

No. _____

Twelfth District

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 LEE WAYNE HUNT)
)
 Defendant-Appellant.)
)

From Cumberland County
 85CRS16651-16654

AMICUS CURIAE BRIEF OF THE
 NORTH CAROLINA CENTER ON ACTUAL INNOCENCE,
 THE DARRYL HUNT PROJECT FOR FREEDOM AND JUSTICE,
 AND THE INNOCENCE NETWORK

CLERK OF THE COURT
 OF NORTH CAROLINA

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INTRODUCTION

In *In Re Miller*, 357 N.C. 316, 584 S.E.2d 772 (2003) (“*Miller*”), the Supreme Court, after a lengthy analysis of the public policies underlying the attorney-client privilege in circumstances where the client is deceased, outlined an *in camera* review procedure for trial courts to follow in order to determine whether the privilege remained applicable after death.

In this case, at a hearing on Petitioner’s Motion for Appropriate Relief conducted on January 8, 2007 and in a subsequent Order on that Motion dated April 23, 2007, the trial court failed to follow that procedure, ruling that it could not consider the testimony of the deceased client’s former lawyers, thereby

precluding evidence of Petitioner's actual innocence. That ruling – in circumstances concerning the privilege virtually identical to those in *Miller* and with respect to a claim of innocence – was clearly erroneous. The North Carolina Center on Actual Innocence, The Darryl Hunt Project for Freedom and Justice (also a North Carolina organization), and The Innocence Network (usually collectively referred to as the “Center”) respectfully submit that this Court should grant certiorari and reverse the ruling of the trial court.

INTEREST OF AMICI CURIAE

Amicus curiae The North Carolina Center on Actual Innocence is an independent non-profit organization that coordinates innocence efforts in our State. The Center's mission is to identify, investigate and advance credible claims of innocence made by inmates convicted of felonies in North Carolina. The Center serves as the screening organization for the North Carolina Innocence Inquiry Commission, which was established by the General Assembly upon the prompting of former Chief Justice Lake to hear developed claims of actual innocence.

In addition, the Center serves as the central intake organization for North Carolina prisoners' claims of actual innocence by screening the claims and passing along the credible ones to the various student-led/faculty-supervised Innocence Projects and the several Wrongful Convictions courses/clinics at the state's law

schools. Every law school in North Carolina undertakes investigation of innocence claims in cooperation with the Center.

To qualify for review by the Center, an inmate must claim he or she did not have any involvement in the felony for which he or she was convicted. The Center does not accept claims based on legal or procedural error, nor does the Center accept cases in which an inmate is guilty of a lesser crime related to the case.

Amicus curiae The Darryl Hunt Project for Freedom and Justice, based in Winston-Salem, is a non-profit organization started by Darryl Hunt, after he served more than eighteen years in prison for a crime he did not commit. He was exonerated in court on February 6, 2004, and on April 15, 2004, at the request of his attorneys and the Forsyth County District Attorney, Hunt was granted a formal pardon of innocence by the Governor.

The Project provides assistance to individuals who have been wrongfully convicted and imprisoned; helps ex-offenders obtain the skills, guidance, and support they need as they return to life outside the prison system; and advocates for changes in the justice system to prevent innocent people from being convicted and serving time in prison.

Amicus curiae The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for

whom evidence discovered post conviction can provide conclusive proof of innocence. The thirty-eight current members of the Network (which are listed by name in the motion accompanying this brief) represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, and Australia. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

All three of these organizations are dedicated to investigating claims of and advancing justice for innocent people who are wrongfully convicted and sentenced to prison, or in some cases, to death. Individually and collectively, they have a significant interest in the outcome of this case.

STATEMENT OF THE CASE

The Center adopts Petitioner's Statement of the Case by reference. N.C. R. App. P. 28(f).

STATEMENT OF THE FACTS

The Center adopts Petitioner's Statement of the Facts by reference. N.C. R. App. 28(f).

