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**To: The Panel From: Karen Thompson**

Utah Court of Appeals

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## MEMORANDUM

TO: The panel

FROM: Karen Thompson

RE: State v. Cross, Case No. 20150444  
Rule 23B Motion for Remand

DATE: October 3, 2017

Pursuant to the Utah Supreme Court's Revised Order Pertaining to Rule 23B, Appellant Raymond Cross filed his opening brief, accompanied with a motion seeking a remand to supplement the record with materials necessary to provide a basis for eight additional ineffective assistance of counsel claims. The motion must be supported by a "nonspeculative allegation of facts, no fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective." Utah R. App. P. 23B(a). The present motion is arguably insufficient to meet this standard, as more fully discussed in the State's response. This is a summary of the issues.

In order to prevail on an ineffective assistance of counsel claim, a defendant must rebut a strong presumption in favor of effective representation and show that no objectively reasonable attorney would have acted as counsel did. In particular, a defendant must demonstrate that there would be no conceivable tactical basis or strategy for counsel's actions and must also demonstrate prejudice from the alleged deficient performance. Most of the claims in the present rule 23B motion concern alleged failures of trial counsel that demonstrate a tactical trial strategy. Cross first claims that his trial counsel was ineffective for advising him not to testify at trial and that he was prejudiced because he could have effectively rebutted the evidence against him. This claim clearly concerns a matter of trial strategy. If Cross had testified, he would have been subjected to cross-examination and the considerable peril that it posed for him. His counsel would have been cognizant of how Cross was likely to perform on the stand and how he would handle himself when cross-examined. The decision not to have Cross testify was a strategic one and does not support a claim of ineffective assistance.

Many pages of the lengthy memorandum in support of a rule 23B remand are devoted to a claim that trial counsel was ineffective in at least seeking to have the results of three polygraph tests and a voice stress test performed on Cross admitted. This claim is supported by a treatise-like discussion of trends toward admission of such

evidence. While admitting that the admissibility of the tests was not certain, the argument is that counsel should have attempted to do so. Thus, the claim is at best speculative. More importantly, the State notes that admission of polygraph test results in Utah requires both an agreement from the prosecution and a demonstration of admissibility under rule 702 of the Utah Rules of Evidence. Although the defense provided the results of at least one of the tests to the State, there was no agreement for admission. Under these circumstances, trial counsel would not have been ineffective for failing to seek admission of the polygraph tests because the State would not agree to admission.

The remaining claims are even less persuasive. Cross claims that there was no record of any report of abuse of the Cross children made to DCFS before December 2011 and that this proved that the children's pediatrician and their mother committed "perjury" by claiming that they made such reports. The failure of DCFS to have a record of the reports does not demonstrate that they were not made. It was a reasonable tactical decision not to present testimony from Cross's wife's ex-husband claiming that she made false claims of abuse against him. The claimed impeachment evidence was not sufficiently probative to support a claim of deficient performance by failing to pursue it. The claim that trial counsel did not effectively cross-examine victim R.C. about claimed inconsistencies between his trial testimony and his Children's Justice Center interview is discounted or refuted by the record demonstrating that trial counsel did engage in such cross-examination. The failure to examine a police detective about missing photographs he took of doorknobs in the home is arguably inconsequential. The State persuasively argues that the confusing claim of anatomical impossibility was easily rebutted and carried a high risk of alienating the jury.

Finally, the claim that trial counsel failed to adequately prepare defense experts is unsupported. Trial counsel's affidavit reflects that he prepared the witnesses to testify on the subjects as to which they were retained to examine. The fact that their testimony did not achieve the desired result does not demonstrate a lack of preparation rising to the level of deficient performance by trial counsel.