Case No. 20180095-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JEREMIAH RAY HART,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated murder, a first degree felony, obstructing justice, a second degree felony, and possession of a dangerous weapon by a restricted person, a second degree felony, in the Third Judicial District, Salt Lake County, the Honorable Keith A. Kelly presiding

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INTRODUCTION

Jeremiah Ray Hart planned a robbery with Erick Michael Burwell. The plan was to set up a fake drug deal, take the seller to a secluded area, and Hart would take the drugs at gunpoint.

Hart borrowed a 9 mm Glock with an extended magazine from his cousin. Burwell found two brothers willing to sell them five pounds of marijuana. But when Hart pulled out the gun, one of the sellers pulled his gun and shot Hart, grazing his chin, neck and shoulder. Hart placed his gun against the chest of the seller who shot him and Hart fired, killing him. Hart accidentally left the extended magazine at the murder scene, along with a trail of blood.

After a six-day jury trial, Hart was convicted of aggravated murder, obstruction of justice, and possession of a dangerous weapon by a restricted person. On appeal Hart argues that his trial counsel was ineffective for not moving for a mistrial at three different points during trial: 1) when a forensic firearms examiner referred to a gun that officers confiscated from Hart but ultimately found to be unconnected to this case; 2) when Hart's cousin referred to Hart serving time in prison with him; and 3) when the jury asked for clarification about who owned a jacket that was tested for DNA and whose DNA was found on it. Hart also argues that counsel was ineffective for not objecting to the case manager's opinion testimony about who the source of blood was for some of the bloodstains at the crime scene.

Counsel reasonably chose not to ask for a mistrial. Counsel could reasonably conclude that, had a mistrial been granted, Hart likely would have faced damning 404(b) evidence in the new trial that he did not face in the present trial because of an agreement by the State to avoid postponing trial. The 404(b) evidence showed that Hart and Burwell planned and tried to execute a robbery about two months before the murder, where Burwell set up a drug deal and Hart brought a gun to rob the sellers. Counsel could reasonably decide that none of the alleged problems would warrant a

mistrial, or that even if they did, they were not egregious enough to justify creating a real risk that Hart would face the 404(b) evidence on retrial.

Instead of risking that, counsel pursued other reasonable options. Counsel got the forensic firearms examiner to clarify that the gun he had referred to was used for comparison purposes and had no connection to this case. Counsel used the cousin's statements about being Hart's prison cellmate to undermine the cousin's testimony against Hart, getting the cousin to admit that he had the opportunity to read Hart's legal file while in prison and familiarize himself with the facts of the case. And counsel agreed to an instruction directing the jury to rely on its memory of the DNA evidence.

Regarding the case manager's testimony, counsel reasonably chose to use cross-examination and his own expert testimony to undermine the case manager's opinion about the source of bloodstains at the crime scene and parlayed that into a broader attack on the State's investigation of the case. Hart has also failed to show prejudice—that is, that an objection would have succeeded in excluding the testimony and that it would have made a difference if it was.

Because Hart has not shown that counsel was ineffective, this Court should affirm.

STATEMENT OF THE ISSUES

1. Was counsel ineffective by not asking for a mistrial when:

a) a forensic firearms examiner referred to a gun he received for testing but that was not connected to this case?

b) a key witness implied he was Hart's prison cellmate, and counsel used the statement to undermine the witness's testimony?

c) the jury asked a question during deliberations seeking clarification about DNA evidence?

2. Was counsel ineffective for not objecting to the case manager's testimony interpreting the bloodstain evidence and instead using that testimony to undermine the State's investigation?

3. Does the cumulative effect of the foregoing allegations raise a reasonable likelihood of a more favorable result for Hart?

Standard of Review. When a defendant argues for the first time on appeal that his counsel was ineffective, there is no ruling for an appellate court to review and the court "must decide whether the defendant was deprived of effective assistance as a matter of law." *State v. Scott*, 2017 UT App 74, ¶18, 397 P.3d 837, *cert. granted*, 406 P.3d 250 (Utah 2017).

STATEMENT OF THE CASE

A. Summary of Facts

Erick Michael Burwell needed money to buy drugs, so he planned a robbery. R3321, 3327, 3486–87. He asked Jeremiah Ray Hart to help and Hart agreed. R3328–29. The plan was for Burwell to find someone who would sell a large quantity of marijuana, Burwell would tell them the buyer (Hart) was a friend coming from out of state, Burwell and Hart would drive with the seller to a secluded place near a freeway for a quick getaway, Hart would pull a gun and order the seller out of the car, and Burwell and Hart would drive off with the drugs. R3321, 3324–25, 3328–29, 3339–40, 3342, 3349, 3352–53, 3476, 4192–93, 4195.

Through a "parade of middlemen" who thought they were involved in a legitimate drug deal, Burwell found someone to sell them five pounds of marijuana—brothers Malcom and Christian McDonald. R3321–22, 3327, 3329–30, 3537–40, 3356–58, 3576–81, 3601–03, 3638–41, 4073–76, 4457. Malcom had sold marijuana with Christian several times in the past, but usually in much smaller quantities and usually to people they knew. R4072–74, 4104. Because they were selling a large quantity to a stranger, both Malcom and Christian brought guns with them. R4075–76, 4101, 4104.

Burwell met the McDonalds for the first time in the Red Lobster parking lot in Sugarhouse. R3427, 4077–80. Burwell said they had to go pick up the buyer, who was having dinner with his wife nearby, and then they would drive somewhere to do the deal. R3341–42. Burwell insisted that they take his car. R3339–41. Reluctantly, the McDonalds agreed. R4080. Malcom got in the back driver-side seat, and Christian got in the front passenger seat, which was reclined somewhat. R3343, 3490–91; SE141. They drove to the Olive Garden parking lot in another section of the same shopping center, and Hart got in the back passenger-side seat, behind Christian. R3344–45.

Concealed in his jacket pocket, Hart had a 9 mm Glock with an extended magazine. R3353, 4085–86, 4112–13; SE11; DE4. Hart had shown it to Burwell earlier that evening. R3353, 3471. Hart borrowed the gun that day from his cousin, Kary Carter, who had loaded the magazine with a variety of hollow point and roundnose 9 mm bullets. R3685–87, 3934–35; SE12.

After Hart got in the car, the group left the shopping center parking lot and drove to a neighborhood just moments away. SE140. As they were driving, Hart asked Malcom, "Does it weigh?" R3447. Malcom confirmed that it did, and he opened a backpack containing the marijuana so Hart could check the quality. R3447, 3350, 4084. Burwell turned onto the first side street

south of I-80, flipped the car around so it was pointing east and he could quickly get to the onramp, and stopped the car. R3348–50, 3362; SE140.

As Burwell stopped, Hart pulled out his gun and pointed it at Malcom's head. R3355, 4085–86. "[I]t's a jack move," Hart said. "[E]verybody out of the car." R3353–54, 3451. Malcom froze, but Christian started moving for his gun. R3354, 4087. Hart reached around the front seat with his left arm wrapped around Christian's neck or chest, and he pointed his gun at Christian, ordering him out of the car. R3452–54, 4087–88. Christian started to comply, so Hart lowered his gun. R3494–95. But as Christian turned to open the door, he drew his gun, pointed it toward Hart, and shot. R3454–58. The bullet grazed the left side of Hart's chin, neck, and shoulder, piercing his shirt but not exiting it. R4014–17, 4248; SE90–97.

Christian was still turned toward Hart but was halfway out of the car. R3356–58, 3360–62. Reaching over the seat, Hart placed the muzzle of his gun against Christian's chest and fired. R3355–57, 3360–62, 3815–16, 3820–21, 4087–88; SE82–86. The bullet pierced Christian's chest, fracturing a rib; lacerating the right lobe of his lung, the pericardial sac, the right atrium of his

heart, and the ascending aorta; and fracturing a rib as it exited near his spine. R3824–26.[1]

Clutching his chest, Christian got out of the car. R3359. He walked briefly to the west, away from the car, before collapsing in the gutter. R3788–89, 3828–29, 4116. A woman found him not long afterward, and a doctor with extensive ER experience who lived nearby began performing CPR, but Christian died at the hospital. R3503–09, 3784–85, 3789–90, 3813.

Hart had also gotten out of the car, and Burwell drove off, thinking Malcom had gotten out as well. R3355, 3358, 3362. Burwell was surprised by the shooting, but when he realized that Malcom was still in the car he feigned surprise at the robbery to keep up the ruse. R3340, 3366. Still in shock, Malcom just asked Burwell to drop him off at his apartment, where he hid the marijuana and his gun until he could get rid of them. R3363–66, 4092, 4142.

It is unclear how long Hart stayed at the scene when he got out of the car, but when he left, he left a trail of blood for about two blocks. R3697–3702, 3738–39, 3856, 3874–75, 3877; SE26–65. Hart called his cousin, Carter, who

[1] The sequence of the two shootings was unclear. Malcom remembered Hart shooting Christian when he had him pinned against the seat. He did not see Christian shoot Hart, though he acknowledged that he may have heard two shots. R4089, 4106–08.

came and picked him up and took him to the hospital. R3936–38. On the way, Hart told Carter that "the dude shot [me] first … and [I] shot back." R3947. Hart also told Carter that he had dropped the extended magazine back at the scene. R3945; *see also* R3353, 3685, 3934, 3939, 4086, 4271; SE10–11. Hart left the rest of the gun on the floor of the back seat of Carter's car, and Carter got rid of it the next day. R3939–41, 3945.

At the hospital, an officer spoke with Hart about his wound. R3998–4001. Hart first said he was at a park with his wife when two guys approached them, robbed them, and shot Hart. R4000. He then named a different park and said he got robbed and shot when he walked away from his wife to go behind a restroom. R4000–01. Officers investigating the homicide later came to speak with Hart, but Hart was uncooperative. R4203–05; SE124, 1/25/15 Interview.

After leaving the hospital the next day, Hart visited a friend and told her that he would be leaving for Texas soon and asked if she wanted to come with him. R3993–94. He said he thought the officers were "building a case" against him. R3993. When his friend asked about Hart's wounds, Hart said he had handled some business, adding that "the other person was worse off," and "some people just need to act right." R3991–92.

When officers next spoke to Hart, Hart told them that Carter was giving him a ride somewhere when Carter made a stop in Sugarhouse and got out of the car to talk to someone; after a while Hart got out to see what was going on, and someone shot him so he turned and ran away. SE124, 1/29/15 Interview, Episode 1.1. The clear implication was that Carter then shot the other person (Christian).

But Hart had told his sister on a jail call that Carter "wasn't even there." SE100, File 4. Carter never agreed to let Hart implicate him in a murder. R3948–49, 3951. But before he knew that Christian had died, Carter had agreed with Hart that he could use Carter's name to buy some time. R3941–42, 3947–49, 3963. Carter did so because he was suffering from several serious illnesses, was facing extensive prison time for other offenses, was suicidal, and "really didn't care." R3929–32, 3941, 3947, 3969.

The next time Hart spoke to police, he told a different story. He said he was at dinner in Sugarhouse with his wife and Carter when Burwell called him saying he had some money to pay back a debt he owed Hart. SE124, 2/25/19 Interview, Part I, Selection 2 at 1:30–3:15. Hart had been arguing with Carter and wanted to leave, so he asked Burwell for a ride. SE124, 2/25/19 Interview, Part I, Selection 2 at 4:50–6:15. Burwell picked him up, and there were two strangers in the car—the McDonald brothers. SE124,

2/25/19 Interview, Part I, Selection 2 at 6:15–6:45. They had not driven far when Malcom pulled out a gun with an extended magazine and pointed it at Hart. SE124, 2/25/19 Interview, Part I, Selection 2 at 6:15–8:00; Selection 5. The two fought over the gun until Christian turned and shot Hart. SE124, 2/25/19 Interview, Part I, Selection 2 at 6:40–9:00. Hart got out and ran. SE124, 2/25/19 Interview, Part II, Selection 2 at 1:45–2:30. He said Malcom's gun could have gone off and hit Christian when they were fighting over it, but he said he did not really know how Christian got shot. SE124, 2/25/19 Interview, Part I, Selection 3.

B. Summary of Proceedings

The State charged Hart with aggravated murder, a first degree felony; obstruction of justice, a second degree felony; and possession of a firearm by a restricted person, a second degree felony. R1–2. It charged Burwell with murder, aggravated robbery, and obstruction of justice. R3317. In exchange for his truthful testimony in this case, the State agreed to let Burwell plead to manslaughter and robbery and it dismissed the obstruction charge. R3317.

Before trial, the State provided notice that it intended to admit evidence under rule 404(b), Utah Rules of Evidence. R421–23. Hart and Burwell had planned and attempted to execute a robbery just 54 days before the robbery in this case. R850. The plan was similar to this robbery: Burwell set up a drug

deal, Hart brought a black gun with an extended magazine, and they tried to rob the seller. R849–50. That robbery failed when the victims fought back. R850. But Hart did not shoot the victims; instead, he fled the scene, leaving behind a beanie that officers later confirmed had his DNA on it. R850–51. The trial court ruled that the evidence satisfied rule 404(b) and could be admitted to prove intent, motive, plan, absence of mistake, and lack of accident. R848–55. After the trial court ruled that the 404(b) evidence would come in, Hart successfully persuaded this Court to grant a petition for interlocutory appeal. R1739. This Court's ruling came 14 days before trial. R1739, 1760. Hart moved to stay proceedings in the trial court pending the outcome of the appeal, but the State agreed not to present the 404(b) evidence so the trial could move forward and the appeal was dismissed. R1741, 1760–61, 1789, 1941.

At trial, the State presented testimony from Burwell, Carter, Malcom, five people who helped arrange the drug deal, Hart's friend whom he visited after leaving the hospital, the woman who found Christian lying in the gutter, the doctor who performed CPR, the medical examiner, a bloodstain pattern expert, a forensic firearms examiner, two forensic DNA analysts, the first officer who responded to the crime scene, the officer who processed the crime scene, the officer who conducted the initial hospital interview, and the

detective who served as the case manager who conducted the remaining interviews with Hart.

Hart presented testimony from a forensic scientist. Hart's defense centered on challenging the adequacy of the State's investigation and undermining the credibility of the main witnesses against him—Carter, Malcom, and Burwell. R4442–50, 4452–53, 4457, 4459, 4461. Consistent with Hart's final interview, his theory of the case was that Burwell and the McDonalds were working together and that Christian was shot when Malcom and Hart were fighting over the gun. R4455–59, 4463–65.

The jury convicted Hart of aggravated murder, finding through a special verdict that the murder was committed in the course of an attempted aggravated robbery. R1987–88. The jury also convicted Hart of obstruction of justice and possession of a firearm. R1987. The court then found that Hart was a restricted person based on prior convictions. R4516. The court later sentenced Hart to consecutive terms of 25 years to life for aggravated murder and one to 15 years each for obstruction of justice and possession of a firearm by a restricted person. R2053. The court ordered the sentences to run consecutively with a prior sentence because Hart committed the present offenses while on parole. R2053, 4516, 4570. Hart timely appealed. R2055.

SUMMARY OF ARGUMENT

I. Hart argues that his counsel was ineffective for not requesting a mistrial at three separate points during trial.

But counsel had a strong incentive not to ask for a mistrial—avoiding damning 404(b) evidence about a prior, strikingly similar robbery that Hart and Burwell planned and tried to carry out. Counsel had secured an agreement from the State that it would not use the evidence at trial so that the trial was not postponed. But a new trial would put the 404(b) evidence back into play. Counsel could reasonably conclude that a mistrial would not be worth the risk of facing the 404(b) evidence in a new trial, particularly given the weak bases for seeking a mistrial and the availability of other options at each of the three points at which Hart says counsel should have moved for a mistrial.

First, Hart argues that a mistrial was warranted when the forensic firearms examiner referred to a second gun received in this case. The second gun was confiscated from Hart when he was arrested about a month after the murder, but the examiner excluded it as the murder weapon in this case.

Counsel could reasonably conclude that this did not present a basis for a mistrial—particularly not one egregious enough to justify the risk of a new trial with the 404(b) evidence. The forensic firearms examiner did not connect

the gun to Hart. He simply said he received the gun for testing. This statement was easily cured by a stipulation, whereby the witness clarified that the gun was used only for comparison purposes to demonstrate the types of markings different handguns leave on shell casings, and that the gun was not connected to this case.

Second, Hart argues that counsel should have asked for a mistrial when Carter suggested that he and Hart were cellmates in prison. Again, counsel could conclude that a mistrial was not warranted—and the testimony certainly was not egregious enough to justify the costs of a mistrial in this case. Carter did not explicitly name Hart when he made two passing references to incarceration. Hart argues that counsel was unprepared for Carter's testimony and was deficient when he asked questions that Carter responded to by mentioning Hart's incarceration. But Hart has not pointed to any record evidence to establish that counsel did not prepare, and Carter volunteered the information despite counsel's best efforts to word his questions carefully to avoid it.

Furthermore, counsel reasonably decided to use Carter's statements to his advantage. Counsel asked Carter details about the incarceration to highlight that Carter had the opportunity to read Hart's legal papers in this case, implying that Carter could have fabricated his testimony in a way that

aligned with the State's case in hopes of gaining leniency from the State. This approach was reasonable because Carter's testimony that he gave Hart a gun with an extended magazine was particularly damaging to Hart and Hart needed some way to try to discredit Carter's testimony.

Third, Hart argues that counsel should have moved for a mistrial when the jury asked a question that he says exhibited confusion about a stipulation addressing DNA testing of Hart's jacket. Hart's DNA was found on the left sleeve of Hart's jacket, and Christian's DNA was excluded. The DNA analyst testified about the result but not the ownership of the jacket. A stipulation was read into the record stating that the jacket belonged to Hart, and the case manager later testified to the same effect. But during deliberations, the jury asked whom the jacket belonged to and whose DNA was found on it. With input from counsel, the court referred the jury back to its collective memory of the stipulation.

This claim is inadequately briefed and the Court should not address it. Hart never explains how the jury's question establishes that a fair trial could not be had and that a mistrial would have been appropriate. Nor does he explain why counsel was deficient for not moving for a mistrial. In any event, such a commonplace occurrence as a jury question asking for clarification

would not justify a mistrial, especially given the high cost of a mistrial in this case.

Finally, Hart has not shown a reasonable likelihood that any mistrial motion would have been granted. Thus, he has not proven prejudice.

II. Hart argues that counsel should have objected to the case manager's testimony that he believed Hart was the source of the bloodstain furthest to the east at the crime scene. Hart argues that the testimony was inadmissible under rule 702, Utah Rules of Evidence, and that the State had not given notice.

Regardless of admissibility, counsel had a clear, reasonable strategy to use the case manager's testimony to undermine his believability and to question the thoroughness of the State's investigation. Counsel got the case manager to admit that he could not be sure of the identity of the bloodstain's source without doing DNA testing, and that he had time to test it in this case but did not.

Hart has not proven prejudice because he has not proved that an objection would have excluded the testimony. He has not shown that the case manager was unqualified or that the testimony was unreliable. And the expert-notice statute does not apply because the case manager is an employee of a political subdivision of the state. Also, at best Hart would have been

entitled to a continuance under the expert-notice statute, but he did not need one because, as the record shows, counsel was prepared to thoroughly cross-examine the case manager.

Furthermore, whether the bloodstain came from Hart was ultimately unimportant. Its only relevance came from establishing how close Hart was to the extended magazine that was left at the scene. But two witnesses saw Hart shoot Christian with a gun that had an extended magazine. A third witness who was not there said he gave the gun with the extended magazine to Hart and Hart returned the gun without the magazine. And the first people on the scene saw the extended magazine much closer to where Hart indisputably was, compared to where the magazine ended up when officers photographed the scene.

III. Finally, Hart argues that the cumulative effect of counsel's deficiencies justifies reversal.

But Hart has not shown any deficiency, so the cumulative-error doctrine has no effect.

ARGUMENT

All of Hart's claims challenge his trial counsel's representation. To show that his counsel was ineffective, Hart must prove both that his counsel

performed deficiently and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687–89, 694 (1984).

To prove deficient performance, Hart must show that "no competent attorney" would have proceeded as his counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011). That analysis does not turn on a binary consideration of whether counsel's actions were strategic, *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000), or whether a forgone objection would have succeeded, *see State v. Bedell*, 2014 UT 1, ¶¶21–25, 322 P.3d 697. Rather, the analysis examines "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688; *Bullock v. Carver*, 297 F.3d 1036, 1045–51 (10th Cir. 2002). In other words, *Strickland*'s deficient performance analysis requires courts to take a holistic view of counsel's actions, considering reasonableness in view of the totality of the situation counsel faced. Further, that analysis begins with "a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011). Hart must rebut that presumption with affirmative evidence. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013).

To prove that he suffered prejudice, Hart must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." *Strickland*, 466 U.S. at 694. And to prove cumulative harm, Hart must show more than one instance of deficient performance and that "'the cumulative effect of the several errors undermines [the court's] confidence ... that a fair trial was had.'" *See State v. Martinez-Castellanos*, 2018 UT 46, ¶39, 428 P.3d 1038

I.

Counsel acted reasonably in not moving for a mistrial given the high cost of and the weak justifications for a mistrial in this case; further, Hart has not shown a reasonable likelihood that a mistrial would have been granted.

Hart argues that counsel should have moved for a mistrial at three different points during trial: when the forensic firearms examiner referred to two guns he received in this case, when Carter indicated that he was incarcerated with Hart, and when the jury asked for clarification of the evidence during deliberations.

Hart has proved neither deficient performance nor prejudice. "[T]he trial court should not grant a mistrial except where the circumstances are such as to reasonably indicate that a fair trial cannot be had and that a mistrial is necessary in order to avoid injustice." *State v. Maestas*, 2012 UT 46, ¶325, 299 P.3d 892. As discussed below, counsel could have reasonably decided that a mistrial motion was unlikely to succeed in any of the three

circumstances, and counsel had other reasonable options to deal with any problems.

But that is only half of the analysis. When considering whether to ask for a mistrial on any of the three points, one overarching consideration counsel would have faced in this case was the 404(b) evidence. This Court's grant of interlocutory review on the eve of trial did not guarantee that Hart would ultimately prevail on the issue if the appeal had gone forward. But counsel secured a guarantee when the State agreed not to use the 404(b) evidence in this trial. In winning a mistrial, counsel would have lost that guarantee. Counsel surely would have weighed the risk that a mistrial would reopen the possibility that the 404(b) evidence would be admitted in the new trial.

While some grounds for a mistrial may justify facing such a risk, counsel could reasonably conclude that each ground asserted here did not, as discussed below.

A. Hart has not proven that counsel was ineffective for not moving for a mistrial when a witness referred to a second firearm unconnected to this case.

Hart argues that his counsel should have moved for a mistrial when the forensic firearms examiner said that he had examined two guns that he received in this case. Br.Aplt. 25–31. While counsel successfully objected and

the State had the witness clarify that the second firearm was unrelated to this case, Hart argues that the correction was insufficient and a mistrial was warranted. Br.Aplt. 27, 30–31.

But whether a mistrial was warranted is not the relevant question for deficient performance. Rather, Hart must prove that all competent counsel would have moved for one. He has not met that burden. Counsel reasonably concluded that the witness's correction of his earlier statement resolved the problem by unequivocally stating that the second gun was unaffiliated with this case and was relevant for comparison purposes only. Further, Hart has not proven prejudice because he has not shown a reasonable likelihood that a mistrial motion would have succeeded: no evidence connected the gun to Hart.

1. Background

Officers investigating the scene of the shooting found Christian's gun, a .45 caliber Taurus Millennium Pro PT145 handgun.[2] R3688, 4076; SE16. The standard-sized magazine was still in place. R3689; SE17. They also found the bullet that shot Hart—an expended .45 caliber bullet with Hart's DNA on it that was fired from Christian's Taurus. R3692, 3862–63, 3889–91; SE22–23.

[2] Addendum C contains several of the gun-related exhibits discussed in this section.

At the scene, officers also found an extended magazine from a Glock handgun, but the gun was not there. R3685. The extended magazine was about nine inches long and could hold 31 nine-millimeter cartridges. R3686; SE10–11. The magazine was loaded with fifteen cartridges of different styles and made by different manufacturers. R3686–87; SE12. A single spent 9 mm casing was also found at the scene. R3691; SE24–25.

No expended 9 mm bullet was found, R3692, and no other gun was found. Burwell testified that he did not have a gun. R3353. Malcom testified that he had a gun but never pulled it out. R4095. He later took his gun apart and scattered it in the west desert; although he took police there nine months later to look for it, they never found any of it. R4094–96, 4232. Malcom said his gun was a .40 caliber handgun, but he could not remember the make or model. R4075. And as noted, Carter testified that Hart dropped his gun in the back seat of his car and that Carter got rid of it. R3939–41. Officers never found that gun. R4258–59.[3]

When Hart was arrested about a month after the murder, he had a Kel-Tec 9 mm handgun, not a Glock. R3892, 3897. A forensic firearms examiner

[3] Although Carter accurately described the magazine and the cartridges in it, he mistakenly said the gun was a .40 caliber. R3934. It was a 9 mm. R3689.

with the Salt Lake City Police Department Crime Lab test fired a cartridge from the Kel-Tec, apparently to determine whether the expended 9 mm casing found at the murder scene could have been fired from the Kel-Tec. R3881, 3891–92. The impression made on the casing from the Kel-Tec did not match the impression on the casing found at the scene. R3891–92, 3922–23; SE122.

At trial, the forensic firearms examiner testified that he "examined [the Taurus] and another firearm that was submitted as well." R3887. After questioning him about the Taurus, the prosecutor asked about State's Exhibit 122, a close-up photograph of the expended 9 mm casing from the scene next to another expended 9 mm casing. R3891–92; SE122. The witness explained that he took the photograph "to show the comparison of [the expended casing from the scene] … verses a test fired cartridge case from another firearm that I received." R3891–92.

Trial counsel asked for a bench conference. R3892. Counsel pointed out to the court that the comparison was made using the Kel-Tec taken from Hart, and he objected to any reference tying the gun to Hart. R3892, 3895–96. The court agreed and cautioned the State: "I want to make clear you risk a mistrial" if "any evidence" presented to the jury indicates that the "comparison gun was obtained from the defendant." R3899–3900. The

prosecutor agreed that such evidence would be a problem and he assured the court that he intended to use the exhibit solely to demonstrate that the expended shell found at the scene was fired from a Glock. R3895–99.

Counsel then argued that "the cat is out of the bag"—the witness referred to "a gun coming into evidence that we're never going to talk about." R3900–02. But the court disagreed. R3901–04. The court noted that the jury had not heard any evidence that "a gun [was] received from the defendant"—a point with which counsel agreed. R3901. The court emphasized that "there is to be no testimony that this impression was made by a gun that had any connection to the defendant"—a point with which the prosecutor agreed. R3901–02. To resolve counsel's concern, the court proposed having the prosecutor lead the witness to testify that the second gun was used for comparison purposes only and that it had no connection to this case. R3902–04. Counsel agreed that this would resolve the issue. R3904, 3917–19.

When the witness took the stand again, the prosecutor complied with the stipulation:

> Q: I want to just make a few things clear just because we've been—a kind of long lunch break. But when we talk about two guns, one of those guns was a comparison gun just available to you in the lab; is that correct?
>
> A. That's correct.
>
> Q. It is not affiliated with this case?