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION THAT AN ATTORNEY IS PROHIBITED FROM DISCLOSING THE CONTENT OF HIS DISCUSSIONS WITH HIS CLIENT, UNDER THE CIRCUMSTANCES PRESENTED HERE, IS INCONSISTENT WITH THE NORTH CAROLINA SUPREME COURT'S DECISION IN *IN RE MILLER*.

In its Order dated April 24, 2007 (the "Order"), the trial court ruled that attorney Staples Hughes was prohibited from disclosing the content of discussions he had with his deceased client, Jerry Cashwell, upon a finding that such discussions were protected by the attorney-client privilege. Based upon that ruling, another former Cashwell attorney, Mary Ann Tally, and another lawyer from the Cumberland County Public Defender's Office, Stephen Freedman, were not able to testify regarding evidence relating to Cashwell's statements. That ruling, and the means by which the trial court reached the ruling, is plainly inconsistent with the North Carolina Supreme Court's recent decision regarding the privilege of a deceased person in *Miller*.

The confidentiality and protection afforded the communication between an attorney and client is one of the oldest and most revered in law, dating back to the sixteenth century. *See Nationwide Mut. Fire Ins. Co. v. Bournon*, 172 N.C. App. 595, 610, 617 S.E.2d 40, 50 (2005). Despite this rich history, the attorney-client privilege is not absolute. Through the years, our courts have recognized certain

circumstances in which the protection granted to communications between an attorney and her client must yield when the interests of justice so dictate. *See, e.g., State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (N.C. 1981); *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (N.C. 1978); *Dobias v. White*, 240 N.C. 680, 83 S.E.2d 785 (N.C. 1954); *see also United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619 (1989). In *Miller*, the Court was confronted with just such a case.

On December 2, 2000, Dr. Eric Miller died from arsenic poisoning. In the week following his death, law enforcement officials began questioning individuals that may have witnessed Miller consume beer suspected of containing a lethal dose of arsenic. Sensing that he was a potential suspect, Derril Willard sought legal counsel from criminal defense attorney Richard T. Gammon. Gammon apparently advised Willard that he could be charged with the attempted murder of Miller. Within days of his meeting with Gammon, Willard committed suicide. The State subsequently attempted to compel Gammon to disclose the content of his discussions with Willard. Gammon objected, claiming that such discussions were protected by the attorney-client privilege.

In analyzing that situation, the Supreme Court held that, as a general proposition, the attorney-client privilege survives the death of the client. However, the Court opted to remand the case to the trial court to determine whether nondisclosure of the communication advanced the purposes for which the

privilege exists. Relying on *Swidler & Berlin v. United States*, 524 U.S. 399, 407, 188 S.Ct. 2081, 2086 (1998), the trial court was instructed to consider three possible consequences of disclosure: (1) that disclosure might subject the client to criminal liability; (2) that disclosure might subject the client, or the client's estate, to civil liability; and (3) that disclosure might harm the client's loved ones or his reputation. If, after *in camera* review of Gammon's affidavit regarding his communications with Willard, the trial court were to find that any of the *Swidler* factors existed, the communication was to remain undisclosed. If, on the other hand, the trial court were to determine that the *Swidler* factors were absent, the trial court was to compel disclosure of the communication because the purpose underlying the privilege would no longer exist. Within this framework, the Court pronounced a rule that is directly applicable to the instant case:

To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation.

Miller, supra, at 343, 584 S.E.2d 791.

In its Order here, the trial court failed to apply this test or otherwise consider whether the policy reasons underlying the attorney-client privilege existed. The trial court correctly noted that *Miller* held that the attorney-client

privilege survives the death of the client. (Order at 7). However, the mere affirmation of this age-old principle was not the crux of the *Miller* decision. Far from it. A careful reading of *Miller* discloses our Supreme Court's desire to grant trial courts, in limited and extraordinary circumstances, the discretion to supplant an important evidentiary privilege in favor of truth-seeking and justice. This is evident from the *Miller* Court's reference to and reliance upon *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454 (1960):

The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

Miller, supra, at 334, 584 S.E.2d 785-86.

