2009

Trovon Donta Ross v. State of Utah : Reply Brief

Utah Court of Appeals

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Case No. 20090894-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

TROVON DONTA ROSS
Petitioner and Appellant,

v.

STATE OF UTAH
Respondent and Appellee

Reply Brief of Appellant

Direct appeal from summary judgment dismissing petition under the Post-Conviction Remedies Act entered in the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Rodney S. Page, presiding.

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ARGUMENT

I. MR. ROSS'S CLAIM THAT TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE WAS PERMISSIBLE UNDER THE POST-CONVICTION REMEDIES ACT.

A. Mr. Ross was Denied the Protections of the Post-Conviction Remedies Act.

Mr. Ross requested post-conviction relief on the grounds that his trial counsel and appellate counsel were ineffective for failing to address the affirmative defense of "extreme emotional distress" at trial and on appeal. (PR. 000005, 7-8, 101, 108, 122, 124.)[1] In response, the State asserted that Mr. Ross's claims were "procedurally barred" because he could have raised them on direct appeal. The State continues to make that claim here, but it is incorrect.

The Post-Conviction Remedies Act ("PCRA") states that "a person may be eligible for relief [under this Act] on a basis that the ground could have been but

[1] "PR" refers to the Post-Conviction Record; "TR" refers to the Trial Record.

was not raised at trial and on appeal, if the failure to raise that ground was due to ineffective assistance of counsel." Utah Code Ann. § 78B-9-106(3) (2008).

Mr. Ross has argued in the post-conviction proceedings that his trial counsel and appellate counsel should have raised the affirmative defense of extreme emotional distress at trial or on appeal, but they failed to do so "due to ineffective assistance of counsel." *See id.*; (PR. 000005, 7-8, 101, 108, 122, 124.) Because Mr. Ross has claimed ineffective assistance of counsel against both his trial and appellate counsel, the procedural bar is expressly inapplicable here.

B. Mr. Ross's Claim of Appellate Counsel's Ineffective Assistance Was Procedurally Permissible and Supported By the Record.

In the Brief of the Appellee ("St. Br."), the State argues that Mr. Ross's claims fail because he does not explain why he could not have raised ineffective assistance of trial counsel on direct appeal. (St. Br. at 15.) But the State has applied an incorrect standard. Mr. Ross is not required under the doctrine in *Strickland v. Washington* to explain "why he could not have raised on direct appeal his claim of trial counsel ineffectiveness." (*Id.*) Rather, he is required to show that appellate counsel's performance "fell below an objective standard of reasonableness." 466 U.S. 668, 688 (1984). Pursuant to that requirement, Mr. Ross stated in his opening brief that appellate counsel's ineffective performance prevented the claims against trial counsel from being properly identified and raised. (Aplt. Br. at 32-33.) Specifically, trial counsel's failure to raise the extreme

emotional distress affirmative defense was not investigated and/or raised by appellate counsel, even though the availability and applicability of the defense was obvious from the trial record. (Aplt. Br. at 27-29.) Indeed, Mr. Ross has shown "that appellate counsel omitted an issue which is obvious from the trial record and one which probably would have resulted in reversal on appeal." *Taylor v. State,* 2007 UT 12, ¶ 7, 156 P.3d 739 (citations omitted).

In the post-conviction proceedings, the court erroneously concluded that Mr. Ross's rights had been protected because of the *availability* of a Rule 23B hearing. *See* Utah R. App. P. 23B; (*See* PR. 000361.) Rule 23B allows appellate counsel to investigate and bring an apparent claim of ineffective assistance of counsel to the appellate court's attention. The rule is only available on direct appeal and it serves to protect a defendant against ineffective assistance of trial counsel only if appellate counsel investigates the defendant's case and makes a request for a hearing under the rule. In this case, appellate counsel did none of these things. Thus the rule did not serve to protect Mr. Ross against the ineffective assistance of his trial counsel. The *availability* of a procedural tool that was left unused by his appellate counsel prevented Mr. Ross from developing his legitimate claims that trial counsel was ineffective. Indeed, the safeguarding function of Rule 23B was never realized, and, to date, because of appellate counsel's inadequate assistance, Mr. Ross has been denied an adequate opportunity to address whether his trial

counsel's assistance was deficient. If the record had pointed to a reasonable strategy for not raising the issue on appeal, it would be incumbent on Mr. Ross to affirmatively show something more in order to establish appellate counsel's deficient performance. But this record points to no strategy whatsoever for failing to raise the issue on direct appeal. Given the silent record at trial for counsel's reason to forgo the extreme emotional distress affirmative defense, appellate counsel should have recognized the shortcoming and investigated the issue via a 23B proceeding. A proper 23B motion would have protected Mr. Ross's rights.

Thus, on its face, the record supports that appellate counsel's performance was deficient and, but for that deficient performance, the result on appeal would have been different. (*See* Aplt. Br. at 23.)

C. Mr. Ross's Claim of Trial Counsel's Ineffective Assistance Was Procedurally Permissible and Supported By the Record.

The State claims that the post-conviction court's ruling for summary judgment was correct because trial counsel's decision not to raise the extreme emotional defense was strategic and Mr. Ross agreed to that strategy. (St. Br. at 16.) Also, the State seems to claim that Mr. Ross has not rebutted the strong presumption of reasonableness that applies to trial counsel's strategic decisions in a criminal case.

But Mr. Ross has argued in the post-conviction proceedings and in the opening brief that a "strategy" alone is not enough under the law; trial counsel

provides effective assistance only if the strategy is reasonable. Also, Mr. Ross has filed pleadings and papers in the post-conviction court that raise an issue of material fact concerning the unreasonableness of defense counsel's decision not to present the extreme emotional defense. The pleadings and papers rebut the presumption of reasonableness where defense counsel apparently misunderstood the law. Moreover, based on defense counsel's misunderstanding of the law, Mr. Ross's post-conviction filings raise an issue of fact as to whether Mr. Ross received competent legal assistance when he purportedly agreed to a strategy to waive an affirmative defense that would have been supported by the facts. Where counsel was ineffective, Mr. Ross's purported agreement was irrelevant.

1. Counsel Must Use a Strategy that is Reasonable.

Counsel must use a strategy that is reasonable, but in Mr. Ross's case, counsel did not. The post-conviction court granted summary judgment because it determined that "the trial record conclusively demonstrate[d] that petitioner's trial counsel's decision not to raise the 'extreme emotional distress' affirmative defense was . . . strategic . . . .." (PR. 000363). That ruling does not support summary judgment. Indeed, the law requires counsel's strategy to be "reasonable" to overcome a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 688. An unreasonable strategy violates a defendant's rights. *State v. Hales*, 2007 UT 14, ¶ 69, 152 P.3d 321. In this case, the trial record is silent as to whether

counsel actually had a strategy, and if there was a discernable strategy, the reasonableness of counsel's strategy. Mr. Ross's pleadings and papers in the post-conviction proceedings support that trial counsel's purported strategy was based on a misunderstanding of the law.

2. The Post-Conviction Filings Support That Trial Counsel Failed to Raise an Affirmative Defense Supported by the Facts.

It is important to reiterate that an attorney has a duty to adequately investigate the claims and defenses available to a client. *See State v. Templin*, 805 P.2d 182, 188 (Utah 1990); *Hales*, 2007 UT at ¶ 69, (citations omitted). "If counsel does not adequately investigate the underlying facts of a case . . . counsel's performance cannot fall within the 'wide range of reasonable professional assistance.'" *Templin*, 805 P.2d at 188 (citing *Strickland*, 466 U.S. at 686). "This is because a decision not to investigate cannot be considered a tactical decision." *Id.* Counsel also has an obligation to stay current on the relevant law, and a failure to do so constitutes objectively deficient performance. *See State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989). Likewise, counsel's performance is deemed to be deficient and prejudicial if he fails to present evidence and argument challenging the facts that would warrant a lesser charge. *See State v. Moore*, 2009 UT App 386, ¶¶ 9-10, 223 P.3d 1137 *cert. granted*, 238 P.3d 443 (Utah 2010). An ineffective assistance of counsel claim may be meritorious where counsel fails to

inform the defendant of an affirmative defense that could materially affect a potential conviction such that the defendant does not understand the legal significance and consequences of a particular legal strategy. *See Adams v. State*, 2005 UT 62, ¶¶ 23-24, 123 P.3d 400.

Relevant to this case, the extreme emotional distress affirmative defense to aggravated murder and attempted aggravated murder was available to Mr. Ross. Pursuant to the version of Utah Code Ann. § 76-5-202 (2003) in effect at the time of the shootings in Mr. Ross's case, extreme emotional distress was "an affirmative defense to a charge of aggravated murder or attempted aggravated murder [when] the defendant caused the death of another or attempted to cause the death of another: (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." Utah Code Ann. § 76-5-202.

The "defense was generally enacted by states in response to the unworkable nature of the heat of passion defense." *State v. White*, 2011 UT 21, ¶ 25, 251 P.3d 820. ("*State v. White II*") (citations omitted). "The defense was meant to substantially enlarge the class of cases that might be reduced to manslaughter and to do away with categories of adequate provocation which had developed in the cases . . . to make it more accessible to criminal defendants and to move away from a case-by-case examination of whether the 'type' of provocation rendered the defendant's reaction reasonable." *Id.* at ¶¶ 25-33 (citations and quotations

omitted). "A person acts under the influence of extreme emotional distress when he is exposed to extremely unusual and overwhelming stress that would cause the average reasonable person under the same circumstances to experience a loss of self-control, and be overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions." *Id.* at ¶ 26 (citations and quotations omitted). The defense is available if there is "'any reasonable basis' upon which the jury should be allowed to consider the extreme emotional distress defense at trial." *Id.* at ¶ 33.

The extreme emotional distress affirmative defense applies when the external circumstances provoke the defendant to respond, albeit unlawfully, and does not turn on whether his acts or reactions were reasonable, but whether a reasonable person would experience distress under the circumstances. *See id.* at ¶ 37; *State v. Bishop*, 753 P.2d 439, 471-72 (Utah 1988) (ruling that instructions for extreme-emotional distress manslaughter "should not be read as requiring the jury to find that defendant's acts of killing were reasonable.") *overruled on other grounds by*, *State v. Menzies*, 889 P.2d 393 (Utah 1994).

If the defense had been properly raised at Mr. Ross's trial, Mr. Ross would have been convicted only of murder and attempted murder and his sentence would have been five years to life, rather than life without parole. *See* Utah Code Ann.

§§ 76-5-202 (2003), 76-3-203 (2003), and 76-5-203 (2003). But the defense was not raised.

Mr. Ross has raised a genuine issue of material fact whether he was entitled to raise an extreme emotional distress affirmative defense because he had been subjected to highly provocative triggers which resulted in the loss of self-control. Both the trial record and Mr. Ross's petition for post-conviction relief show that he had a long-term and intimate relationship with Ms. Christensen that dated back to late 2000 or early 2001. Upon arriving at Ms. Christensen's house on the morning at issue, Mr. Ross suddenly realized that she just spent the night with another man and that she had been lying to him. (*See* PR. 000086, 88, 92-93, 96, 98, 99). That realization was particularly distressing to Mr. Ross because, just one day earlier, Ms. Christensen had been intimate with Mr. Ross and they had recently made promises to be in a committed relationship. (*See* PR. 000074, 88, 92-93). Importantly, the defense of extreme emotional distress does not require a contemporaneous trigger which causes a person to lose self-control. *State v. White II*, 2011 UT at ¶ 30.[2]

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[2] Based on the current interpretations of the law at the time of Mr. Ross's Opening Brief, the court of appeals had mistakenly interpreted a claim of extreme emotional distress as being available only where a highly provocative and contemporaneous trigger causes a person to lose self-control. *State v. White*, 2009 UT App 81, ¶¶ 24-25, 206 P.3d 646 (*"State v. White I"*). Subsequently, on April 19, 2011, this Court clarified that "the court of appeals decision imposes a standard more exacting than the statute mandates." *State v. White II*, 2011 UT at ¶ 18.

It is undisputed that Mr. Ross did not arrive at Ms. Christensen's house in a rage. (*See* TR. 433:44-45). Yet, overcome by extreme feelings of jealousy, passion, anger, and distress, he reacted in an extreme and emotional manner upon "discovering that 'the love of his life' had lied to him and was actually caught sleeping with another man." (PR. 000081, 86, 88, 92-93, 95, 98, 99). His extreme and emotional response was to kill the woman he loved and then shoot at the person who had come between them. (PR. 000081, 88-90, 92-93, 96, 99; TR: 433:47-50).

Had Mr. Ross's trial counsel investigated and/or offered evidence supporting the nature and intensity of his relationship with Ms. Christensen or the fact that Mr. Ross's original calm disposition quickly escalated after discovering Ms. Christensen had slept with Mr. May, the jury likely would have concluded that he was acting under extreme emotional distress. *See State v. Lenkart*, 2011 UT 27, ¶¶ 41-44, 262 P.3d 1. Indeed, the facts would have been sufficient to enable a reasonable jury to find that Mr. Ross was suffering from intense feelings including jealousy, passion, anger, or distress. (PR. 000081, 88-90, 92-93, 98, 106). The facts show Mr. Ross was provoked by the emotionally distressing circumstances he encountered. Thus, a reasonable jury would have found that Mr. Ross experienced a provocative trigger capable of causing an extreme emotional reaction. The numerous facts in the record suggesting Mr. Ross reacted to extreme emotional

distress make it obvious that trial counsel could have and should have investigated and/or raised the affirmative defense.[3]

3. The Post-Conviction Filings Support That Defense Counsel Failed to Raise the Affirmative Defense Because He Misunderstood the Law, and thus, the Strategy was Unreasonable.

The presumption that Mr. Ross's trial counsel's conduct fell within "the wide range of professional assistance" is overcome because there are sufficient facts showing that counsel's performance was deficient and prejudicial. At trial, defense counsel stated cryptically on the record that he was not raising extreme emotional distress as a defense on Mr. Ross's behalf "because of evidentiary problems as are known to Mr. Ross and myself." (PR. 000328). But trial counsel never said what the evidentiary problems were and there is no evidence in the record suggesting potential evidentiary problems significant enough to undermine assertion of an affirmative defense. Instead, the record supports that defense counsel misunderstood the defense. In particular, Mr. Ross filed papers in the post-conviction proceedings to support that counsel "informed" him that the defense was precluded because "mental evaluations were holding him of sound mind." (PR. 000336.) The post-conviction filings raise questions suggesting that counsel misunderstood the law. (*See* PR. 000328; 336). Indeed, even if Mr. Ross

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[3] This Court need not determine that the foregoing facts are true, but only that they are sufficient to raise a material issue of fact and that the post-conviction court erred in granting summary judgment without a hearing

was of "sound mind" at the time of the shootings, under the law, this would not have prevented his assertion of an extreme emotional distress affirmative defense. Soundness of mind does not preclude an extreme emotional distress affirmative defense. Trial counsel's misunderstanding of the law led to an unreasonable strategic decision. Trial counsel also told the court that the "reasonableness of that strategy" would be shown when Mr. Ross testified at the sentencing hearing. (PR. 000328). But no sentencing hearing was held and no explanation was ever proffered.

Without an evidentiary hearing, the post-conviction court had no basis for determining that trial counsel's strategy was reasonable. The record contains no reasons for the purported strategy, nor any analysis to support it. The record demonstrates that trial counsel did not make an opening argument, did not cross examine most of the State's witnesses, did not provide any affirmative evidence or testimony explaining why Mr. Ross did what he did, failed to request jury instructions, failed to develop or present the affirmative defense of extreme emotional distress, and entirely foreclosed any consideration of the defense in his closing argument. Indeed, rather than identify and explain the impact of the emotional triggers for Mr. Ross's conduct, trial counsel actually encouraged the jury to look favorably on the fact that Mr. Ross " . . . to his credit did not take the witness stand and . . . attempt to offer some excuse or justification for his actions."

(TR. 434:12). Given this argument, there is no way the jury could have considered that extreme emotional distress might have caused Mr. Ross's unlawful conduct. (*See* TR. 434:12). A proper defense requires investigation, evidence, jury instructions, and effective argument, while not foreclosing important affirmative defenses.

In sum, trial counsel's failure to adequately investigate and raise the extreme emotional distress affirmative defense demonstrates the existence of a genuine issue of material fact with respect to whether counsel's performance was defective and prejudicial to the outcome of the case. Viewing the facts in the light most favorable to Mr. Ross, trial counsel's failure to raise the affirmative defense constituted deficient performance because counsel failed to fully advocate Mr. Ross's position and protect his rights at trial. Trial counsel's failure prejudiced his rights because Mr. Ross was denied the opportunity to have a jury consider a defense that may have lessened his conviction and sentence. The presence of such facts are sufficient to rebut any presumption of trial counsel's strategy because there is a reasonable probability that, but for counsel's failure, the result of the proceedings would have been different. Mr. Ross should be entitled to a hearing.

II. THE STATE FAILED TO MEET ITS AFFIRMATIVE BURDEN TO DEMONSTRATE THERE WERE NO DISPUTED ISSUES OF MATERIAL FACT.

"Because summary judgment is a drastic remedy, we generally require strict compliance with the rules governing summary judgment." *Kell v. State*, 2008 UT 62, ¶ 48, 194 P.3d 913 (citations omitted). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "A summary judgment movant must show both that there is no material issue of fact *and* that the movant is entitled to judgment as a matter of law." *Orvis v. Johnson*, 2008 UT 2, ¶10, 177 P.3d 600 *citing* Utah R. Civ. P. 56(c). "Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party's case, but instead requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact." *Id.* at ¶ 16. The facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. *Id.* at ¶ 6.

In this case, summary judgment was not appropriate because the State failed to affirmatively show there was no material issue of fact. *Id.* at ¶ 10 *citing* Utah R. Civ. P. 56(c). At the post-conviction stage of this case, the State moved for

summary judgment on Mr. Ross's claims for ineffective assistance of counsel without meeting its burden to demonstrate there were no issues of disputed fact. Indeed, there remained significant facts in dispute pertaining to whether Mr. Ross received effective assistance of counsel at trial and on appeal.

Mr. Ross attempted to navigate the procedural maze of the PCRA by filing his petition for relief and, soon thereafter, responding to the State's motion for summary judgment. Notwithstanding that he had twice been denied appointment of pro bono counsel, Mr. Ross, proceeding on his own, argued that the system had failed him by not providing him with effective assistance of counsel at trial and on appeal. Mr. Ross specifically identified trial counsel's failure to assert the affirmative defense of extreme emotional distress as the basis for his claim of ineffective assistance. Likewise, Mr. Ross identified appellate counsel's failure to investigate the reasons for trial counsel's failure to assert the affirmative defense and appellate counsel's failure to request a Rule 23B hearing. Furthermore, Mr. Ross was denied the opportunity to conduct discovery to support his claims of ineffective assistance of counsel. As a result, Mr. Ross was forced to litigate his ineffective assistance of counsel claims without the assistance of a pro bono attorney and without proper evidentiary support. In short, the post-conviction court prevented Mr. Ross from having a full and fair opportunity to discover and present evidence to support his claims.

At the post-conviction stage, the State disputed Mr. Ross's arguments that he had received ineffective assistance, yet the State never affirmatively showed the absence of a genuine issue of material fact. The State continues to argue that Mr. Ross had the burden to proffer evidence that counsel was ineffective and that he had to allege the reasons that his trial counsel chose not to raise the defense, even though the evidence supported it, and then explain why those reasons were inadequate. (St. Br. at 11-12.) But Mr. Ross's petition supports a claim for ineffective assistance of counsel. The pleadings on file and the record of the underlying criminal proceedings support deficient performance and the prejudice resulting therefrom. Moreover, as this Court held in *Orvis*, on a motion for summary judgment, it is not Mr. Ross's burden to demonstrate a material issue of fact, it is the State's burden to demonstrate the absence of a material issue. *See Orvis*, 2008 UT 2 at ¶10 *citing* Utah R. Civ. P. 56(c).

The State's argument would put an untenable burden on Mr. Ross. First, it assumes Mr. Ross had adequate legal resources and sufficient understanding of the law to articulate the law and apply it to his case. Second, if accepted by this Court, the State's argument enables the State to use the "presumption of reasonableness" as a shield to prevent a petitioner from being able to properly develop his claims when the trial record is silent on the issue and appellate counsel fails to use a 23B hearing to fill in any deficiencies. Mr. Ross is not seeking to avoid his ultimate

burden to prove that counsel's performance was deficient and prejudicial, but the State should not be allowed to take refuge in the omissions of attorneys who fail to ensure a complete record. In reality, the State's argument all but concedes that an evidentiary hearing was necessary so that Mr. Ross could develop sufficient facts to support his allegations.

The State argues that trial counsel had a strategy simply because he made reference to a "strategic decision" based on evidentiary problems. (St. Br. at 12.) The trial attorney claimed that the reasons were known to Mr. Ross, but all we can glean from the record is that the attorney misunderstood the law. Trial counsel's mere statement that a "strategy" existed does not demonstrate what the strategy was, that the "strategy" was reasonable, or that Mr. Ross understood and agreed with the strategy. The record as a whole is silent as to what strategy trial counsel may have been attempting to employ. Neither trial nor appellate counsel ever disclosed what the purported strategy might be. It appears the more plausible explanation is that trial counsel misunderstood the law and Mr. Ross was left with ineffective assistance. The record's silence demonstrates that disputed issues of material fact remained unresolved.

Indeed, the presumption of reasonableness of trial counsel's strategy is cast in doubt, if not completely overcome by the implausibility that Mr. Ross would have knowingly and voluntarily given up an opportunity to have his conviction

and/or punishment lessened without receiving any benefit in return. Why would a person knowingly agree to a "strategy" to forego the opportunity to be convicted of a lesser offense when he was not disputing the fact that he had committed a crime? Why wouldn't appellate counsel investigate whether trial counsel was reasonable in employing a strategy that included relinquishing a valuable defense that could have had a significant impact on Mr. Ross's sentence?

Absent meaningful legal guidance at the post-conviction stage, Mr. Ross attempted to articulate how his trial and appellate counsel's performance were deficient and prejudiced his defense. Although his attempt may have lacked sophistication, the fact remains that the State never met its burden to affirmatively demonstrate the absence of a genuine issue of material fact with respect to whether trial and appellate counsel were ineffective. Consequently, the post-conviction court erred when it made the factual determinations that trial counsel strategically decided to not raise the extreme emotional distress affirmative defense, (PR. 000365), and that trial counsel's decision not to raise the extreme emotional distress affirmative defense was agreed to by Mr. Ross. (PR. 000363.) Summary judgment on Mr. Ross's claims for ineffective assistance was improperly granted.

III. MR. ROSS'S REQUESTS FOR THE APPOINTMENT OF PRO BONO COUNSEL SHOULD HAVE BEEN GRANTED.

The court may appoint counsel to an indigent petitioner seeking post-conviction relief when the petition or the appeal contains factual allegations

that will require an evidentiary hearing, and the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication. Utah Code Ann. § 78B-9-109 (2008). The PCRA is comprised of "extraordinary, complex legal doctrines" and it is a "legal fiction" and "deliberate fantasy" that post-conviction proceedings may be handled competently by an unrepresented indigent defendant. *Parsons v. Barnes*, 871 P.2d 516, 530-31 (Utah 1994) (Zimmerman, J. concurring). Thus, pro bono counsel is often necessary to assist a defendant in developing his post-conviction claims.

Twice, Mr. Ross requested pro bono counsel, but was denied by the court on the grounds that his requests were "premature" and "the complexity of [Mr. Ross's] remaining claims [for ineffective assistance of counsel] and the need for appointment of counsel for the proper adjudication of such claims is uncertain at this time." (PR. 000012-13; PR. 000265-266). Proceeding on his own, Mr. Ross attempted to set forth the facts showing the ineffective assistance rendered by trial and appellate counsel, but October 7, 2009, the court granted summary judgment. (PR. 000353-366, 383-385).

It is difficult to imagine how a lay person could possibly investigate, evaluate, and present claims of ineffective assistance without the benefit of counsel because such claims necessarily involve complicated factual and legal issues and often require evidentiary hearings. *See e.gs., State v. King*, 2010 UT App 396,

¶ 11, WL 5393676 (Utah Ct. App., Dec. 30, 2010); *State v. Millard*, 2010 UT App 355, ¶ 11, 2010 WL 5121491 (Utah Ct. App., Dec. 16, 2010). How can a lay person evaluate whether his lawyers effectively analyzed the law and the facts and made reasonable strategic decisions?

The State compliments Mr. Ross's ability to proceed on his own and timely file his petition for relief, impliedly suggesting that he had the wherewithal to analyze and articulate his claims. (St. Br. at 12-13, 19.) Under the State's argument, Mr. Ross should have been able to do what his trial and appellate counsel were unable to do. The State's logic only highlights the need for counsel to clear the hurdles or navigate the maze of the PCRA and to effectively present a claim of ineffective assistance.

This need for appointment of counsel could not be more apparent from the State's condemnation of Mr. Ross for having "never renewed his motion after he received the State's summary judgment motion." (St. Br. at 26.) Mr. Ross twice requested pro bono counsel to assist him from the beginning, not merely in response to a dispositive motion filed many months after his initial petition and requests. The need for early appointment of counsel is further exemplified by the State's conclusion that since Mr. Ross did not request assistance of counsel for a third time, he "tacitly conceded that he did not need counsel's assistance to respond to the State's motion." (St. Br. at 12-13.) This Court has never allowed a

right to counsel to be "tacitly" waived. If the State were correct, then it has successfully inserted a new procedural hurdle into the PCRA process which would require an indigent petitioner to renew a motion for counsel at every procedural juncture. How many times should a petitioner have to ask for counsel in the course of one post-conviction proceeding?

To resolve whether trial counsel was ineffective, Mr. Ross simply needed brief fact discovery and an evidentiary hearing with the assistance of competent counsel. Mr. Ross is not a lawyer. He was entitled to rely on the guidance and advice of his attorneys at trial and on appeal. *See State v. Holland ("Holland I")*, 876 P.2d 357, 359 (Utah 1994) *appeal after remand*, 921 P.2d 430 (Utah 1996) ("In almost all cases, defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law."). To expect a lay person to recognize when and how his attorneys fail to protect his rights contradicts the very reason that a defendant employs a trained advocate to competently represent his rights. Only a lawyer could effectively evaluate whether previous counsel met the standard of care and made appropriate and reasonable strategy decisions. Without the appointment of competent pro bono counsel to assist with a post-conviction petition, it is entirely unfair to think an incarcerated, indigent petitioner could evaluate his attorneys' performance and

recognize specific instances when the attorneys' conduct and strategies fell below the standard of reasonableness.

CONCLUSION

For the reasons set forth above, Mr. Ross respectfully requests this Court to reverse the summary judgment and remand for an evidentiary hearing with instructions to appoint counsel to assist Mr. Ross.

SUBMITTED this 9th day of January, 2012.

Sanna-Rae Taylor
PARSONS BEHLE & LATIMER
Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT OF RULE 24(f)(1) OF THE UTAH RULES OF APPELLATE PROCEDURE

This brief complies with the word limitation of Rule 24(f)(1)(A) of the Utah Rules of Appellate Procedure because this brief contains 5,084 words, excluding the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record as exempted by Rule 24.

This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 font Times New Roman.

Dated this 9th day of January, 2012.

SANNA-RAE TAYLOR

CERTIFICATE OF DELIVERY

I, Sanna-Rae Taylor, hereby certify that I have caused to be hand-delivered an original and 9 copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and I have caused 2 copies to be hand-delivered to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 9th day of January, 2012.

SANNA-RAE TAYLOR

DELIVERED to the Utah Supreme Court and Utah Attorney General's Office as indicated above this 9th day of January, 2012.