

2016

**State of Utah, Plaintiff/Appellee, v. Cullen Christopher Carrick,  
Defendant/Appellant : Brief of Appellant**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20160249-CA
	)	
v.	)	
	)	
CULLEN CHRISTOPHER CARRICK,	)	
	)	
Defendant / Appellant.	)	

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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Pursuant to the Order of the Utah Court of Appeals dated June 18, 2019, to provide supplemental briefing on “the failure to investigate alibi witnesses and to present a timeline” issues on Rule 23B remand

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**ORAL ARGUMENT REQUESTED**

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This Supplemental Brief of Appellant, which is submitted pursuant to the Court's Order dated June 18, 2019, addresses "trial counsel's alleged failure to investigate alibi witnesses and to present a timeline of [Carrick's] whereabouts during the time of the burglary." *See* Order, dated June 18, 2019, ¶ 1 (*See* Addendum A).

## **ARGUMENTS**

### **I. TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE MR. BISHOP AS AN ALIBI WITNESS AND INTRODUCE A SOLID TIMELINE OF MR. CARRICK'S WHEREABOUTS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.**

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant's Sixth Amendment<sup>1</sup> right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. The test – adopted by Utah courts – requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92; *Bundy v. Deland*,

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<sup>1</sup>According to the Sixth Amendment to the United States Constitution, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

763 P.2d 803, 805 (Utah 1988); *State v. Craft*, 2017 UT App 87, ¶ 16, 397 P.3d 889; *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696.

To satisfy the first prong of the test, a defendant must “‘identify the acts or omissions’ which, under the circumstances, ‘show that counsel’s representation fell below an objective standard of reasonableness.’” *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). In so doing, a defendant must “rebut the strong presumption that ‘under the circumstances, the challenged action might be considered sound trial strategy.’” *Litherland*, 2000 UT 76 at ¶ 19 (quoting *Strickland*, 466 U.S. at 689 (additional internal quotation marks omitted)).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Litherland*, 2000 UT 76 at ¶ 19; *Templin*, 805 P.2d at 187. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986). “[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” *See Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

**A. Trial Counsel Rendered Deficient Performance.**

In the Order of Further Remand Pursuant to Rule 23B – dated May 8, 2019 – this

Court stated:

Defendant claimed that he informed trial counsel that “there was two older ladies” who followed him to the funeral and back and could provide alibi testimony. These “older ladies” proved to be the additional alibi witnesses. Trial counsel said that he did not recall hearing anything about the existence of these two witnesses. And, importantly, he claimed to have contacted *all* of the witnesses he and Defendant discussed. With the benefit of hearing their testimony firsthand and having the opportunity to judge their credibility, the district court must resolve this critical dispute in the evidence: Did Carrick, or did he not, disclose the additional alibi witnesses to his trial counsel? If he did not, counsel’s performance was not deficient on the facts of this case.

*See* Order of Further Remand Pursuant to Rule 23B, p. 2 (*See* Addendum B). The remand court found – on further remand – that “Defendant failed to disclose additional alibi witnesses and that [trial counsel] was not aware of them.” *See* Supplemental Findings of Fact, R. 780-81 (*See* Addendum D). However, whether or not Mr. Carrick specifically informed trial counsel about the “two older ladies” as additional alibi witnesses is not dispositive under the circumstances of this case as to whether counsel rendered ineffective assistance of counsel by failing to adequately investigate the alibi witnesses at issue on remand. This particularly applies to trial counsel’s failure to adequately investigate Matt Bishop as an alibi witness. As demonstrated below – the failure by trial counsel to



adequately investigate the names of the alibi witnesses given to him by Mr. Carrick constituted deficient performance.

In its Findings of Fact, the remand court found the following facts: that in April 2015, almost ten months prior to trial, Mr. Carrick provided trial counsel with the name of Matt Bishop as an alibi witness along with Mr. Bishop's contact information (*See* Finding of Fact No. 12, R. 767-77; *accord* Finding of Fact No. 36, R. 772) (*See* Addendum C); that in the fall of 2015, trial counsel had not yet contacted Mr. Bishop and that trial counsel again asked for Mr. Bishop's contact information (*See* Finding of Fact No. 13, R. 768); that as of a couple of days prior to trial, Mr. Carrick learned that trial counsel had not yet contacted Mr. Bishop and that he was therefore provided with Mr. Bishop's work information (*See* Finding of Fact No. 14, R. 768; *see also* Finding of Fact No. 16, R. 768-69 and Finding of Fact No. 38, R. 773).

Consistent with the above findings of fact, the remand court found that Mr. Bishop never met trial counsel prior to trial (*See* Finding of Fact No. 33, R. 772). Rather, Mr. Bishop spoke with trial counsel by phone for "about three minutes" the day before trial (*See id.*). According to the remand court's findings, Mr. Bishop felt that trial counsel "should have asked him who was at the funeral with him." (*See* Finding of Fact No. 34, 772).

The remand court's findings regarding trial counsel's testimony on remand include the following: that trial counsel had been provided with Mr. Bishop's name as an alibi witness substantially before trial along with his contact information (*See* Finding of Fact

No. 49, R. 777). Additionally, the remand court found that it “took a while” for trial counsel to find Mr. Bishop because trial counsel claimed “he was hard to find” – and that trial counsel did not contact Mr. Bishop until “a day or two before trial.” (*See id.*).

Trial counsel rendered deficient performance by failing to contact Mr. Bishop until shortly before trial – even though Mr. Bishop was readily available. Mr. Bishop’s availability is demonstrated by Mr. Bishop being contacted by Mr. Carrick and his sister upon learning a couple of days before trial that trial counsel had still not contacted Mr. Bishop in preparation for trial (*See* Finding of Fact No. 38, R. 773 (finding that Mr. Carrick contacted Mr. Bishop through Facebook and requesting that he call trial counsel about the impending jury trial); *see also* Finding of Fact No. 14, R. 768).