In other words, once the policy reasons for upholding the privilege cease to exist, the privilege serves no purpose: "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a [case] when that reason utterly fails." *Miller, supra*, at 341, 584 S.E.2d at 790, citing *Patton v. United States*, 281 U.S. 276, 306, 50 S.Ct. 253, 261 (1930). Further, "...since the [attorney-client] privilege has the effect of withholding information from the

factfinder, it applies *only where necessary* to achieve its purpose.” *Id.* (emphasis added). The only proper means for determining whether the attorney-client privilege continues to serve a purpose in this case is by applying the *Miller* test, which the trial court inexplicably failed to do. Indeed, the trial court’s Order is completely devoid of even a passing reference to any of the *Swidler* factors. This omission is plainly inconsistent with the directives of our Supreme Court and is therefore erroneous.

It is noteworthy that *Miller* and *Swidler* reached different outcomes, despite the fact that *Miller* is largely based on *Swidler*. That is not to say, however, that the cases are irreconcilable. To the contrary, the divergent outcomes were foreseeable in light of the underlying facts of each case. *Swidler* involved an investigation by the Office of Independent Counsel into the circumstances surrounding the dismissal of employees from the White House Travel Office. Shortly after meeting with his attorney regarding the investigation, Vincent Foster, Deputy White House Counsel, committed suicide. A grand jury subpoenaed the notes taken by Foster’s attorney during their discussions with him. The attorney filed a motion to quash, arguing that the notes were protected by the attorney-client privilege.

The U.S. Supreme Court ultimately determined that the attorney-client privilege survived the death of the client and that the communication was,

therefore, not discoverable. In so doing, the Court was seemingly unconvinced that the interest of justice dictated a deviation from the general rule: “here the Independent Counsel has simply not made a sufficient showing to overturn the common-law rule embodied in the prevailing case law. Interpreted in the light of reason and experience, that body of law requires that the attorney-client privilege prevent disclosure of the notes at issue in this case.” *Swidler*, 524 U.S. at 411, 118 S.Ct. 2088.

When read in light of *Swidler*, *Miller* suggests that the discoverability of otherwise privileged information turns on the interest to be protected. The United States Supreme Court determined that the interest of justice to be protected in *Swidler* was not a compelling one. The attorney-client communications were made in connection with a preliminary inquiry only into possible misdeeds.

This determination is not inconsistent with *Miller*. The *Miller* Court implied that, if confronted with similar facts, it would have reached the same decision as the *Swidler* Court. *Miller, supra*, at 342, 584 S.E.2d at 791 (“we are in no way sanctioning or suggesting any general application of special proceedings or grand jury investigations by prosecutors in the nature of fishing expeditions”).

Miller involved an interest – bringing a murderer to justice – that was clearly more compelling than any raised in *Swidler*. Both *Miller* and *Swidler*, however, pale in comparison to the interests raised in this case: the potential

exoneration of a wrongly-convicted criminal defendant. In fact, it is difficult to fathom a circumstance in which ascertaining the truth is more critical than it is here. As stated in *Swidler*, “Our historic commitment to the rule of law...is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.” *Swidler, supra*, at 413, 118 S.Ct. at 2089. Clearly, claims of innocence are paramount and an application of the *Miller* test was required in this case to determine whether the attorney-client communication should properly be disclosed.

Indeed, the Supreme Court in *Miller* explicitly recognized that “[c]onfidentiality rules invite attorneys to withhold information that could prevent harm to third parties in the course of representing their clients.” 357 N.C. at 334, 584 S.E.2d at 786. Thus, the court held, “[i]t is further well established that the attorney-client privilege is not absolute. When certain extraordinary circumstances are present, the need for disclosure of attorney-client communications will trump the confidential nature of the privilege.” 357 N.C. at 333, 584 S.E.2d at 786, *citing Zolin*, 491 U.S. 554, 109 S.Ct. 2619 (1989). In other words, in light of the potential harm associated with maintenance of the privilege, in limited circumstances, the privilege will give way. The Center respectfully suggests that the unusual factual circumstances present here – the same as those in *Miller* – coupled with a claim of innocence, should trump the privilege in this case.

In any event, whether one agrees with the policy considerations underlying *Miller* or not, one thing is certain: it is the controlling law in our State. Our Supreme Court saw fit to grant an exception, under particular and admittedly narrow circumstances – indeed, under the very circumstances of the instant case – to the general rule that the attorney-client privilege survives the client’s death. That the trial court did apply *Miller* to the facts of this case was clearly erroneous and this Court should grant certiorari to review the trial court’s Order as it relates to this point of law, and, ultimately, the *Miller* Court’s holding should be applied in this case, and the exculpatory attorney-client communications should properly be considered in accordance with the factors set forth in *Miller*.

II. THIS COURT SHOULD REQUIRE THE NEUTRAL APPLICATION OF RULES CONCERNING THE PRIVILEGE, PARTICULARLY IN CASES CONCERNING CLAIMS OF INNOCENCE

In *Miller*, the Supreme Court, at the behest of the District Attorney investigating a murder, permitted the *in camera* examination and later use of otherwise privileged information. Thus *Miller* concerned evidence likely to *inculpate* a defendant. To apply a different rule and procedure with respect to exculpatory evidence in the context of a possible claim of innocence cannot be justified.

The established rules of evidence, including the rules of privilege

incorporated therein, are predicated upon the principle of the neutral and fair application of rules to the end that the truth may be ascertained and proceedings justly determined. *See* N.C.R. Evid. 102(a); *see also Weinstein on Federal Evidence*, at § 102.2. It is imperative to the fair administration of justice that the application of the rules of evidence and privilege be applied neutrally to all parties and irrespective of the way in which they cut in a particular case. That imperative is the heart of equal protection. *See Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 461, 57 S.Ct. 838, 839 (1937) (“the rights of all persons must rest upon the same rule under similar circumstances . . . and that applies to the exercise of all the powers of the state which can affect the individual”). Thus, the Supreme Court has held that states are justified in applying their own *neutral* procedural rules. *See Felder v. Casey*, 487 U.S. 131, 141, 108 S.Ct. 2302, 2309 (1988). But when states do not apply such rules uniformly and neutrally or those rules unduly burden one party – especially rules that unduly burden an individual in favor of the State – they are struck down. *See id.*, 108 S.Ct. at 2309.

The North Carolina Supreme Court has also recognized the importance of that principle. For example, in *State v. Cooke*, 306 N.C. 132, 138, 291 S.E.2d 618, 621 (1982), the court held that the State – just like an individual criminal defendant – could not advance a new argument for the first time on appeal; *see also Sherrod v. Nash General Hosp., Inc.*, 348 N.C. 526, 537, 500 S.E.2d 708, 714

(1998) (Mitchell, C.J., dissenting)(“the only fundamentally fair procedure would be apply the same rule . . . for both parties. The sauce to be used on the goose should also be used on the gander”).

To the extent the rule in *Miller* is not applied neutrally, it should, if anything, be applied in favor of individuals claiming innocence. Tellingly, the neutral application of rules does not mean that courts have applied all evidentiary and privilege rules mechanistically in cases where “constitutional rights directly affecting the ascertainment of guilt are implicated.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049 (1973). “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Id.* 93 S.Ct. at 1049. Therefore, in certain cases involving evidence blocked from introduction due to evidentiary rules, courts have abandoned otherwise neutral rules – not in order to allow the state to present inculpatory evidence – but rather to allow the introduction of exculpatory evidence in order to safeguard a defendant’s constitutional right to present evidence in his own defense. *See Chambers* 410 U.S. at 302, 93 S.Ct. at 1049; *see also State v. Barts*, 321 N.C. 170, 362 S.E.2d 235 (1987); *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150 (1979).

Therefore in the interests of fair administration of justice, and in light of Petitioner’s constitutional protections, the Court’s holding in *Miller* should be applied in this case in order to further the ends of justice, and the exculpatory

attorney-client communications should properly be considered in accordance with the factors set forth in *Miller*.

III. THE TRIAL COURT'S REFUSAL TO CONSIDER ALL OF THE EVIDENCE AT THE HEARING RENDERED ALL OF ITS DECISIONS ERRONEOUS OR, AT BEST, PREMATURE.

At the hearing in this matter, in addition to excluding the testimony of Cashwell's attorney Hughes, the trial court's rulings on the attorney-client privilege effectively barred two other attorneys, Tally and Freedman, from testifying regarding their communications with and regarding the deceased. Neither the trial court – nor this Court – has any knowledge of the potential evidence that Tally and Freedman would have offered. As discussed above, the trial court failed to follow the proper procedure as outlined in the *Miller* decision.

In *Miller*, the Supreme Court bottomed its ruling on the fundamental principle that the “primary goal of our adversarial system of justice is to ascertain the truth in any legal proceeding.” 357 N.C. at 334, 584 S.E.2d at 785. Whether the truth can be ascertained by a court is, of course, dependent on knowledge of potential evidence. In fact, *Miller* clearly stands for the proposition that without the knowledge of the contested or proposed evidence, the trial court simply cannot make an informed determination of the privilege's applicability. 357 N.C. at 336, 584 S.E.2d at 787 (“[i]n the usual instance, it is impossible to determine whether a

particular communication meets the elements of [the test for privilege] without first knowing the substance of that communication”).

Moreover, an erroneous determination of a privilege issue can lead to a cascade of significant negative consequence based on the loss of valuable and relevant evidence because potential witnesses are not permitted to testify. Therefore, the applicability of the attorney-client privilege in this case must be determined *prior* to a trial court ruling on other evidentiary questions, including whether the same evidence is hearsay or subject to an exception, and certainly prior to any ruling on the merits of the underlying motion. Questions as to the applicability of a privilege have always been identified as “preliminary questions” to be determined by the trial court under North Carolina’s Rule of Evidence 104(a).

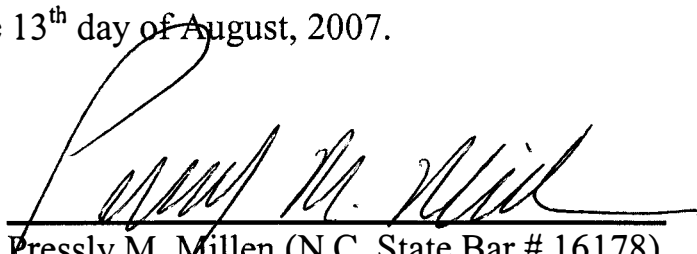
That the trial court did not perform the *in camera* review to discern the substance of the potential evidence to be offered by Tally and Freedman and to determine whether that evidence was privileged as required under *Miller* was prejudicial error and this Court should grant certiorari to review the trial court’s Order as it relates to this point of law. Any other rulings – including rulings on the merits – must abide that determination.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the

Court below and remand this case for further proceedings in accordance with *In Re Miller*, 357 N.C. 316, 584 S.E.2d 772 (2003).

Respectfully submitted, this the 13th day of August, 2007.



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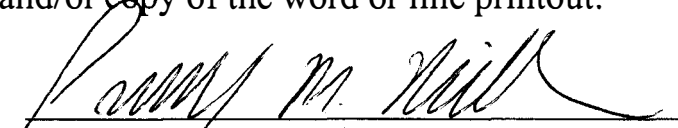
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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH
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I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or copy of the word or line printout.



Pressly M. Millen

CERTIFICATE OF SERVICE


The undersigned hereby certifies that he served a copy of the attached **AMICUS CURIAE BRIEF OF THE NORTH CAROLINA CENTER ON ACTUAL INNOCENCE, THE DARRYL HUNT PROJECT FOR FREEDOM AND JUSTICE AND THE INNOCENCE NETWORK** by hand delivery to the Clerk of the Court of Appeals of North Carolina, and by depositing copies of said document enclosed in a first class postpaid envelope, properly addressed to the persons hereinafter named, at the places and addresses stated below, and by depositing said envelopes and their contents in the United States Mail at Raleigh, North Carolina.

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