Case No. 20170518-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

TRACY SCOTT,
Defendant/Respondent.

Brief of Amicus Curiae

On Writ of Certiorari to the Utah Court of Appeals

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CONSENT FOR AMICUS FILING

The Court granted permission for amicus briefing on January 3, 2018.

INTRODUCTION: IDENTIFICATION OF AMICUS CURIAE AND ITS STATEMENT OF INTEREST IN THE ISSUES PRESENTED

Rocky Mountain Innocence Center ("RMIC") is a non-profit organization dedicated to correcting and preventing wrongful convictions in Utah, Wyoming, and Nevada. RMIC is also a founding member of the National Innocence Network, an international affiliation of more than 60 different organizations in forty-four states and eleven countries dedicated to providing pro bono legal and investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted[1]. Drawing on the lessons from cases in which

[1] The member organizations include: Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions,

the system convicted innocent persons, the National Innocence Network also promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The issues presented to this Court center on the question of what standard should be applied to claims of ineffective assistance of counsel. Studies indicate

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Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project/Post-conviction Unit, Duke Center for Criminal Justice & Professional Responsibility, Exoneration Initiative, George C. Cochran Mississippi Innocence Project, Griffith University Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence Canada, Innocence & Justice Project at the University of New Mexico School of Law, Innocence Project, Innocence Project Argentina, Innocence Project at UVA School of Law, Innocence Project London, Innocence Project of Minnesota, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Texas, Irish Innocence Project at Griffith College, Italy Innocence Project, Justicia Reinvindicada – Puerto Rico Innocence Project, Kentucky Innocence Project, Knoops' Innocence Project, Life After Innocence, Loyola Law School Project for the Innocent, Michigan Innocence Clinic, Michigan State Appellate Defender Office – Wrongful Convictions Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender – Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project, Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project, Taiwan Association for Innocence, The Israeli Public Defender, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law, University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Western Michigan University Cooley Law School Innocence Project, Wisconsin Innocence Project, Witness to Innocence, Wrongful Conviction Clinic at Indiana University.

that ineffective assistance of counsel played a significant role in at least a quarter of all wrongful convictions. *See, e.g.*, Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 75. RMIC has a direct interest in ensuring that criminal defendants are afforded effective assistance of counsel at trial and, to that end, that courts apply the correct standard to evaluate claims of ineffective trial counsel, so as to reduce the likelihood of wrongful convictions. In addition, in passing the Utah Post-Conviction Determination of Factual Innocence Statute ("Innocence Statute"), the Utah Legislature recognized that the innocent are wrongfully convicted and that wrongfully convicted individuals should have a mechanism to correct that injustice. Utah Code Ann. § 78B-9-401 et seq. (West 2014). However, the Innocence Statute essentially restricts factual innocence claims to those involving new evidence that could not reasonably have been known or discovered at the time of trial *or* to those instances where a court has found ineffective assistance of counsel relating to the failure to uncover that evidence. Utah Code Ann. § 78B-9-402(3)(a). For those wrongfully convicted individuals who may not be able to meet all of the other necessary requirements of the Innocence Statute, they may still find a remedy in the Utah Post Conviction Remedies Act ("PCRA"), often in the ineffective assistance of counsel provision. Utah Code Ann. § 78B-3-104(1)(d) (West 2017). Accordingly, RMIC has an even greater interest in how the

ineffective assistance of counsel jurisprudence develops in the state of Utah. In short, RMIC believes that the Court of Appeals applied the correct standard for ineffective assistance of counsel claims in this case, and the State's contentions otherwise and its demand that this Court adopt a new *Strickland* standard would substantially harm the interests of many innocent defendants and would make it more difficult to remedy wrongful convictions in the state of Utah.

STATEMENT OF ISSUES PRESENTED ON APPEAL, STANDARD OF APPELLATE REVIEW, AND STATEMENT OF THE CASE

As amicus curiae, the Rocky Mountain Innocence Center refers to the Issues Presented on Appeal, the Standard of Appellate Review and Statement of the Case as set forth by Defendant/Respondent Tracy Scott, and incorporates them as if set forth fully herein.

SUMMARY OF THE ARGUMENT

Claims of ineffective assistance of trial counsel serve as a primary vehicle for criminal defendants to protect their constitutional right to a fair trial and for courts to protect the integrity of the judicial process. Importantly, ineffective assistance of counsel claims are also instrumental when the innocent seek reversal of a wrongful conviction. *Strickland v. Washington* provides the governing standard for assessing a criminal defendant's ineffective assistance of counsel claim. 466 U.S. 668 (1984). Under *Strickland* and its progeny, a defendant can succeed with such a claim by showing both that counsel's performance "fell

below an objective standard of reasonableness," *id.* at 688, and a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Under the first prong, "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. For the second prong, the *Strickland* court was clear that prejudice (*i.e.*, an unreliable outcome) may be found "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. The *Strickland* approach imposes a daunting obstacle for a defendant seeking to prove ineffective assistance. *See Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (meeting the *Strickland* standard is not "an easy task"); *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) (the standard is "highly demanding").

Since the United States Supreme Court decided *Strickland*, Utah courts have adhered to this standard, carefully assessing whether an attorney's performance stood outside the wide range of professionally competent assistance and whether such performance prejudiced the defendant. *See, e.g., State v. Barela.* 2015 UT 22, 349 P.3d 676 (failure to object to jury instruction); *Gregg v. State*, 2012 UT 32, 279 P.3d 396 (failure to investigate); *State v. Hallett*, 856 P.2d 1060 (Utah 1993)(failure to object to misinterpretation of a statute); *State v. Millett*, 2015 UT App 187, 356 P.3d 700 (failure to file motion to suppress); *State v. Thompson*, 2014

UT App 14, 318 P.3d 1221 (failure to object to hearsay testimony and failure to challenge unqualified expert). This case – where an attorney failed to understand and properly use the rules of evidence -- simply does not provide a reason for this Court to reconsider over twenty years of ineffective assistance jurisprudence. Nor should this case be the impetus for this Court to make the *Strickland* standard more onerous.

