IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff / Petitioner, vs. TRACY SCOTT, Defendant / Respondent.	Case No: 20170518-SC

BRIEF OF RESPONDENT

CERTIORARI REVIEW ON A DECISION OF THE UTAH COURT OF APPEALS FROM AN APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, FOR A CONVICTION OF MURDER, FIRST DEGREE FELONY, BEFORE THE HONORABLE DAVID MORTENSEN

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ORAL ARGUMENT REQUESTED

Appellant is currently incarcerated on this case

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INTRODUCTION

Tracy Scott shot and killed his wife, Teresa. The only defense Tracy presented was that his guilt should be mitigated by the fact that he acted "under the influence of extreme emotional distress for which there is a reasonable explanation or excuse", which was not "substantially caused by [his] own conduct." UTAH CODE §76-5-205.5 (2013). In order to demonstrate this distress and its source, Tracy intended to testify that in the days preceding the shooting, his wife had threatened him. This threat would be used in conjunction with other evidence, like that Teresa repeatedly removed her gun from the gun safe and that their fighting had gotten worse than ever, with repeated confrontational behavior, to show Tracy experienced extreme distress caused by Teresa's statements and conduct. As Tracy began to testify about that threat the prosecutor objected, alleging Teresa's statements were hearsay. The correct response, the obvious response, was that the threat was not being offered to prove the truth of the matter

asserted, but to prove the effect the threat had upon Tracy, to prove how he received it, how it affected him. It was being offered to prove that Tracy's distress was due, at least in part, to having been threatened by Teresa. Tracy continued to try to introduce the threat because it was the basis for his defense, but each time he did the prosecutor objected, defense counsel failed to respond, and the trial court excluded the testimony. Tracy was unable to present his defense, and counsel was unable to argue that threat contributed to Tracy's distress, that the threat enhanced and amplified Teresa's other conduct. On the other hand, the State was able to argue there was nothing Teresa did to cause Tracy's distress.

This Court has allowed the State to challenge the Court of Appeals' decision about whether it was deficient performance for counsel not to argue the threat evidence was not hearsay. Making that argument should be very difficult for the State. Reasonable counsel would not have failed to respond to the incorrect hearsay objection. The most basic question at issue in hearsay is 'what is the purpose of the statement, why is it being offered?' Any reasonable counsel would have known that the only relevant purpose to introduce Teresa's threat was to prove the effect it had upon Tracy, and how it could have impacted his emotional distress. Any reasonable counsel would have known it wasn't hearsay because it wasn't being offered to prove the truth of the matter asserted. To fail to utilize the basic rules of evidence was unreasonable and deficient.

This Court has also granted cert to consider the State's argument that counsel's failure to introduce the threat evidence didn't prejudice Tracy's case. But

again, this should be difficult fof the State. There can be little doubt that the threat evidence was central to Tracy's defense. The only question is whether there is a reasonable likelihood that at least one juror would have found, by a preponderance, that Tracy's extreme emotional distress was not substantially caused by his own conduct. Logic, as well as the record evidence, strongly suggests that at least one juror would have believed Tracy's actions, while not justifiable, were mitigated by the totality of the circumstances, when the totality of the circumstances include that threat. Because this Court's confidence in the verdict and the fairness of the trial should be undermined, trial counsel's failure to respond to the hearsay objection was prejudicial.

QUESTIONS PRESENTED FOR REVIEW

1. Whether trial counsel's failure to use basic evidentiary rules to admit a key piece of evidence for the defense constitutes deficient performance.

2. Whether trial counsel's deficient performance prejudiced the defense such that it undermines the Court's confidence in the jury's verdict.

STANDARD OF REVIEW

"On certiorari, this court reviews the decision of the court of appeals for correctness, giving no deference to its conclusions of law." *State v. Baker*, 2010 UT 18, ¶7, 229 P.3d 650. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

OPINION BELOW

The Court of Appeals' opinion to be reviewed is *State v. Scott*, 2017 UT App 74, __ P.3d __.[1]

STATEMENT OF THE CASE

A. Summary of the Facts

Tracy and Teresa Scott began their marriage as "two peas in a pod." R.278:84. Within a few years, however, the marriage became "good and bad" with instances of jealousy and fighting. R.278:86. According to Tracy, 65 to 70 percent of the time they were fighting. R.278:86–87. During their fighting, Scott insulted Teresa and used profanity. R.278:150. But, in terms of insults, threats, and profanity, Teresa could and would "pour it out" right back at him. R.278:168.

The couple's fighting prompted police response some "six to eight time," including one time in 2008 or 2009 when Scott was charged with domestic violence. R.278:88, 90. To deal with their fighting and confrontations, the couple started counseling with their local bishop and made attempts to improve the relationship. R.278:91. For a time, things improved. *Id.* Then, in 2006, police were called after the two began another fight that led to Tracy kicking Teresa. R.278:154.

At the time, Tracy was working for the Alpine School District as a school bus mechanic. R.278:93. Teresa attended college, trying to "get into something that she could comfortably do." R.278:92. During this time, the two continued to fight

[1] A copy of the Court of Appeals' decision is attached to this brief as Addendum A.

about finances, student loan debt, Teresa's inability to find work, spending habits, how to use tax refunds, the need to repair the family's vehicles, what assets could be sold to relive their financial burdens, and Teresa's prescription drug costs. R.278:94–102. In the weeks preceding Teresa's death, the couple's fighting "was a lot, lot worse" than usual. R.278:107. It was "get in your face, yell, scream at each other, spit flying…" kind of fighting. R.278:107; 278:160.

Two or three days before the shooting, Tracy called his brother Zane on the phone. R.278:195. Tracy was "distraught," "seemed worse," and was "very disturbed." R.278:196. Tracy's voice was shaking on the phone and he "seemed over-concerned about what was going on." *Id.*

On Friday, the day before the shooting, Tracy had the day off, so he went "out back" to "tinker in the garage or tinker in the yard." R.278:108. When the phone rang in the garage, Tracy answered it. R.278:110. It was Teresa's mother, so he took the phone into the couple's bedroom where he saw Teresa "off to the front of the bed, sitting on a stool crouched down at the bed, in front of the bed crouched down.' R.278:110–11. Tracy leaned across the corner of the bed, tossed the phone on the bed, and told Teresa it was her mother. R.278:112. As Tracy stood back up, he noticed that the couple's gun safe was pulled out from under the dresser where it usually stayed, and was open. *Id.* He saw one pistol inside, but he did not see Teresa's gun there, a Beretta 9-millimeter. R.278:116–17.

Walking back out to the garage, Tracy thought about the missing pistol and remembered "there was threat made" on Wednesday. R.278:112–13. Now, he

thought, "the threat was serious." *Id.* Tracy believed Teresa was going to use the missing gun, the 9-millimeter Beretta, to do him some harm. R.278:117. Tracy was nervous, continued to stew and worry about it, and felt "scared to death." *Id.*[2]

Tracy did not sleep well that night, and woke up feeling stressed and scared. R.278:121. Saturday morning Tracy went to a haircut appointment and then to work to put tires on the family's car. R.278:121–22. Later that day, Tracy arranged to pick up some manure for the garden, but when he tried to back the trailer into the backyard, it "kept rubbing the fence." R.278:125. That caused "another argument" in front of the children. *Id.* Their oldest son, Thayne, remembered the fighting that day "was more aggressive than regular fights." R.279:98. It was more contentious than normal. R.278:103.

When Tracy went into the house to use the bathroom, he saw "the [gun] safe was pulled out from… underneath the dresser—open with one pistol in it." R.278:126–27. Earlier, Tracy had seen the safe "closed and shoved back under the dresser," but now it was open again, and the Beretta was missing. R.278:163. Like the day before, Teresa was sitting next to the bed. R.278:127. Having seen the gun taken from the safe again, Tracy decided that using the bathroom inside the home was the "last of [his] problems," so he went outside and "went to the bathroom in a ditch out back in the corner." *Id.* He did not "dare go back in the house," and

[2] Trial counsel asked, "who threatened who?", but before Tracy could answer, the prosecutor objected again and Tracy did not testify who had threatened him. R.278:113.

instead, stayed out in the garage. *Id.*

Several times, while Tracy was in the garage, he noticed "Teresa would be leaning out the door and just staring at [him] and so [he] just was freaking out." R.278:128. Scared to death because he thought she had a gun, Tracy "started to wig out, just freak out." R.278:129. Eventually, he decided he was "going to go in there and confront this." *Id.* When he entered the house, he could hear Teresa on the phone and thought she was talking to her mother. R.278:130. Tracy went into the kitchen and took a drink from out of the refrigerator. R.278:131. Then, he heard Teresa's voice yelling at him. *Id.*

At that moment, Tracy "snapped," "saw red," and "went storming in there." *Id.* Teresa was laying on the bed, point her cell phone at Tracy, as if she was taking a picture or video of him. R.278:164. Tracy "looked at her…looked at the cell…[and] looked down at the gun safe." R.278:131. The "only gun there was the black one," the Beretta was missing again. *Id.*

Tracy "reached down and grabbed the gun" and cocked it on the way up. *Id.* He stood there "with the gun in [his] hand pointed at Teresa." He noticed his hand was shaking, "[a]nd then, boom." *Id.* Tracy stared at Teresa, but she just sat there not moving. *Id.* Then, Tracy started walking away when "all of the sudden she just started to lean and was dead." *Id.* Tracy jumped, and the gun went off again. R.278:132. Cautiously, Tracy walked around the end of the bed to the other side and looked down. *Id.* There, "right off the side" of the bed on the carpet, was the 9-millimeter Beretta, fully loaded with a round in the chamber. R.278:163; 277:120.

B. Summary of the Proceedings

Several times during his testimony, defense counsel asked questions related to the circumstances of a particular threat Teresa made to Tracy. The prosecutor objected to this testimony, arguing that it would be hearsay. R.278:98, 110, 113. The trial court called a sidebar and told defense counsel, "There's no way that you're going to dance around and get a threat without [it] being hearsay. The only two people in the room is this, so get away from this…." R.291:113.

Following the sidebar, defense counsel resumed questioning Tracy. Again, defense counsel asked a question related to the details of the threat made to Tracy. *Id*. The prosecutor objected again, and the court called another sidebar. The court warned defense counsel, "if we get a feel within one question, I'm just going to make you move onto a new line of testimony…" *Id*. Defense counsel never argued, at either sidebar, that the testimony he sought to introduce was not hearsay, and thus admissible. R.278:113–14. In fact, defense counsel never really responded at all to the claim that Teresa's statements were hearsay. The specific words of the threat were never introduced or proffered during trial, and subsequently, are not part of this record on appeal.[3]

During deliberation, the jury sent several written communications to the court. One note characterized the jurors as "at an absolute impasse. 6-2." R.182;

[3] Scott filed a 23B motion to remand to the Utah Court of Appeals with attachments demonstrating what the content of the threat was. The Court of Appeals did not rule on that motion. A copy of that motion, with its attachments, is attached to this brief as Addendum B.

280:78. The note then stated, "Two feel that 'substantially caused' needs to be the 'majority of the time' See 13b." *Id.* Referring to the requirements of special mitigation, the jury sent another note asking, "What is the legal definition of 'substantially caused?'" R.181, see Utah Code §76-5-205.5(3)(b).[4]

The court declined to define the term "substantially caused" and concluded that the instructions already given were proper. R.280:85–86. It found no difference "between an impasse and an absolute impasse." R.280:86. According to the court, "absolutely" only meant that the jury had "really tried." *Id.* The court then issued an *Allen*-type dynamite instruction, over defense counsel's objection and request for mistrial, urging the jury to continue deliberations "in an effort to agree upon a verdict." R.180; 280:94.[5]

After having receive the dynamite instruction, the jury continued deliberations "from 6:06 to 8:19," or another two hours and 13 minutes. R.280:95. After deliberations, it returned a verdict of guilty of murder and did not find special mitigation under the influence of extreme emotional distress. R.179; 280:96. The court sentenced Tracy to serve 15 years to life in prison. R.236; 182:12–13.

Scott filed a timely notice of appeal. R.238. The Court of Appeals issued its

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[4] Although the record is not precisely clear when these two notes were sent from the jury, and whether they were sent at the same time, the context of the record makes clear that the court and the parties understood the jury's impasse was tied to the question of special mitigation and about the meaning of "substantially caused." The jury questions (R.181-82) are attached to this brief as Addendum C.

[5] A copy of the trial court's supplemental instruction (R.180) is attached to this brief as Addendum D.

opinion reversing Scott's conviction and ordering a new trial on May 4, 2017.

C. Decision of the Court of Appeals

On appeal, Scott raised two issues: 1) Whether the trial court erred in giving a verdict-urging instruction when the jury was at an absolute impasse; and 2) Whether trial counsel provided effective assistance. The Court of Appeals addressed only the second issue in its opinion. Scott also filed a motion for remand pursuant to Rule 23B to produce evidence of ineffectiveness, including the content of the threat evidence. The Court of Appeals did not rule on that motion.

In support of his claim for ineffective assistance of counsel, Scott argued that when the State objected to testimony regarding Teresa's threat, defense counsel did not attempt to argue the threat was admissible non-hearsay. *State v. Scott*, 2017 UT App 74, ¶19, ___ P.3d ___. The State, defense, and Court of Appeals all agreed that the threat was not hearsay and should have been admitted. *Scott*, ¶22. "[I]f defense counsel had demonstrated this through proper argument," the Court of Appeals wrote, "the [trial] court would have allowed Scott to testify about it." *Id.* at 23. "[D]efense counsel failed to correctly use the rules of evidence to support Scott's defense". *Id.* at ¶25. This failure, the Court concluded, "was unreasonable, especially in light of Scott's trial strategy, which was to show that his distress originated outside his own behavior… a reasonable attorney would have used the rules of evidence to explain to the court why the threat was admissible." *Id.* at ¶25. The court concluded that counsel's failure to utilize the rules of evidence "did not merely 'deviate from best practices or most common custom'—it amounted to

deficient performance." *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

The State claimed counsel's performance "was not deficient because 'counsel had a sound strategic reason not to seek to admit the specific words of Teresa's alleged threat.'" *Id.* at ¶26. According to the State, "an 'imaginary threat' could have had a greater impact on the jury than hearing the actual words." *Id.* at ¶26. The Court of Appeals quickly dismissed this argument: "the negative repercussions of omitting the content of the threat were greater than the possible benefits; admitting its contents would only have strengthened Scott's defense." *Id.* at ¶27. The court characterized the threat as "central to a defense that focused on trying to show that Scott's conduct originated from distress caused by a source other than his own conduct, there was no strategic reason for counsel not to argue that the threat was admissible." *Id.* at ¶28. Ultimately, the court determined that Scott had med his burden showing his defense counsel's performance was deficient. *Id.*

The Court of Appeals then turned its attention to the question of whether defense counsel's deficient performance caused prejudice. While the State maintained "there [was] no reasonable likelihood the outcome of the trial would have been different if the jury had heard the specific words of Teresa's threat," the Court of Appeals found otherwise. *Id.* at ¶32.

