Case No. 20180095-CA

IN THE

UTAH COURT OF APPEALS

State of Utah
Plaintiff/Appellee

v.

JEREMIAH RAY HART
Defendant/Appellant

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND CONVICTION OF AGGRAVATED MURDER, OBSTRUCTING JUSTICE AND POSSESSION OF A DANGEROUS WEAPON BY RESTRICTED PERSON IN THE THIRD DISTRICT COURT

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The Defendant is Incarcerated in the Utah State Prison

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ARGUMENT

The State argues that ineffective assistance of counsel is always a function of whether "no competent attorney" would have proceeded as counsel did. Br.St., p. 18, citing *Premo v. Moore*, 562 U.S. 115, 124 (2011). *Premo* is inapposite and its application misleading. Habeas corpus cases involving guilty pleas, a defendant's buyer's remorse, and attempts to set aside a guilty plea, are distinguishable from those involving in trial strategy. "Acknowledging guilt and accepting responsibility by an early plea responds to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place." *Premo v. Moore*, 562 U.S. 115, 124, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649 (2011). That is not at all what is involved in the instant matter.

The central question during the course of trial always comes down to whether or not counsel failed "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688, 104 Sup. Ct. 2052 (1984).688, 104 Sup. Ct. 2052 (1984). Defense counsel's failure to do so in this instance was a "demonstrable reality."

The State's assertion that the determination, "does not turn on a binary consideration of whether counsel's actions were strategic," referencing *Roe v. Flores-Ortega*, 528 U.S. 470, 481, is also misleading. Br.St., p. 18. *Flores-Ortega* dealt again with the question, on a petition for habeas corpus, of whether it was not *per se* deficient for defense counsel to fail to file a notice of appeal from a plea of guilty. The Court merely held that, under these particular circumstances, a defense attorney has a constitutionally mandated duty "to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id., at 480. Neither the facts nor the holding of that case are germane to the decisions made by defense counsel in the instant matter.

It is undisputed that appellate courts give "wide latitude to trial counsel to make tactical decisions and 'will not question such decisions unless there is no reasonable basis supporting them.'" *State v. Bedell*, 2014 UT 1, ¶ 23, 322 P.3d 697, 704 quoting *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996); Br.St., p. 19, citing *Bedell*, ¶¶21–25. The problem is that the State confuses cases involving tactical decisions of counsel, which in

most cases cannot be second guessed, with those cases where counsel is simply wrong on the law and acts, or fails to act, based upon the error.

When a lawyer fails to assert beneficial, current law, this constitutes objectively deficient performance that cannot be excused on the basis of tactical decisions. See *State v. Moritzsky*, 771 P.2d 688, 692 (Utah App. 1989). Failure to object to prejudicially irrelevant testimony, or as in this case, request a mistrial in the face of clearly prejudicial evidence of prior conviction of a felony and prison sentence, constitutes deficient performance. *State v. Hutchings*, 2012 UT 50, ¶¶ 19-23, 285 P.3d I 183; *Moritzsky*, 771 P.2d at 692. It is axiomatic that failing to provide adversarial testing as to a single issue, when that issue is critical to a finding of guilt, may in itself produce a breakdown in the adversarial process warranting a mistrial. *United States v. Cronic*, 466 U.S. 648, 657, n. 20, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Contrary to the State's assertion, Hart has shown 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.

POINT I

NO REASONABLE COUNSEL WOULD HAVE FAILED TO OBJECT TO EVIDENCE OF A PRIOR CONVICTION AND INCARCERATION AND ALL REASONABLE COUNSEL WOULD HAVE MOVED FOR A MISTRIAL GIVEN THE STRONG LIKELIHOOD THAT A MISTRIAL WOULD HAVE BEEN GRANTED.

Evidence of a prior conviction and imprisonment, especially where it is recent, is devastating to a defendant in a criminal trial. The Rule is very clear: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show

that on a particular occasion the person acted in conformity with the character." Utah R. Evid. 404(b)(1). Kary Carter's testimony regarding Mr. Hart's prior imprisonment in the Utah State Prison could have left no other impression than that he was a person of low character, i.e., a "criminal." The evidence plainly did not speak to "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 404(b)(2). It was wholly inadmissible. Evidence of prior bad acts is "admissible under rule 404(b) if the evidence is relevant to a proper, non-character purpose, unless its danger for unfair prejudice and the like substantially outweighs its probative value." *State v. Holbert*, 2002 UT App 426, ¶ 29, 61 P.3d 291, 297, quoting *State v. Widdison*, 2001 UT 60,¶ 41, 28 P.3d 1278.

The determinative question "is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega, supra*, 528 U.S. at 481. The State's argument is contradictory. The State argues that a mistrial would not have been granted, so defense counsel, for strategic reasons, did not bother to make objections or mistrial motions. Br.St., p. 20.[1] On the other hand, it argues that such motions may well have succeeded, but the consequences would have been unbearable because of the ramifications a new trial would visit upon Mr. Hart, i.e., the motion(s) was sufficiently strong that counsel could not risk winning it. Id.

The basis of defense counsel's inaction is all, of course, rank speculation. Again, the determinative question "is not whether counsel's choices were strategic, but whether

[1] "(C)ounsel could have reasonably decided that a mistrial motion was unlikely to succeed in any of the three circumstances . . . ." Br.St., p. 20.

they were reasonable." *Roe* at 481. They were not reasonable.

POINT II

COUNSEL WAS INEFFECTIVE FOR NOT MOVING FOR A MISTRIAL WHEN A WITNESS REFERRED TO A SECOND FIREARM UNCONNECTED TO THIS CASE.

When Derek Mears, Salt Lake Police Crime Lab Firearms Expert, testified that he examined two firearms which he had received in evidence, and that "I examined this particular firearm (the Taurus) and another firearm that was submitted as well," R.3886-3887, the jury well could have concluded that the reason "another firearm" was submitted was that it was tied to Mr. Hart. The later testimony of the witness that it was "just available" to him in the lab, R. R3921, hardly cured the impression of his initial testimony.[2] Contrary to the State's contention, Br.St. p., 26, the cure was insufficient to dispel the initial impression of the testimony and no competent counsel would have come to that conclusion. That would have been an entirely reasonable inference based upon the nature of the witness as an expert and his testimony. True, efforts were made to clarify that it was merely a "comparison" gun, R.3900-01, but as defense counsel indicated at the time, "the cat is out of the bag at this point. We're talking about he's seen two guns as a part of this case." R.3901. And the court had, contrary to the State's position regarding the unlikelihood of a mistrial being granted, Br.St., p. 28, already made clear to the State

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[2] See https://pendletonupdates.com/2017/01/16/the-rule-of-primacy-the-cornerstone-to-effective-trial-advocacy-plus-some-bonus-acting-tips/ ("Rule of Primacy:" Jurors tend to believe what they hear first). "Lasting impressions are probable, in spite of advice from the judge that the jury should not make up its mind until all the evidence is in. Jurors often begin making decisions just as soon as they receive information about the case." Pattern Discovery: Tort ActionsPDTORT § 27:3TrialDouglas Danner, Larry L. Varn, and Amy M. Dorsey, § 27:3.Importance

that "you risk a mistrial." R.3899.

So at this juncture of the bench discussion, it seems clear that defense counsel understood the ramifications of the two guns being attributed to the defendant, as well as the court's inclination to grant a mistrial, and counsel's willingness to push the issue. R.3901. Counsel was not reticent about stating his position that the "cat is out of the bag" on the very heals of the court indicating that the State was at risk of a mistrial. Of course the discussion was not over and the issue seemed to be resolved. But, irrespective of whether a mistrial motion, had it been made, would have been granted, this colloquy puts the lie to the the State's argument that counsel feared to request a mistrial because it might be granted.

The State contends that whether a mistrial was warranted is not the relevant question for deficient performance and that Hart must prove that all competent counsel would have moved for one. Br.St., p. 22. He has met that burden. All reasonably competent counsel would have moved for a mistrial.

As was enunciated in the defendant's Opening Brief, the evidence was prejudicial by introducing it in the manner in which it was presented in the first place. Br.Aplt., p. 30. It is the persistence of the issue and the perseveration devoted to the subject that tainted and leant further error to what was already a seething problem. The "stipulation" did not solve the lingering doubt that the jury would assume the reason the gun was submitted was because it was tied to the defendant. The defendant has established that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." See *Kimmelman v. Morrison*, 477 U.S.

365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Defendant contends that the trial was tainted by this evidence, which had questionable relevance under Utah R. Evid. 402 in any event. As was previously stated, the reason for the State presenting this "demonstrative" evidence is highly suspect. Br.Aplt., p. 30. Defense counsel failed to rise to the standard required by contemporary professional norms and that he was entirely remiss in failing to adhere to the courage of his prior stated convictions by failing to stand by his initial objection and request a mistrial.

The evidence was more prejudicial than it was probative and should have been disallowed under Utah R. Evid. 403. Having allowed it, Mr. Hart was seriously prejudiced, and a mistrial, had it been requested, should and likely would have been granted.

POINT III

COUNSEL WAS INEFFECTIVE WHEN, INSTEAD OF MOVING FOR A MISTRIAL, HE DOUBLED DOWN ON THE WITNESS'S VOLUNTEERED STATEMENTS ABOUT HART'S PRIOR CONVICTION, BROKEN PAROLE, AND INCARCERATION, WHICH HAD NO EFFECT WHATSOEVER IN UNDERMINING THE WITNESS'S TESTIMONY.

If, as the State argues, defense counsel was actually prepared for Kary Carter to testify that he and Mr. Hart were in prison together, Br.St., p. 29, why then did defense counsel not take prophylactic measures? Defense counsel could and should have requested that the court admonish the witness not to mention anything to do with the subject. That is what every reasonably competent defense attorney would have done. But it is apparent that either defense counsel was too inexperienced or too unprepared to suggest such a reasonable approach.

The State suggests that, well it is just one issue, and the breakdown in the adversarial process has to be "entire," quoting *Bell v. Cone*, 535 U.S. 685, 696–97 (2002), quoting from *United States v. Chronic*, 466 U.S. 648, 659–62 & n.26 (1984). Br.St., p.30, n. 6. In other words, the State apparently maintains that counsel has to botch the entire trial in order to be ineffective. But that is specifically what *Cronic* does not say. "Of course, the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well." *United States v. Cronic, supra*, 466 U.S. 648, 657, n. 20.

The State indicates that after Kary Carter made his initial statements, which clearly implicated Mr. Hart as his cellmate in prison, "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." Br.St., p. 32, referencing R3976–77. This is stated as though conferring with his client would somehow insulate his lack of perspicacity, preparation, or skill as a trial lawyer, from a claim of ineffective assistance. It does not. In this regard, the United States Supreme Court has stated the following:

The ABA Model Rules of Professional Conduct provide:

> "A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.... In a criminal case, the lawyer shall abide by the client's decision, ... as to a plea to be entered, whether to waive jury trial and whether the client will testify." Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).

> With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.

Jones v. Barnes, 463 U.S. 745, 753, 103 S. Ct. 3308, 3313, 77 L. Ed. 2d 987 (1983). The Court's quotation from the Model Rules mirrors Utah Rule of Professional Conduct 1.2(a). And as stated in the Comment to URPC 1.2, "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." Official Comment 2. The conclusion is that defense counsel cannot hide behind their clients. They must take responsibility for decisions which are beyond the scope of the client's knowledge or understanding. The instant case presents just such a circumstance.

The decision to jump into the frying pan belonged to defense counsel. It was a desperate play, with no upside. The court showed its obvious concern (which leads one to conclude that a mistrial would have been granted if it had been timely sought). Br.Aplt., p. 35-36; R.3936-3997. Counsel's announcement that he had made a "strategic decision" was both too little, too late, and disingenuous. The entire episode, as set forth in Point II of Mr. Hart's Opening Brief, amounted to defense counsel's gross negligence. The critical question, whether counsel's performance was so deficient that the process "lost its character as a confrontation between adversaries," producing an "actual breakdown in the adversary process," must be answered in the affirmative. *United States v. Cronic*, 466 U.S. 648, 654 – 58 (Internal cites omitted). The result was extremely prejudicial, and no amount of strategic cross-examination or closing argument could

possibly overcome the resultant prejudice.

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled." *Strickland* 466 U.S. 684-85. The complete failure of defense counsel in this instance so prejudiced the defendant that he is entitled to a reversal and remand for a new trial.

POINT IV

COUNSEL WAS INEFFECTIVE FOR NOT MOVING FOR A MISTRIAL WHEN THE JURY ASKED A QUESTION DURING DELIBERATIONS.

Notwithstanding the State's carping that his issue was inadequately briefed, this Court is redirected to Point III of the Defendant's Opening Brief. It is contended there, as here, that the trial court's failure to adequately explain to the jury when a question was asked about the Defendant's DNA on a jacket that the jacket was the Defendant's, was a clear abuse of discretion. This Court has stated the following:

> We acknowledge that there is little "procedural guidance" governing the proper handling of written questions submitted by juries in the course of deliberation. See *State v. Ison*, 2006 UT 26, ¶ 42, 135 P.3d 864. However, our caselaw provides some direction. For a defendant to successfully argue that the trial court erred in its treatment of a question from the jury, he must show (1) that the response given to the jury was incorrect or somehow misinformed the jury and (2) that there is a reasonable likelihood the jury's verdict would have been different if a correct response had been given.

State v. Ojeda, 2015 UT App 124, ¶ 9, 350 P.3d 640, 644. In this instance, the trial court simply refused to clarify what was obviously confused. The non-answer from the court

simply misinformed the jury by reinforcing whatever misimpression it already had. If the jury thought the jacket belonged to Christian McDonald, that definitely would have amounted to prejudicial error of titanic proportions.

The subject was not inadequately briefed. "An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *State v. Dennis*, 2007 UT App 266, ¶ 13, 167 P.3d 528, 532. The point was made clearly and succinctly and no burden was placed upon this Court.

The prejudicial error merits reversal and remand.

POINT V

IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL FAILING TO OBJECT WHEN LEAD DETECTIVE TESTIFIED TO BLOOD SPATTERS AND DROPS FOUND IN AND ABOUT THE VICTIM'S BODY MATCHED THE DEFENDANT'S DNA, WHERE THE DETECTIVE WAS NOT NOTICED OR QUALIFIED AS A BLOOD PATTERN EXPERT.

The State is apparently of the belief that by relabeling Detective Spangenburg, the "Case Manager," that somehow elevates him to a position of expert. Br.St., Point II, passim. It does not, of course. But perhaps it has more gravitas to characterize the detective in that fashion. Further, the State speculates that defense "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." Br.St., p. 47. This is nonsense.

As explained in detail in the Defendant's Opening Brief, defense counsel simply

sat on his hands and failed to object to any of the damning evidence regarding blood spatters the witness presumed to come from the Defendant. Br.Aplt., pps. 46-47. That counsel may have attempted subsequently to utilize the evidence admitted due to his failures in order to poke holes in the State's evidence hardly excuses his failure in the first instance. Secondly, it is absurd to posit that a defense attorney didn't make a potentially viable objection because it might not have succeeded. Defense attorneys would make precious few objections if that were the prevailing calculus and professional norm. There was no downside to making an objection which had a reasonable likelihood of being sustained, and would have prevented prejudicial testimony and evidence from being presented to the jury. In this regard, it is settled law that when a lawyer fails to assert beneficial, current law, this constitutes objectively deficient performance that cannot be excused on the basis of tactical decisions. *State v. Moritzsky, supra*, 771 P.2d at 692.

The State concedes that "(t)he (forensic) 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." Br.St., p. 49 citing R3740. The State's statement that the case manager presented the opinions he drew from the evidence as the detective assigned to the case and merely repeated the forensic DNA analyst's conclusion, Br.St., p. 49-50, is merely a rationalization for presenting him as an expert, which he was not and he should not have been allowed to testify as one.

Spangenburg testified for example to the ultimate question, based upon not only hearsay but the "opinion" testimony of others, in a very real sense bolstering the

testimony of the opinion of others, which is also impermissible. See Utah Rule of Evidence 608(a). This is not, of course, the classic case of "bolstering" under Utah R. Evid. 608(a), i.e., where one witness vouches for the credibility of another. See *State v. Stefaniak*, 900 P.2d 1094, 1095 (Utah Ct. App. 1995). In the same sense, however, the testimony of Detective Spangenburg implicitly and strongly vouched for and bolstered the testimony of the forensic examiners who testified. For example, Detective Spangenburg opined, without any foundation as to his own expertise, as follows:

Q. Was there, in fact -- let me back up one step, I guess. Was there a swab taken of this blood marked C?
A. Yes.
Q. And then was that swab submitted to Sorenson Forensics for DNA testing?
A. Yes.
Q. Was that compared to Jeremiah Hart?
A. It was.
Q. And what was -- what was the conclusion?
A. It came back as his blood.

R.4167. This testimony lacked foundation, was hearsay, was expert opinion testimony from a non-expert, and had the effect of bolstering subsequent witnesses. Counsel was objectively deficient in failing to object to the testimony and the defendant was seriously prejudiced as a result.

Mr. Hart contends the "expert" testimony from detective Spangenburg, no matter how you characterize him, was impermissible for the reasons stated in his Opening Brief, Point IV. A more favorable result would no doubt have followed had this evidence, tracing the blood to that of Mr. Hart, been disallowed. It would have had counsel for the defense not been objectively deficient in his performance and countenanced a breakdown in the adversarial process of a sufficiently serious magnitude that this Court should

reverse and remand for a new trial.

POINT VI

THE CUMULATIVE EFFECT OF THE COMBINED ERRORS REQUIRES REVERSAL.

For the reasons set forth in the Defendant's Opening Brief and herein, the cumulative effect of the various errors made by the trial court and defense counsel require reversal.

Dated this 9 day of July, 2019.

HERSCHEL BULLEN
Attorney for Defendant/Appellant

CERTIFICATE OF RULE 21 & 24 COMPLIANCE

Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing Reply brief of appellant contains less than 4,000 words, inclusive of headings and certifications. Appellant further certifies pursuant to Rule 21(g) that the filing herein contains no non-public information.

HERSCHEL BULLEN
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CERTIFICATE OF SERVICE

I hereby certify that on the 12, July, 2019,I caused to be served by e-mail and two (2) true and accurate copies of the foregoing REPLY BRIEF ON APPEAL by hand delivery or placing said copies in the United States mail, postage prepaid, addressed as follows:

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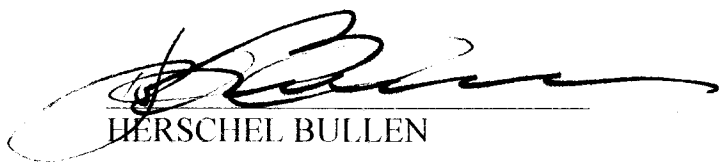

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