

No. 20180116-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff / Appellee,

v.

PATRICK BOBBY JR. GALINDO,
Defendant / Appellant.

Opening Brief—PUBLIC

On appeal from the Second Judicial District Court, Weber County,
Honorable Ernie Jones, District Court No. 161901398

Mr. Galindo is incarcerated

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Table of Contents

Introduction.....	1
Issues Presented.....	2
Statement of the Case	4
1. Somebody shot Ramon Guzman	4
2. The competency determination.....	5
3. 23B Evidence.....	8
Summary of the Argument	9
Argument	11
1. Trial counsel provided ineffective assistance when he stipulated to Mr. Galindo’s competency	11
1.1 It was error for trial counsel to stipulate to competency under the circumstances	11
1.2 Trial counsel’s stipulation to competency harmed Mr. Galindo, because the trial court relied on it instead of conducting its own review of the issue.....	14
2. Trial counsel provided ineffective assistance when he failed to talk with Mr. Galindo’s psychologist to discuss Mr. Galindo’s ability to counsel with him at trial or to participate in the proceedings	16
2.1 Trial counsel erred when he failed to discuss his observations with Dr. Hawks, who was assessing his client’s competency at his own request.....	16
2.2 Trial counsel’s failure to talk to Dr. Hawks harmed Mr. Galindo, as Dr. Hawks could not consider trial counsel’s own personal interactions with Mr. Galindo in making his conclusions	17
3. The above errors cumulate to warrant reversal on appeal because together they raise sufficient doubt as to whether Mr. Galindo should have been found competent to stand trial.....	22

Conclusion26

Addenda

- A The Hawks Report
- B The Wilkinson Report
- C The Competency Hearing Trial Transcript
- D Trial Counsel Affidavit

Table of Authorities

CASES

Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001) 23
McMann v. Richardson, 397 U.S. 759 (1970)..... 11
State v. Campos, 2013 UT App 213, 309 P.3d 1160 11, 13, 16
State v. Clark, 2004 UT 25, 89 P.3d 162 2, 3
State v. Curtis, 2013 UT App 287, 317 P.3d 968.....18
State v. Jamieson, 2017 UT App 236, 414 P.3d 559 12, 13, 17
State v. King, 2017 UT App 43, 392 P.3d 997..... 22
State v. Kozlov, 2012 UT App 114, 276 P.3d 1207..... 2, 3
State v. MacNeill, 2017 UT App 48, 397 P.3d 626..... 3, 22
State v. Perea, 2013 UT 68, 322 P.3d 624 23
Strickland v. Washington, 466 U.S. 668 (1984) 11, 14, 16, 18, 23
United States v. Medlock, 645 Fed. App’x 810 (10th Cir. 2016) 23
United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990) 23
Williams v. Taylor, 529 U.S. 362 (2000) 23

STATUTES

Utah Code Ann. § 77-15-1 1, 12
Utah Code Ann. § 77-15-2 passim

OTHER AUTHORITIES

U.S. Const. amend. XI. 11

Introduction

The State charged Appellant Patrick Galindo with attempted murder and possession of a firearm by a restricted person. Before trial, his counsel raised the question of his competency. The Utah Code provides that a person is incompetent to stand trial if he “is suffering from . . . mental retardation resulting . . . in . . . his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.” Utah Code Ann. §§ 77-15-1, 77-15-2 (West).¹ The trial court ordered two psychological evaluations of Mr. Galindo to assess his competency.

One of the psychological evaluations listed Mr. Galindo’s IQ at 54, plus or minus 5—well below the mental retardation threshold score of 70. R.56, 60. This psychologist also explained that trial counsel for Mr. Galindo was unavailable to discuss Mr. Galindo’s ability to counsel with him and to rationally participate in the proceedings before the evaluation was filed. R.65.

¹ Mr. Galindo was charged July, 6 2016. The language of Utah Code Ann. section 77-15-2 changed in relevant part in May, 2018, to provide that a person is competent to stand trial if he has

- (a) a rational and factual understanding of the criminal proceedings against the defendant and of the punishment specified for the offense charged; and
- (b) the ability to consult with the defendant’s legal counsel with a reasonable degree of rational understanding in order to assist in the defense.

The other psychologist used another test, the WASI test, to assess Mr. Galindo's mental capacity. R.45. He reported that Mr. Galindo's score of T=33 placed him in the fifth percentile. R.45. This psychologist also admitted that Mr. Galindo's intellectual disability impacted his ability to understand what was going on in court. R.48.

Both psychologists deemed Mr. Galindo competent to stand trial, even though they left the final determination of his competency up to the court. At the competency hearing, trial counsel for Mr. Galindo stipulated to Mr. Galindo's competency rather than raising and bringing to the court's attention the many issues the reports presented. The trial court relied on trial counsel's stipulation when it found Mr. Galindo competent to stand trial.

A jury later found Mr. Galindo guilty of attempted murder. Mr. Galindo then pleaded guilty to possessing a firearm as a restricted person for handling the gun the night of the shooting.

Issues Presented

Issue 1: Did trial counsel provide ineffective assistance when he stipulated to Mr. Galindo's competency?

Standard of Review: "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

Preservation: An ineffective assistance of counsel claim is an “exception to the preservation requirement.” *State v. Kozlov*, 2012 UT App 114, ¶ 35, 276 P.3d 1207.

Issue 2: Did trial counsel provide ineffective assistance when he failed to talk with the court-appointed psychologists to discuss Mr. Galindo’s ability to counsel with him and to participate at trial?

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *Clark*, 2004 UT 25, ¶ 6.