A. That's correct.

R3921. The witness then discussed the shape of the impression made by the firing pin on the casing found at the scene. R3922–23; SE122. He testified that the impression was made by a Glock, and to illustrate he pointed to the comparison casing that he created with the 9 mm comparison gun that was not a Glock. R3922–23.[4]

2. A competent attorney could decide that the cure the parties agreed to was sufficient.

Hart has not shown that the host of factors counsel faced would require all competent attorneys to move for a mistrial.

As counsel readily and correctly agreed, the jury did not hear any evidence tying the second gun to Hart. R3901. And even though the witness said he "received" the second gun and that it was "submitted" in this case, he later clarified—as a result of counsel's objection—that the gun was not affiliated with this case and that it was used for purposes of comparison. R3887, 3891–92, 3921. Competent counsel could conclude that this was enough to safeguard Hart from being associated with the test-fired gun.

[4] On cross-examination, the witness conceded that there are other models of 9 mm guns that make impressions similar to Glocks when fired. R3923–24.

Even if the jury believed that the comparator gun had some connection to the case, the gun was shown to have produced markings on casings that were inconsistent with the markings on the casing found at the scene. SE122. In other words, if the jury connected the gun with Hart, it would not have inculpated him in the murder.[5]

On this record then, competent counsel could conclude that as it played out, the risk to Hart's right to a fair trial, if there were any at all, was too low to justify a mistrial, and that moving for one would have been unlikely to succeed.

Against that low risk of prejudice to Hart, counsel would have weighed the cost of a mistrial. While a new jury in a retrial would not have heard an oblique reference to a second gun, it very well may have heard evidence of a

[5] Further, counsel could have reasonably concluded that, given the other evidence at trial, there was no risk that the jury's determination of whether Hart possessed a gun would come down to this cryptic reference to a second firearm that was not the murder weapon. Malcom and Burwell, who met for the first time during the drug deal, and Carter, who apparently never met Malcom or Burwell, all testified that Hart had a gun with an extended magazine. R3353, 3357–58, 3427, 3933–38, 4080, 4086. And the extended magazine belonged to a Glock, which made markings on shell casings distinct from the markings that the second gun made. 3922–23; SE122. Again, the jury never heard any evidence connecting the second gun to Hart, and they heard explicit evidence that it was unconnected to this case. The reference to another gun unconnected to this case could not have had any effect on the jury's consideration of whether Hart possessed a firearm.

second robbery that Hart and Burwell attempted, with Hart using the same gun that he used in this robbery.

A competent attorney assessing these factors holistically could reasonably decide not to ask for a mistrial based on testimony that did not link his client to a gun that did not implicate his client in the murder.

3. Hart has not proven a reasonable likelihood that a mistrial would have been granted.

Finally, Hart has not shown prejudice. To prove a reasonable likelihood of a more favorable result, Hart would have to prove a reasonable likelihood that a mistrial motion would have been granted. *See State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel."). For the reasons discussed above, the threat to Hart's right to a fair trial approached zero. Hart therefore has not proved that there was a reasonable likelihood of the court granting a mistrial. *See Maestas*, 2012 UT 46, ¶325 (stating that mistrial is only to be granted when "a fair trial cannot be had" and "a mistrial is necessary in order to avoid injustice"). Hart thus suffered no prejudice when counsel did not move for a mistrial but got the witness to clarify that the gun that did *not* implicate Hart in the murder was nevertheless unrelated to this case.

B. Hart has not proven that counsel was ineffective when, instead of moving for a mistrial, counsel used a witness's volunteered statements about Hart's prior incarceration to undermine that witness's testimony.

Hart argues that counsel did not prepare for Carter's testimony and as a result was caught off guard when Carter indicated that he was in prison with Hart. Br.Aplt. 36, 40–42. He argues that counsel then "unnecessarily" "exacerbate[d] the situation" by highlighting that testimony rather than asking for a curative instruction or moving for a mistrial. Br.Aplt. 42. Hart argues that the testimony "could not help but predispose the jury to presume his guilt in the instant case." Br.Aplt. 40, 43.

Hart has not overcome the presumption that counsel acted reasonably. Counsel's actions demonstrate that he was prepared, and he reasonably decided—in consultation with Hart—to use Carter's statements to undermine Carter's testimony rather than moving for a mistrial or asking for a curative instruction. Furthermore, Hart has not proven prejudice because

he has not shown a reasonable likelihood that a mistrial would have been granted.[6]

1. Background

During Carter's cross-examination, trial counsel asked him about each of his three interviews with police. R3959–60. Through questioning, counsel highlighted Carter's shifting accounts. Carter admitted that in his first interview, he said that he shot Christian, and when officers pressed him on it, he conceded that he and Hart had agreed that Carter would take the blame for shooting Christian. R3959. Carter admitted that during the second interview, he told police that Hart never told him that Hart shot anyone. R3959. But when counsel asked Carter whether Carter told police in the third interview that Hart said he shot someone, Carter responded by trying to explain his shifting accounts:

> [inaudible] both times I was still—I was still trying to protect him. We were out here in a situation where I'm going to prison [inaudible] same room [inaudible]. See, yeah, if I sat there and

[6] Hart also suggests that there was an "'actual breakdown in the adversary process,'" leading to a presumption of prejudice. Br.Aplt. 43. Hart has not explained how counsel's actions "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," or how they amounted to circumstances of similar "magnitude" to justify presuming prejudice. *United States v. Chronic*, 466 U.S. 648, 659–62 & n.26 (1984). And *Chronic*'s presumed prejudice applies only when the failure is "'entire[]'"; the exception will not apply for failing to oppose the state at specific points in the proceedings. *Bell v. Cone*, 535 U.S. 685, 696–97 (2002). That is all Hart has alleged here.

> I made up whatever to have to protect myself. So, yeah, at that time they had me in a cell with a person who was taking care of me.

R3960. Counsel asked for a bench conference. R3960. The prosecutor noted that Carter had not explicitly identified Hart as the person he was in the same cell with, and he suggested that they not draw any more attention to it. R3960. Counsel agreed and resumed questioning on a different point. R3960.

Later, counsel tried to highlight Carter's inconsistency in providing "three different motivations" for initially saying he shot Christian, then saying Hart never told him that anyone got shot, and finally saying Hart told him that he shot Christian. R3964–65. Counsel began by asking about Carter's sense of indebtedness toward Hart, and Carter responded again by volunteering information about Hart's criminal history:

> Q. All right. So and—without getting into details, I think you told me that—that Mr. Hart has taken care of you through a lot of medical conditions; is that correct?
>
> A. Yeah.
>
> Q. And—and did he—he let you live with him before all this happened?
>
> A. Yeah. As soon as they're violate—they violated his parole.
>
> Q. All right. You guys—before all of this happened, you two lived together on—
>
> A. Yeah.

> Q. —on the streets, yeah? And he—he helped take care of you, and for how long? How long in your life did Jeremiah Hart help take care of you?
>
> A. Do you think it's a—a few times take care of a few situations when I was a kid and then just recently. And then I've been locked up the majority of my life, so it's been off and on pretty much here and there.

R3964.

Counsel asked the court for a brief recess, stating, "I need to talk to my client about what we're going to do, whether I'm going to take it one direction or not." R3965. The court declined to grant a recess in the middle of the witness's testimony. R3965. So during the prosecutor's redirect examination, counsel consulted with Hart about how and whether to address Carter's references that Hart had been in prison. *See* R3976–77.

Counsel began his recross examination, "So elephant in the room, you and [Hart] spent a year in prison together after this happened, correct?" R3971. Counsel elicited information that Carter and Hart were cellmates, that Carter was in a wheelchair, and that Hart took care of Carter as his assigned ADA assistant. R3971–72. Counsel pressed Carter on whether he ever talked with Hart about this case while they were cellmates. R3972. Carter insisted that they "never sat down and had a conversation." R3972. Counsel then pressed Carter about whether he ever read through any paperwork Hart had in his cell regarding this case. R3973–74. Carter was adamant that he never

looked through Hart's legal papers, but he conceded that he had the opportunity, and counsel highlighted those opportunities—when Hart was working out, taking a shower, visiting the doctor, or attending court. R3973.

After Carter was done testifying, counsel made a record that he had made a strategic decision in consultation with Hart to use Carter's reference to Hart's incarceration. R3976–77.

In closing argument, counsel emphasized that Carter and Hart "spent a lot of time together in a cell with all of Jeremiah Hart's legal papers right there with him." R4461. Counsel repeated all the opportunities Carter would have had to look through Hart's papers. R4461. And he argued that "having information about somebody's case could actually be valuable" in prison, insinuating that Carter looked at the papers so he could craft his testimony in a way that coincided with the State's case. R4461.

2. A competent attorney could decide to use the volunteered statements about Hart's incarceration to undermine a key witness's testimony.

Hart has not overcome the presumption that his counsel adequately investigated the case and prepared to cross-examine Carter. "It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 23 (2013). Hart has

pointed to no record evidence about counsel's actual preparation in this case, and he has not sought a remand under rule 23B, Utah Rules of Appellate Procedure, to create a factual record of how counsel did or did not investigate and prepare for this case. The Court must therefore presume that counsel acted reasonably in preparing for trial. *See Strickland*, 466 U.S. at 689.

Nor has Hart overcome the presumption that counsel acted reasonably in his initial cross-examination of Carter. Carter's first reference to being in prison "in a cell with a person who was taking care of me" came after a question that in no way called for such a response. R3960. Counsel had simply asked a leading question about what Carter said in his final interview. R3960. When counsel later asked questions that risked eliciting information about Carter and Hart being in prison together, counsel worded his questions carefully to avoid that response. First, he asked a leading question about whether Carter had said that Hart took care of him "through a lot of medical conditions"—and he said he wanted Carter to answer "without getting into details." R3964. Carter showed that he could answer the question with a simple "Yeah." R3964. Counsel then asked another leading question about whether Hart had let Carter live with him, and he specified that he was interested only in the time period "before all this happened." R3964. But after answering "Yeah," Carter added, "As soon as they're violate—they violated

his parole." R3964. Counsel again tried to refocus Carter's response: "You guys—before all of this happened, you two lived together on … on the streets, yeah?" R3964.

Counsel had reasonably engaged in a line of questioning that would develop the "three different motivations" Carter mentioned for his shifting accounts, all in an effort to undermine Carter's credibility and show inconsistencies. R3965.

Hart argues that counsel could have taken "precautionary measures" to ensure that the information did not come out, such as having the court instruct Carter not to refer to Hart's incarceration. Br.Aplt. 41–42. But counsel took precautionary measures. He crafted his questions in a way that should have avoided any reference to Hart's incarceration. Carter was bent on talking about it and offered the testimony despite—not as a result of—counsel's best efforts to steer Carter away. Counsel cannot be deficient for not being able to control an opposing party's witness.

Once the information was out, counsel acted reasonably in choosing to use it to Hart's advantage rather than seeking a curative instruction or moving for a mistrial.

Carter was a key prosecution witness. Both Burwell and Malcom testified that they saw Hart shoot Christian with a gun that had an extended magazine. R3353, 3358–62, 4086–88. An extended magazine from a 9 mm Glock was left behind at the scene. R3685–86; SE10–11. And a spent 9 mm casing with markings consistent with those made by a Glock was found at the scene. R3691, 3922–23; SE24–25, 122. Hart's theory was that Burwell and Malcom were in cahoots, that the gun with the extended magazine was Malcom's, and that Malcom had shot his brother when Hart and Malcom were fighting over the gun. R4456–59, 4463–65.

But Hart's theory was significantly undermined by Carter's testimony—a witness with no connection to either Burwell or Malcom. Carter testified that he gave Hart the gun with the extended magazine. R3934. Carter even identified the types of bullets he had loaded in the magazine, which was consistent with the types of bullets officers found in the magazine left at the scene. *See* R3685–87, 3935; SE10–12. Carter also testified that Hart returned the gun without the magazine. R3939. None of counsel's efforts to undermine Carter's credibility could explain Carter's knowledge about the details of the murder weapon. The best counsel could do was to point out one discrepancy in the details—Carter called the gun a .40 caliber when the extended magazine actually came from a 9 mm. R3689, 3934, 4458–59.

Counsel reasonably concluded that Carter's hinting at his incarceration with Hart gave counsel the opening he needed to more effectively challenge Carter's testimony. Although Carter denied talking about the case with Hart or looking through his legal papers, counsel effectively emphasized the many opportunities Carter would have to familiarize himself with the details of Hart's case over the year that the two were cellmates in prison. R3971–74. Earlier in cross-examination, counsel elicited that the prosecutor had agreed to send a "pretty glowing letter" to the Board of Pardons and Parole after Carter testified; Carter had a parole review date the next year and the prosecutor's draft letter urged the Board to consider Carter's cooperation, "grit and true character." R3949–51; DE3. In closing argument counsel emphasized the opportunity Carter had to look through Hart's legal papers, and he suggested that that kind of information would be "valuable" to someone in prison. R4461.

Counsel also could have concluded that under the facts of this case, there was little risk that the jury would assume Hart's guilt just because he had a criminal history. Every player in this drama was involved in a crime; several had criminal histories. R3317–19, 3524–29, 3552–53, 3575–76, 3600, 3655, 3927–29, 3985, 4070–71. Everyone but Burwell received use immunity for their testimonies in this case. SE132–39. Again, Hart's theory was that

Burwell was working with the McDonald brothers, not Hart. R4456–59, 4463–65. Hart emphasized that Malcom was dealing drugs, that he lied to police regarding their investigation of his brother's death, and that he got rid of his gun. R4444–46, 4448, 4450. Burwell had just gotten out of prison, and he pleaded guilty to manslaughter and robbery for his role in Christian's murder. R3317–19, 4447–48. Knowing that Hart had some unspecified criminal history that resulted in a prison sentence and that he had violated parole was not likely to have swayed the jury as it decided whom to believe.

