Exceptions to Preservation & Evolving Standards of IAC

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Preservation

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When is an issue preserved?

- New issue/claim/theory
- New argument
- New precedent
- New interpretation
- Invited error
- A ruling—not an objection—preserves an issue

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When is an issue preserved?

"An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it. To provide the court with this opportunity, the issue must be specifically raised by the party asserting error, in a timely manner, and must be supported by evidence and relevant legal authority." *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 (cleaned up).

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New issue/claim/legal theory

Appellate courts "view *issues* narrowly, but . . . new *arguments*, when brought under a properly preserved issue or theory, do not require an exception to preservation. Such arguments include citing new authority or cases supporting an issue that was properly preserved." Appellate courts refuse to consider on appeal "entirely new legal theories." *State v. Johnson*, 2017 UT 76, ¶ 15 n.2.

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New precedent

"[This issue] is an entirely distinct legal theory, and is thus a new claim or issue. So, if the appellant . . . had preserved the issue . . . below, and had simply cited different precedent or clarified their argument . . . on appeal, they would not have required an exception to preservation." *State v. Johnson*, 2017 UT 76, ¶ 15 n.2.

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New interpretation, same text

"Here, Garcia presented the question of how the statute should be interpreted to the district court, and the district court ruled on it . . . .Garcia's failure to invoke the constitutional avoidance canon does not deprive us of the ability to employ that canon to interpret the statute. Garcia preserved the statutory interpretation and insufficient evidence issues at the district court and on appeal and, thus, both are fair game on certiorari." *State v. Garcia*, 2017 UT 53; *See also State v. Salgado*, 2018 UT App 139.

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Invited error, specific language

- “Although Williams initially objected to the admission of the entire call, when the court gave him the opportunity to argue for redaction, he abandoned that objection *with the word ‘no.’*”
- *“No*, more that he’s dangerous when he’s on drugs.”
- “The court found that it could not make that redaction because the father never made such a ***statement*** during the call.”

State v. Williams, 2020 UT App 67.

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Circle back!

Due process claim preserved where defendant argued bad faith—which was an aspect of due process—and where defendant failed to cite due process clause or caselaw, because (1) the court cut off counsel, (2) counsel circled back and asked for a ruling for preservation purposes, and (3) the court ruled on it.

State v. Rogers, 2020 UT App 78.

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Citing authority

"Defense counsel's due process argument could have been more complete, but the district court denied counsel's motion before he had finished his argument, leaving us to wonder what counsel would have argued had he been given the opportunity. Further, the court appeared to apply a *Tiedemann* analysis, and thus the issue was presented to the district court in such a way that the court had an opportunity to rule on it." *State v. Rogers*, 2020 UT App 78; *see also State v. Doyle*, 2018 UT App 239.

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Get a ruling

Rulings—not objections—preserve issues.

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Get a ruling

"[O]ne rather vaguely-worded statement" preserved an issue for appeal because the trial court ruled on it.

State v. Florez, 2020 UT App 76, fn 3.

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Exceptions to Preservation

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Exceptions to Preservation

- **Ineffective assistance of counsel**
- Plain error
- Exceptional circumstances

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Ineffective Assistance of Counsel

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Ineffective Assistance of Counsel

- Deficient Performance
- Prejudice
- Utah Rule of Appellate Procedure 23B

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Ineffective Assistance of Counsel

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

U.S. Const. amend. VI

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Ineffective Assistance of Counsel

State v. Scott, 2020 UT 13 (citing *Strickland v. Washington*):

To prevail on this claim, a defendant must demonstrate that

- (1) his counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and
- (2) "the deficient performance prejudiced the defense," meaning that there is a reasonable likelihood of a different result without the deficient performance.

Deficient Performance

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Deficient performance under *Strickland*

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, **the defendant must show that counsel's representation fell below an objective standard of reasonableness**.

"*More specific guidelines are not appropriate*.

"In any case presenting an ineffectiveness claim, **the performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*.**"

Strickland, 466 U.S. at 687–88.

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Policy Behind the Doctrine

"Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."

. . . .

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Policy Behind the Doctrine

. . . .

"In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

Strickland, 466 U.S. at 687–88, 696 (emphases added).

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Recent clarifications in Utah

- Is it necessary to prove that “no competent attorney” would have acted as counsel did?
- Does it matter if they attorney had a “conceivable tactical basis” for her actions or omissions?
- Does it matter if the attorney’s action was “strategic”?
- Does it matter if the attorney’s actual rationale was wrong or misguided?
- Can counsel be ineffective for failing to raise an argument unsupported by then-existing legal precedent?
- What role does an attorney’s investigation play in the analysis?
- What role do professional standards play in the analysis?

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Begin with a presumption of reasonableness

"*Strickland* instructs that a defendant must ultimately overcome the presumption that an attorney's decision 'falls within the wide range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. If an attorney's decisions can be explained by a reasonable trial strategy, the defendant has necessarily failed to show deficient performance."

State v. Gallegos, 2020 UT 19, ¶ 56.

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Ignorance of law

"An attorney's demonstrated ignorance of law directly relevant to a decision will eliminate *Strickland*'s presumption that the decision was objectively reasonable because it might have been made for strategic purposes, and it will often prevent the government from claiming that the attorney made an adequately informed strategic choice."

Bullock v. Carver, 297 F.3d 1036, 1049 (10th Cir. 2002).

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Strategic vs. Reasonable

"[W]hen the court of appeals concluded there was no strategic reason for counsel to not object to the instruction, the deficiency analysis was not at an end. A reviewing court must always base its deficiency determination on the ultimate question of whether counsel's act or omission fell below an objective standard of reasonableness."

State v. Ray, 2020 UT 12, ¶ 36.

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The “no competent attorney” language

“In *Moore*, the Supreme Court stated that whether ‘no competent attorney’ would have acted as the allegedly deficient attorney did ‘is the relevant question under *Strickland*.’ . . . Based on the Supreme Court’s precedent to date, we do not understand *Moore* to change the deficiency standard announced in *Strickland*. Accordingly, we . . . ask whether counsel’s failure . . . ‘fell below an objective standard of reasonableness.’”

State v. Scott, 2020 UT 13, ¶¶ 30–31.

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Conceivable tactical basis

"But we take this opportunity to disavow any notion that the 'no conceivable tactical basis' language means anything other than the *Strickland* standard. The Supreme Court has spoken. And we are duty bound to follow."

State v. Gallegos, 2020 UT 19, ¶ 58.

A conceivable tactical basis is a sufficient but not necessary means of affirmance.

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Objective vs. Subjective

"The *Strickland* inquiry is objective, not subjective. While trial counsel's subjective thinking may inform what an objectively reasonable attorney may have done when presented with the same circumstances, counsel's subjective understanding is not the standard by which her actions are judged. . . . Accordingly, trial counsel's subjective reasoning is not the critical component of the *Strickland* inquiry."

State v. Gallegos, 2020 UT 19, ¶ 47 (cleaned up).

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Failure to investigate never reasonable

“If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel’s performance cannot fall within the ‘wide range of reasonable professional assistance.’ This is because a decision not to investigate cannot be considered a tactical decision.”

. . . .

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Failure to investigate never reasonable

"It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons. Therefore, because defendant's trial counsel did not make a reasonable investigation into the possibility of procuring prospective defense witnesses, the first part of the *Strickland* test has been met."

State v. Templin, 805 P.2d 182, 188 (Utah 1990).

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Existing legal precedent not required

The plain error "obvious" test is not required to show IAC:

"[T]he United States Supreme Court has never said that trial counsel is categorically excused from failure to raise an argument not supported by existing legal precedent. In fact, the Court has said just the opposite."

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Existing legal precedent not required

"We thus repudiate the language in our case law limiting our review of an attorney's performance to the law in effect at the time of trial."

State v. Silva, 2019 UT 36, ¶ 19–20, *reh'g denied* (Jan. 7, 2020).

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Professional Standards

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

State v. Silva, 2019 UT 36, ¶ 20, *reh'g denied* (Jan. 7, 2020) (citing *Strickland*, 466 U.S. 688).

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Professional Standards

- Legal standard
- ABA standards
- Utah Rules of Professional conduct
- Utah standards for the defense
- Specific caselaw drawing lines in the sand, like *State v. Templin*: failure to investigate can never be reasonable, etc.

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Prejudice

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Prejudice

The appellate analysis requires the court to ask: “So what?”

- The prejudice inquiry requires the Court to ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
- “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

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Prejudice & Harmful Error

The appellate analysis requires the court to ask: "So what?"

- "We should reverse and remand for a new trial . . . if the likelihood of a different outcome is sufficiently high to undermine [the court's] confidence in the verdict." *SIRQ, Inc. v. The Layton Companies, Inc.*, 2016 UT 30, ¶ 32, 379 P.3d 1237 (*State v. Knight*, 734 P.2d 913, 920 (Utah 1987).
- "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Utah R. Civ. P. 61.

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Structural Error (Rare)

- Structural errors are flaws in the framework within which the trial proceeds, rather than simply an error in the trial process itself." [I]nstead of requiring an aggrieved defendant to prove prejudice, . . . a structural error analysis presumes prejudice." *State v. Cruz*, 2005 UT 45, ¶ 17, 122 P.3d 543, 549

- Examples:
  - Complete denial of counsel at a critical stage of the proceeding.
  - Denial to the right to self-representation.
  - Erroneous reasonable doubt instructions.

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A Reasonable Probability of a Different Result

When the court's confidence may be undermined:

- If we assume a spectrum of probabilities . . . [a] "mere possibility" is at the low end of the spectrum, "near certainty" is at the high end, and "more probable than not" is a likelihood greater than fifty percent. *State v. Knight*, 734 P.2d 913, 920 (Utah 1987).

- The court's "confidence in the outcome may be undermined at some point substantially short of . . . more probable than not" that the jury would have reached a different result. *Id.*

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Prejudice vs. Sufficiency

Sufficiency analysis:

- An appellate court will reverse "on a claim of insufficiency of the evidence if, when viewed in the light most favorable to the State, some evidence exists from which a reasonable jury could find that the elements of the crime had been **proven beyond a reasonable doubt**." *State v. Gonzalez*, 2015 UT 10, ¶ 27.
- *See also Jackson v. Virginia,* 443 U.S. 307 (1979)

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Prejudice vs. Sufficiency

A defendant may be prejudiced even if the evidence is sufficient to sustain the conviction:

- A court's "confidence in the verdict" may be undermined even where there is "substantial" other evidence that the jury could have relied on without relying on the improper evidence. *SIRQ, Inc. v. The Layton Companies, Inc.*, 2016 UT 30, ¶¶ 32-35, 379 P.3d 1237.

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Prejudice vs. Sufficiency

The court must consider "counterfactuals":

- "*Strickland* and the cases that follow it illustrate that to evaluate prejudice, [courts] assess counterfactuals scenarios—. . . what would have happened but for the ineffective assistance." *Ross v. State*, 2019 UT 48, ¶¶ 75-76.

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Prejudice vs. Sufficiency

In so doing, the court should not defer to the jury:

- Considering counterfactuals requires the court to assess what effect the IAC may have had on the jury's determinations (assessments of credibility, etc.) in light of the case as a whole.
- Thus, the court is answering a *legal question* as to whether there is a reasonable likelihood the jury *would have* reached a different result without the ineffective assistance.

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Showing Prejudice

How does the IAC fit into the evidentiary picture?

- In assessing prejudice, reviewing court "must consider the totality of the evidence before the judge or jury," and the evidence omitted or presented as a result of counsel's deficient performance "must be considered alongside the totality of the evidence that was already before the jury." *Strickland*, 466 U.S. at 694–95; *State v. Scott*, 2020 UT 13, ¶ 45.

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Showing Prejudice

How strong or weak is the other evidence?

- "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland,* 466 U.S. at 696.
- "[J]ust as we are more ready to view errors as harmless when confronted with overwhelming evidence of a defendant's guilt." *State v. Charles*, 2011 UT App 291, ¶ 37 n. 14 263 P.3d 469.

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Showing Prejudice

What bearing might the IAC have had on credibility determinations?

- In "cases that hinge entirely on the veracity of the victim, [courts] have more readily found prejudice where the challenged testimony has the effect of bolstering the victim's credibility." *State v. Nunes*, 2020 UT App 71, ¶ 27.

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Showing Prejudice

What did the State emphasize in closing?

- If the State emphasized the IAC or something related to it in closing, this supports an argument that the IAC may have been significant in the jury's deliberations.
- Similarly, the State's closing arguments can refute the State's attempt to avoid prejudice based on the idea that the jury could have convicted under an alternate theory or without the evidence or error at issue.

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Showing Prejudice

What did the jury do?

- Split verdicts. *State v. Burnett*, 2018 UT App 80, ¶ 39.
- Jury questions.
- Length of time in deliberation.

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Showing Prejudice

What did the jury do?

- "[A] court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Strickland*, 466 U.S. at 694–95.
- The assessment "must exclude the possibility of arbitrariness, . . . [i]t should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency…" *Id.*
- "Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review . . .should not be considered in the prejudice determination." *Id.*

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Showing Prejduce

What else went wrong at trial? (IAC, errors, etc.)

- "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*.
- The more that went wrong (or the more different the trial would have been without the IAC or errors), the more the court's confidence should be undermined that the result would have been the same.

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Rule 23B

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Motions for 23B Remand

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Rule 23B

- “The motion will be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.” Utah R. App. P. 23B.

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Facts Not Already in the Record

- “If the facts necessary for an ineffective assistance of counsel determination are apparent on the record, there is no need for a remand…, and the motion should be denied.” *Griffin*, 2015 UT 18, ¶ 18.

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Nonspeculative Allegations

Nonspecualtive allegations are *specific* and *supported*:

- "'Speculation' is 'mere guesswork or surmise,' a conjecture,' or a guess.' . . . . [S]peculative allegations are those that have little basis in articulable facts but instead rest on generalized assertions." *Griffin*, 2015 UT 18, ¶ 19.
- It is "improper to remand a claim under rule 23B for a fishing expedition. The mere hope that an individual may be able to provide information if subpoenaed to testify is not sufficient." *Griffin*, 2015 UT 18, ¶ 19.

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Show Deficient Performance & Prejudice

Demonstrate how the allegations and record show IAC:

- "Prejudice cannot be determined here without knowing the specifics of the threat. And in determining whether Scott has shown a reasonable probability that admission of the threat would have changed the jury's guilty verdict, this piece of evidence must be considered alongside the "totality of the evidence" already before the jury." *Scott*, 2020 UT 13, ¶ 46.

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Rule 23B Hearings

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Prehearing Filings

- District court will likely have little experience
- Prehearing briefing
- Exhibits (try to get them stipulated to)
- Witness disclosures

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Calling Witnesses

- Create the logical train that counsel knew about a witness/issue and did not take reasonable steps
- Do not necessarily need trial counsel (*State v. Gallegos*, 2020 UT 19)
- State can put on new evidence (*Ross v. State,* 2019 UT 488)

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Posthearing Filings

- Posthearing brief
- Proposed findings of fact and conclusions of law

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Other Exceptions to Preservation

- Ineffective assistance of counsel
- **Plain error**
- **Exceptional circumstances**

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Plain Error

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The Test for Plain Error

- Error exists
- Error should have been obvious (caselaw or statute directly on point)
- Error was harmful

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When to Argue Plain Error

- Clear binding appellate caselaw on all fours
- Clear statutory language

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Exceptional Circumstances

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Test for Exceptional Circumstances

- *State v. Johnson*, 2017 UT 76
- Rare procedural anomaly
- Effects of that anomaly and whether those effects result in
    - Manifest injustice
    - Infringe on a significant constitutional right or liberty interest
    - Judicial economy

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When to Argue Exceptional Circumstances

- Pro se defendants
- Truly strange procedural posture where the defendant was unable to object

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