No. _____

In the Supreme Court of the United States

STATE OF UTAH,

Petitioner,

v.

DOUGLAS A. LOVELL,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Utah

Petition for a Writ of Certiorari

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QUESTION PRESENTED

CAPITAL CASE

Nearly forty years ago, Respondent Douglas Lovell kidnapped, raped, and sodomized Joyce Yost. Because Yost reported the rape and testified at Lovell's preliminary hearing, Lovell kidnapped and murdered her, burying her somewhere in the Wasatch Mountains. Nearly ten years ago, a jury sentenced Lovell to death for his aggravated murder of Yost.

Remorse was a central theme of Lovell's mitigation case, presented primarily through three of his former ecclesiastical leaders—volunteer clergy in The Church of Jesus Christ of Latter-day Saints (Church)—and other religious-themed witnesses. The Utah Supreme Court vacated Lovell's death sentence and ordered a new sentencing proceeding because it determined that defense counsel did not adequately object to the State's cross-examination of one of these witnesses about the sincerity and authenticity of Lovell's alleged remorse.

Without any analysis of the facts and circumstances of Lovell's crime, or the eleven proved aggravating factors, the Utah Supreme Court concluded that the jurors were encouraged by the State's cross-examination of Lovell's ecclesiastical leader to forfeit their assessment of Lovell's remorse—and by extension their ultimate sentencing decision—to Church leadership.

The Question Presented is:

Did the Utah Supreme Court violate this Court's binding case law when it failed to (1)

properly assess *Strickland* deficient performance by considering the range of legitimate strategic reasons defense counsel may have had for not objecting to the State's cross-examination of one of Lovell's former ecclesiastical leaders, and (2) properly assess *Strickland* prejudice when, even assuming deficient performance, it failed to reweigh the totality of the aggravating and mitigating factors that still would have been before the jury absent any error by counsel?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

State v. Lovell (Lovell IV), Utah Supreme Court, No. 20150632-SC. Judgment entered July 25, 2024.

State v. Lovell (Lovell III), Utah Supreme Court, No. 20061025-SC, 262 P.3d 803 (Utah 2011). Judgment entered Aug. 30, 2011.

State v. Lovell (Lovell II), Utah Supreme Court, No. 20030262-SC, 114 P.3d 575 (Utah 2005). Judgment entered May 27, 2005

State v. Lovell (Lovell I), Utah Supreme Court, No. 930439-SC, 984 P.2d 382 (Utah 1999). Judgment entered June 22, 1999.

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The opinion of the Utah Supreme Court is reported at 2024 UT 25, —— P.3d ——.

JURISDICTION

The Utah Supreme Court entered judgment on July 25, 2024. Pet. App. 183a. An application for extension of time to file this petition was submitted on October 11, 2024, and on October 21, 2024, Justice Gorsuch granted an extension until November 22, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defense."

U.S. Const., amend. VI.

STATEMENT OF THE CASE

A. Lovell rapes Yost and she testifies against him.

One evening in 1985, Joyce Yost was at a restaurant having dinner with a friend. R8846:122, 134-35.[1] Lovell saw her leave the restaurant alone in her car, and he followed her home. R8846:135-39. As Yost

[1] The citations refer to the record as paginated on appeal in the Utah Supreme Court, with the number preceding the colon indicating the transcript number and the number following the colon indicating the page number within that transcript.

pulled into her carport, Lovell pulled in behind her, opened her car door, and asked if she would go get a drink with him. R8846:138-39. When Yost declined, Lovell grabbed her throat and pushed her down across the seat, forcing his way into her car. R8846:140-43. Lovell threatened to tear out her throat if she said anything. R8846:142. Still, Yost fought back, grabbing her keys and hitting him on the side of the face. R8846:145. Lovell became even more violent. R8846:145-46. He tore Yost's clothes and raped her. R8846:146.

After raping Yost, Lovell dragged her to his car and threw her inside with her head on the floor and her feet in the air. R8846:147-48. He warned her that he had a gun and would use it if she "made one wrong move." R8846:148. Lovell held Yost's head down as he drove her to his house. R8846:148-50; 8847:176.

There, Lovell raped Yost two more times and sodomized her. R8846:152; 8847:176-77. Lovell then drove Yost home and during the drive tried to convince her "what a nice person he was," adding that "normally he gives girls flowers[; he] doesn't do things like this." R8846:153-54.

Yost reported the rape to police, Lovell was charged with aggravated kidnapping and aggravated sexual assault, and Yost testified at the preliminary hearing. R8846:122, 124-25, 156.

One month before trial was scheduled to begin, Lovell insisted to a detective that the case was "not going to trial." R8846:130-31. Ten days before trial, Yost went missing. R8846:131. But her preliminary hearing testimony was admitted at trial, and a jury convicted Lovell as charged. R8846:132.

B. Lovell tries to hire someone to kill Yost then does it himself.

Lovell was "very mad" at Yost for testifying against him. R8847:39. He had been to prison for aggravated robbery and theft and did not want to go back. R8847:39; 8849:125, 128, 131-32. He did not want Yost to testify at trial. R8847:39. So he decided to have her killed. R8847:39, 48-49.

Lovell offered one friend between $6,000 and $7,000 to kill Yost. R8847:41-43. The friend agreed and stole some guns with Lovell to use in the murder, but the friend disappeared without killing Yost. R8847:43-45.

Lovell paid another friend $800 to kill Yost. R8847:46, 122. Lovell went to a cabin with family on the agreed-upon day so he would have an alibi, but again the friend disappeared without killing Yost. R8847:47-48.

So Lovell took matters into his own hands and began to plan how he would kill Yost. R8847:48-49. He had his wife drive him to Yost's house twice to case it out. R8847:49. He found an unlocked window that he decided he would use to enter the house when he returned. R8847:49.

Lovell told his wife the evening of August 10, 1985, that he was going to kill Yost that night. R8847:50, 182. Lovell's wife drove him to Yost's home and dropped him off around midnight. R8847:50-51. Lovell put on gloves, covered his hair with a nylon, then climbed into Yost's house through the kitchen window. R8847:54, 182-83. He found Yost asleep in her bed. R8847:57. Hunting knife in hand, he covered her mouth so she could not scream. R8847:57, 183-84.

Yost raised her hand instinctively and sliced her fingers on the knife, getting blood on the sheets which soaked through to the mattress. R8847:57, 184-86.

Yost pleaded with Lovell not to kill her, offering to talk to the police and "call everything off." R8847:57, 184-85. Lovell tried to calm her by telling her he was not there to kill her, just kidnap her—that he would take her to some friends and "hold" her there "until after the trial." R8847:57. While Lovell tried to clean or hide the blood stains on the mattress, he made Yost get dressed and pack a suitcase so that it would look like she was going on a trip. R8847:57-58.

When they left Yost's house, Lovell planned to put Yost in the trunk of her car. R8847:187-88. But Yost pleaded with him not to, so Lovell relented and let her ride in the car—but only after he sedated her with valium so that she would not give him away if he got pulled over. R8847:187-88.

Lovell drove Yost up into the Wasatch Mountains, pulled off the road, and led her up a hill. R8847:58. There, Lovell strangled Yost, and when she fell to the ground, he stomped on her neck. R8847:58-59. After she was dead, he covered her body with leaves and left. R8847:59.

Lovell abandoned Yost's car in another location, burned the clothes she had packed, and threw Yost's suitcase and his knife in a river. R8847:55-56, 58, 189. With hunting season approaching, Lovell worried that someone might find Yost's body, so he returned a couple weeks later with a shovel and buried her. R8847:198. But first, Lovell took Yost's watch from her wrist and later tried to pawn it. R8847:154, 198. Yost's body has never been found. R8854:238-39.

After murdering Yost, Lovell faked a back injury, quit his job, and began walking with crutches. R8850:25. He figured that the bloody mattress would lead police to think Yost was killed in, then removed from, her house. *Id.* So Lovell wanted to be able to argue that he was physically incapable of climbing in through a window and carrying her body out of the house. *Id.*

C. Lovell is convicted and sentenced to death, twice.

Seven years later, Lovell was charged when his now ex-wife implicated him in exchange for a promise of immunity, and the police obtained a recording of Lovell confessing the murder to his ex-wife when she visited him in prison. *State v. Lovell (Lovell I)*, 984 P.2d 382, 385 (1999); R8850:26.

After Lovell tried unsuccessfully to suppress his confession and his ex-wife's statements, the parties signed a memorandum of understanding detailing the terms of a potential plea agreement, which included a joint sentencing recommendation of life without parole. *Id.* at 385-86. But the agreement was contingent on Lovell leading authorities to Yost's body. *Id.* Lovell led officers to a spot in the mountains where he said he had buried Yost's body in a shallow grave R8853:97, although it was not the same spot that Lovell had told his ex-wife and another inmate that he had buried Yost, R8847:58; 8850:81; 8853:98. Officers searched the site extensively—visiting it five times with Lovell—but they never found Yost's remains. R8853:98, 101-03.

In 1993, Lovell pleaded guilty to aggravated murder without a plea agreement, and a judge sentenced him to death. Pet. App. 185a; *see also Lovell I*, 984

P.2d at 385. His conviction and sentence were affirmed on appeal. *Id.* at 392. Yet Lovell was later permitted to withdraw his guilty plea. Pet. App. 185a-86a.

Twenty-two years after first pleading guilty, now in 2015, Lovell was tried and again sentenced to death, this time by a jury. Pet. App. 186a, 197a. As now required by Utah law, Lovell's capital trial was divided into two parts: the guilt phase (determining Lovell's guilt or innocence of aggravated murder); and the penalty phase (determining aggravating factors, mitigation, and appropriate sentence—life or death). *See* Utah Code § 76-3-207(1)(a).

Lovell authorized his counsel to concede guilt before the jury and focus the defense solely on the penalty phase. Pet. App. 186a; R8845:289, 8846:77-78. The State presented evidence in the guilt phase about Lovell's rapes, kidnapping, and later murder of Yost—including Yost's preliminary hearing testimony about the rapes and kidnapping, statements Lovell made to his ex-wife describing how he killed Yost, and Lovell's testimony from his first sentencing where Lovell confessed to raping, kidnapping, and ultimately murdering Yost to keep her from testifying. Pet. App. 186a-87a.

At the conclusion of the guilt phase, the jury convicted Lovell of aggravated murder. *Id.* at 187a. In doing so, the jury found the following aggravating circumstances, making Lovell eligible for the death penalty:

- the murder was committed during 1) an aggravated burglary and 2) an aggravated kidnapping; and

- the murder was committed for the purpose of 1) retaliating against a witness for testifying; 2) preventing a witness from testifying; 3) preventing a person from providing evidence or participating in a legal proceedings or official investigation; and 4) disrupting or hindering any governmental function.

R8433; *see also* Utah Code §§ 76-3-202(2)(a), (3)(a).

During the penalty phase, the State presented testimony from several of Yost's family members about the impact of the murder on her family. Pet. App. 187a. The jury heard about Lovell's "lengthy criminal history," R8433, as well as evidence of several episodes of uncharged criminal conduct Lovell committed, including

- aggravated sexual assault;
- forcible sodomy;
- conspiracy to commit murder;
- witness tampering; and
- solicitation to commit aggravated murder.

R8510, 8531-37. And several law enforcement officers testified that Lovell "was untruthful, manipulative, … self-centered[,]" "cold, calculating, and controlling." Pet. App. 188a.

At the time of the murder, Utah law provided only two sentencing options for aggravated murder—life with the possibility of parole or death. *Id.* at 187a n.2. By the time of Lovell's second sentencing, life without parole had been added as a third option, and the statute gave Lovell the right to choose whether to present that option to the jury. *Id.* Lovell's counsel implored him to include life without parole as a sentencing

option as his best chance at avoiding the death penalty; however, Lovell repeatedly refused, giving the jurors only two options—death or life with the possibility of parole. *Id.*; *see also* R11626-27.

A parole officer testified that if Lovell were sentenced to life with the possibility of parole, "the parole board would 'have the authority to release [him] immediately.'" Pet. App. 188a.

Lovell's proffered mitigation had two themes: (1) diminished culpability, and (2) that he "was a changed person who had shown remorse and accepted responsibility for his crimes." *Id.* at 188a, 195a-97a.

Lovell presented two mental health experts in support of the first theme. A clinical and forensic psychologist testified that while Lovell had a choice about what he did, he was not as morally culpable as others. R8851:80-86, 91. He explained that Lovell had suffered from a variety of maladies throughout his life: genetic predisposition to substance abuse and dependence, mood disorders, and personality disturbance; prenatal amphetamine exposure; hyperactivity disorder; learning disability; neuropsychological deficits; teen onset drug and alcohol abuse; inadequate intervention and treatment; traumatic family life; parental substance abuse and mental illness; chronic absence of Lovell's father; chronic marital dysfunction; inadequate family structure, supervision, and guidance; and the death of his brother. R8851:87-91. The forensic psychologist further opined about a very low likelihood that Lovell would be violent in prison and that, if paroled, there was a low risk that Lovell would commit a future act of serious violence. R8852:67-84.

A neuropsychologist also testified. R8853:5. She began by noting that Lovell had suffered multiple

head injuries at ages four, six, eleven, sixteen, and nineteen. R8853:9-12. She stated that previous testing showed that Lovell suffered from a moderate degree of brain damage and that he had impairments in memory and executive functioning. R8853:12-13. The neuropsychologist also opined that her testing led to a primary diagnosis that Lovell suffered from mild neurocognitive deficits due to traumatic brain injury. R8853:43. She testified that Lovell reported that he works every weekday, spends time on his legal case, has completed forty-six high school and college-level independent study classes since 2001, and he is involved in at least three charities. R8853:20. The neuropsychologist further opined that she did not believe that Lovell was a psychopath. R8853:46-47.

Lovell presented twenty-three mitigation witnesses to show that he was a changed person—some through live testimony, some through transcripts of prior testimony, and some through letters. R8850:3; 8851:2; 8853:2-3, 226-27; 8854:2-3. Several prison officials testified that Lovell was a good inmate and was "polite, respectful, and took responsibility for his actions." Pet. App. 195a. The prison substance-abuse-program social worker opined that Lovell was remorseful for his crimes—an opinion she based on Lovell's statements to that effect, his demeanor, and his alleged efforts to help locate Yost's body. R8850:177, 188-90. Several witnesses discussed those efforts, including an expert in wildlife ecology who opined that Yost's body was not found because her remains could have been consumed or scattered by wildlife. R8853:98, 101-03, 236-37; 8854:56, 10, 14. Lovell's family members testified that he was kind, humble, and positive; that he would not commit another crime; and that they would support him were he paroled. Pet.

App. 195a. Letters from several pen-pals "described Lovell as encouraging, supportive, understanding, respectful, courteous, and a good friend." *Id.* One pen-pal expressed her conviction that Lovell's remorse was genuine. R8854:145. Another, a Catholic sister, wrote about her ministry to Lovell and what she learned of "his spiritual life." R8854:138-40.

Three of Lovell's ecclesiastical leaders from his time in prison also testified in support of this theme. Pet. App. 188a. They "described Lovell as very remorseful, a model prisoner, a hard worker, and a caring individual." *Id.* As described more fully below, the State cross-examined the first ecclesiastical leader extensively about the basis for his conclusions based on his religious interactions with Lovell. *Id.* at 188a-92a. Lovell's counsel objected at times but did not assert that these religion-based cross-examination inquiries and answers were categorically inadmissible. *Id.*

By trial counsel's own estimation, the star witness underpinning the changed-man theme was Rebecca Douglas, the founder of a charity to which Lovell contributed. R13488. She described Lovell as sincere, thoughtful, remorseful, and changed from the person he had been when he committed his violent crimes against Yost. R8851:26, 34. She recounted a four-hour visit she had with Lovell in prison, where Lovell described his "come to Jesus" moment and Douglas used the example of Paul from the New Testament to help Lovell forgive himself. R8851:29-30, 52. She testified that she has worked with murderers and rapists through her charity work and that she could "feel the difference" between someone who has "truly changed" and someone who would only "pretend" so they could get something from her charity. R8851:47. She further opined that Lovell was "the most penitent person" she

had ever met, that his remorse and desire for reconciliation with God was genuine, and that she would have no hesitation inviting him into her home were he released on parole. R8851:31-32, 37, 45-46. Trial counsel later recalled that after Douglas finished her testimony, the sense in the courtroom was that she "had won the case" for Lovell. R13488-89.

But the jury sentenced Lovell to death. Pet. App. 197a. As non-statutory aggravators—in addition to the aggravators that made Lovell death-eligible—the jury specifically found that Lovell had committed five uncharged felonies:

- an additional instance of aggravated sexual assault of Yost when he first accosted her;
- an uncharged instance of forcible sodomy of Yost on that same night;
- conspiracy with his friend to murder Yost;
- conspiracy with another friend to murder Yost; and
- witness tampering for threatening the second friend for testifying against him.

R8510,8531-36; *see also* Utah Code § 76-3-207(2)(a)(ii), (iv).

Lovell appealed to the Utah Supreme Court.

D. The Utah Supreme Court finds ineffective assistance of counsel, vacates Lovell's sentence, and orders a new sentencing proceeding.

On appeal, Lovell raised multiple challenges to his convictions and death sentence, only two of which the Utah Supreme Court addressed—one about his

conviction and the other about his sentence. Pet. App. 184a. The court rejected Lovell's challenge to his conviction based on the overwhelming evidence of Lovell's guilt. *Id.* at 184a, 202a-03a, 205a. As to the penalty phase, the court considered only one of Lovell's many ineffective-assistance claims: whether counsel unreasonably chose not to object to the State's cross-examination of one of Lovell's religious witnesses about Lovell's excommunication from the Church and related Church doctrine about remorse and repentance. *Id.* at 205a.

The supreme court prefaced its analysis by correctly identifying the applicable *Strickland*[2] standard, ostensibly recognizing that it must indulge a "strong presumption" in favor of competent representation, that Lovell was required to specify counsel's acts or omissions that were deficient, and that Lovell carried the burden to prove that his counsel's performance was objectively unreasonable. *Id.* at 206a. But then it did not follow those standards.

1. The Utah Supreme Court's deficient-performance analysis.

Citing Lovell's remorse and "changed man" theme, the supreme court recounted the direct-examination testimony of mitigation witness John Newton, the first of three religious volunteer clergy Lovell presented. *Id.* at 212a. According to the supreme court, trial counsel's "questioning of Newton never strayed into religion," but Newton testified that he talked with Lovell about the Ten Commandments, the Bible, and the Book of Mormon. *Id.* at 213a. Newton also stated

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[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

that Lovell was remorseful and was "regarded as a model prisoner." *Id.*

Despite what the court viewed as a "lack of religious testimony during Lovell's direct examination of Newton, the State questioned Newton almost exclusively about religious topics." *Id.* at 213a-14a. This included Lovell's prior membership in the Church, Newton's decision not to terminate Lovell's membership in the Church, Lovell's subsequent excommunication from the Church for the murder of Yost by another ecclesiastical leader, that readmission into the Church would require the approval of the Church's senior leadership (the First Presidency) based on Lovell's remorse and repentance, that repentance entails a full confession of wrongdoing, and that Lovell has not been readmitted into the Church. *Id.* at 214a-19a. Trial counsel objected only a few times for foundation reasons and because a question was beyond the scope of direct examination, both of which the trial court overruled. *Id.* at 214a-15a, 218a-19a.

Based on the religious nature of the testimony and the limited number of objections, the supreme court concluded that "reasonable counsel would have recognized both the problems with [the religious] testimony and its potential to invite the jury to base its decision on something other than its own assessment of Lovell." *Id.* at 219a. The court further concluded that "reasonable counsel would have done something—either object to the entire line of questioning, seek curative instructions, or move for a mistrial—to protect their client." *Id.*

The supreme court acknowledged that Lovell failed to overcome *Strickland*'s strong presumption that trial counsel acted reasonably and failed to meet

the requirement to specifically identify trial counsel's acts or omissions that were alleged not to have been the result of reasonable professional judgment, which meant he had to pinpoint "what objection trial counsel should have made" to the State's questioning. *Id.* at 219a n.21, 221a-22a. Reasoning that death is different, however, the Court decided to "look past briefing deficiencies" and reached the issue anyway. *Id.* at 219a n.21.

First, the supreme court determined that penalty-phase counsel's few objections "missed the mark." *Id.* at 221a-22a. Second, the court held that even "more troubling than the misaimed objections are the many instances counsel neglected to object at all. Counsel did not object to the testimony about Lovell's excommunication nor the testimony about Church doctrine concerning repentance and remorse." *Id.* at 222a. Without crediting that only trial counsel can gauge the flow of testimony and its effect on the jury, the court was "trouble[ed]" by trial counsel's decision to resist objecting to the cross-examination of Lovell's clergyman because Newton's cross-examination testimony was, according to the court, "obviously improper." *Id.*

Citing *Caldwell v. Mississippi*, 472 U.S. 320, 328-39 (1985), the supreme court found that Newton's cross-examination testimony invited the jury to place responsibility for determining Lovell's sentence elsewhere. *Id.* In other words, the court reasoned, Newton's testimony did not merely suggest that Lovell's excommunication from the Church and "subsequent failure to be readmitted by its First Presidency was evidence that he lacked genuine remorse," but, in the court's opinion, it "insinuated that the jury could consider whether the Church had found Lovell

sufficiently remorseful as a proxy for deciding themselves whether he was truly a changed person." *Id.* at 222a-23a.

The court surmised that Newton's testimony about Church procedures "invited the jury 'to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere' because the Church had already determined that Lovell was not remorseful by not readmitting him to membership." *Id.* In short, the court speculated that the testimony encouraged jurors to assess whether Lovell was remorseful and a changed man by "substituting an ecclesiastical determination of Lovell's rehabilitation for the jurors' own review of the evidence. Any reasonable attorney would have recognized the risk Newton's testimony posed to Lovell's mitigation case and challenged it." *Id.* at 223a.

Based on the court's conjecture about the effect Newton's religious testimony had on the jurors, the court determined that "there was no reasonable basis for Lovell's trial counsel to forego objecting to Newton's religious testimony. The State was eliciting evidence that undermined the entire theory of mitigation—that Lovell was a changed man who was remorseful for his crimes." *Id.* at 225a.

The court acknowledged, but rejected, the State's *Strickland*-based argument that a reasonable basis existed for counsel not to object. *Id.* at 235a. The State argued that because religious themes played a central role in Lovell's defense—not only through the ecclesiastical leaders, but also through Douglas's testimony—"'counsel could reasonably think that if he argued that discussion of religious matters was improper, the court would also prevent Lovell from

presenting evidence he wanted to present.'" *Id.* at 226a. But the court rejected this argument, reasoning that the witnesses' testimony was not really religious. *Id.* The court recognized that Douglas's testimony contained numerous religious references, such as forgiveness, remorse, the New Testament, Paul the Apostle, the atonement, and Jesus Christ. *Id.* at 231a-32a. Yet the court believed such references did not make her testimony overtly religious—they just gave it "a religious flavor." *Id.* at 228a. According to the supreme court, while Douglas's subsequent testimony "contained numerous religious references," her testimony that Lovell was remorseful "did not rely on religion" and therefore, presumably, was not objectionable. Pet. App. 233a.

The supreme court also noted that during posttrial proceedings on Lovell's ineffective-assistance claim, Douglas revealed that she intended to give even more religious testimony; however, trial counsel did not elicit that testimony. *Id.* at 233a-34a. In short, the supreme court believed that in light of Douglas's actual testimony and the testimony she wishes she would have provided but that trial counsel supposedly avoided, "the religious aspects of Douglas's testimony were not part of counsel's trial strategy." *Id.* at 234a. According to the Utah Supreme Court, a primary reasonable basis for penalty-phase counsel's decision not to object to Newton's religious testimony—to avoid the risk that Douglas's testimony might be curtailed by the trial court—simply did not exist. *Id.*

In addition, the supreme court held that even if further objections to Newton's testimony ran the risk of excluding additional mitigating evidence Lovell planned to present, "the failure to object was *still* unreasonable." *Id.* at 234a-35a (emphasis added). And

that is because not objecting to testimony challenging the defense mitigation theory "belies any reasonable strategy." *Id.* On that *Strickland*-defying note, the court concluded that penalty-phase counsel lacked a reasonable strategy, and therefore, not objecting to Newton's religious testimony "was objectively unreasonable." *Id.* at 235a.

2. The Utah Supreme Court's prejudice analysis.

The supreme court also held that trial counsel's light-objection strategy to Newton's religious cross-examination testimony was prejudicial. *Id.* at 242a. The court accurately explained *Strickland*'s high prejudice standard—"'whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Id.* at 235a-36a (quoting *Strickland*, 466 U.S. at 695). Yet without actually applying that standard, the court concluded that "[w]ithout the improper religious testimony, there is a reasonable probability that at least one member of the jury would not have been convinced that the State met its burden" to prove "that the aggravating circumstances outweigh[ed] the mitigating circumstances, and that the death penalty [was] justified and appropriate under the circumstances." *Id.* at 236a-37a (citing Utah Code § 76-3-207(5)(b)).

The court reached this conclusion without discussing the facts and circumstances of the case and without reweighing the aggravating and mitigating factors that still would have been before the jury in a hypothetical trial where the allegedly improper testimony had been excluded. Instead, in a single, terse paragraph—and relying on the most general terms—the

court mentioned some of the aggravating evidence found beyond a reasonable doubt by the jury. *Id.* at 237a. The court also identified the mitigating evidence in similarly cursory terms. *Id.* at 238a. But the court never evaluated the strength of all the evidence or compared the weight of aggravating and mitigating factors—as required by this Court's case law and reiterated in strong fashion *before* the Utah Supreme Court issued its opinion here. *See Thornell v. Jones*, 602 U.S. 154 (2024).

Rather than consider prejudice in terms of what the penalty phase would have looked like *absent* any religious testimony, which the court acknowledged *Strickland* required, the court instead focused its analysis on how it *speculated* the religious testimony *actually affected* the jury. Pet. App. 238a-39a. For example, ignoring the jury instructions given by the trial court, the supreme court held that the "religious testimony told [jurors] they could look to the Church and its leaders who, Newton's testimony suggested, had evidently determined that Lovell had not shown the requisite remorse for readmittance to Church membership." *Id.* at 238a. The court determined that "Newton's testimony"—not the absence of his testimony—"altered the entire evidentiary picture by weakening all the evidence Lovell presented about his remorse and efforts to rehabilitate." *Id.* at 238a-39a. Moreover, the court's analysis assumes a great deal about the minds and religious affiliations of the jurors.

