2017

STATE OF UTAH, Plaintiff/Petitioner, v. TRACY SCOTT, Defendant/ Respondent. : Reply Brief

Utah Supreme Court

Case No. 20170518-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

TRACY SCOTT,
Defendant/Respondent.

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

TERA J. PETERSON (12204)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: @agutah.gov

DAVID S. STURGILL
LANCE E. BASTIAN
Utah County Attorney's Office

Counsel for Petitioner

MARGARET P. LINDSAY
DOUGLAS J. THOMPSON
Utah County Public Defender Assoc.
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601

Counsel for Respondent

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Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in Defendant's responsive brief. The State does not concede any matters not addressed in the reply, but believes those matters are adequately addressed in the State's opening brief.

ARGUMENT

I.

DEFENDANT, LIKE THE COURT OF APPEALS, INCORRECTLY APPLIES *STRICKLAND*'S PERFORMANCE STANDARD BY ASSUMING THAT DEFENSE COUNSEL HAD A SUBJECTIVE STRATEGY IN MIND RATHER THAN EVALUATING WHETHER DEFENSE COUNSEL'S ACTIONS WERE OBJECTIVELY REASONABLE

Defendant murdered his wife by shooting her three times at point blank range. He admitted killing his wife, but relied on an extreme emotional

distress defense. Among other things, he testified that three days before he killed his wife, she had threatened him, and that when he saw her by their gun safe and noticed that a Beretta was missing, he took the threat seriously and believed that she meant to harm him. When Defendant began to testify about his wife's alleged threat, however, the State objected that the testimony was inadmissible hearsay.

Defense counsel did not counter that the exact words were admissible non-hearsay because they were not offered for the truth of the matter asserted. The trial court sustained the State's objection, so the jury never heard the alleged threat's exact words.

On appeal, Defendant argued that his counsel was ineffective for not making the non-hearsay argument. The court of appeals agreed, reasoning that defense counsel was deficient because admitting the specific words of the threat—which are not part of the record—would only have strengthened his defense. The court of appeals began and ended its analysis with whether defense counsel's strategy was sound.

But as the State showed in its opening brief, whether the representation advances sound strategy is a consideration, but it is not determinative of *Strickland*'s deficient performance element. Rather, the determinative question "is not whether counsel's choices were strategic, but whether they

were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Defendant nevertheless defends the court of appeals' reasoning. He assumes that defense counsel's subjective strategy was to introduce the specific words of Teresa's alleged threat: "There can be no doubt," Defendant contends, that "defense counsel was attempting to admit the evidence." Br.Resp.22.[1] And because defense counsel did not "make a basic evidentiary argument" to overcome the prosecution's hearsay objection, Defendant concludes, defense counsel necessarily performed deficiently. Br.Resp.29. In Defendant's eyes, counsel is deficient whenever he fails to do what he sets out to do. *Id*.

The record, however, does not demonstrate either that defense counsel's subjective strategy was to introduce the content of Teresa's alleged threat or that defense counsel did not respond to the prosecutor's hearsay objection due to unreasonable preparation to meet it. And because the record does not support either contention, Defendant did not rebut *Strickland*'s strong presumption that defense counsel performed effectively. The court of appeals erred by holding otherwise.

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[1] Defendant asserts that the "state, defense, and Court of Appeals all agreed that the threat was not hearsay and should have been admitted." Br.Resp.10. The State, however, did not agree that the content of Teresa's alleged threat "should" have been admitted. *Id*. Rather, it agreed only that the content of the alleged threat was not hearsay.

But even if the record did reflect that defense counsel's subjective strategy had initially been to introduce the specific content of Teresa's alleged threat yet failed to do so, Defendant still did not prove that his counsel performed deficiently. The ultimate inquiry under *Strickland* is not whether defense counsel had a specific strategy in mind (and failed to accomplish it), but whether defense counsel's actions were *objectively* reasonable. Because reasonably competent counsel could have proceeded as defense counsel did here, Defendant did not meet his burden to prove that his counsel was objectively deficient. The court of appeals erroneously held that he did.

A. Defendant did not rebut *Strickland*'s strong presumption that his counsel had a valid strategic reason not to respond to the prosecutor's hearsay objection.