Without explicitly stating its intention, the State is asking this Court to fundamentally alter the well-established test that courts across the country have used to assess claims under *Strickland.* Under the State's approach, virtually any act or omission of trial counsel could be construed as part of a hypothetical "strategy" (rather than an error that is objectively unreasonable). Thus, under the State's approach, a criminal defendant could only succeed in an ineffective assistance claim if the defendant could show that no competent attorney would have taken the chosen approach – or, in other words, the defendant must show that every single competent attorney would have taken a different approach. Additionally, the State argues that courts should restrict their review of evidence for the prejudice prong of the *Strickland* test to only evidence that supports a finding of guilt, which would make it virtually impossible for a criminal defendant to ever show prejudice in any matter in which he is challenging

counsel's failure to take a particular action. The State's approach is not a proper interpretation of the *Strickland* standard, nor should it be.

The State's approach is even more troubling because of the interplay between claims of factual innocence and ineffective assistance of counsel. Utah's Post-Conviction Determination of Factual Innocence Statute essentially restricts petitions of factual innocence to those involving new evidence that could not reasonably have been known or discovered at the time of trial *or* to those instances where a court has found ineffective assistance of counsel relating to the failure to uncover that evidence. Utah Code Ann. § 78B-9-402(3)(a). Further the wrongfully convicted may be limited to traditional PCRA ineffective assistance claims when their evidence cannot meet the higher standard required under the Innocence Statute. Should this Court adopt the State's proposed *Strickland* standard, individuals seeking redress for their wrongful convictions would be unfairly affected as they pursue factual innocence claims, which in turn will seriously hamper courts ability to correct these fundamental injustices.

ARGUMENT

The Sixth Amendment guarantees that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right is one of the most basic and fundamental constitutional rights afforded to our citizens. This right, applied to

the states via the Fourteenth Amendment, means "the right to counsel is the right to the *effective* assistance of counsel." *Strickland v. Washington,* 466 U.S. at 686 (emphasis added)(quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970)). Simply put, "assistance of counsel . . . is critical to the ability of the adversarial system to produce just results." *Strickland,* 466 U.S. at 685.

In *Strickland,* the Supreme Court established a two-prong test for determining whether a "counsel's assistance was so defective as to require a reversal of a conviction." *Strickland,* 466 U.S. at 687. As an initial matter, "the defendant must show that counsel's performance was deficient" such that it "fell below an objective standard of reasonableness." *Id.* at 687-688. Second, the defendant must show prejudice, namely that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

No bright line or per se rule exists for determining ineffective assistance of counsel and no court has ever suggested otherwise. This Court has found ineffective assistance in a variety of instances, including when counsel fails to object to a misleading jury instruction, *State v. Barela,* 2015 UT 22, 349 P.3d 676 or when counsel fails to request a critical jury instruction, *State v. Maestas,* 1999 UT 32, 984 P.2d 376 (1999); based on trial counsel's failure to object to one sentence in a prosecutor's closing argument, *State v. Larrabee,* 2013 UT 70, 321 P.3d 1136;

because of counsel's failure to investigate, *Gregg v. State*, 2012 UT 32, 279 P.3d 396, *State v. J.A.L.*, 2011 UT 27, 262 P.3d 1, *State v. Templin*, 805 P.2d 182 (Utah 1990); when counsel does not present any witnesses at a retention hearing, *Housekeeper v. State*, 2008 UT 78, 197 P.3d 636; when counsel fails to obtain a qualified expert to review medical results, *State v. Hales*, 2007 UT 14, 152 P.3d 321; and for failing to object to a court's erroneous interpretation of a statute, *Hallett*, 856 P.2d 1060 (1993)[2]. In several of these cases, the State was able to posit a hypothetical tactical reason why defense counsel behaved as they did, but in

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[2] As illustrated by the following cases from around the United States, ineffective assistance of counsel may be based upon a spectrum of conduct—including failure to present alibi evidence, failure to present expert testimony rebutting the State's case, failure to challenge the admissibility of evidence, and failure to challenge jury selections. *See, e.g., State v. Faust*, 660 N.W.2d 844, 877 (Neb. 2003) (ineffectiveness found where counsel failed to object to prejudicial and inadmissible testimony on prior bad acts), overruled in part on other grounds *State v. McCulloch*, 742 N.W.2d 727 (Neb. 2007); *Kirkland v. State*, 560 S.E.2d 6, 7-8 (Ga. 2002) (ineffectiveness found where counsel failed to challenge for cause jurors with a business relationship to the corporate victim); *Sanchez v. State*, 569 S.E.2d 363, 364-66 (S.C. 2002) (ineffectiveness found where counsel failed to object to hearsay testimony recounting inadmissible statements made by statutory rape victim); *State v. Bishop*, 639 N.W.2d 409, 418 (Neb. 2002) (ineffectiveness found where counsel failed to advise defendant of double jeopardy defense before entry of guilty plea); *Hofman v. Weber*, 639 N.W.2d 523, 528-29 (S.D. 2002) (ineffectiveness found where counsel failed to move to suppress involuntary confessions); *Johnson v. State*, 796 So. 2d 1227, 1228-29 (Fla. Dist. Ct. App. 2001) (ineffectiveness found where counsel failed to move to dismiss based on dispositive precedent); *Patterson v. LeMaster*, 21 P.3d 1032, 1040 (N.M. 2001)(ineffectiveness found where failed to object to unduly suggestive showup procedure); *People v. Jackson*, 741 N.E.2d 1026, 1030-33 (Ill. App. Ct. 2000)(ineffectiveness found where counsel failed to move to dismiss after prosecution rested without introducing evidence on a necessary crime element); *Padgett v. State*, 484 S.E.2d 101, 104 (S.C. 1997) (ineffectiveness found where counsel failed to challenge burglary charge when building in question was unoccupied); *Grace v. State*, 683 So. 2d 17, 19-21 (Ala. 1996) (unreported in state reporter) (ineffectiveness found where counsel failed to file written discovery motion that would have resulted in suppression of incriminating statement).

each instance, this Court rejected the State's arguments and found that both prongs of *Strickland* were satisfied.

In the case at hand, RMIC urges this Court to affirm the Court of Appeals' decision, as that decision recognizes and properly applies both prongs of the *Strickland* standard both as interpreted by the United States Supreme Court and by this Court. In addition, RMIC requests that this Court reject the State's proposed standard governing ineffective assistance of counsel claims as it is fundamentally incompatible with well-established *Strickland* jurisprudence and would essentially abolish ineffective assistance of counsel claims in Utah. Finally, RMIC asks this Court to consider the adverse impact on the wrongfully convicted that reversing the Court of Appeals decision or adopting State's proposed *Strickland* standard would have.

1. Mr. Scott's Trial Counsel's Performance Fell Below an Objective Standard of Reasonableness Because He Did Not Know or Argue Basic Hearsay Rules.

In determining whether the defendant meets the first prong of the *Strickland* test, courts, including the United States Supreme Court, look to American Bar Association standards when assessing what constitutes objective level of reasonableness. "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community... We long have recognized that [p]revailing norms of practice as reflected in American

Bar Association standards and the like ... are guides to determining what is reasonable..." *Padilla*, 559 U.S. at 366. The ABA's Criminal Justice Standard for the Defense Function 4-1.5 specifically states that counsel, "[S]hould take steps necessary to make a clear and complete record for potential review" and that such steps include "making objections and placing explanations on the record." American Bar Association, *Criminal Justice Standards for the Defense Function*, Standard 4-1.5 (4th Ed. 2015). And with specific regard to adverse evidentiary rulings, ABA Standard 4-7.6(e) provides, "Defense counsel should make an adequate record for appeal." *Id.* at Standard 4-7.6(e). Put another way, "[c]ounsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S at 688.

On the other hand, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy" *Strickland*, 466 U.S. at 689. *See also Met v. State*, 2016 UT 51, ¶ 113, 388 P.3d 477; *State v. Houston*, 2015 UT 40, ¶ 70, 353 P.3d 55. However, despite the strong presumption that an action or omission of counsel "might be considered sound trial strategy" *Strickland*, 466 U.S. at 689, this Court has recognized that some acts or omissions of counsel simply must be considered deficient rather than sound

strategic decisions deserving of deference. *See State v. Barela*, 2015 UT 22, ¶ 27, 349 P.3d 676 (holding that no reasonable strategy could explain trial counsel's failure to object to erroneous mens rea requirement); *State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136 (decision of defense counsel not to object to prosecutor's "improper and inflammatory statements" in closing was not a "sound trial strategy"); *State v. Finlayson*, 2000 UT 10, ¶ 25, 994 P.2d 1243 (holding that no possible explanation or tactical reason can support counsel's decision not to object to an unsupported charge).

In Mr. Scott's case, the Court of Appeals correctly concluded that, under a *Strickland* analysis, Mr. Scott's trial counsel did not display even basic skill and knowledge by failing to know the hearsay rules and failing to respond to the prosecutor's objections – in other words, that defense counsel's failure to challenge the prosecutor's erroneous hearsay objection "could not have been sound trial strategy" and, in fact, undermined defense counsel's actual strategy. 2017 UT App 74 ¶ 27, 397 P.3d 837.

Specifically, in Mr. Scott's case, trial counsel's failure to be sufficiently versed in the basic definition of hearsay considerably weakened the entire strategy he had devised to defend Mr. Scott. His actions fall squarely within the realm of conduct this Court has found to constitute ineffective assistance of counsel. At trial, Mr. Scott sought to introduce the threats made by his wife in

the days leading up to the shooting. The State objected, contending that the statements constituted hearsay. The court sustained the objection. The problem, however, was that the threats were not hearsay because they were not being offered to prove the truth of the matter asserted. The State conceded as much on appeal. Mr. Scott's trial counsel failed to make this argument to the court. This was a mistake that an objectively reasonable attorney would not have made under the same circumstances. Under prevailing professional norms, a criminal defense attorney would be expected to know, and be prepared to argue, the hearsay rules. This is especially true when the evidentiary fight relates to testimony trial counsel is eliciting that is central to the defense.

In addition, when assessing the objective unreasonableness of trial counsel's actions, it is important that the issue of Teresa's threats was not a minor, tangentially relevant piece of evidence. Rather, it directly affected a central aspect of the defense. As the Court of Appeals stated, "the underpinning of Scott's defense was that he acted under distress not substantially caused by his own conduct." *State v. Scott*, 2017 UT App 74, ¶ 27, 397 P.3d 837. Importantly, the burden when presenting an emotional duress defense is on the defendant and so the actual threats were even more critical. The trial court provided jury instructions that related directly to Mr. Scott's state of mind and his emotional

distress. Therefore, ensuring that Teresa's specific threats were entered into evidence was essential to Mr. Scott's defense.

It is true that an ineffective assistance of counsel claim fails if there is a "conceivable legitimate tactic or strategy can be surmised from counsel's actions." *State v. Tennyson*, 850 P.2d 461, 468 (Utah Ct. App. 1993); *see also State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162. But in this matter, no legitimate tactic or strategy can be surmised. The State posits that perhaps trial counsel thought that the vague reference of the threats could "magnify" their power with the jury. (State's Br. at 38.) The State faults the Court of Appeals for second-guessing trial counsel's decision. (*Id.*)

In fact, though, it is the State that is second-guessing trial counsel's tactical decision and, in so doing, seeks to paper over counsel's deficient performance. The State basically ignores that trial counsel made the strategic decision to seek to introduce Teresa's specific threats. The prosecutor's objection and the court's incorrect hearsay ruling, combined with trial counsels subsequent failure to know and explain why the threats did not constitute hearsay, prevented him from pursuing the strategy he'd devised. The State does not, and cannot, offer a legitimate tactical reason for defense counsel's failing to respond to the State's hearsay objection with a few simple words—"the threats are not hearsay because

they are not offered to prove the truth of the matter asserted" – that would have allowed him to get into evidence information critical to Mr. Scott's defense.

The State seeks to legitimize defense counsel's deficient performance by suggesting that counsel might not have pursued introducing the specific words of the threat because "the jury could magnify the effect of Defendant's testimony, allowing the jury to believe that the threat was greater than what it actually may have been." (State's Br. at 38.) The State's logic defies credibility. There is a reason why Mr. Scott's counsel sought to introduce the specific words and the prosecutor sought to exclude them. If it were truly likely – or even possible – that the jury would "magnify" the threat beyond its actual words, the prosecutor would have wanted the mild nature of Teresa's threats known to the jury.

In fact, the State's description of the proceedings demonstrates how critical Teresa's words were to the defense. Mr. Scott did not dispute the killing, but argued that he should be convicted of manslaughter because he acted under extreme emotional distress (State's Br. at 10). In his opening statement, Mr. Scott's counsel focused on the emotional distress and Mr. Scott's fears – fears based in part on Teresa's threats. (*Id.*) Trial counsel called several witnesses who discussed Mr. Scott's stated fear and testified about his emotional distress. (*Id.* at 11.) In his closing statement, trial counsel again focused on the emotional distress. (*Id.* at 17.) The prosecutor highlighted this too, in the State's closing,

arguing that "Teresa was no threat" and that it was not reasonable for Mr. Scott to fear her. (*Id.* at 18.) At least several jurors believed Mr. Scott's testimony about his emotional distress because the jury informed the court that it was deadlocked at 6-2 and requested further guidance on the instruction regarding emotional distress. (*Id.* at 19.)

This case stands in stark contrast to the cases cited by the State in which courts have denied ineffective assistance of counsel claims based on trial counsel's failure to object to evidence proffered by the prosecution. *See, e.g., State v. Bullock*, 791 P.2d 155 (Utah 1990); *State v. Moore*, 2012 UT App 227, 285 P.3d 809. There are certainly conceivable *and* legitimate reasons why defense counsel may not object to technically inadmissible evidence, especially when the evidence is not central to the prosecutor's or defendant's burdens. But that is a wholly different matter than here, where counsel made the strategic decision to seek to admit Teresa's threats that related directly to Mr. Scott's defense.

Instead, if any case should guide the analysis here, it is *State v. Larrabee*, 2013 UT 70, 321 P.3d 1136. In *Larrabee*, this Court found trial counsel's performance deficient based on the failure to object to one improper statement in the prosecutor's closing argument. 2013 UT 70, ¶ 21. In assessing the ineffective assistance claim, this Court rejected a contention offered by the State that is similar to that offered here: that the trial counsel's omission might have been

strategic and, therefore, sound. *Id.* at ¶¶ 22, 23. The Court based its decision on the fact that the improper nature of the prosecutor's statements "should have been clear" to defense counsel, *id.* at ¶ 23, and that "under all the circumstances of this case, no sound trial strategy would condone defense counsel's decision to remain silent." *Id.* at ¶ 26. The same is true here. The incorrectness of the State's hearsay objection should have been immediately clear to Mr. Scott's counsel as it implicated the plain, clear definition of hearsay. Furthermore, given the circumstances of the case and the centrality of the specific words of Teresa's threat to Mr. Scott's entire defense strategy no legitimate tactical decision can justify defense counsel's failure to offer a few words to explain this critical evidence's admissibility.

In short, the State is attempting to complicate the required *Strickland* inquiry. Mr. Scott's defense counsel chose a trial strategy that emphasized Mr. Scott's emotional distress and Mr. Scott's defense counsel chose a strategy that sought to admit relevant, nonhearsay evidence. Mr. Scott is not questioning, nor did the Court of Appeals second-guess, this strategic decision. Instead, the correct inquiry—the one conducted by the Court of Appeals—is whether trial counsel's failure to know and properly argue the hearsay rules regarding evidence that was critical to the strategy he chose fell below an objective standard. The Court of Appeals rightly held that it did.

2. Defense Counsel's Deficient Performance Prejudiced Mr. Scott.

When assessing whether a defendant was prejudiced by trial counsel's acts or omissions, the *Strickland* court was clear that prejudice (i.e., an unreliable outcome) may be found "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. *See Moore v. State*, 2009 UT App 386, ¶¶ 8, 10 , 223 P.3d 1137 (trial counsel's failure to present evidence and argument as to the unreliability of victim's statement on stating when the abuse occurred was prejudicial even when not an element of the crime)[3]. Put another way, where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," a defendant's constitutional right to counsel is violated and the integrity of the judicial process challenged." *Strickland*, 388 U.S. at 692-93. In this case, the Court of Appeals correctly determined that Mr. Scott had met his burden to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 2017 UTApp. 74, ¶ 29.

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[3] *See also Kigozi v. United States*, 55 A.3d 643, 654 (prejudice exists where result of proceeding was rendered unreliable because of defense attorney's failure to consult expert on reliability of victim's dying declarations); *Espinal v. Bennett*, 588 F. Supp.2d 388, 407 (E.D.N.Y. 2008) (prejudice exists where trial counsel failed to cross-examine witness based on his prior inconsistent hospital statement); *People v. Grant*, 684 N.W.2d 686, 696 (Mich. 2004) (defendant was prejudiced when his counsel failed to investigate and substantiate his primary defense).

