

2004

## Utah v. Robert Ellis Cox : Reply Brief

Utah Court of Appeals

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### Recommended Citation

Reply Brief, *Utah v. Cox*, No. 20040894 (Utah Court of Appeals, 2004).  
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IN THE UTAH SUPREME COURT

**.59  
DOCKET NO.** 20040894-SC

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THE STATE OF UTAH, :  
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 Plaintiff/Respondent, :  
 :  
 v. :  
 :  
 ROBERT ELLIS COX, : Case No. 20040894-SC  
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 Defendant/Petitioner. :

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**REPLY BRIEF OF PETITIONER**

**ON WRIT OF CERTIORARI**

**TO THE UTAH COURT OF APPEALS**

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FILED  
UTAH APPELLATE COURTS  
SEP 13 2005

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This Court has asked Petitioner Robert Cox and the state to address whether an appellate court has the authority to remand a case for nunc-pro-tunc resentencing when it lacks jurisdiction over an appeal from the convictions. (See Order, dated December 22, 2004.) Cox maintains it does.

As set forth in the Brief of Petitioner, if an existing record supports that defense counsel was ineffective in perfecting an appeal, an appellate court has the authority to remand the case to the original sentencing court and to order, advise, direct, or instruct resentencing, even where the appellate court otherwise lacks jurisdiction over an appeal from the convictions. (Brief of Petitioner, dated March 25, 2005.) Cox asked the Court of Appeals to remand for resentencing here. It refused. See State v. Cox, 2004 UT App 277, 2004 Utah App. LEXIS 305. He is now asking this Court for a remedy.

In its brief, the state acknowledges that this Court has inherent supervisory powers and authority over the judiciary in this State. (See Brief of Respondent ("State's Brief"),



dated July 1, 2005, at 17.) Likewise, while this Court may dismiss an appeal for lack of jurisdiction over the convictions, it also may advise or explain (see id. at 11) further proceedings for the parties and trial court to follow. (Id.)

The state agrees that resentencing in certain circumstances is an appropriate remedy. (Id. at 35 (asserting that the state will stipulate to resentencing "when the record facts indisputably demonstrate that the defendant was denied his right to appeal").) However, it maintains that if an appellate court lacks jurisdiction over convictions, it must dismiss; it may not remand the case to the original court for resentencing even where the existing record supports it. (See State's Brief, Argument.) That is untenable.

An appellate court is charged with carefully protecting the right to appeal. State v. Tuttle, 713 P.2d 703, 704 (Utah 1985). At this juncture, Cox has been denied an appeal through no fault of his own. (Brief of Petitioner, Argument B.) He is seeking a remedy in resentencing. (Id., Argument A.2.) While an appellate court may lack jurisdiction over an appeal from the convictions, it also may direct resentencing in the original case so that a defendant may take a timely appeal from the new sentence and judgment. See State v. Johnson, 635 P.2d 36, 37-38 (Utah 1981). That is what Cox requests here.

**THE STATE DOES NOT DISPUTE RESENTENCING AS A REMEDY WHEN COUNSEL IS INEFFECTIVE IN PERFECTING AN APPEAL; IT MAINTAINS ONLY THAT AN APPELLATE COURT MAY NOT ORDER THE ORIGINAL SENTENCING COURT TO PROVIDE SUCH A REMEDY. YET, UTAH LAW PERMITS REMAND AND RESENTENCING.**

A. THE STATE DOES NOT DISPUTE THAT COUNSEL IN THIS CASE WAS INEFFECTIVE IN PERFECTING AN APPEAL FROM THE CONVICTIONS. THUS, COX IS ENTITLED TO REMAND TO THE ORIGINAL SENTENCING COURT.

Before this Court or the Court of Appeals may exercise statutory appellate jurisdiction over a conviction, a timely notice of appeal must be filed. See Utah R. App. P. 3 & 4 (2005); Utah Code Ann. §§ 78-2-2(3), 78-2a-3(2) (2002).

In this case, the record supports that defense counsel provided ineffective assistance in perfecting an appeal from the convictions. (Brief of Petitioner, Argument B.) It shows that after trial and before sentencing, counsel filed a post-trial motion for a new trial. (See R. 182-86, 203-06.) The motion was premature and untimely under Utah R. Crim. P. 24(c) (2005) (motion must be made within ten days after sentencing). It did not toll the effect of the sentence and judgment for purposes of the appeal. See State v. Putnik, 2002 UT 122, ¶5, 63 P.3d 91.

Nevertheless, at sentencing in December 2003, counsel for Cox claimed in open court that the motion stayed the time for filing a notice of appeal. (R. 291:4-5; see also 302: 15-17.) Counsel's representations were incorrect. See Utah R. App. P. 4(a) (stating that a timely post-trial motion will toll the time for an appeal); Utah R. Crim. P. 24(c) (specifying that a new trial motion must be filed after sentencing). They misled Cox.

Also, counsel acknowledged an appeal for Cox in the case. (R. 291:4-5.) However, counsel did not file a timely notice. Instead, almost three months after sentencing, on March 2, 2004, the trial court held a hearing on the post-trial motion. (R. 302.) During the hearing, trial counsel assisted Cox in signing a notice of appeal, and

counsel advised Cox and the trial court that he would file the notice after the trial court entered the order on the post-trial motion. (R. 302:15-17.) At that point in the proceedings, the notice would have been too late. See Utah R. App. P. 3 & 4. Cox again was misled by counsel's misstatements since the time for appeal had elapsed.

On March 11, 2004, the trial court entered an order denying the post-trial motion. (R. 263-65.) Cox then filed his notice of appeal on April 8, 2004. (R. 266.) The notice was filed within 30 days of the order on the post-trial motion. It did not give the Court of Appeals jurisdiction over the convictions.

On August 19, 2004, the Court of Appeals dismissed the appeal as untimely. Cox, 2004 UT App 277. It also rejected Cox's request to remand the case to the original sentencing court for the limited purpose of resentencing. According to the Court of Appeals, Cox must pursue resentencing in habeas proceedings and he must demonstrate what the record here already established: "that he lost his right to appeal because of counsel's misrepresentations or ineffective assistance." Id. (relying on Utah R. Civ. P. 65C). The Court of Appeals maintained it could not remand for resentencing because it lacked jurisdiction over an appeal from the convictions. Cox, 2004 UT App 277. It did not see the duplicity in its ruling: while it purportedly *lacked jurisdiction to order anything further*, it simultaneously *ordered* Cox to pursue his remedy in habeas. Id.

The state does not dispute that trial counsel was ineffective in perfecting a timely appeal from the convictions in Cox's case. (See State's Brief.) That point is uncontested.

Notwithstanding, the state asserts that even under the circumstances here, an

appellate court may not remand to the original sentencing court for resentencing. (See e.g. State's Brief at 5.) According to the state, if an appellate court lacks jurisdiction over a conviction, it must dismiss the appeal without more. (Id.) In connection with that position, the state has cited to cases that have no relevance to the resentencing issue here, and it has rejected or disregarded orders from this Court supporting remand to the original criminal case where the record supports ineffective assistance of counsel. The state also seems to claim that the rules of appellate procedure prohibit remand for resentencing. (See State's Brief at 6-10, 14-15, 18-25.) Cox has addressed each matter below.

1. The State Has Cited to Cases That Do Not Concern Resentencing.

The state maintains that if an appellate court lacks jurisdiction over an appeal from the convictions, it must dismiss; it may not remand the case to the original sentencing court for resentencing. In support of its position, the state has cited to civil cases. It also has cited to State v. Putnik, 2002 UT 122; State v. Bowers, 2002 UT 100, 57 P.3d 1065; and State v. Jiminez, 938 P.2d 264 (Utah 1997). (State's Brief at 7, 8-10, 14-15.) Those cases support that an appellate court may not exercise statutory appellate jurisdiction over the convictions in a case where the appeal was not properly perfected. Cox does not dispute that proposition. He recognizes that at this stage in his case, the Court of Appeals lacks jurisdiction under Section 78-2a-3(2) over an appeal from the convictions; thus, he did not ask the court to exercise its appellate jurisdiction under that provision. Rather, he asked the Court of Appeals to order a process pursuant to Section 78-2a-3(1) for a remedy in the original sentencing court. He asked the court to remand for resentencing.

The Court of Appeals had statutory authority to grant Cox's request. (See Brief of Petitioner at 18-21 (discussing an appellate court's authority to dismiss an appeal for lack of jurisdiction and to remand for further proceedings in the original court).)

Specifically, pursuant to Utah Code Ann. § 78-2a-3(1), the Court of Appeals has the authority to order any process necessary in aid of its jurisdiction. See also Utah Code Ann. § 78-2-2(2) (providing this Court with the same statutory authority). That power and authority is not limited to cases where a proper appeal has been perfected. See Barnard v. Murphy, 882 P.2d 679, 681 (Utah Ct. App. 1994). Indeed, the authority to order any "process" in aid of jurisdiction is separate from an appellate court's statutory jurisdiction over an appeal. Id. (stating that the authority to order any process in aid of jurisdiction does not depend on appellate jurisdiction over the matter); see also Utah Code Ann. §§ 78-2-2(2) (concerning authority to issue any process in aid of jurisdiction) and -2(3) (concerning statutory appellate jurisdiction); 78-2a-3(1) and (2). Thus, where Cox requested relief in the Court of Appeals in aid of jurisdiction, and where the record supported that Cox received ineffective assistance of counsel in perfecting an original appeal in his case, the Court of Appeals had the authority to direct or remand the case to the original sentencing court for resentencing. See Utah Code Ann. § 78-2a-3(1).

The cases cited by the state in this matter are not relevant to that issue. Putnik, 2002 UT 122, Bowers, 2002 UT 100, and Jiminez, 938 P.2d 264, do not address the issue of remand for resentencing when the record supports ineffective assistance of counsel in perfecting an appeal. There is no indication in those cases that the defendant requested or

briefed the issue of resentencing, and there is no indication that the Court contemplated the issue under Utah law. See Putnik, 2002 UT 122; Bowers, 2002 UT 100; Jiminez, 938 P.2d 264. Since Putnik, Bowers, and Jiminez do not discuss remand for resentencing, they are not controlling authority for the issue here. See Horton v. Goldminer's Daughter, 785 P.2d 1087, 1090 (Utah 1989) (ruling that where case law fails to provide analysis for a proposition, it has little persuasive effect and is not dispositive of the issue).

2. Utah Cases Support Remand Where Ineffective Assistance of Counsel Is Established on the Existing Record.

Next, the state maintains that no precedent from this Court supports "defendant's contention that an appellate court may, in an untimely appeal, remand to the district court with instructions to resentence the defendant." (State's Brief at 16.) Yet, orders from this Court support remand. Cox provided copies of the orders as a courtesy. See State v. Clark, Case No. 20010819-SC (Addendum D to the Brief of Petitioner); State v. Munford, Case No. 20010413-SC (Addendum E to the Brief of Petitioner); State v. Hassan, Case No. 20020885-SC (Addendum F to the Brief of Petitioner). He also presented the orders to the Court of Appeals. (See State's Brief, Addendum C at 2, n.1.)

In State v. Clark, Case No. 20010819-SC, State v. Munford, Case No. 20010413-SC, and State v. Hassan, Case No. 20020885-SC, this Court specifically granted Salt Lake Legal Defender Association's request to remand for resentencing. The state was involved in those proceedings. See Clark, Case No. 20010819-SC; Munford, Case No. 20010413-SC; Hassan, Case No. 20020885-SC.

In each of those cases, the defendant desired to appeal from the convictions; this Court lacked jurisdiction over an appeal; this Court remanded for resentencing. See Clark, Case No. 20010819-SC; Munford, Case No. 20010413-SC; Hassan, Case No. 20020885-SC. In Munford, Case No. 20010413-SC, this Court ordered that counsel must be appointed to protect the defendant's right to appeal (Addendum E to Brief of Petitioner). In Clark, Case No. 20010819-SC, this Court recognized that defendant was denied his right to appeal by an attorney "who has since been suspended from the practice of law." (Addendum D to Brief of Petitioner.) In Hassan, Case No. 20020885, this Court relied on its statutory authority under § 78-2-2(2) to issue "any process necessary" in aid of jurisdiction and to carry its orders into effect. (Addendum F to Brief of Petitioner.)

The orders in Clark, Munford, and Hassan constitute in-court precedent; the principles set forth therein apply to this case.

The record here supports that while Cox intended to exercise his constitutional right to appeal, trial counsel failed to properly perfect that appeal. (Brief of Appellant at 31-37.) Thus, the Court of Appeals lacked statutory appellate jurisdiction over the convictions. See Utah Code Ann. § 78-2a-3(2). However, the Court of Appeals had the power and authority to remand at this juncture for resentencing (see Utah Code Ann. § 78-2a-3(1)), just as this Court did in Clark, Case No. 20010819-SC, Munford, Case No. 20010413-SC, and Hassan, Case No. 20020885-SC. The orders in those cases have force and effect; they are relevant to the issue here. They support remand for resentencing.

Cox is entitled to remand to the original sentencing court for additional reasons

that the state has not addressed in its brief. (See State's Brief.) First, the trial court here failed to advise Cox *at sentencing* of his right to appeal. See Utah R. Crim. P. 22(c); (R. 291; 203-06). That supports remand for new *sentencing* proceedings. See U.S. v. Butler, 938 F.2d 702 (6th Cir. 1991) (remanding for resentencing where the trial court failed to properly advise defendant of his right to appeal); (Brief of Petitioner at 35).

Second, Cox has established ineffective assistance of counsel on the existing record. (Brief of Petitioner at 31-35.) Under Utah law, if the record supports ineffective assistance, the appellate court will remand the case to that point in the original criminal proceedings where the ineffective assistance occurred. See State v. Maestas, 1999 UT 32, ¶37, 984 P.2d 376 (ruling that counsel's deficient performance at trial entitled defendant to a new trial); State v. Holland, 921 P.2d 430 (Utah 1996) (finding ineffective assistance and remanding for new proceedings); State v. Humphries, 818 P.2d 1027, 1029-30 (Utah 1991) (finding ineffective assistance where counsel failed to object to prosecutorial misconduct at trial, and remanding for a new trial); State v. Templin, 805 P.2d 182, 187-89 (Utah 1990) (remanding for a new trial where counsel failed to investigate witnesses who were known to him before trial).

Since ineffective assistance is established on an existing record here, the case should be remanded for new proceedings. Such an order of remand would not result in preferential treatment to Cox, but would be consistent with other cases, where ineffective assistance of counsel occurred. See e.g. Maestas, 1999 UT 32 at ¶37; Templin, 805 P.2d at 187-89; (Brief of Petitioner at 34-35).



In the context of this case, where the post-trial motion was untimely, it did not toll the effect of the *judgment* for purposes of the appeal (see Utah R. App. P. 4; Utah R. Crim. P. 24). The Court of Appeals lacked statutory appellate jurisdiction over *the judgment of convictions*. See Utah Code Ann. § 78-2a-3(2) (identifying appellate jurisdiction). However, that did not preclude the Court of Appeals from saying more about the matter. Specifically, where a notice of appeal was filed within 30 days of an order on the post-trial motion, the court could remand to those proceedings. Pursuant to the Court of Appeals' statutory authority to order any process in aid of its jurisdiction (Utah Code Ann. § 78-2a-3(1)), and based on the record of ineffective assistance in the proceedings here, the Court of Appeals should have ordered a limited remedy: remand to that point in the proceedings where the error occurred. (Brief of Petitioner at 34-35.)

### 3. Remand Is Not Prohibited by the Rules of Appellate Procedure.

Finally, the state seems to claim that if an appellate court remands for resentencing, it somehow will be invoking or exercising its statutory appellate jurisdiction over the convictions, or enlarging the time for appeal under the appellate rules, or suspending or circumventing those rules. (See State's Brief at 6-7, 18-21.)

Yet, that is not the case. Remand does not require an appellate court to enlarge the time for an appeal under the rules. See Black's Law Dictionary, 571 (8th ed. 2004) (defining an enlargement of time to mean an "extension of the time allowed to perform an action"); Johnson, 635 P.2d at 37-38 (stating the time for appeal cannot be enlarged; and articulating a motion procedure in the sentencing court for resentencing).

It does not require an appellate court to suspend, circumvent or transubstantiate the appellate rules. See Black's Law Dictionary, 260, 1487 (8th ed. 2004) (defining "circumvention" to mean the act of bypassing or avoiding; and defining "suspend" to mean to interrupt, postpone, or defer); Anderson v. Schwendiman, 764 P.2d 999, 1000 (Utah Ct. App. 1988) (explaining that certain motions will *suspend* the effect of an *existing* judgment); Webster's New World College Dictionary, 1522 (4th ed. 1999) (defining "transubstantiate" to mean to transform).

Remand will return this case to that point in the proceedings in the original trial court where error occurred. It will serve to purge the proceedings of the taint caused by the error. Just as *remand for a new trial* does not serve to enlarge, suspend or circumvent the appellate rules, remand for resentencing does not have any such effect on the rules. Remand is not prohibited by the rules of appellate procedure.

**B. RESENTENCING IS A REMEDY THAT IS AVAILABLE IF THE RECORD SUPPORTS THAT COUNSEL WAS INEFFECTIVE IN PERFECTING AN APPEAL.**

**1. The Court of Appeals Had Authority to Order Resentencing.**

In this case, the Court of Appeals refused to direct or order resentencing in the original sentencing court even though the record supported ineffective assistance of counsel. See Cox, 2004 UT App 277. It seemed to believe that only a habeas court could order resentencing. Id. It ruled that Cox must seek his remedy in habeas in the district court, and he must establish what the existing record already supported here: "that he lost his right to appeal because of counsel's misrepresentations or ineffective assistance." Id.

Yet an appellate court may order the remedy of resentencing. Resentencing allows a defendant to be sentenced "upon the previous finding of guilt so as to afford him 'an opportunity of prosecuting and perfecting an appeal, since the time for taking such appeal would date from the rendition of the new judgment.'" Johnson, 635 P.2d at 38 (cite omitted).

Cox maintains that if the existing record supports ineffective assistance of counsel in perfecting the appeal, an *appellate court* may order or direct resentencing in the original trial court (see Clark, Case No. 20010819-SC; Munford, Case No. 20010413-SC; Hassan, Case No. 20020885-SC), or it may advise a motion practice for the procedure in that court.

In State v. Johnson, 635 P.2d 36 (Utah 1981), this Court advised trial courts in how to proceed with resentencing in the original criminal case. It looked to the common-law writ of *coram nobis* and Rule 65B(i) to adopt a motion practice in the sentencing court. See Johnson, 635 P.2d at 38 (citing Utah R. Civ. P. 65B(i) (1977)). It did not require the defendant to pursue resentencing in habeas proceedings. See Utah R. Civ. P. 65B(f) (1977) (concerning habeas corpus proceedings); (Brief of Petitioner at 14-16).

Rule 65B as it exists today specifically accommodates a "motion" in the original sentencing court for resentencing. It allows a party to file a petition for relief; it states, "there shall be no special form of writ." Utah R. Civ. P. 65B(a) (2005). Thus, a petition under Rule 65B may be in the form of a motion in the original sentencing court. (See Brief of Petitioner at 16, n.3.)

Also, Rule 65B applies where "no other plain, speedy or adequate remedy is available." Utah R. Civ. P. 65B(a). If a defendant were denied an appeal through no fault of his own, he has no other plain, speedy or adequate remedy for the appeal. Thus, an appellate court may order resentencing in the original sentencing court so that defendant may file a motion under Rule 65B for the remedy. (Brief of Petitioner at 23-26.)

In the alternative, Rule 60(b) may be an appropriate avenue for resentencing in the original sentencing court. Pursuant to that rule, a party may be relieved from a final judgment for any reason justifying relief and upon such terms as are just where there has been inadvertence, excusable neglect, or the like. Utah R. Civ. P. 60(b). The rule accommodates relief from judgment where defense counsel was ineffective, and it accommodates reimposition of the original sentence to ensure justice. (See Brief of Petitioner at 29-31.) Under the proper circumstances, an appellate court may direct a defendant to file a motion under Rule 60(b) in the original sentencing court for resentencing. (Id.)

In this case, Cox has raised several provisions that would accommodate a procedure for resentencing in the original court. (See Brief of Petitioner, Argument A.2.) Cox relied on those same provisions when he asked the Court of Appeals to order resentencing. (See "Memorandum in Support of Motion to Temporarily Remand this Case to the Trial Court for Resentencing," attached as Addendum C to the State's Brief, and citing Clark, Case No. 20010819-SC (remanding for direct resentencing); Munford, Case No. 20010413-SC (same); Hassan, Case No. 20020885-SC (same); Utah Code Ann. § 78-2a-3(1) (authorizing the Court of Appeals to issue any process necessary in aid of its

jurisdiction); Barnard, 882 P.2d at 681 (recognizing that the court of appeals may exercise its statutory powers even where an appeal has not been perfected); Johnson, 635 P.2d at 37-38 (advising that defendant should file a motion in the original sentencing court for resentencing to revive the right to appeal); Utah R. Civ. P. 60(b) & 65B.)

The Court of Appeals rejected Cox's request and refused to order resentencing in the sentencing court. Cox, 2004 UT App 277. That was error. (Brief of Petitioner, Argument A.) Cox now is seeking a remedy here.

2. This Court May Order Resentencing in the Original Criminal Case and It May Implement Resentencing Procedures for the Trial Court to Follow.

As set forth in the Brief of Petitioner, pursuant to the Utah Constitution and case law, this Court has inherent supervisory authority over the judiciary in this State. (See Brief of Petitioner, Argument A.2. (citing to cases supporting this Court's inherent supervisory powers over the judiciary in this State, and Utah Const. art. VIII, § 3)); see also State v. Reyes, 2005 UT 33, ¶37, 116 P.3d 305 (exercising inherent supervisory powers to promulgate a reasonable-doubt instruction for use in the trial courts of this State).

That authority is unique to this Court. (See State's Brief at 16 (complaining that Cox did not rely on this Supreme Court's inherent supervisory powers in requesting relief in the Court of Appeals, and also recognizing that the Court of Appeals does not share in this Court's powers over the judiciary); also State's Brief at 32 (complaining that Cox did not rely on this Supreme Court's constitutional powers in requesting relief in the Court of Appeals); but see Utah Const. art. VIII, § 3 concerning the "Jurisdiction of [this] Supreme Court".) This Court may issue all processes and forms of proceedings necessary for the

exercise of its jurisdiction, in aid of its jurisdiction, to a complete determination of any cause, and to ensure a just process and result. See Utah Const. art. VIII, § 3; see also Utah Code Ann. §§ 78-2-2(2), 78-7-5(9) (2002); (Brief of Petitioner, Argument A.2.).

While the Court of Appeals had sufficient authority under Utah statutory law and case law to order the relief that Cox requested here for resentencing (see e.g. Utah Code Ann. § 78-2a-3(1) (authorizing the Court of Appeals to issue any process necessary in aid of its jurisdiction); Johnson, 635 P.2d at 37-38 (dismissing for lack of jurisdiction *and* advising that defendant should file a motion in the original sentencing court for resentencing to revive the right to appeal)), this Court now may affirm a procedure pursuant to its inherent supervisory powers for the trial court to follow that will allow resentencing in the original case, where the existing record supports ineffective assistance of counsel in perfecting the appeal. (See Brief of Petitioner, Argument A.2.)

Resentencing is a proper remedy. The state does not dispute that proposition. (See State's Brief at 35 (recognizing that a defendant may be entitled to resentencing when the record facts indisputably demonstrate that he was denied his right to appeal).)

Cox should be resentenced in the sentencing court "so as to afford him 'an opportunity of prosecuting and perfecting an appeal, since the time for taking such appeal would date from the rendition of the new judgment.'" Johnson, 635 P.2d at 38 (cite omitted). He respectfully requests that this Court order the remedy here for resentencing in the original criminal case.

C. PROCEEDINGS UNDER RULE 65C AND THE POST-CONVICTION REMEDIES ACT WOULD BE BURDENSOME TO COX.

Where the Court of Appeals ordered Cox to comply with the provisions of Rule 65C and the Post-Conviction Remedies Act (the "Act") for relief in this case, Cox, 2004 UT App 277, that is unnecessary. Cox has already demonstrated ineffective assistance of counsel on the existing record. (Brief of Petitioner, Argument B.) He is entitled to a remedy. He should not be required to proceed with habeas for resentencing here.

The state seems to agree. In its brief, the state asserts that defendant may file a "simple petition" for resentencing in the district court, where he will be represented by "able counsel." (State's Brief at 34-35.) The state claims that a simple petition is efficient and it will take less time to prepare than a brief for appeal. (Id.)

As set forth in the Brief of Petitioner, Rule 65C and the Act do not accommodate a simple petition for resentencing or the right to "able counsel." (Brief of Petitioner, Argument C.) Indeed, according to Rule 65C, before a petitioner may be entitled to relief, he must file *in forma pauperis* papers, a petition for relief, and supporting memoranda. See Utah R. Civ. P. 65C(b)-(d). The petition must set forth "all claims that the petitioner has in relation to the legality of the conviction or sentence." Utah R. Civ. P. 65C(c). Any "[a]dditional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown." Id. Also, successive petitions may not be permitted. Utah Code Ann. § 78-35a-106(1)(d).

In the context of this case, if Cox were required to proceed under Rule 65C for resentencing, he must raise all claims in his petition that he intends to pursue later in

habeas. He will be required to present all substantive claims concerning ineffective assistance of counsel, trial error, and the discovery of new evidence (see Utah Code Ann. § 78-35a-104), together with his procedural request for resentencing. He must include supporting attachments and a legal memorandum on the matter. Utah R. Civ. P. 65C(d), (e). Where Cox must present all substantive claims together with his request for resentencing, his petition will be more involved than an actual brief on appeal.

Thereafter, once Cox has filed his papers for habeas and resentencing under Rule 65C, the habeas court will review them. Utah R. Civ. P. 65C(g). If that court finds procedural or filing defects, it may delay the proceedings or dismiss the claims. Id. If the habeas court does not dismiss any or all claims, Cox may request the appointment of pro bono counsel in the matter. See Cox, 2004 UT App 277; Utah Code Ann. § 78-35a-109(1). The habeas court has the discretion to grant or deny that request; appellate counsel here may be precluded from representing Cox in the habeas proceedings. See Utah Code Ann. § 78-35a-109(1).

The habeas court then will forward Cox's petition to the Attorney General's office for a response and further proceedings. Utah R. Civ. P. 65C(h)-(m).

In this case, the state claims it routinely stipulates to "the grant of a post-conviction petition and resentencing" when the record facts support it. (State's Brief at 35.) However, the state may decide to contest other claims raised in the petition, thereby resulting in further delay. Utah R. Civ. P. 65C(i) – (j).

After the state has filed its papers in habeas, the district court may grant the



procedural remedy and order immediate resentencing in the original criminal case. See State v. Hallett, 856 P.2d 1060, 1062 (Utah 1993). At that point in the proceedings, it is not clear what will become of the substantive claims that Cox has raised in his habeas petition. See Utah R. Civ. P. 65C; Utah Code Ann. §§ 78-35a-101 through -110 (2002). They may be dismissed. If Cox's substantive claims then are not raised or resolved on the merits in the direct appeal, he may wish to proceed with them later in habeas. However, if they have been dismissed for resentencing, he likely will have to litigate whether the substantive claims can be revived.

If Cox is required to pursue resentencing in habeas, it is not a simple task. He must take measures at this stage – unrelated to resentencing – to ensure that he has not waived any substantive claim that he may intend to raise at an appropriate time after an appeal in future habeas proceedings. The process at this juncture is cumbersome, time consuming and unpredictable.<sup>1</sup>

Since a person seeking habeas relief typically has had his direct appeal, Rule 65C and the Act do not accommodate a simple procedure for resentencing. Those provisions

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<sup>1</sup> In Jiminez, 938 P.2d 264, this Court dismissed the defendant's appeal as untimely and directed him to proceed with habeas relief under Rule 65C and the Act. Id. That was in 1997. To date, no direct appeal has been processed for Jiminez. In Putnik, 2002 UT 122, and Bowers, 2002 UT 100, this Court simply dismissed the appeals. No direct appeal has been processed for those defendants.

In Clark, Case No. 20010819-SC; Munford, Case No. 20010413-SC; and Hassan, Case No. 20020885-SC, this Court ordered remand for resentencing. The defendants in those cases have since had an appeal on the merits as contemplated by this Court in Johnson, 635 P.2d at 38, and Tuttle, 713 P.2d at 704 (stating that the right to appeal must be carefully protected). See State v. Hassan, 2004 UT 99, 108 P.3d 695; State v. Clark, 2004 UT 25, 89 P.3d 162; State v. Munford, 2003 UT App 279, 2003 UT App. LEXIS 255 (attached hereto as an Addendum).

offer substantive relief; they allow the petitioner/defendant to present extra-record facts, and they contemplate that the parties will fully litigate the substantive claims on the merits to conclusion. See Utah Code Ann. §§ 78-35a-102, -104, -108; Utah R. Civ. P. 65C(j), (l). The provisions do not provide a plain, speedy, or adequate remedy for resentencing in a case where the record already supports ineffective assistance of counsel in perfecting the appeal.

That is not to say that Rule 65C and the Act may never be used for resentencing. The state asserts that it will not stipulate to resentencing "when a defendant consciously foregoes his right to appeal by pleading guilty or instructing his counsel not to file the notice of appeal." (State's Brief at 37.) That is not the case for Cox. The existing record here supports ineffective assistance of counsel. (Brief of Petitioner, Argument B.)

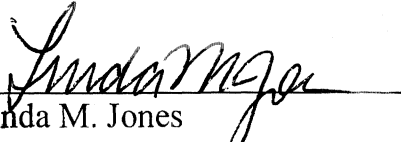
In this case, the only way to ensure that the constitutional right to appeal is protected is to remand for resentencing to the original trial court. Remand will ensure that there is no gap in Cox's right to the assistance of counsel in connection with his appeal.

If the right to appeal has any meaning in a case of this nature, and if this Court is to protect that right, then a defendant who has shown that trial counsel was ineffective in perfecting the appeal should be permitted remand to that point in the proceedings where the error occurred. In this case, error occurred when counsel filed an untimely post-trial motion and failed to protect Cox in his right to appeal. It occurred before sentencing. Cox respectfully requests that this Court remand this case for resentencing.

### CONCLUSION

For the reasons set forth in the Brief of Petitioner and herein, Cox respectfully requests that this Court remand this case for resentencing.

SUBMITTED this 13<sup>th</sup> day of September, 2005.

  
Linda M. Jones  
Salt Lake Legal Defender Association  
Attorneys for Defendant/Appellant

### **CERTIFICATE OF DELIVERY**

I, Linda M. Jones, hereby certify that I have caused to be hand delivered an original and 9 copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, Salt Lake City, Utah 84114 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 13<sup>th</sup> day of September, 2005.

  
LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Supreme Court as indicated above this \_\_\_ day of \_\_\_\_\_, 2005.

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## ADDENDUM

LEXSEE 2003 UT APP 279

**State of Utah, Plaintiff and Appellee, v. Damon R. Munford,  
Defendant and Appellant.**

**Case No. 20010812-CA**

**COURT OF APPEALS OF UTAH**

***2003 UT App 279; 2003 Utah App. LEXIS 255***

**August 7, 2003, Filed**

**NOTICE:** [\*1] NOT FOR OFFICIAL  
PUBLICATION

**PRIOR HISTORY:** Third District, Salt  
Lake Department. The Honorable David S.  
Young

**DISPOSITION:** Affirmed.

**COUNSEL:** Margaret P. Lindsay and  
Patrick V. Lindsay, Provo, for Appellant

Mark L. Shurtleff and Jeffrey S. Gray, Salt  
Lake City, for Appellee

**JUDGES:** Norman H. Jackson, Presiding  
Judge, Russell W. Bench, Judge, Gregory K.  
Orme, Judge

**OPINION:**

MEMORANDUM DECISION

Before Judges Jackson, Bench, and Orme.

PER CURIAM:

"In reviewing a jury verdict, we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Dunn*, 850 P.2d 1201, 1205 (Utah 1993). "Appellant bears a heavy burden of establishing that the evidence is so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt that [he] committed the crime." *Julian v. State*, 2002 UT 61, P 16, 52 P.3d 1168 (quoting *State v. Kerekes*, 622 P.2d 1161, 1168 (Utah 1980)). This court "will not substitute its judgment for that of the fact finder." *Id.* (quoting *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980)). Further, this court "will not weigh conflicting evidence or the credibility [\*2] of witnesses." *Id.* (quoting *State v. Logan*, 563 P.2d 811, 813-14 (Utah 1977)). Accordingly, we must assume the jury believed the testimony of the State's witnesses. See *Dunn*, 850 P.2d at 1213.

Munford's burden is heightened in this instance because he concedes that the issue of the sufficiency of the evidence was not preserved in the trial court. Therefore, he

must demonstrate plain error. See *State v. Holgate*, 2000 UT 74, P 13, 10 P.3d 346. The requirements for plain error are that (1) error exists, (2) the error should have been obvious to the trial court, and (3) the error is harmful. See *id.*

Munford argues on appeal that the State proved only his presence at the homicide, not participation. We disagree. The evidence, viewed in the light most favorable to the verdict, demonstrates acts on Munford's part that could be construed as knowledge and participation, particularly in light of Kiriluk's roommate's testimony that Munford was present on at least one occasion where Kiriluk indicated he was going to kill Brown. The cumulative evidence was certainly not so insubstantial that reasonable minds must have entertained [\*3] doubt.

Munford also argues that his trial counsel was ineffective in failing to move for a directed verdict. However, because we determine that the evidence was sufficient to support the jury verdict, it stands to reason that a motion for a directed verdict would have been unsuccessful and futile. "The decision to forgo futile acts does not amount to ineffective assistance." *State v. Wallace*, 2002 UT App 295, P 27, 55 P.3d 1147.

The conviction is affirmed.

Norman H. Jackson, Presiding Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge