2006

State of Utah v. Donald Millard : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, vs. DONALD MILLARD, Appellant.	)))))))))	**CASE NO. 20060336 CA**

REPLY BRIEF OF APPELLANT

APPEAL FROM THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
JUDGE RANDALL SKANCHY

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ATTORNEYS FOR APPELLEE

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Appellee,	)	
	)	
vs.	)	
	)	
DONALD MILLARD,	)	
	)	
Appellant.	)	

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REPLY BRIEF OF APPELLANT

CORRECTED AND SUPPLEMENTED STATEMENT OF FACTS

Davey Desvari ("Davey") was not about to report to prison but to jail. R.502:283-85. The money Don loaned Ben Desvari ("Ben") was not substantial R.502:289. Ben admitted during cross (incorrectly cited R.502:290), that Don was loaning money to Ben. Ditto for R.502:350-351 (with the exception that Ben stated Don and he were doing business together, a lot of framing, work on houses. Nothing was stated about loaning money.) R.502:351. Don only told Ben he owed child support. R.502:288.

Ben also admitted Don would not hurt a flea. R.502:354. At trial, defense counsel never questioned Ben about Brinkerhoff's testimony at the preliminary hearing, *viz.*, that Ben showed him where Susan lived because that was where Don would take his kids after his vacation so he could get a job with Don doing construction work. R.489:115-16, R. 502:360-61.

Regarding the $5,000 Don allegedly told Ben he would pay him, Ben testified he did not receive a penny for attempting to break Susan's neck. R.502:359-60. At the preliminary hearing, Ben testified that no one paid him anything to kill Don's ex-wife. R. 489:71. Ben admitted the cell phone he used belonged to Davey. R.502:363. Ben also admitted he "was telling so many

lies I didn't know what the truth was anymore." R.502:365.

Brinkerhoff Transcript From Preliminary Hearing

Don never asked him or anyone else to kill or harm Susan Hyatt. Don never threatened her harm. Ben Desvari ("Ben") brought up making Susan disappear. He testified it was a joke. Don never offered to compensate Brinkerhoff to make Susan disappear. Brinkerhoff never believed anyone intended to kill Susan. Brinkerhoff never agreed to kill Susan. He never believed there was any agreement, plan, plot, to help kill Susan. R.489:106-112

Why Brinkerhoff Went To Susan's House

Ben showed Brinkerhoff where Susan lived so Brinkerhoff could meet Don there after his return from vacation and attempt to get a job. This was his sole reason for going to Susan's. He did not intend to kill Susan and had not agreed with Don or Ben to kill Susan. R.489:115-16.

At trial, defense counsel never questioned Brinkerhoff about why Ben showed him where Susan Hyatt lived comparing his preliminary hearing testimony. Brinkerhoff testified that he went to the home of Susan Hyatt to meet Don and see if he could get a construction job from him. R.502:421. Brinkerhoff testified that Don wanted him to pull some permits or to see if he could get some paperwork for Don. R.502:400.

Paragraph 18 of the Statement of Facts in the initial brief related a conversation between Don and Brinkerhoff that Bugden failed to cross-examine Brinkerhoff about, losing an opportunity to raise reasonable doubt. R.502:393-423,424-426. *See* Affidavit of Don R.1079.

Don did not convince Brinkerhoff to kill his exwife

At trial and contradicting his preliminary hearing testimony, Brinkerhoff testified when on his way to Susan's, he allegedly had a change of heart and did not want to kill her. R.502:381. He then stated his reason for continuing to Susan's house was to see Don because he knew that Don was going to be bringing the children back from a vacation to her home and he had permits with him Don wanted obtained. R.502:382. No cross-examination occurred

regarding his preliminary hearing testimony.

Brinkerhoff testified he went to Susan's house and asked to borrow her cell phone to call Don. She let him in her house and allowed him to use it. Brinkerhoff stated he spoke to Don about papers (permits) for the job. R.502:382-83;503:588.

Brinkerhoff testified that as he handed Susan's cell phone back, his knife slipped out of his waistband and fell to the floor. Susan turned and lunged for the knife. They wrestled with the knife and then Brinkerhoff gave it to Susan, receiving minor injuries in the process. Brinkerhoff asked her if she needed any help. He went to the sink and got some paper towels and again asked if she needed any help. She told him to leave and he asked for his knife. He then followed her out the door [she being in front of him] and left. R.502:383-84. This markedly differed from Susan's testimony concerning Brinkerhoff's attack. *See* R.503:595-97. However, this testimony was entirely consistent with the actual injuries Susan suffered. Susan was never taken to the hospital and never required stitches. R.503:599. Yet, defense counsel never cross-examined her about her testimony being inconsistent with Brinkeroff's.

Tara Isaacson's promises in her opening statement

"Now, with respect to child support, Don was behind. He was way behind. There's no excuse for that. He needed to be following through with his obligation. But there were not angry phone calls with Susan. There wasn't animosity; there weren't fights about that. He was working on a house and had a plan to try to catch up. Things were not in a situation where he felt desperate or in a situation where he would want to harm the mother of his children. That's simply not what the circumstances were. We believe that, once you hear all this evidence that has been described, and a whole lot more, I imagine, you will conclude that Don Millard is not guilty of this offense, that he's innocent of the charges filed against him, and that you'll return the only fair verdict which is not guilty. R.502:255, 257."

"At the same time, he was also doing work on a home in West Valley. You'll hear evidence that Don has a background as a handyman, likes to work with his hands and for years,

really, has done work rehabbing houses and preparing them for resale. So he was always on the lookout for people who could do that kind of work. Don will tell you, he considered Davey Desvari a good friend. He'd known him for years. Davey had done a lot of work for him; he was an electrician. He had been a tenant. And so when things went bad for Davey and he went to jail, Ben got in touch with Don and said, Hey, I need help with some of these things; can you help me with them? And then Don found out that Ben also was a construction worker. He was able to do framing. So the relationship evolved where Ben was helping him with some issues with Davey and he was also having Ben do some work for him. Don Millard went in voluntarily and spoke with Detective Chamberlain. He answered all his questions. He came to the police station. He answered every question that was put to him by the officer. He could have -- you know, he didn't have to do that. He did that. Then when he got a call later, he still answered the questions. He still tried to provide information to the detective. He was very cooperative throughout all this investigation. Things were not in a situation where he felt desperate or in a situation where he would want to harm the mother of his children. That's simply not what the circumstances were." R.502:249-250,254-55.

Wally Bugden's damning disclosure in his closing statement

During closing argument and even though never entered into evidence, Bugden told the jury that the Magna phone number in question that could directly link Don to Brinkerhoff and the conspiracy belonged to Carol Durrant, Brinkeroff's sister. R.504:833-34.

ARGUMENT

I. DEFENSE COUNSEL'S BROKEN PROMISE TO THE JURY THAT DON AND HIS MOTHER WOULD TESTIFY IS INEFFECTIVE ASSISTANCE OF COUNSEL

Don's request that this Court find ineffective assistance of counsel by promising the jury that Don and his mother would testify and then break that promise without the occurrence of

any unforeseeable or unexpected events should not be rejected. It is not at odds with *Strickland v. Washington*, 466 U.S. 668 (1984), as asserted by the State. In fact, the cases cited by Don use a in-depth *Strickland* analysis.

The cases cited by Don in his initial brief are remarkably factually-similar to his case. Contrary to the implication in the State's brief in this section, they all engage in a *Strickland* analysis. In *People v. Briones*, 816 N.E.2d 1120, 1122 (Ill.App.2004) defense counsel simply stated that defendant was going to testify, that he was going to be cross-examined, and he was going to tell the truth. He was never called. Contrary to the assertions of the State, making an unfulfilled promise to a jury constitutes prejudice, as set forth in *U.S. ex rel. Hampton v. Leibach*, 347 F. 3d 219,257,259 (7th Cir.Ct.App.2003):

> [W]hen the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for `little is more damaging than to fail to produce important evidence that had been promised in an opening.' (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988)). The court continued:
>
> > Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility. In no sense does it serve the defendant's interests.

Id. at 257, 259.

In accord, *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir.2002) ["When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made."]; and *State v. Zimmerman*, 823 S.W.2d 220, 226 (Tenn.Crim.App.1991) [Ineffective assistance of counsel was found arising from counsel's statements during opening

statements that defendant, a psychiatrist, and others would testify that defendant was a battered wife and that she killed in self-defense. Trial counsel later advised defendant not to testify and presented no such evidence (the instant case). The court determined that there was no "sudden change" in the case which would have justified changing trial strategy.]

The State has grossly understated Tara's opening statement promises concerning having Don testify. Under "Defense counsel's opening statement" above, it is obvious that Don would testify to many things pertinent to his defense. He never did. Defense counsel never called him. The jury never heard his side of the story. No reasonable doubt was created.

The State cited *State v. Heil*, 2005 UT App 117 which is inapposite. Even though Heil's counsel stated in opening that Dr. Declore would testify, counsel later discovered that his testimony would be contrary to Heil's case. That is not the case here. Glenda Millard's testimony would buttress Don's case, creating more reasonable doubt had defense counsel questioned her about meeting Ben Desvari in the Murray Park. R.1110-1108 (Bugden's admission he knew of the park meeting from Glenda R.1031:50-52.) Had he been called, Don would have been able to rebut the statements of the State's witnesses, also creating more reasonable doubt. R.1098-1065. There was absolutely no tactical reason not to call Glenda Millard and defendant. Ditto for *United States v. McGill*, 11 F.3d 223, 226-28 (1st Cir. 1993), where defense counsel discovered that that the witness would "easily be impeached," and (2) defense counsel had managed to elicit "much the same opinion evidence" during his cross-examinations of the government's own witnesses. Again, there is no evidence that either Glenda or Don could be easily impeached (whether easily impeached or not, Don had the right to testify but was not allowed to do so). Certainly, because defense counsel never managed to elicit the same evidence from the State's witnesses (defense counsel never even cross-examined Ben about the meeting in the park), that element is inapposite. There was no strategic reason why Glenda or Don were

not called to testify. There were no unforeseeable or unexpected events that occurred to cause defense counsel not to have them testify. Certainly, defense counsel never proved any points by their decision not to have Glenda and Don testify. They never mounted any meaningful or substantive defense; consequently, the State's cite *United States v. McGill*, 11 F.3d at 228 (leaving well enough alone) is not apposite to these facts and goes against the State's position. As clearly set forth in the initial brief and here, defense counsel's decision not to call Glenda and Don, especially since they failed to mount any real, substantive defense, was unreasonable and not based on any articulated, objective, sound trial strategy. "To avoid the shoals of ineffective assistance, an attorney's judgment need not necessarily be right, so long as it is reasonable." *McGill* at ¶ 20.

Likewise, *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir.1994), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir.1996) (Aple.Br.19) is inapposite. All of the circumstances of the instant case demonstrate that there existed no reasonable strategic bases for the decision not to call Glenda or Don. (In the final analysis, Strickland teaches that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Turner* at 35 F.3d at 900.)

The State would have this Court believe that there were factors present at trial mandating a mid-trial change of strategy. Aple.Br.20. These factors are not found in the record and are nothing more than speculation. The State suggests that defense counsel felt one of the State's witnesses was seriously weakened during cross-examination. In light of the cross-examination of Ted Anthony ("Ted"), when defense counsel continued to use the objectionable hearsay statements of Ted re what Idrese Richardson allegedly said to him, rhetorically speaking, how could they reasonably conclude their cross-examination of him seriously weakened his testimony, especially when defense counsel knew that Idrese Richardson was unavailable.

[R.503:464, ¶¶ 20-32, Statement of Facts, Initial Br.] When defense counsel knew that Don was traveling from California to Salt Lake City on the evening of the alleged incident, how could they rely on this excuse of seriously weakening Brinkeroff during cross-examination when they failed to ask him when, where, and who was present when he testified Don drove to Magna to meet him. Defense counsel passed up a golden opportunity to create an alibi had they effectively cross-examined Brinkerhoff. R.502:393-423,425-26;R.1098-1065. Again, the totality of the circumstances must be considered. The record is devoid of any facts indicating that defense counsel's original trial strategy was mistaken or that the client may be better served by a different strategy. Reference must be made to the December 2, 2005 letter sent to Don by his counsel regarding him testifying, "there are too many explanations that can only come from you". R.1066. Nothing changed during trial to not have Don testify. At the close of the State's case-in-chief, defense counsel knew there were too many explanations that could only come from Don, that without him testifying, the jury would never hear these explanations and could only conclude he was guilty because no contrary evidence was presented.[1]

II. DEFENSE COUNSEL WAS INEFFECTIVE BY ADMITTING TO THE COURT THAT DEFENDANT WAS INVOLVED IN A CONSPIRACY TO HARM HIS EXWIFE, ALSO PRESUMING PREJUDICE

In this section of the State's brief [Aple.Br.26-31], it attempts to reinvent the history of this trial. The statement of Bugden was clear-cut with no qualifying language that Don was involved with Mr. Desvari in a conspiracy to harm Susan Hyatt:

And the idea that the State would make this into two different conspiracies, I

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[1]At this corresponding point in their response, the State admitted that it was defense counsel who decided Don would not testify: "but later decided not to call him after Brinkerhoff testified that he had spoken with Defendant within 2 hours of the September 11 attack". R. 1031: 23-25, 33, 176-79. Aple.Br.24. What would be the trial strategy that would justify them not calling Don even if Brinkerhoff had spoken to Don within 2 hours of the alleged attack? *See* Don's Affidavit R.1098-1065, re his testimony and R.1031:213-220.

> think, is contrary to the evidentiary picture and contrary to the law. I think there was a conspiracy. The goal of the conspiracy was to harm Ms. Hyatt. And Mr. Desvari was enlisted for that purpose in the beginning and was unsuccessful. He continued to work with Mr. Millard and work with Mr. Brinkerhoff and Mr. Desvari continued to have a role. R.504:614

Before that damning statement, he also said, "In fact, that's what happened. He did show Mr. Brinkerhoff [Susan's Hyatt's home]". (Again, no qualifier.) His statement was not a hypothetical. The admission was not made *arguendo*. It was a forthright statement of fact. Bugden was arguing there was no termination of the conspiracy. That damning statement has nothing to do with his argument that one count should be dismissed. He could have easily made an argument for one conspiracy by omitting that damning statement, i.e., "He [Ben] continued to work with Mr. Brinkerhoff and Mr. Desvari continued to have a role". (Moreover, the way defense counsel ineffectively conducted this trial demonstrates they had a conflict of interest, e.g., Bugden's treatment of Susan, that he thought she was a heroine thus, giving her carte blanche permission to lie, because he believed her to be credible, acting this way to Don's substantial detriment, abdicating his ethical responsibilities in the process. R.1031:157.)

Another error in appellee's brief is found on page 28. Defense counsel was not moving to dismiss for failure to prove all of the elements, he was moving to dismiss one count.

It matters not what Bugden stated at the remand hearing regarding this statement. The trial record is what it is. At the time the trial record was made, Bugden lacked a motive to be deceptive. Now that he is the object of a charge of being ineffective, that motive is present. The fact that Mr. Drake had to supplement the remand record with clear evidence of defense counsel's perfidy (by manufacturing documents for the remand hearing), demonstrates that defense counsel's motive to color the truth was prevalent. R.1031:203-04; R.1029-1023, 980-969, 1098-1065 (addenda).

It matters not that this damning statement was made outside the presence of the jury. That

is not the standard espoused in *State v. Holland*, 921, P.2d 430 (Utah 1996) . *Holland* made it clear that the very fact that a defense attorney would take a position contrary to that of his client and side with the state was enough to find ineffective assistance of counsel:

> We need not examine whether such performance resulted in prejudice to Holland. 'Once the Court conclude[s] that [the defendant's] lawyer had an actual conflict of interest, it [shall] refuse to indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' [citing] *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980) [quoting *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467-68, 86 L.Ed. 680 (1943)); other citations omitted. [Emphasis added.]

Id. at 436.

Further, it should be noted that the attorney for Holland did not make that statement to the Holland jury. As stated by the *Holland* court: "At the very least, this duty of loyalty requires attorneys to refrain from acting as an advocate against their clients, **even in a matter unrelated to the case for which the attorney has been retained**." [citing *Holland II*, 876 P.2d at 359-60] [emphasis added] Again, prejudice is presumed and no matter how much posturing or manipulating the facts, the damning statement was made. This damning statement also implies a breach of an attorney-client confidence, implying that Don had made a confession to his defendant counsel. Such despicable conduct should not be tolerated. This egregious breach of ethical duties to Don should result in a reversal of the conviction.

III. DEFENSE COUNSEL WAS INEFFECTIVE BY NOT ALLOWING DON TO TESTIFY ESPECIALLY DUE TO THEIR LACK OF PREPAREDNESS

Contrary to the State's assertion, the record does not contradict Don's claim that defense counsel would not allow him to testify. R.1031:213-225;1098-1065.

Defense counsel admitted they failed to tell Don he had a constitutional right to testify. R.1031:26. Don wanted to testify. In fact, he never told them he did not want to testify. R.1098-

1065;1031:20-21. After Brinkerhoff testified regarding the phone calls on the second day of trial, defense counsel testified they had Don meet with them to discuss how they were to deal with these "smoking gun" phone records. R.1031:22-23. This admission demonstrates that 1) Ms. Isaacson did not review the phone records as she stated (actually broke down day by day for two months); 2) she did not review the phone numbers/records with Don; and 3) she failed to investigate the phone records. (R.1031: 29,170,174-176). She impliedly admitted she failed to investigate the phone records, especially the Magna phone number, even though they were the most important issue of the trial.[2] R.1031:194-96. All of this evinces ineffective assistance of counsel. **Moreover, as stated in its brief, the State admitted that defense counsel decided not to call Don**. Aple.Br.24.

Defense counsel admitted that the phone records were the most serious issue R.1031:194 and that it was absolutely essential for Don to testify because there were so many gaps that only he could fill, too many explanations that could only come from him. R.1031:32-33.

This section comes down to the credibility of defense counsel versus Don. Even though the remand findings paint defense counsel as very honest and trustworthy, the record contradicts that (one example is that Ms. Isaacson testified under oath that David Drake didn't ask for everything R.1031:186, which is contradicted by his letter to her asking for everything and chiding her for not providing it in an attempt to manufacture evidence for the remand hearing R.1026). *See* R.1031:203-04,224; 1029-1023; 980-972 (incomplete since the district court clerk failed to properly index the exhibit to 980-972) (all in the adenda). Don testified that Bugden was not present and did not talk to him. R.1031:213. Moreover, contrary to defense counsel's testimonies, Don did not tell them the next day at trial the "story" of Davey Desvari being at his

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[2] Ms. Isaacson's questionable testimony regarding not knowing anything about the Magna number R.1033:176 contradicts Mr. Bugden's closing argument statement that this phone number belonged to Carol Durrant, again evincing perfidy on her part. R.504:833.

home, that never happened. R.1031:219-220 (cf R.1031:195; but, cf that with R.1110-1099 & 1064-1058). The record also supports Don's claim that defense counsel would not let him testify. He was on the witness list. The December 2, 2005 defense counsel letter sets forth compelling reasons why he should testify (R.1066-65). Defense counsel promised the jury he would testify R.502:249-250,254-55,257. The reason defense counsel did not allow Don to testify is they were not prepared. They had not analyzed and investigated the phone records they had for 10 months. If they were as prepared as they stated they were during the remand hearing, why were they so buffaloed by the testimonies of two State witnesses who couldn't remember pertinent facts and phone numbers? Why then did they not have Don testify with all of this great amount of preparedness? The reasons are obvious. Defense counsel were not prepared!

Footnote 11, Initial Brief of Appellant, demonstrates the kind of proper cross-examination defense counsel could have done with a thorough investigation of the records.

> "If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance.' This is because **a decision not to investigate cannot be considered a tactical decision.** It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

State v. Hernandez, 2005 UT App 546, ¶ 19, 128 P.3d 556.

As stated in his initial brief, Don had state and federal constitutional and statutory rights to testify. *See* Initial Brief, § III, pages 26-31 for legal citations. His defense counsel denied him these rights. Moreover, defense counsel provided no evidence to create a reasonable doubt. As stated herein and in the Initial Brief, their cross-examination of the State's witnesses was ineffective. The prejudice is obvious – the unrefuted testimonies of Ted, Ben, and Brinkerhoff were so damning the jury had no choice but to convict Don. An error generally is considered prejudicial if there is a strong possibility that it affected the outcome of the trial. *Ouber, supra.*

The right of Don to testify and present his version of events in his own words is a fundamental right guaranteed by both the United States Constitution and the Utah Constitution. He is the ultimate authority in deciding whether to testify. *State v. Brook*, 833 P.2d 362, 364 (UT. App.1992)

IV. DON'S DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PHONE RECORDS

A. The phone records were not properly admitted

The record is clear that once the phone records were offered into evidence by the State that the trial court never stated the words, "received" or otherwise responded. Without this response from the trial court, the phone records were never admitted as evidence. R.503:600-01. The documents were never authenticated as required by Utah law. *See State v. Lamorie*, 610 P.2d 342 (Utah 1980) ["By Utah law, any document, to be received in evidence, must be authenticated. [citation omitted] Absent such authentication, no competent evidence is before the court that the document is what it purports to be."]; *People v. McClerren*, Ill.App.5 Dist., 554 N.E.2d 776 (1990) ["Neither testimony nor physical objects are evidence unless they are produced, introduced, and ***received*** in a trial." (Emphasis added.)]; and *State v. Torres*, 87 P.3d 572,582 (Okla. 2004) ["***It is elementary that evidence must be offered and admitted at a hearing in which fact issues are in dispute***. In sum, that which counsel desires to use as proof must be adduced in a proper manner in the adversarial proceedings conducted to resolve the disputed facts on the merits of a claim or defense." (Emphasis added.)].

The State incorrectly stated that defense counsel agreed with the stipulation and made scheduling suggestions based on it, citing R.503:485-6. Instead, Mr. Searle made all the talk about a stipulation without any response from defense counsel. Bugden did not mention a stipulation when talking about scheduling. R.503:485-6. But, the very fact that defense counsel may have stipulated to the entry of these phone records when the State rested, when no State

witness was approached and asked to testify from the phone records, and none of the State's witnesses could remember phone numbers, and defense counsel considered these phone records to be the most damaging piece of evidence against Don completely boggles the mind. This is a decision, under these circumstances, that cannot be considered a tactical decision. Certainly, the State could have produced witnesses to authenticate these records; however, since this stipulation was entered into when the State rested is a classic example of ineffective assistance of counsel. These phone records were not subject to any foundation to establish admissibility. The question must then be asked why defense counsel would stipulate to them when they were inadmissible for at least this reason. *See Tribe v. Salt Lake City Corporation*, 540 P.2d 499, fn 4 (Utah 1975).

As enunciated in *Strickland v. Washington*, 466 U.S. 668,687,689, 104 S.Ct. 2052 (1984):

> To prevail on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance was so seriously deficient that it fell below an objective standard of reasonableness under prevailing professional norms, that is, counsel made errors so serious that he no longer functioned as the "counsel" guaranteed by the sixth amendment. To establish deficiency, the defendant must overcome the strong presumption that counsel' challenged action or inaction was the product of sound trial strategy.

Id. at 687, 689.

Defense counsel considered the phone records the most critical and damaging piece of evidence against Don. R.1031:194; R.1066-65. Defense counsel stipulated to the phone records coming in at the end of the state's case-in-chief, knowing that no foundation for the records had been established. R.503:600-01. There is absolutely no conceivable trial strategy that, under these circumstances, would allow defense counsel to stipulate to these phone records being entered into evidence, especially knowing that Don would not thereafter testify. The only conceivable result of so stipulating would be a guilty jury verdict. Rhetorically speaking, why

make it easier for the State to obtain a guilty verdict against your own client. Such ineffective actions defy an objective standard of reasonableness.

The State argues that this "error" regarding the admission and admissibility of the phone records was not preserved. If every defendant who was represented by ineffective counsel had to depend on whether that ineffective counsel preserved the record by timely and proper objections, there would be few successful claims of ineffective assistance of counsel. Counsel are found ineffective in this regard because of their failure to timely and properly object to evidence. Under the circumstances of this case, set forth above and in Don's Initial Brief, the State's argument in this regard is frivolous.

State's claim of futile objections

The State's claim that defense counsel are not required to make futile objections under these facts has no merit. *State v. Kelley*, 2000 UT 41 and *State v. Whittle*, 1999 UT 96 are inapposite since they can be distinguished on their facts. The claim of ineffectiveness in *Kelley* arose from failure to timely file a motion in limine to exclude an expert's testimony (who was plainly an expert) and to object to the use of an IQ test to which the expert established a foundation. In the instant case, the phone records had not been authenticated nor a foundation established. Clearly distinguishable. *Whittle* involved a claim of ineffectiveness based upon his counsel's failure to object to hearsay which statement was admissible. Again, distinguishable.

Furthermore, the custodians of the records for the phone companies did not testify. At the time of the attempted admission of the phone records, the State was resting. To state otherwise as the State has done is nothing but speculation, something the State has wrongfully accused Don of doing. Moreover, the State's witnesses could not even identify the phone numbers allegedly called. They were never shown the phone records and no foundation was established.

Don doesn't have to point to evidence suggesting the phone records were inauthentic. The record is clear they weren't authenticated – the State had rested and no authenticating witnesses testified. No foundation was established. Therefore, the State's counter-argument fails.

Since the State failed to address the issue of prosecutorial misconduct, dismissing it as frivolous without any in-depth analysis, this Court should accept Don's claim of such misconduct. As stated in his initial brief, the prosecutor testified to facts that were not in evidence, causing the jury to focus on his testimony. What Mr. Searle testified to in his closing argument without any objection whatsoever from defense counsel was not what his witnesses testified to or did not testify about. This is clearly prosecutorial misconduct as discussed more fully in Don's Initial Brief, Section IV(C). There is absolutely no conceivable trial strategy that would allow defense counsel to not strenuously object to this misconduct. Consequently, they were ineffective.

V. DON'S DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO OBJECT TO THE HEARSAY TESTIMONY OF TED ANTHONY

The State's rendition of what occurred at the remand trial is irrelevant to this argument. In the State's Statement of Facts (Defendant tries to convince Ted Anthony to kill Susan, p.6), it emphasized how important this hearsay testimony of Idrese Richardson was to demonstrate that Don was a participant in the conspiracy.

The State's reliance on *State v. Litherland*, 2000 UT 76, ¶ 17, 12 P.3d 92, is misplaced. In its May 31, 2008 remand order, this Court stated the record concerning defense counsel's failure to object to Ted Anthony's ("Ted") hearsay testimony **DID NOT HAVE TO BE SUPPLEMENTED** since the record was complete.[3] Not allowing Bugden to explain is not

[3] The State should be aware that the a Rule 23B Motion is to supplement the record. The record concerning defense counsel's failure to object to the hearsay testimony of Ted Anthony did not need to be supplemented. Moreover, an experienced trial attorney would know that what occurred in the remand hearing in this regard, without any objection from the

preserving the record. The trial record is what it is and this portion of it did not need to be supplemented. Moreover, all the State is attempting to do is engage in conjecture and speculation about what Bugden would state, years after the fact and with a motive to present himself in the best possible light. Such testimony is not preserving the record. If this Court felt the record in this regard was inadequate, it would have ordered it supplemented.

The State's argument that this hearsay testimony of Ted is cumulative (Aple.Br.44-45) is wholly lacking in merit. The bottom line is that Ted's testimony directly concerned Don's involvement in a conspiracy, that Idrese was his agent, and that Don himself wanted to hire a hitman. R.503:438-39,441-42,451-476,434-489. (*See* Statement of Facts, Initial Brief, ¶¶ 20-32,34,44.) When mentioning what Ted stated Don allegedly said to him, the State ignored the fact that Don's affidavit is part of the record. In that affidavit, Don categorically denied stating anything to Ted about hiring a hitman or otherwise implicating himself. R.1088,1074-70.

There is no conceivable trial strategy that would countenance trial counsel allowing damaging hearsay evidence in without objection, underscored by their December 2, 2004 letter (R.1066-65) where defense counsel admitted that Idrese was critical: "If he doesn't back us up, our defense is weakened." To not object to such damaging hearsay is clearly deficient performance, falling below an objective standard of reasonable professional judgment. Rhetorically, what trial attorney would not object to such hearsay on the most major issue of the state's case-in-chief, i.e., whether Don was guilty of a conspiracy. Defense counsel's failure to object is made more egregious by two more factors: (1) trial counsel knew that Idrese was not

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prosecution or the judge, did not stifle evidence. All the State is doing is engaging in frivolous conjecture about what Bugden would have stated, all of which is immaterial based upon this Court's remand order. Moreover, Mr. Searle did not feel this testimony arose to the "so-what" level since he did not rehabilitate Bugden. As an aside, this neophyte statement in the State's brief overlooks the fact that if Mr. Drake allowed Mr. Bugden to not respond to his questions, Mr. Drake may be ineffective. The State can't now object when Searle didn't.

going to testify because they failed to investigate and meet with him; and (2) trial counsel perpetuated this hearsay by asking further questions that called for more hearsay. R.503:464.

The prejudice is that the jury heard these hearsay statements without objection implying that they were true. Had an objection been timely made prior to Ted's testimony, the jury would never had heard such. It goes without saying that these statements prejudiced Don and led to his conviction.[4]

VI. DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO PREPARE AND INVESTIGATE FACTS AND WITNESSES

As set forth above, defense counsel's testimonies at the remand hearing were not credible. Moreover, the State generally ignored the affidavits of Diane Martin, Glenda Millard, Melody Oliver, and Don in its arguments. Even though Bugden stated he thought **Glenda Millard's** testimony was self-serving and unbelievable (as if Ben and Brinkerhoff's testimonies weren't), Bugden put on absolutely no evidence to create reasonable doubt. (An examination of the whole trial record reveals this.) Had he questioned her about the meeting in the park and about the statements of Ben (a conspirator), that would have at least presented some reasonable doubt evidence for the jury. Ditto for **Diane Martin**. To fail to present such evidence falls below an objective standard of reasonableness. Without any evidence of reasonable doubt being

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[4] Equally egregious is that during Ted's testimony at the preliminary hearing, he testified the same way he did at trial. *See* Initial Brf. Statement of Facts ¶¶ 20-32, R.490:21. From February, 2005 to the trial in December, 2005, trial counsel filed no motion in limine to prevent Ted from testifying to anything Idrese may have said. R.1031:77.

There was no legitimate strategy in failing to timely file a motion in limine. Had the motion was denied, immediate steps could have been taken to obtain Idrese and investigate his being a witness or to blunt the harsh effects of these statements. However, without the motion being filed, trial counsel never effectively dealt with this hearsay issue, resulting in obvious prejudice to Don. *See State v. Ferry*, 2007 UT App 128, ¶¶ 15, 16.

presented, the jury had to convict.[5] According to *Hernandez*, "a decision not to investigate cannot be considered a tactical decision".

The self-serving testimony of Bugden concerning **Melody Oliver** is refuted by the fact that she willing gave an affidavit (R.1057-54), testifying to matters that could have produced more reasonable doubt. Bugden placed her on his witness list. The above analysis applies here. The State's assumption that Bugden conducted an adequate investigation of Melody (Aple.Br.48) is nothing more than an non-fact-based assumption. All of the reasons set forth on page 48 pale when compared to the self-serving testimonies of the State's witnesses. Let Ted make a jealousy argument. Without Melody's testimony, no reasonable doubt is created. Ted's testimony is not refuted. The prejudice is manifested by a no-other-choice guilty verdict.

Bugden's December 2, 2005 letter about how important it was for **Idrese Richardson** to testify refutes defense counsel's testimonies at the remand. Moreover, rhetorically, why would Bugden wait until the eleventh hour to attempt to investigate and reach Idrese. Idrese's testimony was critical in light of Bugden's not objecting to Ted's hearsay testimony concerning Idrese and Bugden's questioning asking for more hearsay testimony. Idrese was no more pathetic than the State's witnesses. However, had he "righteously" testified, he would have created reasonable doubt. Had he not, Don would be no worse off. Defense counsel didn't even try to represent Don. They never created any reasonable doubt.

Don continually told defense counsel about the importance of **Davey Desvari**. 1092,91,89,88. He was listed as a witness. It is incomprehensible that Bugden would refuse to call Davey after Don told him he was the one who used his cell phone that evening to call the critical Magna number. The lack of Bugden's credibility is manifested by his statement that

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[5] This is another example of Bugden's lack of preparation and investigation. He or his investigator could have contacted David Brown, spoken to him or obtained his file. They did not even though they knew through their investigator Doug Maack these facts. R.1062-61.

Davey would have been a relevant witness had he known that the phone exclusively used by Ben Desvari actually belonged to Davey Desvari (R.1031:40), which clearly demonstrates that Bugden was not prepared since the statement was made clear at the preliminary hearing that the phone Ben used belonged to Davey. R.489:15,29,39,69.[6]

The State admits that Bugden just gave up. *See* Aple.Br.51-52. This is manifested by the fact he never once produced one shred of evidence to assist in creating reasonable doubt.[7]

The outrageous statement by the State that it would have been counter-productive to have called Davey (Aple.Br.52) ignores Don's affidavit, Bugden's statement about Davey being a relevant witness, and him being listed as a witness. His criminal record was no more extensive than the State's witnesses. However, in spite of his criminal record, his testimony could have raised reasonable doubt, especially being corroborated by Glenda's and Diane's. This lack of investigation of Davey cannot be considered a tactical decision. Not producing any reasonable doubt evidence in a first degree felony case cannot be considered a tactical decision.

The State's reference to page 47 of the initial brief is erroneous. Don never said he did not have time to meet **Brinkerhoff** after the 9:08 phone call. It states Don did not meet with Brinkerhoff after 8:00 PM. This whole section of the State's argument is frivolous. One, Bugden knew Don was traveling from California to Salt Lake City on September 11. Two, Bugden knew

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[6]The State claims that the ownership of the phone was never in doubt. This is again re-writing history – Bugden claimed that had he known the phone exclusively used by Ben actually belonged to Davey, **he would have been a relevant witness. There is more to this issue of Davey being a witness than meets the eye.** If what Bugden stated at the remand was true, why was Davey listed as a witness?

[7]It is obvious that these portions of the remand transcript are extremely self-serving in light of R.1066-65 and Don's affidavit. The trial transcript is totally devoid of the State's witnesses being shredded. The is no record proof that defense counsel was aggressively preparing to defend him. The fact that no witness was produced to create reasonable doubt confirms this.

Don did not arrive in Salt Lake City until during the evening. Three, Bugden knew Brinkeroff's visit to Susan ended around 8:00 PM. Four, asking Brinkerhoff what time he met with Don in Magna would not have further corroborated and made himself more reliable. Asking this simple question is "eminently reasonable". It is purely a foundational question. However, had Bugden asked this simple question, he would have been able to show the jury that 1) Don did not meet him at all because of his traveling; 2) corroborating witness testimonies that they were with Don that evening; 3) with the Magna meeting there was no need to make the phone call from Don to Magna (which, by the way, corroborates the fact that Davey used Don's phone to make that call); and 4) Brinkerhoff lacked credibility. The State misses the point about an alibi. The use of the word alibi in this context is used to show that had Bugden asked this very foundational question (which any seasoned defense attorney would ask knowing that Don was traveling or had just gotten home), Brinkerhoff would have been forced to name a time which could have easily been discredited by testimonies Don and others that he could not have been there. Bugden's performance in this matter was ineffective. The prejudice is the jury never heard any counter-testimony, easily obtained. No reasonable doubt testimony was presented. This boils down to a failure to investigate the facts and a lack of preparedness.

VII. THE REMAND FINDINGS ARE NOT SUPPORTED BY THE RECORD

The State claims, without specifics, that Don failed to marshal the supporting evidence. For marshaling purposes, Don cited to portions of the record supporting the challenged findings, as had done the trial court, after considering the trial transcript. For example, Finding 5 as indicated by its citations to the record in subsequent findings, pinpoints the evidence relied upon to support the findings. R.1031:7-162. This marshaling process also pertains to the objections to Findings 6, 9, and 10. Don has logically summarized by these citations to the record, and with the page-limitation restriction, by pinpointing to the remand record support for these findings. That was done in each finding. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 21, 217 P.3d 733 [Instead,

marshaling "can only logically be done by summarizing . . . whatever evidence there is that supports each challenged finding. We emphasize that only supportive evidence is legally relevant and is all that counsel should call our attention to."] In the above example, R.1031:7-162 is a summary of all the supportive evidence there is that supports this finding, exactly what the trial court did. Nowhere in Don's challenge is there a rehash of any arguments. The supporting cites are to the record. Still countering the State's argument (Aple.Br.55), Don specifically referred to each finding by number. The State cited no cases that this was insufficient.

Moreover, in making its claim about Don's alleged deficiencies in challenging the findings, the State completely ignores the fact that the affidavits of Don, Diane Martin, Glenda Millard, and Melody Oliver are just as much a part of the record as is the remand trial. Consequently, it conclusions found on pages 58 and 59 are erroneous. The evidence is overwhelming (especially considering the many instances of ineffective assistance of counsel) that defense counsel was woefully ineffective.

VIII. DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO HAVE SIDE-BAR CONFERENCES ON THE RECORD

All side-bar conferences held during the trial were not on the record. R.502:265-426; 503:473,483,542,557,566,578; 504:627,699,713,834. Because they were not recorded, it is impossible to gage their importance. However, it is the duty of defense counsel to ensure that an accurate record is made. *See State v. Smedley*, 2003 UT App 79. As to the claim of inadequate briefing, this Court will address an issue not fully analyzed in an appellant's initial brief if the appellant does so in her reply brief. *U.P.C., Inc. v. R.O.A. General, Inc.*, 1999 UT App 303, 990 P.2d 945.

CONCLUSION

Defense counsel's multitudinous (accumulated) errors set forth herein all constituted

objectively deficient performance, not rising to the standard of reasonable professional judgment, and cannot be attributed to any legitimate trial strategy. Defense counsel's errors were prejudicial to Don, for in the absence of the errors, there is a reasonable probability of a different result. Defense counsel presented no evidence attempting to create reasonable doubt.

The accumulated errors of defense counsel are: 1) unfulfilled promises made in opening statement, creating expectations with the jury that when defense counsel did not deliver, such would have a negative impact on the jurors; 2) failure to effectively cross-examine Brinkerhoff (with just one foundational question) concerning the time he allegedly met with Don in Magna in order to establish that Don could not have met with him since he was driving back from California, and then not producing any witnesses to refute that Don met with him on September 11 in Magna; 3) not objecting to the hearsay testimony of Ted concerning the alleged statements of Idrese Richardson to him about furthering the conspiracy and Don's involvement in the conspiracy, knowing that Idrese would not testify; 4) perpetuating this hearsay testimony regarding Don's involvement in the conspiracy by asking Ted questions on cross-examination that called for hearsay answers, knowing that Idrese would not testify; 5) failing to effectively cross-examine Ben and Brinkerhoff with the inconsistencies between their preliminary hearing testimonies and their testimonies at trial; 6) failing to effectively cross-examine Susan Hyatt by questioning her about the inconsistencies of her testimony of the attack with what Brinkeroff's testified to concerning there was no attack, that her injuries were more consistent with Brinkeroff's testimony (Bugden, at the remand hearing made it sound that he was enamored with Susan Hyatt, that she was a very brave heroine, placing what he perceived her needs and comfort were over his obligation to Don to ferret out the truth and represent his interests over all other interests – that Bugden's treatment of Susan allowed her to not tell the truth and exaggerate her injuries for jury sympathy rather than show the jury, in a civil and adroit manner,

that her injuries were entirely inconsistent with her testimony) (the transcript of her testimony is in the addenda); 7) never effectively cross-examining Ben or Brinkerhoff with phone records in hand showing inconsistencies between their testimonies and the phone records (hopefully to create reasonable doubt); 8) stipulating to the admission or authenticity of the phone records (Bugden never stated which) when Bugden knew these phone records were so critical to Don's defense that if he did not produce contrary or compelling evidence showing that Don called Ben's number, not to speak to Ben but to Davey, Don would lose, and where there were glaring inconsistencies between the phone records and the State's witnesses' testimonies; 9) stipulating to the admissibility of the phone records knowing no foundation was established; 10) never once objecting to the closing argument/testimony of the prosecutor when he literally testified to the jury about facts not in evidence (Searle admitting they were not in evidence), testifying from phone records when no foundation had been established and the State's witnesses never being shown the phone records; 11) **probably one of the most egregious acts of ineffectiveness:** Bugden disclosing to the jury the missing link in the whole trial – who did the mysterious Magna phone belong to – that the Magna phone number called from Don's phone belonged to Carol Durrant, Brinkeroff's sister, now linking Don, with tangible evidence, to the conspiracy, when this fact was not in evidence (no one was able to testify to whom this phone number belonged), and there was absolutely no tactical reason for doing so; 12) not allowing Don to testify even though listed as a witness, prepared, and the record being completely devoid of any evidence that he refused or did not want to testify (even defense counsel' deer-in-the-headlight look, if believed, did not address Don's wanting to testify after that – defense counsel didn't say, it was defense counsel's decision not to have him testify, not Don's), when only Don could fill in the missing pieces and create the reasonable doubt that was necessary to gain an acquittal; 13) failure to investigate Glenda and have her called as a witness (even with the Murray park

testimony, Glenda could have created reasonable doubt); 14) failure to investigate Diane Martin and call her as a witness; 15) failure to investigate Melody Oliver and call her as a witness; 16) failure to investigate Davey Desvari and call him as a witness especially with Bugden's remand statement that he would be a relevant witness had Bugden known Ben's phone belonged to Davey; 17) failure to analyze and investigate the phone records; 18) failure to prepare for trial (as enumerated throughout this and the initial brief); 19) failure to investigate Idrese Richardson and waiting until the last minute to even attempt to speak to him and then allowing hearsay statements to come in with absolutely no rebuttal because of defense counsel's failure to investigate and timely prepare for trial; and 20) defense counsel allowing Brinkeroff's incomplete testimony to buffalo then into telling Don he would not testify when, with their amount of preparedness defense counsel testified to at the remand hearing, they should have easily been able to deal with Brinkeroff's testimony. None of the foregoing could be attributable to tactical decisions. Moreover, the prejudice is obvious. Defense counsel never put on any evidence to create reasonable doubt. Their remand testimony had a pattern – the jury would not believe Glenda, Diane Martin, Davey, Don because their testimonies would be too unbelievable. Well, the jury never heard any reasonable doubt testimony. So, is it just giving up or putting on the evidence from Glenda, Diane Martin, Melody, Davey, and Don in the hopes that reasonable doubt would be created? Defense counsel just gave up. They were unprepared. They did not investigate. Their performance was dismal, to say the least.

There is no question that the prosecutor engaged in misconduct by testifying to matters outside of the evidence and drawing the jurors' attention to these matters. Don's 6th Amendment right to effective counsel was denied him by the ineffective assistance of counsel he received from defense counsel. Moreover, not being advised of his constitutional right to testify, he had no idea he could exercise this right. Consequently, the conviction of the trial court should be

reversed and this case remanded for a new trial.

RESPECTFULLY SUBMITTED this 19th day of April, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 20th day of April, 2010 a true and correct copy of the foregoing Reply Brief was hand-delivered to the following counsel of record:

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