Had trial counsel adequately investigated Mr. Bishop as an important alibi witness, he would have learned about Edith Dawson and Cheryl Stoker, the additional alibi witnesses. Both Ms. Dawson, a small business owner, and Ms. Stoker, who serves as a Councilwoman for North Ogden City, would added much-needed credibility to Mr. Carrick’s defense as it was presented at trial (*See* Finding of Fact Nos. 17-19 and 21-25). This is particularly important in the instant case because trial counsel’s defense focused on highlighting Mr. Carrick’s alibi. Both Ms. Dawson and Ms. Stoker – based on the evidence presented on remand and the remand court’s findings – were with and could account for Mr. Carrick’s whereabouts from approximately 3:15 p.m. to 6:45 p.m. on May 21, 2014 (*See*

R. 783:139-40; R. 783:60-64; R. 783:76-80; R. 783:109-14; *see also* Findings of Fact Nos. 17-18 and 22-24).

On January 10, 2016, trial counsel filed an Alibi Witness List that did not include either Ms. Dawson or Ms. Stoker as alibi witnesses (*See* R. 783:238-39; R. 72-73; Finding of Fact No. 55). Trial counsel's deficient performance in failing to adequately investigate Mr. Bishop as an important alibi witness is further demonstrated by the fact that by the time trial counsel had contacted Mr. Bishop the day before trial, it was too late to properly notice Ms. Dawson and Ms. Stoker as alibi witnesses in this case (*See* R. 783:253-54).<sup>2</sup> As a result, trial counsel rendered deficient performance by failing to contact and speak with Mr. Bishop within a sufficient amount of time in order to reasonably determine how Ms. Dawson and Ms. Stoker could provide alibi witness testimony that was critical to Mr. Carrick's defense in this case.

By failing to adequately investigate the alibi witnesses in this case, including Mr. Bishop, trial counsel failed to establish a full timeline of Mr. Carrick's whereabouts and movements before, during, and after the alleged burglary in this case. Trial counsel knew that Mr. Bishop was an important alibi witness in this case (*See* R. 783:259:7-10 (trial counsel testifying that Mr. Bishop was "pretty important" because "he was a driver of a vehicle that [Mr. Carrick] was in")). Nevertheless, trial counsel did not speak with Mr.

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<sup>2</sup>*See* Utah Code Ann. § 77-14-2(1) (requiring that a notice of alibi witnesses be filed "not less than 10 days before trial or at such other time as the court may allow").

Bishop until the day before trial and then for only a few minutes by phone (*See* R. 783:115:13-22; R. 783:118:13-17; R. 783:245:17-24).

On remand, Mr. Carrick presented a full timeline detailing his whereabouts and movements before, during, and after the alleged burglary in this case (*See* R. 783:138-55; R. 783:183-85; *see also* Findings of Fact Nos. 40-41 and 45). The investigation and development of a full timeline included both time and distance calculations of 23 minutes and 15 seconds and 15.7 miles for the trip between Gillies Funeral Chapel and Rack's Barber Shop (*See* R. 783:139:6-9; R. 783:183-85).

The funeral services for April Taylor concluded at 5:04 p.m. (R. 783:15-17). Shortly thereafter, the balloon release in the parking lot of Gillies Funeral Chapel occurred at 5:17 p.m. (R. 783:142:4-15; R. 783:11:11-23). Mr. Carrick and the group of individuals with whom he traveled to the funeral services, namely, Edith Dawson, Cheryl Stoker, and Matt Bishop, remained in the parking lot of Gillies Funeral Chapel socializing until approximately 5:47 p.m. (*See* R. 783:60-64; R. 783:76-80; R. 783:86-96; R. 783:109-14; R. 783:138-44; R. 783:185:10-12).

At approximately 5:47 p.m., Mr. Carrick, Ms. Dawson, Ms. Stoker, and Mr. Bishop left the parking lot in the same vehicles and returned to Rack's Barber Shop (*See* R. 783:62-64; R. 783:77-79; R. 783:114:11-25; R. 783:142:20-23; R. 783:185:10-12). After arriving at Rack's Barber Shop, the group – including Mr. Carrick – entered the barber shop and visited for about 30 minutes about the funeral (*See* R. 783:63-64; R. 783:79:4-15; R.

783:114:22-25; R. 783:142-44; R. 783:185:10-12). When they finished visiting at approximately 6:45 p.m., the group – including Mr. Carrick – split up and left Rack’s Barber Shop, with Mr. Carrick turning south onto Hwy 89 towards Ogden (*See* R. 783:79:16-19; R. 783:119:14-21; R. 783:143-44; R. 783:185:10-12).

According to the Call-Detail Report, the 911 call of the alleged burglary in this case was made at 6:03 p.m., on May 21, 2014, with the complainant stating that the alleged burglary had concluded 10 minutes earlier (*See* R. 783:144:11-22; R. 783:9-11). Based on the timeline evidence presented at the remand hearing, Mr. Carrick did not have an opportunity to commit the alleged burglary in this case (*See* R. 783:152-53; R. 783:205-06; *see also* Finding of Fact No. 41 (finding that investigator concluded that Mr. Carrick “did not have the opportunity to commit the burglary))).

Trial counsel testified that “he went over the timeline with [Mr. Carrick]”, discussing things such as “who was there, what [Mr. Carrick] was doing, whose car he was driving in, where they went, and the balloon release after the funeral.” (*See* Finding of Fact No. 51, R. 777). However, trial counsel failed to adequately investigate and obtain evidence, such as the Call-Detail Report, which clearly established when the burglary took place – which, in turn was critical to establishing the impossibility of Mr. Carrick having had the opportunity to commit the burglary.

