IDC CLE Series
How to Litigate 23B Motions
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Topics:

I. Rule 23B and affidavits requirements

II. Putting this into practice

III. Litigating the 23B motion

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The record and rule 23B

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The record on appeal

- Appeals must be based on the record
- Rule 11(h) supplementation of the record
- Preservation

Rule 23B

- Utah Rules of Appellate Procedure, rule 23B
  - Rule 23: Motions
  - Rule 23A: Motion for reinstatement of appeal
  - Rule 23B: Motion to remand for findings necessary to determination of ***ineffective assistance of counsel*** claim
  - Rule 23C: Motion for emergency relief

Rule 23B

- Exception to the closed-record rule
- Admit extra-record evidence that would support an IAC claim

Rule 23B

(a) Grounds for motion; time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel.

Rule 23B

(a) Grounds for motion; time. . . . 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.

How do you find a 23B issue?

- Initial letter or consultation with client: is there anything your attorney missed, anyone your attorney should have talked to but didn't?
    - Missing fact witness
    - Missing expert
    - Other missing evidence that is significant

How do you find a 23B issue?

- Record evidence

➢ Counsel should have admitted evidence and did not

➢ Counsel should have spoken to someone and did not

Rule 23B

(b) Content of motion. The content of the motion must conform to the **requirements of Rule 23**. The motion must include or be accompanied by **affidavits alleging facts** not fully appearing in the record on appeal that show the claimed deficient performance of the attorney.

Affidavit requirement

- Affidavits do not have to be from the missing witness (*State v. Griffin*, 2015 UT 18)
- Trial counsel affidavit
- Missing documentary exhibits

Affidavit requirement

"Requiring the potential witness to submit an affidavit himself goes too far. Nowhere does the text of the rule specify from whom the affidavit must be submitted."

State v. Griffin, 2015 UT 18, ¶ 27

Nonspeculative facts

"[S]peculative allegations are those that have little basis in articulable facts but instead rest on generalized assertions . . . [W]hen a defendant alleges that counsel failed to investigate or call a witness, the defendant must, at the very least, identify the witness."

Griffin, 2015 UT 18, ¶ 19.

Briefing a Rule 23B Motion: Ineffective Assistance of Counsel

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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.

Types of IAC at issue for 23B

- Failure to
  - **Investigate**
    - Expert witness,
    - Fact witness, or
    - Evidence

- Failure to
  - **Present**
    - Expert witness,
    - Fact witness, or
    - Evidence

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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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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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. . . . It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons."

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

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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

Demonstrate how the 23B nonspeculative allegations and record together 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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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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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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Helpful Rule 23B / IAC Cases

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Recent USC Rule 23B Cases (last 5 years)

- *State v. Drommond*, 2020 UT 50
- *State v. Gallegos,* 2020 UT 19
- *State v. Scott*, 2020 UT 13
- *Ross v. State*, 2019 UT 48
- *State v. Ring*, 2018 UT 19
- *State v. Mackin*, 2016 UT 47
- *State v. Griffin*, 2020 UT 33; 2015 UT 13
- *State v. Nelson*, 2015 UT 62

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Other Helpful IAC Cases

- *State v. Burnett*, 2018 UT App 80, ¶¶ 32–40
- *State v. J.A.L.*, 2011 UT 27, ¶¶ 29, 40-41
- *State v. Hales,* 2007 UT 14
- *State v. Templin,* 805 P.2d 182 (Utah 1990)

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Briefing Rule 23B Motions

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Briefing

For both deficient performance and prejudice:

- What are the elements?
- What was primarily contested at trial?
- What was the State’s main evidence to establish that element?
- How do the rule 23B nonspeculative allegations fit in?
  - Their admissibility
  - How they undermine the State’s evidence
  - How they present something additional for the jury’s consideration

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Briefing

For deficient performance:

- Why would a reasonable attorney have investigated or presented the rule 23B nonspeculative allegations? Why was the failure to do so unreasonable under the circumstances?
- If counsel had (or appears to have had or could have had) a conscious strategy in failing to do so, why was that strategy unreasonable?

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Briefing

For prejudice:

- The State's evidence is not overwhelming---instead, it supports reasonable doubt.
- The State's strongest evidence is not determinative.
- The State's evidence is undermined by the rule 23B allegations.
- The 23B allegations bring something to the case that otherwise was not put before the jury.
- There is a reasonable likelihood of a different result.

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Briefing

For prejudice:

- What gap is there in the evidentiary picture without the rule 23B nonspeculative allegations?
- What is the likely result of that gap?
- Why is it unfair?

Think

- The failure to investigate and present the rule 23B allegations left a *vacuum* in the evidence *to be filled by*---the State's untested evidence, the jury's misconceptions or assumptions, etc.

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Litigating the 23B Motion

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What evidence is available?

- Anything an investigator can find
- GRAMA requests
- Client’s medical records
- Subpoena power

Appellate litigation of a 23B motion

- Motions to stay briefing
- References to 23B in opening brief
- Oral argument
- Cannot file PFC on a denial of a 23B motion alone

District court litigation of a 23B motion

- 90-day period
- Set an evidentiary hearing
- Witnesses to call
- Post-hearing briefing
- District court will issue findings of fact and conclusions of law

Back at the Court of Appeals

- Argue from the findings of fact and conclusions of law
- “We **defer** to a trial court’s findings of fact after a rule 23B hearing, and we review them only for **clear error**. That means we set aside the rule 23B court's factual findings only if they are **against the clear weight of the evidence**, or if we otherwise reach a definite and firm conviction that a mistake has been made.” *State v. Drommond*, 2020 UT 50, ¶ 56, 469 P.3d 1056

Duty to investigate

- *McCloud v. State*, 2019 UT App 35
- PCRA does not procedurally bar IAC claims that could have been raised in a 23B motion on direct appeal if the record on appeal “did not indicate a **reasonable probability** that developing those claims would have resulted in reversal”

Duty to investigate

- “Her current practice is to conduct a thorough extra-record investigation and raise any meritorious issues found. We think that, in many cases, such a thorough extra-record investigation may go beyond what is required of objectively reasonable appellate counsel.”