It is Defendant's burden to prove that his counsel performed deficiently and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687–89, 694 (1984). "Judicial scrutiny of counsel's performance" is "highly deferential," and counsel is "strongly presumed to have rendered adequate assistance." *Strickland*, 466 U.S. at 689-690.

Strickland's strong presumption exists because "[t]here are countless ways to provide effective assistance in any given case." *Id.* at 689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Indeed, "[d]ifferent

lawyers have different gifts," *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000), *cert. denied*, 531 U.S. 1204 (2001), and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

In addition, the trial process "contains a myriad of complex decisions" that often are made in the heat of trial and made with the benefit of experience, knowledge, and information that is not apparent on the record. *United States v. Forston*, 194 F.3d 730, 736 (6th Cir. 1999); *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (explaining that counsel "observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge"); *Premo v. Moore*, 562 U.S. 115, 125 (2011) (noting that counsel's actions can be influenced by "insights borne of past dealings with the same prosecutor or court"). Reviewing courts thus must be careful of "the potential for the distortions and imbalance that can inhere in a hindsight perspective." *Moore*, 562 U.S. 115, 125. As a result, the United States Supreme Court has mandated that "deference must be accorded to counsel's judgment." *Id*. at 126. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

It is the defendant's burden to rebut this presumption. *Id*.; *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) (stating that "burden to 'show that counsel's performance was deficient' rests squarely on the defendant") (internal citation removed). A defendant cannot assume that his counsel acted out of neglect or incompetence. He must prove it. *See State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 ("[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.") (citation and internal quotation marks omitted)). And "[i]t should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Titlow*, 134 S. Ct. at 17 (quoting *Strickland*, 466 U.S. at 689); *see also Sallahdin v. Mullin*, 380 F.3d 1242, 1248-1251 (10th Cir. 2004) (holding that Sallahdin failed to overcome the "strong presumption of constitutionally reasonable conduct" where there was "'no discernible explanation for counsel's failure to call'" expert witness; counsel's incompetence could not be assumed); *Fretwell v. Norris*, 133 F.3d 621, 623-624 (8th Cir. 1998) (holding that counsel's inability to remember reasons for his performance did not rebut the presumption that he performed effectively); *Chandler*, 218 F.3d at 1314 n.15 (explaining that an "ambiguous or silent record is not sufficient to disprove the strong and continuing presumption" that counsel performed effectively).

Here, the court of appeals did not hold Defendant to this burden. Defendant assumes both that defense counsel subjectively intended to introduce the specific words of Teresa's alleged threat and that counsel did not respond to the prosecutor's hearsay objection out of neglect or lack of knowledge. But the record does not support either assumption.

First, the record does not reflect that defense counsel intended to introduce the specific words of Teresa's alleged threat. For example, defense counsel never mentioned Teresa's alleged threat in his opening statement. *See* R.277:17-29. If this were "the linchpin of the defense," as Defendant and the court of appeals contend, one would expect defense counsel to at least mention it in his opening statement. Br.Resp.28. He did not.

But even more importantly, defense counsel never asked Defendant to tell the jury exactly what he claimed Teresa said to him. Instead, defense counsel asked Defendant only "who threatened who?" and "After you saw the safe opened, . . . what were you thinking?" R.278:113-114. It was Defendant's responses—not defense counsel's questions—that drew the prosecutor's objections. *Id*. Again, if defense counsel's strategy had been to introduce the specific wording of Teresa's threat, one would expect defense counsel to specifically ask Defendant what those words were, just as defense counsel did when he asked witnesses to repeat out-of-court statements in

other contexts. *See* R.278:118 (asking Defendant, "what did you tell your mother?"); R.278:177 (asking Defendant's mother, "what did [Defendant] tell you?").