The Court of Appeals relied significantly on the fact that the jury indicated it was deadlocked 6-2, with at least two jurors believing Mr. Scott was acting under extreme emotional distress not substantially caused by his own conduct—the very point the excluded evidence addressed and the sole issue at trial. *Id.* at ¶ 34.

The State suggests that focusing on the jury's notes meant that the Court of Appeals did not consider the totality of the evidence. (State's Br. at 47.) This misconstrues the Court's analysis. The *jury* considered the totality of the evidence and, in so doing, indicated that it was deadlocked on the issue of Mr. Scott's distress. The Court of Appeals then properly considered how the incorrectly excluded evidence related to the point raised by the jury's notes. As the Court concluded:

> [T]he jury notes demonstrate the jury was at an impasse over whether Scott had substantially caused the distress he felt. At least two jurors were so convinced that Scott acted under extreme emotional distress that the jury described its position as an "absolute impasse." Testimony about the threat would have directly reinforced the sentiments of these two jurors. That testimony also might have influenced the jurors who believed that "substantially caused" meant "the majority of the time." Consequently, had Scott been allowed to testify about the threat, there is a reasonable probability the jury would have continued to be deadlocked, ending the case in a mistrial. This probability is enough to undermine our confidence in the outcome of this trial.

2017 UT App. 74, ¶ 34.

Incredibly, the State argues, in essence, that the Court could not complete its prejudice analysis because it did not know the specific words of Teresa's threat. (State's Br. at 47.) Of course, Teresa's threat is not in the record precisely because of trial counsel's deficient performance. But more to the point, while the Court of Appeals might not have known the specific words of the threat, it knew that Mr. Scott's counsel had made the strategic decision to seek to admit the words into evidence and that the State objected. The Court also knew that during closing argument, the prosecutor stated that Teresa "was no threat," had not "provoke[d] him," and asked "what reasonable basis does [Scott] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]" 2017 UT App. 74, ¶ 33. Considering Mr. Scott's effort to introduce Teresa's words and the State's proffered interest in excluding them, there is a reasonable probability that had the jury been aware of her words, the jury would have better understood Mr. Scott's basis for claiming the absence of a gun from the couple's safe created extreme emotional distress. Given the issue's centrality to the verdict and the jury's two notes expressing they were at an "absolute impasse" on the matter of Mr. Scott's distress, *id.* at ¶ 34, the Court of Appeals correctly found that the trial counsel's deficient performance sufficiently undermines confidence in the outcome to warrant reversal.

3. The State Stakes Out a Position Fundamentally at Odds with Twenty Years of Jurisprudence Applying *Strickland* and Relies on Inapplicable Case Law.

The State's formulation of the *Strickland* standard would transform an already daunting standard to an impossible one. Since the Supreme Court first announced its decision in *Strickland,* the two-pronged test has remained the same: first, whether the counsel's performance "fell below an objective standard of reasonableness," 466 U.S. at 688, and, second, whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

On the first prong, the State seems to argue that to succeed on a claim that trial counsel's actions fell below an objective standard of reasonableness, the defendant would have to show that "no competent attorney would have failed to make that argument," regardless of the facts and circumstances of the case (State's Br. at 25, 27, 31, 32, 33, 40, 43). In Mr. Scott's case, the State concocts a hypothetical strategy, unsupported by the facts of the case, to explain trial counsel's failure to respond to the prosecutor's hearsay objection. The State then relies on this hypothetical strategy to argue that counsel's performance was objectively reasonable (State's Br. at 36-38). Imaginative attorneys will, in almost every case, be able to come up with some strategy, or some hypothetical circumstance, that could conceivably explain the actions or omissions of trial

counsel, and thus "prove" that there exists a competent attorney who would have proceeded in the same manner. The objectively reasonable standard focuses on "the practice and expectations of the legal community." *Padilla*, 559 U.S. at 366. Instead, the State contends that to succeed, a defendant must show that no reasonable or competent attorney would have done as trial counsel did. (State's Br. at 25, 27, 31, 32, 33, 40, 43). This is not the standard required by *Strickland* and it is difficult to imagine a scenario in which a defendant could satisfy such a burden. The correct question is whether trial counsel's performance fell below an objective standard of reasonableness. It does not inquire as to whether there exists some competent or reasonable attorney who would have acted as the trial counsel did, but instead asks what the prevailing professional norms suggest is reasonable. To require some other showing by the defendant is to whittle away the Sixth Amendment right to meaninglessness.

With respect to the second prong of the *Strickland* test, the State apparently asks this Court to restrict its review of the evidence to only the evidence that supports a finding of guilt (State's Br. at 47-48). In Mr. Scott's case, trial counsel's failure to challenge the prosecutor's hearsay objection resulted in critical evidence (Teresa's threat) not being entered into the record. The State argues that because the threat was not in the record, the Court has no basis to determine whether or not its absence was prejudicial, and in fact, that the Court of Appeals'

"prejudice holding fails for this reason alone." (State's Br. at 48). This standard would effectively bar defendants from ever succeeding on an ineffective assistance of counsel claim where the claim is based on a failure of counsel to act.

Furthermore, the State relies on a number of federal cases that have no bearing on the *Strickland* analysis relevant here. Each of those are federal habeas corpus cases brought under 28 U.S.C. § 2254(d) which sought judicial review of state court decisions regarding ineffective assistance of counsel claims. *See Burt v. Titlow*, 134 S. Ct. 10 (2013); *Harrington v. Richter*, 562 U.S. 86 (2011); *Premo v. Moore*, 562 U.S. 115 (2011); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *Knowles v. Mirzayance*, 556 U.S. 111 (2009); *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228 (11th Cir. 2011); *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002); *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000). Those cases require analysis different from that conducted under *Strickland*. Specifically, the question in each was not whether a trial counsel's performance violated *Strickland*, but instead whether the State court's holding that it did not violate *Strickland* was unreasonable. In other words, there was a double layer of deference that doesn't apply in a direct *Strickland* analysis. Thus, "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult [than establishing deficient performance.]." *Moore*, 562 U.S. at 122 (quoting *Harrington*, 562 U.S. at 105). The United States Supreme Court has instructed that, "Federal

habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Id.* at 123 (quoting *Harrington*, 562 U.S. at 105).

For this reason, the federal cases brought under §2254(d) are inapposite when conducting the direct *Strickland* analysis relevant here. The State's reliance on these cases taints its reasoning.

4. The State's Approach Would Unfairly Affect the Ability of the Wrongfully Convicted to Pursue Factual Innocence Claims and Post-Conviction DNA Testing Claims, and In Turn, Seriously Hamper the Court's Ability to Correct Fundamental Injustice.

Wrongful conviction as a result of deficient trial counsel is a significant problem in the United States. Indeed, ineffective assistance of counsel is a leading contributor to wrongful convictions nationwide. *See The National Registry of Exonerations, Browse the Cases,* https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited January 13, 2018) (finding that 535, or 24.8%, of 2,154 recorded exonerations involved inadequate legal defense); *The Innocence Project, Inadequate Defense,* https://www.innocenceproject.org/causes/inadequate-defense/ (last visited January 13, 2018). The State's proposed approach to ineffective assistance of counsel claims in Utah will prevent the

wrongfully convicted from remedying this injustice that plagues our criminal justice system.

Strickland is clear in its recognition that effective assistance of counsel is an important due process right, both for the individual and for the criminal justice system in general. "Assistance of counsel . . . is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Put simply "[t]hat a person who happens to be a lawyer is present at a trial alongside the accused . . . is not enough to satisfy" a criminal defendant's Sixth Amendment right to effective trial counsel. *Id.* Where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," a defendant's constitutional right to counsel is violated and the integrity of the judicial process challenged. *Id.* at 692-93.

Further evidence that ineffective assistance of counsel results in a substantial number of wrongful convictions. For example, criminal defendants brought 330 successful ineffective assistance of counsel claims in state court and an additional 122 successful claims in federal court between 2000 and 2006. See John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 156 (2007). In

view of the particularized and already difficult legal standard set forth in *Strickland v. Washington* to establish unconstitutional ineffectiveness, and the fact that many claims are raised by incarcerated defendants acting pro se, it is likely that many more defendants have been convicted in trials in which they were served by unconstitutionally ineffective trial counsel. Gross & Shaffer, *Exonerations in the U.S. 1990-2012*, https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf (stating that because defense counsel incompetency is often not reported, "perhaps a clear majority" of exonerations involve the failure of defense counsel).

The risk that deficient trial counsel will cause wrongful convictions is widely recognized, particularly in cases where the defendant is indigent. The American Bar Association has noted that "[a]lthough there undoubtedly are a variety of causes of wrongful conviction . . . inadequate representation often is cited as a significant contributing factor." A.B.A. Standing Comm. on Legal Aid and Indigent Defs., *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (Dec. 2004). Speaking directly to the problems of indigent defense, the A.B.A. concluded: "Taken as whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent . . . ." *Id.* at 7; A.B.A., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty*

Cases, 31 Hofstra L. Rev. 913, 928 (2003) ("The commentary to the first edition of this Guideline noted that 'many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance' and supported the statement with numerous examples. The situation is no better today.").

However, as ineffective assistance of counsel jurisprudence makes clear (and the State seems to admit in its brief), criminal defendants already have a remarkably difficult task in demonstrating ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. at 381. The State's approach seeks to make it even more challenging, or impossible, for a defendant to succeed with such a claim. Indeed, the State proposed standard seems to impose a nearly insurmountable obstacle to showing ineffective assistance. Specifically, the State would like to replace the *Strickland* standard with one requiring the defendant to show that all objectively reasonable counsel would have taken a different approach than trial counsel. In addition, the State would seemingly like to restrict the review of the evidence for the prejudice prong to only the evidence that supports a finding of guilt. As the above analysis shows, this is not the correct approach under *Strickland*.

Importantly, a more restrictive ineffective assistance of counsel approach not only undermines Sixth Amendment guarantees protected by *Strickland*, but

would pose the additional consequence of making it harder for those who are factually innocent to remedy the injustice they have suffered in at least three ways. First, the State's untenable approach to *Strickland* would make it much more difficult for an individual who has been wrongfully convicted to have their claims heard under Utah's Post-Conviction Determination of Factual Innocence Statute (the "Innocence Statute"). Utah Code Ann. § 78B-9-402 et seq. (West 2014). The Factual Innocence Statute limits petitions of factual innocence to instances where there is new evidence that was not known or could not reasonably have been discovered through due diligence by the defendant or counsel. Utah Code Ann. § 78B-9-402(3)(a)(i). The primary exception to that requirement is when, "[A] court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence." Utah Code Ann. § 78B-9-402(3)(a)(ii)[4]. The State's proposed standard would essentially obliterate the exception and further punish innocent defendants who had

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[4] A second, more limited, exception exists that provides:

> [t]he court may waive the requirements of Subsection (3)(a) if the court finds the petition should proceed to hearing based upon the strength of the petition, and that there is other evidence that could have been discovered through the exercise of reasonable diligence by the petitioner or the petitioner's counsel at trial, and the other evidence:
>
> (i) was not discovered by the petitioner or the petitioner's counsel;
> (ii) is material upon the issue of factual innocence; and
> (iii) has never been presented to a court.

Utah Code Ann. § 78B-9-402(3)(b).

strategically or otherwise incompetent counsel. Second, Utah's Post-Conviction DNA Testing Statute prevents an individual claiming innocence from obtaining DNA testing on previously untested physical evidence if the "DNA testing was available at the time of trial and the person did not request DNA testing or present DNA evidence for tactical reasons." Utah Code Ann. § 78B-9-301(4) (West 2014). By advocating on behalf of a more severe standard under *Strickland's* first prong, the State essentially would deny DNA testing to anyone whose trial counsel did not request DNA testing on available physical evidence, even if that decision was tactically "elusive" or fundamentally incompetent. Finally, because DNA evidence is available in only 10% of criminal cases and the Factual Innocence Statute includes necessarily difficult hurdles to proving factual innocence, including a clear and convincing evidence standard, many innocent individuals are forced to seek redress through the ineffective assistance of counsel provision of the Post-Conviction Remedies Act. Utah Code Ann. § 78b-9-104 (1)(d)(West 2017); *See State v. Landry*, 2016 UT App 164, 380 P.3d 25 (overturning arson conviction on grounds of ineffective assistance of counsel where innocence claim could not be brought due to destruction of evidence). Imposing the State's impossibly harsh standard on those individuals, and indeed on any individuals who trial was marred by incompetent counsel, violates public

policy, long-standing constitutional principles and well-established *Strickland* jurisprudence.

The cases described below represent a small sampling of those in which wrongful convictions occurred in whole or in part because trial counsel provided ineffective assistance and which would not have been successful under the State's proposed interpretation of *Strickland*:

- Although there was no physical evidence linking him to the crime, Cory Credell was convicted of murder and robbery in 2001. *Credell v. Bodison*, 818 F. Supp. 2d 928, 932 (D.S.C. 2011). Mr. Credell's was convicted based upon eyewitness misidentification, and because he testified in his own defense on the advice of counsel and because trial counsel did not understand that prior bad act evidence was inadmissible under the rules of evidence, the jury learned that Mr. Credell had been involved in the drug trade throughout his life. *Id.* at 935. Mr. Credell claimed that he had an airtight alibi – that he had been in New York City on the day that the crime occurred in South Carolina. *Id.* at 939. Nonetheless, he was convicted and sentence to life in prison. *Id.* at 932. After Mr. Credell had spent eleven years in prison, a judge granted his federal habeas corpus petition ruling that Mr. Credell's trial counsel's "striking ignorance of state evidence law profoundly affected the course" of the trial. *Id.* at 935. The judge also ruled that the introduction of Mr. Credell's background information was "profoundly

prejudicial" and "destroyed any suggestion of a meaningful defense." Id. Mr. Credell was never retried as the State dropped all charges after further evidence of Mr. Credell's alibi was discovered and it became undeniably clear that Mr. Credell was an innocent man. *The National Registry of Exonerations, Browse the Cases*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3976 (Last visited January 15, 2018). Under the State's proposed interpretation of Strickland, Mr. Credell would likely still be in prison. Using a little imagination, a tactical reason, rather than an ignorance of state evidence law, could be theorized as the reason Mr. Credell's criminal history was admitted. The State could argue that allowing Mr. Credell's criminal history in was simply a way to show that he was a drug dealer, not a murderer, and that it was merely "speculation" to suggest that his portrait as a career criminal affected the jury's ultimate verdict.

- In 1997, Lon Walker was convicted of murder after a friend committed suicide in his trailer. *Walker v. Morrow*, 458 Fed. Appx. 475 (6th Cir. 2013). The only evidence against Mr. Walker was testimony from an incentivized witness who had reported the death as suicide in the first instant, but maintained that it was actually murder when she was given the option of testifying in exchange for her incarcerated husband's freedom. *Id.* at 479. At trial, the court admitted the incentivized witness's multiple inconsistent

statements stating that the death was suicide, but the judge then instructed the jury that the inconsistent statements could only be used to impeach the witness, not for the purpose of determining Mr. Walker's guilt or innocence (which was contrary to state law). Id. at 483. In his federal habeas corpus proceeding, Mr. Walker claimed that his trial counsel was ineffective for, among other things, failing to object to the erroneous jury instruction. *Id.* at 480. On the first prong of the Strickland test, the Court found "[t]here is no reason to believe counsel's failure to object flowed from sound strategic considerations." *Id.* at 483. On the second prong, the Court held that "while the jury may have returned a guilty verdict if properly instructed . . . that outcome is hardly beyond doubt, to say the least." *Id.* at 486. Based upon the overwhelming evidence that the death was actually a suicide, the State chose not to retry Mr. Walker and he was released from prison after fifteen years of wrongful incarceration. Mr. Walker's ineffectiveness claim would have been denied under the State's proposed Strickland standard – the court found deficiency by examining the soundness of trial counsel's strategy, and speculated as to the possible result had the proper instruction been given. *Id.* at 483-46.

- Appointed counsel to Ronald Williamson in a state capital murder case failed to investigate Williamson's history of severe mental illness, which included diagnoses of schizophrenia, paranoid and borderline personality

disorders, and atypical bipolar illness, among others. *Williamson v. Ward*, 110 F.3d 1508, 1514-16 (10th Cir. 1997). As a result, counsel "did not move the court for a competency determination, nor did he suggest at trial that Williamson's dream confessions were not credible because they were the delusional product of Williamson's mental illness." *Id.* at 1516. The Tenth Circuit Court of Appeals overturned Williamson's state conviction on federal habeas review, agreeing with the district court that trial counsel provided prejudicially ineffective assistance. *Id.* at 1520. Then, in preparation for retrial, DNA evidence conclusively exonerated Williamson. *See* Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases* (Sept. 2010), http://www.innocenceproject.org/docs/ Innocence_Project_IAC_Report.pdf. Mr. Williamson would still be incarcerated under the State's proposed *Strickland* standard as it would be nearly impossible to show that no reasonable counsel would have made the same decisions as the incompetent individual representing Mr. Williamson.

