IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1997

DAVID PALMER DEWBERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DECATUR COUNTY
THE HONORABLE JOHN D. LLOYD, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: May 15, 2019)

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether "actual innocence" for purposes of a free-standing actual innocence claim as recognized by *Schmidt v. State*, 909 N.W.2d 778 (Iowa 2018), means the defendant is innocent of the crime of conviction and any lesser included offenses?

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

On May 15, 2019, the Court of Appeals reversed the district court's denial of David Palmer Dewberry's second application for postconviction relief. *Dewberry v. State*, No. 17-1997, 2019 WL 2144623 (Iowa Ct. App. May 15, 2019). The panel opinion held that the district court "deprived Dewberry of the opportunity to establish his actual-innocence claim" when it granted summary disposition. This Court should grant further review because the State's primary argument on appeal—which was not addressed by the Court of Appeals—presents both an important question of changing legal principles and an issue of broad public importance that this Court should ultimately determine. Ia. R. App. P. 6.1103(1)(b)(3)-(4).

Dewberry's second application for postconviction relief began as a claim that his trial counsel should have called an expert to testify whether the BB gun or pellet gun that he used in the robbery met the definition of a "dangerous weapon." It was that claim that the district court ruled on when it granted summary disposition. *See* Decatur No. PCCV006515 Order 09/30/16; App. 53-58. Dewberry filed a motion to enlarge that developed his claim into an "actual innocence" claim. Decatur No. PCCV006515 Motion to Enlarge; App. 59-61. The

district court denied the motion. Decatur No. PCCV006515 Ruling on Motion to Enlarge; App. 62-63. It noted that, at the time, Iowa's appellate courts had not recognized a freestanding actual innocence claim.

Dewberry filed his proof brief on appeal on March 16, 2018. One week later, this Court decided *Schimdt v. State*, 909 N.W.2d 778 (Iowa 2018). In *Schmidt*, this Court recognized a freestanding actual innocence claim under the Iowa Constitution. Dewberry sought to amend his proof brief to address the decision and the State did not object. Dewberry's amended proof brief on appeal provided his first opportunity to address the *Schmidt* decision and presented the State with its first opportunity to respond. The State argued in its brief that Dewberry did not raise a cognizable *Schmidt* claim because he did not allege that he was innocent of robbery. Rather, he claims that if the BB gun or pellet gun were not a dangerous weapon, he was guilty of second-degree robbery rather than first-degree robbery.

The State cited decisions from other jurisdictions supporting its argument that to plead "actual innocence," a defendant must allege that he is innocent of the crime of conviction *and any lesser included offenses*. Because Dewberry did not do so, summary disposition was

appropriate regardless whether he could establish that his gun was not a dangerous weapon. The Court of Appeals did not address the State's argument in its decision. This Court should grant further review to clarify the meaning of "actual innocence" for purposes of a freestanding actual innocence claim under the Iowa Constitution.

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of the Iowa Court of Appeals decision reversing the denial of David Palmer Dewberry's second application for postconviction relief. The court of appeals held that the district court should have afforded Dewberry an opportunity to prove his actual innocence claim.

Course of Proceedings & Facts

The court of appeals summarized the facts of Dewberry's conviction 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."

Dewberry v. State, No. 14-1198, 2015 WL 7567514, at *1 (Iowa Ct. App. Nov. 25, 2015).

Dewberry was charged with first-degree burglary, three counts of first-degree robbery, assault while participating in a felony, and going armed with intent. 2nd Amended PCR Application; App. 31. He pleaded guilty to one count of first-degree robbery. 2nd Amended PCR Application; App. 31. At the plea hearing, the district court engaged Dewberry in the following colloquy:

> 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.
>
> DEWBERRY: 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: Was it a spring-loaded BB gun, or was it CO2?

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

. . . .

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?

DEWBERRY: Yes, Your Honor.

COURT: Did you threaten the alleged victim in this case?

DEWBERRY: Yes, Your Honor.

COURT: Did you physically assault the alleged victim in this case? Did you have any physical contact with her?

DEWBERRY: Yes, Your Honor.

COURT: In your opinion, did you place her in fear of immediate serious injury?

DEWBERRY: Yes, Your Honor.

Dewberry v. State, No. 17-1997, 2019 WL 2144623 (Iowa Ct. App. May 15, 2019). The court accepted Dewberry's guilty plea to first-degree robbery. He was sentenced to a term of imprisonment not to exceed twenty-five years. Dewberry's direct appeal was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 6.1005. 2nd Amended PCR Application; App. 31-32.

In his first application for postconviction relief, Dewberry alleged that he received ineffective assistance because defense counsel permitted him to plead guilty to first-degree robbery when there was not a sufficient factual basis for the plea. Specifically, Dewberry challenged the evidence establishing that the BB gun or pellet gun met the definition of a dangerous weapon. 2nd Amended PCR Application; App. 31-32. The Court of Appeals held that the State established a sufficient factual basis for Dewberry's plea and his counsel was not ineffective. *Dewberry v. State*, No. 14-1198, 2015 WL 7567514, at *2-4 (Iowa Ct. App. Nov. 25, 2015). His second application for postconviction relief was filed on February 12, 2016.

ARGUMENT

I. Dewberry is Not Actually Innocent of Robbery.

In order to succeed on an actual innocence claim, a defendant must show, "by clear and convincing evidence that, despite the evidence of guilt supporting the conviction, no reasonable fact finder could convict the applicant of the crimes for which the sentencing court found the applicant guilty in light of all the evidence." *Schmidt*, 909 N.W.2d at 797. Dewberry did not argue that clear and convincing evidence supported his actual innocence claim. Rather, he argued that the district court erred in dismissing his second application for postconviction relief without affording him an opportunity to prove his actual innocence. The Court of Appeals agreed.

Specifically, he argued that an expert should examine the gun that he used to commit the robbery to determine whether it was in fact capable of inflicting death. But no such determination is necessary. Even if an expert determined that Dewberry's gun was not capable of inflicting death, Dewberry is not innocent. He was convicted of robbery. The code defines robbery as follows:

> 1. A person commits a robbery when, having the intent to commit a theft, the person does

> any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> a. Commits an assault upon another.
>
> b. Threatens another with or purposely puts another in fear of immediate serious injury.
>
> c. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1. Dewberry admits that he is guilty of robbery. His argument focuses on the *degree* of the robbery he committed. If the gun was not a dangerous weapon, Dewberry argues that he could not have been convicted of first-degree robbery. If that were the case, Dewberry could challenge the factual basis for his guilty plea as he did in his first application for postconviction relief. But Dewberry is not innocent. At the time Dewberry was convicted, the code provided that "[a]ll robbery which is not robbery in the first degree is robbery in the second degree." Iowa Code § 711.3 (2013). A defendant is not "factually and actually innocent" when he is guilty of a lesser included offense.

One of the small number of states that recognizes a freestanding actual innocence claim based on the due process clause explains that innocence means "total vindication" or "exoneration." *People v.*

Barnslater, 869 N.E.2d 293, 300-01 (Ill. App. 2007) (quoting *People v. Savory*, 722 N.E.2d 220, 225 (Ill. App. 1999)). The Illinois court held that "actual innocence requires that a defendant be free of liability not only for the crime of conviction, but also of any related offenses." *Id*; *see also Wanatee v. Ault*, 120 F.Supp.2d 784, 789 (N.D.Iowa 2000) ("there is a public interest in the continued incarceration of a person convicted of murder, where the grounds for habeas release did not go to his actual innocence, but only to a constitutional defect in his representation, which this court concluded resulted in his conviction of a greater offense, as opposed to his pleading guilty to a lesser offense with a lesser sentence"); *Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993) ("we require that as an element to a cause of action in trespass against a defense attorney whose dereliction was the sole proximate cause of the defendant's unlawful conviction, the defendant must prove that he is innocent of the crime or any lesser included offense. … The underlying act for first degree murder and for voluntary manslaughter is the unlawful taking of human life. A person convicted of unlawfully taking a human life may not collect monetary damages for being wrongfully convicted of first degree murder when in fact that person is guilty of a lesser degree of

homicide"); *Sangha v. LaBarbera*, 52 Cal.Rptr.3d 640, 647 (Cal. App. 2006) (holding that to be "actually innocent" so as to recover for legal malpractice, a defendant must be free from "any criminal involvement," including the commission of a lesser included offense of the crime of conviction).

A Texas decision relied on by this Court in *Schmidt* explained that the distinction between "actual" innocence and "legal" innocence where the latter described someone who, despite having engaged in the criminal conduct, is nevertheless not guilty for a legal reason. *Ex parte Fournier*, 473 S.W.3d 789, 792 (Texas Crim. App. 2015). It explained that actual innocence applies "only in circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses." *Id.* In *Schmidt*, this Court said that it is a due process violation to hold a person "who has committed no crime." *Schmidt*, 909 N.W.2d at 793. Because Dewberry admits that he is guilty of robbery, he is not actually innocent and reversal in light of *Schmidt* was not necessary.

Even if Dewberry did have a cognizable actual innocence claim, summary disposition was still appropriate. Iowa Code section 822.6 authorizes the district court to "grant a motion by either party for

summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." As the special concurrence explained in *Schmidt*, summary disposition is still appropriate for an actual innocence claim on postconviction relief when, under a set of facts assumed to be undisputed for purposes of the motion, "a reasonable juror could still conclude the defendant is guilty of the crime." 909 N.W.2d at 800-01 (Cady, C.J., concurring specially).

Dewberry does not allege that the weapon that he used to commit the robbery was not a dangerous weapon. He admitted it was when he pleaded guilty and he now alleges that he may have been mistaken. For purposes of summary disposition of Dewberry's application, the State does not have to dispute that he may have been mistaken. Nevertheless, Dewberry did not show a genuine issue of material fact. The district court did not err when it granted the State's motion.

CONCLUSION

For the foregoing reasons, this Court should grant the application, vacate the decision of the court of appeals, and affirm the district court's denial of Dewberry's second application for postconviction relief.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument on this application.

Respectfully submitted,

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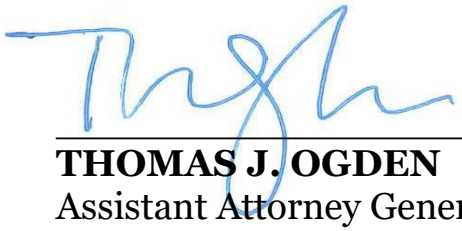

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CERTIFICATE OF COMPLIANCE

This application complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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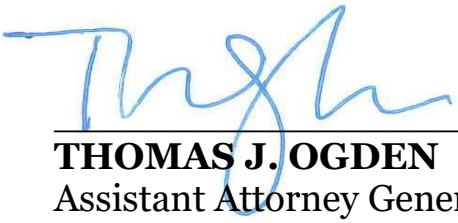
Dated: June 4, 2019



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