Second, the record does not reflect that defense counsel did not respond to the prosecutor's hearsay objections out of neglect or lack of knowledge. Indeed, just four pages of transcript after defense counsel did not respond to the prosecutor's hearsay objection at issue here, defense counsel responded to a hearsay objection to different testimony with the very non-hearsay argument that Defendant argues defense counsel should have made but did not. Br.Resp.19. During this later exchange, defense counsel responded to the prosecutor's hearsay objection by arguing that the testimony was "not being offered for the truth of the matter" and "was also his present sense impression and his state of mind." R.278:118-119. This rebuts Defendant's surmise that defense counsel "lack[ed]" the "basic evidentiary knowledge" to get the specific words of Teresa's threat admitted as non-hearsay. Br.Resp.19.

Likewise, when defense counsel was questioning the witness following Defendant and the prosecutor again objected that defense counsel was eliciting hearsay, defense counsel exhaustively argued that the testimony was admissible under the rules of evidence. R.278:177-184. Again, if defense

counsel did not understand hearsay or the rules of evidence as Defendant asserts, one would not expect defense counsel to have been able to make these evidentiary arguments.

The record thus does not support Defendant's assertion that defense counsel intended to introduce the content of Teresa's alleged threat but was unable to do so because he did not understand the rules of evidence. Quite the opposite. The record supports the conclusion that defense counsel did *not* intend to introduce the content of Teresa's alleged threat. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."); *Richter*, 562 U.S. at 109 (same).

And even if there were some basis in the record to suggest that defense counsel initially intended to introduce the specific words of Teresa's threat, a competent attorney could have reversed course. Here, defense counsel elicited Defendant's unrebutted testimony that (1) Teresa threatened him, and (2) the threat made him fear for his life. Counsel could have concluded that this was enough. He may have determined that the specific words of the threat would have diluted this testimony if the jury could have concluded

that they were insufficient to make someone actually fear for their life.[2] Or he may have determined that, facing a judge who was hostile to admitting the evidence, he had the critical information before the jury anyway, and he would preserve his hearsay battles for evidence that mattered more. Defense counsel, not the court of appeals, was best positioned to weigh those risks and benefits. And unless no competent counsel would have struck the balance as trial counsel did, the presumption of competent representation remained unrebutted. Defendant did not meet that burden and the court of appeals did not hold him to it.

By assuming that defense counsel's unwavering intent was to introduce this evidence, Defendant and the court of appeals ignored *Strickland*'s directive to not "second-guess" defense counsel's performance on the basis of an inanimate record. *Strickland*, 466 U.S. at 689. And they contradicted *Strickland*'s mandate that defense counsel is strongly presumed to have acted in the exercise of his professional judgment. *Id.; Munguia*, 2011 UT 5, ¶30 ("[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality."); *Sallahdin*, 380 F.3d at 1248-1251 (holding that Sallahdin failed to overcome the "strong presumption of

[2] Defense counsel presumably knew what those words were, but they are not part of the record.

constitutionally reasonable conduct" where there was "'no discernible explanation for counsel's failure to call'" expert witness; counsel's incompetence could not be assumed); *Fretwell*, 133 F.3d at 623-624 (holding that counsel's inability to remember reasons for his performance did not rebut the presumption that he performed effectively); *Chandler*, 218 F.3d at 1314 n.15 (explaining that an "ambiguous or silent record is not sufficient to disprove the strong and continuing presumption" that counsel performed effectively).

The "*Strickland* standard must be applied with scrupulous care." *Harrington*, 562 U.S. at 105. The court of appeals failed to do so here. And in failing to do so, the court of appeals' precedent "threaten[s] the integrity of the very adversary process the right to counsel is meant to serve." *Id.* (quoting *Strickland*, 466 U.S. at 689–690). The Court should reverse.

But even if defense counsel had subjectively intended to introduce the content of Teresa's threat and failed to do so, the court of appeals still erred. To prove deficient performance, Defendant must not only rebut the presumption that defense counsel acted in the exercise of his professional judgement, but also prove that counsel's performance was *objectively* unreasonable. The court of appeals erred by not holding Defendant to this burden.

B. The determinative question under *Strickland*'s performance standard is whether defense counsel's actions were objectively reasonable, not whether counsel had a specific strategy in mind.