But the supreme court did not stop there. It further stated that the "cross-examination of Newton suggested to the jurors that they could look to the Church and its leaders, who 'are living oracles of God' according to Church doctrine," and a "juror who was a faithful Church member" could interpret "Lovell's

excommunication and the fact that he had not been readmitted … as evidence of divine guidance that he was not remorseful." *Id.* at 239a-40a.

The court concluded that its confidence in the outcome of the penalty phase was undermined because "there is a reasonable probability that at least one juror would have opposed imposition of the death penalty if the jury had not been exposed" to Newton's religious cross-examination testimony. *Id.* at 242a-43a. It thus vacated the jury's verdict imposing a death sentence for Lovell's aggravated murder of Yost.

REASONS FOR GRANTING THE PETITION

The Utah Supreme Court was duty-bound under *Strickland* and its progeny to require Lovell to affirmatively prove (1) "that counsel's performance was deficient" because it "fell below an objective standard of reasonableness," and (2) "that the deficient performance prejudiced the defense" because it "deprive[d] the defendant of a fair trial." *Strickland*, 466 U.S. at 687-88. Where, as here, a defendant challenges a death sentence "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Despite citing the foregoing standards for evaluating penalty-phase counsel's actions and their consequences, the state supreme court wholly failed to follow that standard and this Court's binding precedent illuminating it.

The Utah Supreme Court substantially departed from this Court's well-established standard for evaluating defense counsel's performance in a capital penalty phase.

In *Strickland*, the Court established two elements for a constitutional claim of ineffective assistance of counsel—a defendant must show *both* that his counsel's performance was "deficient" and that he was "prejudiced" by it. *Strickland*, 466 U.S. at 687. The Court recently reiterated the duty of a reviewing court to faithfully apply this test to penalty-phase ineffective-assistance-of-counsel claims in capital cases. In *Jones*, the Court reversed the Ninth Circuit's grant of habeas relief to an Arizona capital defendant based on that court's failure to follow *Strickland*. 602 U.S. at 158. Correcting the complete misapplication of *Strickland*'s governing standard is no less important on direct review—the procedural posture of this case. If a state's highest court runs afoul of binding federal law, this Court will address it. *See, e.g., Lynch v. Arizona*, 578 U.S. 613 (2016) (Arizona Supreme Court reversed *per curiam* for failing to follow controlling federal law). Like the Ninth Circuit in *Jones*, the Utah Supreme Court did not follow *Strickland*'s dictates. And that warrants this Court's intervention.

A. The Utah Supreme Court failed to correctly follow *Strickland*'s deficient-performance standard when evaluating trial counsel's decision not to object to religious testimony.

1. The high deference to counsel's decisions.

When tasked with assessing trial counsel's performance, "*Strickland* requires a reviewing court to

'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (quoting *Strickland*, 466 U.S. at 690). In making this determination, "*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

In other words, the Utah Supreme Court may "not grant relief if '[t]he record does not reveal' that counsel took an approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (per curiam) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 23-24 (2013); *accord Buck v. Davis*, 580 U.S. 100, 119 (2017); *Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Morrison*, 477 U.S. at 382 (defendants must "prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys").

This standard is "highly demanding." *Morrison*, 477 U.S. at 382; *see also Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). This is so because a reviewing court's consideration of trial counsel's performance must be "highly deferential" to the judgments, strategies, and decisions counsel must make. *Strickland*, 466 U.S. at 689.

This deference is particularly important because "[r]arely, if ever" will the record give a reviewing court "a complete understanding of all the intangible factors that influenced a defense counsel's decision not to undertake a particular course of action." *United States v.*

Rushin, 642 F.3d 1299, 1308 (10th Cir. 2011). "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, … with the judge," and with the jury. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Thus, when evaluating counsel's actions, a reviewing court must do more than "simply … give [the] attorney[] the benefit of the doubt." *Pinholster*, 563 U.S. at 196 (citation omitted) (first alteration in original). Rather, the court must "affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did.'" *Id.*

Together, judicial deference and the presumption of reasonableness safeguard the "constitutionally protected independence of counsel" to choose among the "countless ways" a competent attorney could defend his client. *Strickland*, 466 U.S. at 689-90. And they also ensure that reviewing courts do not "second-guess" counsel's performance with the benefit of hindsight, but instead "evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

2. The Utah Supreme Court sidesteps deference.

For several years now, the Utah Attorney General's Office has argued for Utah's appellate courts to properly apply *Strickland*, with mixed results.[3] As

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[3] *Compare State v. Ray*, 469 P.3d 871, 876-77 (Utah 2020) (acknowledging prior Utah cases that "muddied" question of controlling test under *Strickland* and realigning case law with requirement that ultimate test is whether counsel's actions were reasonable, not whether they were strategic), *with State v.*

detailed below, the Utah Supreme Court's disregard of *Strickland* in Lovell's case—and vacating his death sentence on that basis—is particularly troubling not only for the unnecessary delay and costs in this case but also for its application to countless other Utah cases.

To begin, the Utah Supreme Court excused Lovell's failure to meet *Strickland*'s requirement to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690; Pet. App. 219a

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Baugh, 556 P.3d 35, 40-43 & n.25 (Utah 2024) (holding counsel deficient for not requesting more specific jury instruction despite absence of any prior case directing how jury needed to be instructed on the issue); *State v. Grunwald*, 478 P.3d 1, 3 n.1, 7-9 & n.22, 23 n.91 (Utah 2020) (equating *Strickland*'s counterfactual prejudice test with showing that error probably affected the actual verdict); *id.* at 24 & n.92, 27-29 & nn.95-96 (Lee, J., dissenting) (criticizing majority's "substantial reformulation" of *Strickland*'s controlling prejudice standard); *State v. Gourdin*, 549 P.3d 685, 700, 704-11 (Utah Ct. App. 2024) (holding counsel ineffective for not adequately investigating State's DNA evidence despite defendant telling counsel "he did not want them to investigate the DNA evidence further"), *reh'g denied* (June 13, 2024), *cert. petition pending* (Utah); *State v. Carranza*, 533 P.3d 850, 857 (Utah Ct. App.) (holding counsel deficient despite significant gaps in record about counsel's performance), *cert. denied*, 540 P.3d 78 (Utah 2023); *State v. Pullman*, 527 P.3d 1126, 1129-32 (Utah Ct. App.) (same), *cert. denied*, 534 P.3d 753 (Utah 2023); *State v. Elkface*, 527 P.3d 820, 822-26 (Utah Ct. App.) (same), *cert. denied*, 534 P.3d 752 (Utah 2023); *State v. Carrera*, 517 P.3d 440, 446, 457 (Utah Ct. App. 2022) (same), *cert. denied*, 525 P.3d 1264 (Utah 2023); *and State v. Beames*, 511 P.3d 1226, 1231 (Utah Ct. App. 2022) (holding that *Kimmelman v. Morrison*'s requirement that suppression motion be "meritorious" requires only that defendant prove it "would *likely* have been successful").

n.21. While the court recognized that this failure "will preclude succeeding on a claim of ineffective assistance," the court nevertheless excused Lovell from this *Strickland* requirement based on its own practice in death-penalty cases to sua sponte notice errors regardless of a defendant's briefing deficiencies. Pet. App. 219a n.21. While the supreme court, for its own purposes, certainly has the authority to employ a practice to notice unidentified errors, it may *not* exempt Lovell from satisfying *Strickland*'s binding directives. *Morrison*, 477 U.S. at 382.

But that is precisely what the court did when it excused Lovell's failure to specifically identify the acts or omissions he contends were not the product of reasonable, professional judgment. *Strickland*'s standard is highly demanding, but that is a burden the defendant must bear—a reviewing court should not shoulder it for him. *Strickland*, 466 U.S. at 690.

The Utah Supreme Court's errors did not end there. Despite *Strickland*'s clear mandates, the supreme court failed to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, or to "affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did,'" *Pinholster*, 563 U.S. at 196. Indeed, the supreme court did not begin its assessment of counsel's performance "with the premise that 'under the circumstances, the challenged action[s] might be considered sound trial strategy,'" *Pinholster*, 563 U.S. at 191 (alteration in original) (quoting *Strickland*, 466 U.S. at 689-90), or by applying "a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691.

Rather, the court's analysis began with the unsupported conclusion that Newton's religious cross-examination testimony was "'obviously improper.'" Pet. App. 222a. The court theorized that, while Newton's testimony "suggested that Lovell's excommunication from the Church and subsequent failure to be readmitted by its First Presidency was evidence that he lacked genuine remorse," it was improper because—in the court's view—it "insinuated that the jury could consider whether the Church had found Lovell sufficiently remorseful as a proxy for deciding themselves whether he was truly a changed person." *Id.* at 222a-23a. According to the court, Newton's religious testimony "invited the jury 'to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere' because the Church had already determined that Lovell was not remorseful by not readmitting him to membership." *Id.* (quoting *Caldwell*, 472 U.S. at 329).

This conclusion is sheer conjecture. To begin, no evidence was presented that Lovell *ever* tried but failed to be readmitted to the Church. In fact, every ecclesiastical leader who testified said that Lovell never asked to be readmitted. R8850:118, 129, 139.

Plus, a juror is *entitled* to find mitigating evidence unpersuasive. *Jones*, 602 U.S. at 164-65. Indeed, this is the entire purpose of any cross-examination—to probe the persuasiveness of a witness's testimony. Counsel could thus reasonably view the cross-examination as a legitimate attempt to undermine Newton's opinion that Lovell was remorseful. Competent counsel could reasonably believe the testimony was not improper—let alone so improper that it required an objection.

In any event, the supreme court overlooked a host of reasons why a competent attorney in counsel's circumstances could reasonably forgo an objection.

First, counsel knew that jurors were to be specifically instructed that it was "*solely*" their duty to "decide from the evidence what the facts are" and that "*in that role, neither I nor anyone else may interfere*." R8496 (emphasis added). The jury would also be instructed that it was the jury's "duty to determine whether death is justified and appropriate." R8504. Counsel could reasonably think such instructions would be sufficient to prevent the jurors from making the tenuous leap from hearing Newton's testimony to outsourcing their assessment of Lovell's remorse to the Church's First Presidency.

Second, counsel here were far more familiar with the jurors than the supreme court. For example, counsel previously reviewed the jurors' 18-page jury questionnaires, *see* R4191-7818, and personally questioned every sitting juror during jury selection, *see generally* R8842-45. Counsel were in the best position to judge the effect of Newton's cross-examination testimony on the jurors, as well as the potential negative effect repeated defense objections would have had. Moreover, applying, as *Strickland* directs, "a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691, and taking into account counsel's familiarity with the jury and real-time observation of their reaction to the cross-examination, *see Richter*, 562 U.S. at 105, competent counsel in the circumstances could reasonably conclude that the antagonistic tone of the cross-examination was damaging the prosecutor's credibility more than the witness's. *See* R8850:95-117.

Third, as the State argued below, counsel could reasonably believe that objecting could jeopardize religious testimony Lovell wanted to later present. Pet. App. 226a. Religious themes played a significant role in Lovell's mitigation defense. *Id.* In particular, religious references permeated Douglas's mitigation testimony about Lovell's remorse and rehabilitation. *Id.* In light of the religious references that would characterize the testimony that was still to come, competent counsel could reasonably decide not to argue that it was improper for the State to cross-examine a lay clergy witness about religious matters. Succeeding on such an objection would run a substantial risk that the State would then object in kind to Douglas's testimony—and that the court would then sustain the objection as a matter of fairness. Counsel could fear that objecting would then force Douglas to present a more sanitized, less compelling account of her interactions with Lovell. *Id.* at 228a.

Indeed, when the State in fact objected to Douglas's testimony on religious grounds, the court said it would be flexible in what it allowed because the State had been allowed to extensively explore religious matters in Newton's cross-examination. R8851:25-29. True, the Utah Supreme Court inexplicably decided that Douglas's testimony about remorse, repentance, forgiveness, reconciliation with God, the atonement of Jesus Christ, and Lovell's "come to Jesus" moment was not all that religious. Pet. App. 233a; R8851:11, 20, 25-26, 29-30, 32, 34, 45-47, 51-52. But that is judging Douglas's testimony (inaccurately at that) with the benefit of hindsight, directly contrary to *Strickland*. 466 U.S. at 689. Competent counsel could reasonably conclude that it was better for the jury to hear *all* the religiously based testimony rather than make

an objection that could curtail such testimony not only from Newton, but also Lovell's star witness.

Thus, contrary to the supreme court's view, there were many reasonable bases for counsel not to object to Newton's religious testimony on cross-examination. And, even assuming the supreme court was correct about the impropriety of Newton's religious testimony, the court was *still* obligated under *Strickland* to "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and carefully consider whether all competent counsel would have objected to Newton's testimony, *see Dunn*, 594 U.S. at 739. The supreme court made little effort to do so. Rather, on a cold record, the court instead engaged in what can only be described as an exegesis of Newton's and Douglas's mitigation testimony. Drawing fine distinctions in the witnesses' use of religious language and terms, the court ultimately concluded that Newton's testimony was overtly religious—and therefore improper—whereas Douglas's "numerous religious references" only had a "religious flavor," and never actually relied on "religion." Pet. Add. 228a, 233a.

Trial counsel, of course, had no such luxury. In the midst of his presentation of Lovell's mitigation case, counsel had only moments to decide whether to object and run the risk that the strength of Douglas's testimony might be affected by future objections from the State, or let Newton's cross-examination testimony proceed in the hopes of ensuring that Douglas could testify without objections. And that decision also played out against his assessment of the mood in the room and the real-time reactions of the jurors.

In the heat of trial, counsel chose instead to respond by asking each of the ecclesiastical leaders, including Newton, whether they were aware of Lovell ever requesting readmission to the Church. R8850:118, 129, 139. Each said he never asked them to be readmitted. *Id.*

Under these circumstances, counsel's decision to respond through further questioning rather than objecting was quintessentially the type of choice that *Strickland* required the reviewing court to presume was made "in the exercise of reasonable professional judgment." *Pinholster*, 563 U.S. at 196. The post-hoc analysis the Utah Supreme Court engaged in is precisely the sort of hindsight speculation about the virtues of a different trial strategy that this Court's case law forbids. *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The "contemporary assessment" of counsel's conduct is "a more rigid requirement" precisely because to do otherwise "'could dampen the ardor and impair the independence of defense counsel, discourage the assignment of cases, and undermine the trust between attorney and client.'" *Id.* (quoting *Strickland*, 466 U.S. at 690). It also undermines the trust that the public and victims have in the justice system when extensive delay and unnecessary proceedings are ordered on such speculative bases.

The Utah Supreme Court's decision cannot be squared with *Strickland*. Yet the precedential nature of that decision will lead to additional cases unmoored from the dictates of *Strickland* absent review by this Court.

B. The Utah Supreme Court failed to analyze whether, absent the alleged error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

The test for prejudice under *Strickland* should be clear enough. A defendant challenging a death sentence must prove "there is a reasonable probability that, absent the errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The Court has made clear that this showing requires a counterfactual analysis, *id.*, "asking how a hypothetical trial would have played out absent the error," *Lee v. United States*, 582 U.S. 357, 365 (2017). And that counterfactual analysis must account for "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

In the capital sentencing context, courts are thus required to "reweigh the evidence in aggravation against the totality of available mitigating evidence" to determine whether there is a reasonable probability of a different outcome absent the error. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Pinholster*, 563 U.S. at 198. Thus, a reviewing court "must consider all the evidence—the good and the bad—when evaluating prejudice." *Belmontes v. Wong*, 558 U.S. 15, 26 (2009); *see also Bobby v. Van Hook*, 558 U.S. 4, 13 (2009) (faulting court of appeals for giving aggravating factors "short shrift" and thus "overstating further the effect additional mitigating evidence might have had"). The Court made this clear again earlier this year, reversing the Ninth Circuit's grant of habeas relief to a capital defendant because that court "all but

ignored the strong aggravating circumstances" in its prejudice analysis. *Jones*, 602 U.S. at 158.

Here, the Utah Supreme Court did worse than give the aggravating factors and circumstances of the crime "short shrift." *See Van Hook*, 558 U.S. at 13. The opinion barely mentions either at all. Lovell murdered his rape victim for having the audacity to report the rape and testify at his preliminary hearing. R8433; 8846:146; 8847:39. He murdered her not only in retaliation for testifying against him, but also to prevent her from testifying at his trial, apparently believing that doing so could prevent his conviction and return to prison. R8433; 8847:39. And his efforts to murder her were relentless—hiring two different people to do it for him before finally breaking into her home, dragging her out of her own bed, kidnapping her, strangling her, stomping on her neck, and leaving her body in a still-unknown mountain grave. R8433; 8847:41-49, 54, 57-59, 182-88. Remorse, even when genuine and proved, is historically weak mitigation—especially in the face of facts like these. Yet the supreme court "all but ignored the strong aggravating circumstances" and basic facts of the crime. *Jones*, 602 U.S. at 158.

Critically, Lovell refused to give the jurors a life-without-parole option—another crucial fact that the court glossed over. That significantly changed the calculus for the jury, which would have realized that the only alternative to death was a sentence that carried the possibility that Lovell could be released "'immediately.'" Pet. App. 188a.

And yet, without analysis of the facts and circumstances of the crime and without balancing the aggravating and mitigating factors, the Utah Supreme

Court vacated Lovell's death sentence and ordered a new sentencing proceeding. It did so because, in its estimation, defense counsel's "anemic," "misaimed," or missing objections to the State's cross-examination of a single mitigation witnesses resulted in the jury outsourcing its decision to Church authorities. Pet. App. 221a-23a.

Citing *Caldwell*, the state supreme court held that, upon hearing testimony that the ultimate assessment of remorse in Lovell's former religion rests with the Church's First Presidency as an institutional matter, the jurors would fail to "thoroughly consider" Lovell's remorse evidence. Pet. App. 223a. The court found that this ran afoul of *Caldwell* because it invited the jurors to "believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 222a.

In short, the court found prejudice because it believed counsel's lack of objection influenced the jury. But it never examined the likelihood of a more favorable sentence, absent any error, in light of the totality of the evidence.

The Utah Supreme Court's analysis flouts another key requirement of *Strickland*—that the reviewing court "presume … that the judge or jury acted according to law." *Strickland*, 466 U.S. at 694-95. That law was reflected in the trial court's repeated instructions that the jury must decide the case based only on the evidence presented in court and that it was the jury's duty alone to decide based on that evidence whether death was justified and appropriate. R8379, 8387, 8401, 8501-04. "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234

(2000). And doubly so for purposes of *Strickland* prejudice. 466 U.S. at 694-95.

The supreme court's *Caldwell* analysis runs afoul of that presumption. In *Caldwell*, this Court found fault with the prosecutor leading the jury to believe that the responsibility for "determining the appropriateness of a death sentence rests not with the jury but with the appellate court." 472 U.S. at 323. There, the prosecutor "urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." *Id.*

That's not what happened here. The prosecutor never told the jury it was not responsible for its decision. The state supreme court speculated that because the prosecutors (rightly) cross-examined religious remorse witnesses about what remorse meant in their religion, the jurors must have thought that the responsibility of determining the appropriateness of the death sentence did not rest with them, but with the leaders of that religion. But there is no discernible difference between the challenged cross-examination here and that of Lovell's mental health expert witnesses—questions designed to probe the limits of the witness's knowledge and what the terms used mean in their relative wheelhouses. And there is no discernable reason why jurors would not simply consider and weigh Newton's testimony the same as any of the other evidence relating to the mitigation theory "that Lovell was a changed man who was remorseful for his crimes," Pet. App. 225a, using the cross-examination to assess the authenticity and weight to give Newton's opinion of Lovell. No one told the jury it should take that cross-examination as an excuse to outsource its sworn duty to determine the appropriate sentence

based on its assessment of the facts presented in court.

Moreover, the Utah Supreme Court's assumption about the jurors' alleged forfeiture of the weighty decision of the appropriateness of the death penalty to the Church's First Presidency is nothing short of insulting to jurors. Indeed, the supreme court appears to have based its opinion on the (false) premise that faithful members of the Church on the jury (if, in fact, there were any) are necessarily incapable of following the court's instructions upon hearing about Church doctrine from a ecclesiastical leader—a premise that runs headlong into *Strickland*'s presumption that jurors follow the law.

By labeling the legitimate cross-examination at issue here as an insertion of a "religious test for remorse," *id.* at 223a, and thus concluding that the jurors would use the Church "as a proxy for deciding themselves whether [Lovell] was truly a changed person," *id.* at 222a-23a, the Utah Supreme Court sounds like those who argued that John F. Kennedy or Mitt Romney (and many faithful jurists) could not serve as President (or as federal judges) because their ecclesiastical leaders actually would be making the decisions. Simply put, the Utah Supreme Court suggested the jurors were sheep without minds of their own. But our legal system depends on presuming the opposite.

Similarly misplaced is the Utah Supreme Court's citation to other court cases condemning the use of religious *arguments* to encourage a jury to convict a defendant. *Id.* at 223a-25a. Using *argument* of religion or religious doctrine to compel the jury to reach a certain verdict is not the same as testing a capital defendant's own religious-themed evidence. *Id.* Nothing in

those cases prevents cross-examination of religion-based mitigation witnesses to probe the authenticity and substance of the proffered mitigation. Lovell was constitutionally entitled to present his religious-themed mitigation evidence to allow the sentencer to "render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). Lovell chose to make his remorse, defined in religious terms, part of his defense. The State was entitled to test his evidence.

The lack of *Strickland* prejudice here is evident by the erroneousness of the state court's premises alone—that the State cannot cross-examine a religious mitigation witness about their religion-based testimony, and that religious jurors are unable to think for themselves. But it is the court's utter disregard of *Strickland*'s demands that reviewing courts presume jurors follow the law and that reviewing courts balance the remaining aggravating and mitigating evidence, together with the facts and circumstances of the crime, that condemns the opinion unquestionably.

In short, Lovell cannot show that had defense counsel objected more robustly to the State's cross-examination of a single religious-based remorse mitigation witness, the properly instructed jurors "'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones*, 602 U.S at 163 (quoting *Strickland*, 466 U.S. at 695). Had the Utah Supreme Court followed *Strickland*'s dictates, it could not have concluded that there

was a reasonable probability of a more favorable sentence had counsel objected.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Dated: November 22, 2024

APPENDIX

TABLE OF APPENDICES

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APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, STATE OF UTAH, DATED FEBRUARY 26, 2021

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

Case No. 921900407

STATE OF UTAH,

Plaintiff,

vs.

DOUGLAS A. LOVELL,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judge Michael D. DiReda

THIS MATTER IS BEFORE THE COURT on remand under rule 23B, Utah Rules of Appellate Procedure. The Utah Supreme Court directed this Court to conduct hearings and enter findings of fact and conclusions of law on ineffective assistance of counsel claims raised by Defendant Douglas Lovell against one of his trial attorneys, Sean Young. The Court conducted evidentiary hearings between August and October 2019.

Following the hearing, the Court allowed the parties to provide proposed findings of fact and conclusions of law consistent with the Rule 23B remand order. The Court granted motions for extensions of time to submit briefing on the matter several times. The State filed its proposed findings on July 2, 2020. The Church of Jesus Christ of Latter-day Saints filed its proposed findings on December 8, 2020, and Defendant filed his proposed findings on January 29, 2021.

[TABLES INTENTIONALLY OMITTED]

[1]**INTRODUCTION**

Over twenty years after pleading guilty to—and being sentenced to death for—the aggravated murder of Joyce Yost, Mr. Lovell was allowed to withdraw his guilty plea. *See State v. Lovell*, 2011 UT 36, ¶80, 262 P.3d 803, *abrogated by State v. Guard*, 2015 UT 96, ¶¶52-53, 61, 371 P.3d 1 (rejecting "clear break" rule on which supreme court relied to allow Mr. Lovell to withdraw his guilty plea); *State v. Lovell*, 1999 UT 40, ¶2, 984 P.2d 382. In March 2015, he was tried for the murder of Ms. Yost, convicted, and again sentenced to death. As part of his direct appeal, Mr. Lovell filed a voluminous rule 23B remand motion alleging that Mr. Young provided ineffective representation. The State did not object to a remand to address Mr. Lovell's counsel-ineffectiveness claims.

On March 6, 2017, the Utah Supreme Court issued an order granting in part Mr. Lovell's remand motion ("rule

23B Order").[1] The rule 23B Order requires this Court to "make all findings of fact necessary to resolve" two questions. *See* Rule 23B Order at 1. First, in Category 1, whether Sean Young "performed deficiently" with regard to any of the following:

> (a) in not interviewing, preparing, and examining the following mitigation [2]witnesses: Rebecca Douglas, Holly Rae Neville, John Newton, Kent Tucker, Chuck Thompson, and Gary Webster;
>
> (b) in not calling the following potential mitigation witnesses to testify: Colleen Bartell, Richard Boyer, Leon Denny, Amy Humphrey, Judy Humphries, Tony Milar, Russell Minas, Debra Motteshard, Brent Scharman, and Betty Tucker, Blake Nielsen, Jack Ford, Brian Morris, and Paul Kirkpatrick;
>
> (c) in not adequately cross-examining Carl Jacobsen;
>
> (d) in not adequately assisting and preparing Marissa Sandall-Barrus in her role as a mitigation specialist; and

1. The portion of the rule 23B Order granting the motion reflects the State's stipulation. The Utah Supreme Court denied the motion with respect to allegations that were not adequately supported or that were raised in Mr. Lovell's reply memorandum. *See* Rule 23B Order at 2. This included ineffective assistance claims against lead counsel, Michael Bouwhuis, raised for the first time in Mr. Lovell's reply.

> (e) in not timely or adequately objecting to the alleged obstruction of, or interference with, testimony from John Newton, Chuck Thompson, Gary Webster, Richard Boyer and Brent Scharman by attorneys representing the Church of Jesus Christ of Latter-day Saints.

Id. at 1-2. Second, in Category 2, "[w]hether Lovell was prejudiced by Young's deficient performance, if any." *Id.* at 2.

After an extensive period of discovery of the defense team's years-worth of files and email communications, the Court convened multiple days of evidentiary hearings during the months of August, September, and October 2019. Fifteen witnesses testified, some over several days. Mr. Lovell was present for every hearing and represented by his attorney, Colleen K. Coebergh. The State was represented by Mark C. Field, Aaron G. Murphy, and Shane D. Smith, Assistant Solicitors General.