- Counsel for Earl Washington, Jr. in a state capital murder case failed to investigate evidence presented to him before trial suggesting that semen stains on a blanket in the victim's bedroom did not match Washington's blood type and therefore could not belong to him. *Washington v. Murray*, 4 F.3d 1285, 1286 (4th Cir. 1993). On federal habeas review, the Fourth Circuit found that trial counsel

had performed deficiently by failing to investigate this evidence but, over a vigorous dissent, concluded that Washington did not suffer prejudice. *Id.* at 1290. Washington was later released from prison in 2000 when DNA evidence conclusively showed that, in fact, he could not have been the source of the semen. *Know the Cases: Earl Washington*, The Innocence Project, http://www.innocenceproject.org/Content/Earl_Washington.php. In Mr. Washington's case, the State could simply argue that counsel's decision not to investigate was objectively reasonable as he could have been concerned about what evidence of guilt he might discover. This result, as would be allowed by the State's proposed interpretation of the *Strickland* standard, would be not only unjust but also absurd.

- Julie Baumer was convicted of first-degree child abuse after her trial counsel failed to consult with or call a single expert capable of rebutting testimony from the State's experts that CT scans and MRIs of the victim revealed injuries caused by shaking and blunt-force trauma. *People v. Baumer*, No. 2004-2096-FH, slip op. at 1, 7-8 (Macomb Cnty. Cir. Ct. Nov. 20, 2009) (unreported). A state habeas court set aside Baumer's conviction after multiple experts testified that the CT scans and MRIs actually revealed that the injuries were caused by infant stroke, a condition entirely unrelated to the charges against Baumer. *Id.* at 8-9. On retrial, a jury found Baumer not guilty. *See* Emily Bazelon, *Shaken-Baby*

Syndrome Faces New Questions in Court, N.Y. Times Mag., Feb. 2, 2011, at 30. Under the State's proposed *Strickland* standard, the State could argue that defense counsel's failure to call experts, although strategically "elusive" was "reasonable" as it was conceivable that defense counsel believed experts would confuse the jury or that expert testimony did not support the trial theory. Such an application of *Strickland* would be, in a word, nonsensical, but it is what the State is requesting this Court to adopt.

- Trial counsel to Jose Garcia possessed overwhelming evidence that Garcia was in the Dominican Republic on the day that the State of New York claimed he committed a murder in the Bronx. *Garcia v. Portundo*, 459 F. Supp. 2d 267, 271 (S.D.N.Y. 2006). But Garcia's counsel failed to introduce any of this evidence at trial, resulting in Garcia's conviction. *Id.* at 272-73. After Garcia had already spent fifteen years wrongly incarcerated, a federal district court granted his habeas petition, concluding that trial counsel had performed "well below the minimal standards of competence" in this "exceptionally troubling case." *Id.* at 295. Garcia was not retried. *See* Paul Davies & Phil Kuntz, *An Ex-Wife's Battle: Set Mr. Garcia Free – Contesting a Lone Murder Witness Became Ms. Ortega's 15-Year Odyssey*, Wall St. J., June 15, 2007, at A1.

- In a Utah case similar to Mr. Garcia's, Harry Miller was convicted of armed robbery even though there was evidence showing that he was in

Donaldsonville, Louisiana recovering from a stroke at exactly the same time as the robbery occurred in Utah. *Miller v. State*, 2010 UT App 25, ¶ 3. Rather than presenting specific alibi evidence at trial, Mr. Miller's trial counsel challenged the eyewitness identification and then simply called Mr. Miller to the stand to testify in his own defense. *Id.* After Mr. Miller was convicted and sentenced to life in prison, he challenged the effectiveness of his counsel and the trial court rejected that claim. *Id.* The State ultimately stipulated to dismissing Mr. Miller's charges rather than face an appeal of the trial court's erroneous interpretation of counsel incompetence. Mr. Miller then brought an innocence claim under the Factual Innocence Statute, and that claim too was rejected by the trial court, specifically because none of the evidence of his alibi could be consider "new" as defined by the Statute. *Id.* at ¶ 5. The Utah Court of Appeals reversed and remanded the case, applying two sections of the Factual Innocence Statute that have since been removed. *Id.* at ¶ 19. Ultimately, the State stipulated to Mr. Miller's innocence, but under the current version of the Factual Innocence Statute, when coupled with the State's proposed *Strickland* analysis, Mr. Miller might very well be continuing to fight for his freedom.

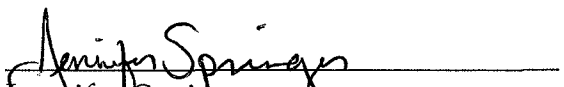
These profiles illustrate the substantial risk and irreparable harm of wrongful conviction that criminal defendants face from ineffective trial counsel.

Individuals who should never have been convicted in the first place spent years incarcerated because of the inadequacy of their counsel. The Utah legislature enacted Utah's Post-Conviction DNA Testing Statute and Utah's Post-Conviction Determination of Factual Innocence Statute with an understanding of the applicable ineffective assistance of counsel jurisprudence. Absent United States Supreme Court case law mandating otherwise, this Court should not accept the State's effort to further restrict the applicable standards because doing so would disrupt the statutory scheme put in place by the legislature and harm those who may have been wrongfully convicted in the state of Utah.

CONCLUSION

For these reasons, amicus urges this Court to find the Court of Appeals correctly held that Mr. Scott was not afforded effective assistance of counsel.

Respectfully submitted on January 17, 2018.



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CERTIFICATE OF COMPLIANCE

I certify that in compliance with Rule 24(g)(1), Utah Rules of Appellate Procedure, this brief contains 8,904 words, excluding the table of contents, table of authorities, certificates, and addenda.

I further certify that in compliance with Rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda does not contain non-public information.

Jennifer Springer

CERTIFICATE OF SERVICE

I certify that on January 17, 2018, two copies of the Brief of Amicus Curiae were emailed to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format will be filed and served within 14 days.