IN THE SUPREME COURT OF IOWA

IOWA SUPREME COURT NO. 17-1997

DAVID PALMER DEWBERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR DECATUR COUNTY
HONORABLE JOHN D. LLOYD, DISTRICT JUDGE
Decatur County No. PCCV006515

APPELLANT'S FINAL BRIEF & REQUEST FOR ORAL ARGUMENT

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FINAL BRIEF

PROOF OF SERVICE

On the 9th day of November, 2018, the undersigned hereby certifies that she electronically served the within Appellant's Proof Brief on the Iowa Attorney General Criminal Appeals Division for State of Iowa via EDMS. The undersigned further certifies that she served the Defendant/Appellant by mailing a copy thereof to him at the following address: David Palmer Dewberry, #6276340, Fort Dodge Correctional Facility, 1550 L Street, Fort Dodge, Iowa 50501.

Respectfully Submitted:

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CERTIFICATE OF FILING

I hereby certify that I did file the within Appellant's Proof Brief with the Clerk of the Iowa Supreme Court via electronic filing (EDMS) on the 9th day of November, 2018.

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Authorities

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Iowa Code § 663A.1(2); 702.7; 711.2; and 822.2(1)(a)

ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court for review as it involves a claim of actual innocence which presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court, and substantial questions of changing legal principals pursuant to Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(d) and (f). Specifically, the Appellant sought post-conviction relief of his Robbery in the First Degree conviction because the weapon used in the commission of the crime was not capable of causing death. His claim is one of "actual innocence". In light of the recent decision of *Schmidt v. State*, 90 N.W.2d 778 (Iowa 2018), the Iowa Supreme Court should take this opportunity to further clarify the change of law in actual innocence claims.

STATEMENT OF THE CASE

Nature of the Case:

This matter is an appeal of the ruling entered by the Decatur County District Court granting the State's Motion to Dismiss a post-conviction relief claim regarding trial counsel's failure to hire an expert witness to determine whether the weapon used in commission of an alleged Robbery in the First

Degree was "in-fact" capable of inflicting death. (Ruling on Motion to Dismiss 9/30/2016). (Ruling on Motion to Reconsider 12/14/16). (App. 106, 115).

Course of the Proceedings:

The Post-Conviction Relief Applicant and Appellant herein, Mr. David Palmer Dewberry, was originally charged on July 29, 2011 by trial information in the Iowa District Court for Decatur County in Case No. FECR006441 with the following crimes: Burglary in the First Degree in violation of Iowa Code § 713.3, a Class B Felony; three counts of Robbery in the First Degree in violation of Iowa Code § 711.22, Class B Felonies; Assault While Participating in a Felony in violation of Iowa Code § 708.3, a Class D Felony; and Going, Armed with Intent in violation of Iowa Code § 708.8, also a Class D Felony. (Trial Information 7/29/11).

Ultimately, on December 2, 2011, Mr. Dewberry pled guilty to one count of Robbery in the First Degree. (Plea Hearing Transcript pp. 2:18-3:10 / 1st PCR Ex. 2). He was sentenced on January 20, 2012 to twenty-five years in prison. (Judgment and Sentence Order FECR006441 7/9/2011).

Mr. Dewberry filed a direct appeal which was dismissed by the Iowa Court of Appeals as frivolous on September 6, 2012. *See* State v. Dewberry, No. 12-0362).

Mr. Dewberry filed his first post-conviction relief action on February 11, 2013. His application was later amended to include a claim of ineffective assistance of counsel for failure to challenge whether a bb gun was a dangerous weapon. (1st PCR Petition, 2nd Amended). (App. 31). This first application was denied and Mr. Dewberry appealed. The Iowa Court of Appeals affirmed the District Court on November 25, 2015. *See* Dewberry v. State, 873 N.W.2d 551, 2015 WL 7567514 (Iowa Ct. App. 2015). (App.64). The Iowa Supreme Court denied further review on February 2, 2016, and *procedendo* was issued. (App.104).