Scott testified that "there was a threat made," and had even pointed to the fact that Teresa's gun missing from its safe made him think "the threat was serious." *Id.* at ¶33. However, when Scott tried to explain the details of the threat,

tried to explain why the threat was connected to the missing gun, the State objected, the Court sustained the objection, and defense counsel did not "inquire into it again and did not argue, or even imply, that the threat played a role in special mitigation." *Id.* At closing argument, the Court of Appeals found that the prosecution asked the jury "what reasonable basis does [Scott] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]." *Id.* (alteration in original). "For these reasons," the Court ruled, "we are persuaded that testimony of the specific threat and its effect on Scott would have given the jury more evidence on the very point that was in dispute." *Id.* That probability was enough to undermine the Court's confidence in the outcome of the trial. *Id.* At ¶34. The Court of Appeals then concluded that Scott had received ineffective assistance of counsel and ordered his conviction reversed and remanded for a new trial. *Id.* at ¶35.

Judge Voros and Judge Christiansen wrote concurring opinions, in which both acknowledged that "Scott was the usual aggressor" in the relationship. *Id.* at ¶37, ¶46. Considering the lengthy accounts of arguments, fights, domestic violence reports, and even a temporary restraining order, both Judge Voros and Judge Christiansen questions whether Scott *should* have had access to the extreme emotional distress defense, questioned whether the law should not be changed. *Id.* at ¶39–40, ¶44. Yet, both judges also agreed that the threatening statement made to Scott "fell outside the definition of hearsay" and "Competent defense counsel should have known enough to correctly argue that the rules of evidence would

allow the jury to hear this testimony." *Id.* at ¶43, ¶36. Both judges joined in the opinion finding counsel's error in responding to the hearsay objection prejudiced Scott's defense.

On July 5, 2017, the State filed its Petition for a Writ of Certiorari. Scott filed his Response on August 3, 2017. A reply from the State was filed on August 22, 2017. This Court granted the State's Petition for a Writ of Certiorari on September 20, 2017.

SUMMARY OF THE ARGUMENT

The Court of Appeals found trial counsel's performance deficient because he failed to use the rules of evidence to admit the most crucial piece of evidence for the defense. In an attempt to undermine that decision the State tries to reframe the question, and rather than focusing on the actual issue (the hearsay objection and counsel's failure to respond) the State tries to imagine a different case where the defense does not intend to admit the threat evidence. The State wants this Court to focus on this imaginary case and the conceivable strategies that could play a role there. But this Court should not follow the State's lead. Because the defense in this case was trying to admit evidence that was admissible non-hearsay, it was objectively unreasonable, and certainly not strategic, for trial counsel not to respond to the objection. Trial counsel should have known what evidentiary argument to make to overcome the State's objection. Instead, counsel failed to make any argument in support of admitting the evidence. Such conduct is

objectively unreasonable and, under *Strickland*'s test, constitutes deficient performance.

By performing in a way no other competent attorney would have performed, the jury found that Scott substantially caused his extreme emotional distress. However, had trial counsel used the rules of evidence to admit the defense's key piece of evidence, the jury would have learned that Teresa had been a major source of Tracy's distress. The State disagrees with this analysis, arguing the threat played only a minor role in the defense. Considering the jury had already reached an absolute impasse during initial deliberations, though, the State's argument underestimates how necessary testimony of the threat was to the defense. With it, the jury likely would have remained at an impasse, or more jurors would have believed Tracy did not substantially cause his own distress. Therefore, but for defense counsel's deficient performance, there is a reasonable probability that the trial's outcome would have been different. For these reasons, Scott respectfully asks this Court to affirm the Court of Appeals' opinion.

ARGUMENT

I. FOLLOWING THE STANDARD SET FORTH IN *STRICKLAND v. WASHINGTON*, THE COURT OF APPEALS CORRECTLY FOUND TRIAL COUNSEL'S PERFORMANCE DEFICIENT

This Court has "classified the burden that defendants bear when asserting an ineffective assistance of counsel claim as a 'heavy' one." *State v. Larrabee*, 2013 UT 70, ¶18, 321 P.3d 1136. That is because a defendant must prove both of the following: 1) that counsel's performance was so deficient as to fall below an

objective standard of reasonableness and 2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different. *Id.* (citing *State v. Nelson–Waggoner*, 2004 UT 29, ¶29, 94 P.3d 186). Yet, the Sixth Amendment recognizes defense counsel's role to "ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "For that reason, the Court has recognized that the right to counsel is the right to *effective* assistance of counsel." *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). "The benchmark for judging any claim of *ineffectiveness* must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

This Court granted the State's Writ of Certiorari to determine whether Scott's trial counsel's failure with respect to the erroneous hearsay objection fell below the objectively reasonable standard set forth in *Strickland*. The State's brief goes to great lengths to argue that the Court of Appeals failed to use *Strickland*'s standard in analyzing defense counsel's performance. As an initial, procedural matter, Scott asserts that this Court limited the issues on appeal to arguments over whether the Court of Appeals correctly *applied* the *Strickland* standard, not whether it *used* the appropriate standard.

The Court of Appeal's opinion unequivocally found defense counsel's performance objectively unreasonable, based on *Strickland*'s requirements. Specifically, the court found that defense counsel had failed to make a basic

evidentiary argument to overcome a hearsay objection. In turn, this failure prevented counsel from admitting a key piece of evidence necessary for Scott's mitigating defense of extreme emotional distress. That evidence was a threat, made by Scott's wife Teresa, to Scott. Failure to "correctly use the rules of evidence" to admit this testimony, the court concluded, constituted performance below an objective standard of reasonableness. *Scott*, ¶25.

Despite this conclusion, the State argues that because the record did not include the details of Teresa's threat, the Court of Appeals could not reach the conclusion that counsel performed deficiently. For purposes of the *Strickland* deficiency prong, however, the State places more weight than necessary on the content of the threat. As admissible, non-hearsay testimony, counsel should have easily overcome the State's hearsay objection at trial and admitted this crucial piece of evidence. Although the State argues that because the content of the threat is not in the record Scott cannot prove deficiency, the State confuses deficiency for prejudice.

A. The Supreme Court's Restatement of the Issues in this Appeal Do Not Give Leave for Arguments Over the Standard Used in the Lower Court's Opinion

The Court granted the Petition for Writ of Certiorari and used the following language to restate the issues on appeal: "1. Whether the Court of Appeals erred in concluding Respondent's trial counsel provided ineffective assistance by failing to argue testimony about a threat was not hearsay. 2. Whether the Court of Appeals erred in concluding Respondent was prejudiced by counsel's failure to assert that

testimony about a threat was not hearsay." *See* Order Granting State's Petition for Writ of Certiorari. The Court's restatement of these issues indicates its intent to hear arguments about the correctness of the lower court's conclusions, not whether the Court of Appeals applied the wrong standard in making those conclusions. More specifically, the Court's issue restatement invites arguments on the ineffectiveness claim within the context of the hearsay issue and counsel's failure to overcome the hearsay. Indeed, the Court's language seems to discourage arguments about whether the contested evidence conforms to a particular trial theory. Had the Court wished to consider the lower courts construction and application of the standard for ineffective assistance of counsel, its restatement of the issues would more clearly represent its desire to do so.

Instead, the Court expressly limited the parties' arguments to whether the lower court reached the correct conclusion about the hearsay issue. Nonetheless, the State argued in its brief that the Court of Appeals misconstrued the *Strickland* standard in its analysis. *See* Brief of Petitioner (hereinafter "Pet. Bf."), pgs. 27, 33, 36, & 38. "The court of appeals began and ended its deficient performance analysis with assessing whether counsel had a sound trial strategy." *Id.* at 27. This analysis, the State criticized, was incorrect. *Id.*

The State's criticism is misplaced and entirely overlooks the lower court's discussion of *Strickland's* standard, the "objective standard of reasonableness." *Strickland*, 446 U.S. at 688. Indeed, the court, from the outset of its opinion, noted, "To show deficient performance under *Strickland*, Scott must demonstrate that

counsel's performance 'fell below an objective standard of reasonableness.'" *Scott*, 2017 UT 74, ¶20 (quoting *Strickland*, 446 U.S. at 688). The court continued its discussion of the "objective standard of reasonableness" when it analyzed defense counsel's inability to correctly argue the rules of evidence, comparing counsel's failure to what a "reasonable attorney" would have done in light of Scott's trial strategy. *Id.* at ¶25. Such an attorney "would have used the rules of evidence to explain to the court why [Teresa's threat] was admissible." *Id.* "Counsel's lack of argument," the Court of Appeals concluded, "did not merely 'deviate[] from best practices or most common custom—it amounted to deficient performance." *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

The State believes the court rested its conclusion solely upon a determination that counsel's actions did not constitute "sound trial strategy." Pet. Bf., pg. 27. Yet, the State fails to acknowledge that the lower court's discussion of trial strategy was merely a response to the State's argument that "counsel had a sound strategic reason not to seek to admit the specific words of Teresa's alleged threat." *Scott*, ¶26. Quickly disposing with that argument, the court found that "the threat's actual content could have connected it to various aspects of Scott's testimony…and would have established the foundation for testimony about Scott's reaction to seeing the empty gun safe." *Id.* at ¶27. Thus, according to the court, choosing not to admit the threat "could not have been sound trial strategy." *Id.* By removing the actual wording of the court's opinion, and by taking portions of that opinion out of context, the State seeks for this Court to clarify that the correct

standard for ineffective assistance of counsel is whether an attorney's performance was objectively unreasonable. Because the Court of Appeals conducted that exact analysis, albeit not to the State's preferred outcome, there is no reason to suspect the court erred in either its construction or application of the *Strickland* standard. This Court should not entertain the State's attempt to redraw the lines for *Strickland* ineffectiveness because the Court of Appeals' opinion clearly follows the standards set forth there and followed by Utah Courts for decades.

B. Using the *Strickland* Standard, the Court of Appeals Correctly Found Trial Counsel's Performance Deficient

It is uncontested that the threat Teresa made should have been admitted at trial as non-hearsay statements crucial to establishing Scott's state of mind at the time of the shooting. Despite this fact, the State maintains that defense counsel pursued a reasonable, strategic decision to not admit evidence that ought to have been admitted. It reasons that the evidence was unnecessary, given the volume of other evidence in the larger evidentiary picture. As such, the State believes there was no strategic value in attempting to admit the threat. It concludes that this trial strategy, abandoning the threat and using the other available evidence at trial to prove Scott's extreme emotional distress defense, precludes a finding that defense counsel performed deficiently. The State's arguments, however fail for the following reasons. First, because the evidence was admissible non-hearsay, there was no reasonable, strategic decision not to admit the evidence. Second, because the evidence should have been admitted, defense counsel should have known what

evidentiary argument to make to admit the evidence. Third, by failing to make any evidentiary argument in support of admitting the evidence at all, defense counsel performed in a way no other competent attorney would have done.

1. There was no strategic reason to not admit Teresa's threat

It is well-established that in reviewing a claim of ineffective assistance of counsel, courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. However, the *Strickland* standard reinforces the strong presumption that, "under the circumstances, the challenged action might be considered sound trial strategy." *Benvenuto v. State*, 2007 UT 53, ¶19, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 689). Therefore, to satisfy *Strickland*'s first prong, a "defendant must overcome the strong presumption that [his] trial counsel rendered adequate assistance…by persuading the court that there was no conceivable tactical basis for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (quoting *Bryant*, 965 P.2d 539, 542 (1998); *Strickland*, 466 U.S. at 689) (internal quotation marks omitted). "[T]o rebut the presumption of sound strategy, a defendant must 'persaud[e] the court that there was no conceivable tactical basis for counsel's actions.'" *Id.*

The State has never admitted that trial counsel erred by not offering any argument to support the admission of Teresa's threat. Instead, the State asserts that defense counsel's actions "appear designed to further a reasonable trial strategy…." Pet. Bf., pg. 30. When counsel drew an objection to testimony about

Teresa's threat during trial, the State assumes counsel had acted under the belief that "reasonably concluded he need not respond to the prosecutor's hearsay objection by arguing that the words were nonhearsay." *Id.* at 36–37. In other words, according to the State, it was objectively reasonable for defense counsel to immediately abandon his perfectly legitimate line of questioning that could have continued with Tracy's testimony detailing Teresa's threat when the State erroneously objected because counsel could have believed the testimony wasn't "necessary". It is as if the State believes, because there was other evidence of Tracy's distress, even though the threat testimony was admissible and Tracy was there ready to present it, because counsel would have had to actually respond to the objection by saying "it's not hearsay" it was objectively reasonable to simply give up and limit the defense to the other evidence of distress.

The State supports this contention for two reasons: 1) "Defense counsel could have reasonably concluded… he was not likely to succeed in getting the words of the threat admitted"; and 2) "a reasonable attorney could conclude that he already had more than enough to add the threat piece to the larger extreme emotional disturbance puzzle." *Id.* at 37. These arguments to the Court suggest, as it did to the Court of Appeals below, that defense counsel, either before or during trial, decided he did not want the contents of the threat admitted. Even if that were the case, though the record strongly suggests otherwise, deciding not to admit this threat would itself constitute objectively unreasonable performance. No competent attorney would decide not to admit the defense's most crucial piece of

evidence. It seems, then, that the State's understanding of counsel's trial strategy is at odds with the facts of this case.

This is not a case where, after the fact, the defendant points to some evidence that was never discussed at trial and blames his attorney for not presenting it, but that is the way the State wants the Court to think of it. Instead, this is a case where the evidence was gathered, it was prepared, it was loaded and ready to admit. It was on the tip of the witness's tongue. The record is clear that defense counsel made not one, but two attempts to get Teresa's threat in. R.278:113–14. There can be no doubt, defense counsel was attempting to admit the evidence, contrary to the State's belief. How then can the State argue it is possible "to conceive of a reasonable tactical basis for trial counsel's actions" when the facts so blatantly contradict the State's belief? Pet. Bf., pg. 29.

Perhaps the State believes that, prior to trial, defense counsel determined "he was not likely to succeed in getting the words of the threat admitted," but nonetheless, endeavored to try anyway. *Id*. Under this theory, defense counsel would have acted under a pre-determined assumption that the evidence would be inadmissible, but perhaps the State would not object. If that were true, though the record seems to contradict this scenario, counsel's performance would still be deficient, not because of any strategic decision, but because counsel's actions plainly illustrate his lack of basic evidentiary knowledge, because the evidence plainly was admissible. A pre-trial determination that a non-hearsay threat was actually inadmissible evidence, would be construed as deficient performance,

simply because no competent attorney would reach the conclusion the State suggests defense counsel may have reached.

Or perhaps the State is suggesting that, prior to trial, counsel knew the threat evidence was admissible but decided he did not actually want to admit the threat, only to have the jury see him try to admit it and fail. Under this scenario counsel would have had to correctly predict both that counsel for the State would incorrectly object to the threat evidence, and the trial court would incorrectly exclude it. To be correct about that set of errors borders on prophetic, and in reality, is not reasonable strategic purpose.

Another possible scenario, the one appellate counsel believes the State most likely endorses, is that counsel intended to introduce the hearsay evidence but, after the warning from the judge, decided not to continue attempting to admit it. See Pet. Br., pg. 37. In this scenario, it is unclear whether counsel knows the rules on hearsay, but assuming he does, his actions seem very strange. The State characterizes counsel's decision not to continue seeking to admit the threat evidence as reasonable following the "judge's strong admonition against inquiring into the specific words of the threat". Pet. Br., pg. 37. But what about the first time the objection was raised? What about prior to the strong admonition? What about, immediately following the first hearsay objection? Why wouldn't counsel properly respond then? Under this scenario, reasonable counsel would correctly respond to the hearsay objection.

On this point, the State's case fails. The underlying question here is not, as the State contends, about why some other attorney might conclude it was reasonable trial strategy to not admit the evidence. Rather, the question is whether counsel's failure to respond to a hearsay objection was objectively reasonable. As explained above, there was "no conceivable tactical basis for counsel's actions." *Clark*, at ¶6. To conclude otherwise would be illogical under the facts presented in this appeal and simplicity of the solution. But, counsel's performance was not only deficient for strategic reasons; counsel did what no other competent attorney would have done, counsel failed to make *any* argument over the prosecutor's erroneous objection, even where the rules of evidence provide a perfectly suited response… this was not hearsay because it was not offered to prove the truth of the matter asserted. See UT.R.EVID. 801(c). No reasonable attorney would fail to use the rules of evidence to admit this testimony.

2. Defense counsel should have overcome the hearsay objection

Since Teresa's threat was admissible, it follows that defense counsel should have overcome the prosecutor's hearsay objection by making a simple evidentiary argument. The State insists there is a reasonable alternative for defense counsel's actual actions. And reviewing courts should affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). But, the threshold question under *Strickland* "is whether a reasonable, competent attorney could have chosen the

strategy that was employed in the real-time context of trial." *State v. Barela*, 2015 UT 22, ¶21, 349 P.3d 676 (citing *Strickland*, 466 U.S. at 689).

From the State's perspective, the Court of Appeals was wrong because it did not force Scott to prove that no reasonable attorney would have stayed silent when the State incorrectly made the hearsay objection. Instead, according to the State, the Court of Appeals found counsel deficient merely because it found "counsel could have successfully made an argument" and didn't. Pet. Br., pg. 40. The State wants this Court to consider the wide range of options that were open to counsel when the hearsay objection came in, and claims that there were other legitimate, reasonable, responses, including doing nothing. *Id.*, at 40-41. The State believes the Court of Appeals' decision was too hasty because it did not consider that counsel was "permitted to choose a strategy within the wide 'range of legitimate decisions regarding how best to represent a criminal defendant.'" *Id.*, at 41 (quoting *State v. Met*, 2016 UT 51, ¶113).

What is odd about the State's argument is that while it presumes there was this wide range of reasonable options available to counsel when the objection came in, the State does not actually present any conceivable reasonable alternatives. The State simply criticizes the Court of Appeals and asks this Court to reverse because the court below did not consider whether it was reasonable to "conclude[] that getting the specific wording of Teresa's threat was not so necessary to the defense that it was worth *pressing* the issue further." Pet. Br., pg. 37 (emphasis added). This proposed strategy, to not respond to the objection for fear that it would upset

the trial judge, is new (the State only argued the objection was omitted because counsel "concluded that he was better off without the specific wording of Teresa's threat" its brief to the Court of Appeals, page 33-34). But there can be little doubt that, had it been presented as a conceivable strategy, it would have been rejected as well. Nothing about the record suggests Judge Mortenson was not permitting responses to objections, or that if counsel had asserted the evidence was not hearsay that the court would have held it against Scott or taken revenge in some way. One cannot reasonably argue that properly responding to the hearsay objection in this context would have been met with anger or retribution from the judge. And because counsel could not have reasonably feared it would, no reasonable attorney would find failing to respond would be a reasonable strategic response.

The Court of Appeals did entertain the State's purported strategic reason for *not* responding to the hearsay objection below and found the proposed strategy did not constitute sound trial strategy. *Scott*, ¶¶25–27. The State argued that an "'imaginary threat' could have had a greater impact on the jury than hearing the actual words." *Scott*, ¶26. In order to respond to this proposal, first, the Court of Appeals looked at the case in context, which was that the defense strategy was to "show that [Tracy's] distress originated outside his own behavior." *Id.* at ¶25. Scott, who had the constitutional right to testify, to tell his side of the story, was there on the witness stand trying to explain why he was so worried about that gun. Counsel's failure to respond to the erroneous objection occurred in this context. This Court

should start with the same context in mind. The Court of Appeals related the threat evidence to the rest of the evidence presented, "including Teresa's threatening behavior in other contexts", as well as counsel's failure to refer to an imaginary threat in closing. *Id*. at ¶27. If counsel had wanted the jury to conjure up something worse and connect that imaginary threat to Tracy's distress, counsel would have at least mentioned it in closing, but he didn't. Instead, counsel steered clear of the threat *entirely* after the judge ruled it was inadmissible hearsay.

For example, on Friday, the day before the shooting, Scott testified that he first noticed Teresa's gun was missing from the couple's safe. R.278:112. This caused him to think back to the Wednesday before, when he and Teresa had been in a "big fight," Teresa had accused Scott of having an affair, and a threat had been made. R.278:113. But before he could testify about the details of the threat, the prosecutor objected on hearsay grounds. R.278:113. After a brief sidebar, defense counsel again inquired into Scott's thoughts about the missing gun, to which Scott replied, "I was thinking that the threat that I had received the day before…That she was going to—she was," and another objection was raised. R.278:113–114. The hearsay objection was not responded to and was sustained, so the questioning moved on. R.278:114. Defense counsel then asked Scott, "were you worried that Teresa was going to use that gun to do some harm to you?" R.278:117. Scott responded, "Yes." *Id*.

Then, on the day of the shooting, Scott testified that while working in the garage he decided to go inside to use the bathroom. R.278:126. Once inside, he saw

Teresa in the corner of their bedroom, and noticed Teresa's gun missing from the safe again. R.278:127. Scott panicked, and refused to stay inside any longer. R.278.:127). He went back to the garage and moments later noticed Teresa leaning out the door, "just staring at [him]…." R.278:128. Scott contemplated calling the cops, but decided not to when Teresa went back inside. R.278:128. Scott went back to work, but a few moments later Teresa came back into the garage and began staring at him again before going back into the house. R.278:129. Scott testified that he "was scared to death" during this episode, and when he heard Teresa yelling at him from inside, he "snapped." R.278:131. Scott "went storming" into the bedroom, saw Teresa on the bed, and looked down to see her gun was still missing from the safe. R.278:131. That is when Scott reached down, grabbed his own gun out of the safe, and shot Teresa. R.278:131.

In light of this testimony, defense counsel could not conclude that "sound trial strategy" excused his failure to present any arguments in favor of admitting the contents of Teresa's threat. Sound trial strategy could not be to hope the jury would remember the fact that Tracy had testified there had been a threat and never mention it again. The threat testimony was the linchpin of the defense, it was crucial to understand how the threat connected to the rest of Tracy's testimony, and because this evidence was perfectly admissible, counsel should have overcome the hearsay objection.

Nonetheless, the State contends, "Merely because counsel could have successfully made an argument, and that doing so may have supported the

defendant's defense, is never enough to prove deficient performance under *Strickland*." Pet. Bf., pg. 40.

While there is some truth to this contention, since this Court has not interpreted *Strickland's* test to permit a per se deficient performance, Scott is not seeking a finding of per se deficiency here. *See Kell v. State*, 2008 UT 62, ¶31, 194 P.3d 913 (refusing to make a per se deficient finding for counsel's failure to challenge five jurors for cause, or object to the prosecutor's opening statement); *but see United State v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (recognizing some circumstances where ineffective assistance of counsel is presumed: 1) complete denial of counsel; 2) defense counsel fails to subject the State's case to any "meaningful adversarial testing"; and 3) when it is unlikely that any attorney could prove effective assistance under the circumstances). Instead, Scott asks the Court to do just as the Court of Appeals has done, to find that, under the circumstances, counsel's failure to respond to the objection was unreasonable.

No attorney is perfect, and *Strickland* does not require flawless representation. But *Strickland* does require counsel to perform objectively reasonably. And when no other competent attorney would fail to make a basic evidentiary argument to introduce clearly admissible evidence, evidence the defense clearly intends to introduce, it cannot be said that such action is objectively reasonable. Despite the State's claim that "[t]here are countless ways to provide effective assistance in any given case," (*See* Pet. Br., pg. 41 (quoting *Strickland*, 466 U.S. at 689) in this case there was only one way to present the defense counsel

sought to raise, extreme emotional distress caused by Teresa's conduct, and counsel failed to make the one simple evidentiary argument necessary to present that defense.

A similar situation arose in *State v. Millett*, where a defendant sought post-conviction relief by claiming ineffective assistance of counsel. 2015 UT App 187, ¶7, 356 P.3d 700. There, the defendant asserted that he did not receive proper *Miranda* warnings before an interrogation by police and defense counsel failed to exclude his involuntary confession on that basis. *Id.* at ¶8. The Court of Appeals agreed, finding defense counsel's actions "outside the wide range of professionally competent assistance." *Id.* at ¶18. Nonetheless, the State presented arguments that defense counsel had "a clear strategic reason to forgo a motion to suppress," claiming the defendant would have been forced to testify at trial to support his defense of consent. *Id.* at ¶16. According to the State, to avoid the risk of cross-examination, defense counsel made a tactical decision not to suppress the defendant's confession. *Id.* Unconvinced by the State's assertions, the court found that trial counsel actually had made an attempt to exclude the confession under the rules of evidence, rather than under a *Miranda* argument. *Id.* at ¶17. However, by failing to argue the confession was involuntary under *Miranda*, defense counsel was unsuccessful in excluding the evidence and rendered ineffective assistance. *Id.*

As it has done in this case, the State argued in *Millett*, in spite of the record evidence that showed otherwise, that counsel, for strategic reasons, didn't really want to present the defense later argued on appeal. The State wanted the court to

ignore the record evidence that showed counsel was trying, albeit impotently, to exclude his confession, and pretend exclusion was never part of the plan. But the Court of Appeals there looked to the record, found evidence that counsel actually tried to exclude the evidence, and reject the State's claim that counsel had a strategic purpose in mind.

The State makes the same backward argument here. Despite the clear record evidence showing counsel's repeated attempts to admit the threat testimony, the State reimagines the case with new facts where counsel does not actually want to admit the evidence. The State wants this Court to ignore the record and rewrite the facts consistent with this new narrative. But, like the Court of Appeals in *Millett*, this Court should judge counsel's decision in the real-time context of the case, as demonstrated by the record. Here, this Court should find that counsel made repeated attempts to admit the threat testimony as part of the defense theory. The question is, given that theory and the need for the evidence, could a reasonable defense attorney fail to respond to the State's erroneous hearsay objection?

Here, Scott asserts that his defense counsel's performance fell below the objectively reasonable standard articulated in *Strickland* when he failed to make any argument in support of admitting the defense's key piece of evidence. Like trial counsel in *Millett*, counsel here was clearly trying to present the defense, and had Scott's counsel made the correct argument, the defense's objective (to admit the evidence) would have been met. Moreover, because the value of the evidence was so significant for the success of Scott's defense, there was no reasonable strategic

reason not to admit the evidence, as was the case in *Millett*. Thus, *Millett* provides a strong analogy to the present case and demonstrates why this Court should affirm the lower court's opinion.

3. Defense counsel performed in a manner no other competent attorney would have performed

Teresa's threat was clearly admissible and Tracy clearly wanted to tell the jury about it. Defense counsel could easily have overcome the prosecutor's objection by making an elementary evidentiary argument. Yet, admittedly, the trial judge may have incorrectly sustained the objection, even if defense counsel had given a proper argument. Had he done so, Scott would have been able to raise a visibly different claim on appeal than ineffective assistance of counsel, that of preserved error. The fact is, trial counsel failed to make any argument over the prosecutor's objection, precluding a preserved error appeal, and performed in a way no other competent attorney would have performed.

The State seeks to justify this performance by arguing that counsel "already had more than enough [evidence] to add the threat piece to the larger extreme emotional disturbance puzzle." Pet. Br., pg. 37. This argument misses the point. No reasonable attorney would conclude, after repeatedly failing to argue anything in response, that the threat was unnecessary. No reasonable attorney would repeatedly try to admit the evidence and then think, 'I could argue it's not hearsay, but I've already got enough evidence, so I'll just move on without responding.' A competent attorney would have raised the necessary evidentiary argument to

overcome the prosecutor's first objection and get this important testimony admitted, or at the very least, properly preserved the issue for appeal.

Still, the State argues that Scott's deficient performance claim rises or falls with the value of Teresa's threat to the whole evidentiary picture. Scott does not disagree that the rest of the evidence is important, but he does disagree with the limited evidence the State suggests should be considered. The State lists several important facts, asserting that this evidence obviated any need for admitting Teresa's threat. For example, the State argues, "Defendant testified that he felt threatened by Teresa in many ways—the open safe, the missing gun, Teresa opening the garage door and leering at him, and Teresa being angry with him and starting fights." Pet. Br., pg. 36. The State even asserts that on the day before the shooting, Scott called his mother and said, "Mom, I'm afraid. The gun safe is open and a gun is missing. And I think Teresa is going to kill me." Pet. Br., pg. 10 (quoting R.277:25). Also, in an attempt to undercut Scott's claim to distress, the State maintains that despite Teresa's threat, Scott still "slept by her side" during the nights leading up to Teresa's death. Pet. Br., pg. 35.

The State's recitation of these facts overlooks other important facts. In the days leading up to Teresa's death, Tracy tried to convince himself to stay with a friend (R.278:122–23), called his bishop to help him decide whether to call the police (R.278:128), hid in the garage rather than go inside where Teresa was (R.278:128), and even refused to go to the bathroom inside the home with Teresa there (R.278:127). Critically, the State forgets to mention that when Tracy shot

Teresa, he discovered her 9-millimeter Beretta laying near her on the ground next to the bed, fully loaded, with a round in the chamber. R.278:132. But all these facts make Teresa's threat more probative, more important to the defense, not less. Even with all this other evidence, it would be difficult to both explain why Scott felt so distressed on the day of the shooting and to prevent the jury from believing Tracy himself "substantially caused" that distress. But, had counsel admitted Teresa's threat, it could explain why Tracy believed Teresa's was going to harm him, why seeing Teresa's gun removed from the safe was so distressing, giving the jury a reasonable basis to find that Teresa's actions caused Tracy's distress, as opposed to his own overreactions.

Competent counsel, knowing the value of this evidence, and knowing it was perfectly admissible, would have overcome the prosecution objection to the proffered evidence. Defense counsel, here, failed to do that. Because counsel had no strategic reason to not admit the evidence, failed to make a basic evidentiary argument to overcome the prosecutor's objection, and acted in a way that no competent attorney would have, the defense's key piece of evidence was excluded. Such action plainly meets *Strickland's* standard for deficient performance.

C. The Specific Content of the Contested Threat Was Not Required for the Court of Appeals to Find Counsel's Performance Deficient

The State maintains that "[w]ithout knowing the content of the threat, concluding that it necessarily would have strengthened the defense was mere speculation." Pet. Brf. at 43. The Court of Appeals did not rely on the content of the

threat to reach its conclusion; nor did it have to. As to the deficient performance test, the details of the threat were significantly less important than the source of the threat. Defense counsel admitted multiple pieces of evidence to support Scott's defense of extreme emotional distress, pointing to Teresa's gun missing from the open safe, Teresa glaring at Scott in the garage on multiple occasions, Tracy's unwillingness to go inside the home while Teresa was there, his unwillingness to even use the restroom while Teresa was inside, and Teresa's hostile behavior towards Scott on the day of the shooting. R.278:112, 128, 127, 131. But, this evidence, taken as a whole, may not have been sufficient for the jury to believe Tracy was under extreme emotional distress caused by someone else's action at the time of the shooting. Rather, this limited evidentiary picture would, and likely did, lead the jury to believe Tracy had "substantially caused" his own emotional distress.

The jury likely believed Tracy overreacted to his circumstances, causing his own distress. It follows then, that if the jury could hear testimony that Teresa had actually made a verbal threat to Tracy in the days leading up to the shooting, it would change the source of Tracy's distress and change the way the jury viewed Tracy's interpretation of Teresa's other actions. No longer would Tracy's overreaction be the sole cause of that distress, but the jury could impute responsibility for that distress onto Teresa for verbally threatening Tracy which he continued to consider and view each new circumstance in light of the threat. Thus, the fact that the record did not contain the contents of the threat matters

significantly less than the fact that the Court of Appeals understood the evidence was a verbal threat from Teresa.

That missing piece of evidence was sufficient justification for the Court to conclude that defense counsel had performed unreasonably in failing to admit the threat. In other words, the question is whether defense counsel could reasonably raise his defense, and overcome the "substantially caused" barrier to that defense, without the threat. The Court of Appeals concluded he could not. It pointed to the prosecutor's closing argument, who asked the jury "what reasonable basis does [Tracy] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]" *Scott*, ¶33. Without the threat, Tracy had no reasonable basis to make that claim. The Court of Appeals' reasoning mirrors this conclusion. Scott asks the Court do to the same.

II. TRIAL COUNSEL'S DEFICIENT PERFORMANCE CAUSED ACTUAL PREJUDICE TO THE DEFENSE, CREATING A REASONABLE PROBABILITY THAT THE TRIAL'S OUTCOME WOULD HAVE BEEN DIFFERENT

Strickland also requires a defendant "show that the deficient performance prejudiced the defense." *Strickland*, 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693. Instead, *Strickland* requires the defendant show "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

As it did in the previous issue, the State complains the lower court had an inadequate record on appeal, and thus could not properly reach the question of whether defense counsel's actions prejudiced the defense. Without the specific contents of the threat in the record, the State argues, the Court of Appeals could not evaluate the prejudicial effect on trial counsel's unprofessional errors. Pet. Br., pg. 47. Again, the State exaggerates *Strickland*'s requirements regarding the record on appeal. Neither prong of the *Strickland* test demands a complete, perfect record, absent of any errors. Rather, *Strickland* and its progeny require an adequate, unambiguous record.

The record on appeal in this case is both adequate enough, and clear enough to establish that had defense counsel succeeded in admitting Teresa's threat, the defense's key piece of evidence, there is a reasonable likelihood of a more favorable outcome. Scott does not deny that the content of the threat is persuasive, this is exactly the reason he filed a 23B motion to the Court of Appeals as a backup in case the court disagreed with the IAC claim in his brief. But Scott denies that the Court of Appeals was unable, based on the existing record, to conclude counsel's error was prejudicial. But for counsel's failure to admit the testimony, the trial would likely have resulted in a different outcome. Scott respectfully asks this Court to affirm the lower court's opinion.

A. Whether the Record on Appeal was Inadequate is Not a Threshold Issue for Evaluating the Merits of Scott's Prejudice Claim

In 1992, Rule 23B of the Utah Rules of Appellate Procedure was adopted, "designed to address the inadequate record dilemma" in ineffective assistance of counsel claims. *State v. Litherland*, 2000 UT 76, ¶14, 12 P.3d 92. In such claims, "counsel's ineffectiveness may have caused, exacerbated, or contributed to the record deficiencies, thus presenting the defendant with a catch–22 unique to claims of ineffectiveness of trial counsel." *Id.* at ¶12 (citing *Hurst*, 777 P.2d at 1036, n. 6 (noting ineffectiveness of counsel as an example of the type of error that may arise outside the record)). With the adoption of Rule 23B, however, "a ready procedural mechanism for addressing the inadequate record dilemma was grafted into the appeals process." *Id.* at ¶14.

Rule 23B permits a reviewing court "to remand the case to the trial court for entry of finding of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." UT.R.APP.P. 23B(a). "In this light, appellate courts need no longer treat the question of an adequate record as a necessary threshold issue." *Litherland*, 2000 UT 76, ¶17. Instead, if the record "appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Id.*

Litherland obviates the need for a Court to conclude, based on the adequacy of a record, whether to proceed into a defendant's ineffectiveness claim. Yet, the State begins its prejudice argument by making an assertion that conflicts with

Litherland's holding. Because the record was "legally insufficient," the State argues, the Court of Appeals' "prejudice holding fails for this reason alone. And because prejudice is a necessary element of an ineffective assistance claim, the entire claim fails for this reason." See Pet. Bf., pg. 48. As explained above, however, this Court has clearly established that the question of an adequate record is no longer a threshold issue. Moreover, Scott availed himself of Rule 23B's procedures by filing a motion for remand.[6] The Court of Appeals never ruled on Scott's 23B motion, issuing its decision without deciding whether Scott had met the requirements under Rule 23B. In doing so, the Court of Appeals found itself capable of analyzing the prejudice prong of *Strickland*'s test without supplementing the record with the words of Teresa's threat. The State complains this is error.

However, in grating the State's Petition for Writ of Certiorari, this Court did not address as an issue on appeal whether the lower court erred in completing its *Strickland* analysis before ruling on the 23B motion. Therefore, despite the State's contention that the record is "legally insufficient" (Pet. Bf., pg. 48), Scott respectfully asks the Court to proceed in the following manner: 1) Make a finding that the record is adequate for the purposes of conducting a *Strickland* analysis and affirm the lower court's conclusions; 2) Give leave for Scott to file a 23B motion to *this* Court to supplement the record on appeal; or 3) Remand the case for the

[6] See Addendum B.

Court of Appeals to rule on the prior 23B motion Scott filed in that court.[7] Scott maintains that the Court of Appeals was correct, and that the record is adequate for disposition of this appeal, and sufficient to find trial counsel's performance prejudicial to the defense.

B. The Record on Appeal Adequately and Clearly Establishes the Need to Admit Teresa's Threat During Trial

As indicted above, the Court of Appeals found the record adequate to conduct its *Strickland* analysis. It noted that while the jury had heard Scott testify that there was a threat made, "he was not allowed to offer any other information regarding the threat, including the surrounding circumstances, the words used, and the effect it had on him." *Scott*, ¶33. The court contrasted Scott's impeded testimony with the closing argument of the prosecutor, who stated Teresa "was no threat" and asked the jury "what reasonable basis does [Scott] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]" *Id.* Had Teresa's threat been admitted, the court concluded, "Scott would have given the jury more evidence on the very point that was in dispute." *Id.*

Whether Scott experienced extreme emotional distress before the shooting proved to be some point of contention during deliberations, since "the jury notes demonstrate the jury was at an impasse over whether Scott had substantially

[7] What this Court cannot do, what it must not do, is reverse the Court of Appeals' decision on the grounds that the record is inadequate without allowing Scott access to Rule 23B to supplement the record. Scott followed the rules, and filed his motion with accompanying affidavits. To reverse the Court of Appeals and deny Scott's appeal without having his 23B motion ruled on would be fundamentally unfair.

caused the distress he felt." *Id.* at ¶34. Testimony about Teresa's threat would have "reinforced the sentiments" of the two jurors who believed Scott acted under extreme emotional distress. *Id.* Additionally, other jurors suspecting that "substantially caused" meant "the majority of the time," would have been influenced by this testimony. *Id.* Ultimately, the Court of Appeals made a logical conclusion based on these reasonable outcomes: "had Scott been allowed to testify about the threat, there is a reasonable probability the jury would have continued to be deadlocked, ending the case in a mistrial." *Id.* That probability was enough to undermine the court's confidence in the outcome of the trial. *Id.* (citing *Strickland*, 466 U.S. 668).

For the State, however, the court's analysis operated in a vacuum, failing to consider all the evidence presented at trial. Pet. Br., pgs. 48–49. To prove special mitigation of extreme emotional stress, the State argues, Scott must have been "exposed to extremely unusual and overwhelming stress that would have caused the average reasonable person under the same circumstances to experience a loss of self-control and be overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions." Pet. Br., pg. 49 (quoting *State v. White*, 2011 UT 21, ¶26, 251 P.3d 820 (quoting, in turn, *State v. Bishop*, 753 P.2d 439, 471 (Utah 1988))) (internal quotation marks omitted). Scott, the State claims, "did not act under distress… Nor would a reasonable person have reacted in the same way Defendant did…." Pet. Br., pg. 50. Instead, the State asserts that Teresa's killing was the result of disrespect and bullying. *Id.*

The State's arguments and factual recitations seem to overlook how distressful Tracy's circumstances truly were. The couple's fighting had grown significantly worse in the days leading up to the shooting, the "get in your face, yell, scream at each other, spit flying…" kind of fighting. R.278:107; 160. Then, on the day before the shooting, Scott first noticed Teresa's gun missing from the couple's safe. R.278:112. Contemplate that for a moment. At a time when this couple was fighting worse than they had ever fought, Teresa introduced a gun.

Tracy worried that Teresa was going to use the gun to harm him, and refused to go inside while Teresa was there, even to the point that he preferred to urinate outside to avoid her. R.278:117, 125–127. While working in the garage, Tracy noticed Teresa leaning her head out of the door and staring at him, at least on two separate occasions. R.278:128–29. Then, when Teresa began yelling at him from inside the house, Tracy snapped and stormed inside. R.278:131. When Tracy came into the bedroom, he was still thinking about that threat and that gun, and when he looked down he saw Teresa's gun missing again, so grabbed his own gun and shot Teresa. R.278:131. Immediately after shooting Teresa, Tracy found the missing gun within inches of Teresa, next to the bed, fully loaded, with a round in the chamber. R.278:131.

The jury was tasked with finding whether Tracy acted under the influence of extreme emotional distress, whether the "then-existing circumstances expose[d] him to extremely unusual and overwhelming stress" that caused an "extreme emotional reaction". R.200. Specifically, the jury was asked to determine whether

a reasonable person under these circumstances would have "experienced a loss of self-control and had his reason overborne by intense feelings such as anger, distress, grief, excessive agitation, or other similar emotions." R.200, see also UTAH CODE §76-5-205.5. The jury was instructed that emotional distress did not include "distress that is substantially caused by the defendant's own conduct." R.199. With the law of special mitigation in mind, the State argues "[Scott] could not prove that he acted under extreme emotional distress. His theory was simply unbelievable." Pet. Br. 50. If that is true, it is precisely because the jury did not hear the one piece of evidence that would have contextualized and legitimized Tracy's fear that Teresa was going to harm him, the piece of evidence that would have shed light on why Teresa's other acts, like yelling at time from inside the home, repeatedly staring at him from the door, and repeatedly removing her gun from the safe would have caused him extreme distress. As the Court of Appeals noted, without this evidence, the jury would not have understood "any other information regarding the threat, including the surrounding circumstances, the words used, and the effect it had on him." *Scott*, ¶33. Instead, the jury was left with unspecified testimony that some threat had been made. The significance this evidence would have had is evident when the jury's questions are reviewed. Even the limited evidence the jury did hear caused an "absolute impasse." R.182, 280:78. Even without knowing how Teresa had threatened Tracy, some of the jurors were convinced he was not the one who substantially caused his extreme emotional distress. R.182.

But without testimony about the threat, the jury eventually did not find that Tracy acted under extreme emotional distress when he shot Teresa. This missing evidentiary link was absolutely crucial to the defense, and as the Court of Appeals concluded, "had Scott been allowed to testify about the threat, there is a reasonable probability the jury would have continued to be deadlocked, ending the case in a mistrial." *Scott*, ¶34. This conclusion was not controversial. The threat evidence tied the entire story together for the defense. The threat evidence showed why Tracy's seemingly outrageous behavior was rooted in a legitimate emotional reaction to Teresa's conduct.

The Court of Appeals did not have had the specific details of Teresa's threat before it, nor could it relied on those details during its prejudice analysis. Nonetheless, the importance and weight of the fact that there had been a threat to the entire evidentiary picture and to the possible success of Scott's defense was squarely on the mind of the court. As such, the court's conclusion represents an appropriate analysis of a reasonably likely alternative outcome, but for trial counsel's deficient performance. For these reasons, Scott respectfully asks this Court to affirm the lower court's opinion and remand the case for a new trial.

C. If the Record on Appeal is Inadequate This Court Should Allow Scott to File His 23B Motion or Remand to Allow the Court of Appeals to Grant the Motion

If the Court finds the record is inadequate to determine prejudice (or deficiency for that matter) the Court should not reach the merits of the case. Instead the Court should grant leave for Scott to file his Rule 23B motion.

According to Rule 23B motions for remand must be "filed prior to the filing of the appellant's brief." UT.R.APP.P. 23B(a). However, given the procedural posture of the case, a 23B motion would not be appropriately filed unless and until this Court finds the Court of Appeals erred by ruling with an inadequate record. That circumstance would fall within this Court's ability to "remand[] the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party." *Id.*

The motion filed with the Court of Appeals is prepared and can be filed as soon as the Court will accept it. The State's response filed with the Court of Appeals is prepared and conceivably, the State could file it immediately.

Finally, if this Court is not prepared or interested in deciding the 23B question, it should remand the case to the Court of Appeals with an order to rule on the previously filed 23B motion. Scott has no doubt that he has met the requirements for a 23B remand.

CONCLUSION

Though the State characterizes trial counsel's performance as reasonable trial strategy, the facts of this case neither support that argument, nor provide justification for counsel's failure to admit the threat. Where admission of the threat evidence was clearly part of the defense, a competent attorney would have made the basic evidentiary argument necessary to admit the threat. Trial counsel made no argument for its admission. Such inaction, therefore, falls below the objectively reasonable representation required by *Strickland*.

Counsel's inadequate representation prevented the jury from hearing evidence necessary to find that Teresa caused Scott's extreme emotional distress. While the State underestimates the impact of this testimony on the jury, the record clearly establishes that the jury felt conflicted about whether Tracy or Teresa had caused his distress. If Teresa's threat had been presented in evidence, there is a reasonable probability that the result of the proceeding would have been different, that the jury, or at least one member of the jury, would have believed special mitigation applied. For these reasons, Scott respectfully asks this Court to affirm the Court of Appeals' decision, and remand the case for a new trial.

If the Court finds the record is inadequate, the Court should grant Scott leave to file his 23B motion, or in the alternative, remand the case to the Court of Appeals with direction to rule upon the 23B motion.

In any event, because the Court of Appeals did not rule on Scott's verdict urging claim, unless this Court remands for a new trial on ineffectiveness grounds, the Court should remand to the Court of Appeals to address the remaining issue.

RESPECTFULLY SUBMITTED this 28th day of December, 2017.

