

2006

# State of Utah v. Jimmie and Anita Butler : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**STATE OF UTAH,**  
Plaintiff/Appellee,

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Appeal No. **20060509-CA**

**JIMMIE AND ANITA BUTLER,**  
Defendant/Appellant.

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**BRIEF OF APPELLANT**

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THIS IS A DIRECT APPEAL FROM A MEMORANDUM DECISION AND  
ORDER DENYING NEW TRIAL  
ENTERED IN THE FIFTH JUDICIAL DISTRICT COURT IN AND  
FOR IRON COUNTY, STATE OF UTAH,  
BY JUDGE J. WALTON, JUDGE, PRESIDING.

-----o0o-----

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FILED  
UTAH APPELLATE COURT

MAR 19 2007

ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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**IN THE UTAH COURT OF APPEALS**

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**JIMMIE AND ANITA BUTLER,**  
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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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**IN THE UTAH COURT OF APPEALS**

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<b>STATE OF UTAH,</b>	:	
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Plaintiff/Appellee,	:	
	:	
v.	:	
	:	Appeal No. 20060509-CA
<b>JIMMIE AND ANITA BUTLER</b>	:	
	:	
Defendant/Appellant.	:	

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**BRIEF OF APPELLANT**

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**JURISDICTION**

UTAH CODE ANN. §77-18a-1(1)(b) (2003) and UT. R. APP. P. 3(a) provides this Court's jurisdiction over this appeal from the *Memorandum Decision and Order Denying New Trial* entered on May 4, 2006 (the "**Judgment**"), by the Fifth Judicial District Court in and for Iron County, State of Utah, in this case involving a second-degree felony and third-degree felony conviction from a court of record.

**CONSTITUTIONAL AND STATUTORY PROVISIONS, STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF REVIEW**

**ISSUE I:**     *Did the trial court err in denying Appellants' Motion to Arrest Judgment because the court held that their ineffective assistance of counsel claim did not constitute good cause as provided for under UT. R. CRIM. P. 23?*



**STANDARD OF REVIEW:** “Interpretation of a rule of criminal procedure is a question of law which is reviewed for correctness.” State v. Pena, 869 P.2d 932 (Utah 1994).

**ISSUE II:** *Did the trial court err in denying Appellant’s Motion for New Trial because the court held that their ineffective assistance of counsel claim did not fall under UT. R. CRIM. P. 24?*

**STANDARD OF REVIEW** “Interpretation of a rule of criminal procedure is a question of law which is reviewed for correctness.” State v. Pena, 869 P.2d 932 (Utah 1994)

**ISSUE III:** *Was Appellant’s trial counsel ineffective for (a) failing to enter into evidence a power of attorney from the victim to another person; (b) failing to impeach a critical witness; (c) failing to object to irrelevant and highly prejudicial testimony; (d) stipulating to critical facts without a basis for doing so; (e) failing to protect and properly analyze evidence; (f) failing to investigate, obtain and present evidence that the signature considered to be a forgery may have been made by the victim under the influence of alcohol; and (g) failing to object to the Introduction of Documents based upon UT. R. EVID. 106?*

**STANDARD OF REVIEW:** “An ineffective assistance of counsel claim. . .presents a question of law” that this Court reviews for correctness. State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162. To demonstrate ineffective assistance of counsel, “a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.” Wickham v. Galetka, 2002 UT 72, ¶ 19, 61 P.3d 978 (quoting State v. Smith, 909 P.2d 236, 243 (Utah 1995)); see

also Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

**ISSUE IV:** *Did the trial court err in denying Appellant's Motion to Arrest Judgment because "the facts proved did not constitute a public offense?"*

**STANDARD OF REVIEW:** "The standard for determining whether a trial court correctly granted or deniedst of judgment is the same standard appellate courts apply in determining whether a jury verdict should be set aside for insufficient evidence. *See State v. Workman*, 852 P.2d 981, 984 (Utah 1993). Under that standard, "a trial court may arrest a jury verdict when the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." *Id. State v. Hoffhin* 20 P.3d 265, 2001 UT 4 (Utah 2001)

**ISSUE V:** *Did the trial court err in denying Appellant's Motion for New Trial?*

**STANDARD OF REVIEW:** "The decision to grant or deny a new trial is a matter of discretion with the trial court and will not be reversed absent a clear abuse of that discretion." *State v. Williams*, 712 P.2d 220 (Utah 1985) *citing State v. Lesley*, Utah, 672 P.2d 79 (1983).

#### **DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

- A. UNITED STATES CONST. AMEND VI.
- B. UNITED STATES CONST. AMEND. XIV
- C. UTAH STATE CONST. ART. I § 7
- D. UTAH STATE CONST. ART. I § 12
- E. UT. R. CRIM. P. 23
- F. UT. R. CRIM. P. 24

## STATEMENT OF THE CASE

On October 31, 2002, Anita Mae Butler and Jimmie Butler (collectively, the “Butlers”) were charged by *Information* with Theft, a second-degree felony; and Forgery, a third-degree felony. R001. On January 15, 2003, the matter came for a preliminary hearing in the Fifth Judicial District Court in and for Iron County before the Honorable Judge Robert L. Braithwaite, at which time the Butlers were bound over for trial on the charges in the *Information*. R0462.

On February 17 and 18, 2005, the matter came for jury trial in the Fifth Judicial District Court in and for Iron County before the Honorable Judge J. Philip Eves. R0463. On February 18, 2005, a jury found the Butlers guilty of the charges of Theft, a second-degree felony; and Forgery, a third-degree felony. R0464.

On May 9, 2005, the Butlers filed their *Motion to Arrest Judgment* pursuant to UT. R. CRIM. P. 23, based upon a claim of ineffective assistance of trial counsel. R0347. On July 11, 2005, the State filed its *Objection to Defendants’ Motion to Arrest Judgment*. R0331. On August 29, 2005, the trial court heard oral arguments on the *Motion to Arrest Judgment*. R0465. On October 3, 2005, the trial court issued its *Memorandum Opinion* denying the Butlers’ *Motion to Arrest Judgment* and ordering that the matter be set for sentencing as soon as possible. R0347.

On November 14, 2005, sentencing was held and the Butlers were sentenced to a term of not less than one (1) year and not more than fifteen (15) years in the Utah State Prison For

the second-degree theft conviction and a term of not more than five (5) years in the Utah State Prison for the third-degree forgery charge. R0359. Both terms were ordered to be served concurrently. *Id.* However, the prison terms were suspended and the Butlers were placed on probation for a period of thirty-six (36) months and ordered to serve sixty (60) days in jail. *Id.* The Butlers were also ordered to pay a \$2025 fine. R0360.

On November 28, 2005, the Butlers filed their *Motion for a New Trial* pursuant to UT. R. CRIM. P. 24 and requested oral arguments for the same. R0362. On December 16, 2005, the trial court filed its *Judgment, Sentence, Stay of Execution of Sentence, Order of Probation, and Commitment*. R0388. On January 9, 2006, the State filed its *Objection to Defendants' Motion for New Trial*. R0395. A hearing on the *Motion for New Trial* was held on January 17, 2006. R404. At the end of that hearing, the court denied the Butler's *Motion for a New Trial*. R405.

On February 15, 2006, the Butlers timely filed their *Joint Notice of Appeal* from the denial of the post-judgment motion. R0424. On March 6, 2006, the trial court entered a *Modified Commitment and Order* which included the schedule for the Butlers to serve their jail sentence. R0427. On April 14, 2006, the Butlers filed their *Motion for Stays Pending Appeal and Applications for Certificates of Probable Cause* R0448. On May 3, 2006, a hearing was held on the *Motion for Stays Pending Appeal and Applications for Certificates of Probable Cause*, after which the trial court denied the motion. R0441. On May 4, 2006,

the trial court entered its *Memorandum Decision and Order Denying Motion for New Trial*. R0443. On May 30, 2006, the Butlers timely filed a new *Joint Notice of Appeal*.

### STATEMENT OF FACTS

#### A. Presumed Facts<sup>1</sup>

Elmer (“**Elmer**”) and Edna Butler (“**Edna**”) bought a home in Cedar City, Utah in approximately January, 1999. R0463 at p. 38. Edna passed away in March of 2001. *Id.* Approximately a month after Edna passed away, Elmer went with his daughter Marilyn Goldberg (“**Goldberg**”) to a title company in Cedar City, Utah, for the purpose of removing Edna’s name from the title on the house and to deed an interest in the home to Goldberg so, if something happened to Elmer, the house would not have to go through probate. *Id.* About six (6) months later when it was time to pay the property taxes on the home, Elmer found that a deed had been signed transferring his interest in the home to Anita Butler. *Id.*

The deed showing that Anita Butler has ownership in the home was signed on April 23, 1999, a few months after the home was purchased. R0463 at p. 39. The deed was recorded in the Iron County Recorder’s Office in April of 2001, approximately a month after Edna passed away, and about seven (7) days before Elmer attempted to remove Edna’s name from the deed. *Id.* Elmer testified at trial that his signature was forged on the deed and that it was not his signature nor did he authorize anyone to sign the deed on his behalf. R0463 at p.

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<sup>1</sup> As with all jury trials there are no formal findings of facts on the record, hence these facts reflect what is presumed to have been found by the jury in rendering its guilty verdict in the matter.

48. Elmer also testified that he never received a penny for the home, that the Butlers simply took it away. R0463 at p.49.

Elmer also testified at trial that Anita Butler and her children would come over and visit him almost every day, except for his granddaughter Hollie, who almost never came over. R0463 at p. 52. Elmer also testified that he believed it was unlikely that Edna had signed over the property on his behalf but that it was possible she had done so. *Id.*

Goldberg testified that Elmer came to her about a month after Edna died and asked her to go with him to the title company and put her name on the house so that, should he pass away, it would not have to go through probate. R0463 at p. 67. Goldberg agreed and went with Elmer to the title company having no knowledge that the property had been transferred. *Id.* Jill Orton (“Orton”) testified that she is an escrow officer for First American Title and that she helped Elmer and Goldberg on April 11, 2001, in order to remove Edna from the deed and give Goldberg an interest in the house. R0463 at p. 95.

Goldberg testified that, in the early Fall while helping Elmer pay the bills, she discovered a tax notice addressed to Anita that had been altered with white out. R0463 at p. 68. Goldberg and Elmer did not know why Anita had received the tax notice, so they called Jimmie to come over explain why the tax notice was addressed to Anita. *Id.* Jimmie came to the house and Elmer asked him why Anita had received the tax notice on the house. *Id.* Goldberg testified that Jimmie told Elmer that Anita owned the house. R0463 at p. 69. Goldberg then testified that Jimmie indicated that Elmer was drunk when he signed the deed

that she had not spoken to her brother since that time. *Id.* Goldberg also testified that the signature on the warranty deed appeared to be Edna's, but that Elmer's signature was not signed by Elmer. *Id.*

Kent Peterson ("**Peterson**") was the notary public whose signature and seal appear on the deed at issue. Peterson testified that, while it appeared to be his signature and stamp on the warranty deed, he did not remember notarizing such a document. R0463 at p. 81. Peterson testified that he only notarized things at his office and that he had no recollection of Elmer, Edna, or the Butlers ever being present in his office on April 23, 1999, to sign the warranty deed. R0463 at p. 84. Peterson also testified that the date had been hand-written on the deed and that it was not his handwriting. R0463 at p. 85. He testified that this was unusual because it was something he usually filled in when he notarized a document. *Id.* He also testified that the names were typed on to the deed and that he does not recall ever typing anything on any document he notarized. R0463 at p. 86. Peterson also testified that it did not appear that his stamp or signature was altered. R0463 at p. 87. Peterson also testified that his log book did not indicate he had notarized the warranty deed since there was no entry for that date. R0463 at p. 91. Peterson also testified that the fact that the transaction was not in his book did not necessary mean it was invalid, but it was "strange." R0463 at p. 92.

Mitchell Schoppmann ("**Schoopmann**") who is the owner of Cedar Land and Title Company testified that he had done work for Anita Butler. R0463 at p. 99. Schoppmann

testified that he had witnessed and notarized a deed of trust for Anita Butler which secured a loan for \$75,000 against the property at issue. R0463 at p. 102.

Matthew Throckmorton (“**Throckmorton**”), who is a crime scene investigator for the Salt Lake City Police Department crime lab, with a speciality in forensic documents, testified that he believed that Elmer’s signature was a simulated forgery, that they were written by someone who had access or was familiar with his signature. R0463 at p. 115. Throckmorton also testified that he believed that Edna’s signature on the warranty deed was authentic. R0463 at p. 120.

Hollie Butler (“**Hollie**”), who is the daughter of the Butlers, testified at trial that she was at her grandparents house every day at least once a day prior to Edna’s death. R0463 at p. 178. She testified she would take Elmer and Edna shopping, to her rodeos, or out to lunch or dinner. *Id.* She testified that, after Edna’s death, she still saw Elmer everyday. R0463 at p. 179. She testified she saw him drink alcohol every day and that she had conversations with Elmer about what he wanted to do with the house. R0463 at p. 180. Hollie testified Elmer had told her that he and Edna wanted her to have the house but that, because she was still a minor, they had deeded it to Anita who would then deed it to Hollie when she became eighteen (18). R0463 at p. 181. Hollie testified that she saw Elmer and Edna deed the house to Anita. R0463 at p. 184. Hollie testified that she saw Elmer, Edna, Anita, and Jimmie sign the deed and that Elmer was intoxicated at the time. *Id.* Hollie testified that Elmer and Edna



wanted her to have the house because she had taken care of them in their older years. R0463 at p. 186.

**B. Additional Facts Regarding the Ineffective Assistance of Counsel.**

(1) Trial Counsel's Ineffectiveness for Failure to Enter Power of Attorney into Evidence.

At the hearing on the Butlers *Motion to Arrest Judgment*, counsel herein presented evidence that the Butlers' trial counsel was ineffective for failing to produce at trial the Power of Attorney, which gave Edna power of attorney to sign for Elmer. R0465 at p. 13. Counsel presented evidence that trial counsel was aware of the Power of Attorney and either forgot about the document or did not recognize its significance. *Id.* Counsel presented evidence that no investigation was ever conducted pertaining to whether it was Edna who had signed Elmer's name on the deed. R0465 at p. 17.

(2) Trial Counsel's Ineffectiveness for Failing to Impeach or Disqualify the Testimony of Elmer Butler.

Counsel presented evidence in the motions at issue herein that Elmer made statements during his testimony that carried a very strong inference of guilt, without foundation, and trial counsel made no objection and basically allowed the witness to say whatever he wanted to. R0465 at p. 24. Counsel also presented evidence that Elmer had trouble remembering his name, age, and addresses and that trial counsel should have attacked the credibility or competency of Elmer. R0465 at pp. 25-26. Counsel presented evidence that trial counsel was ineffective for failing to impeach Elmer with the Power of Attorney that was signed by

Edna. Counsel also presented evidence that trial counsel was ineffective for failure to discuss or investigate Elmer's alleged alcoholism. R0465 at p. 26.

(3) Trial Counsel's Ineffectiveness for Allowing Prejudicial Testimony to be Presented

Counsel presented evidence in the motions at issue herein that trial counsel failed to present impeachment evidence on Marilyn Goldberg at trial. R0465 at p. 29. He also presented evidence that Goldberg was allowed to answer questions in the narrative with unsolicited comments that just "kept going on and on." *Id.* Counsel presented evidence that Goldberg was allowed to undertake a narrative in response to the questions she was asked on direct from the Butlers' trial counsel. *Id.* Counsel presented evidence that some of the responses were highly prejudicial. *Id.* Counsel also presented evidence that Goldberg was allowed to speculate as to whether Elmer's signature on the deed was authentic without any foundation being laid for a layperson's testimony as to handwriting. R0465 at p. 33.

(4) Trial Counsel was Ineffective for Stipulating to Critical Facts without a Basis.

Counsel presented evidence in the motions at issue herein that trial counsel allowed the deed in question to be admitted with the statement that it was recorded at the request of Anita Butler, without any foundation being laid for the contention that she recorded it. R0465 at p. 35. Counsel presented evidence that trial counsel was ineffective for not requiring that the recorder of the deed be brought in to determine whether Anita Butler had been the one who actually asked for the document to be recorded. *Id.*

(5) Trial Counsel was Ineffective for Failing to Properly Protect and Analyze Evidence.

Counsel presented evidence in the motions at issue herein that trial counsel made no attempt to analyze any of the documents in this matter. R0465 at p. 36. Counsel presented evidence that trial counsel should have attempted to undermine the interferences made by the notaries as to the alleged alterations of the documents. R0465 at p. 38.

(6) Trial Counsel was Ineffective for Failing to Investigate the Claim that the Deed was Signed by Elmer while Intoxicated.

Hollie Butler testified at trial that she witnessed Elmer and Edna deed the house to Anita and that she witnessed Elmer, Edna, Anita, and Jimmie sign the deed. R0463 at p. 184. Hollie testified that Elmer was intoxicated at the time he signed the deed. *Id.* Counsel presented evidence at the Motion hearing that trial counsel was ineffective for failing to investigate Hollie's testimony. R0465 at p. 43. Counsel presented evidence in the motions at issue herein that the signature on the deed was never analyzed to determine if Elmer could have signed the deed while he was intoxicated. *Id.*

(7) Trial Counsel was Ineffective for Failure to Object to the Use of Copies.

In the *Motion to Arrest Judgment*, Counsel presented evidence that trial counsel was ineffective for failing to require that originals be available at trial instead of the certified copies that were used, citing UT .R. EVID. 106 as authority. Counsel argued that copies of documents do not always contain the same information as the originals do and originals should be available to make sure no information is missing or altered. R0300.

## SUMMARY OF THE ARGUMENT

To prevail on an ineffective assistance of counsel claim, “a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.” Wickham v. Galetka, 2002 UT 72, ¶ 19, 61 P.3d 978 (quoting State v. Smith, 909 P.2d 236, 243 (Utah 1995)); see also Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In making this evaluation, the court must “indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Myers v. State, 2004 UT 31, ¶20, 94 P.3d 211, citing State v. Templin, 805 P.2d 182, 186 (Utah 1990) (quoting Strickland).

In the instant matter, the Butlers’ trial counsel was ineffective. The Butlers properly brought such issues to the attention of the trial court through motions brought pursuant to UT. R. CRIM. P. 23 prior to sentencing and UT. R. CRIM. P. 24 subsequent to sentencing. Both motions were based upon the ineffective assistance of counsel. The Butlers’ claims of ineffective assistance of counsel are valid and they should have been afforded relief under both UT. R. CRIM. P. 23 and UT. R. CRIM. P. 24. In addition, there was no established nexus to show that the Butlers actually simulated Elmer Butler’s signature on the deed at issue, hence their *Motion to Arrest Judgment* should not have been denied on the basis that the

State did not present enough facts to establish the constitution of a public offense. *See*, UT. R. CRIM. P. 23.

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S *MOTION TO ARREST JUDGMENT* BECAUSE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CONSTITUTED GOOD CAUSE.**

UT. R. CRIM. P. 23 states as follows:

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

“Good cause” has been defined as “a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.” Black’s Law Dictionary, abridged 6<sup>h</sup> edition, 1991. The Utah Court of Appeals has held that a motion to arrest judgment under Rule 23 is appropriate when, “the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element.” State v. Giles, 966 P.2d 872, 876-877 (Utah App 1998). “At common law, an arrest of judgment was the trial court’s act of refusing to enter judgment on a verdict because of some error appearing on the face of the record that rendered the judgment invalid.” State v. Owens, 753 P.2d 976, 978 (Utah App 1988), *citing* United States v. Sisson, 399 U.S. 267, 280-281, 90 S.Ct. 2117, 2124-2125, 26

L.Ed.2d 608 (1970); see, e.g., State v. Merritt, 247 P.2d 497 (Utah 1926). “The ‘face of the record’ does not include proof offered or adduced at trial.” *Id.*, citing Sisson, 399 U.S. at 281, 90 S.Ct. at 2125.

In the instant matter, the Butlers obtained new counsel after trial and prior to sentencing on the charges for purposes of challenging the effectiveness of their trial counsel. Counsel herein was retained and filed a *Motion to Arrest Judgment* pursuant to UT R. CRIM. P. 23 with the trial court. The trial court denied the Rule 23 Motion indicating that the ineffective assistance of counsel did not rise to good cause and, therefore, the grounds for obtaining such relief had not been met. Pursuant to Black’s Law Dictionary definition, however, it appears that the Butlers did indeed have good cause to file their Mot on based upon the ineffective assistance of their trial counsel.

Under the Sixth Amendment of the United States Constitution, every person charged with a crime is entitled to have the assistance of counsel to represent them on legal matters. If that assistance is not required to be effective, then a person’s rights cannot be protected, and they are not provided adequate due process of law. UNITED STATES CONST. AMEND. XIV. If persons are entitled to the assistance of counsel, but not to having that assistance be effective, then such a right would be meaningless. In juvenile court the Utah Court of Appeals has similarly stated that, “. . .the counsel appointed to represent parents must provide effective assistance, because construing the statute any other way would render it ‘meaningless or illusory.’” State ex rel. C.C. 2002 UT App 149, ¶9, 48 P.3d 244, citing In

re E.H., 880 P.2d at 13. Similarly here, if counsel is not effective, the constitutional right afforded to all persons to have the assistance of counsel would be meaningless.

If you have the right to the assistance of counsel, but no guidelines require that the assistance be effective, then the right to counsel becomes “illusory.” The Butlers’ trial counsel failed to render effective assistance in his representation of the Butlers, as argued more particularly below. Hence, the Butlers have been denied their right to the effective assistance of counsel which ultimately led to them being convicted on the theft and forgery charges.

Trial counsel’s ineffectiveness rises to “good cause” to arrest the judgment under UT. R. CRIM. P. 23. Trial counsel’s ineffectiveness led to a violation of the Butlers’ constitutional rights, which led to a judgment against the Butlers that may have been different had the Appellants received effective assistance. Because constitutional rights were at issue in the motion brought under Rule 23, there was “good cause” and reason for the Butlers’ new counsel to file their *Motion to Arrest the Judgment*. Arresting the judgment would have corrected the violation of the Butlers’ constitutional rights caused by the ineffective assistance of counsel. The Butlers properly brought their motion, supported by “good cause” to have the judgment arrested based on the fact that the judgment against them was entered based upon their trial counsel’s ineffectiveness, thus establishing the good cause and reason necessary to file the *Motion to Arrest Judgment*. The trial court erred in its determination that

the ineffective assistance of counsel was inappropriate for a motion to arrest judgment under UT. R. CRIM. P. 23.

**II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S *MOTION FOR NEW TRIAL* BECAUSE THEIR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DOES FALL UNDER UT. R. CRIM. P. 24**

UT. R. CRIM. P. 24(a) states that, “[t]he court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.” “[A] motion for new trial generally is permitted for correcting errors made in the trial court, *Wharton’s Criminal Procedure* §590 (12<sup>th</sup> ed. 1976), or for reviewing a conviction obtained by unfair or unlawful methods.” State v. Owens, 753 P.2d 976, 978 (Utah App. 1988), *citing* 24 *C.J.S. Criminal Law* §1418 (1961). An error resulting in a denial of a defendant’s right to a fair trial can warrant a new trial. *Id.*, *see e.g.*, United States v. MacCloskey, 682 F.2d 468, 479 (4<sup>th</sup> Cir. 1982). “It is proper for the trial court, when confronted with a motion for a new trial due to newly discovered evidence, to consider the credibility of new witnesses as well as the manner in which new evidence meshes or clashes with evidence presented at trial.” State v. Pinder, 2005 UT 15, ¶67, 114 P.3d 551, *citing* State v. Loose, 2000 UT 11, ¶18, 994 P.2d 1237.

To prevail on an ineffective assistance of counsel claim, “a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.” Wickham v. Galetka,



2002 UT 72, ¶ 19, 61 P.3d 978 (*quoting State v. Smith*, 909 P.2d 236, 243 (Utah 1995)); *see also Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In making this evaluation, the court must “indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Myers v. State*, 2004 UT 31, ¶20, 94 P.3d 211, *citing State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (*quoting Strickland*).

In the instant matter, the ineffective assistance of trial counsel had a substantial adverse effect upon the rights of the Butlers. The ineffective assistance of their trial counsel led to the Butlers being convicted of the theft and forgery charges when, had their trial counsel been effective, the outcome of trial may have been different. The substantial adverse effect required by UT. R. CRIM. P. 24 is similar in nature to the two-prong test set forth in *Strickland* for proving that trial counsel was ineffective to the extent that relief in the form of a new trial is necessary.

Under *Strickland* it must be shown that, for ineffective assistance of counsel to exist, it must be shown that counsel's performance was so deficient it fell below an objective standard of reasonableness and that, had counsel not been ineffective, the outcome would have been different. The same can be said of UT. R. CRIM. P. 24. The first prong of the *Strickland* test requires proof of an error or impropriety on behalf of trial counsel. UT. R. CRIM. P. 24 similarly requires proof that an error or impropriety has occurred. The second

prong of Strickland requires evidence that, but for trial counsel's errors, the outcome would have been different. UT. R. CRIM. P. 24 similarly requires proof that the error or impropriety has caused a substantial adverse effect on the party. Both require a showing of "prejudice." Therefore, since the two-prong test of Strickland and the requirements of UT. R. CRIM. P. 24 both require evidence of (1) an error or impropriety, and (2) a showing of prejudice, ineffective assistance of counsel can clearly be grounds for the granting of a new trial under UT. R. CRIM. P. 24.

It was an error for the trial court to deny the *Motion for New Trial* by stating that the ineffective assistance of counsel claim does not fall under UT. R. CRIM. P. 24. At the hearing on the Rule 24 Motion, the trial court stated that it had found no case law in which an ineffective assistance of counsel claim had been grounds for a new trial based upon UT. R. CRIM. P. 24. R0466 p. 2. However, simply because no case law existed at the time respecting an ineffective assistance of counsel claim as grounds for a new trial under Rule 24 does not require a finding that such grounds do not exist in this matter. The Butlers were substantially adversely affected by the ineffective assistance of counsel and, had the counsel been effective, there would have been a different outcome at the time of trial. Therefore, the Butlers ineffective assistance of counsel was an appropriate claim to be brought under Rule 24 and, as more particularly argued below, ultimately met the grounds for relief under UT. R. CRIM. P. 24 in the form of a new trial.

### III. APPELLANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

#### A. Appellant's Counsel was Ineffective for Failing to Enter into Evidence the Power of Attorney.

In Strickland, as set forth *supra*, two things must be established in order to determine whether the assistance of counsel has in fact been ineffective. "To prevail on an ineffective assistance of counsel claim, "a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" Wickham v. Galetka, 2002 UT 72, ¶ 19, 61 P.3d 978 (*quoting State v. Smith*, 909 P.2d 236, 243 (Utah 1995)); *see also Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In the instant matter, Appellant's trial counsel was ineffective for failing to present the Power of Attorney for Elmer Butler that gave his wife, Edna Butler, the authority to sign documents for him. It appears that trial counsel was aware of the existence of the Power of Attorney and even had a copy of the document in his file. However, trial counsel failed to mention the Power of Attorney or present it as evidence at trial. Had the Power of Attorney been presented at trial, it may have been the needed evidence to show that it was Edna who had deeded the home to the Butlers. Under the Power of Attorney, Edna was allowed to sign for Elmer, and sufficient doubt could have easily been raised that a forgery had not occurred.

Evidence was presented by Throckmorton that Edna executed the deed. Since Edna maintained the power of attorney to sign for Elmer, she could have signed the deed for him. A reasonable attorney would have presented such evidence to the jury questioning why the Butlers would have forged the deed if such forgery was unnecessary in light of Edna's signature on the deed and her power of attorney for Elmer. The alleged motive and intent to commit the forgery and alleged consequent theft evaporates in light of the power of attorney, hence there is no sufficient trial strategy that can be surmised from the Butlers' trial counsel's failure to investigate or present such evidence.

Because Appellant's trial counsel failed to present the Power of Attorney as evidence, trial counsel's performance fell below the objective standard of reasonableness meeting the first prong of Strickland. Had Appellant's trial counsel provided the Power of Attorney as evidence, the outcome of the trial could have been very different, since a sufficient doubt could have been cast on whether the allegations of forgery had even existed, thereby leading to an acquittal. This meets the second prong of Strickland. Therefore, the Butlers' trial counsel was ineffective for failure to present the Power of Attorney as evidence thereby casting doubt upon the very elements of the underlying charge.

**B. Trial Counsel was Ineffective for Failing to Impeach the Testimony of a Critical Witness**

Appellant's trial counsel was ineffective for failing to impeach statements made by the victim, Elmer Butler, in this matter. While testifying at the trial Elmer made statements that carried a very strong inference of guilt, or had no foundation. However, trial counsel

made no attempt to object to any of these statements and essentially allowed Elmer to testify or say whatever he wanted. This may have prejudiced the jury. At trial Elmer also had trouble remembering his name, age, and address. If he was not able to remember his basic information, it was questionable how could he remember whether or not he actually signed the warranty deed giving the house to Anita Butler. However, trial counsel again made no effort to attack the credibility or competency of Elmer to testify. Additionally, trial counsel made no effort to investigate the alleged alcoholism of Elmer in light of Hollie's testimony that she had witnessed Elmer signing it while intoxicated. Failing to investigate the alleged alcoholism was crucial to the case, because strong evidence would need to be presented to show that Elmer may have signed the deed while intoxicated and did not remember doing so. Because trial counsel allowed a crucial witness to testify, whose memory was obviously failing, allowed him to make statements that contained strong inferences of guilt, and allowed him to undertake narratives in front of the jury, trial counsel's performance was deficient and fell well below the objective reasonableness standard, meeting the first Strickland prong.

Allowing Elmer to make such statements and testify when his credibility was questionable in the presence of the jury was highly prejudicial to the Butlers. Had the Butlers' trial counsel been effective, the jury would not have heard statements and inferences that may have led them to find the Butlers guilty based upon Elmer's own thoughts and feelings instead of the evidence. Allowing those statements and feelings to be heard by the

jury may have caused the jury to convict the Butlers based upon those statements instead of the evidence that was presented. Had those statements not been made or not been made in the presence of the jury, the outcome of the trial may have been different and the Butlers would not have been prejudiced by those statements. Therefore, the Butlers' trial counsel was ineffective for failing to impeach a critical witness, effectively meeting both prongs of Strickland.

**C. Trial Counsel was Ineffective for Failing to Object to Highly Prejudicial Testimony**

Appellants trial counsel was ineffective for failing to impeach Marilyn Goldberg, who is Elmer Butler's daughter. Goldberg was allowed to answer questions in the narrative with unsolicited comments. Goldberg responded in whatever manner she desired to the questions she was asked, some of which were even asked by Butlers' trial counsel. Many of these answers were highly prejudicial to the Butlers and the jury should have been informed of there prejudicial nature.

Counsel herein mentioned at hearing on the *Motion to Arrest Judgment* that Goldberg wanted the house for herself so that she could obtain the funds to go on a trip to Paris and that her ex-husband, Scott Dutton, was the one who was the most interested in pursuing the charges against the Butlers. Goldberg was also allowed to speculate as to whether Elmer's signature on the deed was authentic without any foundation being laid for a layperson's testimony as to handwriting under UT. R. EVID. 901.

Additionally, Goldberg made several unsolicited statements respecting an alleged criminal record pertaining to illegal drugs by Jimmy Butler. The Butlers' trial counsel failed to adequately object to such statements as irrelevant pursuant to UT. R. EVID. 401, and in likely violation of UT. R. EVID. 404(b), which provides that such evidence "of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Having failed to so object, such evidence was provided to a conservative jury and they were allowed to deliberate with these unfounded and unsolicited allegations. Such action necessarily resulted in a violation of the Butlers' rights to a fair trial.

Trial counsel made no effort to object to any of the statements made by Goldberg or to stop her from undertaking long narratives during examination. Because trial counsel allowed Goldberg to make such statements without making any objections or attempts to curtail her responses, counsel's performance was deficient and he was thus ineffective. Because Goldberg's highly prejudicial responses were heard by the jury, it severely prejudiced the case. Had counsel been effective, it is possible that the jury may have acquitted the Butlers since such prejudicial statements went directly to the elements of the charges. Therefore, the Butlers' trial counsel was ineffective for failing to impeach Goldberg, directly affecting the outcome of the case. Hence, both prongs of Strickland have been met.

**D. Trial Counsel was Ineffective for Stipulating to Critical Facts without a Basis to do so.**

Appellant's trial counsel was ineffective for allowing the warranty deed in question to be admitted containing the statement that it was recorded at the request of Anita Butler without any foundation being laid that she was the one who actually recorded it. Trial counsel stipulated to this fact absent the Butlers' consent, and did not request that the recorder of the deed be required to testify and lay the foundation that it had been Anita Butler who requested the document be recorded. By failing to object or require foundation, counsel in essence stipulated to the fact that Anita Butler had uttered the deed although the State had no such evidence.

To render effective assistance, trial counsel should have avoided stipulating to this fact and required the recorder testify to these facts in court since the burden of such evidence was on the State. Because no foundation was laid, Anita Butler was prejudiced since the jury was required to rely on the stipulated evidence that was not based upon actual investigation and presentation by the State. Therefore, trial counsel was ineffective for stipulating to vital evidence pertaining directly to the elements of the charge, thereby prejudicing the Butlers. Having shown that counsel's performance fell below the level of reasonableness and substantially affected the outcome of the case, both prongs of Strickland have been met.

**E. Trial Counsel was Ineffective for Failing to Properly Protect and Analyze Evidence.**

Trial counsel in this matter was ineffective for failing to analyze any of the documents presented at trial and for the failure to undermine any interferences made by the notaries as



to the alleged alterations of the documents. Trial counsel made no attempt to conduct any kind of analysis or investigation into any of the documentation presented at trial or to undermine or provide reasoning for any of the notaries allegations that some of the other document presented in this matter may have been altered. Had trial counsel been effective in this matter, they would have investigated all documentation presented in this matter in order to determine how it pertained and whether it was relevant evidence to be presented. Trial counsel also would have attempted to undermine the allegations of the notaries in this matter as to the possible alterations of documents.

Had trial counsel been effective in this matter, it is possible that much of the documentation and allegations of alteration would not have been admitted and the evidence presented against the Butlers may have been very different. Had the presented evidence been different it is possible that the Butlers may have been acquitted by the jury. Therefore, trial counsel was ineffective and both prongs of Strickland have been met.

**F. Trial Counsel was Ineffective for Failing to Investigate the Claim that the Deed was Signed by Elmer while Intoxicated**

Trial counsel was ineffective for failing to investigate the claim that Elmer had signed the warranty deed while intoxicated. Hollie Butler testified at trial that she was present when her grandparents, Elmer and Edna deeded the house to her mother Anita and that she saw Anita, Elmer, Edna and her father Jimmie sign the document. She testified that, at the time of her firsthand account, Elmer was intoxicated. Trial counsel was ineffective for failure to investigate this claim and for failure to analyze whether Elmer could have signed the deed

while in an intoxicated state. The fact that Elmer may have been intoxicated when he signed the deed was a crucial part of the Butlers' defense.

Hollie Butler's testimony was the only testimony presented by the defense at trial and it was the only time his intoxication was mentioned. When a fact is crucial to a defense, such as the possibility that Elmer signed the deed while intoxicated and that the forgery does not exist, any attorney would have undertaken an investigation into such a claim since it could exonerate their client. A reasonable attorney would not have determined not to investigate as part of any conceivable trial strategy. A reasonable attorney would have investigated the handwriting on the warranty deed and had it analyzed to determine whether it was made by Elmer in an intoxicated state. Had Appellants' trial counsel done these things, it quite likely would have affected the outcome of the trial. Had trial counsel investigated the alleged intoxication of Elmer and had his signature analyzed to determine whether he may have signed the deed in an intoxicated state, it is possible that evidence may have been presented that would have shown that the Butlers did not forge Elmer's signature and they would have been acquitted by the jury. Because trial counsel failed to investigate this claim, he effectively caused prejudice to the Butlers. Having shown that counsel's performance fell below a reasonable standard and prejudiced the outcome of the case, both prongs of Strickland have been met.

**G. Trial Counsel was Ineffective for Failure to Object to the Use of Copies and not Originals.**

“The rule of completeness generally provides that a party may introduce the whole of a statement if any part is introduced by the opposing party. State v. Dunkley, 85 Utah 546, 39 P.2d 1097, 1109 (1935) overruled by State v. Crank, 105 Utah 332, 142 P.2d 178, 188 (1943) (to the extent it allowed jury to determine voluntariness of a confession). This rule has been accepted, in part, by the Utah Rules of Evidence, which allow introduction of previously unintroduced portions of a writing or recording “which ought in fairness to be considered contemporaneously with [the previously introduced portions].” Utah R. Evid. 106. Rule 106 applies only to writings. State v. Cruz-Meza, 2003 UT 32 ¶9, 76 P.3d 1165. UT. R. EVID. 106 states that, “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

Trial counsel was ineffective for failing to object to the use of certified copies of documents rather than the originals. Copies of documents could have been altered or be missing portions that would appear on the originals. Even if copies were used at trial, originals should have been available. Trial counsel was ineffective for failing to object to the use of the certified copies at trial without the originals being available. Had the originals been available then the documents would have been complete.

Because trial counsel was ineffective and failed to object to the use of copies it is possible that documentation was used and relied upon as evidence that was incomplete. The use of incomplete documentation may have led to crucial evidence being omitted or to allegations of alterations that were incorrect because the copies of documentation were incomplete. Had trial counsel been effective and required that originals also be available then complete documentation would have been presented possibly showing different or additional crucial evidence which may have led the jury to acquit the Butlers. Based upon counsel's ineffectiveness for not requiring the original documents be available and because the outcome of trial may have been different if the original documents had been present, trial counsel was ineffective and both Strickland factors have been met.

**IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S *MOTION TO ARREST* BECAUSE "THE FACTS PROVED DID NOT CONSTITUTE A PUBLIC OFFENSE"**

As stated above, UT. R. CRIM. P. 23 states as follows:

At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted *do not constitute a public offense*, or the defendant is mentally ill, or there is other good cause for the arrest of judgment." (emphasis added). In the instant matter, the trial court denied Appellants' *Motion to Arrest Judgment* on the grounds that the State had shown that the facts proved constituted a public offense. However, this is not the case.

At trial, the State's expert, Throckmorton, testified that the signatures of Jimmie and Anita Butler on the warranty deed were in fact their signatures. Throckmorton testified that Edna Butler's signature was in fact her signature. However, Throckmorton gave no testimony as to *who* simulated the signature of Elmer Butler, only that his signature was

simulated. No evidence was presented as to whether Elmer's signature may have been placed on the deed either before or after the other three (3) participants' signatures were placed upon the deed. Outside of Throckmorton's testimony, no other evidence was presented to show who had actually signed Elmer's name to the deed, only that it was simulated. Edna, Elmer's wife had Power of Attorney to sign things for him, and it is possible that she signed the deed on his behalf. However, since no evidence was presented as to who actually signed the deed, no nexus can be established between the simulated signature of Elmer and the Butlers. Therefore, reasonable doubt exists to show facts to indicate that a public offense has occurred.

The trial court erred in denying the Butlers' *Motion to Arrest Judgment* based upon the existence of facts to constitute a public offense. While a forgery is alleged to have taken place, no nexus or evidence has been presented to show that the Butlers are the ones who committed such an offense. Since no evidence was presented at trial that showed that the Butlers were the ones who simulated Elmer's name on the deed, no one saw them take any such action, and no evidence was presented to show that the Butlers altered, made, completed, executed, authenticated, issued, transferred, published or uttered the document. No nexus has been established between Appellants and the simulated signature. Without this nexus it is impossible for the trial court to declare that the State proved the constitution of a public offense. Because no evidence was presented to show that the Butlers actually put the pen on the paper and simulated Elmer's signature, the trial court erred in denying their

*Motion to Arrest Judgment* based upon the contention that the facts proved a public offense had occurred.

**V. THE TRIAL COURT ERRED IN ITS CONCLUSION FOR DENYING APPELLANTS MOTION FOR NEW TRIAL UNDER UT. R. CRIM. P. 24**

As is discussed in arguments II and III, *supra*, the trial court erred in denying the Butlers' *Motion For New Trial* based upon its ineffective counsel claim because the Butlers claim of ineffective assistance of counsel meets the grounds as set forth in UT. R. CRIM. P. 24. Also, as shown in argument III, the Butlers' trial counsel was ineffective in his representation of them.

Because the Butlers' trial counsel was ineffective in his representation of the Butlers at trial, and because the Butlers' ineffective assistance of counsel claim meets the grounds for a new trial under UT. R. CRIM. P. 24, the Butlers should have been afforded relief thereunder. Appellants' trial counsel's ineffective assistance and representation caused a substantially adverse effect upon the Butlers, which effectively meets the grounds under UT. R. CRIM. P. 24 for a new trial. Therefore, the trial court erroneously denied the Appellant's *Motion for a New Trial*.

**CONCLUSION**

Wherefore, based upon the foregoing, the Butlers respectfully requests that this Court overturn the Judgment and enter other such orders as this Court deems appropriate.

DATED this 19<sup>th</sup> day of March, 2007.

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Mr. Michael W. Isbell  
Mr. William L. Bernard  
Attorneys for Jimmie and Anita Butler

**CERTIFICATE OF MAILING**

I hereby certify that on this 19<sup>th</sup> day of March, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

Assistant Attorney General  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

# **Addendum ~A~**

*Memorandum Decision and Order Denying  
New Trial,  
dated May 4, 2006*



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**IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,  
STATE OF UTAH**

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**STATE OF UTAH,**

**Plaintiff,**

**vs.**

**ANITA BUTLER ,**

**Defendant.**

*AL*

**MEMORANDUM DECISION AND  
ORDER DENYING MOTION FOR NEW  
TRIAL**

**Case No. 0215001175  
Judge John J. Walton**

The above entitled matter came before the court for hearing on January 18, 2006 for purposes of oral argument on Defendant's Motion for New Trial. Defendant Anita Butler waived her appearance and appeared by and through her attorney Michael IsBell, and the State of Utah appeared by and through Chief Deputy Iron County, Troy A. Little. The court heard arguments and reviewed memorandum from both parties. The court enters the following ruling on Defendant's Motion.

**BACKGROUND**

Defendants Jimmie Butler and Anita Butler were found guilty of forgery and theft by Jury Verdict on February 18, 2005. Defendant now seeks a new trial pursuant to Rule 24, Utah Rules of Civil Procedure.

Reference is made to the Memorandum Decision of Judge Eves dated October 3, 2005. That Memorandum Decision contains a description of the facts and procedural history of the case.

### **MOTION UNDER RULE 24**

The court is not persuaded that a Motion for New Trial is the appropriate procedure to pursue a claim for ineffective assistance of counsel. The court can find no precedent for such a Motion. Defendant's Motion is not based on newly discovered evidence. The parties stipulated that the evidence Defendant claims should have been presented to the jury was known to her and to her counsel at the time of trial. Nor are the grounds traditionally made the basis of a Motion for a New Trial alleged in this case. Defendant may pursue her claim for ineffective assistance of counsel on appeal.

### **COURT'S PRIOR DECISION**

The court finds that Defendant's Motion (or a near duplicate of the current motion) was previously filed by the Defendant pursuant to Rule 23, Utah Rules of Civil Procedure (as a Motion to Arrest Judgment) and was denied by Judge Eves. The court finds the reasoning in Judge Eves' decision persuasive in denying Defendant's Motion for New Trial. The Memorandum Opinion dated October 3, 2005, is, therefore, incorporated herein.

### **DEFENDANT'S SUBSTANTIVE ARGUMENT**

Defendant's claim is that her trial attorney should have presented evidence to the jury of a Power of Attorney allegedly granted by the victim to his now deceased wife. The Power of Attorney was allegedly given to the victim prior to the execution of the deed the Defendant's were found to have forged or uttered. The Defendant argues that since the victim's wife apparently signed the deed that there would be no reason for Defendants to forge the victim's signature. In short, the victim's wife could have transferred the property to the Defendants on

her husband's behalf pursuant to the Power of Attorney.

As Judge Eves previously ruled, Defendant's attorney's trial strategy was likely tactical. Evidence of the Power of Attorney would have been at odds with the Defendant's key witness who testified that she saw the victim sign the deed. Therefore, evidence of the Power of Attorney may have been deemed contrary to the Defendant's most exculpatory evidence.

Defendant's other arguments claiming ineffective assistance of counsel were not emphasized by Defendant at oral argument and the court finds that each constitutes second guessing and conclusory allegations of ineffective assistance of counsel. Defendant's current counsel may have tried the case differently, but the decisions of trial counsel cannot be successfully challenged by simply claiming that a different procedural or substantive strategy should have been followed.

The court finds that there is not sufficient evidence of ineffective assistance of counsel as required by Strickland vs. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There has been no showing that counsel errors were so serious that Defendant's attorney was not functioning as counsel as guaranteed the Defendant by the Sixth Amendment. There has been no showing that a deficient performance prejudiced the defense or that counsel's conduct or his trial strategy so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result.

By granting the Defendant's Motion the court would be doing what Strickland prevents, i.e... second-guessing trial counsel's strategic choices, however flawed those choices might appear in retrospect. Nor has there has been a showing that but for defense counsel's

unprofessional errors the result of the proceedings would have been different. Strickland, 466 694.

### **SUFFICIENCY OF EVIDENCE**

The basis of Defendant's remaining arguments are not entirely clear but appear to be that no public offense was committed, or that the Jury's Verdict was not supported by the facts of the case.

The court finds that there is sufficient evidence in the record on which the Jury could have reached its Verdict. First, the court notes that Defendant should have marshaled the evidence in support of the Jury's Verdict in attempt to demonstrate that the Verdict is not supported by the record. The Defendant has not done so. In fact, Defendant has simply argued the evidence in a manner most favorable to her position.

The court finds that the Jury had a choice: did they believe the victim signed the deed, forgot the signing and that the expert witness was mistaken, or did they believe that the Defendants prepared and/or uttered the deed for their own gain? The Jury's conclusion as to the latter is supported by facts in the record.

The court finds that this Motion was denied by Judge Eves when previously captioned as a Motion to Arrest Judgment. Notwithstanding the different standard that may be appropriate for ruling on a Motion for New Trial, the same reasoning that Judge Eves applied in denying the Motion to Arrest Judgment is applicable to Defendant's Rule 24 Motion for New Trial, and the court incorporates Judge Eves' Memorandum Decision herein. The verdict is supported by the evidence and there is adequate evidence that a public offense was committed. See Memorandum Opinion of October 3, 2005.

The Defendant's final claim is that the Defendant's theft conviction hinges on an improper forgery conviction and should be set aside. However, the Court finds that the Jury's forgery verdict is supported by the evidence.

**CONCLUSION**

Based on the foregoing, Defendant's Motion for New Trial is denied.

Dated this 4 day of May, 2006.



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JOHN J. WALTON  
District Court Judge

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that I mailed a full, true, and correct copy of the within and foregoing Memorandum Decision and Order Denying Motion for New Trial by first-class mail, postage fully prepaid, on this 9th day of May, 2006, to the following, to wit:

Mr. Michael IsBell  
Attorney for Defendant  
46-398 Sherman Drive  
Indio, CA 92201

Troy Little  
Deputy Iron County Attorney  
PO Box 428  
Cedar City, UT 84720



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Deputy Court Clerk