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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

SALT LAKE CITY DEPARTMENT, STATE OF UTAH

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HARRY MILLER,	:	MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS
Petitioner,	:	
vs.	:	
STATE OF UTAH,	:	Civil No. 080907781
Respondent,	:	

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COMES NOW the Petitioner and cites the following Points and Authorities in opposition to Respondent's Motion to Dismiss his Petition under the Post Conviction Remedies Act to determine factual innocence:

STATEMENT OF FACTS

1. Petitioner was arrested and charged before this Court with the crime of aggravated robbery, a second degree felony, on or about February 18, 2003, in Case No. 031901163FS. 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.

2. Petitioner was convicted by a jury of the felony of aggravated robbery in this Court on December 16, 2003; and on February 9, 2004, he was sentenced to a term in the Utah State Prison of from five years to life. 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.

3. Petitioner appealed his conviction to the Utah Court of Appeals under Case No. 20040150. 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. 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.

4. On or about January 18, 2007, the parties filed a Stipulated Motion for Summary Reversal; and on January 22, 2007, the Court of Appeals dismissed the appeal and remanded the case to this Court for a new trial.

5. Petitioner always maintained that he was in the State of Louisiana on the day when the crime was committed, and so testified

at trial. During 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.

6. A retrial was scheduled for July, 2007. On July 3, 2007, the Salt Lake District Attorney notified this Court that it would not be going forward to trial on the assigned date, and filed a Motion to Dismiss all charges.

7. On July 6, 2007, Defendant was released from custody, all charges having been dismissed.

8. Petitioner was admitted to River West Medical Center in Plaquemine, LA in the early morning hours of November 25, 2000, unable to speak. He was diagnosed as having a "cerebrovascular accident" (a stroke). He was released to his sister on November 28, 2000 and provided with a speech therapist and a home health care nurse.

9. At the time, he was employed for Chef's Fried Chicken, in Donaldsonville, LA. His employment records show that he was absent from work for medical reasons from November 25 through December 13, 2000.

10. In the Court of Appeals, Petitioner filed an Affidavit of

Beverly Kolder, a registered nurse involved in providing home health care in Donaldsonville, LA in the year 2000, and assigned to provide care to Harry Miller. 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."

12. At a hearing held in this Court pursuant to an Order of Remand. Defendant's sister also testified that she had seen him every day during the three weeks he was out of work due to his illness.

13. Mr. Miller was in Court in Ascension Parish Court, State of Louisiana on December 5, 2000 for fishing without a license, which confirms the information give by the nurse who visited him on the 7th. A copy of the Court docket showing his presence is attached hereto, labeled "Exhibit A" and by reference made a part hereof.

14. Mr. Miller was in the state of Louisiana during the time in which the crime was committed. Mr. Miller would have had to fly to Utah on the 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; and no suggestion has been made as to why.

ARGUMENT

1. This is a Petition to determine factual innocence, pursuant to § 78-35a-401 U.C.A. This Petition is brought pursuant to Rule 65C of the Utah Rules of Civil Procedure. This Petition is filed within one year of the date that retrial was scheduled, and upon which this Court ordered all charged dismissed. Further, this Petition was filed promptly upon jurisdiction being conferred on this Court to determine factual innocence, pursuant to Utah Code Ann. § 78-35a-401, effective May 5, 2008.

2. In its 2008 general session, the Utah legislature passed Utah Code Ann. §78-35a-401, et seq., entitled "Post Conviction 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. §78-35a-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 may 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. It must be evidence that was unknown at the time of trial; or a finding must have been made that Petitioner had ineffective assistance of counsel at trial. While there was no such finding here, the parties stipulated that there were serious errors at trial sufficient to reverse the judgment on appeal. The new law (§ 78-35a-402(2)(a)(vi)(A)), however, 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. Petitioner claims that there is substantial new evidence which due diligence on the part of his 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 asks that this matter be set for hearing to determine factual innocence.

3. Respondent has filed a 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 then and all reasonable inferences to be drawn from them in a light most favorable to the Plaintiff. (Internal citations omitted).

Petitioner's appellate attorney, in the closing paragraph of his Reply Brief to the Utah Court of Appeals, summed up the situation regarding the original conviction, firmly and simply:

> 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.

The fact is, of course, that this is the very first case brought under the new law. The Petition filed by Mr. Miller in this matter, and the Motion filed by the State appear to reflect substantially different readings of the law by the parties. Petitioner concedes that 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. Furthermore, the proceedings are governed by Rule 65C of the Rules of Civil Procedure, the same provision which applies to post

conviction remedies. But there is a fundamental difference in the proceedings, which the State does 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 alternative, of course, is when counsel for Defendant in the criminal proceedings was found to be ineffective.

The language here is similar; but the effect cannot be meant to be the same. While there was indeed a claim made on 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. (pp. 9-10). (Emphasis added).

It once again approaches the absurd to read this statute not to apply where the conviction has been reversed on appeal, and th e case has been dismissed. We now know that Mr. Miller was incarcerated for something of which he is now presumed innocent. The law cannot be read to prevent his compensation under these circumstances.

4. Prior to the reversal, this matter was remanded from the Court of Appeals to the trial Court to make additional findings, 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". Thus, the remand hearing 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. 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 affidavit of Beverly Kolder, a home health care nurse assigned to assist Mr. Miller while he recuperated from a stroke suffered in late November and the testimony of Berthella Miller, Defendant's

sister. The trial Court made at least some pronouncement as to how this new evidence might have affected the outcome of the trial. 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]". 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 <u>to visit his brother</u>, 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? And nobody has ever attempted to plot out what planes he would have taken, and whether the planes actually did arrive on time. While his brother did not testify, he gave a statement to investigators, indicating that they had not seen each other since Harry moved back to Louisiana in the first place. The testimony of Defendant's sister was to the effect that she had seen the Defendant every day during the time period at issue, the first half of December, 2000, after he was released from the hospital. The trial Court spent some time detailing the difficulty in getting Ms. Miller to testify, including her refusal to come to Utah for the original trial. The Court then stated:

> 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.

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 sister, 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."

The State 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." p. 8. 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. Attached hereto, labeled "Exhibit B" and by reference made a part hereof, is a 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." Attached hereto, as "Exhibit C", and by reference made a part hereof, is an 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).
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> 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.

Attached as "Exhibit D" and by reference made a part hereof, is a copy (unsigned) of the stipulation which was entered into before trial as to the dates of Mr. Miller's employment in Louisiana. By the time that 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.

5. The State opens its memorandum with a recitation of the requirements of Utah Code Ann. § 78B-9-402. 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.

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. The State ignores the decision of the Salt Lake District Attorney, made by not to go forward with retrial. 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 State now asks this Court to stick with its earlier ruling 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. At this point, everyone must concede that this does not make sense.

Whether this Court, under very different circumstances, reviewed some of the evidence and found it insufficient to sustain a finding of ineffective counsel is not now important. The original jury verdict has indeed been overturned. And the State seems to have forgotten the very basic tenet of American justice, that a man is presumed innocent until proven guilty. Under the circumstances, the State is simply wrong in its assertion that "should a hearing be granted, the burden of proof as to petitioner's factual innocence does not lie with the State." (P. 8). The State must indeed bear some burden to overcome the presumption of innocence. The State, lamely points 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 makes the point with even less force: "it still remains possible for petitioner to have committed the crime". (Emphasis

added)p. 7. The State then makes 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". In fact, Petitioner believes that statement to be basically true, though with exactly the opposite result. The State did not, would not, and could not, even try to prove the case against Defendant, after its original case had unraveled. 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." 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 very day this memorandum is being written, the United States Supreme Court 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". If so, the interest here is considerably more so. It is time that justice is done.

DATED this _____ day of July, 2008.

W. ANDREW MCCULLOUGH, L.L.C.

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W. Andrew McCullough
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum to Scott W. Reed, Attorney for Respondent State of Utah, 5272 S. College Dr. Suite 200, Murray, UT 84123, postage prepaid, this ____ day of July, 2008.

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