Preservation: Ineffective assistance of counsel is an “exception to the preservation requirement.” *Kozlov*, 2012 UT App 114, ¶ 35. Because this claim relies on facts outside of the record, Mr. Galindo has filed a Rule 23B motion concurrently with this brief.

Issue 3: Do the above errors cumulate to warrant reversal on appeal because together they raise sufficient doubt as to whether Mr. Galindo should have been found competent to stand trial?

Standard of Review: “When reviewing a claim of cumulative error, [appellate courts] apply the standard of review applicable to each underlying claim of error.” *State v. MacNeill*, 2017 UT App 48, ¶ 53, 397 P.3d 626 (quotation omitted). “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *Clark*, 2004 UT 25, ¶ 6.

Preservation: Cumulative error based on a claim of ineffective assistance of counsel circumvents this court’s preservation requirement. *State v. Low*, 2008 UT 58, ¶ 19, 192 P.3d 867.

Statement of the Case

1. Somebody shot Ramon Guzman

Late one night, two men were walking down a street in downtown Ogden when they “seen two people hanging out of the window” from an apartment above them. R.929. The two groups yelled fighting words at each other, and Ramon Guzman told the men in the apartment to “bring it over here mother f*cker.” R.418; R.841; R.929. Three men exited the apartment, crossed the street, and confronted the two men—who at that point were brandishing knives. R.932; R.853. The two groups did not know each other. Mr. Guzman thought they were going to fight, but almost immediately, the middle of the three assailants shot him four times and turned and fled. R843. The gun was later found in the bushes near the apartment building. R.716.

Mr. Guzman—who survived the shooting—said he got a good look at his shooter. R.845. He later identified Mr. Galindo as the shooter in a photo line-up. R.880–81. Mr. Galindo’s fingerprints were also found on the gun’s magazine. R.504–05.

The police charged Mr. Galindo with attempted murder, felony discharge of a firearm, and possession or use of a firearm by a restricted person. R.1. The

State dropped the charge of felony discharge of a firearm and the trial court held a bifurcated trial, trying only the issue of whether it was Mr. Galindo or someone else who shot Mr. Guzman on the street. R.148; R.1260.

2. The competency determination

Before trial, trial counsel asked the court to evaluate Mr. Galindo's competency. R.34. As the basis for the competency evaluation, trial counsel stated, "In conversing with Mr. Galindo, in the past several court hearings, Mr. Galindo does not appear to be able to comprehend what is going on. Or make rational decisions regarding this case." R.37. The court ordered two psychologists to examine Mr. Galindo. R.38.

One of the psychologists who examined Mr. Galindo was Dr. Rick Hawks. The Hawks Report placed Mr. Galindo on the schizophrenia spectrum due to the voices that Mr. Galindo reported hearing. R.56. It listed his depression and anxiety, as well as borderline and antisocial personality disorders. R.56. It detailed Mr. Galindo's suicidal ideations and his past attempt at suicide and self-mutilation. R.60.

The Hawks Report reported that Mr. Galindo's IQ "fell within the mental retardation/intellectual impairment range of intellectual functioning"—it reported his IQ as 54, plus or minus 5. R.56; R.60. Mental retardation "is clearly defined by the American Psychiatric Association" as having a measured IQ of 70 and below. R.60. The Hawks Report also stated that Dr. Hawks had not been able

to speak with Mr. Galindo's trial counsel before making his ultimate conclusion regarding Mr. Galindo's competence, despite an attempt to contact him during the course of the evaluation. R.65.

The other psychologist who examined Mr. Galindo was Dr. Renée Wilkinson. Like the Hawks Report, the Wilkinson Report weighed in on Mr. Galindo's intelligence. Using the WASI test (Wechsler Abbreviated Scale of Intelligence), the Wilkinson Report placed Mr. Galindo at an IQ score of T=33, placing him in the fifth percentile. R.45. The Wilkinson Report initially stated that Mr. Galindo "is not able to consult with his attorney and participate in the proceeding against him with a reasonable degree of rational understanding," but concluded that Mr. Galindo was competent to proceed to trial anyway. R.41. The Wilkinson Report also acknowledged that Mr. Galindo was "confused by what is being discussed in court," but stated that if he was confused he could "ask his attorney to explain matters to him." R.48.

At the hearing to determine Mr. Galindo's competency, trial counsel stipulated that Mr. Galindo was competent to stand trial. R.378. The trial court relied on trial counsel's stipulation, stating, "Based on the two reports and stipulation of counsel the Court will enter a finding then that Mr. Galindo is competent to proceed." R.379.

At trial, the State admitted evidence that the victim identified Mr. Galindo as his shooter from a photo lineup. R.880. A police officer testified that in

another photo lineup, the victim's friend—the only other eyewitness close enough to identify the shooter—picked out one of Mr. Galindo's friends as the shooter with 100% certainty. R.1000–05.

A gun found near the crime scene was also admitted into evidence. R.437, 757. No fingerprints were recovered from the gun, R.1047, but Mr. Galindo's fingerprints were found on the magazine, R.1034–45. The gun's DNA testing was inconclusive because there were too many DNA samples to narrow down the result. R.823–26.

After the State rested, the defense admitted evidence that Mr. Galindo was in the bathroom with his on-again off-again girlfriend “messing around” at the moment of the shooting. R.1093–95. Girlfriend also explained that a gun was present at the party that night and that the guys looked at it and handled it—including Mr. Galindo. R.1091. She testified that she and Mr. Galindo left the bathroom after they heard shouting, and that they ran outside but that she never lost sight of Mr. Galindo. R.1095–1103. During examination of a police witness, defense counsel admitted evidence that the police refused to interview Girlfriend when she contacted them about the case. R.915.

The defense also admitted evidence that there was another prime suspect who was never actually investigated—the tenant of the apartment where Mr. Galindo had spent the evening. R.1008. Defense counsel discovered that the police never showed a photo of the tenant in a photo lineup to any of the

witnesses—including the victim and his friend—who were asked to identify the shooter. R.902, 1008–09.

A jury found Mr. Galindo guilty of attempted murder. R.1248.

3. 23B Evidence

Mr. Galindo’s trial counsel has submitted an affidavit detailing what he would have told Dr. Hawks had he communicated with Dr. Hawks while Dr. Hawks was writing his report. (*See Randy Richards Aff. Add D.*) Trial counsel’s affidavit explained:

- It was abundantly clear that Mr. Galindo was intellectually disabled;
- Mr. Galindo was unable to assist with preparation for trial;
- Mr. Galindo could not give his trial counsel information about the incident, making it impossible to get adequate witnesses for the defense;
- Mr. Galindo did not appear to be able to understand the proceedings;
- Mr. Galindo would agree with anything trial counsel suggested;
- Trial counsel tested Mr. Galindo’s ability to counsel with him at trial by asking him two questions in a row, both suggesting totally opposite answers;
- Mr. Galindo would respond in the affirmative to two totally opposing questions in a row;

- Mr. Galindo was conversant and happy and did not understand the gravity of the offenses and did not understand there was a possibility he could lose at trial;
- Had counsel connected with Dr. Hawks, counsel would have been able to give him information as to his frustrations trying to prepare a defense for Mr. Galindo due to his inability to understand the gravity of the charges;
- Mr. Galindo could not adequately testify at trial;
- Under normal circumstances, trial counsel would have put Mr. Galindo on the stand to explain where he was at the time of the shooting, but it was impossible due to Mr. Galindo's intellectual disability, his inability to understand complex questions, and his total inability to be able to withstand any kind of cross examination.

(Randy Richards Aff. Add. D.).

Summary of the Argument

Trial counsel provided ineffective assistance of counsel when he stipulated to Mr. Galindo's competency to withstand trial in light of the findings in the psychologists' reports. The psychologists' reports indicated that Mr. Galindo's IQ placed him far below the mental retardation range, that he was struggling to understand the proceedings, and that he was unable to participate or counsel with his attorney in a rational way. But counsel stipulated to Mr. Galindo's

competence anyway. Because the trial court relied on counsel's stipulation, this error harmed Mr. Galindo.

Trial counsel likewise provided ineffective assistance when he failed to discuss with one psychologist Mr. Galindo's ability to counsel with him at trial or to participate in the proceedings against him. In a rule 23B affidavit, trial counsel admits that had he spoken with the psychologist while the psychologist was preparing his report, he would have provided details supporting a finding of incompetence. There is no conceivable tactical basis for trial counsel's decision not to discuss Mr. Galindo's ability to counsel with him and participate in the proceedings when trial counsel himself requested a psychological evaluation and competency hearing.

In light of the above, cumulative error demands reversal. Had Mr. Galindo gotten a hearing where the psychologists and trial court considered the evidence included in trial counsel's affidavit coupled with a vigorous—or even competent—argument from trial counsel that Mr. Galindo could not participate in his own defense, the outcome of the competency hearing would have been quite different. Trial counsel's double-whammy of (1) stipulating to competency and (2) utterly failing to talk to Dr. Hawks left Mr. Galindo—for all intents and purposes—without an advocate. These two issues should cumulate to obliterate this court's confidence in the outcome of Mr. Galindo's competency hearing.

Argument

1. Trial counsel provided ineffective assistance when he stipulated to Mr. Galindo's competency

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have Assistance of counsel for his defense.” U.S. Const. amend. XI. That right is now recognized as the right to “*effective* assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 fn. 14 (1970) (emphasis added) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

To show constitutionally ineffective assistance of counsel, Mr. Galindo must show (1) error, i.e. “that [his] counsel’s performance was deficient,” and (2) “that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1.1 It was error for trial counsel to stipulate to competency under the circumstances

Mr. Galindo’s trial counsel erred when he stipulated to Mr. Galindo’s competency in light of the findings in the psychologists’ reports.

To show attorney error, Mr. Galindo must show “that counsel’s representation fell below an objective standard of reasonableness considering all the circumstances.” *State v. Campos*, 2013 UT App 213, ¶ 23, 309 P.3d 1160. Furthermore, “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.”

Id. In other words, he must show “that there was no conceivable tactical basis for counsel’s actions.” *State v. Jamieson*, 2017 UT App 236, ¶ 32, 414 P.3d 559.

The Utah Code provides that “no person who is incompetent shall be tried for a public offense.” Utah Code Ann. § 77-15-1 (West). For purposes of trial

a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in:

- (1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or
- (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding

Id. § 77-15-2. Thus, in statutory shorthand, Mr. Galindo could be incompetent to stand trial if he was “suffering from . . . mental retardation resulting . . . in . . . his ability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.” *Id.*

Trial counsel asked for a review of Mr. Galindo’s competency because, he stated, “In conversing with Mr. Galindo, in the past several court hearings, Mr. Galindo does not appear to be able to comprehend what is going on. Or make rational decisions regarding this case.” R.37.

The subsequent psychologists’ reports confirmed trial counsel’s observations. The Hawks Report concluded that Mr. Galindo’s IQ was 54, plus or minus 5—falling “within the mental retardation/intellectual impairment range of intellectual functioning.” R.56; R.60. The Wilkinson Report used the WASI test,

which placed Mr. Galindo’s IQ at 33—landing him in the bottom fifth percentile. R.45. The Wilkinson Report also stated that Mr. Galindo “is not able to consult with his attorney and participate in the proceeding against him with a reasonable degree of rational understanding.” R.41. That report also acknowledged Mr. Galindo’s confusion in court. R.48.

