion that would change the Plaintiff's Sentence was confirmed during the review when Judge Adkins, now on Court record,

declared that he had never intended the review for any purpose other than “an inpatient program if there was one available.” (Exhibit J –January 14, 2008 Review Colloquy) According to Black’s Law Dictionary, Eighth Edition, “Prison” is “a State or Federal facility of confinement for convicted criminals...,” and is also termed an “adult correctional institution”. As such, the Court made it clear that the promise of “no Prison” was used solely to coerce the Plaintiff into entering the Plea since the Court’s intent all along was to sentence the Plaintiff to a Utah Department of Corrections facility.

7. The Plaintiff exercised his right to withdraw the Plea in a timely manner by notifying his counsel before sentencing that he wished to do so. (Exhibit K – July 3, 2007 e-mail) He demanded that Mr. Yengich withdraw the plea, use the forged letter submitted by Kathryn Wamsley for sentencing to prove perjury to the Court, and subpoena documents that would provide further evidence in his defense. (Exhibit L - Aug. 13, 2007 letter from Ron, Aug. 23, 2007 e-mail from Ron). Mr. Yengich refused to request the subpoenas, made a call to the Plaintiff’s therapist, Margo Miles, who had encouraged the Plaintiff to fight and not enter a plea, and told Ms. Miles that the Plaintiff was lying to her about what he had really done to his girls, which caused Ms. Miles to withdraw as the Plaintiff’s therapist. The defense attorney, an officer of the legal system, violated his client’s constitutional rights when he refused to withdraw the Plea for him, and made it a matter of coercion in forcing the Plea on his client by lying to the client’s therapist, an invaluable emotional support during this time, and threatening the Plaintiff if he tried to withdraw the Plea (Exhibit L). This action by the Defense Counsel gives the Plaintiff the right to seek relief under Utah Code Ann. §78B-9-104(1)(d).

MEMORANDUM OF POINTS AND AUTHORITIES RE: CONVICION OBTAINED
BY PLEA OF GUILTY THAT WAS UNLAWFULLY INDUCED OR NOT MADE
VOLUNTARILY WITH UNDERSTANDING OF THE NATURE OF THE CHARGE
AND THE CONSEQUENCES OF THE PLEA DUE TO INEFFECTIVE
ASSISTANCE OF COUNSEL

1. It is an integral and important part of this country's judicial system that the attorney client relationship be one of integrity. Attorneys are to represent the best interests of their client in all instances and at all times. An attorney who fails to do so has not only betrayed the trust and confidence of his client, but has misrepresented the entire legal system because attorneys are considered officers of the legal system. Following outlines the course of action, lies and coercion used by Defense Attorney, Ron Yengich, to trick and then intimidate the Plaintiff into taking an Alford Plea:
 - A. The Defense Attorney deliberately and willfully lied to his client, Korte Wamsley, about the use of an Alford Plea and what its consequences were. After sequestering the Plaintiff in a conference room, refusing to allow him to have family or anyone else with him, refusing to let him talk to anyone else via phone, and confining the Plaintiff with himself and Private Investigator Gary Potter, the following statements about the plea and its consequences were made by Ron Yengich, or in his presence and with his consent, by Gary Potter:
 - (i) The State was offering this plea as their way of saying the Plaintiff was innocent. Any judge in the land who read the plea would understand this, and it would help the Plaintiff in a custody battle for his children.
 - (ii) An Alford Plea could be used by innocent people for any reason simply to stop a trial, which would enable the Plaintiff to spare his girls the humiliation of being branded liars

in a public courtroom. Under Utah or Federal Law, the sole purpose for entering an Alford Plea is if there is sufficient evidence to convict. Mr. Yengich knew this, but deliberately lied to his client about the use of such a Plea, thereby causing his client to enter the Plea without knowledge. This is confirmed by his statement to the court that the plea was being entered by the Plaintiff “to complete this case for the reasons that you’ve indicated you are entering the plea...”

- (iii) Part of Probation would be to bring about reunification with the Plaintiff’s girls. (Exhibit K – E-mail to Ron).
- (iv) Per Gary Potter (while Yengich remained silent, thereby tacitly agreeing) the State would reduce and then dismiss the convictions in “two to three years” and “It would be as though it never happened.”
- (v) Mr. Yengich claimed that Mr. Torriente was offering such an “exceptional plea” because he did not want to go to trial with Kathryn Wamsley as his main witness since he recognized that Kathryn Wamsley was a “liar and lunatic”. This statement was repeated when Suzanne Wamsley attended a second meeting with Mr. Yengich. When asked why the State did not then simply drop the charges, in both meetings Mr. Yengich responded that the State could not just drop charges since their witnesses refused to recant. When asked if Judge Adkins was aware of this, Mr Yengich claimed that the judge knew exactly what was going on. (Exhibit M – Proof Prosecutor made statement and Yengich was asked if Judge knew).
- (vi) The Plaintiff was told he would not be on the Sex Offender Registry, which Mr. Yengich later claimed he did not promise but that he would “see what he could do”.

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- (vii) Mr. Yengich assured the Plaintiff this was the correct course of action by making the statement, "If you were my own son, I'd tell you to take this".

When an attorney lies to his client in the manner Mr. Yengich lied to the Plaintiff, the attorney's actions, according to the Utah Rules for Professional Conduct, constitute "fraud – any conduct that...has a purpose to deceive." The Plaintiff was relying on his lawyer to provide him with an informed understanding of his legal rights and obligations and their practical implications. Through these actions, the Defense Attorney, an officer of the legal system, deprived the Plaintiff of a true understanding of the nature and elements of the Plea and its consequences. Because of his reliance on his lawyer's deliberately deceptive information, the Plaintiff cannot be considered as having entered the Plea with knowledge or voluntarily.

The act of sequestering the Plaintiff, as described in (A) above, also constitutes coercion, as ruled on by the U.S. Supreme Court in *Chambers v. Florida*, and is enough in and of itself to make the Plea inadmissible.

**MEMORANDUM OF POINTS AND AUTHORITIES RE: ADDITIONAL
VIOLATIONS OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS AND
VIOLATIONS OF URCrP**

Utah Code Ann. §78B-9-104(1)(a) grants post-conviction relief when convictions are obtained or sentences imposed in violation of the United States Constitution or Utah Constitution.

1. Mr. Yengich's pattern of postponing trials at the last minute, with the court's approval but without his client's, not only proves that he never intended to defend his client, hence Mr. Yengich's lies in coercing the Plaintiff into taking a plea, but also served as a violation of the Plaintiff's Sixth Amendment right to have a Speedy Trial by dragging the Plaintiff's case out over a period of twenty three months. The Plaintiff was never given prior notice of trial delays created by the Defense Counsel, has never given his Defense Counsel permission to delay a single trial date, and is even on record as complaining about it. (Exhibit N – E-mail to Ron 2/28/07)

(i) In December of 2006, on the Friday before Monday's jury selection for trial, Mr. Yengich postponed the trial date without consulting his client. This postponement resulted after the Plaintiff refused to take a proffered plea. The Defense Counsel claimed he (the Defense Counsel) exercised his right to postpone the trial because the Prosecutor had "submitted new evidence," but then refused to expand on or clarify this claim. Mr. Yengich then tried to avoid all questions from the Plaintiff about what this new evidence was. When the Plaintiff persisted, upset that such an emotionally devastating and taxing event was to be postponed, and without ever having been consulted by his attorney about it, a copy of a single page statement was sent to him a few weeks later that was not new evidence. Mr. Yengich had delayed the trial without his client's consent or foreknowledge, and without valid reason.

- (ii) In April of 2007, Mr. Yengich once again postponed the trial, claiming he was to appear before a Federal Grand Jury during the same week in which the Plaintiff's trial was to be held, even though the Plaintiff's trial had been scheduled four months prior.
- (iii) The third trial date was set for June, 2007. When the Plaintiff once again refused a proffered plea, it was then that Mr. Yengich set forth the lies listed in Memorandum of Points and Authorities Re: Conviction obtained...due to ineffective Counsel(1) (A).

In Barker v. Wingo, the U.S. Supreme Court ruled that a delay of one year or more from the date on which the speedy trial right "attaches" (the date of arrest or indictment, whichever first occurs) was termed "presumptively prejudicial". In addition to being a violation of the Plaintiff's Constitutional Rights, this action also violates URCrP Rule 25 (b)(1) which requires the court to dismiss the information or indictment when there is unreasonable or unconstitutional delay in bringing the defendant to trial. The Plaintiff was kept waiting for a trial for twenty three months, eleven months beyond what the Supreme Court already considers "presumptively prejudicial."

2. The Plea was submitted with the intent of including the Plaintiff's statement, as is his right under URCrP Rule 22 (a). This is clearly indicated on the Plea Colloquy (Exhibit B) on page 1, lines 27 and 28, and again on page 5, line 3. Under Rule 22 (a) before imposing sentence the court shall afford the defendant the opportunity to make a statement and to present information in mitigation of punishment, or show any legal cause why sentence should not be imposed. The Defense Counsel submitted the Plea without the attached statement, an oversight not corrected by the Court. The Defense Counsel also failed to

submit the evidence of perjury the Plaintiff specifically asked him to submit at sentencing. By these omissions, both the Court and Mr. Yengich violated this rule.

3. Utah Code Ann. §78B-9-104(1)(c) allows for post-conviction relief when the sentence was imposed...in violation of the controlling statutory provisions. Under URCrP, Rule 22, (c)(1), following imposition of sentence, the court shall advise the defendant of the defendant's right to appeal and the time within which any appeal shall be filed. The Court failed to do so. (Exhibit D – Sentencing Colloquy).

4. The Plaintiff was incarcerated within two days of sentencing, and Salt Lake County Jail does not contain a Law Library or any way to research the Plea and its implications, effectively denying the Plaintiff the information needed to submit a Petition to the Court once he discovered his attorney's duplicity and refusal to present evidence at sentencing. The refusal of his attorney to communicate with him, as evidenced in Memorandum of Points and Authorities Re: Illegality of Plea. (6), also served to deny the Plaintiff the right to appeal the sentence. These actions served to violate the Plaintiff's Constitutional Right to "meaningful access to the courts", a right which, had the Plea been valid, he had still not given up.

**MEMORANDUM OF POINTS AND AUTHORITIES RE: MALICIOUS
PROSECUTION, FORGERY, PERJURY AND UNCONSTITUTIONAL FAILURE**

**OF THE PROSECUTION TO DISCLOSE TO THE DEFENDANT EVIDENCE
FAVORABLE TO THE DEFENDANT**

Utah Code Ann. §78B-9-402(2)(a)(v) states that, viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent....

Thus these Statements of Fact combine the accumulation of old with new evidence that was unavailable until recently.

1. Charges filed against the Plaintiff were based on statements created and forged by Witness, Kathryn Wamsley, who at the time they were filed, was seeking a divorce from Plaintiff that would grant her sole custody of their children and all marital assets. (Exhibit O – proof of forgeries). This was discovered when files were turned over to the Plaintiff's current wife by defense counsel in July of 2008.
2. Prosecutor Sean Torriente advised the defense counsel, Ron Yengich, that his witness, Kathryn Wamsley, was “a liar and a lunatic”, yet no where is there a record of Mr. Torriente or Mr. Yengich disclosing this to the Court. (Exhibit E – Bar Complaint, Exhibit M – letters, e-mails to Ron Yengich). Both Mr. Torriente and Mr. Yengich, as lawyers, are considered officers of the legal system and both are obligated to provide such relevant discovery to the Court.

Mr. Torriente, as prosecutor, violated the Utah Rules for Criminal Procedures (henceforth URCrP), Rule 16 by failing to come forth with this information. While Rule 16 of the URCrP states that the prosecutor shall disclose to the defense “upon request”, in Parsons v. Galetka, 57 F. Supp. 2d 1151 a broader disclosure obligation is imposed on the prosecutor. The prosecutor is obliged to make disclosure on a continuing basis without a request, which Mr. Torriente clearly failed to do. Mr. Yengich violated Rule 16(d) of the

URCrP, which requires him to also make continuing disclosure. The failure to disclose this pertinent information to the court prevented the Court from exercising its right under URCrP Rule 25 to dismiss the case, as well as serving to bias the Court against the Plaintiff in its consideration of all information presented.

3. Prosecutor Sean Torriente, at sentencing on Oct. 10, 2007, and now on permanent Court record, made a public statement, "that this case isn't about credibility" after his witness, Korynne Wamsley, disclosed to the court that it was "hard" for her "not to lie" and that she lies because she's "just used to it," that she lies "without even knowing it" because she has "lied so many times." The State had nothing but Witness statements on which to base this case. Such an admission by Mr. Torriente proves corruption of the judicial procedure from the moment charges were filed, since they were based on forgeries, all the way through sentencing. At this admission by both the Witness and the Prosecutor, the Plea and the charges should have been dismissed by the Court. (Exhibit D – Sentencing Colloquy, Page 8)
4. Prosecutor Sean Torriente had copies of a DCFS discovery showing that the two alleged victims, Kaitlin and Korynne Wamsley, were sexually involved with each other for years prior to making any allegations against the Plaintiff, yet the Prosecutor withheld this evidence from the court. (Exhibit F - Discovery, irrelevant text blocked to protect other children) Mr. Torriente claimed to the court that Korynne Wamsley's ongoing sexual behavior resulted from sexual abuse by her father, deliberate perjury given his undisclosed knowledge. Mr. Torriente's involvement in Korynne's subsequent incarceration and two years of State custody (Korynne was not allowed home until she agreed to make statements against her father at sentencing) can only be construed as

coercing a witness. One week prior to her mother claiming Korynne was sexually abusing her little brother, which lead to Mr. Torriente charging her and having her removed from the home to State custody, Korynne had reported to her grandmother that she would not go along with her mother's "divorce scheme". Without Korynne as a "victim/witness" to strengthen his case, Mr. Torriente knew it would quickly be thrown out. While the Plaintiff does not know which specific law Mr. Torriente violated, he has no doubt that attacking and incarcerating an unwilling and defenseless twelve year old girl who refuses to lie for him is a serious crime. The Plaintiff was never advised, as was his legal right, of what was happening to his daughter.

Withholding this evidence served to prejudice the court into believing the girls had no prior sexual encounters before the supposed "touching" by their father, and Mr. Torriente actively attempted to claim to the court that Korynne's subsequent deviant behavior/incarceration was the result of sexual abuse reactivity caused by her being "touched" by her father. Proof is provided herein that Korynne is actually on court record, under sworn oath, as stating that her father never touched her in any manner that can be remotely construed as sex abuse. (Exhibit E - Bar Complaint, Pages 4 & 5 with accompany exhibits specific to Bar Complaint). The Plaintiff only recently received a copy of this Discovery, having been illegally denied it prior to Dec. 9th, 2008, when a Motion entered into Juvenile Court forced its being given to him.

5. Defense Attorney Ron Yengich was provided with notice that the letter supposedly submitted by Kaitlin for sentencing was another forgery actually being submitted by her mother and Mr. Torriente (Exhibit P - e-mail to Ron, Submission by Torriente). In addition, Defense Attorney Ron Yengich was also provided with pictures of Kaitlin

Wamsley that proved to the court she continued to go along with her mother and Mr. Torriente when it came to acting out a charade (perjury) that mocked the Court. (Exhibit Q(i), (ii) – pictures of Kaitlin). Mr. Yengich refused to present this to the Court, but did not inform his client that he had no intention of doing so, thus violating his client's trust and his position as an Officer of the Legal System. Also, once again, a violation of URCrP, Rule 16(d).

6. Mr. Yengich had evidence in the form of audio tapes the Plaintiff gave Private Investigator Gary Potter. Korte Wamsley tape recorded his ex-wife, Kathryn Wamsley, the instigator of this malicious case, confessing that she knew their eldest daughter was given to great embellishment and was making up her stories, a key factor given Kathryn Wamsley had testified that she herself had typed the Statement for Kaitlin Wamsley in which sex abuse by her father is claimed. (Exhibit O – Kathryn Wamsley's Police Statement). He also tape recorded Kathryn Wamsley confessing that she has practiced a lesbian life style, and that their daughters, the two alleged victims, had been experimenting sexually on each other without his knowledge, but with hers. Strong testimony in proving that Kathryn Wamsley was very motivated in removing men from her life and in hiding what was really going on with her girls. In a third tape, Kathryn Wamsley tells the Plaintiff he will "hate her" for what she and the Prosecutor, Sean Torriente, have "collaborated" to do to him. These tapes were turned over to Gary Potter, the Private Investigator used by Mr. Yengich to supposedly investigate this case. Counsel for the Defense failed to use this evidence to get the case dismissed.

When the Plaintiff asked to have his tapes returned so he could use them in family court, Mr. Potter claimed they had been lost. That the tapes existed is proven by Mr.

Torriente's comment in a November 22, 2006 pre-trial conference in which he desperately asks if the defense is going to submit tapes that he knows they have for a Dec. 8, 2006 trial, as well as an e-mail sent by Gary Potter to the Plaintiff (Exhibit R - e-mail).

7. New Evidence is submitted with this Petition that proves a crime was never committed by the Plaintiff in this case. The new polygraph and psychosexual are conclusive, providing additional evidence that a crime was never committed. (Exhibit S – copies of polygraph, psychosexual, Raskin affidavit).

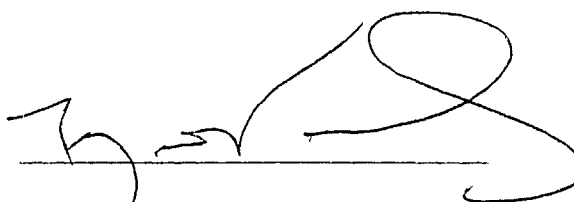
PETITION

WHEREBY the Plaintiff, Korte H Wamsley, Jr., petitions the Court to to take the following actions:

1. As allowed by Utah Code Ann. §78B-9-101 et seq. vacate the Alford Plea entered into on June 8, 2007, in its entirety and overturn the convictions entered into against the Plaintiff under the Post-Conviction Remedies Act.
2. Use its judicial discretion, for substantial cause and in furtherance of justice, to dismiss the charges filed against the Plaintiff on the basis of Evidentiary Insufficiency and the facts of malicious prosecution, fraud and perjury presented herein.
3. Use its judicial discretion, for substantial cause and in furtherance of justice, to dismiss the charges filed against the Plaintiff because of the unreasonable and unconstitutional delay in bringing the Plaintiff to trial.

4. Use its judicial discretion to remedy any prejudice to the Plaintiff resulting from the many breaches to the Utah Rules for Criminal Procedures and both the Utah Constitution and the Constitution of the United States of America as outlined in this Petition.

This Petition for Relief Under the Post-Conviction Remedies Act, Utah Code Ann. § 78B-9-101, et seq. is entered into on this 22 day of June, 2009.

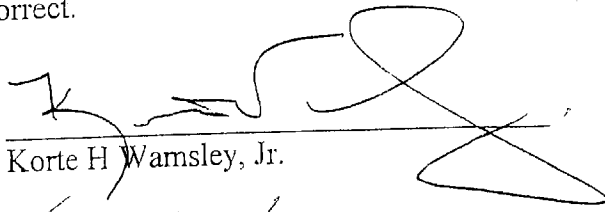
A handwritten signature in black ink, appearing to read 'Korte H Wamsley, Jr.', written over a horizontal line.

Korte H Wamsley, Jr.

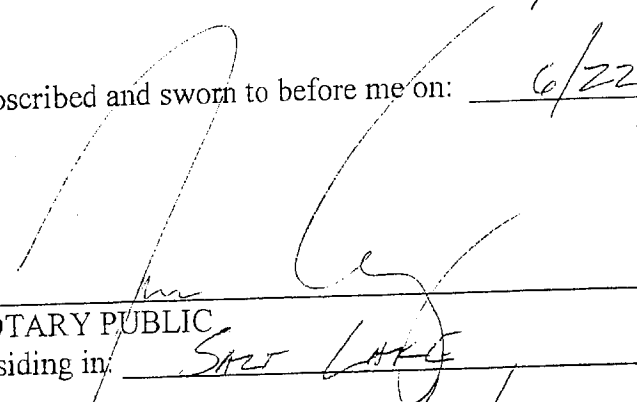
PETITIONER'S VERIFICATION UNDER OATH

STATE OF UTAH
COUNT OF SALT LAKE } ss.

I, the undersigned petitioner, declare under penalty of perjury that the information I have provided in this petition is true and correct.

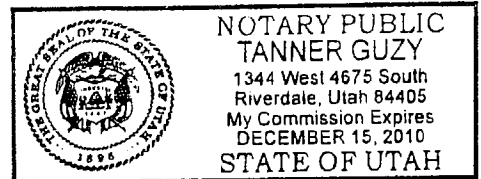

Korte H Wamsley, Jr.

Subscribed and sworn to before me on: 6/22/09


NOTARY PUBLIC

Residing in: SALT LAKE

My Commission Expires: 12/15/10

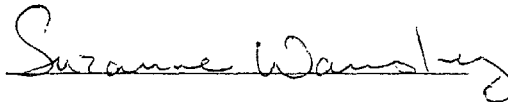


CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR RELIEF UNDER THE POST-CONVICTION REMEDIES ACT, Utah Code Ann. §78B-9-101 et seq. and Utah Rules of Civil Procedure 65C was mailed on the 22nd day of June, 2009 as follows:

LOHRA MILLER
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Suzanne Wamsley