Having carefully considered the testimony presented and the evidence received at the evidentiary hearings, the Court now enters the following findings of fact and conclusions of law that Mr. Young's representation of Mr. Lovell was not ineffective under the Sixth Amendment.

Appendix A

[3]**I.**

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

"The Sixth Amendment to the United States Constitution guarantees criminal defendants the effective assistance of counsel, and [courts] evaluate claims of ineffective assistance under the standard articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984)." *State v. Ray*, 2020 UT 12, ¶24, ___P.3d___; *see also State v. Scott*, 2020 UT 13, ¶28, 462 P.3d 350; *State v. Sessions*, 2014 UT 44, ¶37, 342 P.3d 738. This standard is well-established. First, the defendant must prove that his counsel performed deficiently. *See Strickland*, 466 U.S. at 687. This requires the defendant to show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, he must prove that his attorney's deficient performance was prejudicial. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* A defendant's failure to establish either *Strickland* element is necessarily fatal to the ineffective assistance claim. *Id.* at 687, 697.

"[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993). Thus, Mr. Lovell "has the difficult burden of showing *actual unreasonable representation and actual*

prejudice." *State v. Tyler*, 850 P.2d 1250, 1259 (Utah 1993) (emphasis in original). While *Strickland*'s standard is not "insurmountable, [it] is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). "Surmounting *Strickland*'s high bar is [4]never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). As the Supreme Court has made clear, it is a "standard [that] must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 689–690).

A. Deficient Performance

Strickland measures deficient performance by whether trial counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Because objective reasonableness is the benchmark for assessing counsel's performance, "the relevant question under *Strickland*" is whether "no competent attorney" would have proceeded as counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 775 (2017) (finding deficient performance where "[n]o competent defense attorney" would proceed as counsel did); *Scott*, 2020 UT 13, ¶¶29-31 (same).

"*Strickland* specifically commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 563 U.S.

170, 196, (2011) (alteration in original) (quoting *Strickland*, 466 U.S. at 689-90). For this reason, the Court must begin its examination of Mr. Lovell's counsel-ineffectiveness claims "with the premise that 'under the circumstances, the challenged action[s] might be considered sound trial strategy.'" *Id.* at 191 (alteration in original) (quoting *Strickland*, 466 U.S. at 689-90). In [5]making this assessment, the Court's "scrutiny" of Mr. Young's "performance must be highly deferential." *Strickland*, 466 U.S. at 689; *see also id.* at 691 (courts must "apply[] a heavy measure of deference to counsel's judgments"). This is particularly important because "[r]arely, if ever" will the record give a reviewing court "a complete understanding of all the intangible factors that influenced a defense counsel's decision not to undertake a particular course of action." *United States v. Rushin*, 642 F.3d 1299, 1308 (10th Cir. 2011). "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Richter*, 562 at 105. As *Strickland* explains, it "is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689.

Thus, a "fair assessment of attorney performance requires" the Court to consider "the totality of the evidence" and make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to

evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 695; *see also id.* at 690 (courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). This requires the Court to recognize that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense [6]counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id. at* 688–89, 695. Thus, when evaluating counsel's actions, the Court must do more than "simply . . . give [the] attorney[] the benefit of the doubt," but must "*affirmatively entertain* the range of possible reasons [defense] counsel may have had for proceeding as [he] did." *Pinholster*, 563 U.S. at 196 (emphasis added) (internal quotation marks omitted). Doing so requires the Court to take into account the defendant's own decisions in relation to his case because the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691.

For Mr. Young's representation to be deficient, his actions "must have been completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999); *see also Scott*, 2020 UT 13, ¶40 (defendant "must do more than claim his lawyer made a mistake"). It is not enough for Mr. Lovell to prove that "another lawyer . . . would have taken a different course." *State*

v. Jones, 823 P.2d 1059, 1063 (Utah 1991). Nor does it suffice merely to show that Mr. Young's actions were imprudent, inappropriate, *see Burger v. Kemp*, 483 U.S. 776, 794 (1987), flawed, ill-informed, "[t]roubling," "far from exemplary," or contrary to the rules of professional conduct. *Burt v. Titlow*, 571 U.S. 12, 23-24 (2013). And it is not enough that counsel's performance yielded "[n]o actual tactical advantage," *Knowles v. Mirzayance*, 556 U.S. 111, 122 n.3 (2009); *Ray*, 2020 UT 12, [7]¶¶33-34 (same), "deviated from best practices or most common custom," resulted from "a reasonable miscalculation or lack of foresight," *Richter*, 562 U.S. at 105, 110, "could have been better[,] or . . . might have contributed to [Mr. Lovell's] conviction [or sentence]." *Tyler*, 850 P.2d at 1258-59.

Nor is it enough for Mr. Lovell to show that "a different . . . strategy might have been more successful" than the one Mr. Young relied on. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *see also State v. Lucero*, 2014 UT 15, ¶43, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016 (no deficient performance "even if another, possibly more reasonable or effective strategy could have been employed"). Indeed, "even where a court cannot conceive of a sound strategic reason for counsel's challenged conduct, it does not automatically follow that counsel was deficient." *Scott*, 2020 UT 13, ¶36. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *see also Ray*, 2020 UT 12, ¶34 ("*Strickland* demands reasonable assistance, not strategic assistance."); *Scott*, 2020 UT 13, ¶35 ("The ultimate question is not whether there was a possible

strategic reason for counsel's conduct, but instead whether that conduct was objectively reasonable.").

"To be sure, the [deficient] performance inquiry will often include an analysis of whether there could have been a sound strategic reason for counsel's actions." *Scott*, 2020 UT 13, ¶35; *see also Ray*, 2020 UT 12, ¶34 (whether "'counsel's actions can be considered strategic plays an important role in our analysis of *Strickland*'s deficient [8]performance prong'" (quoting *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir. 2002)). As *Strickland* explains, because of the difficulties inherent in retrospectively evaluating counsel's performance, courts "must indulge a strong presumption that . . . under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotation marks and citation omitted). Possible strategic reasons are relevant because *Strickland* recognizes that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." *Richter*, 562 U.S. at 106 (quoting *Strickland*, 466 U.S. at 689).

An analysis of whether counsel's actions could have been strategic "is often helpful in answering the ultimate question of objective reasonableness." *Scott*, 2020 UT 13, ¶35. If it "appears counsel's actions could have been intended to further a reasonable strategy, a defendant has necessarily failed to show unreasonable performance.

But the converse is not true." *Ray*, 2020 UT 12, ¶34 (citing *Strickland*, 466 U.S. at 688). Even if Mr. Young's actions were not the result of "a purposeful strategy, 'relief is not automatic.'" *Id.* (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)); *see also Scott*, 2020 UT 13, ¶¶35-36. Thus, the *Strickland* presumption of a sound strategy can be [9] dispositive, but only of a finding of effective performance, not deficient performance.[2]

In addition, the Court need not come to a conclusion that counsel made decisions with a specific strategy in mind. *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 562 U.S. at 110. While Mr. Young'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 [his] actions are judged." *State v. Gallegos*, 2020 UT 19, ¶47, 463 P.3d 641. "Thus, it is not enough to simply say that [defense] counsel didn't have a tactical reason for [his

2. In addition, if it is shown that trial counsel's actions—in fact—resulted from well-informed strategic choices, then, under *Strickland*, those actions are presumed to be "virtually unchallengeable." *Strickland*, 466 U.S. at 689; *see also Ray*, 2020 UT 12, ¶34 ("'[W]here it is shown that a challenged action was, in fact, an adequately informed strategic choice, we heighten our presumption of objective reasonableness and presume that the attorney's decision is nearly unchallengeable.'" (quoting *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir. 2002)); *Archuleta v. Galetka*, 2011 UT 73, ¶96, 267 P.3d 232 ("[R]easonably informed strategic choices are almost unassailable.").

decisions]; rather, the question is whether a reasonable attorney could have made the same decision." *State v. Vallejo*, 2019 UT 38, ¶44, 449 P.3d 39. For example, an attorney can "do the right thing for the wrong reason. But that would not constitute [deficient performance] if an objectively reasonable attorney would have taken the same approach." *Gallegos*, 2020 UT 19, ¶47. It follows that "trial counsel's subjective reasoning is not the critical component of the *Strickland* inquiry." *Id.* As the Supreme Court has [10]made clear, "the relevant question" is one of objective reasonableness: whether "no competent attorney" would have proceeded as counsel did. *Moore*, 562 U.S. at 124.

In sum, for any specific challenge Mr. Lovell makes to Mr. Young's representation, if the record shows that Mr. Young's act or omission was—in fact—the result of a sound strategic decision, then Mr. Lovell cannot show that Mr. Young's performance was deficient. But even if the record is silent in this regard, that does not mean that Mr. Young performed deficiently. Because the Court's scrutiny of Mr. Young's actions must be highly deferential and the Court must entertain the wide range of possible reasons Mr. Young could have had for proceeding as he did, if the Court can conceive of a strategic explanation for Mr. Young's actions, then it follows that he did not perform deficiently. And even if a considered strategic reason for Mr. Young's acts or omissions is elusive, because *Strickland* demands reasonable assistance, not strategic assistance, Mr. Lovell still cannot carry his burden of proving deficient performance unless he shows that Mr. Young's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. As

explained, that requires Mr. Lovell to prove that "[n]o competent defense attorney" would have proceeded as Mr. Young did. *Buck*, 137 S. Ct. at 775; *see also Moore*, 562 U.S. at 124; *Scott*, 2020 UT 13, ¶¶29-31.

B. Prejudice

Because of "the profound importance of finality in criminal proceedings," even if the Court concludes that Mr. Young committed a "professionally unreasonable" error, that "does not warrant setting aside the judgment of a criminal proceeding if the error [11]had no effect on the judgment. . . . Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 691–93. Mr. Lovell "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. As with *Strickland*'s deficient performance element, Mr. Lovell must show that Mr. Young's alleged deficiencies "actually had an adverse effect on the defense." *Id.* at 693; *see also State v. Frame*, 723 P.2d 401, 405 (Utah 1986) (proof of prejudice "may not be speculative, but must be a demonstrative reality").

To prove prejudice, Mr. Lovell must do more than merely "show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome

undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. at 693 (citation omitted). Thus, the prejudice "question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Richter*, 562 U.S. at 111 (quoting *Strickland*, 466 U.S. at 696). While *Strickland* indicated that a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case," *Strickland*, 466 U.S. at 693, the [12]Supreme Court more recently clarified that "the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Richter*, 562 U.S. at 112 (quoting *Strickland*, 466 U.S. at 697). In other words, the "likelihood of a different result must be substantial, not just conceivable." *Id.*

In the context of a challenge to a "death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The Court "must consider all the evidence—the good and the bad—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). "In other words, '[i]n evaluating [prejudice], it is necessary to consider *all* the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path.'" *Ross v. State*, 2019 UT 48, ¶85, 448 P.3d 1203 (alterations in original) (quoting *Belmontes*,

558 U.S. at 20). This includes the totality of the evidence "adduced at trial, and the evidence adduced in the [rule 23B] proceeding." *Williams v. Taylor*, 529 U.S. 362, 397 (2000). And the Court must consider the evidence in the overall context of the defense mitigation theory, as well as the sentencing options made available to the jury.

In addition, the Court must take into account that some of the jury's "factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways." *Strickland*, 466 U.S. at 695. For example, some errors may have a "pervasive effect on the inferences to be drawn from the evidence," [13]while others will have only "had an isolated, trivial effect." *Id.* at 695-96. At a minimum, for Mr. Lovell to carry his burden to show prejudice, he must demonstrate that "but for" Mr. Young's alleged errors, the "evidentiary picture" at the sentencing proceeding would have been so transformed that a more favorable outcome would be reasonably probable. *Id.* at 694, 696.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Given the volume of testimony and the number of individual witnesses at issue, the Court has organized its findings and conclusions into sections addressing specific subject matter and witnesses and includes its conclusions of law at the end of the factual findings to which they are most relevant.

Appendix A

A. General findings.

1. Background and structure of the defense team.

1. Mike Bouwhuis testified over three days and the Court found his testimony largely credible. Aug. 6, 2019 Hr'g Tr. at 5-146; Aug. 27, 2019 Hr'g Tr. 4-247; Sept. 13, 2019 Hr'g Tr. 3-42.

2. Mr. Bouwhuis began representing Mr. Lovell in or around July or August 2011. Aug. 6, 2019 Hr'g Tr. at 6.

3. Mr. Bouwhuis was the head of the Weber County public defenders and was lead counsel for Mr. Lovell. Aug. 6, 2019 Hr'g Tr. at 6; Aug. 19, 2019 Hr'g Tr. at 13-14; Aug. 27, 2019 Hr'g Tr. at 5-6, 216.

[14]4. Mr. Bouwhuis selected Mr. Young as co-counsel on the *Lovell* matter. Aug. 27, 2019 Hr'g Tr. at 5.

5. From the beginning of the representation in 2011, Mr. Lovell told Mr. Bouwhuis and Mr. Young that he was not interested in a life without parole sentence and the options for the jury would be death or life with the possibility of parole. Aug. 27, 2019 Hr'g Tr. at 108; Aug. 30, 2019 Hr'g Tr. at 30; State's Ex. 33.

6. Between the time of the crimes in 1985 and the time of the trial, Utah law changed to add life without parole ("LWOP") as a sentencing option for aggravated murder. Utah Code § 76-3-207.5(1)(a). Mr. Lovell

was therefore free to elect to proceed under the law as it existed in 1985—with life with the possibility of parole or death as the only options—or as it existed at the time of trial, which added the LWOP option. *See* R8853:134-35; *see also* Aug. 30, 2019 Hr'g Tr. at 30-31.

7. Mr. Lovell elected to proceed under the 1985 version of the law, thereby removing LWOP as a sentencing option for the jury. The decision to take LWOP off the table for the jury was a decision made by Mr. Lovell that was consistent with Mr. Lovell's views from at least as early as August 2011. Mr. Lovell made the decision not to offer the jury the option of sentencing him to LWOP against the advice of both Mr. Bouwhuis and Mr. Young. Aug. 27, 2019 Hr'g Tr. at 134-141; Aug. 30, 2019 Hr'g Tr. at 28, 30-31; State's Ex. 29, 30.

8. As reflected in contemporaneous communications admitted into evidence, Mr. [15]Bouwhuis and Mr. Young encouraged Mr. Lovell to reconsider his LWOP decision numerous times throughout the representation by trying to educate Mr. Lovell about the ramifications of that decision on the defense strategy. Aug. 27, 2019 Hr'g Tr. at 172:4-13; Aug. 30, 2019 Hr'g Tr. at 30; State's Ex. 29, 30, 33.

9. Mr. Bouwhuis testified that at least by June 2012, he was concerned that, even if the jury had LWOP available as an option, avoiding the death penalty would still be a "tough uphill battle" and he communicated that sentiment to Mr. Lovell and discussed it with Mr.

Young. Aug. 27, 2019 Hr'g Tr. at 134-36; Aug. 30, 2019 Hr'g Tr. at 29-31; State's Ex. 29, 33.

10. Mr. Bouwhuis confirmed that he and Mr. Young discussed evidentiary problems created by Mr. Lovell's LWOP decision. Aug. 27, 2019 Hr'g Tr. at 140; Aug. 30, 2019 Hr'g Tr. at 30.

11. Mr. Bouwhuis also knew from discussions with prior counsel for Mr. Lovell that the LWOP topic was a touchy one for Mr. Lovell and that if he pressed Mr. Lovell too hard on the issue it risked damaging the relationship between attorney and client, which previous counsel had said they experienced with Mr. Lovell. Aug. 27, 2019 Hr'g Tr. at 141-43.

12. As the case progressed toward its initial trial date in the summer of 2014, Mr. Bouwhuis engaged defense mitigation expert Marissa Sandall-Barrus in [16] January 2014.[3] Aug. 23, 2019 Hr'g Tr. at 72-73; State's Ex. 15.

13. Ms. Sandall-Barrus had worked on other capital cases before being hired by Mr. Bouwhuis. Aug. 23, 2019 Hr'g Tr. at 7-8.

14. Her job was to interview witnesses and help the defense team prepare for Mr. Lovell's sentencing

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3. At the time of the evidentiary hearing, Ms. Sandall-Barrus's name had changed to Marissa Day. However, to maintain consistency with the testimony of other witnesses and the contemporaneous documents admitted into evidence, the Court refers to her as Ms. Sandall-Barrus

hearing. Aug 23, 2019 Hr'g Tr. at 8. Her work included preparation of a mitigation binder incorporating written summaries of her witness interviews as well as names and contact information. Aug. 23, 2019 Hr'g Tr. at 8-9. In interviewing potential witnesses and preparing summaries, she gathered information that was "foundational for the attorneys to then use the information to prepare their phase of the case." Aug. 23, 2019 Hr'g Tr. at 32:8-14. In addition to a physical binder of her witness interview summaries, she provided the defense team with a digital copy. Aug. 23, 2019 Hr'g Tr. at 51.

15. She testified that the scope of her role on the *Lovell* matter was narrower than on many other cases. Ms. Sandall-Barrus acknowledged that a full family history had been done in connection with Mr. Lovell's first trial and that defense expert witnesses, Dr. Cunningham and Dr. Gregory, were going to testify about various aspects of Mr. Lovell's family and personal history. Aug. [17]23, 2019 Hr'g Tr. at 75, 79-84.

16. In an email exchange with Mr. Bouwhuis in November 2014, Ms. Sandall-Barrus discussed the overall defense strategy with Mr. Bouwhuis and stated that she agreed with it given the unique circumstances of Mr. Lovell's case. Aug. 23, 2019 Hr'g Tr. at 82-84; State's Ex. 17.

17. Although Mr. Young did not submit bills for his work on the *Lovell* matter to Mr. Bouwhuis on a regular

basis, Mr. Bouwhuis believed that Mr. Young was working on the case throughout 2012, 2013, and 2014. Aug. 27, 2019 Hr'g Tr. at 216-18.

18. Mr. Lovell spent considerable time at the evidentiary hearing reviewing Mr. Young's billing records in an effort to establish that Mr. Young was not doing any work on the case to prepare witnesses. *See generally*, Aug. 20, 2019 Hr'g Tr. at 144-92; Def's Ex. 50-51. The Court does not find this evidence compelling. The evidence was clear that some of those billing records were compiled well after the fact, during a dispute over final payment with Weber County, and were not intended to be a contemporaneous reflection of the day-to-day work on the case. Aug. 30, 2019 Hr'g Tr. at 6-10. Furthermore, Mr. Young's contract with Weber County did not require specific detail about witness interviews or preparation for its bills. Aug. 30, 2019 Hr'g Tr. at 6-7.Other documentation Mr. Lovell relied on was not an actual bill and was instead material prepared, again well after the fact, by Mr. Young's ex-wife based solely on her review of his [18]historical calendar entries. Aug. 30, 2019 Hr'g Tr. at 4-5; Def's Ex. 50. Despite these records, both Mr. Bouwhuis and Mr. Young were clear that Mr. Young was working on the case steadily throughout the representation and the Court found both of them credible on that issue. Furthermore, this Court observed Mr. Young throughout the time it presided over this case and this finding also accords with the Court's own observations.

2. Effect of Mr. Lovell's LWOP decision on defense strategy.

19. Mr. Young's—and the entire defense team's—objective was to save Mr. Lovell's life. Aug. 30, 2019 Hr'g Tr. at 28.

20. Mr. Young believed that Mr. Lovell's life could be saved if the jury had the sentencing option of LWOP, Aug. 30, 2019 Hr'g Tr. at 28, and the entire defense team believed that without an LWOP sentencing option, there was a real risk that Mr. Lovell could be sentenced to death. Aug. 30, 2019 Hr'g Tr. at 28-30; State's Ex. 33.

21. Mr. Lovell made the decision not to allow the jury to have the LWOP sentencing option. Aug. 30, 2019 Hr'g Tr. at 28; State's Ex. 33.

22. On multiple occasions, Mr. Young tried to dissuade Mr. Lovell from not allowing LWOP as a sentencing option, but Mr. Lovell refused. Aug. 30, 2019 Hr'g Tr. at 30.

23. Mr. Bouwhuis, Mr. Young, and Ms. Sandall-Barrus all testified that Mr. Lovell's LWOP decision created significant strategic problems for the defense team. [19]Aug. 27, 2019 Hr'g Tr. at 34-36, 140; Aug. 30, 2019 Hr'g Tr. at 30-38; Aug. 23, 2019 Hr'g Tr. at 87-90. Their testimony about these strategic issues was consistent, highly credible, and corroborated by numerous contemporaneous emails and other

documents admitted into evidence. State's Ex. 18, 23, 29, 30, 31, 32, 33, 34.

24. The strategic problems created by Mr. Lovell's LWOP decision concerned the entire defense team, including Mr. Young, and were discussed at a defense team meeting in April 2014 that was summarized in a letter from Mr. Bouwhuis to Mr. Lovell, in which Mr. Bouwhuis reported: "There is fear on the part of the team" that Mr. Lovell's LWOP decision made the jury "more likely to choose death" because "the prosecutor will scare the jury into thinking they have to prevent any kind of mistake from happening." State's Ex. 30. Mr. Bouwhuis testified that the "mistake" he was referring to is a risk—from the jury's perspective—that Mr. Lovell might be paroled from a life sentence. Aug. 27, 2019 Hr'g Tr. at 152-54.

25. Mr. Young indicated that Mr. Lovell's LWOP decision affected his decision making on witnesses, made it difficult for him to navigate who should and should not testify, and created concern that witnesses who did testify could say something—even minor—that would suggest to the jury that life with parole was not the right sentencing decision. Aug. 30, 2019 Hr'g Tr. at 32-33, 36.

26. One specific problem Mr. Lovell's LWOP decision created became apparent by [20]May 2014 as Ms. Sandall-Barrus was interviewing potential mitigation witnesses and reporting back that, "So far, most of them [the potential witnesses] want Doug off death

row, but not one, including his brother wants him to be paroled." Aug. 27, 2019 Hr'g Tr. at 155-56; State's Ex. 31.

27. Mr. Bouwhuis testified that the issue of witnesses not wanting Mr. Lovell to be paroled was "a big deal" and would have been discussed with Mr. Young. Aug. 27, 2019 Hr'g Tr. at 157:13-17.

28. Mr. Young agreed that had Mr. Lovell allowed the jury the sentencing option of LWOP, Mr. Young's concerns about the risks involved in calling the witnesses on his witness list would have been minimized. Aug. 30, 2019 Hr'g Tr. at 37.

3. Specific issues affecting the defense team's analysis of witnesses.

29. Mr. Bouwhuis testified about at least nine specific strategic concerns that the defense team discussed at various times that would have impacted whether the defense team would call a mitigation witness to testify.

30. Although Mr. Bouwhuis could only recall explicit conversations about specific issues regarding a limited number of witnesses, he was very clear that all of the following issues were discussed among the defense team, including Sean Young, at various times, and many of these discussions were corroborated by contemporaneous emails among members of the defense team that were admitted into evidence. Aug. 27, 2019 Hr'g Tr. at 197.

31. Testimony of Mr. Bouwhuis, Mr. Young, and Ms. Sandall-Barrus, as well as [21]contemporaneous documents admitted into evidence, conclusively demonstrated to the Court that the defense team discussed and had strategic concerns about the following issues relating to potential mitigation witnesses:

    a. The defense team had strategic concerns about any witnesses who, while having favorable things to say about Mr. Lovell, would express uncertainty, equivocate, or give less than credible testimony about their level of support for Mr. Lovell potentially being paroled. These types of witnesses would be helpful only if LWOP were a sentencing option. Aug. 23, 2019 Hr'g Tr. at 86-87; Aug. 27, 2019 Hr'g Tr. at 189; Aug. 30, 2019 Hr'g Tr. at 32-35, 135-37; State's Ex. 18, 23, 31, 34.

    b. The defense team also had strategic concerns about any witnesses who might express very strong support for parole but, under cross-examination, come across as naïve and gullible about the risks of paroling Mr. Lovell, and therefore not be believable. Aug. 27, 2019 Hr'g Tr. at 189; Aug. 30, 2019 Hr'g Tr. at 35, 136-37. Mr. Young agreed that putting witnesses on the stand who would unequivocally testify that Mr. Lovell should have a chance at parole in the future could still be risky if the jurors heard—as they did at trial—that the Board of Pardons and Parole could parole Mr. Lovell the day after he

was sentenced to life with parole. Aug. 30 2019 Hr'g Tr. at 34-35; R8849:137.

c. The defense team had strategic concerns about witnesses testifying in [22]support of Mr. Lovell's mitigation case who knew nothing or very little about the details of Mr. Lovell's crime. Aug. 27, 2019 Hr'g Tr. at 140, 189; Aug. 30, 2019 Hr'g Tr. at 36-37. Believing there was a strong possibility that the prosecution would cross-examine character witnesses about their knowledge of Mr. Lovell's crime, Aug. 30, 2019 Hr'g Tr. at 45, the defense team believed that any witness who might soften, or outright change, their view on the risks of paroling Mr. Lovell after hearing the details of the crime in front of the jury presented significant strategic risk. Aug. 27, 2019 Hr'g Tr. at 140, 189-90; Aug. 30, 2019 Hr'g Tr. at 36-37.

d. The defense team also had strategic concerns about any witness testifying that they were categorically opposed to the death penalty, regardless of the facts, because such a strong stance undermined the witness's credibility on whether Mr. Lovell should have a chance at parole, which was the only other option at trial because of Mr. Lovell's decision regarding LWOP. Aug. 27, 2019 Hr'g Tr. at 190.

e. The defense team had strategic concerns about any witnesses who did not know Mr. Lovell very well. Aug. 23, 2019 Hr'g Tr. at 56; Aug. 27, 2019

Hr'g Tr. at 190-91; State's Ex. 16 at 2, 25 at 2, 37. The defense team believed that any opinion offered by witnesses who had only met Mr. Lovell a few times or who had not seen him for many years presented credibility issues. Aug. 27, 2019 Hr'g Tr. at 190-91.

[23]f. The defense team had strategic concerns about Mr. Lovell's potential behavior in the courtroom in front of the jury. Specifically, there was concern about Mr. Lovell's temper, which was expressed to Mr. Lovell in a detailed letter as early as June 2012. State's Ex. 28 at 5. Mr. Bouwhuis testified that Mr. Lovell sometimes had "an extreme reaction" to conflict, Aug. 27, 2019 Hr'g Tr. at 125:13-15, which caused him to worry about how Mr. Lovell might be perceived by the jury if he reacted negatively to a witness who said something negative about him at trial. Aug. 27, 2019 Hr'g Tr. at 126-27; 191-92.

g. Similarly, the defense team had strategic concerns that Mr. Lovell might behave inappropriately in front of the jury when it came to attractive women testifying. Aug. 6, 2019 Hr'g Tr. at 120-24; State's Ex. 11. This concern was based on a specific incident during jury selection where Mr. Lovell twice asked Mr. Bouwhuis to tell a prospective juror that she was "attractive" during voir dire. Aug. 6, 2019 Hr'g Tr. at 123. Knowing that the evidence at trial would include testimony from Ms. Yost that Mr. Lovell told her she was

"attractive" right before the first time he raped and kidnapped her, Mr. Bouwhuis was concerned about how Mr. Lovell might be perceived by the jury if attractive women were called to testify whose testimony was cumulative or otherwise not particularly valuable. Aug. 6, 2019 Hr'g Tr. at 123-24; Aug. 27, 2019 Hr'g Tr. at 192.

[24]h. The defense team had strategic concerns about any witnesses who might have known Mr. Lovell very well, including his record as a "model prisoner," but who might also offer the opinion that Mr. Lovell was a "master manipulator," thereby suggesting that his exemplary prison record was not indicative of Mr. Lovell's true nature. Aug. 27, 2019 Hr'g Tr. at 165-66, 193; Aug. 30, 2019 Hr'g Tr. at 35.

i. The defense mitigation case included two experts—Dr. Cunningham and Dr. Gregory—who would testify about Mr. Lovell's background, including family and social history as well as injuries, substance abuse, and other issues that may have affected Mr. Lovell's neurological development. Aug. 27, 2019 Hr'g Tr. at 193-94. Mr. Bouwhuis testified that any family member of Mr. Lovell's whose testimony about family history might contradict either expert presented a "strategic concern" because a jury might credit the family member's testimony over the expert's. Aug. 27, 2019 Hr'g Tr. at 193-94; Aug. 30, 2019 Hr'g Tr. at 36; State's Ex. 19, 20, 37.

32. Mr. Bouwhuis testified that all of the above issues were discussed at various times with Mr. Young as they prepared the defense case and affected the overall structure of the defense, including strategic decisions about which witnesses would ultimately testify at trial. Aug. 27, 2019 Hr'g Tr. at 197. Mr. Young and Ms. Sandall-Barrus also testified about many of these same [25]concerns and the Court finds that the contemporaneous communications among the defense team members also confirm that these various strategic concerns were actively discussed and considered by the defense team. Aug. 30, 2019 Hr'g Tr. at 33-37.

4. Witness lists and assignments changed through the final week of trial.

33. Mr. Bouwhuis and Mr. Young prepared a list of names to include in the jury questionnaire in December 2014. Aug. 6, 2019 Hr'g Tr. at 78-79; Aug. 20, 2019 Hr'g Tr. at 115.

34. The names on that questionnaire came from Mr. Lovell and included the names of witnesses that Mr. Lovell believed would be helpful to his case. Aug. 6, 2019 Hr'g Tr. at 79-81; State's Ex. 7. The list was lengthy and included every witness that the defense team might potentially call at trial. State's Ex. 7. Many of the witnesses had already been interviewed by Ms. Sandall-Barrus at the time that list was prepared. Aug. 27, 2019 Hr'g Tr. at 174-76.

35. Beginning in early January 2015, Mr. Bouwhuis prepared and circulated to Mr. Young a shorter list of potential testifying witnesses, distributed between the two of them. Aug. 20, 2019 Hr'g Tr. at 113-15. Numerous other lists were circulated between Mr. Bouwhuis and Mr. Young from early January 2015 up to and including during the final week of trial when the defense mitigation case was being presented. Aug. 20, 2019 Hr'g Tr. At 133-34; Aug. 30, 2019 Hr'g Tr. at 10, 28; Aug. 27 Hr'g Tr. At 197-98.

[26]36. Mr. Bouwhuis testified that each of the witness lists evolved and changed over time. Aug. 27, 2019 Hr'g Tr. at 197-98.

37. The number of witnesses was not as important as the fact that in trying the case to a jury, the defense attorneys do not know what impact any particular witness would have on any particular juror. Aug. 6, 2019 Hr'g Tr. at 42.

38. Mr. Bouwhuis stated that each list merely reflected the then-current thinking about which attorney bore responsibility for each witness, which meant assessing whether a particular witness was going to be useful for the mitigation case given the development of the case at that time, including developments during trial. Aug. 27, 2019 Hr'g Tr. at 199.

5. Findings specific to Mr. Young.

Preparation, Witness Assignments, and Decision Making

39. The Weber County prosecutors provided twenty boxes of discovery to the defense team that was eventually scanned and uploaded to a Google Drive account created by Mr. Bouwhuis. Aug. 19, 2019 Hr'g Tr. at 22.

40. Mr. Young and Mr. Bouwhuis jointly reviewed the entirety of the discovery—all twenty boxes—and made notes together; in addition, both attorneys had access to the discovery on the Google Drive account once the materials were scanned and uploaded. Aug. 19, 2019 Hr'g Tr. at 22. Mr. Young went through the discovery several times. Aug. 20, 2019 Hr'g Tr. at 108.

41. Mr. Young received his *initial* witness assignments in January 2015. Aug. 20, [27]2019 Hr'g Tr. at 26-27, 107, 112, 114.

42. Mr. Young did not receive contact information for witnesses he was assigned until January 15, 2015, a month and a half before trial. After he and Mr. Bouwhuis met with Ms. Sandall-Barrus on January 26, 2015, Mr. Young began to contact the witnesses he was assigned. Aug. 20, 2019 Hr'g Tr. at 36-37, 95, 115, 136, 139-40; Aug. 30, 2019 Hr'g Tr. at 24-25, 27.

43. At the January 26, 2015 meeting, the defense team "discussed every single witness." Aug. 30, 2019 Hr'g Tr. at 74:4-5.

44. Mr. Young reached out to every witness he was assigned. Aug. 20, 2019 Hr'g Tr. at 24, 38, 40-41, 45-46; Aug. 30, 2019 Hr'g Tr. at 41. Some witnesses Mr. Young was able to contact, others he was not; for some, he left messages, but they never returned his call; and for some the contact information was either inaccurate or unavailable. Aug. 30, 2019 Hr'g Tr. at 41.

45. Mr. Young's witness assignments were constantly changing between January 2015 and the time of trial. Aug. 30, 2019 Hr'g Tr. at 10.

46. Mr. Bouwhuis often communicated with Ms. Sandall-Barrus by email about witnesses, but routinely excluded Mr. Young from the communication. Aug. 20, 2019 Hr'g Tr. at 112; State's Ex. 5, 8, 10, 15, 17, 21, 23, 24, 25, and 32.

47. Mr. Bouwhuis assigned to himself the critical witnesses in the case; the witnesses he assigned to Mr. Young were less important and not "game-changing" witnesses. Aug. 30, 2019 Hr'g Tr. at 38:20-22.

[28]48. Mr. Young had the authority to make professional judgments about the witnesses he was assigned, including how important a particular witness's testimony would be, whether a witness should be

called to testify, what questions to ask witnesses who did testify, etc. Aug. 30, 2019 Hr'g Tr. at 27.

49. Mr. Young was aware that not every witness he was assigned had to testify and that, as the case progressed—even during trial as he listened to evidence and heard other witnesses testify—he was authorized to make judgments about whether a particular witness's testimony might be helpful or harmful. Aug. 30, 2019 Hr'g Tr. at 28.

50. Mr. Young relied on Ms. Sandall-Barrus's expertise as a mitigation expert to locate witnesses, find out their background, and inform him what the witnesses knew about Mr. Lovell and what they would be willing to testify to at trial. Aug. 20, 2019 Hr'g Tr. at 36-37; Aug. 30, 2019 Hr'g Tr. at 24, 63.

51. Mr. Young reviewed all of the interview summaries created by Ms. Sandall-Barrus for the witnesses he was assigned and was aware of the testimony they would provide. Aug. 20, 2019 Hr'g Tr. at 23-24, 34, 37, 40.

52. Mr. Young relied on Ms. Sandall-Barrus's "opinion and discussion with the witnesses to see who was going to be more effective and who—who we need to focus on in our limited six weeks prep before trial." Aug. 30, 2019 Hr'g Tr. at 63:13-16.

53. Mr. Young made a strategic decision not to call witnesses he reached out to, but [29]who refused to get back with him.

a. Most of the witnesses Mr. Young attempted to contact did not get back with him. Aug. 20, 2019 Hr'g Tr. at 24, 38.

b. Mr. Young was concerned about subpoenaing witnesses and forcing them to testify when they refused to respond to his attempts to communicate with them. Aug. 20, 2019 Hr'g Tr. at 24; Aug. 30, 2019 Hr'g Tr. at 42.

c. Mr. Young was concerned that unwilling witnesses might contradict Dr. Cunningham's expert testimony about Mr. Lovell's childhood and upbringing. Aug. 20, 2019 Hr'g Tr. at 24, 34.

54. Mr. Young became aware that Mr. Lovell was not the best judge of how well people liked him and, therefore, how favorable their testimony would actually be. Witnesses would say one thing to Mr. Lovell, but something different to the defense team. Witnesses would tell Mr. Lovell what he wanted to hear because they were not concerned that Mr. Lovell would ever be out of prison. Aug. 30, 2019 Hr'g Tr. at 39-41, 43-44; *see also* Aug. 23, 2019 Hr'g Tr. at 89-90. This was another concern for Mr. Young in determining whether to call a witness and what questions to ask on direct examination.

55. Mr. Lovell was not always upfront with the defense team about the witnesses he wanted to have testify. Aug. 30, 2019 Hr'g Tr. at 58. For example,

a. Jared Briggs, a prison inmate housed with Mr. Lovell, testified for the State that Mr. Lovell told him he sexually assaulted Ms. Yost the night he [30]murdered her and showed no remorse for what he did. R8854:192-93, 221.

b. Mr. Lovell never told Mr. Young that he (Mr. Lovell) told Mr. Tucker, "I don't believe I've met a better man than Jared Briggs." Aug. 30, 2019 Hr'g Tr. at 57-58.

c. Mr. Young never would have called Mr. Tucker to testify had Mr. Lovell divulged this information. Aug. 30, 2019 Hr'g Tr. at 57-58.

Bar Complaint

56. After trial, Mr. Lovell filed a bar complaint against Mr. Young. Aug. 19, 2019 Hr'g Tr. at 103.

57. Mr. Lovell's appellate attorney at the time, Sam Newton, prosecuted the bar complaint against Mr. Young on behalf of Mr. Lovell. Aug. 19, 2019 Hr'g Tr. at 96; Aug. 30, 2019 Hr'g Tr. at 101-02.

58. The bar complaint proceedings concluded on July 31, 2018, when Mr. Young signed the Discipline by Consent and Settlement Agreement.[4] Aug. 19, 2019 Hr'g Tr. at 101.

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4. The Discipline by Consent and Settlement Agreement was marked as Def's Ex. 37 and used for questioning, but was neither offered nor admitted into evidence. Aug 30, 2019 Hr'g Tr. at 126-27.

a. The Bar took the affidavit Mr. Newton submitted in support of Mr. Lovell's complaint and cut and pasted the facts into the Discipline by Consent and Settlement Agreement. Aug. 19, 2019 Hr'g Tr. at 118.

[31]b. Mr. Young would have taken the complaint to trial in district court, but he lacked the financial resources, time, and emotional capacity to do so. Aug. 19, 2019 Hr'g Tr. at 118-20; Aug. 30, 2019 Hr'g Tr. at 76.

59. Mr. Young told Barbara Townsend—an attorney for the Bar—that the very issues raised in Mr. Lovell's complaint were going to be addressed and resolved in the rule 23B proceedings, which were ongoing, but Ms. Townsend refused to continue the Bar hearing. Aug. 19, 2019 Hr'g Tr. at 117-18, 120; Aug. 30, 2019 Hr'g Tr. at 78-80.

60. Mr. Young pointed out numerous inaccuracies in the agreement and sought to make corrections, but Ms. Townsend would not permit any changes despite being informed of the inaccuracies. Aug. 19, 2019 Hr'g Tr. at 106-11, 117-18, 121.

61. Mr. Young ultimately signed the agreement, not because Mr. Lovell's accusations were true, but for settlement purposes only and to resolve the complaints against him so that he could move forward with his life. Aug. 19, 2019 Hr'g Tr. at 103, 106, 117, 120-21; Aug. 30, 2019 Hr'g Tr. at 76-77.

62. Any alleged facts in the Discipline by Consent and Settlement Agreement that pertain to Mr. Young's actions or conduct that post-date the criminal trial—specifically paragraphs 62-70—are irrelevant for purposes of the rule 23B evidentiary hearing. Aug. 19, 2019 Hr'g Tr. at 111-15; Aug. 30, 2019 Hr'g Tr. at 120.

63. The Court credits Mr. Young's testimony that the factual findings in the [32]Discipline by Consent and Settlement Agreement, at least as they pertain to the *Lovell* matter, are, to a large extent, inaccurate. Based on findings the Court makes throughout these Findings of Fact and Conclusions of Law, the Court finds that the factual findings in the Discipline by Consent and Settlement Agreement are inaccurate in the following ways:

    a. Paragraph 50 is incorrect because Mr. Lovell only sent a detailed list of witnesses to Mr. Bouwhuis, not Mr. Young. Aug. 19, 2019 Hr'g Tr. at 106.

    b. Paragraph 51 is misleading to the extent it suggests that Mr. Young and Mr. Bouwhuis jointly determined who would have which witnesses; in fact, Mr. Bouwhuis made all witness assignments and it was not a joint effort. Aug. 19, 2019 Hr'g Tr. at 106-07.

    c. Paragraph 52 is incorrect insofar as it states that Mr. Young was tasked with coordinating the testimony of "approximately 18 witnesses." Aug. 30, 2019 Hr'g Tr. at 122.

d. Paragraph 54 is misleading to the extent it suggests that Mr. Young made no efforts to contact, interview, or question the witnesses he was assigned.

e. Paragraph 55 is incorrect because the witnesses assigned to Mr. Young who were not called to testify did not have "compelling evidence to present to the jury."

f. Paragraph 56 is incorrect and misleading insofar as it faults Mr. Young for not asking two unnamed witnesses "about the most pertinent conclusions [33]and opinions they held concerning Mr. Lovell's remorse for the crime or their belief that Mr. Lovell could successfully reenter society on parole." In fact, Mr. Young asked appropriate questions of all the witnesses he examined or made a reasonable determination to limit the questioning.

g. Paragraph 57 is incorrect because Mr. Young adequately cross-examined all of the State's witnesses he was assigned.

h. Paragraph 58 is incorrect in numerous ways. Aug. 19, 2019 Hr'g Tr. at 110; Aug. 30, 2019 Hr'g Tr. at 120-21; Defense Ex. 37. Specifically,

    i. Mr. Young did not fail to timely object to alleged Church interference because attorneys for Kirton McConkie never filed

motions to quash subpoenas and the Church did not try to interfere in the *Lovell* matter. Aug. 30, 2019 Hr'g Tr. at 108-09.

ii. No leader from the Church advised Mr. Lovell's mitigation witnesses "that they should not support a murderer." Aug. 30, 2019 Hr'g Tr. at 121.

iii. Kirton McConkie attorneys advised former ecclesiastical leaders for the Church to limit their testimony to their opinions about Mr. Lovell, and not to opine on Church policy or doctrine.

iv. No leader for the Church ever threatened a witness with excommunication for testifying on Mr. Lovell's behalf. Aug. 30, 2019 Hr'g Tr. at 121.

[34]v. Neither the Church nor attorneys at Kirton McConkie ever condemned witnesses for testifying in support of Mr. Lovell and therefore Mr. Young did not "ineffectively capitulate" to these nonexistent concerns.

i. Paragraph 59 is incorrect because it was the trial court that instructed the jury that Mr. Lovell had opted not to allow a sentence of LWOP, and it was Mr. Bouwhuis, along with the prosecutors, who agreed to that instruction. *See* R8853:114-15, 128-29, 134-35.

64. As it specifically relates to the *Lovell* matter, the Discipline by Consent and Settlement Agreement is unreliable in light of the numerous factual inaccuracies it contains and the Court gives it little, if any, weight. Aug. 30, 2019 Hr'g Tr. at 121, 130.

65. Despite the factual inaccuracies in the Discipline by Consent and Settlement Agreement, the Bar suspended Mr. Young from the practice of law for a period of time. Aug. 19, 2019 Hr'g Tr. at 115-16.

6. General credibility findings.

66. The Court made contemporaneous observations about witness bias during the evidentiary proceeding and repeats those here. Aug 20, 2019 Hr'g Tr. at 12-13.

67. Most of the witnesses Mr. Lovell presented during the evidentiary hearing exhibited a clear bias. Many expressed a clear desire for Lovell to be paroled as well as disappointment at the outcome of the trial that they wished to correct or [35]improve through their testimony at the evidentiary hearing.

68. To that end, Mr. Lovell's witnesses had a motive to be untruthful at the evidentiary hearing and, as discussed in detail below, the Court found many of them to lack credibility by attempting "to unravel this whole process." Aug 20, 2019 Hr'g Tr. at 12-13.

69. During the evidentiary hearing, it was clear to the Court that most of the witnesses knew little or nothing

about Mr. Lovell's crimes, or his previous successes at obtaining parole by being a model prisoner and, once those details were explained to them, most became hesitant or outright evasive in their answers about whether they continued to believe he should be paroled. Aug 20, 2019 Hr'g Tr. at 12-13.

70. In contrast, Mr. Young did not have a motive to be untruthful at the evidentiary hearing; he had already been suspended from the practice of law by the Bar, had abandoned any continued desire to regain his bar license and had move on with his life. He had nothing to gain by not telling the truth. Aug 20, 2019 Hr'g Tr. at 12-13.

7. Mr. Lovell could not lay foundation connecting certain witnesses to Mr. Young.

71. On the first day of the evidentiary hearing, the State made foundation objections to Mr. Lovell's initial presentation of witnesses, arguing that there was no connection between Mr. Young and certain specific witnesses named in [36]the rule 23B Order and that, with no connection established, testimony from those witnesses was not relevant to the proceeding. The State conceded that there was a sufficient connection between Mr. Young and many of the witnesses in the rule 23B Order, but it objected to a specific subset of the named witnesses on foundation grounds. Aug. 5, 2019 Hr'g Tr. 17-19, 28-33.

72. The Court sustained the objection and ruled that Mr. Lovell had to establish foundation for the testimony

of the witnesses to which the State had specifically objected before they could testify. Aug. 5, 2019 Hr'g Tr. 34, 56-57. Mr. Lovell then called Mr. Bouwhuis to testify on the second day of the evidentiary hearing in an effort to establish foundation for the challenged witnesses. Aug. 6, 2019 Hr'g Tr.

Colleen Bartell, Betty Tucker, and Blake Nielsen

73. During the second day of the hearing, Mr. Lovell conceded that he could not establish a foundation connecting Mr. Young to certain witnesses and that those witnesses were therefore not relevant to the issue of Mr. Young's performance. Those witnesses were: Colleen Bartell, Aug. 6, 2019 Hr'g Tr. at 57-58, 167-68; Betty Tucker, Aug. 6, 2019 Hr'g Tr. at 58, 75-76; and Blake Nielsen, Aug. 6, 2019 Hr'g Tr. at 58, 76-77.

74. Having conceded that these three witnesses were not relevant to the issues before the Court, the Court hereby concludes that Mr. Young was not deficient [37]in connection with these three witnesses, nor was Mr. Lovell prejudiced in any way by Mr. Young with regard to these three witnesses.

Jack Ford

75. Jack Ford was a potential witness Ms. Sandall-Barrus could not locate, and whose information she eventually provided to Mr. Bouwhuis for his secretary to continue making calls in an effort to locate him. State's Ex.

10. No evidence was presented that Mr. Young was a participant in these communications between Mr. Bouwhuis and Ms. Sandall-Barrus. Aug. 6, 2019 Hr'g Tr. at 86-87.

76. During trial, Mr. Bouwhuis, not Mr. Young, emailed the prosecution team to inform them that Jack Ford would not be testifying. State's Ex. 9.

77. At the conclusion of the August 6, 2019 hearing, the Court made the finding that "Mr. Bouwhuis, not Mr. Young, made the decision to not call Jack Ford. That was not Mr. Young's decision." Aug. 6, 2019 Hr'g Tr. at 202:2-4.

78. Having failed to lay any foundation connecting Jack Ford to Mr. Young, the Court concludes that Mr. Young was not deficient in connection with Jack Ford, nor was Mr. Lovell prejudiced in any way by Mr. Young with regard to Mr. Ford.

Brian Morris

79. Brian Morris appeared on a list of potential witnesses Mr. Lovell provided to Mr. Bouwhuis in December 2014. Aug. 6, 2019 Hr'g Tr. at 79; State's Ex. 7. Morris was one of three people on the December 2014 witness list who [38]supervised Mr. Lovell when he worked in the prison sign shop prior to being charged with capital murder. Aug. 6, 2019 Hr'g Tr. at 79-80. Mr. Lovell made the following note in the margin of the

December 2014 list: "Have Marissa talk to all 3 & you two pick the one you think would be best." State's Ex. 7.

80. Mr. Bouwhuis understood the phrase "you two pick the one you think would be best" to mean that Mr. Lovell wanted Mr. Bouwhuis and Ms. Sandall-Barrus to select the best sign shop witness after Ms. Sandall-Barrus conducted her interviews. Aug. 6, 2019 Hr'g Tr. at 80.

81. Ultimately, Ms. Sandall-Barrus recommended a sign shop supervisor named Paul Kirkpatrick as the best potential trial witness. Aug. 6, 2019 Hr'g Tr. at 82; State's Ex. 8.

82. During trial, Mr. Bouwhuis, not Mr. Young, emailed the prosecution team to inform them that Brian Morris would not be testifying. State's Ex. 9.

83. At the conclusion of the August 6, 2019 hearing, the Court made the finding that "Mr. Bouwhuis made the decision to not call Brian Morris." Aug. 6, 2019 Hr'g Tr. at 202:4-6.

84. Having failed to lay any foundation connecting Brian Morris to Mr. Young, the Court concludes that Mr. Young was not deficient in connection with Brian Morris, nor was Mr. Lovell prejudiced in any way by Mr. Young with regard to Mr. Morris.

Appendix A

[39]***Tony Milar***

85. Tony Milar was another potential mitigation witness identified by Mr. Lovell.

86. In February 2015, Mr. Bouwhuis and Ms. Sandall-Barrus had an email exchange wherein Ms. Sandall-Barrus recounted some of her efforts at locating Tony Milar, to which Mr. Bouwhuis responded: "I think you've done enough to find this person." State's Ex. 5.

87. A few days after this exchange, Mr. Bouwhuis's detailed time records reflect a conversation he had with Mr. Lovell over the telephone. Aug. 6, 2019 Hr'g Tr. at 72-74; State's Ex. 6. Mr. Bouwhuis testified that no one joined him for his call with Mr. Lovell. Aug. 6, 2019 Hr'g Tr. at 73. Mr. Bouwhuis's notes of that conversation reflect that he discussed Mr. Milar with Mr. Lovell and that together they decided: "We're scratching Tony Milar." Aug. 6, 2019 Hr'g Tr. at 73-74.

88. At the conclusion of the August 6, 2019 hearing, the Court made the finding that the decision not to call Tony Milar "was made by Mr. Bouwhuis, not by Mr. Young. So in terms of assessing Mr. Young's performance in not calling witnesses, Mr. Young . . . did not make that decision with respect to Mr. Milar. So Mr. Milar would be irrelevant to that question." Aug. 6, 2019 Hr'g Tr. at 204:10-16.

89. Having failed to lay any foundation connecting Tony Milar to Mr. Young, the Court concludes that Mr.

Young was not deficient in connection with Mr. [40] Milar, nor was Mr. Lovell prejudiced by Mr. Young with regard to Mr. Milar.

Rebecca Douglas

90. Rebecca Douglas gave lengthy testimony at the criminal trial in March 2015 regarding her interactions with Mr. Lovell arising from her position as the founder of a charity called Rising Star. At trial, her direct examination was conducted by Mr. Bouwhuis. *See* R8851:4-53.

91. At the rule 23B hearing, Mr. Bouwhuis testified that Ms. Douglas was always his witness. Aug. 6, 2019 Hr'g Tr. at 27.

92. After that testimony, Mr. Lovell conceded that Ms. Douglas was not relevant for purposes of category 1(a) of the 23B Order. Aug. 6, 2019 Hr'g Tr. at 56, 160.

93. However, Mr. Lovell did argue, and the Court agreed, that Ms. Douglas's testimony remained potentially relevant to the question of possible Church interference with witnesses and the Court permitted Ms. Douglas to testify regarding that topic, which is discussed below. Aug. 6, 2019 Hr'g Tr. at 59-61.

94. However, having failed to adduce any evidence connecting Rebecca Douglas to Mr. Young as a defense witness, the Court concludes that Mr. Young was not deficient in connection with Ms. Douglas, nor

was Mr. Lovell prejudiced in any way by Mr. Young with regard to Ms. Douglas.

Amy Humphrey

95. Amy Humphrey was Ms. Douglas's assistant at Rising Star. Aug. 6, 2019 Hr'g Tr. at 114.

[41]96. Mr. Bouwhuis testified that Ms. Humphrey was assigned to be Mr. Young's witness. Aug. 6, 2019 Hr'g Tr. at 58-59.

97. Mr. Bouwhuis recounted concerns he had about whether Ms. Humphrey's testimony would be helpful, given that she had never actually met Mr. Lovell. Aug. 6, 2019 Hr'g Tr. at 115.

98. Mr. Bouwhuis was concerned about the duplicative and cumulative nature of any testimony Ms. Humphrey might offer given the testimony that was expected to come from Ms. Douglas regarding Mr. Lovell's support of Rising Star. Aug. 6, 2019 Hr'g Tr. at 115-17.

99. Mr. Bouwhuis expressed these concerns to Mr. Young in an email where he also raised an additional concern about how attractive Ms. Humphrey was and speculated about whether they "could create a conflict for Amy so she can't make it." Aug. 6, 2019 Hr'g Tr. at 117-18; State's Ex. 11.

100. Mr. Bouwhuis testified that his aforementioned concern about Mr. Lovell's behavior relating to

attractive women directly contributed to his concerns about having Ms. Humphrey testify. Aug. 6, 2019 Hr'g Tr. at 123-24

101. Mr. Bouwhuis could not recall any additional discussions with Mr. Young about the concerns he expressed in the email, although he testified that he was sure they did discuss them. Aug. 6, 2019 Hr'g Tr. at 118.

102. But Mr. Bouwhuis also emailed Ms. Douglas directly only two hours after his [42]email to Mr. Young suggesting to her that "it would be best if Amy had a conflict that prevented her from coming." State's Ex. 12. Mr. Young does not appear on the email correspondence between Mr. Bouwhuis and Ms. Douglas. *Id.*

103. Ms. Douglas responded that Ms. Humphrey would be in Georgia for a fundraiser and that she would be returning to Salt Lake "too late to come to the trial with" Ms. Douglas. State's Ex. 12. Mr. Young was not involved in the exchange Mr. Bouwhuis had with Ms. Douglas about Ms. Humphrey's travel plans or the need to create a "conflict that prevented her from coming" to the trial. *Id.*; Aug. 6, 2019 Hr'g Tr. at 120.

104. At the conclusion of the August 6, 2019 hearing, the Court made the finding that "it's clear that Mr. Bouwhuis was the one who was communicating with respect to Ms. Humphrey, and that he ultimately was the one that made the decision not to call her,

and was suggesting that a conflict be created so that she would not have to come" and concluded that "Mr. Young did not have anything to do with the decision not to call her as a potential witness." Aug. 6, 2019 Hr'g Tr. at 202-03.

105. Having failed to lay any foundation connecting Amy Humphrey to Mr. Young, the Court concludes that Mr. Young was not deficient in connection with Ms. Humphrey, nor was Mr. Lovell prejudiced in any way by Mr. Young with regard to Ms. Humphrey.

[43]***Marissa Sandall-Barrus***

106. Marissa Sandall-Barrus was engaged to join the defense team directly by Mr. Bouwhuis. Aug. 6, 2019 Hr'g Tr. at 65-66.

107. In her work as a mitigation specialist, she took direction from Mr. Bouwhuis. Aug. 6, 2019 Hr'g Tr. at 65; Aug. 23, 2019 Hr'g Tr. at 73–74.

108. The scope of Ms. Sandall-Barrus's work was defined by Mr. Bouwhuis and her assignments came from him. Aug. 6, 2019 Hr'g Tr. at 65.

109. Mr. Young was never assigned to assist Ms. Sandall-Barrus or to prepare her to do her work on the *Lovell* case. Aug. 6, 2019 Hr'g Tr. at 65-66.

110. Mr. Young was not in charge of Ms. Sandall-Barrus in any way. Aug. 6, 2019 Hr'g Tr. at 66.

111. During the August 6, 2019 hearing, the Court found that it was Ms. Sandall-Barrus's job to assist the lawyers in preparing the defense case and that Ms. Sandall-Barrus worked at the direction of Mr. Bouwhuis. Mr. Young was not responsible for her in any way. Aug. 6, 2019 Hr'g Tr. at 183.

112. The Court concludes that Mr. Young was not deficient in connection with Ms. Sandall-Barrus, as it was not his job to assist or prepare her. Furthermore, Mr. Lovell was not prejudiced in any way by Mr. Young with regard to Ms. Sandall-Barrus.

[44]**B. Category 1(a): Claim that Mr. Young did not interview, prepare, and examine several mitigation witnesses.**

1. Holly Rae Neville

113. Holly Rae Neville testified at the March 2015 trial and her direct examination was conducted by Mr. Young.

114. At the time of trial, Ms. Neville had a master's degree in psychology and was Mr. Lovell's case worker at the prison, a role she had held at that time for just under two years. Aug. 5, 2019 Hr'g Tr. at 200, 213.

115. Ms. Neville's role as case worker only required her to have one formal meeting with Mr. Lovell per year and, at the time of trial, she had only had one such meeting with him, which lasted a total of 15-20 minutes. Aug. 5, 2019 Hr'g Tr. at 214.

116. Beyond that one formal meeting, her interactions with Mr. Lovell were limited to brief encounters at the glass door to the cell block when Mr. Lovell would have questions or request additional forms and happened to flag Ms. Neville down as she "was going by the area." Aug. 5, 2019 Hr'g Tr. at 203-04, 214-15. Although Ms. Neville testified that there were "a lot" of such encounters, each of them was brief although "sometimes [she] would be at the door for a few minutes if he was explaining . . . something." Aug. 5, 2019 Hr'g Tr. at 215:4-13.

117. Ms. Neville retired from the Utah State Prison in 2017. Aug. 5, 2019 Hr'g Tr. at 199.

[45]118. Ms. Neville submitted an affidavit in support of the motion for rule 23B remand that attached email correspondence between herself and Ms. Sandall-Barrus. State's Ex. 4. The affidavit was drafted by attorney Sam Newton, but Ms. Neville testified during the evidentiary hearing that she adopted its statements as her own. Aug. 5, 2019 Hr'g Tr. at 217-18, 222.

119. Ms. Neville's affidavit in support of the remand stated that the emails she exchanged with Ms. Sandall-Barrus accurately reflected her impressions of Mr. Lovell and that she "was prepared to answer many of these questions at trial, but they were not asked." State's Ex. 4.

120. But at the evidentiary hearing, Ms. Neville was questioned about the contents of her trial testimony

and her email correspondence with Ms. Sandall-Barrus and conceded that, although the words were not identical, most of the subjects and overall impressions conveyed in the emails were also included in her trial testimony. Aug. 5, 2019 Hr'g Tr. at 223-227. That testimony was that Mr. Lovell is well-behaved in prison, pro-social in his attitudes and behavior, and goes above and beyond what is required of him in prison, including undertaking volunteer work and participating in the prison's Last Chance Program. State's Ex. 3 at 61-64.

121. Ms. Neville's testimony at the March 2015 trial was largely the same as what she communicated to the defense team through Ms. Sandall-Barrus.

122. Mr. Young reviewed Ms. Sandall-Barrus's interview summary of Ms. Neville [46]and was aware of the kind of testimony Ms. Neville was willing to give at trial. Aug. 30, 2019 Hr'g Tr. at 64.

123. One of Ms. Sandall-Barrus's emailed questions in the summary asked Ms. Neville if she thought Mr. Lovell "could survive in society" if he "was paroled in 10 or 15 years." Aug. 5, 2019 Hr'g Tr. at 229:14-17; State's Ex. 4. She responded that "an inmate's risk to the community is that social behavior, i.e., behavior in prison does not always equate with or predict criminal behavior." Aug. 30, 2019 Hr'g Tr. at 65; State's Ex. 4 at 4. Mr. Young did not elicit this testimony from Ms. Neville during trial, Aug. 30, 2019 Hr'g Tr. at 65-66, and, correspondingly, the prosecution was not able to

follow up on it at trial. The Court finds that this was of significant benefit to Mr. Lovell.

124. At the evidentiary hearing, Ms. Neville attempted to downplay the significance of her emailed statement that "behavior in prison does not always equate with or predict criminal behavior" by characterizing it as a statement written with caution because she was still employed at the prison at the time of trial. Aug. 5, 2019 Hr'g Tr. at 230:3-6.

125. When asked at the evidentiary hearing what her answers would have been had she been asked at trial whether she thought Mr. Lovell would both do well in general population and "survive in society if paroled in 10 or 15 years," Ms. Neville answered that she would have responded "absolutely" to both questions. Aug. 5, 2019 Hr'g Tr. at 234:4-6,20-24.

[47]126. Following up on this testimony, the State elicited the following statement from Ms. Neville: "I also believe that the best predictor of future behavior is past behavior, having a psychology degree, and that statement is kind of a tenet of psychology . . . Past behavior is [the] best predictor of future behavior. So I also believe that." Aug. 5, 2019 Hr'g Tr. at 235:17-21.

127. But Ms. Neville disagreed that past behavior outside of prison was the relevant past behavior for determining whether Mr. Lovell would do well outside of prison now and insisted that, instead, it was his more recent record of good behavior in prison that

was relevant, as opposed to "something that happened decades ago, like one instance." Aug. 5, 2019 Hr'g Tr. at 236-37.

128. From this point forward in her testimony, the Court found Ms. Neville's testimony, including her demeanor and body language, to be increasingly incredible.

129. Ms. Neville admitted that she did not know the details of Mr. Lovell's criminal record, or even the details of the murder of Ms. Yost.Aug. 5, 2019 Hr'g Tr. at 238.

130. The State pointed out to Ms. Neville that Mr. Lovell had committed a first-degree felony armed robbery in 1978 and received a five-years-to-life sentence in 1979, but was paroled after just three years, and asked Ms. Neville, based on her years of experience at the Utah State Prison, what would justify such an early release.Ms. Neville responded that "[p]ositive behavior in prison" [48]would. Aug. 5, 2019 Hr'g Tr. at 238-39.

131. Having agreed that the record suggests that Mr. Lovell's ability to be a "model prisoner" contributed to his early release from his aggravated robbery conviction, Ms. Neville was then asked whether she was aware of the crimes he committed after his parole. Ms. Neville responded: "I know about his crime" and when pressed for more detail added "I know it was aggravated kidnapping, murder, sexual assault." Aug. 5, 2019 Hr'g Tr. at 239.

132. When asked if she knew about Mr. Lovell's rape of Ms. Yost, Ms. Neville admitted that she did not. Aug. 5, 2019 Hr'g Tr. at 240.

133. The State then walked Ms. Neville through a series of detailed questions about Mr. Lovell's initial rape, kidnapping, and sodomizing of Ms. Yost, his subsequent efforts to hire two different men to murder Ms. Yost, and then the details of his abduction and murder of Ms. Yost. Aug. 5, 2019 Hr'g Tr. at 240-44. Ms. Neville admitted that she knew none of this information and her body language displayed increasing discomfort at the details of Mr. Lovell's crimes.

134. At the conclusion of this questioning, Ms. Neville did not answer yes or no to the question of whether the details of Mr. Lovell's "past behavior when he was in the community" had any effect on her prediction that he would not be a danger if he was released again in the future. Aug. 5, 2019 Hr'g Tr. at 244-45.

135. Ms. Neville conceded that the risk of Mr. Lovell reoffending was greater than zero and that a sentence of LWOP "would be the sentence that would reduce [49]the risk to zero." Aug. 5, 2019 Hr'g Tr. at 246:3-11.

136. Ms. Neville testified that she did not meet with any defense attorney prior to the morning of the trial and that the meeting that morning was to explain how things would proceed that day and not to prepare her substantive testimony. Aug. 5, 2019 Hr'g Tr. at 209.

137. However, Mr. Young testified to meeting Ms. Neville three times, twice at the prison and once the day of the trial. Aug. 20, 2019 Hr'g Tr. at 43-46; Aug. 30, 2019 Hr'g Tr. at 64, 139. Mr. Young described his first meeting with Ms. Neville as a brief and non-substantive introduction during a meeting with Mr. Lovell. Ms. Neville came into the room where Mr. Young and Mr. Lovell were meeting and Mr. Lovell introduced Ms. Neville as she "passed behind" Mr. Young. Aug. 20, 2019 Hr'g Tr. at 44:23-25; Aug. 30, 2019 Hr'g Tr. at 64. This testimony accords with Ms. Neville's own description of her brief encounters with Mr. Lovell as she passed through the relevant area of the prison.

138. Mr. Young further testified that he had a second "impromptu" encounter with Ms. Neville at the prison where they had a discussion about the case and Ms. Neville promised to provide him with a file on Mr. Lovell's behavior in prison, which Mr. Young never received from her. Aug. 20, 2019 Hr'g Tr. at 46. Mr. Young was clear that neither of his meetings with Ms. Neville at the prison were planned in advance. Aug. 20, 2019 Hr'g Tr. at 45.

139. The Court finds Mr. Young's testimony more credible on the subject of whether [50]he met Ms. Neville prior to the day of her testimony. His memory of the meetings was specific and detailed and his recollection immediate. And the details he provided are consistent with how Ms. Neville described all of her encounters

with Mr. Lovell at the prison, other than her one formal meeting with Mr. Lovell.

140. The Court finds that, to the extent Ms. Neville's testimony was beneficial to Mr. Lovell at trial, given her very limited experience with Mr. Lovell at that time, Mr. Young elicited only her beneficial testimony and none of the damaging testimony the State elicited at the evidentiary hearing. Moreover, the Court finds that Ms. Neville's trial testimony came across as far more credible than her testimony at the evidentiary hearing, which the Court finds was evasive and lacking in credibility.

141. The rule 23B Order requires the Court to determine whether Mr. Young "performed deficiently" "in not interviewing, preparing, and examining" Ms. Neville. Although Mr. Lovell tried to demonstrate that Mr. Young did not interview or prepare Ms. Neville at all, the Court finds that Mr. Young did at least have some preliminary conversations with Ms. Neville at the prison and, in any event, Ms. Neville exchanged detailed questions with Ms. Sandall-Barrus covering the helpful information Ms. Neville had to offer, which, in the Court's view, was quite limited. Mr. Young had every right to rely on the information Ms. Sandall-Barrus gathered from Ms. Neville.

[51]142. Moreover, the essence of Ms. Neville's testimony, both at trial and at the evidentiary hearing, was that Mr. Lovell is a "model prisoner," a fact about which there was no dispute at trial and that was testified

to by numerous other witnesses at trial. Given the limited nature of Ms. Neville's contact with Mr. Lovell and the cumulative nature of her helpful testimony, the Court cannot conclude that Mr. Young was deficient in his preparation to put Ms. Neville on as a witness.

143. As for Mr. Young's examination of Ms. Neville at trial, the Court concludes that Mr. Young was not deficient. Indeed, compared to Ms. Neville's testimony at the evidentiary hearing, the trial testimony Mr. Young elicited from Ms. Neville was among the better possible versions that could have been elicited. The Court cannot conclude that "no competent attorney" would have proceeded as Mr. Young did in his preparation and examination of Ms. Neville.

144. The rule 23B Order also required the Court to determine whether Mr. Lovell was prejudiced by Mr. Young's work regarding Ms. Neville. The Court concludes he was not. Ms. Neville was a witness of marginal value, whose testimony was cumulative of other witnesses who also testified that Mr. Lovell was a model prisoner, which was not disputed by the State. Mr. Lovell did not prove that there was a reasonable probability—or any probability—of a more favorable outcome at trial had Mr. Young done anything different with regard to Ms. Neville.

[52]**2. Kent Tucker**

145. At the time of Mr. Lovell's March 2015 trial, Kent Tucker was the husband of Mr. Lovell's first cousin, Betty Tucker. Aug. 16, 2019 Hr'g Tr. at 115.

146. Mr. Tucker has known Mr. Lovell for many years; from the time Mr. Lovell was just a child. Aug. 16, 2019 Hr'g Tr. at 115-16.

147. Mr. Tucker did not have much contact with Mr. Lovell before Mr. Lovell went to prison. Aug. 16, 2019 Hr'g Tr. at 117.

148. When Mr. Lovell was sentenced to prison Mr. Tucker and his wife were angry with him for what he'd done, and didn't visit for a while, but when his wife decided it was time to visit, the two started going together about 1989. Aug. 16, 2019 Hr'g Tr. at 118.

149. Around 1989, Mr. Tucker and his wife visited Mr. Lovell at the prison a few times. Aug. 16, 2019 Hr'g Tr. at 118.

150. Mr. Tucker's contact with Mr. Lovell in the beginning was mostly by telephone. Aug. 16, 2019 Hr'g Tr. at 118, 121.

151. In 2003 and then starting in 2005, Mr. Tucker would visit Mr. Lovell at the prison approximately every six weeks. Aug. 16, 2019 Hr'g Tr. at 119-20.

152. Depending upon the visit, Mr. Tucker would stay a couple of hours or sometimes several hours. Aug. 16, 2019 Hr'g Tr. at 119.

153. Mr. Tucker and Mr. Lovell would talk about hunting, fishing, the mountains, family, friends, current events, etc. Aug. 16, 2019 Hr'g Tr. at 118-19.

[53]154. For eight or ten years, Mr. Tucker's visits were consistent, but tapered off after that because of Mr. Lovell's schedule. Aug. 16, 2019 Hr'g Tr. at 120.

155. Mr. Tucker believes that Mr. Lovell has lots of friends, corresponds with a lot of people, and has numerous pen pals. Aug. 16, 2019 Hr'g Tr. at 120-21, 124.

156. Mr. Lovell calls Mr. Tucker every two weeks. Aug. 16, 2019 Hr'g Tr. at 121.

157. Mr. Tucker willingly pays for Mr. Lovell's telephone calls. Aug. 16, 2019 Hr'g Tr. at 122.

158. Mr. Tucker indicated that Mr. Lovell expresses interest in him and his family and for at least the past twenty years has sent Mr. Tucker letters and birthday cards. Aug. 16, 2019 Hr'g Tr. at 122-23.

159. Mr. Young reviewed Ms. Sandall-Barrus's interview summary of Mr. Tucker and was aware that Mr. Tucker could provide favorable character testimony for Mr. Lovell. Aug. 30, 2019 Hr'g Tr. at 53-54.

160. Mr. Young called Mr. Tucker multiple times, asked him to be a witness, and prepared him to testify. Aug. 16, 2019 Hr'g Tr. at 124-25; Aug. 19, 2019 Hr'g Tr. at 144.

161. While Mr. Tucker testified that he came to the trial, sat in the courtroom (improperly according to him), saw Mr. Young at counsel table with Mr. Lovell, talked

with Mr. Young during a break, asked Mr. Young if he was going to testify, and Mr. Young called him as a witness in the afternoon, Aug. 16, 2019 Hr'g Tr. at 124-27, the Court finds this sequence of events implausible. Mr. [54]Young credibly testified that Mr. Tucker was scheduled to testify on a particular day, but when other testimony went long, Mr. Young asked Mr. Tucker to come back to testify the next day of trial. Aug. 19, 2019 Hr'g Tr. at 144.

162. Mr. Tucker stated that he spoke with Mr. Young for only three or four minutes, Aug. 16, 2019 Hr'g Tr. at 127, but Mr. Young credibly testified that he spoke with Mr. Tucker several times on the telephone, several times at the courthouse during breaks in the trial, and spent 20 to 30 minutes outside one of the courthouse conference rooms preparing Mr. Tucker to testify. Aug. 19, 2019 Hr'g Tr. at 144, 156; Aug. 30, 2019 Hr'g Tr. at 54.

163. Mr. Tucker believes that when Mr. Young asked him at trial if he would support and continue his relationship with Mr. Lovell if Mr. Lovell were released from prison, Mr. Young had no idea that Mr. Tucker's response would be positive rather than negative. Aug. 16, 2019 Hr'g Tr. at 129-30.

    a. But Mr. Young credibly testified that he was well aware that Mr. Tucker was going to provide character testimony favorable to Mr. Lovell. Aug. 30, 2019 Hr'g Tr. at 54.

164. However, Mr. Young never would have called Mr. Tucker to testify had Mr. Lovell divulged that he told Mr. Tucker that he (Mr. Lovell) had not "met a better man than Jared Briggs," a witness for the State who testified at trial that Mr. Lovell sexually assaulted Ms. Yost the night he murdered her. Aug. 30, [55]2019 Hr'g Tr. at 57-58; R8854:192-93, 221.

165. Mr. Tucker believes that,

    a. Mr. Lovell has a kind heart and a good character based on Mr. Lovell's interactions with animals. Aug. 16, 2019 Hr'g Tr. at 133-34.

    b. Mr. Lovell takes a real interest in people. Aug. 16, 2019 Hr'g Tr. at 134.

166. Mr. Tucker wished he could have told the jury more, including that Mr. Lovell told him that,

    a. Mr. Lovell has become familiar with the Church of Jesus Christ of Latter-day Saints (Church) and formed strong bonds with the Church leaders at the prison. Aug. 16, 2019 Hr'g Tr. at 132.

    b. Mr. Lovell has formed strong bonds with other prisoners and encouraged them to work out. Aug. 16, 2019 Hr'g Tr. at 132.

    c. Mr. Lovell cared for a sick inmate. Aug. 16, 2019 Hr'g Tr. at 133.

d. With Mr. Lovell's care, including changing the inmate's seats and helping him to the bathroom, the inmate's condition improved and he was able to walk again when he had not been able to upon his return to the infirmary. Aug. 16, 2019 Hr'g Tr. at 133.

167. But Mr. Tucker conceded that he did not know what the defense strategy was in Mr. Lovell's case and that what he testified to at trial may have been precisely what defense counsel wanted him to testify about. Aug. 16, 2019 Hr'g Tr. at 137-38.

[56]168. Mr. Lovell never told Mr. Tucker the details of his crimes and Mr. Tucker does not know what the details are. Aug. 16, 2019 Hr'g Tr. at 134, 140-41.

169. Mr. Tucker was less than credible when he testified that even if he knew the details of Mr. Lovell's rape and murder, that would have no effect at all on his impressions of Mr. Lovell. Aug. 16, 2019 Hr'g Tr. at 135-36.

170. Mr. Tucker believes Mr. Lovell has shown "a lot of remorse" and believes Mr. Lovell when he says he wishes he could take back what he did and wishes the crimes had never happened. Aug. 16, 2019 Hr'g Tr. at 135.

171. If Mr. Tucker had the power, he would release Mr. Lovell from prison because Mr. Tucker believes that Mr. Lovell "would be a real asset to society." Aug. 16, 2019 Hr'g Tr. at 136:14-15, 141.

172. Mr. Tucker would have no safety concerns if Mr. Lovell were released from prison and would take Mr. Lovell into his home. Aug. 16, 2019 Hr'g Tr. at 135.

173. Mr. Tucker's views of and judgments about Mr. Lovell are based solely on telephone calls and visits to the prison. Aug. 16, 2019 Hr'g Tr. at 118-20.

    a. Mr. Tucker has never seen Mr. Lovell (as an adult) outside of a maximum security setting. Aug. 16, 2019 Hr'g Tr. at 144.

    b. Mr. Tucker has never seen how Mr. Lovell reacts when he is angry with someone. Aug. 16, 2019 Hr'g Tr. at 144.

    c. Mr. Tucker has never seen how Mr. Lovell reacts when a woman turns down his advances. Aug. 16, 2019 Hr'g Tr. at 144.

    [57]d. Mr. Tucker has never seen how Mr. Lovell reacts when he is provoked. Aug. 16, 2019 Hr'g Tr. at 144.

174. Mr. Tucker has never seen Mr. Lovell in any kind of social setting or seen him interact with others. Aug. 16, 2019 Hr'g Tr. at 144. Mr. Tucker lacks sufficient foundation for concluding that Mr. Lovell's expressions of remorse are real, or that there is no risk that Mr. Lovell will harm another person if he is released from prison.

175. Mr. Tucker appeared naïve when he conceded that Mr. Lovell was likely a model prisoner—as he is now—when he was released early from prison on his 1979 armed robbery conviction, that after his release Mr. Lovell raped Ms. Yost, that Mr. Lovell was arrested for the rape but made bail, that after being released again he murdered Ms. Yost, yet still believes that Mr. Lovell will not be a risk to anyone if he were released from prison again. Aug. 16, 2019 Hr'g Tr. at 140-43. Mr. Tucker's evidentiary hearing testimony would not have persuaded a jury to impose a sentence of life in prison with the possibility of parole.

176. Mr. Lovell alleges that Mr. Young performed deficiently because he did not interview, prepare, and (adequately) examine Mr. Tucker. Based on the foregoing findings, the Court concludes that Mr. Young's performance in relation to Mr. Tucker was not deficient. Even assuming that Mr. Young neither interviewed nor prepared Mr. Tucker to testify, that alone is not enough to [58]establish deficient performance. A competent attorney for any number of legitimate reasons—such as insufficient time and resources, the existence of other more pressing matters, or prior knowledge of what the witness will say—may reasonably choose to forego interviewing or preparing a witness. While the surest approach may be to interview and prepare all witness before they testify, the Sixth Amendment does not constitutionalize best practices, only reasonable performance.

177. In any event, given the short amount of time Mr. Young had to contact his witnesses, he reasonably relied on Ms. Sandall-Barrus's interview summary of Mr. Tucker and his wife to inform him of the type of character testimony Mr. Tucker would provide. In addition, the Court credits Mr. Young's evidentiary hearing testimony that he spoke with Mr. Tucker several times on the telephone and for 20 to 30 minutes at the courthouse the day before Mr. Tucker testified. While the details of those conversations are not known, the Court presumes, as *Strickland* requires, that Mr. Young was preparing Mr. Tucker for his testimony.

178. The Court also concludes that Mr. Young adequately examined Mr. Tucker at trial. Mr. Young knew that Mr. Tucker was married to Mr. Lovell's first cousin, Betty, and was therefore a part of Mr. Lovell's extended family. Based on Mr. Tucker's familial relationship with Mr. Lovell, a competent attorney in Mr. Young's circumstances could reasonably conclude that jurors might view the [59]types of favorable statements Mr. Tucker provided at the evidentiary hearing as predictable and therefore not particularly helpful. And because Mr. Young knew that non-family character witnesses would be testifying about Mr. Lovell as a model prisoner and a changed, remorseful person, it was not necessary for Mr. Tucker to provide that kind of cumulative testimony. Nevertheless, as a family member, Mr. Tucker could give believable testimony to buttress Dr. Cunningham's expert testimony that "parole success

is described . . . as being significantly related to the quality of social support the parolee receives as he attempts to reintegrate into the open community." R8852:79-80. And that is precisely the testimony Mr. Young elicited, namely, that Mr. Tucker would be a support to Mr. Lovell if he were paroled and that he would assist Mr. Lovell in anything he might need. R8854:122-25. The Court therefore concludes that Mr. Young did not perform deficiently when he examined Mr. Tucker at trial.

179. Mr. Lovell also alleges that Mr. Young's performance regarding Mr. Tucker was prejudicial. The Court concludes that it was not. While Mr. Tucker's evidentiary hearing testimony was not cumulative of his trial testimony, it was cumulative of testimony provided by several other witnesses. Even without Mr. Tucker's testimony, jurors were fully aware that defense witnesses believed Mr. Lovell was a model prisoner, and that he was truly remorseful, should have a chance at parole, and would be an asset to society if released from prison. More of the same would not have altered the evidentiary picture [60] presented to the jury at trial. In addition, had Mr. Tucker testified at trial consistent with his evidentiary hearing testimony, the jury would have learned that his interactions with Mr. Lovell were so limited that he had no real basis for concluding that Mr. Lovell's expressions of remorse were genuine or that Mr. Lovell would not be a danger to others if paroled. The Court therefore concludes that, even assuming Mr. Young performed deficiently in the ways Mr. Lovell

alleges and that Mr. Tucker had provided at trial the testimony he gave at the evidentiary hearing, there is no reasonable probability that the outcome of the sentencing proceeding would have been different.