Both Defendant and Amicus Curiae fault the State for "imagin[ing] a different case where the defense does not intend to admit the threat evidence." Br.Resp.13; Amicus Br.17.[3] According to them, because the "defense's objective" was to introduce the content of Teresa's alleged threat, the question "is not . . . why some other attorney might conclude it was reasonable trial strategy to not admit the evidence." Br.Resp.13. In their view, "the correct inquiry—the one conducted by the Court of Appeals—is whether

[3] Amicus Curiae further faults the State for relying on United States Supreme Court precedent that involved federal habeas corpus review. *See* Amicus Br.23-24. Although Amicus Curiae seems to agree that *Strickland*—a federal habeas corpus case—controls, it asserts that later Supreme Court cases "have no bearing on the *Strickland* analysis" because the question in those cases "was not whether a trial counsel's performance violated *Strickland*, but instead whether the State court's holding that it did not violate *Strickland* was unreasonable." Amicus Br.23. The State agrees that the question in current federal habeas cases reviewing state decisions is whether the state court's application of the Supreme Court's *Strickland* standard was reasonable. *See Richter*, 562 U.S. at 101 ("The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable."). But to determine whether the state court's application of the *Strickland* standard was reasonable, the Supreme Court must first articulate what that standard is. Relying on the Supreme Court's articulation of the *Strickland* standard in federal habeas cases, then, is perfectly appropriate. *See Strickland*, 466 U.S. at 697 ("The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial."). Amicus Curaie offers no authority providing otherwise.

trial counsel's failure to know and properly argue the hearsay rules regarding evidence that was critical to the strategy he chose fell below an objective standard." Amicus Br.17 (emphasis added). In other words, if counsel picks a strategy and fails to correctly advance it, counsel is constitutionally ineffective. This is not the *Strickland* standard.

As a threshold matter, as shown, the assumption that defense counsel's intent here was to introduce the specific words of Teresa's alleged threat is not supported by the record. But it does not matter. The determinative question under *Strickland* is whether counsel's performance was objectively reasonable.

To establish deficient performance under *Strickland*, a defendant must show that his counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. *Strickland* turns on defense counsel's "acts or omissions." A defendant "must identify the *acts or omissions* of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). "The court must then determine whether, in light of all the circumstances, the identified *acts or omissions* were outside the wide range of professionally competent assistance." *Id*. (emphasis added). *See also Chandler*, 218 F.3d at 1315 n.16 ("To uphold a lawyer's

strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy.").

This requires a defendant to "persuad[e] the court that there was *no conceivable tactical basis* for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original, quotations and citations omitted). The State is not required to articulate a reasonable explanation for counsel's acts or omissions. Nor does a defendant succeed merely because this Court cannot conceive of a tactical explanation for counsel's performance. Rather, "'the defendant'" always bears the burden to "'overcome the 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); *see also Titlow* 134 S.Ct. at 17 (explaining that "burden to 'show that counsel's performance was deficient' rests squarely on the defendant") (quoting *Strickland*, 466 U.S. at 687). And when it is possible to conceive of a reasonable tactical basis for trial counsel's actions, then a defendant clearly has not rebutted the strong presumption that his counsel performed reasonably. *See Clark*, 2004 UT 25, ¶7.

The ultimate inquiry under *Strickland's* deficient performance standard thus "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481 (citing *Strickland*, 466 U.S. at 688).

Richter, 562 U.S. at 110 (explaining that *Strickland* inquires "into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). This inquiry necessarily requires the reviewing court to "imagine" whether a reasonable attorney in the same or similar circumstances could have proceeded the same way as defense counsel. Br.Resp.13. In other words, the court must "affirmatively entertain the range of possible 'reasons [a defendant]'s counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal citation, alteration, and quotation marks omitted); *see also Strickland*, 466 U.S. at 689 ("the general presumption of objective reasonableness requires a petitioner to 'overcome the presumption that, under the circumstances, the challenged action *might* be considered sound trial strategy'") (citation omitted and emphasis added). If a hypothetical attorney could have reasonably decided to take the same course of action as defense counsel, defense counsel's representation met constitutional requirements. *See Chandler*, 218 F.3d at 1320 n.27 (explaining that counsel does not perform deficiently if fully informed and competent "hypothetical counsel" could take same action); *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (explaining that *Strickland* requires reviewing court to consider "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial");