Along with the potential benefit counsel could see in developing Carter's testimony and the minimal risk, counsel had to weigh the costs and benefits of asking for a curative instruction or moving for a mistrial.

Competent counsel could have seen real risk in asking for a curative instruction. Carter's volunteered references were not explicit. R3960, 3964. A curative instruction would draw more attention to the issue, without adding the kind of benefit that counsel could create through further questioning and argument on the point. Certainly, the route counsel chose carried some risk. But as argued above, that risk was minimal in a case where criminal activity was the norm among the fact witnesses. And counsel's strategy carried the benefit of using Hart's incarceration to his advantage rather than drawing attention to it through a curative instruction that lacked that advantage. A

competent attorney could choose the course Hart's counsel chose. In fact, counsel presented this option to Hart, and Hart agreed to the strategy. R3976–77.

And as argued above, counsel had to weigh the damage to Hart's case, if any, against the costs of succeeding on a mistrial motion. Competent counsel could conclude that, on balance, spinning the testimony to support the defense was a better option than a new trial with potential 404(b) evidence that was even more damaging than the vague reference to Hart's incarceration and parole violation.

Taking all of these factors into account, counsel reasonably decided not to move for a mistrial or request a curative instruction. Counsel's decision—made with Hart's approval—was reasonable. "[A]n attorney must play the hand he or she is dealt, and an attorney's decision about how to deal with adverse facts is the sort of thing that courts should not second-guess in the context of ineffective assistance claims." *State v. Garcia*, 2017 UT App 200, ¶23, 407 P.3d 1061. Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Among all the options counsel faced, it was reasonable for counsel to decide to use Hart's prior incarceration to explain how Carter could know about the extended magazine without

having given it to Hart. And that strategy became even more reasonable once Carter "blurted out" the evidence of Hart's prior incarceration. Br.Aplt. 40. That counsel was ultimately unable to persuade the jury does not make counsel's actions unreasonable. *Parsons v. Barnes*, 871 P.2d 516, 524 (Utah 1994).

3. Hart has not proven a reasonable likelihood that a mistrial would have been granted.

Finally, Hart has not shown prejudice. He has not shown a reasonable likelihood that a mistrial motion would have been granted had he asked for one instead of using Carter's testimony about incarceration. As discussed above, the references to Hart's incarceration and parole violation were veiled, referring only obliquely to Hart. They were volunteered by Carter, not elicited by counsel. And they were unlikely to sway the jury in a case where almost all the fact witnesses were involved in criminal activity. *See State v. Allen*, 2005 UT 11, ¶40, 108 P.3d 730 ("A review of our case law amply reveals that a mistrial is not required where an improper statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented."); *State v. Butterfield*, 2001 UT 59, ¶47, 27 P.3d 1133 (concluding that trial court did not abuse its discretion in denying mistrial when witness made "a 'vague,' 'fleeting' remark" indicating that defendant may have had criminal history); *State v. Velarde*, 734 P.2d 440, 448

(Utah 1986) (acknowledging that "some prejudice might result" from "a single phrase, clearly elicited inadvertently, made during a three-day trial," but mistrial requires "some showing that the verdict was substantially influenced by the challenged testimony"). Hart therefore has not proven that there was a reasonable likelihood of the court granting a mistrial had he asked for one rather than choosing to use the testimony.

And he suffered no prejudice when counsel used the incarceration references to Hart's advantage rather than asking for a curative instruction. Again, knowing that Hart had some unspecified criminal history that resulted in a prison sentence and that he had violated parole was not likely to have swayed the jury as it decided whom to believe. Counsel was able to challenge Carter's testimony by emphasizing that Carter had the opportunity to view Hart's legal papers in this case while the two were cellmates, and suggesting that Carter had crafted his testimony to coincide with the State's case so he could get favorable treatment from the State. Had counsel not used Hart's incarceration to try to undermine Carter's testimony, the State's case would have been even stronger.

C. Hart has inadequately briefed his claim that counsel was ineffective for not moving for a mistrial when the jury asked a question during deliberations.

Hart argues that counsel was ineffective for not requesting a mistrial when the jury submitted a question during deliberations asking whose jacket sleeve was tested and whose DNA match was found on the left sleeve. Br.Aplt. 45.

This Court should decline to reach this issue because it is inadequately briefed. In any event, Hart has not shown that counsel was ineffective because counsel could reasonably choose not to move for a mistrial based on the commonplace occurrence of a jury asking for clarification—particularly when a mistrial carried such heavy costs in this case.

During trial, a forensic DNA analyst testified about the results of DNA tests she ran on the jacket that Hart was wearing the night of the murder, but she did not identify the jacket as Hart's. R3859–61. The jacket was tested against a DNA sample known to belong to Christian and a sample known to belong to Hart. *See* R3859–61. The test of the right sleeve was inconclusive. R3860–61. The left sleeve resulted in a match for Hart but not Christian. R3861.

Because the analyst could not lay foundation for whose clothing she tested, the parties agreed to have a stipulation read into the record. R3867–

69. The stipulation stated, "The sleeve tested which contained Jeremiah Hart's DNA was from Jeremiah Hart's jacket." R3921.

The case manager later testified about the jacket. He identified the jacket Hart was wearing the night of the murder, and pictures of the jacket were shown to the jury. R4170–72; SE159–60. He confirmed that both sleeves on this jacket were tested and that Hart's DNA was found on one sleeve but not the other. R4173.

Neither party referred to this evidence in closing argument.

During deliberations, the jury asked the court, "According to [the forensic DNA analyst's report for the left sleeve of the jacket,] whose jacket sleeve was tested? Whose DNA was a match for left sleeve?" R1981. When the court proposed simply referring the jury to their memories of the stipulation, counsel urged the court to answer the question more directly. R4482–83. But after further discussion, counsel agreed with the court's approach. R4483–84. The court responded to the jury by stating, "This issue was the subject of a stipulation read into the record by counsel. Please rely on your collective memory of the evidence presented." R1981.

This Court should not address Hart's appellate challenge because he has not adequately briefed it. Rule 24, Utah Rules of Appellate Procedure, requires parties to "explain, with reasoned analysis … , why the party should

prevail on appeal." Utah R. App. P. 24(a)(8). A claim is inadequately briefed when "the overall analysis is so lacking as to shift the burden of research and argument to the reviewing court." *State v. Nelson*, 2015 UT 62, ¶39, 355 P.3d 1031 (internal quotation marks omitted).

Hart's claim is inadequately briefed because he has done nothing more than "baldly averred" that a mistrial would be appropriate and that counsel was ineffective for not requesting one. *See Living Rivers v. Exec. Dir. of the Utah Dep't of Envt'l Quality*, 2017 UT 64, ¶43, 417 P.3d 57. But Hart has not attempted to meet his burden to prove that all competent counsel would have moved for a mistrial. In fact, he has not even looked to the standard for a mistrial that trial counsel would have had to meet to get one. Instead, he quotes the standard of review for the denial of a mistrial motion and the standard for determining whether a defendant may be retried after a mistrial is granted. Br.Aplt. 45. Nor has Hart shown prejudice by explaining why a mistrial motion was reasonably likely to have succeeded. This Court should therefore not consider this claim.

Hart's ineffective assistance claim would fail on its merits in any event. Competent counsel could conclude that he had no valid basis to move for a mistrial. "[T]he trial court should not grant a mistrial except where the circumstances are such as to reasonably indicate that a fair trial cannot be had

and that a mistrial is necessary in order to avoid injustice." *Maestas*, 2012 UT 46, ¶325. Jury questions during deliberations are commonplace. In fact, the trial court made the offhand remark in this case that "the vast majority of my juries this past year have had questions." R4485. The mere fact that a jury asks for clarification does not demonstrate that a fair trial cannot be had—particularly in a six-day trial with 21 witnesses and 162 exhibits. Counsel could have concluded that any motion for a mistrial based on the jury asking for clarification would have been futile.

Competent counsel could have also decided that any confusion the jury faced related to a relatively unimportant piece of evidence. Unremarkably, Hart's jacket had Hart's DNA on it. Even if counsel could have used the absence of Christian's DNA on Hart's left sleeve to call into question Malcom's and Burwell's testimony that Hart put his left arm around Christian and held him to the seat, that fact was of little importance to the question of whether Hart shot Christian.

And again, along with counsel's assessment of the weakness of a mistrial motion and the relative unimportance of the evidence, competent counsel would have weighed the costs of a mistrial in this case. Counsel could have reasonably concluded that the risk of facing the 404(b) evidence in a new trial was not justified by the jury's apparent confusion about the DNA

evidence. Furthermore, counsel recognized that he had other reasonable alternatives to a mistrial. Counsel agreed to an instruction from the court that the jurors should refer to their collective memory of the evidence—a type of instruction that is commonplace in these situations.[7]

Finally, Hart would not be prejudiced by counsel forgoing a mistrial motion because the motion was not reasonably likely to have succeeded. As explained above, the jury question was commonplace and did not indicate that a fair trial could not be had.

II.

Counsel could reasonably conclude that he could use the case manager's opinion testimony to undermine the State's investigation, and that any objection to notice or admissibility would likely be futile.

Hart argues that counsel was ineffective for not objecting to the case manager's opinion testimony about the blood found at the scene. Br.Aplt. 46–48. He argues that the case manager's testimony amounted to expert testimony, and that counsel could have objected for lack of notice that the

[7] Hart seems to suggest that a mistrial was appropriate because the parties' initial stipulation about whose jacket was tested for DNA was "insufficient for the jury." Br.Aplt. 45. Again, counsel does not explain how this required a mistrial to avoid injustice. Even if the stipulation was insufficient, the case manager later testified that the jacket that was tested for DNA was Hart's jacket and that Hart's DNA was found on one of the sleeves. R4170–73.

case manager would give expert testimony and because the State had not satisfied rule 702, Utah Rules of Evidence. Br.Aplt. 46–47. He argues that the testimony was prejudicial because it had the "tendency to show that [Hart] lingered momentarily over the body of Christian McDonald and thus tie[d] him to the shooting death." Br.Aplt. 47.

Hart has not shown deficient performance or prejudice. Regardless of whether counsel could have excluded the testimony through an objection, counsel reasonably chose to use the testimony to challenge the adequacy of the State's investigation. Further, counsel could have reasonably decided that both a rule 702 objection and a notice objection were unlikely to keep out the case manager's testimony. But in any event, the testimony was harmless.

A. Background

The woman who found Christian saw him lying in the gutter on his back, with his head toward the west and his feet toward the east. R3516. Christian's gun was partially under his left hip or leg, though the doctor who lived nearby picked it up with a towel and moved it onto the grass because it was getting in people's way as they performed CPR. R3511–12, 3514, 3794. The extended magazine was near Christian's left knee or calf, though one of the people assisting Christian may have kicked it because it lay farther to the east by the time officers photographed the scene. R3511–12, 3794–95; SE6.

When officers arrived on the scene, they marked and photographed the evidence.[8] Moving from east to west, the officers found skid marks that may have been from Burwell's car, SE5 (Markers 34 and 36); the extended magazine, SE6 (Marker 35); Christian's body several feet to the west, SE6, 26 (Marker 20, location indicated by a yellow chalk mark in the photograph); several drops of blood near where Christian's waist may have been, SE26 (Stain A); Christian's gun, also near his waist but on the grass, SE6 (Marker 38); several drops and a smeared pool of blood underneath Christian's body, SE26 (Stain B); several drops of blood just west of Christian's head, SE26 (Stain C); and a bloodstain trail that continued to move west for two blocks, R3738–39; *see, e.g.*, SE26–65 (Stains D through Z, AA through AZ, and BA through BD).

Forensic DNA analysts tested blood from two bloodstains at the scene—Stain C, which was just west of Christian's head, and Stain K, which was further west along the blood trail. R3856, 3874–75; SE5–6, 26, 36. Stains C and K both matched Hart's DNA. R3856, 3874–75. Christian was specifically excluded as a contributor to Stain C. R3877–78.

[8] State's Exhibit 5 and 6, which give an overview of the crime scene, are reproduced in Addendum D, along with several exhibits showing the bloodstain evidence.

A forensic scientist with experience in bloodstain pattern analysis testified that Stain A—the one near Christian's waist and the first stain moving east to west—was a "passive stain," meaning the drops of blood "are acted upon only by gravity." R3724; SE27. In other words, the source of the blood was stationary. The expert reached the same conclusion for some of the blood in Stain B—the blood under where Christian had lain—but another portion of the blood in Stain B was from blood pooling on the ground. R3727; SE38. Some of the blood in Stain C was also from a stationary source, but some indicated that the source was "mostly stationary" but had "slight lateral movement." R3727–28; SE29. Stains D through G also showed "slight movement" at most. R3729–32, 3738. But Stains H through BD all represented that the source of the blood was traveling with "a lot more … horizontal movement" toward the west. R3738–39. The expert stated on cross-examination that her bloodstain analysis did not reveal whether each bloodstain came from the same source; she would need DNA evidence. R3740.

As the final witness for the State, the case manager presented the opinions he drew from the evidence as the detective assigned to the case. R4160. He repeated the forensic DNA analyst's conclusion that Stain C—the stain just west of Christian's head—was Hart's blood, and he repeated the

bloodstain expert's opinion that the source of Stain C "would have had to have been stationary for a period of time to leave that pattern." R4167–68. The case manager then stated that Stain B exhibited "a different pattern" from Stain C. R4168; SE28–30. And he offered his opinion "as the case manager" that Stain B was Christian's blood. R4168. He explained that he reached that opinion because Stain B was under the area where Christian was lying, and Christian's clothing had blood on the side that was against the ground. R4168–69.

The case manager also offered his opinion that Hart was the source of all the blood at the scene except Stain B. R4169 He explained his opinion by stating that the patterns of the individual stains, other than Stain B, were consistent with each other. R4169. He also based his opinion on the medical examiner's testimony that due to the nature of Christian's wound, most of Christian's blood would pool in his chest cavity and only some would have come out as he was on the ground. R3826–27, 4169, 4142.

On cross-examination, counsel questioned the case manager about his conclusion that Stain A—the easternmost stain, by Christian's hip—was Hart's blood and that Stain B was Christian's blood. R4240–43. Counsel got the case manager to concede that this was "[a]bsolutely" a "pretty big assumption" without having Stains A and B tested for DNA. R4240–41. The

case manager reiterated the bases of his opinion. R4241–42. But he conceded that he "[a]bsolutely" "could have foreclosed any speculation on the matter by simply having stain A tested for DNA," and that Stain C—the stain just west of Christian's head—was the "eastern-most stain that you can definitively attribute to Jeremiah Hart." R4241–42. Later in the cross-examination, counsel asked whether the case manager had any "definitive evidence" "other than your supposition about the pattern" that Stain A came from Hart, and the case manager conceded that he had "no forensic report stating that." R4250.

After the prosecutor had the case manager reiterate his opinion and add that the extended magazine was also found east of Christian's body, R4271–73, trial counsel returned to the issue on recross. The case manager conceded that he did not know how long the source of Stains A and C were stationary and said they could have been stationary for just one or two seconds. R4277. He conceded that he "had plenty of time" to get Stain A tested. R4277. After reiterating his opinion about Stain A, he also conceded that "[n]othing definitively" established that Hart was ever east of Stain C. R4278–79.

Hart called his own forensic scientist to testify. He testified that Stains A and C were "slightly different" in pattern. R4339–40. When asked his

opinion on the source of Stain A, the expert said, "I don't make assumptions if I don't have a result. This—Blood Stain A was not tested. So I would make no comment. I would make no conclusion as to whose blood that is." R4340. He added that the State could have tested but chose not to, "So we don't know whose blood it is." R4341. He said there was no evidence "positively matched" to Hart east of Stain C, and that if Hart had touched the extended magazine, the expert would have expected to find his DNA on it. R4341–42. "We are really good at finding DNA, very, very trace amounts of DNA." R4342.

The expert acknowledged on cross-examination that investigators typically do not test every bloodstain for DNA. R4354. But he stated that he would test "the most important ones, which are the ones closest to … the actual body," and if there is a trail, "[t]he rule is" that you test the first, second, and third drops, then random selections after that. R4354. He reiterated on redirect examination that in this case, Stain A would have been the most important one to test. R4368–69.

In closing argument, the prosecutor referred to Hart's last statement to police, where he said he got out of the car and ran. R4429. The prosecutor argued, "We know that is not true because of the blood stain. … He was standing there." R4429. Later, the prosecutor conceded that investigators

"should have got DNA" from Stain A. R4434. While he insisted that it was Hart's blood, he argued that it did not really matter whose blood it was in Stain A because it was all within a couple feet of each other. R4434–35.

Trial counsel began his closing argument by emphasizing "hole[s] in the evidence"—"missing guns, missing weed." R4442. Later, he argued that the positioning of the evidence at the scene did not line up with the State's theory of the case. R4452. Counsel tried to distance Hart from the extended magazine, which was photographed several feet east of where Christian had been. Counsel asserted that Stain C—which was just west of Christian's head—"is the easternmost position that we can definitively say … Hart ever went," and that "corresponds with the back door of the car where Jeremiah Hart was sitting." R4452. He argued that it was "irresponsible" of the State never to test Stains A and B, and that it was "a pretty huge logical leap" to conclude that Stain A came from the same source as Stain C merely because they look alike. R4452–53.

Counsel then tied the argument together by discussing the extended magazine, which was further east than any of the bloodstains: "the reason that they want Jeremiah Hart further this way is because they can't explain how that magazine ends—I don't know, ends up 15 feet the other way, 10, at least 10 … ." R4453. Counsel highlighted evidence from the trial indicating

that when the clip was released from the gun, it would have fallen to the ground and would not "shoot" out, so it would not have come from Hart, who fled west after getting out of the car. R4454. Counsel acknowledged that according to the bloodstain expert, Hart stopped momentarily outside the car to "kind of take stock of the situation" before fleeing west. R4454. "But [the evidence] also shows he never goes [east]." R4454.

B. Counsel reasonably chose to use the case manager's testimony to challenge the State's investigation rather than making objections that were likely to fail and were not likely to affect the outcome of the case.

Counsel reasonably decided to let the case manager testify about the source of Stain A without objection then turn that testimony to undermine the witness, the State's investigation, and the State's theory of the case. Counsel got the case manager to concede that his assessment of the source of the easternmost stain (Stain A) was a "pretty big assumption," that it was not backed by any forensic evidence, that the only way to definitively identify the source was through DNA testing, and that he could have submitted it for testing. R4240–42, 4250, 4277–79. Counsel also used the defense expert to undermine the case manager's opinion. The defense expert testified that Stain A would have been the "most important" one to test and there is no way of knowing its source without testing. R4341–42, 4354, 4368–69. Counsel then drew on this evidence in closing argument to simultaneously attack the

State's case and to provide an evidentiary basis for separating Hart from the magazine. R4453–54. Even if counsel could have successfully excluded the case manager's testimony, it was reasonable to use it to Hart's advantage instead. *See Bedell*, 2014 UT 1, ¶¶21–25.

In any event, counsel could have reasonably concluded that any objection would have failed, and Hart has not shown that no competent attorney would think otherwise. *See Premo*, 562 U.S. at 124 (stating that "the relevant question under *Strickland*" is whether "no competent attorney would think a motion … would have failed"). The record does not establish that the case manager—a detective with six years' experience as a homicide detective and 20 years' experience in law enforcement—was unqualified to offer the opinions he offered. R4007. Nor does the record show that the case manager's opinions were unreliable under rule 702. And Hart has not moved for a rule 23B remand to create a record to establish those facts. While the State would have borne the burden of making the threshold showing under rule 702 at trial, Hart bears the burden of proving ineffective assistance. To do so, he must overcome the presumption that counsel reasonably did not object. *See Strickland*, 466 U.S. at 689. And he must point to evidence to overcome that presumption. *Burt*, 571 U.S. at 23.

Counsel may well have chosen not to object under rule 702 because he knew that if he did, the State would be able to lay foundation in front of the jury that would not only satisfy 702, but would also strengthen the case manager's opinion in the eyes of the jury. *Cf. Harrington*, 562 U.S. at 105 ("Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge."). Thus, even the chance that an objection might have failed would have been enough for a reasonable attorney not to risk that outcome, particularly where counsel could effectively use the case manager's testimony against the State.

Hart has also failed to show that all competent counsel would have objected under the expert-notice statute. The expert-notice statute generally requires 30 days' notice before trial that a party intends to offer expert testimony. Utah Code §77-17-13(1)(a). But there are two exceptions that counsel could have decided would excuse the State from that requirement. First, the expert-notice statute "does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice." *Id.*

§77-17-13(6). The case manager was a detective with the Salt Lake City Police Department, a political subdivision of the state. The State gave notice through its general witness list that the case manager would testify (though it also provided an additional notice of expert witness that the case manager would testify about "drug distribution practices and methodology"). R338, 735.

But even if the state employee exception were not adequate, counsel could have concluded that the other exception was. Testimony of an expert at a preliminary hearing "constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing." Utah Code §77-17-13(5)(a). The case manager testified at the preliminary hearing that "we" analyzed the bloodstain pattern to determine a direction of travel and determined that the source of the blood was traveling west. R2415. He testified about blood spatter shown in specific exhibits and explained how the "spines and satellites" in the blood indicated that the trail was moving west. R2420–21. And he testified that swabs were taken, submitted for DNA testing, and determined to be Hart's blood. R2415–16. Counsel thus could have reasonably decided that any objection based on the expert-notice statute would have failed.

But even if an objection were well founded, the most counsel could have obtained was a continuance. Utah Code §77-17-13(4)(b). The expert-notice statute allows for excluding expert testimony only on a showing of a deliberate, bad-faith violation. Utah Code §77-17-13(4)(b); *State v. Roberts*, 2018 UT App 9, ¶¶38–39, 414 P.3d 962. *But see State v. Peraza*, 2018 UT App 68, ¶37, 427 P.3d 276 (ruling that trial court erred in admitting expert testimony when State violated expert notice statute, but not discussing bad faith), *cert. granted*, 429 P.3d 460 (Utah 2018).

Counsel could have reasonably decided not to seek a continuance. The record demonstrates that counsel was prepared to meet the case manager's testimony, so a continuance was unnecessary. It also would have been reasonable for counsel to decide that moving for even a brief continuance during the State's final witness, on day four of trial, so that counsel would have extra time that he did not need to prepare to cross-examine a witness, could antagonize the jury by prolonging their service.

C. Hart has not shown a reasonable likelihood of a more favorable result had he objected.

Hart argues that he was prejudiced because the case manager's testimony tended to show that Hart "lingered over the body of Christian McDonald," and that the lingering somehow "tie[d] him to the shooting." Br.Aplt. 47.

Hart's claim is inadequately briefed because he does not explain how lingering over the body tied him to the shooting. Nor does he examine the case manager's testimony in the context of the entire evidentiary picture. *See Strickland*, 466 U.S. at 695–96 (requiring consideration of the totality of the evidence). Because Hart has inadequately briefed an essential element of his ineffective assistance claim, this Court should not address the claim. *See* Utah R. App. P. 24(a)(8); *Nelson*, 2015 UT 62, ¶39.

In any event, the entire evidentiary picture demonstrates that whether Hart lingered at the scene was irrelevant. Counsel got the case manager to acknowledge that Hart only needed to remain for a second or two for the bloodstains to appear like they came from a stationary source. R4277. Thus, counsel conceded in closing argument that the evidence established that Hart stayed there long enough to take stock of his surroundings before fleeing west. R4454.

The relevant question, according to trial counsel, was not whether Hart lingered, but how far east he went. Counsel's reasonable strategy was to separate Hart from the extended magazine—one of the most damning pieces of evidence for Hart.

But despite counsel's best efforts, the evidence connecting Hart to the shooting was strong. Carter gave Hart a gun with an extended magazine into

which Carter had put a variety of bullets. R3934–35. Burwell and Malcom both saw Hart shoot Christian, and they both said he did it with a gun that had an extended magazine. R3353, 3358–62, 4086–88. Hart returned the gun to Carter without the extended magazine. R3939. An extended magazine from a 9 mm Glock was later found at the scene, as was a spent 9 mm casing with markings consistent with those made by a Glock. R3685–86, 3691, 3922–23; SE10–11, 24–25, 122. The types of bullets in the magazine were consistent with the types of bullets Carter said were in the gun. R3685–87, 3935; SE10–12. And even though officers found the magazine several feet further east from where Hart may have gotten out of the car, the very first people on the scene said the magazine was right by Christian's knee or calf when they first got there. R3511–12, 3794–95; SE6. Furthermore, the medical examiner explained that Christian was shot with the muzzle of the gun placed against his chest—a positioning consistent with Burwell's and Malcom's accounts, but unlikely to have occurred with Hart's account that Christian was shot (in the front seat) as Hart and Malcom wrestled over the gun (in the back seat). R3355–57, 3360–62, 3815–16, 3820–21, 4087–88; SE82–86.

Finally, as the prosecutor pointed out, given the relatively close proximity of Stains A and C, it does not really matter whether Stain A was from Hart or Christian. There is no reasonable likelihood of a more favorable

result had the case manager's testimony about Stain A been excluded entirely rather than thoroughly discredited on cross-examination. And again, excluding it entirely would have excluded evidence that could have jaundiced the jury's view of the State's investigation, resulting in making the State's case stronger, not weaker.

III.

Hart's cumulative prejudice claim fails because counsel was not deficient in any way.

Finally, Hart argues that this Court should reverse under the cumulative error doctrine. Br.Aplt. 48. Under that doctrine, courts will reverse when "'the cumulative effect of the several errors undermines [the court's] confidence ... that a fair trial was had.'" *Martinez-Castellanos*, 2018 UT 46, ¶39. "[A] court must make three determinations before reversing a verdict or sentence under the cumulative error doctrine: it must determine that (1) an error occurred, (2) the error, standing alone, has a conceivable potential for harm, and (3) the cumulative effect of all the potentially harmful errors undermines its confidence in the outcome." *Id.* ¶42. Because counsel was not deficient in any way, this claim fails.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted on May 23, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,943 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

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/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on May 23, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

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/s/ Melanie Kendrick

Addendum A

Statutes & Rules

Utah Code Section 77-17-13
Expert testimony generally – Notice requirements

(1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.

(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:

(i) a copy of the expert's report, if one exists; or

(ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and

(iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.

(2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.

(3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).

(4) (a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose

appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.

(5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.

(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

(6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Rule 702, Utah Rules of Evidence
Testimony by Experts

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(1) are reliable,

(2) are based upon sufficient facts or data, and

(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Addendum B

Cross-Examination of Kary Carter

(R3949–77)

was there [inaudible] time, other than that, tell somebody that I killed him [inaudible]. I never agreed to that part of it.

MR. EVERSHED: Okay. I have nothing further.

THE COURT: Cross-examination?

MR. JOHNSON: Yes. Thank you, Your Honor.

THE COURT: Mr. Johnson.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Carter, so you -- the sentence you're currently serving is 5 to life or --

A. [inaudible] to 15.

Q. Five to life on aggravated burglary; is that right?

A. Aggravated burglary, possession of a firearm by a restricted person and death by receiving stolen property.

Q. Don't you also have a federal conviction?

A. Yeah, from 1997.

Q. All right. And you served, what, about 11 years on that?

A. 10 1/2, and then a year violation.

Q. That was armed robbery?

A. Bank robbery.

Q. Yeah. All right. And do you have a parole date on your -- on your current term?

A. No, expiration date of 2117.

Q. 2117, so --

A. 100 years.

Q. Not in your life time?

A. Definitely not.

Q. All right. Do you have a date to see the board?

A. Next year.

Q. Next year. Do you have any information about how the board treats parole requests from prisoners serving for crimes like yours with a record like yours?

A. My matrix right now is 10 1/2 years.

Q. Your matrix does?

A. It's 10 1/2 years from the matrix.

Q. Okay. And you haven't just been granted immunity in exchange for your testimony today, have you?

A. [inaudible].

Q. The State's -- the State's promised to give you some other help, haven't they?

A. They're sitting right over there to the board.

Q. And they've actually provided you a draft, haven't they?

A. I've seen a draft letter. I haven't been provided [inaudible].

Q. Did you ask them for the letter or did they offer it?

A. No, I didn't ask them for anything.

Q. Okay. You have -- you have read the draft letter, though?

A. Yeah, I have.

Q. And if -- and if you come in and do what they've asked to you do, they're going to send this off to the board?

A. Yeah.

Q. Okay. And it's a pretty glowing letter, isn't it? Says some pretty nice things about you, doesn't it?

A. Yeah.

Q. And let me -- let me ask you: First page, last paragraph of the letter, "Mr. Hart thought it best to pin the murder on a dying man who probably did not have much time to live anyway.

Secondly, Mr. Carter was on probation for aggravated burglary, a first degree felony and he had violated his probation so a warrant was out. Mr. Carter was going to prison anyway for a while so Mr. Hart thought to callously pin a murder on his cousin."

Is that what the letter states?

A. Yes.

Q. Is that accurate?

A. We agreed to it.

Q. You -- but you went to him and you said, "Jeremiah" --

A. [inaudible] word for word what his -- tell him I was dying [inaudible] I told him so he could use my name to buy you sometime. I never said for him to say that I shot anybody.

Q. Okay. But you were never -- you were never charged for shooting anybody, they figured that out a long time ago, right, that you didn't have anything to do with it?

A. Yeah.

Q. But you he said "use my name," that would mean you're saying, "It's okay for you to put me there at that scene and I'll go into the cops and I will lie about what I had to do with it." Is that right? You said you would help him out in that way?

A. Yeah [inaudible] say that I shot anybody.

Q. Okay. So but -- but your position, the second -- the second that the jig was up that you weren't the one who was there in the car, your position remained the same?

A. [inaudible] yeah, after.

Q. Your position remained the same from then forward, right?

A. Yeah.

Q. So whether Jeremiah put it in -- put you into the suit by saying pulled the trigger or whether you got into the suit by walking in there and saying you pulled the trigger, same situation?

A. Yeah. I didn't really do [inaudible] that was his [inaudible] got arrested that night at that time when they questioned me, yeah, I said -- I told them I did it just to get it over with, they can stop bothering me.

Q. But your motivation for testifying today isn't that 2 1/2 years ago Jeremiah Hart went a little above and beyond the agreement that you two had together about you helping him out with this case, right?

A. [inaudible] expound on that so I can understand.

Q. Your motivation -- and I believe in your interview with Mr. Evershed recently -- a couple weeks ago you had an interview, correct?

A. Yeah.

Q. Okay. You said that the reason that you feel like you've been done wrong by Mr. Hart is he didn't give you all of the information back then, way back in January 2015, and that's the reason that you don't feel any allegiance to him and you're going to come in and say whatever they want you to say about them?

A. They're not telling me to say anything. I'm just saying what's -- what's [inaudible]. They're not telling me to do anything.

Q. Okay. So they came in -- when did they offer you the letter to the board?

A. Maybe the same day, I don't know.

Q. Back two weeks ago? September?

A. [inaudible] I don't know. I don't remember [inaudible] around that time, yeah.

Q. Did they come with the draft and hand it to you and

say, "Hey, by the way, we can help you out this way as well"?

A. [inaudible] let me rephrase that, no. It wasn't two weeks ago. This was a little longer than that.

Q. A little longer?

A. Yeah, maybe a month, month and a half beforehand. Because I was in a different part of the prison at that time.

Q. Okay. Who came down and provided you with this letter, this draft letter?

A. Mr. Evershed and the detective, my attorney. Because at first they tried to come talk to me [inaudible] I want my attorney present. I didn't know [inaudible] attorney at first, he told me he was. Because I didn't remember him from the first time I came up here and pled the fifth.

Q. All right. Now part of that letter has said -- and this is on the second page, third paragraph, "Mr. Carter has shown grit and true character in this murder case. Words mean something but actions say it all."

Do you feel like you've shown true grit and true character throughout this?

A. [inaudible] sometimes I forget things, but I'm here.

Q. Okay.

A. Because I didn't want to be here in the first place.

Q. According to you, you set out to deliberately to impede a murder investigation on behalf of your cousin?

A. Yeah.

Q. Is that -- does that show character and grit?

A. [inaudible] my cousin either.

Q. You say that does or does not show character and grit?

A. No, it don't.

Q. Okay. You said you gave Mr. Hart what you believed to be the murder weapon?

A. I don't know if it's the murder weapon or not.

Q. Okay.

A. I don't know if it is or not. I gave him my firearm. I got my firearm back [inaudible].

Q. Okay. You gave him a firearm, you got it back, and then you got rid of it. Why did you get rid of it?

A. [inaudible].

Q. So you couldn't have gone on Amazon.com and ordered another clip?

A. Me going on Amazon and do whatever, but I'm like, "Nah, I'm -- I'm a felon." I'm just going to [inaudible]. like I said before, I was at a bad place in my time and [inaudible] sit around waiting [inaudible] pull over [inaudible] still had plans [inaudible] something to myself [inaudible] sit around and wait.

Q. You had plans of doing something to yourself?

A. To myself [inaudible].

Q. So you wanted -- didn't have time to wait around to

go buy a new magazine for this gun, you'd thrown the gun away and wait until you find one that comes along that has a clip?

A. Yeah.

Q. That would -- okay. How did you get rid of that -- how did you get rid of that gun?

A. I gave it to somebody and they got rid of it for me.

Q. Okay. And that's your friend up at Kennecott?

A. Yup.

Q. And did you ever identify that person to the police?

A. I lied about his name.

Q. You lied about his name.

A. Yes, I did.

Q. Okay. Have you told them that before today?

A. They know that. They asked me his name, I told them I wouldn't tell them that.

Q. Okay. Why -- why won't you?

A. Because I'm not.

Q. Okay. So this is all of the conduct that you believe does show true grit and character?

A. [inaudible]. An innocent life was taken and so I mean, yeah, I'm here [inaudible].

Q. But don't you --

A. -- [inaudible].

Q. -- don't you think it?

A. You asked me a question, so --

Q. Sure.

A. -- let me answer, please. But it means it is dragging another individual down that did not -- what the use of the firearm was for and why. I honestly -- I believe in my heart that it wasn't the right thing to do to [inaudible] a person involved in this when he [inaudible].

Q. Okay.

A. [inaudible].

Q. So your friend doesn't know anything about it, but it -- but it would help the investigation, right? We could have actually confirmed that what you're saying is true?

A. Yeah.

Q. Because when you initially spoke to the police, you told them that there was nothing in your back seat when Jeremiah got out of that car and took him to the hospital, correct?

A. I honestly remember that [inaudible] don't remember.

Q. Well, you lied about all kinds of things to the police --

A. Yeah, I lied.

Q. -- at the outset, right?

A. [inaudible].

Q. On every material aspect of their investigation, correct?

A. Yeah, pretty much [inaudible].

Q. Okay. And -- and then they come around with this glowing letter to the board of pardons and parole and you change it to now you have character and grit?

A. I didn't write the letter so...

Q. Okay.

A. You can ask Mr. Evershed that -- why he wrote that, but as far as that goes, I didn't write that.

Q. It's going to help though, right?

A. To be honest with you, it may, but not my current issue. Does it matter I was in a place where I wasn't supposed to be. And they may give me more time than I've got so it might not help at all.

Q. Have you -- you haven't been charged for any conduct in relation to this case, right?

A. No. Not at this time, no.

Q. Okay. Has anyone from the State expressed to you whether they will or won't charge you?

A. No.

Q. Okay. So nobody said, "Hey, if you help us out, we -- we will let you go on all of this junk you did in this case"?

A. I was told that I couldn't be charged for this [inaudible] get charged.

Q. Do you get the sense that the likelihood of you charged is greater or less by testifying?

A. It's less but there is other law enforcement [inaudible] still charge me.

Q. Okay.

A. [inaudible] want to.

Q. All right. So you gave an interview June 3, 2015, so this is a few months after -- after you walked in there the first time and said, "Hey, yeah, I went over and shot this guy," and then they said, "No, you didn't. We know you didn't." Then you said, "All right. I didn't do it. Jeremiah put me up to -- me and Jeremiah came up with this scheme to fool you guys," right? That's how the first interview went, right?

A. Yeah.

Q. And then you have another interview in June, 2015, and this is supposed to be your coming clean interview, right?

A. Yeah.

Q. Okay. And didn't you tell the police in that interview, "I don't know if I -- I don't know if he shot him though. He never told me if he shot anybody. He didn't tell me that. I will even take a polygraph on that. If need be, I will take that." Do you recall saying that?

A. Yeah.

Q. Okay. That was your -- that was your coming clean interview, right?

A. You can say that, yeah, I guess.

Q. Okay. So then you have another conversation on September 13th, 2 1/2 years later after the incident and did you just come with -- a little more clean to say, "He did tell me that he shot that guy"?

A. [inaudible] both times I was still -- I was still trying to protect him. We were out here in a situation where I'm going to prison [inaudible] same room [inaudible]. See, yeah, if I sat there and I made up whatever to have to protect myself. So, yeah, at that time they had me in a cell with a person who was taking care of me.

MR. JOHNSON: Your Honor -- hold on a second.

THE WITNESS: Huh?

MR. JOHNSON: Your Honor, can we have a sidebar?

THE COURT: Yes.

(Bench Conference.)

MR. JOHNSON: I think perhaps --

MR. EVERSHED: He didn't identify him.

MR. JOHNSON: [Inaudible] I think we need to --

MR. EVERSHED: If I think if we draw anymore attention. Let's just finish the witness and then let's address it.

MR. JOHNSON: Okay.

THE COURT: Okay.

(End of Bench Conference.)

Q. (BY MR. JOHNSON:) Mr. Carter, you can strike that

last question. I'm going to focus on your June 3, 2015 interview. All right. Now in that June 2015 interview -- all right. June 2015. Do you recall -- and do you recall that was with Mr. Meister and Jim Spangenberg? Does that sound familiar?

A. Yeah.

Q. Vince Meister. Do you recall telling them that Jeremiah Hart said nothing about a gun, that you asked about it and he said nothing about it?

A. Yeah.

Q. By September, not only did he talk to you about a gun, he asked you for a gun, you gave him a gun, he took a gun with an extended clip, came back and gave you back the gun and you went and got rid of the gun?

A. Once I saw they were charging him with five to life, when he was walking out the door, I [inaudible]. So I did tell the truth.

Q. All right. Stop. Stop for a minute right there. Who told you that you're going to be charged with another five to life? Vince Meister?

A. Yeah, he told me he could charge with me five to life.

Q. For obstruction?

A. Yeah.

Q. And that influenced what you were going say from then

forward, correct?

A. If I was going to come forward and tell my side, yeah.

Q. All right. You were looking at a five to life for obstruction, first degree felony?

A. Yeah.

Q. Did you ever -- did you ever determine whether there is such a thing as first degree felony obstruction of justice?

A. No, I've heard that you could -- it could be enhanced, so [inaudible] it can be enhanced.

Q. Okay. How -- did you ever hear how it can be --

A. I just asked. I just asked.

Q. -- enhanced? All right.

A. No, I didn't.

Q. So how would you feel if -- if you knew that -- that's not true, there is no such thing as first degree felony obstruction.

A. [inaudible].

Q. What's that?

A. Found out about that along -- later down the road I found out about that.

Q. Okay. In that June 2015 interview, do you recall saying that you don't know where the gun is?

A. Yeah.

Q. Do you recall saying that the gun was melted down?

A. Yeah.

Q. Recall saying that Mr. Hart got rid of the gun by melting it down?

A. [inaudible].

Q. Okay.

A. [inaudible].

Q. At one point you said he did it, at another point you said you did, does that sound about right?

A. No. No. I already admitted that I got rid of it.

Q. Whose idea was it -- whose idea was it for you to get drawn in to whatever the heck happened there in Sugarhouse?

A. Like I said before, I brought it up.

Q. That was you. That was you. So -- so if -- if Jeremiah Hart and he told he said, "I think these guys are building a case against me," right? And he explained it to you that he got shot and you said, "Well, that looks like -- that looks like" --

A. He didn't say nothing about they're building no case, nothing like that, no. I said it was self-defense. Said [inaudible] happens to be the case, it would be self-defense and there was -- I was told he -- I was told he said, "There is no such thing as self-defense." I says, "Yeah, there is because I had gotten self-defense back in 1996."

Q. So you were going to help him out on a self-defense case?

A. Yeah, because I believed it to be so.

Q. All right. So and -- without getting into details, I think you told me that -- that Mr. Hart has taken care of you through a lot of medical conditions; is that correct?

A. Yeah.

Q. And -- and did he -- he let you live with him before all this happened?

A. Yeah. As soon as they're violate -- they violated his parole.

Q. All right. You guys -- before all of this happened, you two lived together on --

A. Yeah.

Q. -- on the streets, yeah?

And he -- he helped take care of you, and for how long? How long in your life did Jeremiah Hart help take care of you?

A. Do you think it's a -- a few times take care of a few situations when I was a kid and then just recently. And then I've been locked up the majority of my life, so it's been off and on pretty much here and there.

MR. JOHNSON: Your Honor, I'd like to take a brief recess to consult --

THE COURT: Can you approach?

MR. JOHNSON: Yes.

(Bench Conference.)

MR. EVERSHED: I don't think my redirect is going to be very long. Can we just finish with him?

MR. JOHNSON: I want to -- I need to talk to my client about what we're going to do, whether I'm going to take it one direction or not.

THE COURT: I think -- I think when we're in the middle of an exam, we need to finish the exam.

(End of Bench Conference.)

MR. JOHNSON: Thank you, Your Honor.

Q. (BY MR. JOHNSON:) So it would be fair to say that Mr. Hart has been like a father figure to you since you were a child?

A. A father figure?

Q. He's stepped in and taken care of you at times when you've had some troubles, particularly when you've been in ill health?

A. Yeah.

Q. Okay. Now, you testified that your motivation -- you've kind of testified to three different motivations now. One, that you didn't -- he wasn't straight with you at the outset, right? That was one motivation for changing the story.

A. That's not why I'm here.

Q. Okay. Another motivation was Vince Meister told you you're looking at five to life unless you come clean?

A. I never said that was the reason why, not one time.

Q. I think you actually just testified --

A. No, I said that Vince Meister told me I would get charged with a five to life.

Q. Yeah.

A. Other than that, that's not why I was here in the first place.

Q. Okay. But you said at that point in June that's why you changed your mind and started telling a different story, right? A story that corroborated --

A. It has no -- nothing to do with Vince, period.

Q. Okay. But it had -- you said I was looking for a five --

A. Didn't say that.

Q. -- to life and once I thought I was looking at another five to life, I started getting wise; is that correct?

A. Yeah.

Q. Okay. I'm just going to ask you one more time, yes or no, do you think that you've conducted yourself with true grit and character throughout this murder case?

A. Honestly, because my memory is a little bad, [inaudible] sometimes, yeah.

Q. Okay. Yes and no then?

A. Yeah.

Q. Fair enough.

MR. JOHNSON: That's all I have.

THE COURT: Redirect?

MR. EVERSHED: Yes.

THE COURT: Mr. Evershed.

MR. EVERSHED: Your Honor, a lot of has been made about a 1 1/2-page letter to the board. A couple things have been read. I would just ask under the doctrine of completeness that it just be entered in as an exhibit.

MR. JOHNSON: Maybe put it in as Defense 2 or --

MS. VISSER: 3.

MR. JOHNSON: Defense 3. We can put it in as Defense 3.

THE COURT: Any objection to the Defense 3?

MR. EVERSHED: No, Your Honor.

THE COURT: Defense 3 is admitted.

(Defense Exhibit 3 was received into evidence.)

Q. (BY MR. EVERSHED:) I will follow-up with that last part. Character and grit. Okay. Specifically what it says, "Words mean something but actions say it all." Okay. "Mr. Carter has shown true change by his actions."

Speaking of grit and character, what's it like for you, Kary, to testify here with your cousin? Is this easy for you?

A. No.

Q. Okay.

A. It's -- no, it's not. I thought I was [inaudible]

something like this.

Q. For you to be here and tell us what you've experienced through this whole thing, through this homicide, we're talking about a dead person here, and -- and to tell us your part, what's that like for you?

A. As far as what I'm going through emotionally or --

Q. Yeah.

A. [inaudible].

Q. Like, right now.

A. Just period?

Q. Like emotionally, what is this like for you to be here?

A. I know -- I know I ain't want to be here but...

Q. Okay.

A. It's hard for me to be here. There is consequences for everything.

Q. Okay. Your first interview and this is -- this is mentioned in this letter. You had an interview February 19, 2015, the police, you originally gave them a lie. At that same interview did you begin to tell them the truth?

A. Yeah.

Q. Okay. So in the words on cross-examination you were impeding a murder, but you were impeding a murder only during that interview where you later learned the truth?

A. Yeah.

Q. When you say -- I want to understand this in terms of -- I want to get to your state of mind. When you say January 2015, February 2015 you were just ready to do something to yourself. What do you mean by that?

A. I was willing just to take my own life or have the police shoot me.

Q. Is that why you had a gun?

A. Yeah. Part of the time, yeah, and protect myself.

Q. Why were you just willing to shoot yourself?

A. Just get tired.

Q. Okay.

A. Get tired after a while. I mean, I get tired [inaudible] just get tired of everything at times. And that's just sometimes the way I tend to deal with stuff.

Q. And you said you had some experience with self-defense in your own case, but you don't have a legal degree, correct?

A. No, I do not.

Q. All right. And then finally it was mentioned on this January 3, 2015, interview with that you -- there was no mention of a gun, but in fact, there was mention of a gun, right? Didn't you tell the investigators in that interview that Jeremiah pulled a gun out on the guy in the car? Do you remember saying that? Saying that in the June of 2015 interview?

As a matter of fact -- obviously, that's more than two years ago. It's hard to remember; is that right?

A. Yeah, I hardly remember that.

Q. So isn't it true that Vince Meister asked you, "So Jeremiah says he pulled out a gun." Your response --

MR. EVERSHED: Sorry, counsel, it's page 17.

Q. (BY MR. EVERSHED:) Your response is: Unintelligible on the guy in the back seat and you said he pulled the gun out. Your responsible was okay. And then -- and then you said and then he pulled [inaudible] dude in the back seat. Vince Meister said, "Right."

And then you said, "I guess the individual in the front seat told him you guys aren't going to need that. And he turned around and supposedly this -- this is going to be honest, this is what we -- he told me, he had the gun -- he had the gun on the dude, he had the gun on the dude, the other one in the front seat pulled around, came around and shot him and then from there he told me he shot back."

You said that in the June 3, 2015 interview; is that correct?

A. No, I don't remember that.

Q. You don't remember that, but if we have a transcript from June 3, 2015, and I can -- do you want me to show it to you?

A. You can show it to me, but I see how --

MR. EVERSHED: Can I just approach, Your Honor?

THE COURT: You may.

THE WITNESS: I don't remember that.

Q. (BY MR. EVERSHED:) At the top of this does it say, Detective Jim Spangenberg, Detective [inaudible] in prison, June 3, 2015. And VM stands for Vince Meister, KC stands for Kary Carter and in that -- on this transcript I understand you don't remember that, does that in fact state the words that I just mentioned?

A. It does say that.

Q. Okay.

A. I don't remember saying them.

Q. You have no reason to dispute that transcript?

A. I just don't remember saying it.

MR. EVERSHED: Okay. All right. Nothing further.

THE COURT: Recross?

MR. JOHNSON: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. JOHNSON:

Q. So elephant in the room, you and Jeremiah spent a year in prison together after this happened, correct?

A. Yeah.

Q. You're actually cellmates?

A. Yeah.

Q. And you're in a wheelchair?

A. Yeah.

Q. And he was your ADA assistant?

A. Yeah.

Q. He took care of you?

A. Yeah.

Q. He is your caretaker?

A. Yeah.

Q. And he's been fighting this case for 2 1/2 years?

A. Yeah.

Q. And he talks to you about this case, he gives you all of the details?

A. Never has he.

Q. What's that?

A. Never has he.

Q. He never has what?

A. We've never sat down and had a conversation.

Q. You've never had a conversation about this case?

A. No.

Q. How did you get the information that you just testified to?

A. [inaudible] as far as what? My firearm, giving him the firearm.

Q. You said he told you that he shot the guy.

A. No. This is on the street. He -- we've never sat down and had no conversation about the details, no, we have

not.

Q. In a year as cellmates you never had a conversation?

A. Never sat down [inaudible].

Q. All right.

A. Not like that.

Q. And -- and he had all his legal work in there?

A. Never looked through it.

Q. You never looked through his legal work?

A. Never.

Q. Not when he went to the gym?

A. Never.

Q. Not when he went to the shower?

A. Never.

Q. Not when he went to court?

A. Not one time.

Q. Not when he went to the doctor?

A. How many times [inaudible] I just told you, [inaudible] one time.

Q. You had access though?

A. It was in the room. Yeah, we're cellies. But no, I have no --

Q. And your story evolved over time while you guys -- from February the first time you talked, to June, your story evolved, right?

A. Like I said, I ain't never read his paperwork.

Q. And you had details.

A. Never read his paperwork.

Q. Never read his paperwork?

A. Nope.

Q. How long did you guys know each other on the outside?

A. [inaudible] known him since I was a kid.

Q. So you've known him your whole life?

A. Yeah.

Q. Known him your whole entire life, you guys never had a conversation about this case while you're in prison together?

A. No, because honestly if we really had, I probably wouldn't be up here. If we had, neither one of us would be here. He wouldn't be here because then I knew the whole story [inaudible].

Q. So your testimony today is you have -- you have no idea about the details of his case --

A. No.

Q. -- either from talking to him or from his paperwork in the cell that you guys shared together for a year.

A. Never ever read his paperwork, never. Never sat down to have a conversation about nothing.

Q. Okay. Take your word for it. Thank you.

THE COURT: Redirect.

MR. EVERSHED: Just a moment.

Just a couple questions.

THE COURT: Mr. Eversed, thank you.

REDIRECT EXAMINATION

BY MR. EVERSHED:

Q. So last time I was up here, Kary, we went over this transcript.

A. Uh-huh.

Q. Where -- where you mentioned and then from there he told you he shot back. Okay?

So did Jeremiah tell that to you?

A. This wasn't in -- this wasn't in prison.

Q. It wasn't in prison. So you never had a conversation with him in prison?

A. It was never.

Q. But you've had conversations -- you had a conversation with him outside of prison?

A. That was one time.

Q. Okay. One time --

A. [inaudible] came over to him, just his self-defense, that's why I told him it was self-defense.

Q. Is that when he told you certain things that happened in the car, about how he shot back?

A. I can't remember that far back.

Q. Okay. But it wasn't -- so your testimony.

A. It was never was in prison, no.

Q. Okay. So your testimony is -- today he never told

you these things in prison, it was outside of prison that you learned this from him?

A. Yeah.

MR. EVERSHED: Okay. Nothing further.

MR. JOHNSON: Nothing -- nothing else, Your Honor.

THE COURT: Okay. Any reason this witness should not be excused. From the State?

MR. EVERSHED: No.

THE COURT: Defense?

MR. JOHNSON: No, Your Honor.

THE COURT: Okay. You're excused from the courthouse, Mr. Carter. Okay. We'll go ahead and take a break. Let's take a break. We'll excuse the jury.

I want to remind the jury not to discuss the case during breaks.

THE BAILIFF: Remain seated for the jury.

THE COURT: Counsel, could you approach?

MR. JOHNSON: Yes.

(Bench Conference.)

THE COURT: I just -- at a sidebar just want to make clear on the record, there was a decision made by defense counsel to introduce the issue --

MR. JOHNSON: That he was in prison.

THE COURT: That he was in prison since the time of the alleged crime. And I assume based upon seeing this that

was a decision you made after consulting with your -- your client as part of a decision as to how to cross-examine this witness?

MR. JOHNSON: Correct.

THE COURT: Okay. I just wanted that to be clear.

MR. JOHNSON: And because it came out three times during ahead of time so...

THE COURT: It terms of that went --

MR. JOHNSON: Yeah, in terms of --

THE COURT: In your cross-examination.

MR. JOHNSON: -- before I made that decision, yeah.

THE COURT: And I didn't hear it come out on the State's examination of the witness.

MR. EVERSHED: No. No. Nothing came out on the State's --

THE COURT: Okay. I just want to make sure the record is clear on that.

MR. JOHNSON: Certainly. That this was not some kind of mistake or issue like that, it was a strategic decision the defense has made in consultation with the defendant. Just wanted the record to be clear on that, to make sure I'm not misunderstanding.

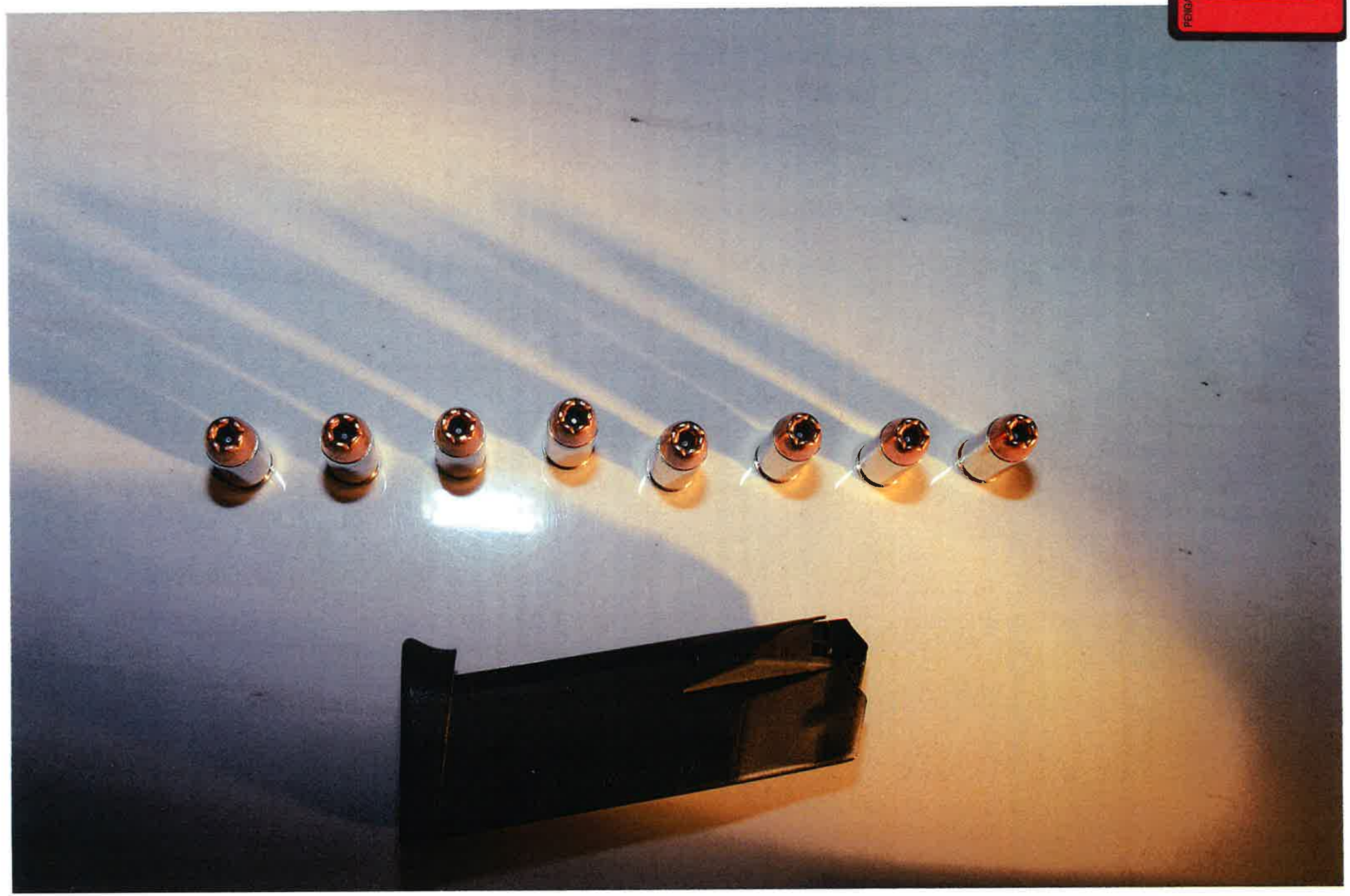
MR. EVERSHED: Since we're now talking about that and since we're here, does this change the analysis for Your Honor and for anyone else when it comes to that video?

Addendum C

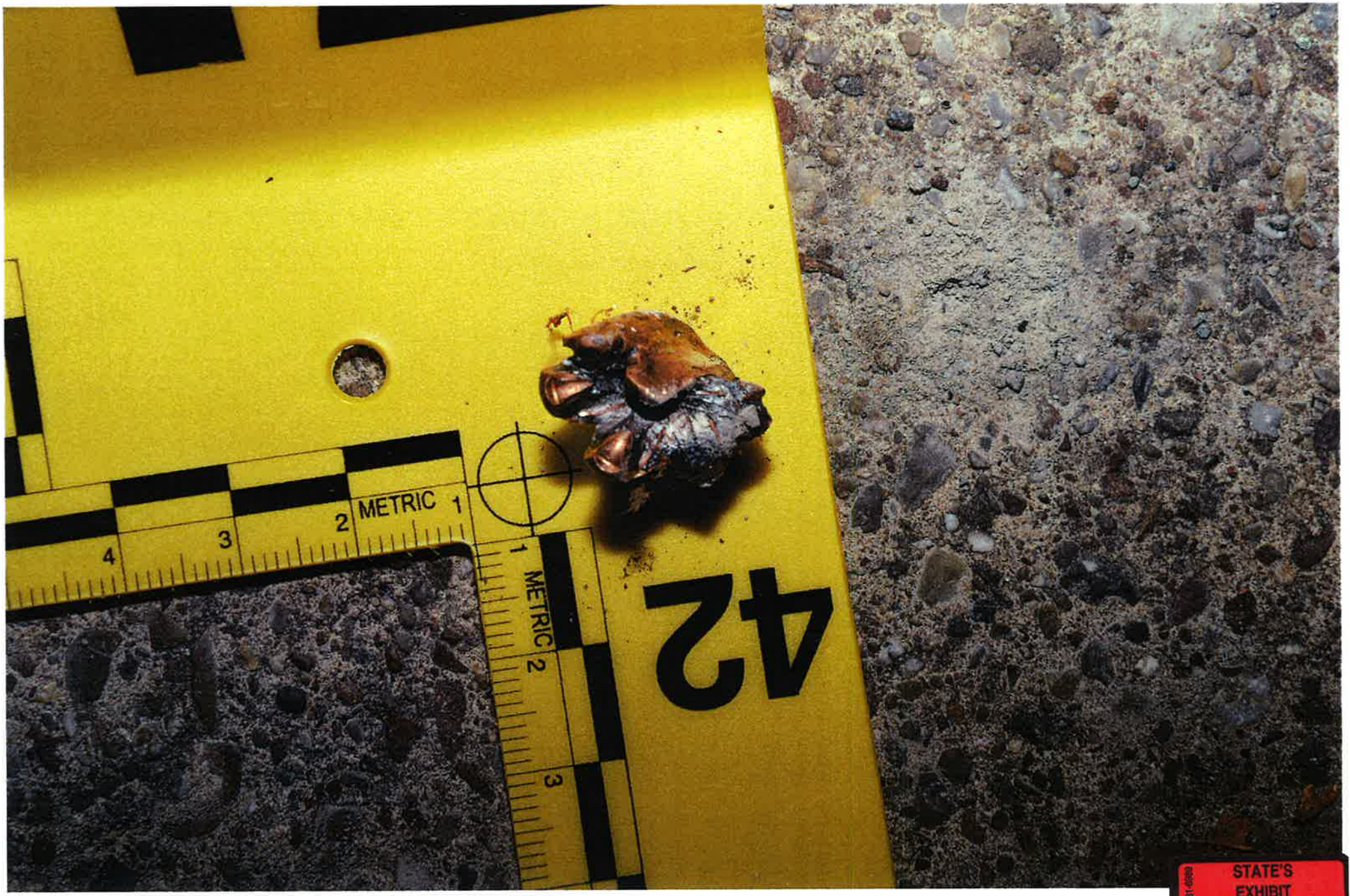
Gun Exhibits

STATE'S EXHIBIT
16

PENGAD 800-631-6989



STATE'S EXHIBIT
20
PENG4D 850-831-6969



STATE'S EXHIBIT
23

STATE'S EXHIBIT
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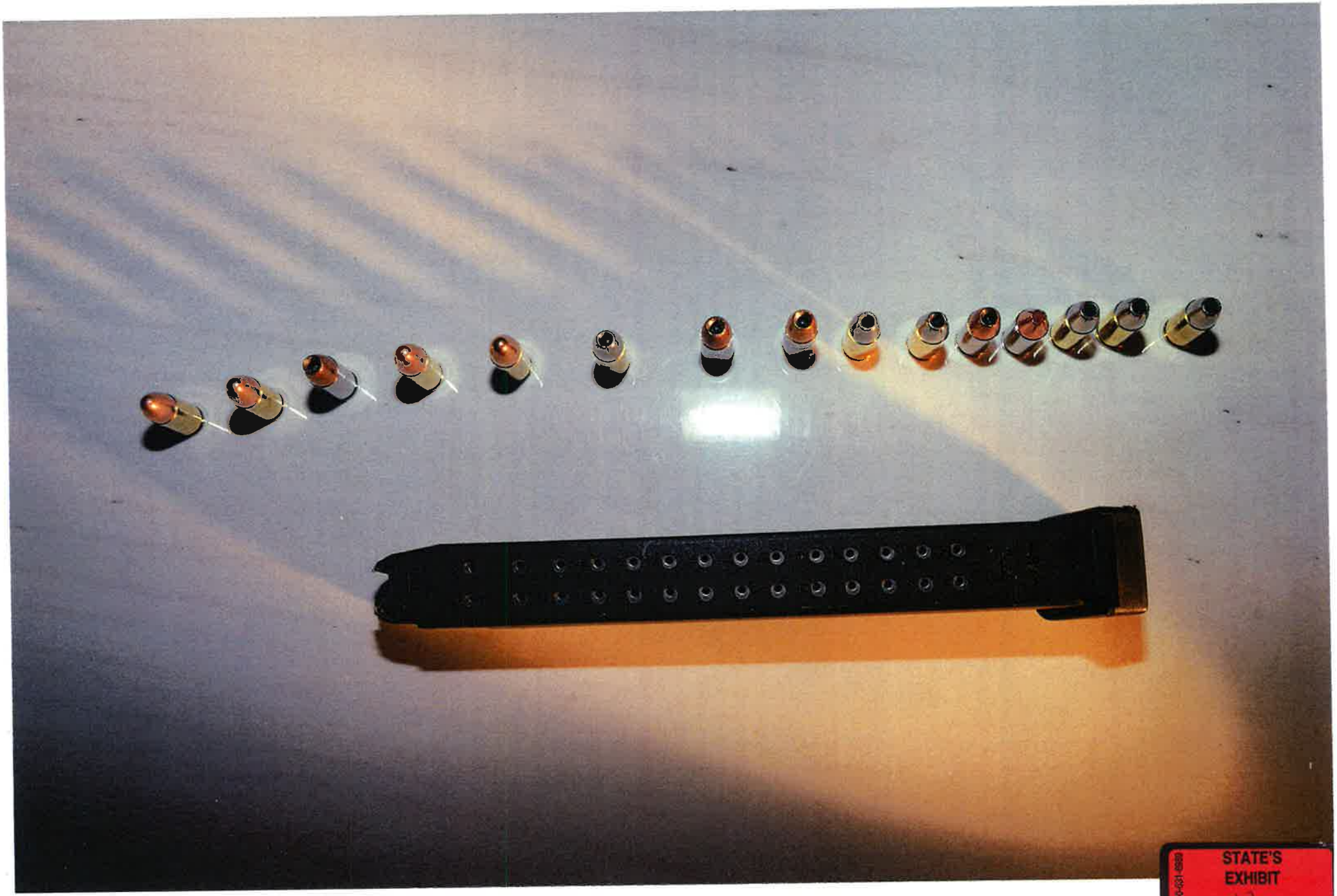
STATE'S EXHIBIT
11
35
METRIC
KESON
6½ FEET



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STATE'S
EXHIBIT
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STATE'S EXHIBIT
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5/5/2015


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STATE'S EXHIBIT
S10

Addendum D

Bloodstain Exhibits


STATE'S
EXHIBIT
5

STATE'S EXHIBIT 60

STATE'S EXHIBIT
26


STATE'S
EXHIBIT
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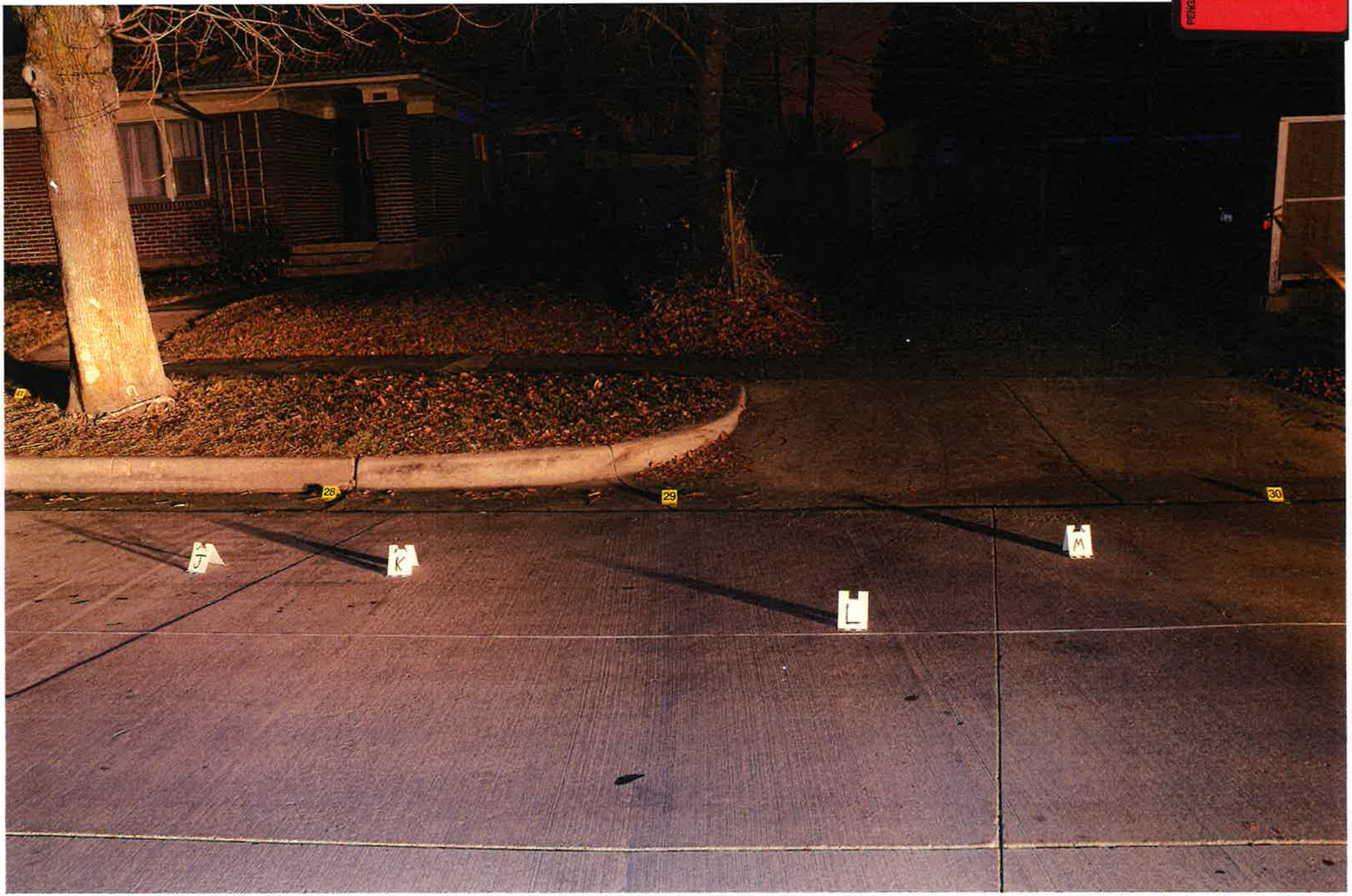
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