3. Ecclesiastical leaders

As a preface to the Court's factual findings for each of the ecclesiastical leaders identified in category 1(a), the Court makes the following findings of fact related to Mr. Young's dealings with the ecclesiastical leaders:

180. Prior to trial, with one exception, Mr. Young was assigned to prepare and examine the ecclesiastical leaders. Aug. 19, 2019 Hr'g Tr. at 127-28; Defense Ex. 40. Mr. Webster was not assigned to Mr. Young until the middle of trial, on March 19, 2015. Aug. 20, 2019 Hr'g Tr. at 116, 118; State's Ex. 13.

181. Mr. Young reached out to the ecclesiastical leaders; he also read their witness summaries prepared by Ms. Sandall-Barrus and was aware of the favorable testimony they were willing to give at trial, including that they believed Mr. Lovell should have a chance at parole, that Mr. Lovell was remorseful, and that [61] he gave to charities. Aug. 30, 2019 Hr'g Tr. at 11.

182. Of the witnesses Mr. Young was assigned, he believed the ecclesiastical leaders were the strongest witnesses for Mr. Lovell because of their contact with Mr. Lovell and their knowledge of Mr. Lovell's change, rehabilitation, and remorse. Aug. 20, 2019 Hr'g Tr. at 95-96.

183. Mr. Young spoke with several of the ecclesiastical leaders on the telephone before the Kirton McConkie attorneys asked Mr. Young not to contact the ecclesiastical leaders directly, but that he should deal directly with the Kirton McConkie attorneys. Aug. 20, 2019 Hr'g Tr. at 57-58; Aug. 30, 2019 Hr'g Tr. at 12, 139.

a. Dr. John Newton

184. Dr. John Newton, an orthodontist, met Mr. Lovell in 2003 when Dr. Newton was a bishop for the Church of Jesus Christ of Latter-day Saints in the section of the prison where Mr. Lovell was housed. Aug. 16, 2019 Hr'g Tr. at 4-6, 57.

185. For security reasons, Dr. Newton visited with inmates individually through a glass barrier, including Mr. Lovell. Aug. 16, 2019 Hr'g Tr. at 6-7, 68.

a. Dr. Newton conceded that inmates where Mr. Lovell was housed (the maximum security unit) are dangerous people. Aug. 16, 2019 Hr'g Tr. at 68.

186. Mr. Lovell was never permitted to participate in any small group meetings. Aug. 16, 2019 Hr'g Tr. at 7.

[62]187. Dr. Newton visited with Mr. Lovell a couple of times a month for a few years for maybe three hours at a time. Aug. 16, 2019 Hr'g Tr. at 69.

188. When Dr. Newton visited with Mr. Lovell, they would talk about religious principles, pray, and "just talk." Aug. 16, 2019 Hr'g Tr. at 6.

189. In his visits with Mr. Lovell, Dr. Newton learned about Mr. Lovell's family, prison experience, his hopes and dreams, and his crimes. Aug. 16, 2019 Hr'g Tr. at 8.

    a. But Dr. Newton conceded that he was unaware of the details of Mr. Lovell's rape and murder of Ms. Yost and that Mr. Lovell never told him the details. Aug. 16, 2019 Hr'g Tr. at 66.

190. Based on his conversations with Mr. Lovell, Dr. Newton believes that Mr. Lovell had a wonderful, normal childhood and that there was a bond of love and affection between him and his family. Aug. 16, 2019 Hr'g Tr. at 8-9, 66-67.

    a. This testimony contradicted Dr. Cunningham's testimony about Mr. Lovell's childhood and upbringing. R8849:73-74; 8851:87-89, 118-33, 148-91; 8852:10-45.

191. Dr. Newton was released as bishop in 2006-2007 and after that he visited Mr. Lovell maybe once a year. anMr. Lovell called Dr. Newton a couple of times a month. Aug. 16, 2019 Hr'g Tr. at 13.

192. Dr. Newton believes Mr. Lovell is genuinely interested in how his family is doing. Aug. 16, 2019 Hr'g Tr. at 15.

[63]193. Dr. Newton considers Mr. Lovell to be one of the most upbeat inmates he has ever met. Aug. 16, 2019 Hr'g Tr. at 16.

194. Dr. Newton considers Mr. Lovell a friend. Aug. 16, 2019 Hr'g Tr. at 14.

195. Dr. Newton believes Mr. Lovell has kept himself in good physical shape. Aug. 16, 2019 Hr'g Tr. at 16-17.

196. According to Dr. Newton, Mr. Lovell has taken classes from BYU, donates money to Rising Star Outreach, and is involved in the Church's genealogical opportunities at the prison. Aug. 16, 2019 Hr'g Tr. at 17-18.

197. Dr. Newton believes that Mr. Lovell is concerned about doing things publicly that might negatively affect Ms. Yost's family. Aug. 16, 2019 Hr'g Tr. at 19.

198. Dr. Newton's opinion is that Mr. Lovell has a great amount of remorse and is greatly aware of the suffering he has put Ms. Yost's family through. Aug. 16, 2019 Hr'g Tr. at 19, 67.

199. Dr. Newton believes Mr. Lovell's expressions of remorse are sincere. Aug. 16, 2019 Hr'g Tr. at 68.

200. Dr. Newton believes he spoke with Ms. Sandall-Barrus in July 2014. Aug. 16, 2019 Hr'g Tr. at 20-22, 41-42.

201. Dr. Newton does not clearly remember whether he spoke with Mr. Young on the telephone. Aug. 16, 2019 Hr'g Tr. at 42.

202. Dr. Newton did not meet with Mr. Young in person, they did not talk about what Dr. Newton's testimony would be, and they met for the first time face-to-[64] face in the hallway outside the courtroom on the day Dr. Newton testified. Aug. 16, 2019 Hr'g Tr. at 42.

    a. But Mr. Young credibly testified that he read Ms. Sandall-Barrus's interview summary of Dr. Newton, he talked to Dr. Newton on the phone, and Mr. Young prepared notes and potential questions to ask Dr. Newton at trial. Aug. 20, 2019 Hr'g Tr. at 54, 57; Aug. 30, 2019 Hr'g Tr. at 27.

203. While Dr. Newton is personally disappointed in his trial testimony and, in hindsight, believes he could have done better; Dr. Newton explained that his disappointment was with how he expressed himself and not the content of his testimony, Aug. 16, 2019 Hr'g Tr. at 44, 60-61, 85-86.

204. Had defense counsel contacted Dr. Newton, he would have talked to counsel. Aug. 16, 2019 Hr'g Tr. at 54.

    a. But Mr. Young credibly testified that he believed he could only speak to attorneys at Kirton McConkie and not directly to Dr. Newton. Aug.

20, 2019 Hr'g Tr. at 57-58; Aug. 30, 2019 Hr'g Tr. at 11-12.

205. Dr. Newton is morally opposed to capital punishment and does not want Mr. Lovell to be executed. Aug. 16, 2019 Hr'g Tr. at 55.

206. Dr. Newton believes Mr. Lovell should be released from prison. Aug. 16, 2019 Hr'g Tr. at 55.

207. Dr. Newton knows that the recidivism rate is high and that inmates who are released from prison find it difficult to have a normal life, but he believes Mr. [65]Lovell is tenacious and that "he's going to be an even bigger success when he's on the outside." Aug. 16, 2019 Hr'g Tr. at 56-57.

208. Dr. Newton believes Mr. Lovell has changed so he would be comfortable seeing him released into the community. Aug. 16, 2019 Hr'g Tr. at 56.

209. If Mr. Lovell is released, Dr. Newton believes Mr. Lovell would be involved with things outdoors, helping others with projects, telling his story to youth headed for trouble, and participating in charities, including Rising Star. Aug. 16, 2019 Hr'g Tr. at 56.

210. Dr. Newton did not know Mr. Lovell at the time Mr. Lovell raped and murdered Ms. Yost, but he believes Mr. Lovell is not the same person now that he was when the crimes were committed, although Dr. Newton conceded that he does not *know* if that is the case. Aug. 16, 2019 Hr'g Tr. at 72.

211. Dr. Newton believes that Mr. Lovell is not a dangerous person in the highly-controlled maximum security setting where Mr. Lovell is housed at the prison. Aug. 16, 2019 Hr'g Tr. at 72-73.

212. Dr. Newton also believes that Mr. Lovell would not be violent or dangerous outside of prison. Aug. 16, 2019 Hr'g Tr. at 81, 91.

213. Dr. Newton believes there are no reasons why Mr. Lovell should not be released from prison. Aug. 16, 2019 Hr'g Tr. at 88, 94.

214. Dr. Newton believes there is zero risk Mr. Lovell would re-offend because of the changes Mr. Lovell has made in his life. Aug. 16, 2019 Hr'g Tr. at 81, 91.

[66]a. But Dr. Newton conceded that he cannot guarantee how Mr. Lovell might behave if released from prison. Aug. 16, 2019 Hr'g Tr. at 55.

b. And Dr. Newton also conceded that if Mr. Lovell were paroled and then murdered another woman, it would not have been worth the risk to have released him from prison. Aug. 16, 2019 Hr'g Tr. at 112.

215. Dr. Newton would release Mr. Lovell from prison if it were in his power to do so and he would be comfortable having Mr. Lovell live across the street from him. Aug. 16, 2019 Hr'g Tr. at 73, 80-81.

216. Dr. Newton lacks sufficient foundation to conclude that Mr. Lovell's expressions of remorse and concern for Ms. Yost's family are real, or that Mr. Lovell will not be a danger to others if released from prison.

    a. Dr. Newton visited with Mr. Lovell a couple of times a month for a few years for maybe three hours at a time. Aug. 16, 2019 Hr'g Tr. at 69.

    b. Dr. Newton has never seen or interacted with Mr. Lovell outside of the highly controlled environment of the maximum security unit at the prison. Aug. 16, 2019 Hr'g Tr. at 68.

    c. Dr. Newton has never seen Mr. Lovell in any kind of social setting. Aug. 16, 2019 Hr'g Tr. at 68.

    d. Dr. Newton has never seen what Mr. Lovell is like when he gets angry with someone. Aug. 16, 2019 Hr'g Tr. at 68.

    e. Dr. Newton has never seen how Mr. Lovell reacts when he is provoked. [67]Aug. 16, 2019 Hr'g Tr. at 69.

    f. Dr. Newton has only a small snapshot of the life Mr. Lovell chooses to present to him. Aug. 16, 2019 Hr'g Tr. at 69-70.

    g. Dr. Newton conceded that, based on the totality of Mr. Lovell's life, his experience with Mr. Lovell

amounts to merely hours. Aug. 16, 2019 Hr'g Tr. at 70.

217. Dr. Newton's evidentiary hearing testimony in support of Mr. Lovell and whether Mr. Lovell should be released from prison was less believable because it was evasive, inconsistent with statements made to the mitigation specialist, went well beyond the testimony he gave at trial in support of Mr. Lovell's release, and was motivated by his disappointment in how he testified at trial and the outcome of the penalty phase.

a. When Dr. Newton spoke to Ms. Sandall-Barrus, he told her that he may not be willing to testify that Mr. Lovell should be released from prison in the future. Aug. 16, 2019 Hr'g Tr. at 76; State's Ex. 40, SY0002475.

b. Dr. Newton acknowledged that when he stated that he could not think of a reason Mr. Lovell should not be released from prison, he was unaware that Mr. Lovell has a history of harming others after being released from custody, specifically, that Mr. Lovell raped Ms. Yost after being released from prison and then murdered Ms. Yost after being released on the rape charge. Aug. 16, 2019 Hr'g Tr. at 93-94.

[68]c. Dr. Newton was evasive when he was asked whether knowing that Mr. Lovell's past behavior of harming others when he was released from

prison was at least a reason not to release Mr. Lovell from prison. Aug. 16, 2019 Hr'g Tr. at 94.

d. Dr. Newton conceded that he testified at trial that he never felt any "personal threat or potential harm by talking with him" because "I'm not sure that he's ever going to get out of prison." Aug. 16, 2019 Hr'g Tr. at 79-80, 84-85, 87.

e. Dr. Newton is personally disappointed in his trial testimony and, in hindsight, believes he could have done better. Aug. 16, 2019 Hr'g Tr. at 43-44, 60-61, 85-86.

f. Dr. Newton wishes he would have said things better in his trial testimony. Aug. 16, 2019 Hr'g Tr. at 64-65.

g. Dr. Newton was disappointed in the jury verdict; had Mr. Lovell's life been spared, he might think differently about how he testified. Aug. 16, 2019 Hr'g Tr. at 65-66.

218. Mr. Lovell never told Dr. Newton that he murdered Ms. Yost to avoid going back to prison and Dr. Newton conceded that a person capable of murdering another person to avoid going to prison is capable of manipulating others in order to get out of prison. Aug. 16, 2019 Hr'g Tr. at 71-72.

219. Mr. Lovell never told Dr. Newton the details of the crimes he committed and [69]Dr. Newton was

unaware of the details. Aug. 16, 2019 Hr'g Tr. at 66, 96-100.

220. After Dr. Newton was informed of the details of Mr. Lovell's rape and murder of Ms. Yost, he was non-responsive and evasive when asked whether those details gave him pause on whether Mr. Lovell would be a risk of harm to others if released from prison. Aug. 16, 2019 Hr'g Tr. at 100-02.

221. Dr. Newton was non-responsive and evasive when asked whether a sentence of LWOP would be the safest sentence for Mr. Lovell. Aug. 16, 2019 Hr'g Tr. at 102-05.

222. Had Dr. Newton testified at trial consistent with his evidentiary hearing testimony, key parts of his testimony would have undermined his credibility and the defense mitigation strategy of convincing the jury that Mr. Lovell deserved a sentence of life in prison with the possibility of parole.

    a. Dr. Newton's judgments about Mr. Lovell were made based only on his limited contact with Mr. Lovell in the highly controlled setting of the maximum security unit at the prison. Dr. Newton's testimony showed that he lacks sufficient foundation to testify that Mr. Lovell was remorseful and would not be a danger if released from prison.

b. Dr. Newton's judgments about Mr. Lovell were made without knowing the details of the rape and murder Mr. Lovell committed against Ms. Yost.

c. Dr. Newton's judgments about Mr. Lovell were made without knowing that Mr. Lovell had a history of harming others after being released from [70]confinement.

d. After learning for the first time the details of Mr. Lovell's crimes, Dr. Newton was evasive and refused to respond when asked whether knowing those details gave him pause on whether Mr. Lovell might be a danger to others if released from prison.

e. Dr. Newton was evasive and refused to respond when asked whether the safest sentence for Mr. Lovell would be LWOP.

f. Dr. Newton conceded that he could not guarantee that Mr. Lovell would not harm another person if released from prison.

g. Dr. Newton conceded that a person, like Mr. Lovell, who would murder another person to avoid going to prison is capable of manipulating others in order to get out of prison, and that Mr. Lovell could be manipulating him.

h. Dr. Newton did not know Mr. Lovell at the time Mr. Lovell raped and murdered Ms. Yost and was

in no position to judge to what extent, if any, Mr. Lovell had changed.

223. Dr. Newton's evidentiary hearing testimony was neither compelling nor convincing and would not have persuaded a jury to impose a sentence of life in prison with the possibility of parole.

224. Mr. Lovell alleges that Mr. Young was deficient for not interviewing, preparing, and examining Dr. Newton. Based on the Court's findings, the [71]Court concludes that Mr. Young's performance regarding Dr. Newton was objectively reasonable in the circumstances. Dr. Newton cannot clearly remember whether he spoke with Mr. Young, but Mr. Young testified that he talked to Dr. Newton on the telephone more than once. Because the details of their conversation is not known, the Court presumes that Mr. Young was either gathering information or talking to Dr. Newton about testifying, or both. But even assuming that is not the case, while the best practice may be to always interview and prepare a witness before the witness testifies, doing so is not constitutionally required in all circumstances. Thus, even assuming that Mr. Young did not interview Dr. Newton and prepare him to testify, that alone is not enough to conclude that Mr. Young performed deficiently. And that is especially so in the present case. Mr. Young reasonably relied on Ms. Sandall-Barrus's interview summary of Dr. Newton to inform him of the type of testimony Dr. Newton would provide. In addition, after the Kirton McConkie attorneys contacted the ecclesiastical

leaders, Mr. Young was told that he should not have direct contact with them, which Mr. Young reasonably believed included Dr. Newton. A competent attorney in these circumstances could reasonably conclude that directly preparing Dr. Newton to testify was no longer an option.

225. The Court also concludes that Mr. Young's examination of Dr. Newton at trial was not deficient. The Court bases its conclusion on the fact that Dr. Newton's [72]favorable evidentiary hearing testimony—which Mr. Lovell presents as the testimony the jury would have heard had Mr. Young interviewed and prepared Dr. Newton—was not materially different than the testimony he gave at trial in response to Mr. Young's questioning. Both times, Dr. Newton stated that Mr. Lovell was a positive, upbeat inmate, he kept himself in good physical shape, pursued educational opportunities, was involved in charities, and was remorseful and concerned about Ms. Yost's family.

226. The only additional testimony that Dr. Newton gave at the evidentiary hearing that Mr. Young did not ask about at trial was (1) whether Dr. Newton believed Mr. Lovell should be released from prison, and (2) if so, whether Mr. Lovell would be a danger to others. Dr. Newton's response to the first inquiry was yes, and to the second, no. While favorable in the abstract, that testimony came at a substantial cost—to Dr. Newton's credibility and the defense mitigation theory—which Mr. Young avoided at trial. As the Court found based on the State's cross-examination, Dr. Newton's

responses were made without knowing the details of the rape and murder Mr. Lovell committed against Ms. Yost and without knowing that Mr. Lovell had a history of harming others after being released from prison. And after being informed of these details, Dr. Newton was evasive and refused to respond when asked whether knowing those details gave him pause on whether Mr. Lovell might be a danger to others if released from prison. He was also evasive and refused to respond [73]when asked whether the safest sentence for Mr. Lovell would be LWOP, but ultimately conceded that he could not guarantee that Mr. Lovell would not harm another person if paroled. All in all, Mr. Young's examination of Dr. Newton at trial produced the better version of favorable testimony that Dr. Newton had to offer. Mr. Young therefore did not perform deficiently in this regard.

227. Mr. Lovell also alleges that Mr. Young's performance was prejudicial. The Court concludes that it was not. As just explained, Dr. Newton's evidentiary hearing testimony—which Mr. Lovell asserts is the testimony that would have reasonably altered the outcome of his sentencing hearing—was not materially different from his trial testimony. And to the extent it was different, that difference made the evidentiary picture worse for Mr. Lovell, not better. Thus, even assuming Mr. Young performed deficiently in the ways Mr. Lovell alleges and that Dr. Newton had provided at trial the testimony he gave at the evidentiary hearing, there is no reasonable probability that the outcome of the sentencing proceeding would have been different.

b. Gary Webster

228. Gary Webster first met Mr. Lovell in 2007 when Mr. Webster was a bishop for the Church of Jesus Christ of Latter-day Saints in the section of the prison where Mr. Lovell was housed. Aug. 12, 2019 Hr'g Tr. at 136-37.

229. Mr. Webster spent nine to ten hours per month with Mr. Lovell for [74]approximately three years. Aug. 12, 2019 Hr'g Tr. at 137, 158.

230. Mr. Webster visited with Mr. Lovell more than any other inmate. Aug. 12, 2019 Hr'g Tr. at 159.

231. Mr. Webster would talk with Mr. Lovell mostly about spiritual matters, but also how Mr. Lovell felt about his crimes, the criminal justice system, and other general topics. Aug. 12, 2019 Hr'g Tr. at 137-38.

232. Mr. Webster found Mr. Lovell to be a "nice guy," consistent, a gentleman, open, and understanding about his need to make changes. Aug. 12, 2019 Hr'g Tr. at 160.

233. Mr. Webster believes Mr. Lovell is a person with potential "whether he's in or out of prison." Aug. 12, 2019 Hr'g Tr. at 166:2-3.

234. Mr. Webster agreed that Mr. Lovell was proactive in getting an education while in prison. Aug. 12, 2019 Hr'g Tr. at 139, 161.

235. Mr. Lovell told Mr. Webster about his involvement with the Rising Star charity and that he had gotten other inmates to participate in Rising Star. Aug. 12, 2019 Hr'g Tr. at 161-62.

236. After Mr. Webster was released as bishop, Mr. Lovell told Mr. Webster that the prison finally allowed death row inmates to participate in the Church's extraction program and Mr. Lovell was a participant. Aug. 12, 2019 Hr'g Tr. at 164.

237. Mr. Lovell told Mr. Webster that he deserved to be in prison because he was [75]not contesting that he committed the crimes. Aug. 12, 2019 Hr'g Tr. at 138.

238. After Mr. Webster was released as bishop, he visited Mr. Lovell at the prison once every few months. Aug. 12, 2019 Hr'g Tr. at 166.

239. Mr. Webster considers Mr. Lovell a friend and Mr. Lovell expresses concern for Mr. Webster and his family; Mr. Lovell sends birthday and Christmas cards. Aug. 12, 2019 Hr'g Tr. at 166-67.

240. In 1979, Mr. Webster was the executive secretary—or administrator—at the Utah Board of Pardons and Parole (the Board). Aug. 12, 2019 Hr'g Tr. at 139-40, 198.

241. In 1983, Mr. Webster was appointed to a six-year term on the Board, and he served for six years. He retired from the Board in April 1989. Aug. 12, 2019 Hr'g Tr. at 140-41, 153, 198.

242. The first two years of his term, Mr. Webster was the Chairman. Aug. 12, 2019 Hr'g Tr. at 149-50.

243. As a Board member, Mr. Webster was responsible for determining an inmate's length of incarceration and conditions of release. Aug. 12, 2019 Hr'g Tr. at 141.

244. In determining whether to parole an inmate, Mr. Webster would consider numerous factors. Aug. 12, 2019 Hr'g Tr. at 142-51. These factors include the inmate's crimes, criminal history, behavior while incarcerated, efforts at rehabilitation, education, psychological testing, etc., as well as the inmate's answers to questions from the Board. Aug. 12, 2019 Hr'g Tr. at 142-51.

[76]a. Mr. Webster would consider the inmate's risk of reoffending. Aug. 12, 2019 Hr'g Tr. at 144.

b. Mr. Webster would consider whether the inmate had a support system in the community, for example, someone who would offer the inmate a place to live. Aug. 12, 2019 Hr'g Tr. at 144-45.

c. Mr. Webster would consider the inmate's criminal history and the details of the crimes—for example, "a robbery is a robbery, but it . . . could be with force, without force." Aug. 12, 2019 Hr'g Tr. at 146:2-6.

d. Mr. Webster would consider whether the inmate completed his prison assignments and treatment,

how much an inmate had to be disciplined or whether he was a model prisoner, because these considerations "give you an indication of what kind of behavior you could expect if [the inmate] were released." Aug. 12, 2019 Hr'g Tr. at 147-48.

e. For Mr. Webster, consistency and sincerity are also important factors to consider in determining whether an inmate should be paroled. He believes he is a good judge of that because he has been around inmates a lot. Aug. 12, 2019 Hr'g Tr. at 149, 151.

f. Mr. Webster believes that "our past behavior is the best predictor of our future behavior." Aug. 12, 2019 Hr'g Tr. at 149:7-8.

245. Mr. Webster spoke with Ms. Sandall-Barrus by telephone on August 15, 2014, about Mr. Lovell's upcoming sentencing. Aug. 12, 2019 Hr'g Tr. at 170.

[77]246. Mr. Webster only remembers speaking with Ms. Sandall-Barrus before the 2015 trial. Aug. 12, 2019 Hr'g Tr. at 170.

247. Mr. Webster told Ms. Sandall-Barrus that he did not want Mr. Lovell to get the death penalty and wanted Mr. Lovell to receive a sentence of life with the possibility of parole. Aug. 12, 2019 Hr'g Tr. at 171-72.

248. Mr. Webster is not morally opposed to the death penalty. Aug. 12, 2019 Hr'g Tr. at 183.

249. At the courthouse on the day he testified, Mr. Webster does not recall being approached by or speaking to anyone about his testimony. Aug. 12, 2019 Hr'g Tr. at 180.

250. Mr. Webster believes that because none of the defense attorneys talked to him before he testified, they had no ability to assess how he would testify or what he would say. Aug. 12, 2019 Hr'g Tr. at 181.

    a. But Mr. Young credibly testified that he read Ms. Sandall-Barrus's summary of her interviews with the ecclesiastical leaders, which would have included Mr. Webster, and was therefore aware of what Mr. Webster would be willing to testify to. Aug. 20, 2019 Hr'g Tr. at 37; Aug. 30, 2019 Hr'g Tr. at 11.

    b. Mr. Webster conceded that he has no idea what the defense strategy was and whether what he testified about was precisely what the defense attorneys wanted him to testify about. Aug. 12, 2019 Hr'g Tr. at 187-88.

    [78]c. While Mr. Webster believed it would have been helpful for an attorney to prepare him to testify, he acknowledged that no preparation was necessary for him to testify and answer questions truthfully. Aug. 12, 2019 Hr'g Tr. at 185-86.

251. Mr. Webster was served with a subpoena. Aug. 12, 2019 Hr'g Tr. at 182.

252. Mr. Lovell consistently expressed remorse to Mr. Webster; Mr. Lovell would tearfully say he was sorry. Aug. 12, 2019 Hr'g Tr. at 138-39.

253. Mr. Webster believed Mr. Lovell's expressions of remorse were sincere. Aug. 12, 2019 Hr'g Tr. at 139, 188. Mr. Webster has only a superficial relationship with Mr. Lovell and lacks foundation to conclude that Mr. Lovell's expressions of remorse are real.

a. Mr. Webster's interaction with Mr. Lovell has only been in the highly controlled environment of the maximum security unit at the prison. Aug. 12, 2019 Hr'g Tr. at 190.

b. Mr. Webster has never interacted with Mr. Lovell in a social setting. Aug. 12, 2019 Hr'g Tr. at 190.

c. Mr. Webster has never seen how Mr. Lovell reacts when he gets angry. Aug. 12, 2019 Hr'g Tr. at 190.

d. Mr. Webster has never seen how Mr. Lovell reacts when a woman has declined his advances. Aug. 12, 2019 Hr'g Tr. at 190.

e. Mr. Webster does not know how Mr. Lovell reacts when he is provoked. [79]Aug. 12, 2019 Hr'g Tr. at 190.

f. Mr. Webster conceded that he has not had the kinds of experiences with Mr. Lovell that a person would need to know whether Mr. Lovell's

expressions of remorse are genuine. Aug. 12, 2019 Hr'g Tr. at 190-91.

g. Mr. Webster conceded that his exposure to Mr. Lovell has been limited. Aug. 12, 2019 Hr'g Tr. at 191.