Cosio v. United States, 927 A.2d 1106, 1127 (D.C. Cir. 2007) (en banc) (explaining that "[i]f a competent defense attorney in trial counsel's shoes reasonably could have" proceeded as defense counsel, he "cannot be deemed" to have provided "constitutionally deficient performance"); *Sallahdin*, 380 F.3d at 1250-1251 (entertaining possible reasons why counsel would not have called expert witness); *United States v. Fortson*, 194 F.3d 730, 736 (6th Cir. 1999) ("We can conceive of numerous reasonable strategic motives for the decision."); "*State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (citation omitted) ("Counsel acts within that objective standard of reasonableness when the attorney provides the client with the 'representation by an attorney exercising customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.'").[4]

[4] The reasonable care standard in negligence cases is analogous. *See Overby v. Union Laundry Co.*, 100 A.2d. 205, 208 (N.J. App. 1953) ("In the field of negligence we compare and contrast the conduct of the accused with that which the hypothetical person of reasonable vigilance, caution and prudence would have exercised in the same or similar factual conditions."); *Sutkowski v. Tymczyna*, 2010 WL 4721156 *7U (N.J. App. 2010) ("The defendant's conduct is compared with that which a hypothetical person of reasonable vigilance would do under the same or similar circumstances."). This standard is objective because "it charts a course for judging people equally and it is easier to prove than a state of mind." 1 Modern Tort Law: Liability and Litigation § 3:19 (2d ed. 2017) Indeed, "[i]f the law is to be objective, the norm of conduct must be objective." 1 Modern Tort Law: Liability and Litigation § 3:19 (2d ed. 2017). Thus, "[c]onsistent with the objectivity of the law, liability depends on the quality of the act rather than the state of mind of the actor." *Id*.

This can be true even if defense counsel failed in his chosen strategy. True, defense counsel's subjective intent can be relevant. *See Chandler*, 218 F.3d at 1320 n.27 ("[W]hen we refer to trial counsel's testimony explaining his personal mental processes . . . we are not crediting his testimony as absolutely true; but we point to this lawyer's testimony as illustrating the kinds of thoughts some lawyer in the circumstances *could*—we conclude—reasonably have had."). This is so because to show his counsel's performance "fell below an *objective* standard of reasonableness," *Strickland*, 466 U.S. at 687-688, he must show that "no competent attorney" would have acted similarly. *Moore*, 562 U.S. at 124; *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (explaining that counsel is deficient only when "counsel's error is so egregious that no reasonably competent attorney would have acted similarly"). For if a competent attorney reasonably could have followed the same course of action as defense counsel, it does not matter that defense counsel actually fell short of his subjectively chosen course of action. *See State v. Sessions*, 2014 UT 44, ¶21, 342 P.3d 738 (concluding that trial counsel performed reasonably despite "his unawareness of the law" because "operative inquiry is whether the 'actual representation would still have been within the range of objectively reasonable representation,' even if counsel had been 'aware of [the law]'"); *Bullock v. Carver*, 297 F.3d 1036, 1048 (10th

Cir. 2002) (holding that defense counsel's performance was not objectively unreasonable even though he was subjectively unaware of the law because a hypothetical, "fully informed attorney could have" performed the same way); *Harich v. Dugger*, 844 F.2d 1464, 1470-1471 (11th Cir. 1988) (en banc) (holding that counsel's ignorance of potential defense was not deficient performance because fully competent attorney aware of the defense "could well have taken action identical to counsel in this case"); *partial overruling on other grounds recognized by Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997); *Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (citation omitted) (holding that counsel's performance was not objectively unreasonable even though counsel signed affidavit stating that it had not occurred to him to object to evidence); *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (explaining that even "if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so").

This makes sense. As the Eleventh Circuit explained, if two attorneys take the identical action, but for different reasons, it would be illogical to label one as constitutionally acceptable and the other constitutionally deficient:

> If some reasonable lawyer might not have pursued a certain defense or not called a certain witness, we fail to understand

> why we would order a new trial on the ground that the actual lawyer had not used the defense or witness in the first trial: at the new trial, a different lawyer (even a reasonable one) might again not use the witness or defense. If two trials are identical, one should not be constitutionally inadequate and the other constitutionally adequate.

Chandler, 218 F.3d at 1315 n.17.

Thus, it would not matter here if defense counsel subjectively intended to introduce the content of Teresa's alleged threat but was unable to do so because he did not understand the rules of evidence. As argued in the State's opening brief, a competent attorney still could have reasonably concluded that he need not respond to the prosecutor's hearsay objection by arguing that the words were non-hearsay. By this time, the judge had already sustained several hearsay objections and counsel could have reasonably concluded that he was not likely to succeed in getting the words of the threat admitted. R.291:113. And where the jury had already heard ample testimony that Defendant believed Teresa had threatened him, he "thought the threat was serious," and he believed Teresa intended to harm him, defense counsel could have reasonably concluded that getting the specific wording of Teresa's threat was not so necessary to the defense that it was worth pressing the issue further. R.278:113-114, 117. Indeed, a reasonable attorney could conclude that he already had more than enough to add the threat piece to the larger extreme emotional disturbance puzzle—Defendant testified that he was afraid of

Teresa because she had threatened him, he believed she had a gun, and he believed she intended to use it.

And certainly, while the record is silent as to the precise words of Teresa's alleged threat, defense counsel knew what they were. *Richter*, 562 U.S. at 105 ("Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge."). And knowing what the specific words of the threat were, counsel could have reasonably concluded that introducing the precise words would not have been so materially more helpful to Defendant's defense that it was critical to get them into evidence. By leaving the specific words to the jury's imagination, counsel could magnify the effect of Defendant's testimony, allowing the jury to believe that the threat was greater than what it actually may have been.

Defendant concedes as much. In his response, Defendant admits that "the details of the threat were significantly less important than the source of the threat." Br.Resp.35. The State agrees. And because the jury was well aware that Teresa was the source of the threat, by Defendant's own account, defense counsel did not perform deficiently. For if appellate counsel—a competent, reasonable attorney—could come to the same conclusion as trial counsel, Defendant has failed to meet his burden of showing that "no

competent attorney" would have acted similarly. *Moore*, 562 U.S. at 124. The court of appeals erred in holding otherwise.

II.

DEFENDANT, LIKE THE COURT OF APPEALS, MISAPPLIED *STRICKLAND*'S PERFORMANCE STANDARD BY SPECULATING THAT THE UNKNOWN CONTENT OF TERESA'S ALLEGED THREAT WOULD HAVE UNDERMINED CONFIDENCE IN THE OUTCOME

Defendant also defends the court of appeals' prejudice analysis. He argues that the court of appeals correctly determined that Defendant was prejudiced because the "jury did not hear the one piece of evidence that would have contextualized and legitimized [Defendant]'s fear that Teresa was going to harm him" and "why Teresa's other acts . . . would have caused him extreme distress." Br.Resp.43.

This argument conflicts with Defendant's concession that knowing the specifics of the threat was far less critical than knowing who made it. Br.Resp.35. By Defendant's own account, the jury had all the critical information; therefore, the additional information would not have sufficiently changed the evidentiary picture to make a more favorable outcome reasonably probable.

In any event, the threat is not part of the record. And without knowing the content of Teresa's threat, this is only speculation. *Strickland* requires more.

To prove prejudice on an ineffective assistance of counsel claim, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The "likelihood of a different result must be substantial, not just conceivable," *Richter*, 562 U.S. at 112, such that counsel's error "'actually had an adverse effect on the defense.'" *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (quoting *Strickland*, 466 U.S. at 691, 693). And the defendant's proof of prejudice "cannot be a speculative matter but must be a demonstrable reality." *Munguia*, 2011 UT 5, ¶30 (quotations and citation omitted). That is, he "has the difficult burden of showing . . . *actual prejudice*." *State v. Tyler*, 850 P.2d 1250, 1259 (1993) (emphasis in original).

In assessing whether a defendant has carried his burden, appellate courts "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. This "requires . . . a probing and fact-specific analysis." *Sears v. Upton*, 561 U.S. 945, 955 (2010) (per curiam). At a minimum, the reviewing must consider each of counsel's alleged deficiencies in the context of the inculpatory evidence presented at trial and demonstrate how counsel's alleged deficiency would have so altered the evidentiary landscape that a more favorable outcome would be reasonably probable. *Id.*

The court of appeals failed to apply this standard. And Defendant fails to take into account that without having the content of the threat in the record, the conclusion that Defendant was prejudiced was mere speculation. *Munguia*, 2011 UT 5, ¶30. Indeed, there was no basis to reject the possibility that the content of the threat was just as likely to cause the jury to conclude that Defendant's fear was unfounded.

A. This court can—and should—reverse without addressing defendant's rule 23b motion.

While Defendant asserts that the record "is adequate for the purposes of conducting a *Strickland* analysis," he argues that this Court cannot reverse without "having his 23B motion ruled on." Br.Resp.39-40. He thus asks that if this Court were not to affirm, it should permit him to file his rule 23B motion in this Court or that it remand to the court of appeals so that court may rule on his 23B motion. *See* Br.Resp.38-40, 44-45. This Court should do none of the above.

It is "well settled" that this Court may affirm a judgment of a lower court if it is sustainable on any legal ground or theory apparent on the record. *State v. Finlayson*, 2000 UT 10, ¶31, 994 P.2d 1243. This Court has thus "never" remanded ineffective assistance of counsel claims to the court of appeals. *Id*. "Remanding this purely legal question to the Court of Appeals would waste time, money, and judicial resources." And where remanding "would likely

result in the case coming back again to this Court," that "procedure would advance no sound policy of judicial review, whether by certiorari or otherwise." *Id*.

Here, remanding the case to the court of appeals to rule on Defendant's rule 23B motion would "advance no sound policy of judicial review." *Id*. Even if he were granted a remand, Defendant cannot meet his burden to prove ineffective assistance of counsel.

Rule 23B, Utah Rules of Appellate Procedure, "provides a mechanism for criminal defendants to supplement the record with facts that are necessary for a *finding* of ineffective assistance of counsel but which do not appear in the record." *State v. Griffin*, 2015 UT 18, ¶ 17, ---P.3d---(emphasis added). But remands are only available for entry of findings of fact, which are "necessary for the appellate court's determination of a claim of ineffective assistance of counsel."

A remand is not "necessary" to a "finding" of ineffective assistance of counsel here, for Defendant cannot meet his burden to prove ineffective assistance of counsel in any event. Defendant's 23B proffer only sought a remand to add to the record the specific words of Teresa's alleged threat. But the jury already knew what Defendant now concedes is the critical information—"the details of the threat were significantly less important than

the source of the threat." Br.Resp.35. As a result, Defendant cannot show that all competent attorneys would have made a non-hearsay objection even knowing the content of the alleged threat. This alone is enough to defeat his *Strickland* claim—and a remand is unnecessary to make this determination.

And similarly, even with a remand, Defendant would not be able to show prejudice. The jury had the critical information—Defendant told the jury that Teresa had threatened him and that the threat made him fear for his life. No matter how threatening the specifics of Teresa's alleged threat could be, they were unlikely to have added enough additional detail to overcome all the other evidence undercutting the extreme emotional disturbance theory. *Richter*, 562 U.S. at 111. And even the specifics would have required the jury to believe Defendant's uncorroborated testimony weighed against third-party witness accounts and Defendant's recorded 911 call coldly reporting that he had killed his wife for reasons wholly unrelated to any threat.

This Court should reverse.

CONCLUSION

For the foregoing reasons and those set forth in the State's opening brief, the Court should reverse the judgment of the court of appeals. The

Court should then remand to the case to the court of appeals to resolve Defendant's verdict-urging instruction claim.

Respectfully submitted on February 16, 2018.

SEAN D. REYES
Utah Attorney General

TERA J. PETERSON
Assistant Solicitor General
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this reply brief contains 5,612, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

TERA J. PETERSON
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on February 16, 2018, the Reply Brief of Petitioner was served upon respondent's counsel of record by ☑ mail ☐ email ☐ hand-delivery at:

MARGARET P. LINDSAY
DOUGLAS J. THOMPSON
Utah County Public Defender Assoc.
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601

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

☑ was filed with the Court and served on respondent by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on respondent.

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