/s/ Douglas Thompson
Appointed Appellate Counsel

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the following requirements of Rule 24(a)(11) of the Utah Rules of Appellate Procedure:

A. The total word count of this brief is 13,071. It was prepared in Microsoft Word.

B. Neither this brief, nor its addendum, contains any non-public information as described in Rule 21(g).

/s/ Douglas Thompson

CERTIFICATE OF SERVICE

I certify that I sent via email a PDF copy, and (2) paper copies of the foregoing brief to the Utah Attorney General, Criminal Appeals Division, at criminalappeals@agutah.gov, PO Box 140854, Salt Lake City, UT 84114, on this 28th day of December, 2017.

/s/ Douglas Thompson

ADDENDA

A – *State v. Scott*, 2017 UT App 74, ___ P.3d _____

B – Scott's Rule 23B Motion filed in the Court of Appeals, with attachments

C – R.181-82: Jury Questions

D – R.180: Trial Court's Supplemental Instruction (Dynamite Instruction)

Addendum A – *State v. Scott*, 2017 UT App 74, ___ P.3d _____

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
TRACY SCOTT,
Appellant.

Opinion
No. 20140995-CA
Filed May 4, 2017

Fourth District Court, Provo Department
The Honorable David N. Mortensen
No. 131400842

Margaret P. Lindsay and Douglas J. Thompson,
Attorneys for Appellant

Sean D. Reyes and Tera J. Peterson, Attorneys
for Appellee

JUDGE KATE A. TOOMEY authored this Opinion, in which JUDGES J. FREDERIC VOROS JR. and MICHELE M. CHRISTIANSEN concurred, with opinions.

TOOMEY, Judge:

¶1 Tracy Scott was convicted of murdering his wife. He appeals, contending he received ineffective assistance of counsel during trial. We agree and reverse and remand for a new trial.

BACKGROUND

¶2 Tracy Scott and Teresa Scott[1] were married for nineteen years. They had two sons.

¶3 Scott and Teresa's relationship was both "good and bad." Some described it as happy and loving, but it was also contentious, and they fought often. The fights were "explosive" and involved taunting, threatening, name calling, profanity, and sometimes, throwing things at each other. Each of them frequently threatened divorce, and Scott threatened Teresa's life "multiple times."

¶4 The police were called to the couple's house on a number of occasions and in 2008 cited Scott for domestic violence. In that incident, the couple argued, Scott tried to hit Teresa with their car, then threw a towel over her face and punched her in the stomach. Teresa filed for a restraining order and they separated, but she later had the restraining order removed and Scott's citation was expunged. The pair reunited.

¶5 Many of the couple's arguments revolved around finances. The family incurred debt so Teresa could earn a degree, but her lack of employment after graduation was a source of conflict. Teresa criticized Scott for spending money on trips and firearms instead of paying bills or having their roof repaired.

¶6 Some witnesses testified Scott was the aggressor in the couple's fights—that he got more upset and was "more aggressive" than Teresa and that he was responsible for "[e]ighty percent" of the contention. Some testified that Teresa "escalate[d]" the situation, that she "nitpick[ed] and push[ed]"

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1. Because the parties share a last name, we refer to Teresa by her first name for clarity, with no disrespect intended by the apparent informality. *See Earhart v. Earhart*, 2015 UT App 308, ¶ 2 n.1, 365 P.3d 719.

Scott, and kept "gnawing [at] him" and did "not let stuff go." Scott's coworkers testified that Teresa frequently called his cell phone while he was at work, and the two would argue over the phone. If Scott did not answer his phone, Teresa would call the shop phone or come to his workplace. These calls occurred several times a week, sometimes two or three times a day, for four or five years.

¶7 Leading up to the events of this case, Scott and Teresa's relationship "started to get bad again." Her calls to Scott's work became more frequent. Remarks between them "got nastier" and "more hateful," and in the weeks before her death, Scott and Teresa had "constant arguments." Their fighting was "[w]orse than it had ever been."

¶8 The day before Teresa's death, Scott and Teresa began "fighting and arguing" while Scott was changing the oil in a family car. The argument got "really bad." Scott spilled oil in the driveway, and they continued to fight about the spill and the lack of money to replace the oil. Later, Scott saw that Teresa's mother had called, and he took the phone into their bedroom to give it to Teresa. He saw her crouched by the end of the bed, but did not know what she was doing. As he turned to leave the room, he saw that the family's gun safe had been pulled out from under the dresser where it was usually kept and that it was open. He also saw that Teresa's gun was not in the safe.

¶9 Scott testified he was "scared to death" when he saw the gun was missing. He was nervous and worried, and he went to the garage and stayed there until their sons came home. He did not sleep well that night. The next day Scott ran errands, and while he was putting new tires on the car, twice purchased the wrong size because he "[wasn't] thinking straight." Scott did not want to go home and instead called a coworker to ask if he could spend the night at the coworker's house. The coworker responded that he could meet Scott later that day, and Scott went home. He did some yard work, but he and Teresa were fighting the "whole time."

¶10 Scott went inside the house to use the bathroom. As he walked into the bedroom, he saw Teresa sitting by the end of the bed. Although the gun safe had been shut and put away under the dresser, it was again open and pulled out, and Teresa's gun was still missing. Scott immediately left the house without using the bathroom. He went to the garage, and while he was there, he saw Teresa several times leaning her head out the door and staring at him. Scott called his ecclesiastical leader because he "didn't know what to do"; he testified that he "really start[ed] to wig out, just freak out."

¶11 Finally, Scott decided to return to the house and "confront" the matter. As he walked in, he could hear Teresa talking on the phone with her mother. While he was in the kitchen, Teresa yelled at him, and he "snapped" and "[saw] red." He stormed into the bedroom where he saw her lying on the bed and pointing her cell phone at him. He looked down at the safe and saw that her gun was still missing. He reached down, grabbed the other gun from the safe, and shot Teresa three times, killing her, then called 911. The police arrived and arrested Scott.

¶12 At trial, Scott admitted to killing Teresa, but he argued that he had acted under extreme emotional distress, which would mitigate the murder charge to manslaughter.

¶13 Scott testified that "there was a threat made" and when he saw Teresa's gun missing from the safe he "thought the threat was serious." Defense counsel asked him to elaborate: "When you say a threat [was] made, are you saying—Who threatened who?" As Scott started to explain the background of the threat, the prosecutor objected that it was hearsay. The court sustained the objection and in a sidebar conversation stated, "There's no way that you're going to dance around and get [in] a threat without [it] being hearsay." Defense counsel said "Okay," and did not offer any counterargument. Counsel continued his questioning, asking, "After you saw the safe open . . . then what were you thinking?" Scott replied, "I was thinking that the threat

that I had received the day before . . . [t]hat she was going to—she was . . . ." The court interrupted Scott and called for another sidebar discussion. The court warned defense counsel to stay away from that line of questioning, because "the only responses [it was] getting are clearly hearsay." Counsel agreed and made no attempt to argue that the statements were not hearsay and were admissible. Scott did not mention the threat again.[2]

¶14 At the conclusion of trial, the court instructed the jury on the elements of murder and the special mitigation of extreme emotional distress. The instructions stated:

> A person acts under the influence of extreme emotional distress when the then-existing circumstances expose him to extremely unusual and overwhelming stress that would cause the average reasonable person under that stress to have an extreme emotional reaction, as a result of which he experienced a loss of self-control and had his reason overborne by intense feelings such as passion, anger, distress, grief, excessive agitation, or other similar emotions.

The instructions also stated that "'[e]motional' distress does not include . . . distress that is substantially caused by the defendant's own conduct."

¶15 The jury deliberated for more than five hours and sent two notes to the court. One note asked, "What is the legal definition of 'substantially caused?'" The next note informed the court, "We are at an absolute impasse, 6-2," and continued, "Two feel that 'substantially caused' needs to be 'the majority of the time.'" Defense counsel moved for a mistrial on the basis that

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2. Scott's testimony did not include the actual words of the threat. The threat's content is not included in the record on appeal, and we do not rely upon it in our analysis.

"absolute impasse" meant that the jury could not "continu[e] to deliberate without doing violence to their individual judgment." The court denied the motion for a mistrial and instead gave a supplemental jury instruction, which asked the jury to "continue [its] deliberations in an effort to agree upon a verdict." The instruction stated, in part,

> This trial represents a significant expenditure of time and effort by you, the court, the parties, and their attorneys . . . and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried to you. . . . Nevertheless . . . it is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment.

¶16 After receiving the supplemental instruction, the jury deliberated for two more hours and found Scott guilty of murder. Scott was sentenced to prison for fifteen years to life. He appeals the conviction.

ISSUES AND STANDARD OF REVIEW

¶17 Scott raises two issues on appeal. First he contends the trial court erred by giving a verdict-urging instruction when the jury was at an absolute impasse. He also contends his counsel provided ineffective assistance at trial. Because we conclude Scott did not receive effective assistance of counsel and reverse on this basis, we need not address the propriety of the court's supplemental instruction.

¶18 When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review, and this court must decide whether the defendant was deprived of effective assistance as a matter of law. *Layton City v. Carr*, 2014 UT App 227, ¶ 6, 336 P.3d 587. To demonstrate

ineffective assistance of counsel, a defendant must show that his counsel performed deficiently and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

ANALYSIS

I. Deficient Performance

¶19 Scott argues that his counsel's performance was deficient because, when the prosecutor objected to testimony regarding a threat Teresa made to Scott, defense counsel did not attempt to argue the threat was nonhearsay and thus admissible. Scott asserts defense counsel had no tactical purpose for failing to make this argument.

¶20 To show deficient performance under *Strickland*, Scott must demonstrate that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. This standard asks "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). Scott must also "rebut the strong presumption that 'under the circumstances, the challenged action might be considered sound trial strategy.'" *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (quoting *Strickland*, 466 U.S. at 689) (additional internal quotation marks omitted).

¶21 Scott argues on appeal that Teresa's threat was not hearsay and was therefore admissible. "Hearsay" is defined as an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c). Scott argues the threat was not hearsay because it was not offered to show the truth of the matter asserted—rather, it was offered to show its impact on Scott. *See* R. Collin Mangrum & Dee Benson, Mangrum & Benson on Utah Evidence 779 (2016) (noting that statements may be relevant "because of

their effect on the hearer" and that such statements have "consistently been held to be nonhearsay in a variety of contexts").

¶22 The State conceded on appeal that the threat was not hearsay, and we agree with both Scott and the State that the threat was not hearsay. Like questions and commands, threats are commonly not hearsay, because they do not make assertions capable of being proved true or false. *See United States v. Stratton*, 779 F.2d 820, 830 (2d Cir. 1985) (stating that a defendant's "threats are not hearsay because [they were] not offered for their truth; the threats are verbal acts"). Here, Scott's testimony concerning the threat was not offered to prove the truth of what Teresa asserted but was offered to show its effect on Scott. Scott's defense depended on demonstrating he shot Teresa while under extreme emotional distress not caused by his own conduct. Testimony about the threat's impact would further Scott's defense that his distress came from an external source. And as Scott testified, when he saw that Teresa's gun was missing from the safe, he "thought the threat was serious." Whether the threat "[was] true is irrelevant, since the crucial factors are that the statements were made and that they influenced the defendant['s] behavior." *See State v. Salmon*, 612 P.2d 366, 369 (Utah 1980) (concluding testimony was not hearsay when it was offered, "not to prove the truth of what [the informant] said to defendants, but rather to show that [the informant] had made statements which induced defendants to commit the offense").

¶23 The threat was not inadmissible hearsay, and it follows that if defense counsel had demonstrated this through proper argument, the court would have allowed Scott to testify about it.

¶24 Scott next argues that his counsel's failure to correctly argue the rules of evidence fell below an objective standard of reasonableness. We agree.

¶25 In this instance, defense counsel failed to correctly use the rules of evidence to support Scott's defense: counsel did not argue the threat was admissible because it was offered to show

its effect on Scott, rather than to prove the truth of what Teresa asserted. Counsel's failure was unreasonable, especially in light of Scott's trial strategy, which was to show that his distress originated outside his own behavior. A serious threat to Scott from Teresa would have been an important piece of evidence at trial, and a reasonable attorney would have used the rules of evidence to explain to the court why the threat was admissible. Counsel's lack of argument did not merely "deviate[] from best practices or most common custom"—it amounted to deficient performance. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011).

¶26 The State argues defense counsel's performance was not deficient because "counsel had a sound strategic reason not to seek to admit the specific words of Teresa's alleged threat." Further, it argues defense counsel did not seek to admit the specific words of the threat because an "imaginary threat" could have had a greater impact on the jury than hearing the actual words.

¶27 We do not agree that this was a sound strategic reason for counsel's actions. While an "imaginary threat" could have allowed the jury to conjure something worse than what Scott would have testified to, the converse is also true. Testimony about the threat's actual content could have connected it to various other aspects of Scott's testimony, including Teresa's threatening behavior in other contexts, and would have established the foundation for testimony about Scott's reaction to seeing the empty gun safe. As it was, Scott did not testify about it and counsel did not refer to it in closing argument, even though the underpinning of Scott's defense was that he acted under distress not substantially caused by his own conduct. Under these circumstances, the negative repercussions of omitting the content of the threat were greater than the possible benefits; admitting its content would only have strengthened Scott's defense. We therefore conclude defense counsel's actions could not have been sound trial strategy.

¶28 Because the threat was central to a defense that focused on trying to show that Scott's conduct originated from distress caused by a source other than his own conduct, there was no strategic reason for counsel not to argue that the threat was admissible. Scott has therefore met his burden in showing that his defense counsel's performance was deficient.

II. Prejudice

¶29 To demonstrate prejudice, Scott must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶30 Scott argues that prejudice is evident because "the jurors expressed their concerns about the very point of law that the excluded evidence would have had a significant impact on." Because Scott admitted he killed Teresa, the sole issue at trial was whether the killing was mitigated by extreme emotional distress. The notes the jury delivered to the court indicate its deliberations had narrowed in on the definition of "substantially caused." This suggests one or more of the jurors was struggling with whether Scott had "substantially caused" the distress he was experiencing. The second note illuminates how the jury was split: "We are at an absolute impasse, 6-2. Two feel that 'substantially caused' needs to be 'the majority of the time.'" Only after a verdict-urging instruction and two more hours of deliberation did the jury arrive at a guilty verdict.

¶31 Scott argues the jury's second note demonstrates that two of the jurors, if not more,[3] believed Scott was "suffering under

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3. The jury stated it was "at an absolute impasse, 6-2" and that "[t]wo feel that 'substantially caused' needs to be 'the majority of the time.'" At a minimum, two jurors apparently believed at that (continued...)

the influence of extreme emotional distress" not substantially caused by his own conduct. As a result, Scott reasons that if the jury had been given more specific evidence regarding the threat, there is a reasonable probability that the result of the trial would have been different.

¶32 The State argues there is no reasonable likelihood the outcome of the trial would have been different if the jury had heard the specific words of Teresa's threat. The jury heard testimony from Scott that Teresa threatened him and that he believed the threat was serious. The jury also heard that after Scott saw the gun missing, he was "scared to death" and "worried that Teresa was going to use that gun to do some harm to [him]." Because of this testimony, the State argues that the "specific words of [the] threat . . . would have added little, if anything, to what the jury already heard."

¶33 Even though Scott testified that "there was a threat made" and seeing that Teresa's gun was missing from the safe made him think "the threat was serious," he was not allowed to offer any other information regarding the threat, including the surrounding circumstances, the words used, and the effect it had on him. After the court warned defense counsel the threat was hearsay and would not be admitted, counsel did not inquire into it again and did not argue, or even imply, that the threat played a role in special mitigation. In contrast, the prosecutor's closing argument stated that Teresa "was no threat" and had not

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(...continued)
point that Scott was acting under extreme emotional distress not substantially caused by his own conduct. It is also possible two other jurors did not believe Scott qualified for the mitigation because he had caused his distress "the majority of the time." And it is not impossible that six jurors believed Scott qualified for mitigation, while the other two maintained that Scott did not qualify because he had caused his distress the majority of the time.

"provoke[d] him" and asked the jury "what reasonable basis does [Scott] have to make [the] claim that simply the absence of that gun from the safe creates extreme emotional distress[?]" For these reasons, we are persuaded that testimony of the specific threat and its effect on Scott would have given the jury more evidence on the very point that was in dispute.

¶34 In sum, the jury notes demonstrate the jury was at an impasse over whether Scott had substantially caused the distress he felt. At least two jurors were so convinced that Scott acted under extreme emotional distress that the jury described its position as an "absolute impasse." Testimony about the threat would have directly reinforced the sentiments of these two jurors. That testimony also might have influenced the jurors who believed that "substantially caused" meant "the majority of the time." Consequently, had Scott been allowed to testify about the threat, there is a reasonable probability the jury would have continued to be deadlocked, ending the case in a mistrial. This probability is enough to undermine our confidence in the outcome of this trial. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

CONCLUSION

¶35 We conclude Scott received ineffective assistance of counsel and therefore reverse and remand for a new trial.

VOROS, Judge (concurring):

¶36 I concur in the majority opinion as a correct statement and application of the law. I write separately to express my concern with the law of extreme emotional distress as it presently exists in Utah, particularly as applied in the context of intimate relationships.

¶37 The facts of the present crime must be viewed against the backdrop of a relationship in which Scott was the usual aggressor. He would call Teresa names like "bitch" or "just anything . . . that could hurt her and make her feel like she was a bad person." In fact, his contact name for her in his cell phone was "Bitch Teresa." Scott threatened "multiple times" to kill Teresa, promising that "'one of these days I'm going to kill you.'" In fact, he did try to kill Teresa once, attempting to run her over with their SUV while their sons were in the back seat. Teresa jumped out of the way. The boys also saw Scott "get physical" with Teresa. One time he threw a towel at Teresa's face and "started punching her in the gut." Another time he "slammed" a vacuum into her legs.

¶38 Teresa would also get mad and yell, but she did not get as angry or aggressive as Scott. The boys never saw her "get physical" with him, call him names, or threaten him. She did call the police a few times. Scott called the police too. During one of the police visits, Scott asked the responding officer to tell Teresa to "stop touching" him. In all, the police came to their home "six to eight times." They arrested Scott on one occasion (he pleaded guilty to domestic violence assault). Teresa obtained a protective order, they separated, but they soon got back together. On the day of the shooting, one of the couple's sons received a call from a friend who asked why the police were at his house; the son called home and nobody answered. He rushed home, worried that Scott had "finally killed her." When the other son heard there had been a fatal shooting, he worried that his "mom was dead."

¶39 And what, according to Scott, ignited his extreme emotional distress? After a fight, he noticed a handgun missing; he heard Teresa on the phone with her mother; she yelled something to him; he stormed into the bedroom and saw her lying on the bed pointing her cell phone at him. In response, he grabbed a gun from the gun safe, cocked it, and shot her three times.

¶40 I do not believe the law should mitigate the culpability of one who kills under these circumstances. "What is generally known as the provocation defense has for two decades been criticized as mitigating violence committed by men against women in intimate relationships." *State v. Sanchez*, 2016 UT App 189, ¶ 40 n.9, 380 P.3d 375, *cert. granted*, 390 P.3d 719 (Utah 2017) *and* 390 P.3d 727 (Utah 2017). It now "is one of the most controversial doctrines in the criminal law because of its perceived gender bias; yet most American scholars and lawmakers have not recommended that it be abolished." Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. Crim. L. & Criminology 33, 33 (2010); *see also* Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 Emory L.J. 665, 667 (2001) ("Voluntary manslaughter has never been a female-friendly doctrine."); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331, 1332 (1997) ("Our most modern and enlightened legal ideal of 'passion' reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned."); Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. Rev. 1679, 1679 (1986) ("[T]he legal standards that define adequate provocation and passionate 'human' weaknesses reflect a male view of understandable homicidal violence.").

¶41 In my judgment, the law should mitigate the culpability of homicides only where society as a whole can to some degree share the rage animating the killing:

> To maintain its monopoly on violence, the State must condemn, at least partially, those who take the law in their own hands. At the same time, however, some provoked murder cases temper our feelings of revenge with the recognition of tragedy. Some defendants who take the law in their own hands respond with a rage shared by the law. In

> such cases, we "understand" the defendant's emotions because these are the very emotions to which the law itself appeals for the legitimacy of its own use of violence. At the same time, we continue to condemn the act because the defendant has claimed a right to use violence that is not his own.

Nourse, 106 Yale L.J. 1331, 1393. This "warranted excuse" approach would mitigate the culpability, for example, of a man who murders his daughter's rapist, but not one who murders his departing girlfriend. *See id.* at 1392.

¶42 But this is not the law in Utah. And here, at least some members of a properly instructed jury seemed to struggle with whether, on these facts, Scott was entitled to special mitigation. In this circumstance, under present law, I cannot say that my confidence in the verdict is not undermined. But like Judge Christiansen, I urge our legislature to revise section 76-5-205.5 so that it can no longer be used to mitigate the final act of abuse perpetrated by an abusive intimate partner.

CHRISTIANSEN, Judge (concurring):

¶43 I agree with the majority opinion's conclusion that defense counsel's performance at trial was deficient when he failed to argue that the alleged "threat" made to Scott by Teresa was non-hearsay. As explained by the majority, *supra* ¶ 22, Teresa's alleged threat to Scott was not a statement offered for its truth and thus fell outside of the definition of hearsay. *See* Utah R. Evid. 801(c); *United States v. Stratton*, 779 F.2d 820, 830 (2d Cir. 1985). Competent defense counsel should have known enough to correctly argue that the rules of evidence would allow the jury to hear this testimony. And, while I do not believe that hearing the specifics of the alleged threat would ultimately have made a difference in the jury's verdict, I recognize that it is "not within the province of an appellate court to substitute its judgment for

that of a front line fact-finder." *In re Z.D.*, 2006 UT 54, ¶ 24, 147 P.3d 401. Therefore, I agree that remand is warranted.

¶44 However, though I agree with the majority opinion, I write separately to voice my concern regarding the current statutory implementation of the extreme emotional distress (EED) defense. I do not believe the EED defense should have been available to Scott. After Scott had abused and threatened her over the course of several years, he shot an unarmed Teresa three times, including once in the mouth, while she was lying on their bed with her cell phone in her hand. In my view, this "reaction" to the marital difficulties combined with an alleged threat by Teresa does not create a situation in which Scott should be able to claim he was exposed "to extreme emotional distress" that would reasonably explain and mitigate his loss of self-control. Though our courts have employed a generous approach to the EED defense, *see, e.g.*, *State v. White*, 2011 UT 21, ¶ 29, 251 P.3d 820, we must still consider the circumstances surrounding a defendant's purported EED from the viewpoint of a reasonable person. "Thus, the legal standard is whether the circumstances were such that the average reasonable person would react by experiencing a loss of self-control." *Id.* ¶ 36 (citation and internal quotation marks omitted).

¶45 I do not agree with Scott's assertion that a difficult and contentious marriage, combined with Teresa's alleged threat, could have resulted in the type of extremely unusual and overwhelming stress that would cause "the average reasonable person" to experience "a loss of self-control." *See id.* (citation and internal quotation marks omitted). Allowing the defendant to claim special mitigation under facts such as these undercuts and de-legitimizes the proper purpose of the battered-spouse aspect of the EED defense.

¶46 Indeed, the availability of the EED defense to persons in Scott's situation highlights the defense's problematic history. As this court has recently stated, and as noted in Judge Voros's concurring opinion, "What is generally known as the

provocation defense has for two decades been criticized as mitigating violence committed by men against women in intimate relationships. It now is one of the most controversial doctrines in the criminal law because of its perceived gender bias[.]" *State v. Sanchez*, 2016 UT App 189, ¶ 40 n.9, 380 P.3d 375 (citation and internal quotation marks omitted) (collecting authorities), *cert. granted*, 390 P.3d 719 (Utah 2017) *and* 390 P.3d 727 (Utah 2017); *see also, e.g.*, James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 Yale L.J. 1845, 1865 (1999) (noting that the "provocation doctrine has its historical roots in a value system that embraced the oppression of women"). It is true that EED defense jurisprudence has come a long way since the old common law provocation/heat of passion defense. *See, e.g., State v. Bishop*, 753 P.2d 439, 468–70 (Utah 1988) (plurality opinion) (discussing the evolution of the EED defense in Utah), *overruled on other grounds as recognized by Ross v. State*, 2012 UT 93, 293 P.3d 345. But, as applied here, the EED defense allows an abusive defendant such as Scott (who had committed domestic violence against Teresa and who had at one time been the subject of a restraining order) to claim that the cumulative emotional stress of a difficult marriage and a single alleged threat mitigated his otherwise unprovoked murder of his wife. By doing so, the current statutory implementation of the EED defense gives continued life to antiquated notions of spousal control and perpetuates a belief that violence against women and intimate-partner homicide are acceptable and legitimate. The law should not do so. I therefore urge our legislature to review Utah Code section 76-5-205.5, and to consider explicit recognition in the statute that an abusive spouse or partner cannot claim special mitigation under these types of circumstances.

Addendum B – Scott's Rule 23B Motion filed in the Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. TRACY SCOTT, Defendant / Appellant.	**MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING RULE 23B MOTION TO REMAND WITH ACCOMPANYING ADDENDUM AND PROPOSED ORDER** Case No: 20140995-CA

COMES NOW, Appellant, by and through counsel, and pursuant to Rules 23 and 23B of the Utah rules of Appellate Procedure, hereby submits a Memorandum and Points of Authorities in support of Appellant's Motion to Remand for Findings Necessary to Determine Ineffective Assistance of Counsel and a Proposed Order. The affidavits demonstrating the non-speculative facts are attached as addendum.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

In order for an appellant to prove a claim of ineffective assistance of counsel, he must first identify the specific acts or omissions he claims fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 690 (1984). In making

the determination about counsel's performance courts should "keep in mind that counsel's function... is to make the adversarial process work in the particular case." *Strickland*, 466 U.S. 668, 690. An appellant must then demonstrate that the deficiencies in counsel's performance were prejudicial to the defense. In cases where prejudice is not presumed (as in denial of assistance of counsel or actual conflict of interest), in order to meet his burden with respect to prejudice an appellant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694.

Rule 23B authorizes this Court to remand criminal cases "to the trial court for entry of findings of fact, necessary for [this Court's] determination of a claim of ineffective assistance of counsel." UTAH R. APP. PRO. 23B(a). The rule requires that the appellant provide "non-speculative allegations of fact, not fully appearing in the record on appeal, which if true, could support a determination that trial counsel was ineffective." *Id.* This "rule is a means to supplement the record with facts now known, even though not previously elicited in the record." *State v. Johnston*, 2000 UT App 290, ¶ 8, 13 P.3d 175.

This memorandum is designed to show there is good reason to remand in order to adequately establish a record of ineffectiveness, specifically to show there is reason to believe trial counsel's performance was deficient when it failed to adequately respond to the State's hearsay objections and establish why defense testimony should have been

admitted at trial. The non-speculative facts supporting remand, combined with the arguments supporting appellant's ineffective assistance claims, have been included in the Appellant's Brief filed simultaneously with this Court.

STATEMENT OF RELEVANT FACTS[1]
(from the record)

Procedural Posture

Appellant Tracy Scott Appeals from the judgment of the Honorable David Mortensen, Fourth District Court, after his conviction of murder, a first degree felony. Scott is currently serving a sentence of fifteen years to life in the Central Utah Correctional Facility.

Trial Testimony

Tracy and Teresa Scott met around 1987, and later began living together. R.278:83-84. The couple got married in 1994 because they "were two peas in a pod", they "were together all the time" and they "loved each other." R.278:84. They moved to Salem where they lived with their two sons, Thayne and Tyson. However, the relationship was "good and bad" with instances of jealousy and fighting. R.287:86. According to Tracy, 65 to 70 percent of the time they were fighting, and the rest of the time they were "getting along or just avoiding... staying out of each other's space." R.278:86-87. During their fighting Scott

[1] A more complete summary of the trial testimony is included in Appellant's Brief. In order to save space Appellant only includes testimony more related to the ineffective assistance of counsel claim in this motion.

insulted Teresa and used profanity. R.278:150. He called her a bitch, in fact for a time the contact in his phone for Teresa was "Bitch Teresa". R.278:150. In terms of insults, threats, and profanity, Teresa could and would "pour it out" right back at Scott. R.278:168.

The police had been called "six to eight times" including one time in 2008 or 2009 when Scott was charged with domestic violence. R.278:88, 90. During that incident Scott threw a towel in Teresa's face and initiated some kind of physical contact, either a punch or a shove. R.278:152-53. That incident led to a temporary separation, but the two "couldn't seem to stay apart" and Scott returned home. R.278:88-89. The couple got some counseling from their bishop and tried to improve the relationship. R.278:91. Things did improve for a time and the fights that they did have "were a little calmer" than before. R.278:91. According to Tracy, the two grew up and stopped "this game of calling the cops" because it was "doing nothing but hurting us and hurting our children and hurting our... reputation in the community." R.278:92.

In another incident in 2006 the police were called after Scott and Teresa began fighting over a cell phone cover. That disagreement led to Scott kicking Teresa by putting his "foot against her to pull on the blanket." R.278:154. In another incident the police were called because Teresa "just simply wouldn't stop touching" Scott. R.278:154. Scott asked the police to tell Teresa to "stop touching" him. R.278:156. Officer Howell responded to one of these incidents and dealt with the couple by taking Scott for ride-along for the afternoon. R.278:16-17, 26-27.

By 2009 the relationship began to "sour again" and they began to fight about finances because there was "not enough to spread around", the family was "living above [their] means." R.278:92. Tracy was working for Alpine School district as a school bus mechanic. R.278:93. Teresa went to school, trying to "get into something that she could comfortably do." R.278:92. After Teresa graduated the "student loan peoples are very quick getting that first bull to you" so the pressure of repaying those loans began. R.278:94. The two fought about finances, student loan debt, about Teresa's lack of work, about spending habits, about how to use the tax return money, about money used to repair family vehicles, about selling assets in order to address financial issues, and about Teresa's prescription drugs. R.278:94-102. They fought about the fact that Scott used tax return money to purchase an assault rifle instead of pay a bill or fix the roof. R.278:142. Scott thought Teresa spent money on frivolous things, buying things on the internet, like camping items that they didn't need but were purchased because "they were on sale at a good price." R.278:143-44.

In the weeks preceding "the event" the couple "argued so much that [Tracy couldn't] really tell you exactly what each argument was over." R.278:103.[2] The fighting during this

[2] But see R.278:159 (On cross examination Scott says the time when he couldn't remember what the couple was fighting about was not during the weeks preceding the shooting, but instead "five to six years previous." Scott said the fighting in the weeks before the shooting was "over the same stuff... I can't sit here and tell you what each fight started with.").

time "was a lot, lot worse" than usual. R.278:107. It was "get in your face, yell, scream at each other, spit flying..." kind of fighting. R.278:107, 278:160. There was "lots of arguing and lots of... miscommunication between the two". R.279:91.

Scott had recently taken the boys and a friend shed hunting, looking for elk antlers shed onto the ground. R.278:103. They took four-wheelers and several guns. R.278:104. According to Tracy they took "two .45's and a 30/30 rifle." R.278:104. They left Teresa's silver Beretta home when they went shed hunting. R.279:104. This trip was a source of some contention between Scott and Teresa because finances were tight. R.278:145. Scott and Teresa argued about the trip "[b]ecause there wasn't enough money to take out of the family fund to go." R.278:105. Teresa thought it would be using money that they didn't have, but Scott "went anyway". R.278:147 Scott decided to use money he received for his birthday to fund the trip, but after they returned from the trip the couple was "back to [their] normal pushing buttons and bickering at each other." R.278:105.

Two or three days before the shooting Scott had called his brother Zane on the phone. R.278:195. Scott "was distraught", "he seemed worse" and was "very disturbed." R.278:196. Scott's voice was shaking on the phone and he "seemed over-concerned about what was going on." R.278:196.

On Friday, the day before the shooting, Scott had the day off work so he slept until about 7:30 or 8:00 and then went "out back" to "tinker in the garage or tinker in the yard." R.278:108. Scott and Teresa "just kind of avoided each other" until the boys got home and

Scott and the boys decided to change the oil in the car. R.278:108. The car "was the source of contention... it was one of the bigger items of contention." R.279:93. During the oil change Teresa and Scott were "fighting and arguing" as Scott rolled back and forth under the car. R.278:108-09. "[T]he old filter was on crooked – or the O-ring rolled out and spit oil everywhere. It just flooded the driveway with oil." R.278:109. Then the couple fought over the spilled oil. R.278:109.

The phone rang and Scott answered in the garage. It was Teresa's mother so Scott took the phone into their bedroom where he saw Teresa "off to the front of the bed, sitting on a stool crouched down at the bed, in front of the bed crouched down." R.110-11. Scott "didn't know what she was doing." R.278:111. Scott leaned across the corner of the bed, threw the phone on the bed and told Teresa it was her mother. R.278:112. As Scott stood back up he noticed that the gun safe was pulled out from under the dresser where it usually stayed, it was open, and there was only one pistol in it. R.278:112. A Beretta 9 millimeter pistol was missing from the safe. R.278:116-17.

Scott walked back out to the garage. The missing pistol made him think about the Wednesday before when "there was a threat made" and he now "thought the threat was serious." R.278:112-13. Scott was worried that Teresa was going to use that missing gun to do some harm to him. R.278:117. Tracy was nervous, he stewed and worried, he "was scared to death." R.278:117. Scott called his mother and stayed out in the garage until the

children got home. Scott felt a little more comfortable "like nothing would happen with the children there." R.278:120.

That night Thayne talked to Scott on the phone. R.279:96. Scott told him he couldn't take it anymore and asked if he should get a divorce, or leave or what. R.279:96. Thayne told Scott he was a grown man "can make his own decisions." R.279:96.

The next day, after he had not slept very well, Scott was still feeling stressed and scared. R.278:121. He went to a haircut appointment and then to his work to put tires on the car. R.278:121-22. There were several miscommunications with the tire salesman so the tires were the wrong size, due to Scott not thinking straight. R.278:124. Scott "really didn't want to go home" so he called a co-worker to see if he could stay at his place. R.278:122-23. Scott arranged to stay at the co-worker's house but Scott eventually just went home. R.278:124. Troy Fackrell, the co-worker said Scott sounded stressed, heard distress in Scott's voice when he called. R.278:218. In all the 15 years he'd known Scott he'd never heard him that upset, "for him to ask that to me was – something had to be bad." R.278:219. When Scott got home and the tires had not been changed it "caused problems." R.278:124.

Scott arranged to pickup some manure for the garden. While Scott tried to back the trailer into the backyard it "kept rubbing the fence" and that caused "another argument." R.278:125. The continued arguing was going on in front of the children. R.278:125.

Thayne remembered that the fighting that day was "more aggressive than regular fights", more mad. R.279:98. It was more contentious than normal. R.278:103.

When Scott went into the house to used the bathroom after cleaning oil from the driveway he saw "the safe was pulled out from... underneath the dresser – open with one pistol in it." R.126-27. Scott had seen the safe "closed and shoved back under the dress" earlier, but now it was open again and the silver gun was missing again. R.278:163. Just like the day before, the Teresa was sitting on the same stool next to the bed. R.127.[3] Scott decided using the bathroom was the "last of [his] problems" so he went back outside and "went to the bathroom in a ditch out back in the corner." R.278:127. Scott "didn't dare go back in the house." R.278:127. He stayed out in the garage.

Scott noticed "Teresa would be leaning out the door and just staring at [him] and so [he] just was freaking out." R.278:128. Scott called his bishop for advice "before he did something" and Scott arranged to meet with the bishop before church the next morning. R.278:L 128. Scott didn't know whether he should call the police. R.278:128. Teresa came out to the garage while Scott was on the phone and went back inside when the call ended. R.278:128. Later Scott heard the door and he "looked back up and Teresa was leaned out the door again, just giving [him] the stare" for what seemed "endless" to Scott. R.278:129.

[3] But see R.278:164 (Scott recalled knowing there was a stool and that Teresa was sitting on it but "didn't remember the stool that day of the incident.").

Scott was scared to death because he thought she had a gun. R.278:129. Scott felt like he had called everyone he could, short of calling the cops. He "started to wig out, just freak out." R.278:129. He finally decided he was "going to go in there and confront this", so he went into the house. R.278:129. He could hear Teresa on the phone and thought she was talking to her mother. R.278:130. Scott took a drink from the refrigerator and heard Teresa's voice yelling at him. R.278:131.

Scott "snapped", he had "seen red" so he "went storming in there." R.278:131. Teresa was laying on the bed and she had her cell phone pointed at Scott, he thought she was taking a picture or video recording of him. R.278:164. Scott "looked at her and [] looked at the cell and [] looked down at the gun safe and the only gun there was the black one." R.278:131. Scott "reached down and grabbed the gun" and "cocked it on the way up." R.278:131. Scott stood there "with the gun in [his] hand pointed at Teresa." R.278:131. He noticed his hand was shaking "[a]nd then, boom." R.278:131. Scott admits that he "shot and killed Teresa." R.278:161. He used the black .45 admitted into evidence. R.278:161, see Exhibit 25 and Exhibit 7.

Scott stared at Teresa but she just sat there not moving. Then Scott started walking away when "all of a sudden she just started to lean and was dead." Scott jumped the gun went off again. R.278:132. Scott walked around the end of the bed and looked down and saw the other gun so he grabbed it. R.278:132. The silver gun had been laying on the carpet "right off the side" of the bed. R.278:163. Then, holding both guns, Scott contemplated

suicide but decided against it after seeing a photo of his sons on the wall. R.278:132. He "put the gun on the bed." R.278:132.

Scott then called 911. R.278:132. He talked to 911 for a minute and then stood at the front door waiting for the officer. When a police car stopped nearby Scott called out to the officer who then pulled in front of Scott's car. R.278:133. Scott "realized he still had the pistol in his hand" so he "put the pistol on the ground, turned around, just walked out, and just went to the ground." R.278:133.

Scott testified he would never do a thing like that if he were in his right mind, and that they had never "done anything that bad", "never, ever pulled guns out or acted like that." R.278:133.

Thayne got a call from a friend who asked why there were a bunch of cops at his house so he called home and nobody answered. R.279:99-100. He rushed home, worried that "he finally killed her." R.279:100. When Tyson heard there had been a fatal shooting he was worried that his "mom was dead." R.279:124.

The police responded to the home after Scott called the 911 and told dispatch that "my wife was shot". See Exhibit 1. When asked "Who shot her?", Scott replied, "I did." See Exhibit 1. Dispatch then asked "Is she awake?" and Scott calmly replied, "No, she's dead." Id.

Dispatch asked Scott if they had been in a fight, and asked what happened, Scott tells her "We've been fighting for the last two weeks, solidly straight." Id. Scott said he

shot her in the bedroom after she got off the phone with her mother "complaining about me and how she's tired of it..." but did not remember "what part of her body", he shot her. Id. "She was gonna take a picture of me and it just went off." Id.

When the police arrived the discovered Scott at the front door of the home, and he yelled "I just shot my wife. I have a gun." R.277:39. After securing Scott in the front yard the police entered the home and found a black pistol laying on the floor in the front room. R.277:42-46, 59. Tracy also told the police there was a "pistol on the bed, too." R.277:90. The police then went into the master bedroom and discovered the victim on the bed. R.277:45. Officer Lowe could see trauma to her mouth, she was not responsive, and the officer could not detect a pulse. R.277:48-49.

While the police were entering the home and initially examining the victim Scott was on the front lawn in the custody of several other officers. During this time[4] Scott became very emotional, distraught, inconsolable, violently shaking, heavy crying, uncontrollably crying, sobbing, hysterical, weeping. R.277:60,61,72,82,83,93, 278:21.

[4] It is unclear from the testimony when this breakdown exactly occurred because Officer Lowe described it as occurring before he entered the home to find the victim, a little after the time when he placed Scott in handcuffs and immediately after Lowe asked where his wife was (R.277:42-43, 71-72), but Officer Cobbley, who stayed with Scott on the lawn while Lowe entered the house, testified that he did not notice Scott become emotional until approximately 60 seconds later when he transferred Scott's custody to Officer Howell (R.277:82, 92-95). Officer Howell testified that as he arrived on scene he saw Scott "laying there quietly as they were handcuffing him" and he "helped get him up." R.278:10. "Once he – once we saw each other, he became pretty inconsolable." R.278:10.

Scott asked Officer Howell, a longtime friend who responded to the scene, to "Tell my mom" and "I want you to tell my kids". R278:11. Howell also recalled Scott saying "something about 'It wasn't worth it.'" R.278:11. Howell later recalled that statement being "I though it would be worth it, but it's not." R.278:30.

The police collected evidence from Scott's person, including evidence of gunshot residue, and evidence from inside the home, including one black handgun, one silver handgun fully loaded with a round in the chamber, 3 shell casings, 3 slugs, a small empty gun safe, and two cell phones. R.277:106, 133-14, 120, 124, 125, 134, 145-46, 160-61, 197, Exhibit 1, Exhibit 2, Exhibit 9, Exhibit 10, Exhibit 11, Exhibit 12, Exhibit 17, Exhibit 25, Exhibit 26. The police also found Teresa Scott's body lying on her back on the bed with feet crossed, "semi-rolled off to the side of the bed" with some crochet work across her lap. R.277:131, Exhibit 14. The slugs and bullet casings recovered from the scene were identified as having been fired from the black handgun. Exhibit 23. Both guns and all of the bullets and shell casings were tested for fingerprints but no identifiable fingerprints were recovered. R.277:165-66, 178.

The medical examiner performed an autopsy on Teresa Scott's body and concluded the cause of Teresa's death was "gunshot wounds to the head and the chest and the manner of death was designated as homicide." R.278:43. No other injuries or natural diseases were present to explain the death. R.278:43. The first gunshot entered at the left corner of the mouth, damaging teeth and fracturing the jaw, passing through the larynx and stopped

against the spine. R.278:45. This wound would have been potentially lethal because of damage to the airway, and would have been very difficult to repair in surgery. R.278:47.

The second gunshot entered just below the chin and angled sharply out the side of the neck below the jaw on the right side. R.278:49. This wound was not potentially lethal and not directly related to the cause of death. R.278:50. It could have caused some scarring, and potentially some speech impediment, but independently it would have been a survivable wound. R.278:50.

The third gunshot entered in the center of the chest, through the sternum, through the heart "causing large holes and tears in the heart muscle tissue itself", then passed through the spine and exited "mid-back." R.278:52-53. This is the lethal wound. "Under any circumstances this would be considered a non-survivable wound." R.278:53.

The medical examiner also performed a toxicology examination as part of his exam and found Trazadone, an antidepressant, and Zolpidem, a sleep aid, in Teresa's blood. R.278:60. These drugs generally cause sleepiness and loss of coordination, and can potentially affect thinking and reasoning skills. R.278:61.

Statement of Relevant Non-speculative Facts
(not yet in the record)

Excluded Testimony from Tracy Scott

At trial Scott testified about the stress and anxiety arising from the constant fighting between he and his wife. He testified that this distress increased when he observed that Teresa's gun had been removed from the safe and he thought she had it

with her in the bed. However, when Scott attempted to testify regarding a threat Teresa made to him shortly before the shooting the State objected and the trial court sustained the objection on hearsay grounds and excluded the evidence. R.278:113, see R.291:113-14 (at sidebar defense counsel has no response to the State's hearsay objection). Because trial counsel did not make a proffer of the substance of that excluded evidence it is not presently in the record.

Tracy Scott prepared and signed an affidavit concerning the testimony he would have given if the trial court allowed it. See Affidavit of Tracy Scott. Scott would have testified that while the two were arguing Teresa told him she had gone to the gun range while Scott was camping. She "held her fingers formed into a circle over her chest and said 'I got them in a group "this" big.'" Affidavit of Tracy Scott at 2. Scott would have testified that he took that statement as "a threat that she would or could shoot me." Affidavit of Tracy Scott at 2.

Trial Counsel's Declarations

Trial counsel, Richard Gale, prepared and signed an affidavit concerning his "main objective at trial" ("to show that Tracy was under the influence of extreme emotional distress... not substantially caused by Tracy's own conduct"), and his preparations for trial, including his understanding of what the excluded testimony would have been. Affidavit of Richard Gale at 1-2. His declaration regarding the expected testimony closely tracks the affidavits from Scott and Warren. See Affidavit of Richard Gale at 1-2. Specifically, Gale

knew that Scott would have testified that Teresa had told Scott about taking her gun to the shooting range and shooting in the small pattern, and that Scott had interpreted the statements as a threat. Gale intended to admit the threat testimony to show that Scott was under the influence of extreme emotional distress.

Argument

Scott intends to present a claim of ineffective assistance of counsel to this Court, based upon trial counsel's failure admit testimony in support of special mitigation. Scott asserts that trial counsel failed to respond correctly to the State's hearsay objections and failed to proffer the excluded evidence for the record. Scott asserts that the excluded testimony should not have been excluded as hearsay and that counsel's failure to correctly respond to the State's objection prejudiced his case. Because the evidence needed to prove this claim is not currently in the record Scott must seek to supplement the record through Rule 23B.

The affidavits set forth non-speculative facts, which, if true, "could support a determination that counsel was ineffective." UT.R.APP.PRO. 23B(a). Scott and Gale have established facts that are non-speculative and that are relevant to considering whether or not counsel was ineffective for failing to properly admit the testimony.

Scott must also show that counsel's performance was deficient. He bears the burden of proving that counsel's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Strickland*, at 688-689 "An

accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, at 685. This includes and attorney who understanding the rules of evidence and utilizes them to admit evidence in support of the client's defense. If it is true that counsel wanted to admit the testimony that the State objected to, as established by the affidavits, then it would be deficient performance for counsel not to utilize the rules of evidence to admit the testimony.

Counsel is expected to know the rules governing evidence and procedure at trial. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." UT. R. PROF. COND., 1.1. The knowledge and skill required to proceed to trial necessarily includes an understanding of the rules of evidence. The preparation reasonably necessary required to proceed to trial includes being prepared to justify how the evidence you intend to admit is admissible under the rules.

Hearsay is defined as "[a] statement" ("an oral or written assertion..."), "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." UT. R. EVID. 801. "Hearsay is not admissible except as provided by law or by" the Utah Rules of Evidence. UT. R. EVID. 802. In other words, an out of court assertion of truth, offered to prove that truth, cannot be admitted unless it meets one of the exceptions.

One common way for out-of-court statements to be admitted without violating the hearsay rule is that it not being offered for the truth of the matter asserted. Because such a statement would not be offered to prove its truth it would not be hearsay (nonhearsay), rather than an exception to hearsay. "[O]ut-of-court statements not offered to prove the truth of the matter asserted are by definition not hearsay." *State v. McCullar*, 2014 UT App 215, ¶27. However, just because a statement is not hearsay does not make it admissible unless it is relevant. "Understanding when a statement has evidentiary value for purposes other than its truth content is one of the most hotly debated and confusing issues in evidence." Collin Mangrum & Dee Benson, MANGRUM & BENSON ON UTAH EVIDENCE 740 (2014).

One of the categories of common admissible nonhearsay statements are those that are relevant because of the impact they have upon the hearer. For example, in a wrongful termination case "safety and discriminatory complaints made by an employee to his employer would be admissible to prove that he was fired in retaliation for 'whistleblowing'", which the is crux of the issue, rather than to prove the truth of complaints themselves. Mangrum, 744.

State v. Salmon, 612 P.2d 366 (Utah 1980) dealt with a predecessor to the current hearsay rule but the principle is the same, evidence is not hearsay if it is not offered to prove the truth. There the defendant was convicted of burglary after presenting a defense of entrapment. On appeal the defendant alleged he should have been able to offer

evidence of what the informer working with the police had said to them as an inducement to commit the crime. The Utah Supreme Court recognized that the "excluded testimony was offered, not to prove the truth of what [the informer] said to defendant, but rather to prove that [the informer] had made statement which induced defendant to commit the offense." *Salmon*, 612 P.2d 366, 369. Whether or not the things the informer's statements "were true is irrelevant, since the crucial factors are that the statements were made and that they influenced the defendants' behavior." *Salmon*, at 369.

At trial defense counsel asked Scott about the "serious" threat, by asking "who threatened who?" R.278:113. Scott's response was a bit round-about, and when he began to mention an accusation of an affair the State objected to hearsay and the court sustained the objection without comment from defense counsel. R.278:113. Then the court asked counsel to approach for a sidebar where it informed counsel there was "no way" he was getting in the threat because it was hearsay. R.291:113. The State commented that "it needs to stop right now", to which counsel merely replied "Okay." R.291:113. After the sidebar Scott begins again to talk about the threat he "had received the day before" and the State again interrupts. R.278:114. The State asked for another sidebar but this time only requests a lunch break. R.291:113. The court ordered a break and the parties eventually begin discussing the "tough spot" the prosecutor was in "because I hate to keep objecting." R.278:115. The prosecutor then suggested defense counsel "talks very directly and frankly with Mr. Scott and tells him exactly what he can and can't say."

R.278:115. Ultimately the court concludes that "the only responses I'm getting are clearly hearsay". R.278:116. After the recess defense counsel moved on and did not introduce any evidence related to Teresa's threat to Scott.

Based on the affidavit from Scott the content of the threat alluded to is now available. According to Scott he would have testified that while they were fighting Teresa told him she recently took the gun to the shooting range and that she was able to shoot in a small area. See Affidavit of Tracy Scott at 2. The affidavit also describes that Scott interpreted Teresa's statements as a threat that she would or could shoot him. Based on the affidavit of trial counsel the fact that counsel knew the content of that threat and how it affected Scott is also now available. See Affidavit of Richard Gale at 3.

Trial counsel knew how the statement affected Scott and therefore counsel knew that the relevant purpose of Teresa's out-of-court statement was not to prove that she actually went shooting, or that she was a good aim, but to prove the impact it had on Scott as the "hearer" of the threat. After all, the whole premise of the defense was that at the time Scott shot his wife he was under the influence of an extreme emotional distress not caused by his own conduct. The defense needed to prove that some external source caused Scott to suffer extreme distress and what better way to do that than to show that Teresa had threatened him, implicitly, with the very same gun he later finds is missing and believes she has on her person or nearby.

The statement from Teresa was not hearsay because it was not offered to prove the

truth of the matter asserted, and it was admissible because it had evidentiary value relevant to prove Scott's level of distress from a source outside of his own conduct. Trial counsel's performance was deficient because it was unreasonable not to use the rules of evidence necessary to admit testimony so crucial to the defense. The only explanation is that counsel either didn't understand the rules or understand the relevance of the threat, either way that is deficient performance.

Under *Strickland* counsel's performance is ineffective only if it was objectively unreasonable under prevailing professional norms and to prevail on his claim, Scott must overcome the "strong presumption" that counsel's conduct might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Presumably the State in this case would assert that there is a conceivable strategy for properly arguing the rules of hearsay, not wanting the evidence admitted. But here it is clear, both from the theory presented at trial and the fact that counsel tried to admit it, it is not conceivable on this record to think counsel did not want to admit evidence that Teresa threatened to shoot Scott days before the killing.

However, that strong presumption counsel's conduct was strategic is easily overcome in this instance because it is clear that counsel wanted this testimony admitted. There can be no presumption, based on the record and the affidavits, that trial counsel's strategy was to purposely argue the wrong rules of evidence, or fail to respond at all, when presented with an objection to the evidence he was trying to admit. There was no sound trial strategy in having part of the most crucial evidence in the defense excluded.

The final requirement of *Strickland* is prejudice. Prejudice is often hard to prove when a jury has heard days of testimony. Often courts will find that, although counsel should have done something, moved to exclude some evidence or admitted some other evidence, the confidence in the outcome is not undermined when the mistake is compared to the rest of the record. Scott asserts that this record plainly demonstrates the prejudice because the juror expressed their concerns about the very point of law that the excluded evidence would have had a significant impact on. As discussed in the first section, the jury was deadlocked over the question of special mitigation. The jury split on the question of whether or not Scott "substantially caused" his own extreme emotional distress and based on the context of the notes sent by the jury, at least two of the jurors believed Scott was suffering under the influence of extreme emotional distress. This was based upon evidence that Scott and Teresa had a long history of fighting that had gotten worse than ever, and evidence that Scott saw a gun was removed from the safe. If the jury had been informed that Teresa threatened to shoot Scott with the very gun he later saw missing from the safe, the question that already led to a deadlocked jury would have been even more important. Trial counsel's failure to introduce that evidence should undermine confidence in the outcome and satisfy the prejudice requirement of *Strickland.*

Because Scott's theory was to show he suffered under an extreme emotional distress counsel's failure to respond correctly to the State's hearsay objection was deficient performance. Because it was counsel's intent to admit the testimony, before

the State objected, there is no conceivable strategic purpose in failing to try to admit it after the objection. Finally, because the impact of the threat evidence would have been significant given what the jury disclosed about its thoughts on special mitigation counsel's deficiency prejudiced Scott.

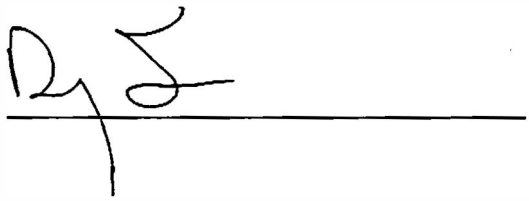
Because the attached affidavits set forth non-speculative facts not currently on the record needed to establish trial counsel's ineffective assistance this Court should grant Scott's motion and remand the case for evidentiary hearings necessary to supplement the record.

DATED this 18th day of December, 2015.

Douglas Thompson

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion, Memorandum, Attachments, and Order postage prepaid to the Utah Attorney General, Appeals Division, 160 East 300 South, P.O. Box 140854, Salt Lake City, Utah 84114-0854 this 18th day of December, 2015.



DOUGLAS J. THOMPSON (12690)
Utah County Public Defenders Assoc.
51 South University Ave., Suite 206
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Tel. 801.852.1070
Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. TRACY SCOTT, Defendant / Appellant.	**PROPOSED ORDER FOR REMAND** Case No: 20140995-CA

Based upon the Motion of Appellant, and for good cause showing, IT IS HEREBY ORDERED that this matter is temporarily remanded to the Fourth District Court for evidentiary hearing and the entry of findings of fact on the following claims of ineffective assistance of counsel:

1. Trial counsel's failure to respond to the State's hearsay objection during Scott's testimony regarding threats made by the alleged victim.

So ordered this _____ day of _____, 20____ .

BY THE COURT:

_____
Judge of the Utah Court of Appeals

Prepared by:
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. TRACY SCOTT, Defendant / Appellant.	**AFFIDAVIT OF TRACY SCOTT** Case No. 20140995-CA

I, TRACY SCOTT, state the following on personal knowledge:

1. I am the Tracy Scott, the defendant in this case.
2. I exercised my right to testify on my own behalf at my trial in this case. During my testimony I tried to testify about an argument that I had with Teresa a few days before the shooting where she threatened me. The judge stopped me from testifying about that argument.
3. If I had been allowed to testify about that argument I would have testified to the following:

a. On Wednesday before the shooting Teresa and I were arguing. During that argument I said to Teresa "at least I take the kids and go do stuff. You just lay around and sleep all day."

b. Teresa replied that "while you was gone with the boys I didn't sleep, I went to the gun range." Then she held her fingers formed into a circle over her chest and said "I got them in a group 'this' big."

c. In the context of that argument I took her statement to be a threat that she would or could shoot me.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED this 8 day of May, 2015.

Tracy Scott

Subscribed and sworn before me this 8 day of May, 2015.

NOTARY PUBLIC
RICHARD D PORT
658269
COMMISSION EXPIRES
SEPTEMBER 12, 2016
STATE OF UTAH

Notary Public

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. TRACY SCOTT, Defendant / Appellant.	**AFFIDAVIT OF RICHARD GALE** Case No. 20140995-CA

I, RICHARD GALE, state the following on personal knowledge:

1. I am an attorney licensed to practice law in the State of Utah.
2. I was retained to represent Tracy Scott in a murder case where he was accused of killing his wife Teresa. I represented Tracy in preparation for trial, at trial, and at sentencing. After sentencing I withdrew from the case when counsel was appointed for appeal.
3. The main objective at trial was to show that Tracy was under the influence of extreme emotional distress at the time of the shooting, and that the distress was not substantially caused by Tracy's own conduct. We hoped to show that Teresa's conduct caused Tracy to suffer from an extreme emotional distress. We planned to show Teresa's conduct included her escalating the level of their fighting, a specific threat Teresa made in the days preceding the shooting, and Teresa's introduction of a gun into the already tense situation caused Tracy's

extreme emotional distress.

4. In preparation for trial I spoke with Linda Scott Warren, Tracy's mother. We discussed her possible testimony at trial.
5. I called Linda Warren as a witness at trial. I hoped to establish through Linda that she witnessed evidence suggesting Tracy was emotionally distressed. Although I was able to introduce evidence related to Linda's observations of Tracy and Teresa's relationship and their history of fighting, the court excluded evidence of the substance of a phone conversation between Tracy and Linda shortly before the shooting. If the judge allowed me to ask Linda questions about that conversation I expect her testimony would have been that:
    a. Tracy said things with Teresa were worse than they had ever been.
    b. Tracy told her he was scared of Teresa, that she had been acting strange.
    c. Tracy told her he had seen a gun missing from the gun safe and that he believed Teresa had the gun with her in the bed.
    d. Tracy told her that if anything bad happened that the boys were supposed to live with Linda.
6. In preparation for trial I spoke with Tracy Scott about what his testimony would be.
7. Tracy elected to testify on his own behalf at his trial. During the direct examination I tried to elicit testimony from Tracy regarding a threat

Teresa made to Tracy in the days prior to the shooting. When I asked Tracy what the specifics of that threat were the judge excluded the testimony. If the judge had allowed Tracy to testify to the content of that threat from Teresa I expect his testimony would have been that:

a. During a fight a few days before the shooting Teresa told Tracy that while he was gone camping she took her gun to the shooting range. Teresa told Tracy that she was able to get all the shots in a pattern "that big" and she held her hands over her heart forming a circle with her fingers.

b. Tracy interpreted Teresa's statement as a threat. He thought she was saying she had a gun and knew how to use it against him if she needed to.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED this 26 day of May, 2015.

Richard Gale

Subscribed and sworn before me this 26 day of May, 2015.

Notary Public

CHARISSA WILLES
NOTARY PUBLIC-STATE OF UTAH
COMMISSION# 611051
COMM. EXP. 06-28-2015

Addendum C – R.181-82: Jury Questions

Aug 22, 2014

We are at an absolute impasse. 6-2

Sandra J Driggell

Two feel that "substantially caused" needs to be "the majority of the time"

See 13.4

S J Driggell

August 22, 2014

1. Re: Jury Instruction #13 -
What is the legal definition
of "substantially caused?"

Sandi Orgill

D – R.180: Trial Court's Supplemental Instruction (Dynamite Instruction)

SUPPLEMENTAL INSTRUCTION

Members of the jury, I am going to ask you to continue your deliberations in an effort to agree upon a verdict . I am specifically asking you to review all of the jury instructions I have previously given you.

This trial represents a significant expenditure of time and effort by you, the court, the parties, and their attorneys. If you should fail to agree upon a verdict, the case is left open and may have to be tried again, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried to you.

In order to bring eight minds to a unanimous result jurors should examine with candor the questions submitted to them, with due regard and deference to the opinions of each other. All jurors should consider whether their position is a reasonable one, when it makes no impression on the minds of another equally honest, equally intelligent juror, who has heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath.

Nevertheless, as I previously instructed you, it is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors. You should not hesitate to change an opinion if convinced that it is erroneous. However, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Utah State Courts

Utah Supreme Court <supremecourt@utcourts.gov>

State v. Scott, 20170518-SC - Respondent's Brief

1 message

Douglas Thompson <dougt@utcpd.com> Thu, Dec 28, 2017 at 5:57 PM
To: Utah Supreme Court <supremecourt@utcourts.gov>, Utah Attorney General Appeals Division <criminalappeals@agutah.gov>

Please see the attached document.
In accordance with Standing Order No. 11, paper copies have been submitted by mail because this is a “brief on the merits under Rule 24”.
Thank you.

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