The remand court found that trial counsel testified that if he called too many alibi witnesses, the jury would tune him out” and that the alibi witnesses that he presented “were

sufficient.” (See Finding of Fact No. 52, R. 777). However, trial counsel’s assertions are inconsistent with the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct 2052 (1984). Here – trial counsel’s failure to adequately investigate the critical alibi witnesses – in light of the circumstances established on remand – was anything but reasonable.

Trial counsel rendered deficient performance in failing to adequately investigate the alibi witnesses and failing to establish a full-timeline as specifically discussed above. By failing to duly investigate the alibi witnesses and present evidence of a timeline that established that Mr. Carrick did not have the opportunity to commit the burglary, trial counsel’s representation – under the circumstances of this case – fell below an objective standard of reasonableness.

**B. Trial Counsel’s Deficient Performance  
Prejudiced Mr. Carrick.**

Had trial counsel adequately investigated Mr. Bishop as an alibi witness, he would have located two additional alibi witnesses, namely, Ms. Dawson and Ms. Stoker, who would have provided critical credible alibi testimony that Mr. Carrick did not commit the burglary. The two additional alibi witnesses, in turn, would have provided a much-needed boost to the credibility of Mr. Carrick’s defense as presented at trial. This is particularly important because trial counsel’s defense focused on highlighting Mr. Carrick’s alibi. Both

Ms. Dawson and Ms. Stoker – along with Mr. Bishop – were with and could account for Mr. Carrick’s whereabouts during the critical points in time when the burglary occurred.

Additionally, had trial counsel adequately investigated the important alibi witnesses, including the alibi testimony of Mr. Bishop, he would have realized and developed a solid timeline to clearly demonstrate that Mr. Carrick did not have the opportunity to commit the burglary. This would have directly contradicted the evidence presented by the prosecution at trial not to mention establishing the theory of impossibility according to the markers such as the previously discussed Call-Detail Report.

By way of the evidence presented on remand, Mr. Carrick proffered sufficient evidence to support a reasonable probability that, but for trial counsel’s failure to adequately investigate Mr. Bishop, as an important alibi witness, the result at trial would have been different. *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92; and *State v. Templin*, 805 P.2d 182, 187 (Utah 1990). The evidence presented on remand together the remand court’s findings of fact demonstrate that trial counsel’s deficient performance more likely than not prejudiced Mr. Carrick’s defense. Moreover – the evidence should cause the Court to reach a definite and firm conviction that a mistake has been made. *See State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

## CONCLUSION

Based on the foregoing, Mr. Carrick respectfully requests that this Court reverse his conviction and remand the case for a new trial before a jury. Mr. Carrick further requests

that the Court provide him with any other remedy that the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of September, 2019.

ARNOLD & WIGGINS, P.C.

/s/ Scott L. Wiggins

Scott L. Wiggins

*Counsel for Appellant*



**CERTIFICATE OF SERVICE**

I, SCOTT L WIGGINS, hereby certify that I personally caused a true and correct copies of the foregoing **SUPPLEMENTAL BRIEF OF APPELLANT** to be mailed by electronic mail to the following on this 3<sup>rd</sup> day of September, 2019:

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*Counsel for Appellee*

/s/ Scott L Wiggins  
Scott L Wiggins

## **ADDENDA**

<b>Addendum A:</b>	<b>Order, dated June 18, 2019</b>
<b>Addendum B:</b>	<b>Order of Further Remand Pursuant to Rule 23B</b>
<b>Addendum C:</b>	<b>Findings of Fact (R. 766-79)</b>
<b>Addendum D:</b>	<b>Supplemental Findings of Fact (R. 780-82)</b>

**Addendum A:**  
**Order, dated June 18, 2019**

**The Order of the Court is stated below:**

**Dated:** June 18, 2019  
02:11:59 PM

**At the direction of:**

/s/ JUDGE GREGORY K. ORME

by

/s/ Lisa A. Collins

Clerk of Court, Utah Court of Appeals



**IN THE UTAH COURT OF APPEALS**

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State of Utah,  
Appellee,  
v.  
Cullen Christopher Carrick,  
Appellant.

**ORDER**

Case No. 20160249-CA

Trial Court Case No. 141100418

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Before Judges Orme, Mortensen, and Harris.

This matter is before the court on Carricks motions for briefing on other rule 23B remand issues and to have the record supplemented with the rule 23B proceedings, both of which the State has stipulated to. Specifically Carrick asks this court to allow further supplemental briefing on his trial counsels alleged failure to investigate alibi witnesses and to present a timeline of his whereabouts during the time of the burglary. Carricks motions are granted, the record has been supplemented as requested, and the parties are given leave to provide the court with supplemental briefing addressing these issues.

Carrick shall submit his memorandum to the court within 45 days from the date of this order. The State shall submit its response memorandum, if it chooses to respond, within 45 days of Carricks submission. Carrick shall then submit his reply within 30 days of the States submission, if any. The memoranda shall not exceed 20 pages in length. All submissions shall comply with the Utah Rules of Appellate Procedure in form, but may be emailed in PDF rather than bound and delivered in hard copy.

**End of Order - Signature at Top of the First Page**

**Addendum B:**  
**Order of Further Remand Pursuant to Rule 23B**

MAY - 8 2019

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, v. CULLEN CHRISTOPHER CARRICK, Appellant.	ORDER OF FURTHER REMAND PURSUANT TO RULE 23B  Case No. 20160249
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Before Judges Orme, Mortensen, and Harris.

Defendant Cullen Christopher Carrick's appeal is again before this court following our remand of the case to the district court pursuant to rule 23B of the Utah Rules of Appellate Procedure for the purpose of "develop[ing] new evidence in the record" regarding Carrick's claim of ineffective assistance of counsel. *State v. Griffin*, 2015 UT 18, ¶ 18. The district court held an evidentiary hearing on the matter, but thereafter shared with counsel its concerns about whether, under the rule, it should make actual findings of fact and conclusions of law or whether it should merely summarize all the evidence it had heard. It opted for the summary, although the mandate of rule 23B provides otherwise: "The trial court shall enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand." Utah R. App. P. 23B(e).<sup>1</sup> The district court subsequently forwarded its "findings of fact" to us. Because these findings are inadequate, as hereafter explained, we must regrettably remand once more.

In order to determine whether Defendant received ineffective assistance of counsel, we must first determine that "counsel's performance was deficient" and, second, whether this "deficient performance prejudiced the [defendant]." *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and we cannot do this without the district court resolving the conflicting evidence presented during the remand hearing. In our previous remand order, we instructed the district court to take evidence and enter

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1. The district court was correct that the rule does not call for the court to enter conclusions of law.

"findings of fact regarding trial counsel's failure to adequately investigate all alibi witnesses, which may have established a full timeline of events and shown that Carrick could not have committed the burglary, as well as Carrick's assertions regarding the garage door code and the other potential suspect."<sup>2</sup> The district court took evidence, but did not provide actual findings of fact with respect to these matters. Instead, the court provided us with a summary of the evidence, which included conflicting evidence without the benefit of the court's resolution of the conflicting evidence based on its determinations concerning the credibility of each witness and, in particular, its factual determination about what Carrick's trial counsel actually knew going into trial.

In one limited respect, a summary of what the district court heard is perfectly appropriate. With respect to the additional alibi witnesses, we do not need the district court to resolve any inconsistencies between their testimonies concerning what they witnessed, with an eye to finding the true facts. The relevance of their respective testimonies was to reveal what they would have testified to had Carrick's trial counsel called them as defense witnesses. Thus, in summarizing their testimony, the court did all it needed to do as an initial matter. It essentially found what their testimony would have been had they been called to testify at trial.

But merely summarizing the inconsistent testimony of Carrick and his trial counsel does not work in that same way. Instead, the district court must resolve the pivotal factual dispute between Defendant's testimony and trial counsel's testimony. Specifically, the district court must determine whether trial counsel knew about the additional alibi witnesses but nevertheless failed to follow up on that information.

Defendant claimed that he informed trial counsel that "there was two older ladies" who followed him to the funeral and back and could provide alibi testimony. These "older ladies" proved to be the additional alibi witnesses. Trial counsel said that he did not recall hearing anything about the existence of these two witnesses. And, importantly, he claimed to have contacted *all* of the witnesses he and Defendant discussed. With the benefit of hearing their testimony firsthand and having the opportunity to judge their credibility, the district court must resolve this critical dispute in the evidence: Did Carrick, or did he not, disclose the additional alibi witnesses to his trial counsel? If he did not, counsel's performance was not deficient on the facts of this case.

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2. As concerns Carrick's allegation that his trial counsel did not investigate an additional suspect, we are satisfied with the district court's findings of fact and require no additional findings on this issue.



But if the district court finds that Carrick did call these witnesses to trial counsel's attention, counsel was deficient in not following up with them. Whether or not that objectively deficient performance prejudiced Carrick is a more complicated matter, the resolution of which requires the district court to make findings on "the claimed prejudice suffered by appellant[.]" Utah R. App. P. 23B(e). Such findings must be sufficient to allow this court to ascertain whether the testimony of the additional alibi witnesses would have been merely cumulative of the testimony offered by the other alibi witnesses or whether it offered Carrick the prospect of a more favorable outcome at trial, either because these witnesses were much more credible than the other alibi witnesses or in some other particular way.

A second factual dispute, namely the one presented by the conflicting testimony of Carrick and his trial counsel as concerns the passcode, must also be resolved by the district court. Carrick claimed that he informed trial counsel that he knew the passcode to the garage and therefore had no need to break in through the window. If true, this evidence would undercut the testimony of the witnesses who said they saw Carrick break in. And it would tend to support the testimony of those witnesses who said he did not. But his trial counsel denies Carrick told him any such thing. This is an important factual disagreement. The credibility of Carrick and trial counsel needs to be assessed and the dispute resulting from the conflicting evidence resolved via appropriate factual findings. This court needs to know whether Carrick actually did inform trial counsel that he knew the passcode, as it could potentially amount to critical evidence of Carrick's innocence in light of the nature of the evidence presented against him. If Carrick told trial counsel he knew the passcode and counsel failed to verify the claim and failed to present this evidence to the jury, his performance may have been objectively deficient. If it was, this court would then have to assess whether the failure prejudiced Carrick, in light of the other evidence against him.


In conclusion, because district courts are in a superior position to resolve conflicting evidence and determine the credibility of witnesses, on remand their "findings of fact should resolve these conflicts unequivocally." *Woodward v. Fazzio*, 823 P.2d 474, 478 (Utah Ct. App. 1991). "Once we possess this information, we can meaningfully evaluate whether [trial counsel was ineffective]." *Id.* Thus, we remand this case once more to the district court to resolve the aforementioned factual disputes, as explained in this order.

Rule 23B specifies that remand should be accomplished "within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length." Utah R. App. P. 23B(e). Because the limited nature of our further remand does not necessitate taking additional evidence or the personal involvement of counsel, but

only the making of additional findings of fact, the usual 90 day limit is unnecessarily long. Therefore, the district court is directed to enter the additional findings of fact pursuant to this order within 30 days of the date of this order.

Dated this 8<sup>th</sup> day of May, 2019.

FOR THE COURT:

---

Gregory K. Orme, Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2019, a true and correct copy of the foregoing ORDER OF FURTHER REMAND PURSUANT TO RULE 23B was deposited in the United States mail or was sent by electronic mail to be delivered to:

KAREN A. KLUCZNIK  
kklucznik@agutah.gov

SCOTT L WIGGINS  
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FIRST DISTRICT, BRIGHAM CITY  
ATTN: LEANN COLE  
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HONORABLE BRANDON J. MAYNARD  
FIRST DISTRICT, BRIGHAM CITY  
43 N MAIN  
PO BOX 873  
BRIGHAM CITY UT 84302-0873

By \_\_\_\_\_  
Jeffrey Ricks  
Appellate Court Coordinator

Case No. 20160249  
FIRST DISTRICT, BRIGHAM CITY, 141100418

**Addendum C:**  
**Findings of Fact (R. 766-79)**

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF BOX ELDER, STATE OF UTAH

APR 29 2019

20160249-CA

STATE OF UTAH,

Plaintiff,

vs.

CULLEN CRISTOPHER CARRICK,

Defendant.

FINDINGS OF FACT

Case No. 141100418

Judge Brandon Maynard

THIS MATTER IS BEFORE THE COURT pursuant to the Order of Remand Pursuant to Rule 23B of the Utah Court of Appeals filed May 23, 2018. Following a hearing held on November 13, 2018, the Court hereby enters the Findings of Fact:

**TESTIMONY OF CURTIS FUNK**

1. Witness provided the live stream webcasting of the funeral.
2. Upon his review of the webcast, the funeral began about 4:00 pm and ended about 5:04 pm.

**TESTIMONY OF AMANDA REED**

3. Witness is the cousin to the Victim's deceased wife. She and the deceased were pretty close and made telephone calls between each other. They did not see each other very much, but would at family functions.
4. Witness was present at the funeral and sat close to the front.

5. She took pictures of the balloon release that took place in the parking lot after the funeral. She provided them to someone else. After the balloon release she left. A pretty good sized crowd remained.

6. Witness also identified pictures of Nicholas Anthony Seymour (Tony). She indicated that she considers him a cousin because Tony and a first cousin of hers are half siblings. She testified that April and Tony are cousins.

#### **TESTIMONY OF ANDREW DEAN HASLEM**

7. Witnesses dated April Taylor's younger sister, Holly Lunday for about 7 years until the end of 2017. They are no longer dating, but they remained friends.

8. He knew who Nicholas Seymour was and identified him in photographs.

9. He testified that he would visit with Nicholas at family functions that he and Holly attended.

He said that Nicholas was homeless most of the time because of substance abuse problems. They would bring him food down to Ogden.

#### **TESTIMONY OF ERIN CARRICK MOORE**

10. Witness is the Defendant's older sister.

11. She testified that she went with the Defendant to two meetings with Ryan Bushell, trial counsel for Defendant.

12. The first meeting was in April of 2015 and lasted 15-20 minutes. In that meeting, she stated that Mr. Bushell was given the name of Matt Bishop and a person named Ally as alibi witnesses. She did not know Ally's last name. She said that the Defendant provided a number for Matt

Bishop but didn't have one for Ally because he had just met her at the funeral and hadn't even caught her last name. No other people were mentioned at this meeting. She indicated that Mr. Bushell mentioned that the case was open and shut.

13. The second meeting occurred in the fall of 2015 and lasted 10-15 minutes. The meeting took place in Mr. Bushell's office. They talked about the events of the day. She testified that Mr. Bushell had not talked to Matt Bishop. She testified that Mr. Bushell would be providing a time chart for the trial. She testified that she never saw Mr. Bushell take notes. She testified that the Defendant told Mr. Bushell that he knew about the garage code at the April's home and therefore would not need to go through the window. The person that had given him the code was April. She testified that Mr. Bushell had not contacted Matt Bishop and asked for his contact information again. No other people were mentioned at this meeting.

14. A third meeting was on the Tuesday evening before the trial. She was asked to attend by the Defendant, but could not. She testified that after that meeting, Mr. Bushell had not contacted Matt Bishop and so she went out and found Matt Bishop's work and left a note for him and gave the information to the Defendant. They also found an address through Google and she and the Defendant went to try and find that address.

#### **TESTIMONY OF COREE BUCK**

15. Witness is an older sister to the Defendant with about 13 years between them.

16. She testified that she went a meeting on a Tuesday, just before the trial, at Mr. Bushell's office in Ogden. Mr. Bushell, the Defendant and she were the only ones at the meeting which lasted about 10-15 minutes. She testified that there had been no trial preparation and that Mr.

Bushell only had the police report. She testified that Mr. Bushell indicated that he had not been able to contact any witnesses. She testified that she was not aware of any disclosure of alibi witnesses from Mr. Bushell about 30 days before the trial. She was not aware of how Mr. Bushell was able to call multiple witnesses at trial.

#### **TESTIMONY OF EDITH DAWSON**

17. Witness did not testify at trial. She stated that April was an employee of hers who worked as a barber at Rack's Barber Shop. She knew the Defendant because he was a client of April.

18. She testified that she went to the funeral in Brigham City with another employee, Cheryl Stoker. She testified that they all met at the barbershop in Harrisville and carpooled with two cars, Cheryl and her in one – a red SUV - and Matt Bishop, the Defendant, and Ally in the other car – a little white car. They drove in tandem because they wanted to be together at the funeral.

19. She saw the Defendant during the funeral and after the funeral, at the balloon launch. After the funeral they had to ask the Defendant to come and leave as he was talking to friends. She determined that the parties, including the Defendant, left somewhere between 35-45 minutes after the funeral, that it was not even 6:00 pm and that it was light outside. She stated that the parties left together in the two cars and drove back to Rack's in Ogden. She testified that they spent about 20-30 minutes there and then all left.

20. She was first contacted about being a witness by Mr. Wiggins earlier in 2018. I knew about the first trial because of Matt being called – he works with me. We talked about Matt coming and why none of us were called. We didn't reach out to anyone because we really didn't know about what was going on.



### **TESTIMONY OF CHERYL STOKER**

21. Witness was another witness that did not testify at trial. She has been cutting hair for 35 years and is a Councilwoman for North Ogden City for 7 years.

22. Edith, Matt, Ally, the Defendant and she met at Rack's. They drove in two different cars. She drove with Edith in her 2011 red Santa Fe, and the Defendant went in Matt's white car. They travelled in tandem together up to the funeral.

23. She uncertain of the time that the parties left after the funeral. At times she estimated 10-20 minutes. She also estimated a few more minutes than 10-20 minutes. After the parties left, the funeral, they drove back to Rack's in the same manner they drove to the funeral – never leaving sight of the other vehicle.

24. They drove on Highway 89 at the speed limit. The drive took about 22-25 minutes. They remained at Rack's for a few minutes talking about April and the funeral and then went home.

25. She was not contacted by Mr. Bushell.

### **TESTIMONY OF LYNETTE HATCH**

26. Lynette was a friend of April Taylor. She met April through Celeste McCulley. She met the Defendant through Celeste.

27. She went to the funeral and saw the Defendant there and he was there the whole time she was there – until he left a few minutes before her. She stated that the Defendant was at the balloon release and left about 55-65 minutes after the funeral. It was bright outside when Defendant left.

### **TESTIMONY OF ANNIE CELESTE MCCULLEY**

28. Witness was called and testified as a witness at trial. She was at April's funeral and that they had been best friends since they were age 13. She was contacted by Mr. Bushell because she was at the funeral and the time after when the events supposedly happened. She was contacted by a brief phone call right before trial. She never met with Mr. Bushell.

29. She talked for about 10 minutes with Mr. Bushell before trial. Later she said it was maybe 5 minutes. She told him what she was trying to convey, but she felt like he wasn't listening. She thought that maybe she hadn't conveyed it in the right way. She wanted him to tell her more about what was going on. She wanted Mr. Bushell to tell her about how many witnesses there would be and what they were going to talk about. She told Mr. Bushell that she thought it was an open and shut case because a group had been together at the funeral home with the Defendant at the time of the incident and that a person can't be in two places at once. She told Mr. Bushell that she was with the Defendant at the funeral home until it was getting dark.

30. She stated that she conveyed what she wanted to at the trial. However, she wanted to tell the jury that April's husband could have saved her life and didn't, and that there was a lot of underlying circumstances.

### **TESTIMONY OF MATT BISHOP**

31. Witness was called and testified as a witness at trial. He testified that he knew April and that they went as a group to her funeral. They met at Rack's Barber Shop and split up into two groups. Cheryl and Edie went in Cheryl's car and the Defendant, Ally and he went in his white 2002 Mazda Protégé. They drove separately because he was vaping and Ally was a smoker. We

never lost sight of Cheryl's car because I had never been to the funeral chapel before. He said he had a phobia of getting lost.

32. The Defendant never left the funeral services. About 15-20 minutes after the funeral they had the balloon release. They then left about 50 minutes after that. He thought it was brighter outside after the funeral then when they were driving back. It wouldn't surprise him if other witnesses at trial said it was getting dark outside. They drove back to Rack's on Highway 89 in the same manner they came. They drove the speed limit and did not make any stops. They went into the barber shop and visited about the funeral and April's death for about 30 minutes. When the Defendant left, he watched him turn South on Highway 89. He was aware that the Defendant and April were having an intimate relationship.

33. He testified that never met Mr. Bushell before trial. He spoke to Mr. Bushell the day before trial and was told needed me to testify for the Defendant's case. He talked to Mr. Bushell for about three minutes on the phone before trial.

34. He said that he answered all of the questions that were asked of him at trial. He felt that Mr. Bushell should have asked him who was at the funeral with him.

#### **TESTIMONY OF CULLEN CARRICK**

35. Witness is the Defendant and was advised of his right not to testify.

36. Witness testified the first meeting with Mr. Bushell was about 8 months before trial. Erin, Mr. Bushell and he were present. The meeting lasted up to 30 minutes, where he told his story. At that meeting, the Defendant gave witness names to Mr. Bushell and Mr. Bushell kept asking for the names.

37. The Defendant testified there was a second meeting in the fall of 2015 that lasted about 15 minutes. Erin, Mr. Bushell and he were present. The Defendant said he told Mr. Bushell about the garage code and that he could enter the house without using a window. The Defendant testified that April had given him the garage code and he had used it 2 or 3 times to get into April's house. The Defendant testified that Mr. Bushell did not use the information at trial. Nor was he aware if Mr. Bushell investigated that information.

38. The Defendant said that he met with Mr. Bushell 2 days before trial. The meeting lasted maybe 20 minutes. He learned that Mr. Bushell never contacted any witnesses. The Defendant told his sister and sought advice as to what to do. They then tried to find the witnesses. The Defendant knocked on 2-3 dozen doors at an apartment complex he believed Matt Bishop to be living at. Having no success, he left a message on Facebook for Matt to call him. When Matt called, the Defendant asked him to call Mr. Bushell and have him Mr. Bushell's phone number. He was unaware if Mr. Bushell had hired an investigator.

#### **TESTIMONY OF ROBERT WELLING**

39. He is a licensed private investigator for Utah for 35 years. He is the owner of his company, Beehive Detective Agency, Inc. He indicated that he is a member of the Private Investigator's association of Utah and has served as a former chairman of the board. In his business he has handled all types of investigations. He testified that it takes 10,000 hours of experience to get a license and then 35 years of work from there. He has done surveillance, timeline reconstruction and witness interviews. He was hired by the Defendant for the appeal.

40. Mr. Welling testified to meeting with the Defendant, reviewing police reports, witness statements and other documents related to the trial. He created a timeline of the Defendants movements before, during and after the burglary.

41. Mr. Welling did 2 time-distance-speed calculations from the funeral home to the barber shop and determined the miles between them to be 15.7 miles and the time to drive at the speed limit was 23 minutes and 15 seconds. He made determinations of where the Defendant was at during the time of the burglary. He obtained photos from Amanda Reed of the balloon release. After reviewing a report from a forensic examiner, Clint Emmet's report of metadata from the balloon release photos, he interviewed the Defendant, Matt Bishop, Edie Dawson and Cheryl Stoker. He didn't have enough information to locate and speak with Ally. From the witnesses' timelines of events, he determined that the Defendant would have left the funeral home at approximately 5:50 pm with them and arrived at Rack's at approximately 6:15 pm. They then remained there visiting for about 30 minutes. He also obtained a call detail report showing that the burglary call came in at 6:03 pm and that the burglary was concluded 10 minutes earlier at 5:53 pm. He concluded, based on his investigation, that Edie Dawson and Cheryl Stoker were critical alibi witnesses. He also concluded that the Defendant did not have the opportunity to commit the burglary.

42. Mr. Welling looked into Nicholas Seymour as another suspect. He came up with Nicholas Seymour's name from interviewing Holly Lunday.

43. Mr. Welling determined that the April's address, the location of the burglary, was 7.3 miles away. The distance in time from the funeral home was 11 minutes and 36 seconds to April's address. He admitted that April's address was on Highway 89 between the funeral home and

**Rack's. At trial, witnesses testified that they saw the Defendant commit the burglary. Mr. Welling did not interview the eyewitnesses from the police report that placed the Defendant at the burglary address while doing a timeline, but he did review their statements. He believed that any eyewitnesses, that identified the Defendant at the burglary address, misidentified him. He was directed by Mr. Wiggins not to interview the eyewitnesses. Mr. Welling said he did not weigh the credibility of the witnesses and later admitted credibility mattered.**

### **TESTIMONY OF JEFFERY NELSON**

**44. Mr. Nelson has been a licensed private investigator since 1977. He helped create Private Investigators Association of Utah. It is a private group whose membership requires private investigators to have a license. He has investigated all types of criminal cases including approximately 70 murder cases some of which were capital cases. He has had training with law enforcement and attended Utah Peace Officers Association although not a sworn officer. He has been involved in a couple high profile type cases wherein at least one involved a timeline investigation. He also attended a law enforcement training relating to death and blood spatter investigations at Davis Area Training Association, it also dealt with timelines. He was hired to look at the timeline and alibi, as well as another suspect Nicholas Seymour.**

**45. Mr. Nelson's investigation established a similar timeline to Mr. Welling. He accompanied Mr. Welling on one trip determining distance and time of travel between the funeral home and the barbershop. He reviewed police reports, statements, a transcript of the trial, he interviewed Matt Bishop and looked at photos of the location.**

46. Mr. Nelson learned that Nicholas Seymour had two burglary convictions from Texas, including a dwelling. He based his information on a document obtained from TLO. The report was generated based on information that Mr. Nelson plugged into the database. Mr. Nelson also used Mugshots.com to obtain some information on Nicholas Seymour's criminal history.

47. Mr. Nelson testified that the only connection between Seymour and the burglary was that he was related to the victim's family. Mr. Nelson acknowledged age differences, as well as that Nicholas Seymour is bald. Mr. Nelson agreed that at trial it was testified that the Defendant wore a very unique hat and that none of the pictures of Nicholas Seymour with a hat resembled such a hat. Mr. Nelson stated that it was not known when the pictures of Nicholas Seymour were taken. Mr. Nelson did not place Nicholas Seymour at the scene of the burglary. Mr. Nelson indicated that there was a difference in the eyewitnesses that testified at trial and Matt, Edie and Cheryl because they were with the Defendant longer. He agreed that there were no pictures or other corroborating evidence that showed the Defendant at the funeral.

#### **TESTIMONY OF RYAN BUSHELL**

48. Mr. Bushell was trial counsel for the Defendant. Mr. Bushell kept a file in this matter. They first met in March or April 2015. Mr. Bushell testified that he met between one dozen to two dozen times with the Defendant, including a time with Coree Buck and the Defendant just before trial. Mr. Bushell said that he was sure that he spent more than 12 hours in preparing that case with the Defendant. He also testified that he spent numerous hours working on the case without the Defendant present.

49. Mr. Bushell indicated that he had the names of individuals who would have been alibi witnesses. The names, phone numbers and some addresses written in Mr. Bushell's file were between the dates of June 1, 2015 and June 26, 2015 – they included Tawnie Mulberg, Celest McCulley, Elias Karras, and Matt Bishop. Mr. Bushell identified an email in April 2015 between him and the Defendant where it was mentioned that Matt Bishop was working at a barber shop. It took a while to find Mr. Bishop, as Mr. Bushell said he was hard to find. He was contacted a day or two before trial. He met a couple of times with the Defendant and talked about who should be called as alibi witnesses. He did not recall hearing the name of Edith Dawson or Cheryl Stoker before. Because it had been so long he did not remember anything other than the names he had written down. If he had been given other names, he would have written them down. He contacted all the witness, that the Defendant and he discussed, and the witnesses gave him what was presented at trial.

50. Mr. Bushell testified that there were four alibi witnesses at trial and their stories were consistent. Mr. Bushell stated that there was no need for two more witnesses.

51. Mr. Bushell testified that he went over the timeline with the Defendant. He said they thoroughly discussed things such as; who was there, what the Defendant was doing, whose car he was driving in, where they went, and the balloon release after the funeral.

52. Mr. Bushell stated that if he called too many alibi witnesses, the jury would tune out. He felt like there may be value to calling more witnesses unless they were cumulative. However, he felt like a defense loses some of its strength if the same thing is presented over and over. He indicated that the 3 alibi witnesses, that they presented, were sufficient.



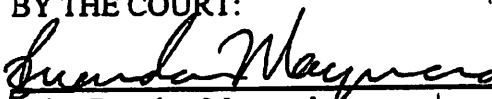
53. Mr. Bushell testified that Defendant never told him about the garage code. He further testified that he would not have brought that up at trial, as the theory of the case was that the Defendant was not there – it was cut and dry that it couldn't have been the Defendant. To indicate different, he felt, would not have made sense. He would have never presented alternate theories – because the defense was, it wasn't the Defendant, he was with friends.

54. Mr. Bushell testified that he never heard of Nicholas Seymour until trial and would have never used him as a possible alternative suspect, as the connections were not significant. He said that, if it was discussed, with no contact information or any way to contact him it would have been frivolous. Likewise, he felt that he would have had no chance of getting anything in at trial. His practice is not a shotgun approach to see what sticks.

55. Mr. Bushell talked to his witnesses and felt prepared for trial. He said it was not true that he had only spent about an hour meeting with the Defendant. Mr. Bushell submitted his alibi list 11 days before trial.

56. Mr. Bushell stated that all of his alibi witnesses testified at trial and he did not have any other alibi witnesses to call. He felt that Matt Bishop was very strong because he was the driver of the car the Defendant was in. He had no other names other than Ally. However, she could not be further identified or located. Mr. Bushell did not feel like he needed a private investigator. He testified that the Defendant couldn't have afforded one.

DATED this 29<sup>th</sup> day of April, 2019  
BY THE COURT:

  
Judge Brandon Maynard



**CERTIFICATE OF NOTIFICATION**

I certify that a copy of the attached document was sent to the following people for case 141100418 by the method and on the date specified.

MANUAL EMAIL: COURT OF APPEALS courtofappeals@utcourts.gov  
MANUAL EMAIL: BRIAN P DUNCAN bduncan@boxeldercounty.org  
MANUAL EMAIL: KAREN A KLUCZNIK kklucznik@agutah.gov  
MANUAL EMAIL: SCOTT L WIGGINS swiggins@awpc.net

04/29/2019

/s/ KATHI JOHNSTON

Date: \_\_\_\_\_

Deputy Court Clerk

**Addendum D:**  
**Supplemental Findings of Fact (R. 780-82)**

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF BOX ELDER, STATE OF UTAH

MAY 15 2019  
20160249-CA

STATE OF UTAH,  Plaintiff,  vs.  CULLEN CRISTOPHER CARRICK,  Defendant.	SUPPLEMENTAL FINDINGS OF FACT  Case No. 141100418  Judge Brandon Maynard
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THIS MATTER IS BEFORE THE COURT pursuant to the Order of Further Remand Pursuant to Rule 23B of the Utah Court of Appeals filed May 8, 2019. The Court hereby enters the Supplemental Findings of Fact:

1. There were a few meetings that took place with Mr. Bushell and the Defendant. Erin Moore and Coree Buck accompanied the Defendant and were present during at least one meeting each, however, Erin Moore and Coree Buck never attended the same meeting. A discussion of alibi witnesses occurred during a meeting where Erin was present. In that meeting Mr. Bushell wrote down the names and contact information the Defendant gave him. Erin Moore indicated that only the people that rode in the Defendant's vehicle to the funeral were discussed. These names did not include Edith Dawson or Cheryl Stoker. Although the Defendant indicates that he mentioned two other "older ladies" to Mr. Bushell, neither Mr. Bushell nor Erin Moore corroborate that Mr. Bushell was told about them by the Defendant. If Mr. Bushell had been given other alibi witness names, he

would have written them down. The Court finds that the Defendant failed to disclose additional alibi witnesses and that Mr. Bushell was not aware of them.

2. During another meeting between the Defendant, Mr. Bushell, and Erin Moore, a strategy and timeline of events was discussed wherein Mr. Bushell told the Defendant that he would be preparing a time chart for the trial. This was important to establish and show that the Defendant could not be in two places at the same time. A discussion of the events led to the Defendant indicating that he had the garage code and would have no need to go through the window. Erin Moore said that during the meeting, the Defendant told Mr. Bushell that he had the garage code at April's home and, therefore, would not need to go through the window. During this discussion, Mr. Bushell was focused on trial strategy relating to the impossibility of the Defendant being at the burglary scene – later indicating that the garage code would not have been significant to him because it was not part of the theory and strategy of the defense and he would not have presented alternate theories. Although Mr. Bushell indicated that he was not told about the Defendant's knowledge of the garage code, Erin Moore corroborated the Defendant's disclosure relating to the code. The Court finds that, during the meeting, the Defendant disclosed that he knew the garage code and would not need to go through the window.

DATED this 15<sup>th</sup> day of May, 2019.

BY THE COURT:

  
Judge Brandon Maynard



**CERTIFICATE OF NOTIFICATION**

I certify that a copy of the attached document was sent to the following people for case 141100418 by the method and on the date specified.

MANUAL EMAIL: COURT OF APPEALS courtofappeals@utcourts.gov

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MANUAL EMAIL: KAREN A KLUCZNIK kklucznik@agutah.gov

MANUAL EMAIL: SCOTT L WIGGINS swiggins@awpc.net

05/15/2019

/s/ KATHI JOHNSTON

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk