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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---oooOooo---

HARRY MILLER,	:	
	:	
Petitioner and Appellant,	:	
	:	Appeal No. 20080921-CA
vs.	:	
	:	
STATE OF UTAH ,	:	
	:	
Defendant and Appellee.	:	

---oooOooo---

**STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(f).

**ISSUES PRESENTED FOR REVIEW**

Rule 12(b)(6) U.R.C.P. allows dismissals only when Plaintiff has failed to state a claim upon which relief may be granted. Plaintiff has met the basic requirements of the statute governing these actions, Utah Code Ann., § 78B-9-402. Plaintiff has asserted that he was factually innocent, based upon evidence that he was not in the State of Utah at the time the crime was committed. He has also shown that some of

the evidence in that regard was obtained after the original trial, and could not have been discovered through due diligence prior to trial. Plaintiff's allegations are sufficient to avoid dismissal under Rule 12(b)(6), and the dismissal should be reversed.

Pursuant to Russell v. Standard Corp., 898 P.2d 263, 364 (Utah 1995), the standard of review in this matter is that the factual allegations are accepted as true, and all reasonable inferences are drawn from them in a light most favorable to Plaintiff. The propriety of such a dismissal is a question of law, and is reviewed for correctness, giving no particular deference to the trial court. This issue was preserved for appeal by Defendant's Motion to Dismiss and Plaintiff's Opposition to that Motions (R 64-65; 70-134;135-158).

### **CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE**

The relevant portions of the Utah Code and Utah Rules of Civil Procedure are included in an Addendum hereto including:

Utah Code Ann., § 78B-9-401, et seq. , the Postconviction Determination of Factual Innocence.

Rule 12(b)(6) Utah Rules of Civil Procedure

Rule 65C of the Utah Rules of Civil Procedure

STATEMENT OF NATURE OF THE CASE

This is an appeal from the Order and Judgment of the Third District Court, Salt Lake City Department, Salt Lake County, granting Defendant's Motion to Dismiss for failure to state a cause of action, pursuant to Rule 12(b)(6) U.R.C.P. This is an action pursuant to Utah Code Ann. 78B-9-402 seeking compensation for imprisonment, due to actual innocence. Plaintiff was previously convicted of aggravated robbery, pursuant to Utah code Ann. § 76-3-302, a first degree felony. That conviction was reversed; and all charges were dismissed.

STATEMENT OF FACTS

References herein are to the Record of this Case, No. 080907781 (R.), and to the Record of the previous criminal case, No. 031901163FS (R2.)

Petitioner was arrested on February 11, 2003; and was charged in the Third District Court with the crime of aggravated robbery, a first degree felony, on or about February 18, 2003, in Case No. 031901163FS. (R2. 1-6). He was remanded to the custody of the Salt Lake County Sheriff on that date. The Information alleged that the crime was committed in Salt Lake County on or about December 8, 2000. (R2. 3).

Petitioner was tried by jury on the felony charge of aggravated robbery on December 16, 2003 (R2. 35-36). At trial, Defendant claimed an alibi defense, but was the only witness to that fact. He testified that he had previously lived in Utah; but lived in Donaldsonville, LA at the time of the crime, and had been living there since 1999. He testified that he had had a stroke in late November, 2000, and had to take some time off work. (R2 162-163). The parties entered into a written stipulation, to be read at trial, that Mr. Miller had been admitted to the River West Medical Center in Louisiana on November 25, 2000 for a “cerebrovascular accident” (a stroke). He was employed by Ten M Corp in Donaldsonville, LA. from May 2000 until February, 2002, and had taken medical leave from November 25 until December 13, 2000. (R2. 40). He also testified that he returned to Utah, where he had lived from 1989 to 1999, in February, 2002.

Petitioner was convicted; and on February 9, 2004, he was sentenced to a term in the Utah State Prison of from five years to life (R2 135-139). Mr. Miller was incarcerated at the Utah State Prison, or the Salt Lake County jail, from February 2004 until his release on July 6, 2007, when the Court dismissed all charges against him, on the Motion of the Salt Lake District Attorney.

Petitioner appealed his conviction to this Court under Case No. 20040150(R2.

156). On February 7, 2005, his appellate counsel filed a Motion to Remand the matter to the District Court to enter findings concerning Petitioner's claim of ineffective assistance of counsel at trial. His appellate counsel argued that other alibi witnesses could have, and should have, been obtained, including Defendant's niece, Berthella Miller, who would testify that Defendant was living with her and Defendant's sister, after the stroke, and that she saw him daily during this period of time. (R2. 160-168). Berthella filed an affidavit with the Court to this effect. (R2. 211-212). Also, Beverly Kolder, a registered nurse who provided home care to Defendant, filed an affidavit with the Court in support of the Motion. That affidavit stated that she visited Mr. Miller in Donaldsonville on December 7, 2000 and again on December 14, 2000. An assessment produced by the nurse on December 14, 2000, included the statement: "Able to ride in a car only when driven by another person OR able to use a bus or handicap van only when assisted or accompanied by another person." (R2 172-186). Neither had been contacted by Defendant's trial attorney.

Defendant's sister, Paula Miller, was contacted by Defense counsel prior to the trial, but she was unwilling to come to trial, because of other family problems in Louisiana. She filed an affidavit with the Court that Mr. Miller had lived with her after he was released from the hospital on November 28, 2000, and had returned to

work on December 13, 2000. She stated that he did not leave the State during that time, and that she believed he would not have been physically able to travel long distances. (R2. 234-236). There were also Court records from Louisiana indicating that Defendant had appeared in Court in Ascension Parish Court, State of Louisiana on December 5, 2000 for fishing without a license. (R2. 208).

The victim, on the other hand, was sure that Defendant was the one who robbed her, despite the fact that it had been over two years since the robbery, when she identified him from a photo line up and an in-person lineup. (R2. 158 p. 65-66; 94). She had, however, seen black men she thought might be the robber a few other times, but had never been sure (R2. 158 P. 68). Her identification was supported by the store clerk at the Stop n' Go outside of which the robbery had occurred, who stated that he had seen the Defendant around the store "every now and then" prior to the date of the robbery, and specifically stated that he was able to identify Defendant because of his prior contacts with him. (R2. 158 p. 96-97). The sightings, "several times", were between July and December, 2000 as he had only started working there in July. (R2. 158 p. 98-99).

See also the narrative report by Sgt. Charles Oliver, of an interview with the store clerk who provided the second identification of Mr. Miller, from a photo lineup

shown him on October 24, 2003, almost three years after the incident. While the clerk picked Mr. Miller out of the photo spread, the report also states: “Mr. Nissan states that he knew the black male as a customer who came into the store once in a while. He states he did not know his name but just recognized him as a customer.”(R. 151). See also the e-mail exchange between Gretchen Havner and Kent Morgan, Assistant Justice Division Director and a man known for his determination to convict criminals, only a week or so before the State moved to dismiss the charges:

Kent Morgan: I am reviewing the file . . . thus far, I see this as only a single eyewitness identification case with no corroboration. . .if I find no corroborative evidence . . .I think I will be letting this case go . . .I have some concern that a third person identified your client as a former customer. (Emphasis added).

Gretchen Havner: The reason I believe the store clerk is mistaken about Harry’s identity is we can show Harry was employed by 10M Corporation in Donaldsonville, Louisiana, from the end of May 2000 until February 2002. Therefore, he wouldn’t have been in Salt Lake City to be a regular customer at the store leading up to the date of the incident. (R. 156).

On or about April 26, 2005, the Court ordered the matter remanded to the District Court for additional factual findings regarding the claim of ineffective assistance of counsel, pursuant to Rule 23B of the Rules of the Utah Rules of Appellate Procedure. The order stated that it was for the purpose of allowing the “Third District Court to conduct hearings and take evidence as necessary to enter

findings of fact necessary to determine the following claims of ineffective assistance of counsel”.

On February 1, 2006, the matter was returned to the Court of Appeals, after additional facts were determined. No finding was made of ineffective assistance of counsel.

The appeal was scheduled for oral arguments before this Court on January 22, 2007. On or about January 18, 2007, the parties filed a Stipulated Motion for Summary Reversal; and on the day set for oral arguments, this Court dismissed the appeal and remanded the case to this Court for a new trial.

A retrial was scheduled for July 12, 2007. On July 5, 2007, the Salt Lake District Attorney notified the District Court that it would not be going forward to trial on the assigned date, and filed a Motion to Dismiss. On July 6, 2007, the trial Court signed the Order dismissing all charges, “in the interest of justice”. Defendant dismissed was released from custody the same day.

#### SUMMARY OF ARGUMENTS

Petitioner’s Petitioner, brought under the recent legislation providing for compensation to those unjustly convicted and imprisoned, alleges sufficient facts to defeat Defendant’s Motion, under Rule 12(b)(6) U.R.C.P. to dismiss, based on the

failure to State a cause of action. The allegations, if true, show that Defendant is highly unlikely to have committed the crime with which he was charged, and of which he was previously convicted.

Further, the trial Court erred in its standard of review. First, it should have reviewed the Petition in light of the reversal of the conviction, and the dismissal of the criminal charges. Second, it should not have relied on the factors set out in Utah Code Ann. § 78B-9-402 (2)(a), as those requirements do not apply to petitions brought under Utah Code Ann. § 78B-9-402 (b). The search here should be for justice, not for a slavish adherence to form.

## ARGUMENT

### POINT I

**ASSUMING THE ALLEGATIONS TO BE TRUE, PETITIONER HAS ALLEGED ADEQUATE FACTS TO REQUIRE THE COURT TO HOLD AN EVIDENTIARY HEARING ON THE QUESTION OF ACTUAL INNOCENCE.**

This is a Petition to determine factual innocence, pursuant to Utah Code Ann. § 78B-9-401. This Petition is brought pursuant to Rule 65C of the Utah Rules of Civil Procedure. This Petition was filed within one year of the date that retrial was scheduled, and upon which this Court ordered all charges dismissed. Further, this Petition was filed promptly upon jurisdiction being conferred on the District Court

to determine factual innocence, pursuant to Utah Code Ann. § 78B-9-401 et seq., effective May 5, 2008. In its 2008 general session, the Utah legislature passed Utah Code Ann., previously designated as §78-35a-401, et seq. and now recodified as § 78B-9-401 et seq. , entitled “Postconviction Determination of Factual Innocence”. The act provides for the filing of a Petition, similar to that provided for by the Post-Conviction Remedies Act, Utah Code Ann. §78B-9-101, et seq., and subject to the provisions of Rule 65C of the Utah Rules of Civil Procedure as to form and content. A Petition is to be filed in the District Court having jurisdiction over the matter, and shall request a hearing to determine factual innocence. The Petitioner may allege “newly discovered evidence that establishes that the petitioner is factually innocent.” It should be sufficient, in conjunction with other evidence, to establish factual innocence. Petitioner claims that there is substantial new evidence which defense counsel did not produce at trial. In the alternative, Petitioner asserts that the evidence taken as a whole shows factual innocence, and no other finding is necessary. Therefore, Petitioner alleges that this matter should have been set for hearing to determine factual innocence.

The trial Court granted Respondent’s Motion to Dismiss this action pursuant to Rules 12(b)(6) and 65C of the Utah Rules of Civil Procedure. Rule 12(b)(6) allows

a Motion to Dismiss based on the failure to State a cause of action. According to the Utah Supreme Court, in Russell v. Standard Corp., 898 P.2d 263, 264 (Utah 1995):

“A rule 12(b)(6) Motion to dismiss admits the facts alleged in the complaint but challenges the Plaintiff’s right to relief based on those facts.” In determining whether a trial Court properly granted a Motion to dismiss under rule 12(b)(6), we accept the factual allegations as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the Plaintiff. (Internal citations omitted) (Emphasis added).

At this point, Petitioner does not need to prove factual innocence. He only needs to show that he is entitled to an evidentiary hearing on that allegation. The State, on the other hand, in order to sustain the dismissal, must show that, even if all the allegations are true, there is no reason to have such a hearing, as the allegations are insufficient in themselves. The burden of proof at the evidentiary hearing is not now important. Certainly, the strong evidence of alibi defense, the poor quality of the eye witness identification, and the nonsensical conclusions relied upon to show guilt are sufficient to get past Rule 12(b)(6) U.R.C.P.

Petitioner’s appellate attorney, in the closing paragraph of his Reply Brief to this Court , on direct appeal, summed up the original conviction:

Here, the result was so unreliable as to approach the absurd. To propose that a man who lived and was gainfully employed in a small Louisiana town would – after being disabled by a stroke – somehow travel over 1800 miles without any of his caretakers knowing about it, immediately commit a random crime

against a stranger with negligible gain, and get himself home without anyone noticing his absence defies logic.

Petitioner has always maintained that he was in the State of Louisiana on the day when the crime was committed, and so testified at trial. Prior to the remand, additional testimony as to an alibi defense was obtained, which had not been available at the original trial. Petitioner claims factual innocence by virtue of his alibi defense, and the high degree of certainty that he was not present at the time and place the offense was committed. Mr. Miller would have had to fly to Utah on December 7th, almost immediately after his nursing appointment, commit the crime, and return to Louisiana shortly thereafter. The nurse's comments show that he was not in physical shape to do so. No evidence has been produced whatsoever that such a trip was made. While some suggestion has been made that he came out to see his brother, his brother gave a statement to the police indicating that he had seen the Defendant for some time. His caretakers did not notice his absence; and given the tight timeline, such a visit makes little sense.

The previous remand to the District Court was not to determine innocence, but instead to determine whether trial counsel met the minimum standard necessary to fulfill his legal duty to defend the Defendant in court. This Court's remand order ,

however, also included the instruction: “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.” (R2. 253). In addressing that issue, the trial Court did review certain newly discovered facts that had not been introduced as evidence at trial. The most important items of evidence were the the testimony of Berthella Miller, Defendant’s niece; and the affidavits of Beverly Kolder, a home health care nurse assigned to assist Mr. Miller while he recuperated from a stroke suffered in late November. There were also affidavits submitted by Melissa Landry, the interim director of River West Home Care, as to the dates of care provided by the agency, and Defendant’s sister, Paula Miller.

Berthella Miller testified personally that she had seen him every day during the three weeks he was out of work due to his illness. The Court found that there were many factors involved in counsel’s inability to obtain all the witnesses and information needed to present the alibi defense. He had incomplete information about the home health care agency. He was able to contact Defendant’s sister, Paula, but he was unable to convince her, because of other family problems, to come to Utah to testify. He was not told of Berthella, the niece, and did not get in touch with her. He reasonably believed that the alibi case was strong , based on the stipulation and the

testimony of Mr. Miller. (R2. 596-609). The Court made the following findings about the witnesses who had not been called by defense counsel at trial:

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.
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. (R2. 606-607).

The affidavit of Ms. Kolder firmly placed Mr. Miller in Donaldsonville, Louisiana the day before the robbery, the visit having concluded at 11:02 AM on that day. The Court responded that "Defendant could have traveled by airplane from Louisiana to Utah on December 7, 2005 [should be 2000]". (R2. 600). While that is true, of

course, it should be rather obvious that the scenario is highly unlikely. Mr. Miller does not travel by plane. Even though members of the UACDL and others contributed to a fund to help him get back to Louisiana after he was released, he never considered a plane, but instead took the bus. The State's brief, filed in the Court of Appeals, referred to the period of time that Mr. Miller was out of work from November 28 through December 13 to recuperate from the stroke, and suggested that "this time gap allowed Defendant time to travel to Salt Lake City to visit his brother, commit the robbery, and return to Louisiana." (P. 8)(Emphasis added). The logistics of getting to Salt Lake City in time to commit this crime make it nearly impossible. If Mr. Miller had driven, it would have taken over 27 hours, something not possible to do in time, even assuming he could physically have made such a trip. If he had flown, he would have to have driven to New Orleans, a trip of about one and a half hours, gotten on a plane, paid extra to fly direct, and POSSIBLY made it in eight hours. For what purpose, to rob somebody of a few dollars and then fly back in time to go back to work, and for his next home nursing visit? Nobody has ever attempted to plot out what planes he would have taken, and whether the planes actually did arrive on time.

The trial Court found that trial counsel there was not deficient regarding the

home health care nurse, “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.” Regarding the testimony of Petitioner’s niece, there was no deficiency “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.” The Court went on to state that, even assuming that the two witnesses had testified, “there is no reasonable probability of a different result” at trial, due most importantly to “the credibility of the two eye witnesses who testified at trial.” (R2. 608-609).

In making its previous findings, the Court made its own determination of the credibility of the witnesses and potential witnesses. The Court, in particular, discounted the testimony of Bethella Miller, as her memory was not sharp, and details were lacking. This is not surprising, in light of the fact that the incident at issue was then over five years old. The State, in its Motion below, also points out that Petitioner’s evidence “must be weighed against the State’s two credible eyewitnesses who have repeatedly identified petitioner as the robber.” (R. 77). The Court appears to have relied upon its previous findings, in its ruling here granting the Motion to Dismiss. So, both the Court and the State were in error, in relying on assertions of

credibility. For purposes of a Motion under Rule 12(b)(6). Credibility is not at issue; nor is the relative weight of the “State’s two credible eyewitnesses”. See again Russell v. Standard Corp., 898 P.2d 263, 264 (Utah 1995): “In determining whether a trial Court properly granted a Motion to dismiss under rule 12(b)(6), we accept the factual allegations as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the Plaintiff.”

In referring to those “credible” witnesses, the State seems to be taking the position that their testimony has some strong weight, because it was sufficient to convict, before that conviction was overturned. When reviewed in conjunction with later discovered evidence, that evidence, given some three years after the robbery, is NOT all that credible. By the time the date set for retrial approached, it appears that the corroborating testimony of Mr. Nissen had been totally discredited. The case was weakened to the point that the charges were dropped. It is disingenuous at this point to make the claim that the State’s case is so strong that no hearing on innocence should even be held.

## POINT II

THE LAW SHOULD BE READ TO GIVE EVERY CHANCE TO AN INNOCENT PERSON TO BE COMPENSATED FOR UNJUSTIFIED IMPRISONMENT.

Rule 65C of the Utah Rules of Civil Procedure applies to “Post-conviction relief.” It was promulgated before the Postconviction Determination of Innocence Act was passed, and does not contemplate its use here. However, the Rule does prescribe the procedure for a Petition, which states the grounds for relief and the allegations that need to be made. The Rule is designed for someone who is attempting to remove a conviction which is still on the record. It does not speak to the situation where there is no conviction. Nevertheless, the procedures of the Rule have been followed, including the Petition, the attachments and the supporting memorandum. The rule allows for summary dismissal of the Petition, if the Petition is frivolous on its face, or if it does not support a claim for relief, as a matter of law. In this regard, it tracks Rule 12(b)(6) U.R.C.P., but does not add to it. This Petition is not frivolous; and it does not fail to State a cause of action as a matter of law. The allegations are sufficient, if believed, to show that the Petitioner is factually innocent. Thus, the petition is sufficient under the rule.

This is the very first case brought under the new law. This new law, which allows for compensation to someone who has been imprisoned for something he did not do, is in the same chapter of the code as the Post Conviction Remedies Act. It reflects some of the same policy considerations, and contains some of the same

limitations. But there is a fundamental difference in the proceedings, which the State and the trial Court did not acknowledge. The Post Conviction Remedies Act will only be used by someone who has been finally convicted of a crime and is seeking relief from that conviction. Because that person has already had a constitutional right to an appeal (Constitution of Utah, Art. VIII, § 5) the right to bring post-conviction proceedings is limited to situations where the appeal did not vindicate the right of the criminal Defendant to due process of law. Such a case would not be brought if the appeal were successful. Therefore, the requirements include that there be new evidence which could not, with reasonable diligence have been discovered in time to be included in post trial motions, and the appellate process. An exception is made when counsel for Defendant in the underlying criminal proceedings was found to be ineffective. While there was a claim made on Petitioner's direct appeal that trial counsel was ineffective, and while that claim was not upheld, the appeal was successful. Counsel for the State downplays that fact in saying:

Although both parties agreed that there was “an error in the trial proceedings” and petitioner's conviction was accordingly reversed, the nature of the error is not stated and therefore this unspecified error cannot be the basis for ordering a hearing for factual innocence. (R.78-79). (Emphasis added).

It once again 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. We now know that Mr. Miller was incarcerated for something of which he is presumed innocent. The law should not be read to prevent his compensation under these circumstances.

The State opened its memorandum below with a recitation of the requirements of Utah Code Ann. § 78B-9-402(2)(a). Those include that there is new evidence, that the evidence is not merely cumulative of what was known at the time of trial, and that the evidence shows that Defendant is factually innocent. Part of the statute referred to by the State reads:

(vi)(A) neither the petitioner nor the petitioner’s counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial Motion or post conviction motion, and the evidence could not have been discovered by the petitioner or the petitioner’s counsel through the exercise of reasonable diligence.

However, the new law (Utah Code Ann § 78B-9-402(2)(a)(vi)(A)) allows the Court to waive the necessity of either showing that the evidence could not have been known at trial, or that counsel was ineffective, in the interest of justice. On the face of it, a person who has had his conviction reversed seems to have no advantage over the person who filed this Petition from his prison cell; but that does not make sense. The act mimics the “Post-Conviction Remedies Act”, in requiring, in § 78B-9-402((2)(a)

that “the petitioner identifies the specific evidence the petitioner claims establishes innocence”. But, see Utah Code Ann. § 78B-9-402(2)(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. (Emphasis added).

Petitioner contends that this language does, in fact, grant some advantage to the person who no longer has a conviction. He may “also file a petition”; but he is not specifically restrained by the language of § 78B-9-402((2)(a). This is a separate and distinct part of the statute, which can stand on its own without any reference to subparagraph (a). Why should the Petitioner here be required to show that the information regarding innocence was unknown to him or his counsel at the original trial, if the results of that trial did not stand? If he had gone to retrial, could he not have introduced all available evidence of his innocence, regardless of when and how it was discovered? What interest does the State now have in defending the result of the original trial, which has now been discredited? The purpose of this statute is to compensate the person who has been unjustly punished for something it now appears he did not do. Further, the statute, in requiring proof of actual innocence, prevents compensation to someone who has prevailed because evidence of his guilt has been suppressed as wrongfully seized. But this is not such a case. Here, after trial, the

evidence of innocence continued to build until the State agreed to a summary reversal of the guilty verdict, not based on a “technicality”, but because it no longer appeared that the evidence, taken as a whole, could support the verdict. Then, the State took the additional step of moving to dismiss the charges and release the Defendant from jail,”in the interest of justice”. And all of this occurred after the trial Judge had found the evidence insufficient to support the claim of ineffective assistance of counsel. The same trial Judge rejected the cumulative evidence of innocence in the context of this Petition, based on her previous decision, which, the parties have stipulated, stopped short of doing justice. The trial Judge reviewed this Petition using the wrong standard. The petition, having been filed after the momentous events involving the dismissal, deserved and required a truly de novo review. What it received was an improper deference to a previously discredited ruling: “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 result even if [the new witnesses] had testified.’” (R. 172).

Petitioner contends that the State and the trial Court erred in their contention that this statute should be limited in its relief to the trial which resulted in the conviction. In the end, the State refused to take this case to retrial, based on newly

discovered weaknesses in the evidence, These facts do not now stand as having been proved. The conviction was reversed, based on the serious questions raised by newly discovered facts. The “credibility of the two eye witnesses who testified at trial” was seriously questioned by both sides in this litigation. Contrary to the State’s assertions here, there is now a very strong presumption of innocence. The State very rarely concedes that a trial reached such an unfair result that it must be summarily reversed. The State now contends that nothing can be read into that stipulation. This was a very serious move, and a great deal must be read into it. The trial Court erred seriously in assuming that the case was in a similar posture on this petition to where it was on the remand from this Court. At that time, the trial Court looked at the case with the knowledge of a conviction, and determined whether there were obvious mistakes which were serious enough to set aside the conviction. On this Petition, the Court should have looked at the case with the knowledge that it had been wrong the first time. There were, in fact, errors serious enough to justify reversal. The State should get no comfort or support in the claim that no one can know what those errors were. We have seen them; and they have justified reversal. The State now asks this Court to affirm the trial Court’s error in failing to understand the completely new posture of this case.. It 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.

The ruling of the trial Court, by the Judge who presided over the trial, and also reviewed the record for evidence of ineffective assistance of counsel, is harsh and illogical in its conclusions:

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 78B-9-402. (Emphasis in original).

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 witnesses would have served only to bolster his testimony, not to present a wholly new assertion. (R. 172).

As pointed out above, Petitioner should not have to comply with those subsections, as those only apply to someone who still has a conviction. The Court notes that she reviewed the new evidence upon remand from the Court of Appeals, and found counsel not to have been ineffective; and she ends the inquiry there. She reviewed the evidence and made the decision that a reasonable jury would likely have

convicted anyway, even if they had known of the new evidence that was now before her. She applied the “harmless error” rule, that an error committed which would not likely have changed the outcome, does not justify a reversal. See State v. Adams, 2000 UT 42, 5 P.3d 642 (Ut 2000). But she ignored the fact, that these facts clearly did justify a reversal.

Under the circumstances, the State was simply wrong in its assertion below that “should a hearing be granted, the burden of proof as to petitioner’s factual innocence does not lie with the State.” (R. 77). The State must indeed bear some burden to overcome the presumption of innocence. The State, lamely pointed out that “this Court has already found that petitioner ‘could have traveled by airplane from Louisiana in December 7, 2005 [again, should be 2000].” (Emphasis added). In another place in its memorandum, the State made the point with even less force: “it still remains possible for petitioner to have committed the crime”. (Emphasis added) (R. 76). The State then made this giant leap of faith: “The State respectfully submits that no bona fide issue exists in this case as to whether the petitioner is factually innocent”. The State did not even try to prove the case against Defendant, after its original case had unraveled. Therefore, there really is “no bona fide issue” as to Petitioner’s innocence.

Near the end of its memorandum: “The State maintains that there is no compelling interest of justice that requires that a factual innocence hearing now be granted to petitioner in this case.” (R. 78). That statement conveys total indifference as to whether an innocent man has been unjustly punished, and punished severely. The Court of Appeals, in State v. Todd, 2007 UT App 349, 173 P.3d 170 (Utah App. 2007) explained the role of the prosecuting attorney in criminal cases:

In our judicial system, “the prosecution’s responsibility is that of a “minister of justice and not simply that of an advocate”, which includes a duty “to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” ¶ 17. (Internal citations omitted).

The State’s position is that a petitioner, who was imprisoned for over four years for a crime that has been dismissed for lack of evidence, does not have a claim which arises to the level of the “compelling interest of justice”. The State’s attorneys are abdicating their responsibility as “ministers of justice”. The United States Supreme Court recently expanded the requirement that counsel be furnished to a criminal Defendant at the very beginning of the criminal proceeding, in order to avoid a miscarriage of justice. In the case of Rothgery v. Gillespie County, Case No. 07-440 (June 23, 2008), the Court reinstated a civil lawsuit for denial of the Sixth Amendment right to counsel, in a case involving an erroneous arrest. Defendant there

was arrested and jailed for a period of time as a felon in possession of a firearm. Counsel was not immediately appointed to represent him. When counsel was appointed, it was determined that the arrest was as a result of a faulty computer entry regarding the former felony. Clearly the Supreme Court, seeing that this innocent man was jailed without a fair chance to show his innocence, found this to be a case of a “compelling interest of justice”.

In light of all this, the conclusion of the trial Court is nothing less than chilling in its failure to recognize the importance of the underlying search for justice:

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 if [the new witnesses] had testified.” (Emphasis added). (R. 172).

Utah Code Ann. § 78B-9-405 provides that, upon a finding of factual innocence, the Petitioner shall be paid a sum equal to “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” for the time he spent incarcerated in this matter. Petitioner is entitled to an evidentiary hearing without a preconceived determination.

Petitioner asserts that he is entitled to compensation, and requests that this amount be determined, after the finding of factual innocence.

#### CONCLUSION

This case is before this Court on review of the dismissal of Petitioner's Petition under Rule 12(b)(6) U.R.C.P., which allows a dismissal for failure to State a cause of action upon which relief may be granted. Petitioners' Petition does, in fact allege sufficient facts to require an evidentiary hearing on innocence, and to defeat such a Motion. The dismissal should be reversed, and the matter should be remanded to the District Court for an evidentiary hearing.

DATED this \_\_\_ day of January, 2009.

W. ANDREW MCCULLOUGH, L.L.C.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_ day of January, 2009, I did hand deliver two true and correct copies of the foregoing Brief of Appellant to J. Frederick Voros, Jr., Assistant Utah Attorney General, 160 East 300 South, Sixth Floor, Salt Lake City, Utah.

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