254. Based on his visits and correspondence with Mr. Lovell, and on his prior experience years ago, Mr. Webster believes that Mr. Lovell is "parolable." Aug. 12, 2019 Hr'g Tr. at 191:9-11.

255. Mr. Webster was evasive when asked whether he believes a sentence of LWOP for Mr. Lovell would be appropriate. Aug. 12, 2019 Hr'g Tr. at 193-94.

256. But Mr. Webster conceded that, based on the "limited snapshot" he has of Mr. Lovell's life, he cannot say that he would—right now—release Mr. Lovell from prison, at least not without additional information that he does not have. Aug. 12, 2019 Hr'g Tr. at 191-92.

257. Mr. Webster conceded that if he knew more about the crimes Mr. Lovell committed, he would have a better sense of whether Mr. Lovell should be paroled. Aug. 12, 2019 Hr'g Tr. at 195-98.

a. Mr. Webster conceded that the jury at Mr. Lovell's March 2015 sentencing hearing had all the information about Mr. Lovell and sentenced him to death. Aug. 12, 2019 Hr'g Tr. at 196-97.

[80]258. Had Mr. Webster testified at trial consistent with his evidentiary hearing testimony, key parts of his testimony would have undermined the defense mitigation strategy of convincing the jury that Mr. Lovell deserved a sentence of life in prison with the possibility of parole.

a. Mr. Webster was working for the Board in 1979 when Mr. Lovell was sentenced to 5 years to life in prison for an armed robbery conviction. Aug. 12, 2019 Hr'g Tr. at 139-40, 198-99.

b. Mr. Webster was working for the Board when Mr. Lovell was paroled three years later without having to serve the full minimum term of his sentence. Aug. 12, 2019 Hr'g Tr. at 139-40, 198-200.

c. Mr. Webster conceded that, in all likelihood, Mr. Lovell was paroled early because he was a model prisoner. Aug. 12, 2019 Hr'g Tr. at 200-01.

d. Mr. Webster was a member of the Board in 1983 when the Board terminated Mr. Lovell's parole and sentence on the armed robbery conviction, and Mr. Webster knew that two years later Mr. Lovell raped Ms. Yost. Aug. 12, 2019 Hr'g Tr. at 140-41, 153, 201; Trial Ex. S69 at 7.

e. Mr. Webster was unaware that after Mr. Lovell was arrested for the rape of Ms. Yost, he bailed out of jail; Mr. Webster (correctly) assumed that

Mr. Lovell then murdered Ms. Yost. Aug. 12, 2019 Hr'g Tr. at 201-02.

f. For Mr. Webster, past behavior is the best predictor of future behavior. Aug. 12, 2019 Hr'g Tr. at 149, 195.

[81]g. Mr. Webster testified that, based on what he learned at the evidentiary hearing, Mr. Lovell's past behavior when he is outside of prison is that he rapes and murders. Aug. 12, 2019 Hr'g Tr. at 202.

h. Mr. Webster conceded that he does not know that Mr. Lovell will not do the same thing—rape and murder—if he gets out of prison again, and that there is a risk that he will. Aug. 12, 2019 Hr'g Tr. at 202-03.

i. Mr. Webster agreed that allowing Mr. Lovell out of prison early in 1982 was, in hindsight, a bad decision. Aug. 12, 2019 Hr'g Tr. at 214.

j. Mr. Webster conceded that the safest option would be for Mr. Lovell to receive a sentence of LWOP. Aug. 12, 2019 Hr'g Tr. at 203.

259. Had Mr. Webster testified at trial consistent with his evidentiary hearing testimony, the jury would have learned that, as part of his corrections experience, Mr. Webster (1) was working for the Board when the Board paroled Mr. Lovell early from his armed

robbery conviction, likely because he was, as he is now, a model prisoner; and (2) was an actual member of the Board that terminated Mr. Lovell's parole and sentence—thereby leaving him unsupervised in the community—and with that freedom Mr. Lovell raped and murdered Ms. Yost two years later.

260. Although Mr. Webster told Ms. Sandall-Barrus that he would testify that Mr. Lovell should receive a sentence of life in prison with the possibility of parole, under cross-examination, his testimony was equivocal on that point. Aug. 12, [82]2019 Hr'g Tr. at 171-72, 202-03, 214.

261. Had Mr. Webster testified at trial consistent with his evidentiary hearing testimony, the jury would have learned that giving Mr. Lovell a sentence that would ensure that he would never be released on parole would be the safest sentence. Aug. 12, 2019 Hr'g Tr. at 203.

    a. Despite the numerous factors Board members like Mr. Webster consider before making the "heavy decision" to release someone on parole, the Board can still be mistaken about whether a prisoner—even a model prisoner—will harm others if released. Aug. 12, 2019 Hr'g Tr. at 144-49, 151, 214.

    b. With respect to Mr. Lovell specifically, while he is a model prisoner in a high security environment, that is no reason to believe he will not harm

others if given the chance at parole because he has, in fact, harmed others after being paroled. Aug. 12, 2019 Hr'g Tr. at 195, 201-02.

262. Mr. Webster's evidentiary hearing testimony would not have persuaded a jury to impose a sentence of life in prison with the possibility of parole.

263. Mr. Lovell alleges that Mr. Young was deficient for not interviewing, preparing, and examining Mr. Webster. But again, based on the Court's findings, the Court concludes that Mr. Young's performance regarding Mr. Webster was objectively reasonable in the circumstances. From the moment witness assignments were made, Mr. Bouwhuis never intended that Mr. Young [83]handle Mr. Webster's testimony. Mr. Young was only assigned the other four ecclesiastical leaders. Thus, in the short month and a half before trial that Mr. Young had to contact and consider the witnesses he was assigned, Mr. Webster was not one of those witnesses. That changed, of course, but only in the middle of trial. It was not until late in the afternoon on Thursday, March 19, 2015, that Mr. Bouwhuis "dumped" Mr. Webster on Mr. Young. Mr. Webster was scheduled to testify the following Monday, March 23, 2015. That left Friday, March 20, 2015, as the only business day—in addition to the weekend—for Mr. Young to make preparations not only for the witnesses he was originally assigned who were testifying the same day, but for Mr. Webster as well. Given the last minute assignment, not to mention the fact that Mr. Young could not directly contact Mr.

Webster because he was represented by attorneys at Kirton McConkie, Mr. Young cannot be faulted for not interviewing or preparing Mr. Webster to testify. Nevertheless, Mr. Young indicated that he reviewed Ms. Sandall-Barrus's entire mitigation binder, which included Mr. Webster's interview summary. Absent evidence to the contrary, the Court presumes that Mr. Young reasonably relied on Ms. Sandall-Barrus's interview summary of Mr. Webster to inform himself of the type of testimony Mr. Webster could provide.

264. The Court also concludes that Mr. Young's examination of Mr. Webster at trial was not deficient. Mr. Young elicited favorable testimony from Mr. Webster [84] that Mr. Lovell was consistent in his demeanor and temperament and in receiving religious instruction and guidance. Mr. Webster also testified that Mr. Lovell had a job in prison, contributed to a charity (Rising Star Outreach), was contrite, and never waivered on his expressions of remorse. Yet, Mr. Lovell faults Mr. Young for not delving into Mr. Webster's background with the Board of Pardons and Parole, and asking questions that would have allowed Mr. Webster to testify that Mr. Lovell should have a chance at parole.

265. But had Mr. Young done so, he would have opened the door for the State to elicit testimony undercutting the defense theory that life with the possibility of parole was the appropriate sentence for Mr. Lovell. On cross-examination at the evidentiary hearing, Mr. Webster testified that he was (1) working for the Board of

Pardons when the Board paroled Mr. Lovell early from an armed robbery conviction, likely because he was, as he is now, a model prisoner; and (2) an actual member of the Board of Pardons that terminated Mr. Lovell's parole and sentence—thereby leaving him unsupervised in the community—which Mr. Lovell then took advantage of to rape and murder Ms. Yost two years later.

266. Also in response to questioning by the State, Mr. Webster testified—again, inconsistent with the defense mitigation theory—that past behavior is the best predictor of future behavior and that, based on what he learned at the evidentiary hearing, Mr. Lovell's past behavior when he is out of prison is that [85]he rapes and murders. Mr. Webster then testified that he cannot be sure that Mr. Lovell will not do the same thing—rape and murder—if he gets out of prison again, and that there is a risk he will. Mr. Webster therefore conceded that the safest option would be for Mr. Lovell to receive a sentence of LWOP.

267. By not questioning Mr. Webster about his experience on the Board of Pardons and his belief that Mr. Lovell should have a chance at parole, Mr. Young avoided all of the foregoing negative testimony that would have been elicited by the State. The Court therefore concludes that Mr. Young's examination of Mr. Webster was not objectively unreasonable.

268. Mr. Lovell also asserts that Mr. Young's performance in relation to Mr. Webster was prejudicial. The Court

concludes that it was not. As explained, Mr. Webster's evidentiary hearing testimony—which Mr. Lovell claims is the testimony that would have reasonably altered the outcome of his sentencing proceeding—would have made the evidentiary picture worse for Mr. Lovell than the one the jury saw based on Mr. Young's questioning of Mr. Webster. Because LWOP was not a sentencing option, Mr. Webster's evidentiary hearing testimony that Mr. Lovell could be a danger if released from prison, that the Board of Pardons can be mistaken about whether a prisoner—even a model prisoner—will harm others if release, and that the safest course would be to keep Mr. Lovell incarcerated, would push jurors toward a sentence of death, not life with the possibility of parole. Thus, even assuming Mr. Young [86]performed deficiently in the ways Mr. Lovell alleges and that Mr. Webster had provided at trial the testimony he gave at the evidentiary hearing, there is no reasonable probability that the outcome of the sentencing proceeding would have been different.

c. Chuck Thompson

Although Chuck Thompson's name is listed in category 1(a) of the rule 23B Order as a potential witness, Mr. Thompson passed away on July 15, 2017. *See* Oct 28, 2019 Hr'g Tr. at 5. Nevertheless, a book authored by Mr. Thompson, entitled "The Mountain"—which was published posthumously—was admitted into evidence. *See* Oct 28, 2019 Hr'g Tr. at 1923-24; Def's Ex. 114. The Court makes the following findings related to Mr. Thompson:

269. Mr. Thompson stated to Ms. Douglas in an email at the time of trial,

    a. "I still don't understand what part of the atonement [Joyce's] kids don't understand. After 30 great years, it is more than time to let God forgive Doug, a changed man." Aug. 12, 2019 Hr'g Tr. at 39-40.

    b. "Doug is a man who has repented and deserves a chance to get into society before he dies," Aug. 12, 2019 Hr'g Tr. at 40.

270. Had Mr. Thompson been alive and called as a witness at the evidentiary hearing, and had he been asked at the time of trial in March 2015, he would have testified as follows:

    a. Mr. Lovell gave "care to his cellmate. Nobody wanted to help and thought [87]it was a waste of time; today, both men have benefited from the extra service and care that was extended out of kindness." Def's Ex. 114, "The Mountain," at 29.

    b. The family of Ms. Yost "hasn't yet forgiven a person [Mr. Lovell] who did harm to a member of their family. They've held onto this pain for over 30 years. Imagine the hatred that has been harbored all those years and how much more joy their lives have lost out on." Def's Ex. 114, "The Mountain," at 124.

c. "I know a family who suffered a family member's life being taken. Today, after decades the 3rd generation still blames the man [Mr. Lovell] who did the crime. They are bitter and want [Mr. Lovell] to say [*sic*] in prison until he dies. [Mr. Lovell] has been a model prisoner, willing to help others who are incarcerated and is involved with a charity. He writes encouraging letters on a regular basis to many. I have spoken with him on many occasions and he is well on the way of forgiving himself. I believe he is a better man than many walking outside the prison." Def's Ex. 114, "The Mountain," at 151.

d. "A man I know in prison [Mr. Lovell] donates from his small earnings each month to a charity. He has influenced many inside and outside the prison. It makes a small difference but he sacrifices from behind bars when those of us on the outside do nothing. [Mr. Lovell] is an inspiration [88] to many who visit including the founder of the charity. A tragedy in her family spurred her on to organize an amazing cause for people in third world countries. I could say a great deal more about both of these individuals." Def's Ex. 114, "The Mountain," at 205-06.

271. The favorable portions of Mr. Thompson's testimony would have been largely cumulative of testimony provided at trial.

a. Had Mr. Thompson testified at trial consistent with his emails to Ms. Douglas and the Lovell-related statements in his book, key parts of his testimony would have undermined his credibility and the defense mitigation strategy of convincing the jury that Mr. Lovell deserved a sentence of life in prison with the possibility of parole. Mr. Thompson's accusations that the children of Ms. Yost "don't understand . . . the atonement," are bitter and unforgiving about Mr. Lovell's rape and murder of their mother, and that they harbor hatred against Mr. Lovell are insensitive, condescending, and demonstrate a lack of regard for the Yost family's anguish over the rape and murder of their mother.

b. Mr. Thompson's criticism that Ms. Yost's children are acting wrong in wanting Mr. Lovell to serve the rest of his life in prison for the rape and murder of their mother, and his claim that Mr. Lovell is a "better man than many walking outside the prison," would have appeared naïve and thoughtless to the jurors who had just heard testimony about the nature of [89]Mr. Lovell's acts of violence against Ms. Yost and the lasting damage it had done to her children and grandchildren.

272. The statements in Mr. Thompson's emails and book regarding Mr. Lovell demonstrated a lack of concern toward Ms. Yost's children and were oblivious to the violent nature of Mr. Lovell's rape and murder of Ms.

Yost. They would not have persuaded a jury to return a sentencing verdict in favor of life in prison with the possibility of parole.

273. The best version of Mr. Thompson's testimony in favor of Mr. Lovell was the testimony Mr. Thompson actually gave during Mr. Young's direct examination of him at trial. *See* R8850:135-40, 142.

274. Mr. Lovell asserts that Mr. Young was deficient for not interviewing, preparing, and examining Mr. Thompson. The Court concludes that Mr. Young did not perform deficiently in the ways Mr. Lovell alleges. Because Mr. Thompson passed away on July 15, 2017, no testimony was received from him on whether Mr. Young contacted or prepared him to testify. But Mr. Young credibly testified that he contacted the ecclesiastical leaders he was assigned and read the interview summaries prepared by Ms. Sandall-Barrus. This would have given Mr. Young information about what type of testimony Mr. Thompson could provide. In addition, because Mr. Thompson was represented by attorneys at Kirton McConkie, Mr. Young had no direct access to Mr. Thompson. A competent attorney in these circumstances could reasonably [90]conclude that directly preparing Mr. Thompson to testify was no longer an option. Mr. Young therefore did not perform deficiently in this regard.

275. The Court also concludes that Mr. Young's examination of Mr. Thompson was not deficient. Based on Mr.

Young's questioning, Mr. Thompson testified that Mr. Lovell was a model prisoner, did not get into trouble, did what he was asked, and had an assignment as a food carrier. Mr. Thompson also testified that Mr. Lovell always expressed remorse for what he had done and had compassion for Ms. Yost's family. While the email and book excerpts admitted into evidence include some additional favorable information—for example, Mr. Lovell is a changed man, he helped a cellmate when others would not, he should have a chance at parole, he writes encouraging letters, and donates to charities—most of that information is cumulative of testimony other witnesses provided. The excerpts also included Mr. Thompson's statements about Ms. Yost's family that could easily have been interpreted as unkind at best, and, at worst, disrespectful and oblivious to the violent nature of Mr. Lovell's rape and murder of Ms. Yost. Mr. Thompson's, statement that Mr. Lovell is a better person than many people outside of prison. may not have endeared Mr. Thompson to the jury and, by extension, could easily have negatively affected jurors views of Mr. Lovell. Mr. Young's questioning of Mr. Thompson avoided these kinds of statements. A competent attorney in Mr. Young's circumstances could have chosen to examine Mr. Thompson exactly the way he did, thereby [91] avoiding the harsh comments Mr. Thompson made about Ms. Yost's family.

276. Mr. Lovell also alleges that Mr. Young's performance was prejudicial. The Court concludes that it was not. The additional favorable testimony Mr. Thompson

could have given was cumulative of testimony that other witnesses provided. More of the same would not have so altered the evidentiary picture presented to the jury that there would be a reasonable likelihood of a different outcome.

4. Rebecca Douglas

Although Mr. Young was not assigned Ms. Douglas as a witness, because questioning by the State opened the door for an inquiry into what additional testimony Ms. Douglas wished she could have given at the time of trial in March 2015, the Court makes the following findings and conclusions based on the parties' examination of Ms. Douglas on that topic:

277. Rebecca Douglas is the president and founder of a charity, Rising Star Outreach, a humanitarian organization that helps children in India who have leprosy. Aug. 12, 2019 Hr'g Tr. at 6, 9.

278. Ms. Douglas is acquainted with Mr. Lovell through her charity. Aug. 12, 2019 Hr'g Tr. at 6-9.

279. Ms. Douglas's introduction to Mr. Lovell occurred when, after seeing a documentary PBS television, he contacted Rising Star asking if he could sponsor a child impacted by leprosy out of the $30.00 a month he receives from [92]the State. Aug. 12, 2019 Hr'g Tr. at 6.

280. Mr. Lovell donates $5 a month to Rising Star. Aug. 12, 2019 Hr'g Tr. at 6-7.

281. Ms. Douglas visited Mr. Lovell once for four hours in the maximum security unit at the prison in July 2012, she has spoken with him on the telephone many times, and they have exchanged numerous letters over the years. Aug. 12, 2019 Hr'g Tr. at 6-9, 114-15.

282. Through her correspondence with Mr. Lovell, Ms. Douglas has been impressed "with how remorseful he was, how much he wanted to do good, how much he cared about the children at Rising Star." Aug. 12, 2019 Hr'g Tr. at 10:8-10, 113.

283. After Mr. Lovell was sentenced to death, Ms. Douglas's position was that there "was actually a lot" that she wanted to share with the jury, but never got the chance. Aug. 12, 2019 Hr'g Tr. at 100.

    a. Ms. Douglas wanted to tell the jury about the content of letters Mr. Lovell sent her; for example, Mr. Lovell took religious instruction courses for four years, he studied the scriptures, he reconciled himself to God, he watched a PBS series on the New Testament and was moved by it, he encouraged inmates who were discouraged and did not have God in their lives, and all his actions in this regard were genuine. Aug. 12, 2019 Hr'g Tr. at 110-11.

b. Ms. Douglas wanted to tell the jury that because of Mr. Lovell's actions, over forty inmates wrote to her telling her that Mr. Lovell had told them, [93]"There is a way for you spiritually to come back to the Lord." Aug. 12, 2019 Hr'g Tr. at 112.

c. Ms. Douglas wanted to tell the jury that the families of the inmates who wrote her also wrote her and said, "My gosh, Doug Lovell saved my son's life. He was at the point of suicide." Aug. 12, 2019 Hr'g Tr. at 112.

284. Ms. Douglas has not had the kinds of experiences with Mr. Lovell that a person would need to make an informed and accurate judgment on whether Mr. Lovell is truthful, sincere, remorseful, a "changed person," and not a danger to others if released from prison.

a. Ms. Douglas has visited with Mr. Lovell only once face-to-face. Aug. 12, 2019 Hr'g Tr. at 6-9, 114-15.

b. Ms. Douglas's interaction with Mr. Lovell is based solely on letters and telephone calls from Mr. Lovell. Aug. 12, 2019 Hr'g Tr. at 6-9, 114-15.

c. Ms. Douglas has never seen Mr. Lovell outside of the maximum security unit at the prison. Aug. 12, 2019 Hr'g Tr. at 116.

d. Ms. Douglas has never seen how Mr. Lovell reacts when he is angry. Aug. 12, 2019 Hr'g Tr. at 116.

e. Ms. Douglas has never seen how Mr. Lovell reacts when a woman refuses his advances. Aug. 12, 2019 Hr'g Tr. at 116.

f. Ms. Douglas has never seen how Mr. Lovell behaves in a social setting. Aug. 12, 2019 Hr'g Tr. at 117.

[94]g. Ms. Douglas has never seen how Mr. Lovell reacts when he is provoked. Aug. 12, 2019 Hr'g Tr. at 117.

285. Mr. Lovell never told Ms. Douglas the details of the crimes he committed against Ms. Yost and Ms. Douglas was unaware of the details. Aug. 12, 2019 Hr'g Tr. at 121-31.

286. Had Ms. Douglas testified at trial consistent with her evidentiary hearing testimony, key parts of her testimony would have undermined her credibility and the defense mitigation strategy of convincing the jury that Mr. Lovell deserved a sentence of life in prison with the possibility of parole.

a. Ms. Douglas's testimony was unnecessarily combative: "I was just going to say these questions seem a little silly. Right?" Aug. 12, 2019 Hr'g Tr. at 117:5-6.

b. Ms. Douglas was repeatedly non-responsive to questions about the details of the crimes Mr. Lovell committed against Ms. Yost. Aug. 12, 2019 Hr'g Tr. at 121-31.

c. Ms. Douglas testified that she did not need to know the details of what Mr. Lovell did to Ms. Yost because, in her view, the facts of his crimes are "irrelevant"; rather she believes she needs to know only what happened to Mr. Lovell after the commission of the crimes. Aug. 12, 2019 Hr'g Tr. at 123-25.

d. Ms. Douglas was evasive and non-responsive when asked whether there [95]is a possibility Mr. Lovell might harm others if released from prison. Aug. 12, 2019 Hr'g Tr. at 133.

e. While Ms. Douglas does not want Mr. Lovell to be executed, she testified that she does not know whether he should be out of prison. Aug. 12, 2019 Hr'g Tr. at 133.

f. Ultimately, Ms. Douglas conceded that the details of Mr. Lovell's crimes against Ms. Yost gave her pause on whether Mr. Lovell should be released from prison. Aug. 12, 2019 Hr'g Tr. at 131.

g. Ms. Douglas conceded that the safest sentencing option would be for Mr. Lovell to receive a sentence of LWOP. Aug. 12, 2019 Hr'g Tr. at 133-34.

h. Ms. Douglas was unaware that Mr. Lovell murdered Ms. Yost to avoid going back to prison and conceded that someone who was capable of murdering another person to avoid going to prison is capable of feigning remorse in order to get out of prison. Aug. 12, 2019 Hr'g Tr. at 134-35.

287. Ms. Douglas was able to testify at trial to everything she wanted to testify about. Aug. 12, 2019 Hr'g Tr. at 38, 99-100.

288. After stating that she was able to testify at trial to all the things she wanted to—in particular that Mr. Lovell was a changed person—Ms. Douglas was not believable when she testified that there "was actually a lot that I had hoped I would be able to share." Aug. 12, 2019 Hr'g Tr. at 99-100.

289. Ms. Douglas's evidentiary hearing testimony that there "was a lot" she wished [96]she could have testified to at trial is based not on what she believed at the time of trial in March 2015, but on the fact that the outcome of the sentencing proceeding was not what she had hoped for. Aug. 12, 2019 Hr'g Tr. at 100.

290. The best version of Ms. Douglas's testimony in favor of Mr. Lovell was the testimony Ms. Douglas actually gave during Mr. Bouwhuis's direct examination of her at trial. *See* R8851:4-39, 51-52.

C. Category 1(b): Claim that Mr. Young did not call several mitigation witnesses to testify.

1. Russ Minas

291. Russell Minas is a member of the bar and domestic relations Commissioner in the Third District Court. Aug. 5, 2019, Hr'g Tr. at 74.

292. At the time of Mr. Lovell's March 2015 trial, Russell Minas had been a family law attorney for 29 years. Aug. 5, 2019 Hr'g Tr. at 74.

293. Mr. Minas became acquainted with Mr. Lovell in 1997 when he was asked to represent Mr. Lovell in matters involving Mr. Lovell's divorce. Aug. 5, 2019 Hr'g Tr. at 74.

294. Mr. Minas met with Mr. Lovell twice at the prison and found him warm, engaging, intelligent, articulate, and funny. Aug. 5, 2019 Hr'g Tr. at 75, 89.

295. After Mr. Minas's representation of Mr. Lovell ended, Mr. Lovell wanted to stay in contact and Mr. Minas set up an account that allowed Mr. Lovell to call him collect. Aug. 5, 2019 Hr'g Tr. at 77.

[97]296. Mr. Minas estimated that he and Mr. Lovell spoke by telephone five or six times a year since 1997. Aug. 5, 2019 Hr'g Tr. at 77, 80.

297. The phone calls last for thirty minutes when the phone system terminates the call. Aug. 5, 2019 Hr'g Tr. at 80.

298. Mr. Minas and Mr. Lovell have had about 100 phone calls over the years. Aug. 5, 2019 Hr'g Tr. at 91.

299. Mr. Lovell also sent Mr. Minas letters, birthday cards, Christmas cards, poetry, stories, jokes, etc. Aug. 5, 2019 Hr'g Tr. at 78-79.

300. Mr. Lovell has communicated with Mr. Minas about his efforts toward assisting a nonprofit organization called "Rising Star Outreach." Aug. 5, 2019 Hr'g Tr. at 77.

301. Mr. Lovell has written poetry, pamphlets and stories for Rising Star. Aug. 5, 2019 Hr'g Tr. at 78.

302. Mr. Lovell has told Mr. Minas that he is remorseful. Aug. 5, 2019 Hr'g Tr. at 80.

303. Mr. Minas believes that,

    a. Mr. Lovell is concerned about the victim and her family. Aug. 5, 2019 Hr'g Tr. at 80-81.

    b. Mr. Lovell's expressions of remorse are real, but Mr. Minas conceded that it is possible Mr. Lovell is not being truthful and that he is manipulative. Aug. 5, 2019 Hr'g Tr. at 80, 88-89, 92-93, 116, 127.

    c. Mr. Lovell would not commit crimes in the future if released from prison, [98]yet he also agreed that there is a risk to public safety if Mr. Lovell were released from prison. Aug. 5, 2019 Hr'g Tr. at 100-01, 111.