All of this comes together to paint a very clear picture of a person who “is incompetent to proceed” because “he is suffering from . . . mental retardation resulting . . . in his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.” Utah Code Ann. § 77-15-2.

Trial counsel is not faulted with erring if, under an objective standard of reasonableness, there is any tactical basis for his actions. *Campos*, 2013 UT App 213, ¶ 23; *Jamieson*, 2017 UT App 236, ¶ 32. Trial counsel is also granted the head-start of receiving the presumption that “the challenged action might be considered sound trial strategy.” *Campos*, 2013 UT App 213, ¶ 23.

There can be no sound trial strategy that includes sending a cognitively impaired client to stand trial for a crime he maintains he never committed. That is not tactical or objectively reasonable. Trial counsel believed Mr. Galindo was impaired enough to ask the court to examine his competency because “in the past several court hearings, Mr. Galindo does not appear to be able to comprehend what is going on. Or make rational decisions regarding this case.” R.37.

After receiving reports stating that medical professionals had determined that Mr. Galindo’s low IQ did indeed place him well within the mental retardation range, that Mr. Galindo was struggling to understand the proceedings, and that he was “not able to consult with his attorney and participate in the proceeding against him with a reasonable degree of rational understanding,” R.41; Utah Code Ann. § 77-15-2, there is no conceivable tactical basis for trial counsel’s stipulation to competency.

1.2 Trial counsel’s stipulation to competency harmed Mr. Galindo, because the trial court relied on it instead of conducting its own review of the issue

In addition to showing error, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

A person may meet the statutory incompetency test in many ways. One way is to show

- (1) that you are “suffering from . . . *mental retardation* resulting . . . in”
- (2) “[your] *inability to consult with [] counsel* and to *participate* in the proceedings against [you] with a *reasonable degree of rational understanding.*”

Utah Code Ann. § 77-15-2 (West) (emphases added).

The mental retardation aspect of the test is clearly met in Mr. Galindo: mental retardation “is clearly defined by the American Psychiatric Association” as

having a measured IQ of 70 and below. R.60. Mr. Galindo's IQ is reportedly about 54, plus or minus 5, which is on his best day somewhere closer to 59—still 11 points shy of 70. And one report stated he was in the bottom fifth percentile. R.45.

What's more, one report in no uncertain terms stated that he was "not able to consult with his attorney and participate in the proceeding against him with a reasonable degree of rational understanding." R.41; Utah Code Ann. § 77-15-2.

But at the competency hearing, trial counsel failed to argue on Mr. Galindo's behalf that Mr. Galindo was incompetent even though, as the psychologists' reports indicated, his IQ placed him far below the mental retardation range, he was struggling to understand the proceedings, and he was unable to participate or counsel with his attorney in a rational way. R.41.

Instead, at the competency hearing, trial counsel stipulated that Mr. Galindo was competent to stand trial. R.378. And the trial court relied on trial counsel's stipulation, giving as one of its reasons for entering a finding of "competent to proceed" the "stipulation of counsel." R.379.

Had trial counsel argued the above to the court and provided the court with personal accounts of dealings with Mr. Galindo, the court would have at least had an opportunity to assess Mr. Galindo's competency instead of relying on the stipulation. Surely had counsel not stipulated to competency, the court would have seen that Mr. Galindo's incompetency precluded him from standing trial. At

the very least, this court's confidence in the outcome of the competency proceeding should be seriously undermined.

2. Trial counsel provided ineffective assistance when he failed to talk with Mr. Galindo's psychologist to discuss Mr. Galindo's ability to counsel with him at trial or to participate in the proceedings

Trial counsel provided constitutionally ineffective assistance when he failed to discuss with one psychologist Mr. Galindo's ability to counsel with him at trial or to participate in the proceedings against him.

To show ineffective assistance of counsel, Mr. Galindo must show (1) error, i.e. "that [his] counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

2.1 Trial counsel erred when he failed to discuss his observations with Dr. Hawks, who was assessing his client's competency at his own request

To show attorney error, Mr. Galindo must show "that counsel's representation fell below an objective standard of reasonableness considering all the circumstances," "overcom[ing] the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Campos*, 2013 UT App 213, ¶ 23.

Before trial was scheduled, trial counsel requested that the court evaluate Mr. Galindo's competency. R.34. As the basis for the competency evaluation, trial counsel stated, "In conversing with Mr. Galindo, in the past several court

hearings, Mr. Galindo does not appear to be able to comprehend what is going on. Or make rational decisions regarding this case.” R.37. The court ordered two psychologists to examine Mr. Galindo. R.38. The Hawks Report explained that Dr. Hawks had not been able to speak with Mr. Galindo’s trial counsel before making his ultimate conclusion regarding Mr. Galindo’s competence, despite an attempt to contact him during the course of the evaluation. R.65.

Trial counsel called for the evaluation himself based upon his belief that his client was incompetent to stand trial. Trial counsel has submitted an affidavit explaining why he believed—and still believes—his client was incompetent to stand trial. (Randy Richards Aff. Add. D.); *see infra* § 2.2 (including the substance of the affidavit in arguing prejudice). That affidavit supports a finding a finding that Mr. Galindo could not participate in the trial or counsel with his trial counsel meaningfully. *Id.*; Utah Code Ann. § 77-15-2.

In light of trial counsel’s belief that his client was incompetent to stand trial, there is no conceivable tactical basis for trial counsel’s decision not to discuss Mr. Galindo’s ability to counsel with him and participate in the proceedings when trial counsel requested a psychological evaluation and competency hearing himself. *See Jamieson*, 2017 UT App 236, ¶ 32.

2.2 Trial counsel’s failure to talk to Dr. Hawks harmed Mr. Galindo, as Dr. Hawks could not consider trial counsel’s own personal interactions with Mr. Galindo in making his conclusions

A “defendant must show that 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.*

Mr. Galindo has filed a rule 23B motion concurrently with this brief. Rule 23B motions are used to “supplement the record with known facts needed for an appellant to assert an ineffectiveness of counsel claim on direct appeal.” *State v. Curtis*, 2013 UT App 287, ¶ 15, 317 P.3d 968 (internal quotation marks omitted).

These motions must

- (1) contain a nonspeculative allegation of facts that
- (2) do not fully appear in the record, which, if true,
- (3) could support a determination that counsel’s performance was deficient, and
- (4) demonstrate that the defendant suffered prejudice as a result.

Id. Additionally, rule 23B motions must “be accompanied by affidavits . . . that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance.” Utah R. App. P. 23B(b).

In an affidavit to this court supporting a 23B motion for remand, trial counsel tells this court what he would have told Dr. Hawks:

- It was abundantly clear that Mr. Galindo was intellectually disabled;
- Mr. Galindo was unable to assist with preparation for trial;

- Mr. Galindo could not give trial counsel information about the incident, making it impossible to get adequate witnesses for the defense;
- Mr. Galindo did not appear to be able to understand the proceedings;
- Mr. Galindo would agree with anything trial counsel suggested;
- Trial counsel tested Mr. Galindo's ability to counsel with him at trial by asking him two questions in a row, both suggesting totally opposite answers;
- Mr. Galindo would respond in the affirmative to two totally opposing questions in a row;
- Mr. Galindo was conversant and happy and did not understand the gravity of the offenses and did not understand there was a possibility he could lose at trial;
- Had he connected with Dr. Hawks, trial counsel would have been able to give him information as to his frustrations trying to prepare a defense for Mr. Galindo due to his inability to understand the gravity of the charges;
- Mr. Galindo could not adequately testify at trial;
- Under normal circumstances, trial counsel would have put Mr. Galindo on the stand to explain where he was at the time of the attempted murder, but it was impossible due to Mr. Galindo's

intellectual disability, his inability to understand complex questions, and his total inability to be able to withstand any kind of cross examination;

(Randy Richards Aff. Add. D.).

Together, the evidence of trial counsel's interactions with Mr. Galindo and the undisputed conclusions in the psychologists' reports that Mr. Galindo was suffering from mental retardation would have led the court to conclude that Mr. Galindo was incompetent.

A person is incompetent if he is (1) suffering from mental retardation that results in (2) his inability to consult with counsel and participate in the criminal proceedings with a reasonable degree of understanding. Utah Code Ann. § 77-15-2 (West) (emphases added).

Mr. Galindo undisputedly meets the first prong: he was suffering from mental retardation. Mental retardation "is clearly defined by the American Psychiatric Association" as having a measured IQ of 70 and below. R.60. The Hawks Report reported that Mr. Galindo's IQ "fell within the mental retardation/intellectual impairment range of intellectual functioning"—it reported his IQ as 54, plus or minus 5. R.56; R.60. The Wilkinson Report placed Mr. Galindo at an IQ score of T=33, placing him in the fifth percentile. R.45.

Mr. Galindo also meets the second prong: he was unable to consult with his attorney and participate in the proceedings with a reasonable degree of understanding. Trial counsel's affidavit explains that Mr. Galindo was unable to

assist with preparation for trial; could not give trial counsel information about the incident, making it impossible to get adequate witnesses for the defense; did not appear to be able to understand the proceedings; and would agree with anything trial counsel suggested. (Randy Richards Aff. Add. D.). In fact, trial counsel had a hunch that Mr. Galindo was not able to comprehend what he was suggesting, and so he tested Mr. Galindo's consistency and ability to counsel with him at trial by asking him two questions in a row, both suggesting totally opposite answers. *Id.* Mr. Galindo would respond in the affirmative to both questions.

Aside from not being able to counsel with his trial attorney, his trial attorney also did not believe Mr. Galindo was mentally equipped to withstand testifying on the stand—an option that should be available to all defendants. But trial counsel attests that Mr. Galindo could not adequately testify at trial because of his intellectual disability, his inability to understand complex questions, and his total inability to be able to withstand any kind of cross examination. (Randy Richards Aff. Add. D.).

Had Mr. Galindo's trial counsel spoken with Dr. Hawks, all of this information would have been available to the doctor and to the trial court. Not only could Dr. Hawks had tested Mr. Galindo in the way that counsel did, but the trial court itself could have tested him for consistency in answering questions. And not only would the doctor's assessment of Mr. Galindo's competency likely have changed, but on its own accord the court's assessment would also likely have changed.

3. The above errors cumulate to warrant reversal on appeal because together they raise sufficient doubt as to whether Mr. Galindo should have been found competent to stand trial

Trial counsel committed two prejudicial errors here. First, trial counsel stipulated to Mr. Galindo's competency after he called for an evaluation and hearing on the matter and in the face of evidence that Mr. Galindo was indeed incompetent to stand trial. *See supra* § 1. And the trial court relied in part on that stipulation. And second, trial counsel failed to discuss his observations and interactions with Mr. Galindo with Dr. Hawks in support of the Hawks Report. *See supra* § 2. Each of these errors standing alone caused sufficient prejudice to warrant reversal. But if this court considers that the prejudice stemming from these errors individually is insufficient to reverse, then it should apply the cumulative error doctrine.

“Under the doctrine of cumulative prejudice, [an appellate court] will reverse if the cumulative effect of the several errors undermines our confidence that a fair trial was had.” *State v. King*, 2017 UT App 43, ¶ 38, 392 P.3d 997 (quotation omitted). “In assessing a claim of cumulative error, [appellate courts] consider all the identified errors, as well as any errors [the courts] assume may have occurred.” *Id.* (quotation omitted). “When reviewing a claim of cumulative error, [appellate courts] apply the standard of review applicable to each underlying claim of error.” *State v. MacNeill*, 2017 UT App 48, ¶ 53, 397 P.3d 626 (quotation omitted).

For an ineffective assistance of counsel claim, defendants must prove prejudice flowing from trial counsel’s error. *Strickland*, 466 U.S. at 686. In the prejudice inquiry, trial counsel’s deficiencies must often be considered cumulatively as a whole, not item-by-item. *See id.* at 695; *see also Williams v. Taylor*, 529 U.S. 362, 397 (2000).

“When counsel’s representation is deficient in several respects, we do not try to measure the result of each individual error; instead we evaluate how the errors affected the overall fairness of the proceeding.” *United States v. Medlock*, 645 Fed. App’x 810 (10th Cir. 2016); *see also Strickland*, 466 U.S. at 694–95 (repeatedly stating prejudice inquiry in aggregate terms); *see also Pavel v. Hollins*, 261 F.3d 210, 216 (2d Cir. 2001) (examining the cumulative weight of defense counsel’s flaws rather than the effect of them standing alone).

“[C]umulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of trial is such that collectively they can no longer be determined to be harmless.” *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). “Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless.” *Id.*; *see State v. Perea*, 2013 UT 68, ¶ 97, 322 P.3d 624 (reciting test for cumulative error).

This court should remand here. The errors present in this case concerning the competency hearing are numerous. Trial counsel erred when he stipulated to Mr. Galindo's competency and when he failed to discuss his interactions with Mr. Galindo with Dr. Hawks. Both issues on appeal go to whether Mr. Galindo should have been tried at all.

Trial counsel should never have stipulated to Mr. Galindo's competency when there was so much evidence supporting a determination of incompetence. There was more than enough evidence that Mr. Galindo satisfied the mental retardation aspect of the incompetency test. *See* R.60 (mental retardation "is clearly defined by the American Psychiatric Association" as having a measured IQ of 70 and below). Mr. Galindo's IQ is reportedly about 54, plus or minus 5, which is on his best day somewhere closer to 59—still 11 points shy of 70. Another report stated he was in the bottom fifth percentile. R.45. And one of the reports in no uncertain terms stated that Mr. Galindo was "not able to consult with his attorney and participate in the proceeding against him with a reasonable degree of rational understanding." R.41; Utah Code Ann. § 77-15-2.

And had trial counsel made himself available to discuss his interactions with Mr. Galindo with Dr. Hawks so that they could be included in the Hawks Report, even more evidence would have supported a finding that. Trial counsel's affidavit affirms that Mr. Galindo was unable to assist with preparation for trial and could not give trial counsel information about the incident, making it

impossible for him to get adequate witnesses for Mr. Galindo's defense. He states that Mr. Galindo did not appear to be able to understand the proceedings and would agree with anything trial counsel suggested—even if the answers opposed each other. (Randy Richards Aff. Add. D.). What's more, trial counsel did not believe that Mr. Galindo could adequately testify at trial because of his intellectual disability, his inability to understand complex questions, and his total inability to be able to withstand any kind of cross examination. (Randy Richards Aff. Add. D.).

In light of the above, the result of Mr. Galindo's competency hearing is far from trustworthy. Imagine a hearing where the doctors and trial court could consider the evidence included in trial counsel's affidavit coupled with a vigorous—or even competent—argument from trial counsel on Mr. Galindo's behalf. Trial counsel would have argued that Mr. Galindo was without a doubt unable to counsel him in preparation for his defense or to participate in defending the charges against him. And counsel would have provided details to the court supported his allegations. The outcome of that hearing could have been quite different than the outcome of the hearing Mr. Galindo got.

Trial counsel's double-whammy of (1) stipulating to competency and (2) failing to talk to Dr. Hawks amounts to almost total silence from trial counsel. At his competency, Mr. Galindo—for all intents and purposes—was left without an

advocate. These two issues should cumulate to obliterate this court's confidence in the outcome of Mr. Galindo's competency hearing.

Conclusion

Mr. Galindo didn't get a fair shake at his competency hearing. Trial counsel stipulated to Mr. Galindo's competency when both psychologists' reports indicated that Mr. Galindo's IQ placed him far below the mental retardation range.

Trial counsel likewise failed to discuss with one psychologist Mr. Galindo's lack of ability to counsel with him at trial or to participate in the proceedings against him. There is no conceivable tactical basis for trial counsel's decision not to discuss the case with him when trial counsel himself requested the evaluation and competency hearing.

Cumulative error demands reversal here. For all intents and purposes, trial counsel's errors left Mr. Galindo without an advocate at his competency hearing. This court's confidence in the outcome of Mr. Galindo's competency hearing should be shattered.

DATED this 26th day of July, 2018.

/s/ Cherise Bacalski

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***Attorneys for
Defendant/Appellant***

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11) and 24 (g) because this brief contains _____ words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21.

DATED this 26th day of July, 2018.

_____/s/ Cherise Bacalski_____

Certificate of Service

This is to certify that on July 26, 2018, I caused two true and correct copies of the foregoing to be served on the following via first class mail, postage prepaid, along with a courtesy brief on CD, which was also filed with the Court of Appeals:

Utah State Attorney General's Office
Appeals Division
160 East 300 South
6th Floor
P.O. Box 140854
Salt Lake City, UT 84114

_____/s/ Cherise Bacalski_____

Addendum A
The Hawks Report

PRIVATE

Addendum B
The Wilkinson Report

PRIVATE

Addendum C
The Sentencing Hearing

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APPEARANCES

For the Plaintiff: GAGE H. ARNOLD
Deputy County Attorney

For the Defendant: RANDALL W. RICHARDS
Attorney at Law

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OGDEN, UTAH - NOVEMBER 16, 2016

JUDGE ERNIE W. JONES PRESIDING

(Transcriber's note: Speaker identification
may not be accurate with audio recordings.)

PROCEEDINGS

THE COURT: All right. This is state versus
Patrick Galindo, it's case 2013, 2681 and 1398, and we
did a competency evaluation. I have two reports, one
from Dr. Wilkinson and one from Dr. Hawks. I believe
both of those indicates that Mr. Galindo was competent to
proceed; is that how you read that?

MR. RICHARDS: That's the way I read it as well.
I didn't personally talk to Mr. Hawks or Dr. Hawks, I
should say, and confirm that as well.

THE COURT: Okay.

MR. RICHARDS: So given that, I think we're
willing to stipulate to competent based on those two
reports.

THE COURT: Okay.

MR. RICHARDS: And we'd like to set a
preliminary hearing on the matter.

THE COURT: All right. And the state have any
objection to that finding?

MR. ARNOLD: No, your Honor, thank you.

THE COURT: All right. Based on the two reports

1 and stipulation of counsel the Court will enter a finding
2 then that Mr. Galindo is competent to proceed, and we
3 want to set a prelim then on case 19 -- or 1398, right?

4 MR. RICHARDS: Correct.

5 THE COURT: Attempted homicide.

6 MR. RICHARDS: Yes.

7 THE COURT: And do you want the affidavits just
8 to trail for now or --

9 MR. RICHARDS: Yeah, that would be what we would
10 like, yes.

11 THE COURT: All right. How long do you think
12 we're gonna need on the prelim?

13 MR. RICHARDS: I think one day's plenty.

14 THE COURT: One day, or?

15 MR. RICHARDS: Yes one.

16 THE COURT: What are you thinking in terms of
17 your schedules, do you want me to try for December some
18 time, or --

19 MR. ARNOLD: I am going to work with both my
20 schedule and Mr. Shaw's schedule.

21 THE COURT: Okay. I just had a case go off on
22 December 1, I don't know if that gives you enough time.

23 MR. ARNOLD: That's --

24 THE COURT: Too quick?

25 MR. ARNOLD: Yeah.

1 MR. RICHARDS: Yes.

2 MR. ARNOLD: Too quick.

3 THE COURT: Okay. I kind of thought so. I've
4 also got some time in the last -- the end of December, I
5 don't know if that's too -- I've got the 27th, 29th and
6 30th all open.

7 MR. RICHARDS: I could do the 27th.

8 MR. ARNOLD: Mr. Shaw is unavailable that last
9 week.

10 THE COURT: Oh, isn't he?

11 MR. ARNOLD: I believe he's --

12 THE COURT: Is he gone the whole week?

13 MR. ARNOLD: He's going to be gone from
14 Christmas until after the new year.

15 THE COURT: Okay, so we're looking at January?

16 MR. ARNOLD: Yes.

17 THE COURT: How about the third or the 5th of
18 January, I've got those days open.

19 MR. ARNOLD: You know, I'm currently --

20 MR. RICHARDS: Third I have a trial.

21 THE COURT: Okay.

22 MR. ARNOLD: And on the 6th, I start a murder
23 trial in Judge Bean's court and that runs through the
24 17th.

25 THE COURT: Okay.

1 MR. ARNOLD: We just kind of have an odd
2 schedule that way.

3 THE COURT: Couldn't do it on the 5th? Did you
4 say the 6th?

5 MR. ARNOLD: The 6th is when I begin that trial.

6 THE COURT: How long does it go? Your trial?

7 MR. RICHARDS: You said the 17th.

8 THE COURT: 17th? Okay.

9 MR. ARNOLD: We're in February, right?

10 MR. RICHARDS: No, January.

11 MR. ARNOLD: Okay. Oh, excuse me, I was looking
12 at the wrong month.

13 THE COURT: How about the 24th of January, I've
14 got that open?

15 MR. RICHARDS: I could do the 24th of January.

16 THE COURT: Okay.

17 MR. ARNOLD: That would be fine, we could find
18 -- well, let me check one thing. Mr. Shaw has a trial
19 scheduled right now.

20 THE COURT: On the 24th?

21 MR. ARNOLD: Yes.

22 THE COURT: How about the 30th or 31st of
23 January?

24 MR. RICHARDS: I'm gone that entire week, your
25 Honor, the 30th, the week of the 30th.

1 THE COURT: How about February 2, Ground Hog
2 day?

3 MR. RICHARDS: I'm gone that whole week.

4 THE COURT: Oh, you're gone the whole week?

5 MR. RICHARDS: Yeah, yeah.

6 THE COURT: Okay. How about the 7th of
7 February?

8 MR. ARNOLD: I misspoke, I apologize, that's
9 when I actually start the murder trial in Judge Bean's
10 court, so what was the day in January?

11 THE COURT: In January, I had the 5th of
12 January, a Thursday, open.

13 MR. ARNOLD: Is that --

14 MR. RICHARDS: And I could do that if we start
15 it at like 9:15.

16 THE COURT: Or 9:30, I can give you 9:30.

17 MR. RICHARDS: 9:30, would that work?

18 THE COURT: Do you want to try that, January
19 5th?

20 MR. ARNOLD: Mr. Shaw told me, try not to set it
21 on that day, he's going to be out of town, so, he's quail
22 hunting.

23 THE COURT: Did we try the second or third of
24 January, or did somebody -- I just hate to go too much
25 further out.

1 MR. RICHARDS: The third I have a bench trial.

2 THE COURT: How about the second? So that's a
3 holiday?

4 MR. RICHARDS: That's a holiday.

5 THE COURT: Oh, that's right, New Year's, thanks
6 Wendy.

7 MR. ARNOLD: You just got the day off.

8 THE COURT: So let's see, we're into February
9 then, is that --

10 MR. RICHARDS: Other January days, none? I
11 mean, I could do the 12th, 13th, 18th, 19th.

12 THE COURT: I had 16, 17 open, but.

13 MR. ARNOLD: I think the 16th is going to be a
14 holiday as well.

15 THE COURT: In February?

16 THE CLERK: Yes. No, January.

17 THE COURT: Oh, I'm sorry, I'm into February, I
18 thought February 16th and 17th, was that --

19 MR. ARNOLD: Those are dates of the murder
20 trial.

21 THE COURT: Oh. All right. My gosh, I hate to
22 go much later. That's, November, December, that's four
23 months.

24 MR. RICHARDS: No other January dates like the
25 18th or 19th?

1 MR. ARNOLD: Let's see, January. Well, the 18th
2 is our law and motion day, but I could do the 17th, but
3 you couldn't?

4 MR. RICHARDS: 17th, I'm open.

5 MR. ARNOLD: That would work.

6 THE COURT: Oh, all right. January 17th. 9:00
7 okay?

8 MR. RICHARDS: I can do nine on that day, yes.

9 THE COURT: All right.

10 MR. RICHARDS: Okay.

11 THE COURT: Do you think one day then?

12 MR. RICHARDS: Yeah, I would think so.

13 THE COURT: All right. So we set January 17th,
14 which is a Tuesday, right?

15 MR. RICHARDS: At 9:00.

16 THE COURT: Nine a.m.

17 MR. RICHARDS: All day.

18 THE COURT: All right, got you a date there Mr.
19 Galindo. I was starting to worry. All right.

20 (Whereupon the matter was concluded.)

21 (Transcribed April 5, 2018)

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Addendum D
Trial Attorney Affidavit

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**IN THE SECOND DISTRICT JUDICIAL COURT
 OF AND FOR COUNTY OF WEBER, STATE OF UTAH**

State of Utah Plaintiff v. PATRICK GALINDO Defendant	AFFIDAVIT OF COUNSEL Case Number: 161901398 Judge: Direda
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STATE OF UTAH)
 :SS
 COUNTY OF DAVIS)

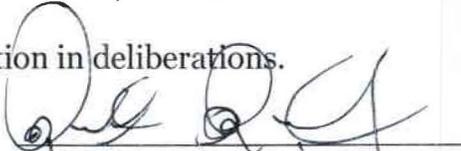
RANDALL W. RICHARDS, after being duly sworn upon his oath, states from firsthand knowledge of the facts and circumstances that:

1. I am a resident of the State of Utah, over the age of 18, and fully competent to make this Affidavit.
2. The matters stated below, unless stated to be made upon information and belief, are based upon my own personal knowledge, and if I were called to testify as a witness, I could and would competently attest thereto.
3. I am the trial attorney of Patrick Galindo.
4. During the proceeding it became abundantly apparent that Mr. Galindo was intellectually disabled, and thus unable to assist with preparation for trial or

adequately be able to testify at trial.

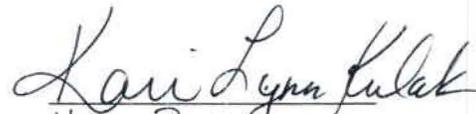
5. In conversing with Mr. Galindo, he did not appear to be able to understand the proceedings, and clearly was not able to give me information about the incident, making it impossible to gather adequate witnesses for the defense.
6. He was able to converse with me, and always seemed happy, but certainly did not understand the gravity of the offenses, and did not comprehend at all that there was a real possibility of losing the trial.
7. If had connected with Dr. Hawkes, I certainly would have been able to give him information as to my frustrations in trying to prepare a defense for Mr. Galindo due to his inability to understand the gravity of the charges, and the necessity of having my investigator contact witnesses to build a possible defense.
8. I also knew that attempting to put Mr. Galindo on the stand to testify in his own behalf, which under normal circumstances would have been the logical trial strategy given the nature of the offense and our claim that he was not even there at the time, was impossible due to the intellectual disability, his inability to understand complex questions, and his total inability to be able to withstand any kind of cross examination.
9. In my lengthy discussions with Mr. Galindo, I discovered that he would agree to anything that I suggested. In fact in testing my hunch on this, I would ask him two questions in a row, suggesting totally opposite answers, and he would answer in the affirmative to both questions.
10. Had I been able to convey this information to Dr. Hawkes, that may have swayed his opinion on competency.
11. I was also amiss in failing to bring in Dr. Hawkes or another psychologist to

inform the jury that Mr. Galindo was intellectually disabled, as that was one of the key components of the facts raised at trial, and that information was not given to the jury for their consideration in deliberations.


RANDALL W RICHARDS

SUBSCRIBED AND SWORN to before me by Randall W Richards on this 10th day of July, 2018.




Notary Public