2006

State of Utah v. Jimmie Butler and Anita Mae Butler : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee,

v.

JIMMIE BUTLER and
ANITA MAE BUTLER

Defendants/Appellants.

Case no. 20060509-CA

REPLY BRIEF OF APPELLANTS

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,
THE HONORABLE JOHN J. WALTON, JUDGE, PRESIDING.

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ARGUMENT

Point 1

I. DEFENDANTS' TRIAL COUNSEL ASSISTANCE WAS INEFFECTIVE FOR FAILING TO INTRODUCE A POWER OF ATTORNEY GRANTING AUTHORITY FOR ELMER BUTLER'S SPOUSE EDNA MAE BUTLER TO SIGN DOCUMENTS FOR HIM.

A. Defendants are not limited to a single theory of the case.

The defendants' claimed in their Brief of Appellant that their trial counsel was ineffective for failing to introduce at trial the power of attorney from Elmer Butler which granted Edna Mae Butler authority to sign his name on the deed in question in the case. The State has argued in its brief that this assertion fails because such a claim is inconsistent with the defendants' theory of the case - that Elmer Butler signed the deed while intoxicated. (See Brief of Appellee at 10-12.)

This argument fails for two reasons. First, the testimony of Elmer Butler's

intoxication at the signing of the deed was not elicited by defense counsel and it would be unfair to tie them to that theory to the exclusion of any other. The prosecution witness Marilyn Goldberg testified that she heard Jimmie Butler say that Elmer Butler signed the document when he was drunk. (R.463: 69) On cross-examination the defense witness Hollie Butler testified that her grandfather, Elmer Butler, drank a great deal, was drinking when he signed the deed, and was probably then drunk. (R.463: 184-185). If this is a contradiction to the theory that Edna Butler could have signed for Elmer then it is one posed by the prosecution and if anyone is to be limited to it then it is the State.

The second reason the argument fails is because there is no such limitation of theories imposed upon defendants in criminal cases. The burden in this case, as all criminal cases, is upon the state to prove beyond reasonable doubt the defendants committed the crimes charged. The defense on the other hand is permitted to present none to many alternatives to the prosecution's case. If the defense presents multiple viable alternatives to the prosecutions case there is no requirement that the alternatives presented be consistent with one another. If any of the alternatives raises reasonable doubt about the prosecutions case then the defense has succeeded.

B. The power of attorney document itself was not inconsistent with the theory and witness testimony that Elmer Butler signed the deed in question and strongly undermined any need for the defendants to commit any crime.

The state argues in its brief that if the defense counsel had introduced at trial the power of attorney from Elmer Butler granting Edna Mae Butler authority

to sign his name it would have "undermined his own theory of defense." (See Brief of Appellee at 10.) This is the same erroneous argument Judge Eves made in his denial of the defendants' motion to arrest judgment (See Brief of Appellee, Addendum A, at 4) and again by Judge Walton in his denial of the defendants' motion for a new trial. (See Brief of Appellee, Addendum B, at 3). As explained following, the noted power of attorney is not inconsistent with the defense witness' testimony that Elmer Butler had signed the deed himself while drunk.

The single most glaring deficiency in the performance of defense counsel at trial was the fact he ignored completely an item of evidence which was probably dispositive of the case. That item was the power of attorney from Elmer Butler to Edna Mae Butler, (Addendum A).[1] This document, signed by Elmer L. Butler and notarized by Frank X. Gordon[2] on December 8th, 1964, was also recorded in the records of Mohave County the same day. This power of attorney was never rescinded and was effective from its signing through April 23, 1999 (the date the deed in question in the instant case was notarized) and thereafter up to the death of Edna Mae Butler.

The power of attorney granted Edna Mae Butler authority to, on behalf of Elmer Butler, "sell, remise, release, convey ... lands upon such terms and conditions ... as she shall think fit." The broad and comprehensive verbiage of the document continues that Edna Butler is granted power "for and in my name [Elmer Butler], and as my act and deed, to sign, seal, execute, deliver, and

1 A certified copy of which was entered into the trial court's file at arguments on the two post trial motions which were denied.

acknowledge .. deeds ... as may be necessary and proper ...". It further grants her "full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done ... as fully and to all intents and purposes as I [Elmer Butler] might or could do if personally present".

The implications of this grant of power are obvious. Edna Mae Butler's signature was on the deed at the center of this prosecution. She apparently willingly conveyed, as her own agent, to Anita Butler the subject property. Her signature was authenticated at trial by prosecution expert George Throckmorton. (R.463: 120.) Her intent to convey the property is implicit by her signature on the deed.

In denying the defendants' motion to arrest judgment the court noted that the defendants had chosen as a theory of their case that Elmer Butler himself had signed the deed while intoxicated, had presented that defense at trial, and the jury had rejected their defense. (See Brief of Appellee, Addendum A, at 7.) However, as argued foregoing in Section A, that is incorrect. Also, what the court did not consider is that the presentation of the noted power of attorney at trial was not in conflict with the theory presented. The defendants did not need to argue that Edna Butler signed the deed for Elmer, they merely needed to argue that she could have signed for him. This fact in connection with her own valid signature on the deed very probably would have bolstered the testimony of the defense witness Holly Butler who testified that Elmer had signed the deed.

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2 Later Supreme Court Justice of the Arizona Supreme Court.

The most important thing Edna Butler's valid signature on the deed and a power of attorney from Elmer Butler to Edna Butler does is raise the question: **What need would Jimmie and Anita Butler have to forge the deed?**

Why would two intelligent people commit a serious felony to obtain something they could probably get by simply asking Edna Butler for it? They have no motive to commit a crime because Edna, who already was evidently a willing signatory, could just as easily sign for Elmer as well. Why would the defendants' lie about Elmer signing the deed when they didn't even need him to sign the deed? Edna could just as easily have signed the deed for Elmer! There was simply no need to forge. Its like robbing the bank to get your own money out – rational, intelligent people with a pass book or ATM card simply do not do such things.

This question of "why would the defendants commit a felony when they apparently did not need to?" would in all probability have presented itself to the jury if they had known of the power of attorney. The question certainly would have presented itself to the jury if trial defense counsel had posed it. The question would probably have significantly affected the balance in the jury's deliberations and probably would have resulted in acquittal. It is not required of the defense to demonstrate by a preponderance the result would have been different (see Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, *reh'g denied,* 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984)), but only "that a reasonable probability exists that except for ineffective counsel, the result would have

been different." (See State v. Verde; 770 P.2d 116, citing State v. Lovell, 758 P.2d 909, 913 (Utah 1988)).

But trial defense counsel did not bring the power of attorney before the jury and he did not pose the important question the document raised. His failure to do so cannot be excused because, as the State argues in its brief , it "would have effectively undermined his own theory of defense" (See Brief of Appellee at 10) since, as argued foregoing, it does not undermine the defense. Nor can it be excused by any possible reasonable trial tactic, strategy or other "rational basis" (see State v. Tennyson, 850 P.2d 461, 468 (Utah App. 1993)).This failure denied the defendants effective assistance of counsel.

Point 2

II. DEFENDANTS' TRIAL COUNSEL ASSISTANCE WAS INEFFECTIVE FOR FAILING TO INVESTIGATE CLAIMS OF ELMER BUTLER'S DRINKING OR TO IMPEACH HIS TESTIMONY.

In its brief, the State argues that defendants' trial counsel's failure to investigate whether Elmer Butler signed the deed while intoxicated was reasonable trial strategy because evidence of intoxication could also mean he did not "knowingly" sign the deed even if he had in fact signed it, but had forgotten he had. (See Brief of Appellee at 10-11.) The state argues that if the defense emphasized Elmer Butler's drinking they were in danger of demonstrating his defective memory and trembling hand, at the cost of showing that he had not knowingly signed the deed. However, the intoxicated state of Elmer Butler is not

the double edged sword the State characterizes it as. If Elmer Butler had signed the deed, but without sufficient mental clarity to constitute a "knowing" act, then that showing exonerates the defendants of criminal culpability and raises only a possibility that a civil claim exists. If it is a double edged sword then one side is extremely dull.

There are actually two issues present in regard to Elmer Butler's intoxication: first, is whether intoxication could have affected Elmer Butler's signature; and second, whether intoxication affected his memory so that after signing the deed he did not remember doing so.

Testimony was given at trial that Elmer Butler was frequently intoxicated. Prosecution witness Marilyn Goldberg testified that Jimmie Butler had said Elmer was drunk when he signed the deed. (R.463: 69) The question of whether the simulation of Elmer Butler's signature could have been made by Elmer Butler while intoxicated was never raised openly by the defense. However, it is an obvious question because there would be obvious similarity between a "drunken" signature and a "sober" one from the same person. Never-the-less, defense counsel at trial ignored this obvious opportunity. He did not explore the issue at all with prosecution expert Throckmorton, probably because his pre-trial preparations for such exploration were inadequate. A competent attorney would have determined the answer to the question by independent expert prior to trial. (See *Strickland v. Washington*, 466 U.S. 668 (1984) "the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective

assistance must be based on professional decisions and informed legal choices can be made only after investigation of options.") Even if he had failed to make proper pre-trial preparations, the defense had nothing to lose by questioning Throckmorton regarding drunk versus sober signatures and everything to gain. Counsel should have done so.

Elmer Butler's assertion that he had not signed the deed (R.463: 69) was bolstered by expert forensic handwriting analyst Throckmorton's testimony of a "high probability" the questioned signature was a "simulated forgery". (Id.:115.) In other words, an elderly old man who couldn't remember his name, age, and address states the signature on the deed is not his and then a reputable expert in handwriting analysis, who testifies about such things for the state, supports his testimony. Without that support the jury probably would have viewed Elmer Butler's testimony very differently. Contrary to the State's claim in its brief, the defense did not need to badger an elderly old man who the jury felt sympathy for. (See Appellee Brief at 13.) They simply needed to explore in a courteous and direct way the alcoholism, intoxication, and memory failings of Elmer Butler coupled with qualifying or erasing the support expert witness Throckmorton's testimony contributed.

It is not enough for this court to examine each of the deficiencies of trial counsel individually. The deficiencies of counsel should be viewed in their totality. (*Washington v. Strickland*, 466 U.S. 668 (1984) "the performance inquiry must be whether counsel's assistance was reasonable **considering all the**

circumstances." (See also *Bundy v. Deland*, 763 P.2d 803, 806 (Utah 1988)) [Bold emphasis added.]

Point 3

III. EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE JURY'S VERDICT IS INSUFFICIENT TO ESTABLISH THAT THE DEFENDANTS COMMITTED BURGLARY. IT IS ALSO INSUFFICIENT TO SUSTAIN VERDICTS FOR FORGERY AND THEFT.

The State cited "BURGLARY" in its heading to Point Two in its brief. (See Brief of Appellee at 16). Since this case does not involve such a charge the reference is inapplicable.

In its brief, the State argues that the defendants "have not marshaled the evidence in support of the verdict..." (See Brief of Appellee at 17.) Let us use the forgery statute under which the defendants were convicted (see U.C.A. §76-6-501) as a framework to examine this claim. To convict under this statute Elmer Butler's signature on the warranty deed in question in this case must be proven to be:

1. a simulation;

   - Elmer Butler "testified at trial that his signature was forged on the deed and that it was not his signature..." (See Brief of Appellant at 6).
   - Expert witness Throckmorton testified "Elmer's signature was a

simulated forgery." (See Brief of Appellant at 8).

2. made or uttered on or after April 23, 1999;

   - The deed was signed April 23, 1999. (See Brief of Appellant at 6).
   - The deed was recorder by Anita Butler. (See Brief of Appellant at 11).

3. in Iron County;

   - The deed was recorded in the Iron County Recorder's Office in April of 2001. (See Brief of Appellant at 6).

4. purports to be the act of Elmer Butler.

   - Elmer Butler found that a deed had been signed [his signature] transferring his interest in the home. (See Brief of Appellant at 6).

5. without authority from Elmer Butler; and

   - Elmer Butler testified at trial that he "did [not] authorize anyone to sign the deed on his behalf."(See Brief of Appellant at 6).
   - Elmer Butler testified at trial that it was unlikely Edna Butler signed the deed on his behalf."(See Brief of Appellant at 6).

6. had either a purpose to defraud or knew they were facilitating a fraud.

   - A forged deed signed transferring Elmer Butler's interest in his home. (See Brief of Appellant at 6).

- Elmer Butler received no compensation for the deed. (See Brief of Appellant at 6).

However, the six elements foregoing are not the issue with respect to either of the defendants' post trial motions nor are they the issue of this portion of their appeal. If the defense has failed to marshal some item in respect to these elements it is irrelevant since, as the defendant's argued in their memorandum in support of their motion for a new trial, even if all this is proven the final and fundamentally critical piece of the puzzle is:

7. *who* did the forgery or uttered the forgery with the requisite *purpose* or *knowledge*?

The Appellants' brief marshaled all the evidence upon which the jury could have made conclusions that Jimmie Butler and/or Anita Butler made or uttered the forgery with the necessary mental state. In its brief the State also argued that the defendants "wholly ignore the circumstantial evidence and the fair inferences." (See Brief of Appellee at 18). Therefore, as to each item of circumstantial evidence the defense will point out the flaws in inferring guilt.

RULES OF LAW REGARDING CIRCUMSTANTIAL EVIDENCE AND INFERENCES

An inference upon an inference is conjecture.

"the jury had to indulge an **inference** upon an **inference** that could lead but to **conjecture** not justifying a conclusion that a theft was accomplished by both or either of the defendants beyond a reasonable doubt and to the exclusion of any

reasonable hypothesis other than theft." (*State v. George*, 481 P.2d 667, 25 Utah 2d 330) [Bold emphasis added.]

A criminal conviction may not be based upon conjecture or probabilities.

"A criminal conviction may not be based upon conjectures, however true, nor upon probabilities, however strong, but rather a conviction must be supported by a quantum of evidence sufficient to logically compel the conclusion of guilt beyond a reasonable doubt.(fn8) Although this Court recognizes circumstantial evidence may be as convincing as direct evidence in support of a criminal conviction we also recognize where a conviction is based on circumstantial evidence that evidence should be looked upon with caution.(fn9) Circumstances when presented as evidence in a criminal conviction must do more than merely cause a strong presumption of guilt.(fn10) Rather when they are relied upon for a conviction, they ought to be of such a character as to negate every reasonable hypothesis except that of the defendant's guilt." (*State v. Lamm*, 606 P.2d 229).

An inference of guilt must exclude every inference of innocence.

"In *Carter* v. *State,* supra, the court questioned the soundness of the rule that an inference cannot be based upon another inference and stated: "Conceding it to be so [that the rule is of doubtful validity], yet it is nevertheless true that where, in a criminal case, a certain fact, such as the recent possession of stolen goods in a prosecution for larceny, is relied on, and is not directly proved, but is to be inferred from circumstances, those circumstances **should** be such as to **exclude every reasonable inference** except that the defendant was actually in the possession of the goods alleged in the indictment to have been stolen."' (*State v. Hall*, 139 P.2d 228, 105 Utah 151) [Bold emphasis added.]

A circumstantial case requires exclusion of every reasonable hypothesis other than guilt.

"The rule often applied in a circumstantial case that requires the exclusion of every reasonable hypothesis other than guilt is in reality nothing more than another manner of stating the burden of proof applicable in all criminal cases, viz., beyond a reasonable doubt. The key word in either concept is that of "reasonable. ...Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show. . . that the alleged facts and circumstances are true, but they must also be such facts and circumstances as are **incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt**".(*State v. Lamm*, 606 P.2d 229.) [Bold emphasis added.]

Possession or uttering alone insufficient to infer guilt.

"But there should be some facts or circumstances from which an inference can logically be drawn before the defendant can be required to mount a defense and prove his lack of knowledge or intent.3

We do not think it proper to infer knowledge that an instrument is forged from its mere possession or uttering.(fn6) The act of possessing a forged instrument and attempting to utter it can be an innocent act which, standing alone, should not automatically give rise to an inference of guilty knowledge. *See Pearson v. State,* 8 Md.App. 79, 258 A.2d 917, 921--22 (Md.Ct.Spec.App.1969). *But see Bieber v. State,* 8 Md.App. 522, 261 A.2d 202, 209 & n. 8 (Md.Ct.Spec.App.1970) (limiting scope of *Pearson*) If the prosecution can present no other facts or circumstances to create such additional suspicion as would warrant the inference, there is insufficient evidence from which the jury can reasonably infer knowledge or intent." (*State v. Kihlstrom*, 988 P.2d 949 (UT App. 1999)) [Bold emphasis added.]

Marshaling of Evidence and Refutations of Guilty Inferences

- The signatures of Jimmie and Anita Butler were on the deed. (See Brief of Appellant at 29).

What could the jury infer from Jimmie and Anita Butler's signatures on the deed that could support their verdict of guilty? They could infer that their signatures authenticated the simulation of Elmer Butler's signature. But are they justified in doing so?

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3 The Court noted – "At oral argument, we explored with counsel several situations in which one might utter a forged instrument in complete innocence. For example, someone may accept a check from a stranger at a garage sale in payment for an old lamp, cash the check, and later be charged with the uttering variant of forgery because the check proves to have been stolen and forged. It seems peculiar to permit the State to satisfy the prima facie case requirement by allowing fraudulent intent on the part of the lamp seller to be inferred merely because she dealt with an instrument later shown to be fraudulent. It is no answer to suggest that the vendor could take the stand and establish her innocence. Very simply, she should be back home rummaging through the garage getting ready for the next sale rather than spending the day in court and being put to the burden of hiring counsel. In our justice system, the prosecution must prove guilt beyond a reasonable doubt; the defendant need not prove innocence. And the defendant, whether guilty or innocent, is privileged to remain silent. An inference that springs from thin air lessens the prosecution's burden while chilling the defendant's Fifth Amendment privilege."

Was the simulated signature of Elmer Butler even on the deed when Jimmie and Anita Butler signed? There is no evidence that it was other than that the deed indicates that the signature of the grantor (notice the singular) was "signed in the presence of" Jimmie Butler. However, similar evidence exists against notary Kent Peterson and Mr. Peterson testified he did not even remember notarizing the deed. It is entirely likely that Jimmie Butler's signature was authenticating only Anita Butler's and Edna Mae Butler's signatures (or one or the other's), which were both validated by expert witness Throckmorton. The format in which Jimmie Butler's signature was placed could have been for authenticating any of the three signatures or any combination thereof. On its face it is equally incriminating or innocent. Innocence is the presumption the jury should be held to.

If Jimmie Butler's signature was authenticating only Anita Butler's signature, then why would he do that when she is not the grantor? What could the jury infer from this and from Anita Butler's signature in the section for grantor that would justify a guilty verdict? They could infer that Jimmie and Anita were using notary Peterson to place his seal on a document which they would then add to – including the simulation of Elmer's signature. However, this is not the only reasonable inference. If two (or more) inferences exist and are equally probable then if one is innocent, the presumption of innocence holds sway.

It must be remembered that this case is not about arms length dealings between strangers, it is completely within a family. Families deal within the family

differently than can be expected of outside dealings. The following dialogue between Judge J. Philip Eves and prosecutor Troy Little immediately prior to opening statements in the case is illustrative:

Judge Eves: "Let me just make a suggestion to you – Suppose that my wife and I are going to convey some property away to somebody and, uh, I'm busy at work, she has time to go down to the notary public to get her signature notarized and I tell her, you know, while you're there write my name in. Is It a Forgery?
Attorney Little: "It's not a forgery, no."
Judge Eves: "And so, where's the intent to defraud?"
Attorney Little: Yeh, well that's not the case here."
Judge Eves: But the question is where is the intent to defraud in that case?" The notary may have been misled if in fact I intended for my signature to go on that document for the transfer to take place – there is no fraud."

(R.463: 26-27).

The signature of Edna Butler is on the deed also and was authenticated by expert Throckmorton as "strong probability". It is reasonable to infer that Jimmie and Anita Butler were making it easier for Edna Butler to fill out the rest of the document. Edna was elderly and may not have wanted to go to the trouble of going to an office to execute a deed. She may have had Jimmie and Anita bring her a document where she could then just fill things out without going anywhere so it would be convenient for her. Or it is possible she wanted it done this way so she could simulate Elmer Butler's signature unknown to Jimmie and Anita (and perhaps Elmer as well). Questions about the legality of the deed would be unlikely with the notary seal and Edna's valid signature.

The fact that Edna had power of attorney for Elmer (a fact not presented at

trial) also makes this scenario an even more reasonable inference based upon the facts. In fact, considering the power of attorney (which both prosecution and defense attorneys were aware of), it makes attorney Little's statement that "this is not the case here" an inaccurate observation. This case indeed shares the critical similarities with Judge Eves hypothetical scenario. As noted above, with Edna Butler's signature on the deed valid and a power of attorney from Elmer Butler to Edna Butler, the teeth are pulled from the prosecution's case – what need would Jimmie and Anita Butler have to forge the deed? They have no motive because Edna, who already was evidently a willing signatory could just as easily sign for Elmer as well. As Judge Eves asked, "here's the intent to defraud?" (Id.)

The facts of Jimmie Butler's and Anita Butler's signatures on the deed, which deed the jury could reasonably believe had a simulated signature of Elmer Butler on it, can support an inference that the defendants knew of or participated in the forgery. But their signatures can equally be innocent or even infer they were used as pawns, as notary Peterson may have been or as the scenario suggested by Judge Eves. The signature of Edna Mae Butler on the deed could also infer she knew or participated in simulating Elmer Butler's signature. However, since a power of attorney gave her authority to sign for Elmer Butler, if she did simulate his signature or if a simulation was made under her direction then no crime occurred. The jury was bound to the presumption of innocence and should have so found.

- Jimmie Butler said Elmer Butler signed the deed. (See Brief of

Appellant at 7).

According to Marilyn Goldberg's testimony at trial, Jimmie Butler asserted to her that Elmer Butler signed the deed when he was drunk. What the jury could infer from this is that by so stating, Jimmie Butler was authenticating the forgery on the deed by stating as fact what was arguably proven as untrue at trial. However, another just as reasonable inference could be made – an innocent one. It could be inferred that Jimmie Butler was evidencing his lack of knowledge of the forgery. The statement could just as easily be taken as a statement of belief rather than knowledge. If Edna Butler had made the simulation of Elmer Butler's signature and informed Jimmie that it was actually Elmer's signature, made while in a state of intoxication, then Jimmie's assertion of this falsity is simply a statement of sincere (albeit false) belief, not an expression of knowledge. The innocent inference, as reasonable as any other, was obligatory upon the jury.

- Anita Butler had the deed recorded. (See Brief of Appellant at 11).

Prosecution witness Elmer Butler stated that "... my son Jimmie and his wife, got papers notarized and sent, uh, to the recorder's office to take my home away from me. They said it was theirs." In fact, the defendants' attorney stipulated to the prosecution's proffered testimony of Patsy Cutler that defendant Anita Butler submitted the deed for recording. The deed itself has printed on it under the recorder's name (Patsy Cutler), number, book, page, date and fee the statement: "REQUEST: ANITA MAE BUTLER". These statements directly accuse the defendants of uttering the deed which the jury believed was forged. The

inference the jury could make is that if they uttered it they must know what it is or they were uttering it with the purpose to defraud. However, with the valid signature of Edna Butler on the deed an equally or even more reasonable inference is that the defendants were merely recording what they believed was a gift from Edna and Elmer Butler, absent knowledge that Elmer's signature was a simulation and absent purpose to defraud. The reasonable inference of innocence is required if the standard of beyond reasonable doubt is honored.

- Jimmie and Anita Butler benefited from the deed. (See Brief of Appellant at 6).

The inference from this is that the defendants had a motive to forge Elmer Butler's name on the deed. From this it would be inferred that they actually did so. However, these inferences weaken considerably when it is noted that Edna Mae Butler did sign the deed herself and that she also had power of attorney to sign for Elmer. In fact, Elmer Butler testified it was possible she did this. (R.463: 48). The inference from Edna Mae Butler's signature on the deed is that she also had motive to sign for Elmer Butler. She apparently wished to convey the property to her daughter-in-law Anita Butler. Again, the jury should be held to an equally plausible inference of innocence.

- The notarization on the deed was not valid. (See Brief of Appellant at 7-8).

The testimony of Notary Kent Peterson implies that the deed in question is not valid and that the signatures thereon were not notarized by him. The inference from

this is that the defendants (whose signatures were on the deed) were behind this chicanery and did so to perpetrate and conceal their crime. However, as in the hypothetical posed by Judge Eves, described above, an innocent motive could just as easily be ascribed to this fact.

- Jimmie and Anita Butler are son and daughter-in-law, respectively, to Elmer Butler. (See Brief of Appellant at 7, 9).

The inference from these relationships is that the defendants were familiar with Elmer Butler's signature and in position to allow them to forge his name. It is reasonable to infer that Jimmie and Anita Butler, as close family members of Elmer Butler, would likely be familiar with Elmer Butler's signature or at least have access to documents with his signature on it. However, Jimmie and Anita Butler were not the only ones empowered by relationship and familial interaction to be able to have access and familiarity with Elmer Butler's signature. It appears obvious that Edna Butler would also be in such a position. Again, an equally plausible inference that points to innocence must be chosen.

- Elmer Butler's signature was forged on the deed by someone with access to or familiarity with his signature. (See Brief of Appellant at 8-9).

The testimony or expert Throckmorton narrows the field of who could have simulated Elmer Butler's signature. The jury could infer that Jimmie and Anita Butler did the simulation because, as noted immediately preceding, they had access to or were familiar with Elmer Butler's signature. However, a similar and

equally plausible inference could just as easily be made toward Edna Mae Butler. The inference toward innocence of the defendants should have been chosen.

- Anita Butler secured a loan on the deeded house. (See Brief of Appellant at 8).

Although this act demonstrates control over the property in question and could be evidence of theft as a follow-up to forgery, such a showing would first require a showing of knowledge that the property was that of another. No such showing exists. In fact, the action is consistent with a good faith belief the property is hers. An inference of guilty knowledge or purpose to defraud cannot be made when equally plausible innocent purposes are present. If Anita Butler had no knowledge of fraud or forgery then it would be reasonable for her to act as she did. There is no such showing of a guilty mind.

- Jimmie and Anita Butler simply took the house. (See Brief of Appellant at 6).

The same argument as the preceding paragraph applies here also.

- Jimmie and Anita Butler attempted to sell the house. (R.464: 201-202. Not found in the Brief of Appellant).

The same argument as the preceding paragraph applies here also.

CONCLUSION

In the arguments above the defendants have refuted the State's claims that they had not shown the assistance of their trial counsel ineffective. If trial counsel

had introduced the power of attorney granting Edna Mae Butler authority to sign documents on behalf of Elmer Butler it would not have undermined the defendants case and would in fact have bolstered their claims of innocence and probably led to a different verdict. The failure to introduce the document is not excused by any reasonable trial tactic or strategy and the failure to introduce it constitutes ineffective assistance of counsel.

The defendants brief in this appeal did marshal the evidence upon which the jury could have relied to reach a guilty verdict. The defendants did not ignore circumstantial evidence and the inferences which flowed from it. The defendants have demonstrated that all essential elements to reach guilty verdicts against them were not present.

Wherefore, based upon the foregoing, the defendants respectfully request this Court to overturn the Judgment and enter other such orders as this Court deems appropriate.

DATED this 16th day of August, 2007.

MICHAEL W. ISBELL (6577)
Attorney for Jimmie and Anita Butler

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of August, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Reply Brief to:

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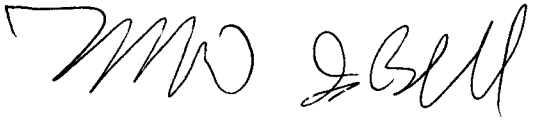

MICHAEL W. ISBELL

Addendum ~A~

Power of Attorney

From Elmer Butler To Edna Mae Butler,

Dated December 8, 1964.

POWER OF ATTORNEY
GENERAL

KNOW ALL MEN BY THESE PRESENTS:

That ELMER L. BUTLER has made, constituted and appointed, and by these presents does hereby make, constitute and appoint EDNA MAE BUTLER, his wife, of Kingman, Arizona, my true and lawful attorney for and in my name, place and stead and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, accounts, interests, dividends and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me; and, have, use and take all lawful ways or means in my name, or otherwise, for the recovery thereof, by legal process, and to compromise and agree for the same, and grant acquitance or other sufficient discharges for the same for me and in my name, to make, seal and deliver; to bargain, contract, agree for, purchase, receive and take lands and accept the possessing of all lands and all deeds and other assurances in the law thereof; and, to lease, let, sell, remise, release, convey and mortgage lands, upon such terms and conditions and under such covenants as she shall think fit. Also to bargain and agree for, buy, sell, mortgage and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action; and, to make, do and transact all and every kind of business of what nature and kind soever; and, also, for and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in

ANK X GORDON
TORNEY AT LAW
NASONIC TEMPLE
SKYLINE 3 3366
NGMAN ARIZONA

writing, of whatever kind and nature, as may be necessary or proper in the premises.

GIVING AND GRANTING unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney, EDNA MAE BUTLER, shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of December, 1964.

Elmer L. Butler
ELMER L. BUTLER

STATE OF ARIZONA)
) §
COUNTY OF MOHAVE)

On this the 8th day of December, 1964, before me, Frank X. Gordon, the undersigned officer, personally appeared ELMER L. BUTLER, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Frank X. Gordon
Notary Public

My commission expires
March 1, 1966.

142939

Filed and Recorded at Request of Elmer L. Butler Atty
DEC 8 1964 30 Min. Past 4 o'clock P.M.
In ~~book~~ DOCKET No. 76 Page 57 - 58
Records of Mohave County Arizona.
By Amie J. Kausel Deputy Recorder
Reggy B. Smith Recorder

Ref: P.O. Box 486.
Kingman, Ariz.

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FRANK X. GORDON
ATTORNEY AT LAW
MASONIC TEMPLE
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KINGMAN, ARIZONA