304. Mr. Minas's views of and judgments about Mr. Lovell are based solely on telephone calls and letters sent by Mr. Lovell. Aug. 5, 2019 Hr'g Tr. at 80, 89-90.

    a. Mr. Minas has only a "telephone relationship" with Mr. Lovell. Aug. 5, 2019 Hr'g Tr. at 80.

b. Mr. Minas has never seen how Mr. Lovell behaves around other people. Aug. 5, 2019 Hr'g Tr. at 91.

c. Mr. Minas has never seen what Mr. Lovell is like when Mr. Lovell gets angry at someone. Aug. 5, 2019 Hr'g Tr. at 91-92.

d. Mr. Minas does not know how Mr. Lovell reacts when he is provoked. Aug. 5, 2019 Hr'g Tr. at 92.

e. Mr. Minas has had no substantive personal interactions with Mr. Lovell. Aug. 5, 2019 Hr'g Tr. at 90-92.

f. Mr. Minas does not know what Mr. Lovell was like before he met him and conceded that Mr. Lovell could be the same person he was when he raped and murdered Ms. Yost. Aug. 5, 2019 Hr'g Tr. at 97, 128.

g. Mr. Lovell never divulged to Mr. Minas the details of Mr. Lovell's rape and murder of Ms. Yost and Mr. Minas was mostly unaware of the details of Mr. Lovell's crimes. Aug. 5, 2019 Hr'g Tr. at 103-10.

h. Mr. Minas conceded that he has misjudged character in the past and that [99]he could be misjudging Mr. Lovell's character. Aug. 5, 2019 Hr'g Tr. at 116.

305. Mr. Minas lacks sufficient foundation for concluding that Mr. Lovell's expressions of remorse or concern for Ms. Yost's family are real, nor does he have a sufficient basis for concluding that Mr. Lovell would not pose a threat to public safety if released from prison.

306. Mr. Minas does not believe Mr. Lovell should be put to death, but conceded that he does not know whether he would want Mr. Lovell put to death had Mr. Lovell murdered one of Mr. Minas's own family members. Aug. 5, 2019 Hr'g Tr. at 100.

307. Mr. Minas was evasive and gave contradictory testimony when asked whether a sentence of LWOP—had it been an available sentencing option—rather than death or life with the possibility of parole, would be the more appropriate sentence for Mr. Lovell's crimes. Aug. 5, 2019 Hr'g Tr. at 101-02, 110, 129-30, 132.

    a. Mr. Minas conceded that there is a risk that Mr. Lovell could harm another person if released from prison, but believes the risk is minimal. Aug. 5, 2019 Hr'g Tr. at 110-11, 129.

    b. Mr. Minas believes that releasing Mr. Lovell from custody would be worth the risk, but conceded that if Mr. Lovell were released and then raped and murdered another woman it would not have been worth the [100]risk to have let him out of prison. Aug. 5, 2019 Hr'g Tr. at 111, 123.

c. Mr. Minas was unaware that Mr. Lovell had been in prison for armed robbery, was paroled early, that Mr. Lovell's parole had been terminated, and he was no longer being supervised, when he raped and murdered Ms. Yost. Aug. 5, 2019 Hr'g Tr. at 112-15.

d. Mr. Minas believes that Mr. Lovell should receive a sentence of life in prison with the possibility of parole, but he also conceded that the new information he heard during his cross-examination gave him pause on whether Mr. Lovell should be released from prison. Aug. 5, 2019 Hr'g Tr. at 115.

e. Mr. Minas conceded that, from a public safety standpoint, keeping Mr. Lovell incarcerated with a sentence of LWOP would be the safest option. Aug. 5, 2019 Hr'g Tr. at 119-20.

308. Mr. Lovell asked Mr. Minas if he would be willing to testify at his trial, Mr. Minas said he would, and he was contacted by Marissa Sandall-Barrus, the defense team's mitigation specialist, on July 22, 2014. Aug. 5, 2019 Hr'g Tr. at 81-82; Aug. 23, 2019 Hr'g Tr. at 7, 113; Defense Ex. 1.

309. Mr. Minas claimed that no one else from the defense team ever contacted him before trial. Aug. 5, 2019 Hr'g Tr. at 83.

310. But Mr. Young credibly testified that he called Mr. Minas at the law firm where Mr. Minas worked, left a message for him, but Mr. Minas never returned Mr. [101]Young's call. Aug. 20, 2019 Hr'g Tr. at 26-27, 31; Aug. 30, 2019 Hr'g Tr. at 60.

311. Based on her conversation with Mr. Minas, Ms. Sandall-Barrus emailed Michael Bouwhuis on July 22, 2014, to inform him that,

> Russ is willing to take the stand on Doug's behalf and explain his experiences and friendship with him over the years. He would like to see Doug have the opportunity of a life with the possibility of parole sentence, however, he would personally be a little uneasy maintaining his friendship with Doug—if Doug was released. He said just don't ask him that question. Russ believes Doug needs the hope of someday being released in order to maintain his emotional stability inside the prison.

Aug. 23, 2019 Hr'g Tr. at 113-14; State's Ex. 23

a. Mr. Minas disputed whether he told Ms. Sandall-Barrus that he would be uneasy maintaining his friendship with Mr. Lovell if Mr. Lovell were released from prison. Aug. 5, 2019 Hr'g Tr. at 133-34.

b. But Mr. Minas conceded that he would hesitate to go camping alone with Mr. Lovell in the woods

or have Mr. Lovell tend his son if Mr. Lovell were released. Aug. 5, 2019 Hr'g Tr. at 133.

c. And Mr. Young testified that on January 26, 2015, the defense team discussed all of the potential witnesses, including Mr. Minas; Mr. Young was informed that Mr. Minas told Ms. Sandall-Barrus that Mr. Minas would like Mr. Lovell to have a chance at parole, but that if Mr. Lovell were paroled, Mr. Minas would not want to maintain his friendship with Mr. Lovell. Aug. 30, 2019 Hr'g Tr. at 62.

[102]312. Given the contemporaneous nature of the email sent by Ms. Sandall-Barrus to Mr. Bouwhuis, the content of the email is more reliable than Mr. Minas's denials about what the email said.

313. Mr. Young reviewed Ms. Sandall-Barrus's interview summary of Mr. Minas and was aware of the kind of testimony Mr. Minas would have provided at trial had he been called to testify. Aug. 20, 2019 Hr'g Tr. at 28; Aug. 30, 2019 Hr'g Tr. at 59-60.

314. But Mr. Minas's failure to return Mr. Young's call and Mr. Minas's position that he would not want to be friends with Mr. Lovell if Mr. Lovell were paroled caused Mr. Young to be concerned about whether Mr. Minas should testify, especially since LWOP was not a sentencing option. Aug. 30, 2019 Hr'g Tr. at 62.

315. Had Mr. Minas been called to testify, key parts of his testimony would have undermined the defense mitigation strategy of convincing the jury that Mr. Lovell deserved a sentence of life with the possibility of parole, rather than death:

    a. Mr. Minas expressed uncertainty and testified inconsistently about whether Mr. Lovell should be paroled.

    b. Mr. Minas was unaware of the horrendous details of Mr. Lovell's crimes and he was evasive and testified inconsistently about the risks Mr. Lovell would pose if released from prison.

    [103]c. Mr. Minas conceded that Mr. Lovell could be manipulating him.

    d. The plausibility of Mr. Minas's testimony about Mr. Lovell's good character, that Mr. Lovell's expressions of remorse and concern for Ms. Yost and her family were genuine, and that Mr. Lovell would not be a danger to others if released from prison is questionable based on the superficial nature of his relationship with Mr. Lovell.

316. Mr. Minas's testimony would not have persuaded a jury to impose a sentence of life in prison with the possibility of parole had he been called to testify.

317. Mr. Lovell alleges that Mr. Young was ineffective for not calling Mr. Minas to testify. But the Court

concludes that Mr. Young did not perform deficiently. And even if he did, Mr. Lovell suffered no prejudice.

318. Mr. Minas was precisely the type of witness that the defense team—including Mr. Young—would have had serious strategic concerns about calling to testify. First, Mr. Young attempted to contact Mr. Minas and left a message at his work. Without evidence to the contrary, the Court presumes that Mr. Young's message explained that Mr. Lovell wanted Mr. Minas to testify on his behalf as a character witness at the upcoming trial. Yet Mr. Minas never returned Mr. Young's telephone call, which raised legitimate concerns in Mr. Young's mind about the willingness of Mr. Minas to testify for Mr. Lovell. A competent attorney could opt not to call Mr. Minas as a witness for this reason alone.

319. Second, Mr. Minas expressed uncertainty and testified inconsistently about [104]whether Mr. Lovell should be paroled. He stated that Mr. Lovell should receive a sentence of life in prison with the possibility of parole, but then conceded that the new information he heard during cross-examination about the details of Mr. Lovell's crimes and that Mr. Lovell has a history of harming others when released from prison, gave him pause on whether Mr. Lovell should be released into the community. Mr. Minas also conceded that, from a public safety standpoint, keeping Mr. Lovell in prison with no chance at parole would be the safest option. Without LWOP as a sentencing option, Mr. Minas's equivocation and inconsistency on the question of

parole would not be helpful, but would undermine the defense team's objective for Mr. Lovell to receive a sentence of life in prison with the possibility of parole. Even though Mr. Minas had favorable things to say about Mr. Lovell, given the double-edged nature of his testimony, a competent attorney could reasonably choose not to call him as a witness.

320. Third, even the favorable evidentiary hearing testimony from Mr. Minas that Mr. Lovell has a good character, will not pose a public safety risk if released, is remorseful, and is not manipulative would be viewed by a jury as suspect. Mr. Minas has not had the kind of interactions with Mr. Lovell that would give him genuine insight into Mr. Lovell's character. Rather, he has a superficial relationship comprised entirely of a relatively small number of telephone conversations and some letters over 25 years. Because Mr. Minas does not [105]actually know Mr. Lovell well, any opinion he might give about Mr. Lovell could easily be called into question. Competent counsel could reasonable decide not to call a witness who presented credibility problems.

321. For all of these reasons, the Court concludes that Mr. Young's decision not to call Mr. Minas to testify fell well within the wide range of professionally reasonable assistance and was therefore objectively reasonable.

322. The Court also concludes that, even if Mr. Young should have called Mr. Minas to testify, Mr. Lovell was

not prejudiced. Much of Mr. Minas's testimony that Mr. Lovell had a good character, was remorseful, and would not pose a danger if released from prison, was cumulative of testimony provided by other witnesses. More of the same information would not have altered the evidentiary picture that was presented to the jury. In addition, because the jury did not have a sentencing option of LWOP, Mr. Minas's testimony would have been detrimental to the defense and would therefore have made the evidentiary picture for Mr. Lovell even worse than it was. Because Mr. Minas's testimony would likely have made things worse for Mr. Lovell, not better, there is no reasonable probability that, but for Mr. Young not calling Mr. Minas to testify, the outcome of the sentencing proceeding would have been different. Mr. Lovell therefore suffered no prejudice as a result of Mr. Young's decision.

2. Leon Denney

323. Leon Denney did not testify at the March 2015 trial.

[106]324. Mr. Denney is retired and lives near Blackfoot, Idaho on his farm. Aug. 5, 2019 Hr'g Tr. at 137-38.

325. Mr. Denney was interviewed by Ms. Sandall-Barrus on August 28, 2014. State's Ex. 40.

326. Mr. Denney was assigned to Mr. Young's witness list and remained Mr. Young's responsibility throughout trial preparation and trial.

327. Mr. Young reviewed Ms. Sandall-Barrus's interview summary of Mr. Denney and was aware of the kind of testimony Mr. Denney would have provided at trial had he been called to testify. Aug. 30, 2019 Hr'g Tr. at 58.

328. Mr. Denney recalled being contacted about testifying at the March 2015 trial, but he could not recall any specific details. He thought one of the people who contacted him was a man who was supposed to get back to him, Aug. 5, 2019 Hr'g Tr. at 146, and at other times seemed to recall speaking with Sam Newton, one of Mr. Lovell's appellate attorneys. Aug. 5, 2019 Hr'g Tr. at 193, 195. He never mentioned speaking with a woman about the case, but he also acknowledged that the statements in Ms. Sandall-Barrus's interview memorandum about her conversation with Mr. Denney were correct. Aug. 5, 2019 Hr'g Tr. at 150-55.

329. Although Mr. Young did not explicitly recall speaking with Mr. Denney during the evidentiary hearing, Mr. Young was emphatic that he reached out to all of the witnesses assigned to him, though he could no longer recall specific details [107]of each individual conversation. Aug. 20, 2019 Hr'g Tr. at 24, 38-41; Aug. 30, 2019 Hr'g Tr. at 41, 59. The Court finds Mr. Young credible on this issue.

330. As to Mr. Denny specifically, a transcript of a recorded conversation between Sam Newton and Mr. Young from July 2015 reflected Mr. Young clearly recalling speaking to Mr. Denney, who he referred to

as "the guy from out of state," though he incorrectly recalled Mr. Denney being from Wyoming instead of Idaho. Aug. 20, 2019 Hr'g Tr. at 38-39.

331. The Court finds that Mr. Young did reach out to Mr. Denney regarding his potential testimony.

332. Mr. Denney met Mr. Lovell at the Utah State Prison sometime in August 1988. Aug. 5, 2019 Hr'g Tr. at 160-61.

333. Mr. Denney was released from the Utah State Prison in January or February 1989. Aug. 5, 2019 Hr'g Tr. at 159-60.

334. The exact reasons for Mr. Denny's incarceration and release were not made entirely clear to the Court, but the State did not seek to use his incarceration to discredit Mr. Denny or undermine his credibility nor did the Court view it as discrediting.

335. Mr. Denney interacted with Mr. Lovell personally, in prison, for a total of seven months in 1988 and 1989. Aug. 5, 2019 Hr'g Tr. at 161. But he traded letters and occasional telephone calls with Mr. Lovell since that time. Aug. 5, 2019 Hr'g Tr. at 144, 167-68.

[108]336. Mr. Denney was a very angry person while incarcerated, and as a result, landed in "max" subject to twenty-three hour a day lockdown. Aug. 5, 2019 Hr'g Tr. at 140-41.

337. He met Mr. Lovell when he joined a program in the prison in which Mr. Lovell held a senior position. Aug. 5, 2019 Hr'g Tr. at 162-63. In Mr. Denney's view, Mr. Lovell "went to bat" for him to help him get into the program. Aug. 5, 2019 Hr'g Tr. at 142-43.

338. He described the program as one designed to help inmates "search themselves," "stop blaming others" for their problems and to learn "to trust—trust people." Aug. 5, 2019 Hr'g Tr. at 142:11-16. He also described Mr. Lovell as devoted to and a believer in the program. Aug. 5, 2019 Hr'g Tr. at 163. Mr. Denney holds a sincere belief that his participation in that program changed his life for the better. Aug. 5, 2019 Hr'g Tr. at 144.

339. But despite the sincerity of Mr. Denney's belief, he readily admitted that, at the time he met Mr. Lovell, Mr. Lovell did not disclose to him that he was in prison for the rape of Ms. Yost in 1988 and 1989. In fact, Mr. Denney recalled that his understanding at the time was that Mr. Lovell had been falsely accused of rape. Aug. 5, 2019 Hr'g Tr. at 164.

340. Even after decades of corresponding since Mr. Lovell was initially charged with and convicted of Ms. Yost's murder, Mr. Denney was unaware of the details of the crime, claiming only to know that "he killed a woman" who "was [109]going to put him in prison." Aug. 5, 2019 Hr'g Tr. at 168:21-25.

341. Mr. Denney also testified that Mr. Lovell was a "different person" than when he first met him, that he had bettered himself and was now a "caring person" who has maintained a positive attitude and is continually trying to better himself from prison. Aug. 5, 2019 Hr'g Tr. at 154-56. He also testified that Mr. Lovell is "very remorseful" and that his crime "eats at him." Aug. 5, 2019 Hr'g Tr. at 156-57.

342. Mr. Denney would unhesitatingly welcome Mr. Lovell into his home and provide him a place to live should Mr. Lovell be released from prison. Aug. 5, 2019 Hr'g Tr. at 145.

343. But it was clear to the Court that, despite their sincerity, Mr. Denney's opinions of Mr. Lovell were based on limited knowledge that Mr. Lovell himself had chosen to share with him. For example:

    a. Mr. Denney knew almost nothing about Mr. Lovell's criminal history from before the rape of Ms. Yost, despite the fact that that history would have been the closest in time to when he first met Mr. Lovell in 1988. Aug. 5, 2019 Hr'g Tr. at 177, 179.

    b. He knew none of the details of the rape of Ms. Yost or the subsequent murder plots and actual murder of Ms. Yost. Aug. 5, 2019 Hr'g Tr. at 175-81.

c. When pressed about when he had learned anything about Mr. Lovell's [110]crimes, Mr. Denney stated "not too long ago," Aug. 5, 2019 Hr'g Tr. at 184:3-11, which he ultimately admitted might have been since the 2015 retrial. Aug. 5, 2019 Hr'g Tr. at 186.

d. But Mr. Lovell did tell Mr. Denney how remorseful and sorry he was before the 2015 retrial. Aug. 5, 2019 Hr'g Tr. at 187-88.

e. Although Mr. Denney stated that he did not think Mr. Lovell "took me in," he admitted that it was at least possible that Mr. Lovell avoided telling him about his crimes so that Mr. Denney would testify favorably for him. Aug. 5, 2019 Hr'g Tr. at 183, 186-87.

f. This testimony severely undermined Mr. Denney's credibility by making him look as though he had been manipulated by Mr. Lovell.

344. When confronted with the facts of Mr. Lovell's actual crimes, Mr. Denney became visibly uncomfortable.

345. Furthermore, Mr. Denney provided an affidavit in support of the rule 23B remand motion that stated that Mr. Lovell "is absolutely in no way a predator," but he admitted that all of Mr. Lovell's behavior in connection with the rape and murder of Ms. Yost were consistent with Mr. Lovell being a predator. Aug. 5, 2019 Hr'g Tr. at 175-81; State's Ex. 2 at 3.

346. By the end of his testimony, Mr. Denney's answers were evasive. Although he had testified that he could not be 100% sure that Mr. Lovell would not reoffend if released from prison, Aug. 5, 2019 Hr'g Tr. at 182, he refused to answer [111]straightforward questions about whether LWOP would be the safest possible sentence for Mr. Lovell. Aug. 5, 2019 Hr'g Tr. at 189-190.

347. Had Mr. Denney testified at trial, his testimony would have raised numerous issues that the defense team was directly concerned about:

    a. Mr. Denney appeared naïve about the risks Mr. Lovell poses because he knew nothing about Mr. Lovell's criminal history or even the murder for which Mr. Lovell was on trial.

    b. Mr. Denney's key experience with Mr. Lovell came from their time in prison in which Mr. Lovell got Mr. Denney into a prison program that emphasized honesty and trust, yet Mr. Lovell did not share any information with Mr. Denney about his own criminal behavior. Indeed, Mr. Lovell continued to maintain that he had been falsely accused.

    c. Mr. Lovell appeared to have manipulated Mr. Denney into testifying favorably by telling him how remorseful he was, but without telling him any details about what he actually did.

d. Mr. Denney's body language and tone of voice under questioning undermined his credibility because he appeared deeply uncomfortable with the details of Mr. Lovell's crimes, yet continued to assert his belief that Mr. Lovell was completely safe to release from prison.

348. Finally, the helpful testimony that Mr. Denney did have to offer was entirely cumulative of other uncontested testimony offered at trial about Mr. Lovell [112]being a model prisoner.

349. Given that Mr. Denney's positive testimony added nothing new to the mix of evidence at trial and that his negative testimony not only undermined his credibility but made him appear to be naïve and manipulated by Mr. Lovell, the Court concludes that Mr. Young did not perform deficiently by not calling him to testify at trial. Mr. Lovell did not prove that no competent attorney would have made the same decision.

350. Nor was Mr. Lovell prejudiced by Mr. Denney not testifying at trial. On balance, Mr. Denney's testimony was more harmful than helpful and Mr. Lovell has not proven any likelihood of a more favorable outcome at trial had Mr. Denney testified.

3. Brent Scharman

351. Before he retired, Brent Scharman was a licensed psychologist working for LDS Family Services. Aug. 28, 2019 Hr'g Tr. at 6-7.

352. In July 2005, Mr. Scharman was asked by the Church to be the bishop of the maximum security unit. He served until 2008. Aug. 28, 2019 Hr'g Tr. at 23, 33.

353. Mr. Scharman heard about Mr. Lovell from Dr. Newton, who told Mr. Scharman that he felt good about his visits with Mr. Lovell. Aug. 28, 2019 Hr'g Tr. at 23-24.

354. Mr. Scharman would visit with Mr. Lovell once a month, one-on-one, through glass, for about an hour. Aug. 28, 2019 Hr'g Tr. at 25-26.

[113]355. Mr. Scharman and Mr. Lovell would usually visit about what was going on in their individual lives and in the world at large. Aug. 28, 2019 Hr'g Tr. at 26.

356. Mr. Scharman learned that Mr. Lovell liked to exercise and read, he was interested in taking classes, he was active and doing things. Aug. 28, 2019 Hr'g Tr. at 26-27.

357. Mr. Lovell told Mr. Scharman that he completed 60 different classes through BYU and other sources. Aug. 28, 2019 Hr'g Tr. at 27.

358. Mr. Lovell shared details about his family and personal life with Mr. Scharman. Aug. 28, 2019 Hr'g Tr. at 28.

359. Mr. Lovell always expressed love and appreciation for his family and never had anything negative to say. Aug. 28, 2019 Hr'g Tr. at 29.

360. Mr. Scharman was never alarmed about any of his interactions with Mr. Lovell. Aug. 28, 2019 Hr'g Tr. at 30.

361. Mr. Scharman described Mr. Lovell as extroverted, talkative, pleasant, easy to meet with, involved, and wanting to learn, grow, and change. Aug. 28, 2019 Hr'g Tr. at 36.

362. Mr. Lovell volunteered information about his crimes to the extent Mr. Lovell felt comfortable doing that, but Mr. Scharman did not ask the details of Mr. Lovell's crimes. Aug. 28, 2019 Hr'g Tr. at 30.

363. Mr. Lovell told Mr. Scharman about the difficulties Mr. Lovell encountered, mistakes he had made that led him to prison, for example, drugs and alcohol. [114] Aug. 28, 2019 Hr'g Tr. at 31.

364. Mr. Scharman's impression was that in Mr. Lovell's younger days, he "went through a period of time where drugs and alcohol consumed his life, led to impulsive, poor choices, significant poor choices." Aug. 28, 2019 Hr'g Tr. at 31.

365. Mr. Scharman knew about Mr. Lovell's crimes based on what Mr. Lovell told him and what was reported in the news media. Aug. 28, 2019 Hr'g Tr. at 32-33.

366. After Mr. Scharman was released as bishop, he had occasional visits with Mr. Lovell at the prison and

received letters from Mr. Lovell. Aug. 28, 2019 Hr'g Tr. at 34-35.

a. Over the next eleven years (2008 to 2019), Mr. Scharman visited with Mr. Lovell "three, four, five times," Aug. 28, 2019 Hr'g Tr. at 35:19-23;

b. Mr. Lovell seemed the same to Mr. Scharman, Aug. 28, 2019 Hr'g Tr. at 36;

c. Mr. Lovell sent Mr. Scharman 54 letters, and Mr. Scharman sent Mr. Lovell 26 letters. Aug. 28, 2019 Hr'g Tr. at 39.

367. Mr. Scharman recalled receiving a telephone call from a female member of the defense team, but did not recall that there was any follow-up either from her or any attorney, although he agreed that there was a mitigation witness summary with his name on it. Aug. 28, 2019 Hr'g Tr. at 40-41, 55.

368. Mr. Scharman said Mr. Lovell expressed concern about Ms. Yost's family. For example, "after the 2010 court process[, Mr. Lovell] said, 'I'm glad for me. I'm devastated for the family. They're devastated. This has to be very painful for [115]them. There's no winner here. I'm not a winner.'" Aug. 28, 2019 Hr'g Tr. at 32:9-14.

369. Mr. Scharman believes that Mr. Lovell is genuinely remorseful. Aug. 28, 2019 Hr'g Tr. at 42-43, 90-91.

370. Mr. Lovell never told Mr. Scharman that he murdered Ms. Yost in order to avoid going back to prison and Mr. Scharman conceded that a person capable of murdering another person to avoid going to prison is capable of feigning remorse. Aug. 28, 2019 Hr'g Tr. at 93-94.

371. While Mr. Scharman believed he got to know Mr. Lovell "reasonably well." Aug. 28, 2019 Hr'g Tr. at 30:3-5.he lacks sufficient foundation to conclude that Mr. Lovell's expressions of remorse and concern for Ms. Yost's family are real.

    a. Mr. Scharman has never seen or interacted with Mr. Lovell outside of the highly controlled environment of the maximum security unit at the prison. Aug. 28, 2019 Hr'g Tr. at 90-91.

    b. Mr. Scharman has never seen Mr. Lovell in any kind of social setting. Aug. 28, 2019 Hr'g Tr. at 91.

    c. Mr. Scharman has never seen what Mr. Lovell is like when he gets angry with someone. Aug. 28, 2019 Hr'g Tr. at 91.

    d. Mr. Scharman has never seen how Mr. Lovell reacts when he is provoked. Aug. 28, 2019 Hr'g Tr. at 91.

    e. Between 2008 and the time of trial in 2015, Mr. Scharman visited with Mr. [116]Lovell, at most, only five times. Aug. 28, 2019 Hr'g Tr. at 35.

f. Mr. Scharman conceded that he has not had the kinds of wide-ranging experiences with Mr. Lovell that would allow him to assess whether Mr. Lovell is, in fact, being honest. Aug. 28, 2019 Hr'g Tr. at 92-93.

372. Mr. Scharman believes Mr. Lovell is a strong and humble man, "has done great work with the genealogy indexing project he has been working on for the church history department," and "has been a positive influence on other inmates within the prison system." Aug. 28, 2019 Hr'g Tr. at 44-45.

373. Mr. Scharman does not want Mr. Lovell to have a death sentence. Aug. 28, 2019 Hr'g Tr. at 94.

374. Mr. Scharman believes that Mr. Lovell would be a good candidate for parole in the future. Aug. 28, 2019 Hr'g Tr. at 43-44, 94-95.

375. Had Mr. Scharman testified at trial consistent with his evidentiary hearing testimony, key parts of his testimony would have undermined the defense mitigation strategy of convincing the jury that Mr. Lovell deserved a sentence of life in prison with the possibility of parole.

a. