**IN THE SUPREME COURT OF IOWA**

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**IOWA SUPREME COURT NO. 17-1997**

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**DAVID PALMER DEWBERRY,**
**Applicant-Appellant,**

**vs.**

**STATE OF IOWA,**
**Respondent-Appellee.**

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

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# RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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

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## PROOF OF SERVICE

On the 14th day of June, 2019, the undersigned hereby certifies that she electronically served the within Resistance to Application for Further Review 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:

***/s/ Cathleen J. Siebrecht***

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## CERTIFICATE OF FILING

I hereby certify that I did file the within Appellant's Resistance to Application for Further Review with the Clerk of the Iowa Supreme Court via electronic filing (EDMS) on the 14th day of June, 2019.

Respectfully Submitted:

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## STATEMENT SUPPORTING RESISTANCE

The State requests this Court to grant further review to clarify the meaning of "actual innocence" for purposes of a freestanding actual innocence claim under the Iowa Constitution as recognized by Schmidt v. State, 909 N.W.2d 778 (Iowa 2018). It asks this Court to adopt a rule that a Defendant must be innocent of any lesser included offenses to be afforded the right to make an actual innocence claim in a post-conviction relief proceeding.

As Dewberry has argued: "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).

Substantive due process should guarantee that the actual truth will prevail over mistake of fact. This is "actual innocence".

## STATEMENT OF THE CASE

### Nature of the Case:

This matter stems from 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:

Dewberry was originally charged in 2011 with the: 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).

Dewberry pled guilty to one count of Robbery in the First Degree and was sentenced on January 20, 2012 to twenty-five years in prison. (Plea

Hearing Transcript pp. 2:18-3:10 / 1st PCR Ex. 2). (Judgment and Sentence Order FECR006441 7/9/2011).

Dewberry's direct appeal was dismissed by the Court of Appeals as frivolous. *See* State v. Dewberry, No. 12-0362). He then filed his first post-conviction relief action, which he 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 he appealed. The Court of Appeals affirmed. *See* Dewberry v. State, 873 N.W.2d 551, 2015 WL 7567514 (Iowa Ct. App. 2015). (App.64). Further Review was denied, and *procedendo* issued. (App.104).

Dewberry filed a second application for post-conviction relief which is the current application at issue herein. (2nd PCR Petition 2/12/16). (App. 11). He argued 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 constituted a dangerous weapon. (2nd PCR Petition 2/12/16). (App. 11).

The State moved to dismiss the second application and argued that the issue regarding whether the weapon was a dangerous was not new and was subject to the prior rulings in the first post-conviction relief action and the

appeal. (Motion to Dismiss 5/19/16). (App. 17). In resistance, Dewberry argued no court had specifically addressed the ineffective assistance claim for failing to obtain an expert witness concerning the dangerous weapon issue; that no court had specifically found the weapon used was "in-fact" capable of inflicting death; and trial counsel was ineffective for allowing him to plead guilty to an offense that was impossible for him to have committed. (Resistance 5/28/16). (App. 20). (08/18/2016 Hearing transcript pp. 4:4-5:16).

The District Court dismissed 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).

Dewberry 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 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). This Court treated the appeal as interlocutory, and denied the appeal. (8/29/17 Supreme Court Order 17-0047). (App. 160). Dewberry then voluntarily dismissed the remaining claims so that he could proceed with

appealing the dangerous weapon issue. (11/6/17 Voluntary Dismissal). (App. 166). (12/8/17 Order Granting Voluntary Dismissal). (App. 167). Dewberry then 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 above. The facts of the underlying alleged crime are summarized by the Court of Appeals as set forth in Appellant's brief and the State's Application for Further Review 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).

The following District Court plea colloquy further explains the underlying facts:

> 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).

No independent evidence was presented. There was simply no evidence or information that the weapon Dewberry had in his possession was capable of inflicting death. He was adjudged guilty, and sentenced to twenty-five years in prison. (Judgment and Sentence Order FECR006441; 1/20/2012).

## ARGUMENT

**THE COURT OF APPEALS PROPERLY FOUND BY GRANTING SUMMARY DISPOSITION, THE DISTRICT COURT DEPRIVED DEWBERRY OF THE OPPORTUNITY TO ESTABLISH HIS ACTUAL-INNOCENCE CLAIM.**

Our Iowa Constitution protects the right to Due Process by ensuring 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 must have an opportunity to prove their actual innocence. This Court recently agreed with this principle in *Schmidt v. State*, 909 N.W.2d 778 (Iowa 2018), by holding that our 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. (*Id.* at 790).

An argument that a conviction for a Class B Felony punished by twenty-five years in prison must stand, even though the Defendant is actually innocent of the crime he was convicted of, simply because he may be guilty of a lesser included offense which may be nothing but a

misdemeanor punishable by only up to two years in prison – is simply unjust and completely undermines this Court's decision in *Schmidt*.

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.

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.

The issue of whether the weapon Dewberry possessed was actually capable of inflicting death has never been adjudicated. He must be afforded the right to prove his actual innocence, or he remains convicted of Robbery in the First Degree with a twenty-five year sentence. This result is exactly what the Court wanted to prevent from happening any further when it decided *Schmidt*. "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).

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).

Under *Schmidt*, Dewberry's plea does not preclude his actual innocence claim merely because he pled guilty to the charges which may include elements of a lesser included offense.

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).

Dewberry must be provided the opportunity under the protection of our Iowa Constitution to prove that he is actually innocent of the crime he was convicted of and sentenced under pursuant to a full evidentiary hearing.

## CONCLUSION

For the reasons set forth herein, the Applicant-Appellant, David Palmer Dewberry, respectfully requests that this Court deny the State's request for further review. Alternatively, Dewberry requests that this Court affirm the Court of Appeals finding under the circumstances of this case that the matter must be reversed and remanded to the District Court for a hearing on the post-conviction relief merits, allowing 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" of the crime of which he was convicted.

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## CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel for Appellant hereby requests to be heard should oral argument be granted.

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## COST CERTIFICATE

I, Cathleen J. Siebrecht, hereby state that the actual cost of printing the foregoing Resistance 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. 6.1103(4) because this brief contains 2,844 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g).

2. This Resistance 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Times New Roman.

***/s/ Cathleen J. Siebrecht*** **June 14, 2019**

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