Mr. Dewberry filed his second application for post-conviction relief on February 12, 2016, the current application at issue herein. (2nd PCR Petition 2/12/16). (App. 11). The claims included in this application were that his conviction and sentence violated the United States and Iowa Constitutions, and that trial counsel was ineffective by failing to obtain an expert witness to testify whether the weapon used in commission of the crime constituted a dangerous weapon. (2nd PCR Petition 2/12/16). (App. 11).

On May 19, 2016, the State of Iowa filed its Motion to Dismiss. (Motion to Dismiss 5/19/16). (App. 17). The State argued that the issue regarding whether the weapon was a dangerous weapon was not new, but was rather subject to the prior rulings in the first post-conviction relief action and the appeal thereof. Mr. Dewberry resisted the Motion to Dismiss. (Resistance 5/28/16). (App. 20). He argued that no court had specifically addressed the issue of whether trial counsel was ineffective for failing to obtain an expert witness concerning the dangerous weapon issue. He further argued that no court had specifically found that the weapon used was "in-fact" capable of inflicting death. Finally, he argued that trial counsel was ineffective for allowing him to plead guilty to an offense that was impossible for him to have committed.

At hearing, Mr. Dewberry's counsel argued that no one had ever decided whether "the weapon was in fact capable of inflicting death." He further argued that the legal procedural approach to a fact that the Court used previously in the first post-conviction relief action to determine whether the weapon was a dangerous weapon possible of inflicting death was insufficient when such a fact can be determined objectively. (08/18/2016 Hearing transcript pp. 4:4-5:16).

The District Court granted the State's Motion to Dismiss as to the claim regarding the dangerous weapon, finding that it was previously determined that the Petitioner had admitted the weapon met the definition of a dangerous weapon and that the issue was foreclosed by his plea and the prior adjudication on his first post-conviction plea. (09/30/2016 Ruling on Motion to Dismiss). (App. 106).

Mr. Dewberry timely filed a 1.904(2) Motion, which was denied. (11/7/16 1.904(2) Motion). (12/14/16 Ruling on 1.904(2) Motion). (App. 110). He then timely filed a Notice of Appeal, appealing from the Order granting the State's Motion to Dismiss the dangerous weapon claim. (1/10/17 NOA). (App. 118). The Iowa Supreme Court determined that the Order granting the State's Motion to Dismiss was not a final, appealable Order, and it was treated as an application for interlocutory appeal, and was denied. (8/29/17 Supreme Court Order 17-0047). (App. 160).

After *procedendo* issued, Mr. Dewberry then filed a Voluntary Dismissal of Remaining Claims, indicating the dismissal was made so that he could proceed with appealing the dangerous weapon issue. (11/6/17 Voluntary Dismissal). (App. 166). The District Court then entered an Order granting the voluntary dismissal of the remaining claims. (12/8/17 Order Granting Voluntary Dismissal). (App. 167).

Finally, Mr. Dewberry timely filed his Notice of Appeal herein. (12/11/17 NOA). (App. 169).

Statement of the Facts:

The facts relevant to this appeal are largely procedural and set out in the Course of Proceedings section outlined above. The facts of the underlying crime for which Mr. Dewberry was erroneously convicted were summarized by the Iowa Court of Appeals in its 2015 decision as follows:

> According to the minutes of evidence, at about 10:45 p.m. on July 16, 2011, Dewberry and Cody Rollins drove to the home of then Congressman Leonard Boswell in Davis City. Rollins stayed in the car while Dewberry, who was armed with a gun and wearing a black ski mask, entered the home. Dewberry put the gun to the head of Boswell's daughter, Cynthia Brown, and demanded money. Boswell came to the aid of Cynthia and engaged in a physical altercation with Dewberry. During the struggle, Dewberry, Boswell, and Cynthia fell down a flight of stairs. Dewberry broke free and ran back up the stairs. He encountered Boswell's wife, Darlene, threatened her with the gun, and again demanded money. Boswell's grandson, Mitchell Brown, heard the incident occurring and got a 12–gauge shotgun. Mitchell pointed the shotgun at Dewberry, who then ran out the front door.
>
> After the Boswells called 911, officers came to the home, including those from the Leon and Lamoni Police Departments. In a field near the home, officers found three black duffel bags, which contained tape, twine, garbage bags, and "a black handgun, which was later determined to

> be similar to a pellet gun." A witness stated Dewberry was "in possession of a black gun used for shooting white pellets." When interviewed by officers, Dewberry admitted "to carrying a 'fake' gun into the house, pointing it at the people inside, and demanding money."

See Dewberry v. State, 873 N.W.2d 551, 2015 WL 7567514, *1 (Iowa Ct. App. 2015) (App. 5).

Pursuant to a plea agreement, Mr. Dewberry pled guilty on December 2, 2011, to one count of Robbery in the First Degree in violation of Iowa Code § 711.2. (Plea Hearing Transcript pp. 2:18-3:10 / 1st PCR Ex. 2). (App. 100).

Mr. Dewberry entered into the following colloquy with the Court:

> COURT: Mr. Dewberry, now we're to a point where I need to make a determination as to whether there is a factual basis for accepting your plea. In order to do so, I must ask you to tell me in your own words what you did that brings you here to plead guilty to this charge.
>
> DEFENDANT: Well, Your Honor, on the day of July 16, 2011, I was going to commit a theft, and in doing so, I entered a residence that was not mine nor had any permission to enter and used the BB gun to put fear or threaten the residents of the home.
>
> COURT: Can you describe for me further what this gun was that you used?
>
> DEFENDANT: It was just a BB gun.
>
> COURT: Was it a spring-loaded BB gun, or was it CO2?

DEFENDANT: It was just a spring-loaded, I think. It might have been CO2. I don't know. I never shot it.

COURT: Well, can you describe what it looked like?

DEFENDANT: It was black.

COURT: Can, you describe it further as to the shape of it?

DEFENDANT: It looked like a gun.

COURT: Have you ever seen a real gun before?

DEFENDANT: Yeah.

COURT: Did it look like a real gun?

DEFENDANT: Pretty close.

COURT: Mr. Dewberry, one of the prongs, if you will, of a definition of a dangerous weapon is any instrument or device of any sort whatsoever which is actually used in such manner as to indicate that the defendant intends to inflict death or serious injury upon the other and which when so used is capable of inflicting death upon a human being. Did the gun that you described fit that definition?

DEFENDANT: Yes, Your Honor.

(FECR006441 Plea Hrg. Tr. pp. 12:2-13:13) (1st PCR Ex. 2) (App. 100-102).

Although Mr. Dewberry pled guilty to the crime, there was no independent evidence presented to show that the weapon he had in his possession was capable of inflicting death. Mr. Dewberry was adjudged

guilty, and sentenced to twenty-five years in prison. (Judgment and Sentence Order FECR006441; 1/20/2012).

ARGUMENT

ISSUE: IS CONSTINUTIONAL DUE PROCESS VIOLATED WHEN THE DISTRICT COURT GRANTS SUMMARY JUDGMENT AGAINST A PCR APPLICANT THAT PLED GUILTY TO AND WAS CONVICTED OF A CRIMINAL OFFENSE IF IT CAN BE LATER SHOWN THAT A FACTUAL ELEMENT OF THE OFFENSE DID NOT EXIST AND THE APPLICANT IS ACTUALLY INNOCENT?

Standard of Review:

Typically, appellate review in summary dismissal of post-conviction relief proceedings is for correction of errors at law. Devoss v. State, 648 N.W.2d 56, 60 (Iowa 2002); Castro v. State, 795 N.W.2d 789, 793 (Iowa 2011). However, when claims of a constitutional nature are asserted, then appellate review is *de novo*. Ledezma v. State, 626 N.W.2d 134, 141 (Iowa 2001).

Preservation of Error:

Error was preserved by Mr. Dewberry filing is Petition for Post Conviction Relief, raising the issue in resistance to the State's Motion to Dismiss, in his Motion to Reconsider following dismissal of the issue, and

through the timely filing of Notice of Appeal. (5/28/16 Resistance to Motion to Dismiss). (11/7/16 Motion to Enlarge). (12/11/17 NOA). (App. 20, 110, 118). The Appellant has never waived his right to raise his claim of actual innocence.

Merits:

First and foremost in our justice system is the right to Due Process. Our Iowa Constitution protects this right providing that "no person shall be deprived of life, liberty or property, without due process of law." Iowa Const. Art. I § 9. If a person is convicted of a crime he did not commit, such a conviction violates the Iowa Constitution. Innocent people should have an opportunity to prove their actual innocence, even when they initially pled guilty to the crime charged. The Iowa Supreme Court recently agreed with this principle in *Schmidt v. State*, 909 N.W.2d 778 (Iowa 2018), and held that the Iowa Constitution allows freestanding claims of actual innocence, and therefore a PCR applicant may bring such claims to attack his guilty plea even when he entered his plea knowingly and voluntarily. The Court acknowledged that innocent people plead guilty to crimes they did not commit for numerous reasons. The Court opined "It is time that we refuse to perpetuate a system of justice that allows actually innocent people to remain

in prison, even those who profess guilt despite their actual innocence." (*Id.* at 790).

Robbery in the First Degree is defined as "while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." Iowa Code § 711.2.

Mr. Dewberry should be afforded the right to prove his actual innocence. The issue of whether the weapon he possessed was actually capable of inflicting death has never been adjudicated.

A dangerous weapon is defined as "any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being". Iowa Code § 702.7.

Mr. Dewberry acknowledged that he was in possession of a bb gun during the commission of the crime. Except for Mr. Dewberry's subjective agreement with the District Court's prompting during the plea colloquy, there is no independent, objective evidence to establish whether the weapon was, in fact, a dangerous weapon capable of inflicting death.

In his 2nd Post Conviction Relief proceeding, Mr. Dewberry requested that he be allowed to have an expert examine the weapon to determine

whether it actually meets the criteria contemplated by the Iowa Code. This request was denied, and his claim dismissed.

When the District Court dismissed this claim, it placed the blame on Mr. Dewberry, stating: "It was his weapon and he should have been familiar with its characteristics and potential." (12/14/16 Ruling on Motion to Reconsider). (App. 115). Mr. Dewberry should not continue to be punished if he was mistaken in his belief that the weapon he used was a dangerous weapon capable of death as contemplated by Iowa law. Substantive due process should guarantee that the actual truth will prevail over mistake of fact. This is "actual innocence".

Summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Davis v. State, 520 N.W.2d 319, 321 (Iowa 1994). A genuine issue of material fact is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists of only the legal consequences flowing from the undisputed facts, entry of summary judgment is proper. Castro v. State, 795 N.W.2d 789, 793 (Iowa 2011). The moving party bears the burden of showing that no material fact exists, the record is viewed in the light most favorable to the moving party, and all legitimate inferences are drawn from the evidence in favor of the non-

moving party. C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 73 (Iowa 2011); Eggiman v. Self-Insured Servs. Co., 718 N.W.2d 754, 758 (Iowa 2006).

In *Schmidt v. State*, 909 N.W.2d 778 (Iowa 2018) the Iowa Supreme Court recently overruled "cases holding that defendants may only attack the intrinsic nature – the voluntary and intelligent character of their pleas" and held that "the Iowa Constitution allows freestanding claims of actual innocence, so applicants may bring such claims to attack their pleas even though they entered their pleas knowingly and voluntarily." Under *Schmidt*, Mr. Dewberry may attack his plea by bringing an actual innocence claim even though such a challenge is extrinsic to his plea. His plea does not preclude his actual innocence claim merely because he pled guilty to the charges.

"Actual innocence" has also been applied by the US Supreme Court and several state courts in various cases. *See*, *e.g.*, Schlup v. Delo, 513 U.S. 298, 324 (1995); Herrera v. Collins, 506 U.S. 390, 400-404 (1993); Miller v. Commr. Of Correction, 700 A.2nd 1108, 1130-31 (Conn. 1997); State ex rel. Amrine v. Roper, 102 S.W.3d 541, 541 (Mo. 2003); People v. Hamilton, 979 N.Y.S.2d 97, 107-108 (N.Y. App. Div. 2d Dept. 2014).

In Illinois, it has been held that "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." People v. Washington, 171 Ill. 2d 475, 665 N.E.2d 1330, 1336 (Ill. 1996).

In California, relief may be granted for "actual innocence" based on proof of false evidence and also on evidence that is newly discovered. *See* In re Lawley, 179 P.3d 891, 897 (Cal. 2008). Also in California, relief is not barred by a guilty plea or mistaken belief regarding a material fact necessary to establish a crime. Specifically, California code provides:

> A writ of habeas corpus may be prosecuted for, but not limited to . .. . false physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

Cal. Penal Code § 1473(b)(2).

Our Iowa Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. Art. I § 9. It affords individuals greater rights than does the United States Constitution. Post-conviction relief may be granted when the conviction violates the protections of our Constitution. Iowa Code § 822.2(1)(a). Persons who are wrongfully imprisoned can seek relief if the Court finds by clear and convincing evidence that either:

> a. That the offense for which the individual was convicted, sentenced, and imprisoned, including any lesser included offenses, was not committed by the individual; or
>
> b. That that the offense for which the individual was convicted, sentenced, and imprisoned was not committed by any person, including the individual.

Iowa Code § 663A.1(2).

"Actual innocence" was not a new concept to Iowa courts even prior to *Schmidt*. Our Supreme Court has used the phrase "actual innocence" in describing a prerequisite to establishing the right to receive compensation for being wrongfully imprisoned as follows:

> With respect to the second prong, or the actual-innocence prong, we have emphasized that under the statute, the claimant has the heavy burden of proving actual innocence. . . [I]t is not enough for a person seeking compensation as a wrongfully imprisoned person to merely establish that a reviewing court determined the conviction was not supported by substantial evidence. . . . The claimant that does not show actual innocence by clear and convincing evidence is not entitled to compensation.

Rhoades v. State, 880 N.W.2d 431, 445 (Iowa 2016).

This Court should continue to follow *Schmidt* and the long line of states that already recognize "actual innocence claims" and determine that it is a violation of the due process clause to allow a conviction to stand when the applicant in a post-conviction relief action establishes "actual innocence" of the alleged crime because the conviction was based on false evidence –

even though the applicant mistakenly believed the evidence was true. In Mr. Dewberry's case, the only evidence that the weapon was capable of inflicting death was Mr. Dewberry's guilty plea agreeing with the statements of the District Court. He should be provided the opportunity under the protection of our Iowa Constitution to prove that he is actually innocent.

"Failure to acknowledge an applicant's right to establish truth unfairly either subjects the applicant to punishment for a crime that was never committed or unfairly subjects the applicant to greater punishment when actually guilty of a lesser offense. An applicant should not be made a victim of his own ignorance or mistake concerning the interpretation or application of the law. Neither ignorance nor mistake standing alone is a crime." (5/24/17 Appellant Proof Brief, Dewberry v. State, No.17-0047 pp. 30-31). (App. 155-156).

CONCLUSION

For the reasons set forth herein, the Applicant-Appellant, David Palmer Dewberry, respectfully requests that this Court reverse and remand this matter with instructions to the District Court for a new trial as there was insufficient evidence to convict him. Alternatively, Mr. Dewberry requests that this matter be reversed and remanded to the District Court for a hearing

on the post-conviction relief merits, allowing Mr. Dewberry the opportunity to have an expert examine the weapon at issue to determine whether it was a dangerous weapon capable of inflicting death in the manner in which it was used and to present the evidence to establish his "actual innocence".

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REQUEST FOR ORAL ARGUMENT

Counsel for Appellant hereby requests to be heard at oral argument upon submission of this case.

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COST CERTIFICATE

I, Cathleen J. Siebrecht, hereby state that the actual cost of printing the foregoing Appellant's Brief was the sum of $0.00 as it is electronically submitted.

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Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g) because this brief contains 3,444 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Times New Roman.

/s/ Cathleen J. Siebrecht **Nov. 9, 2018**

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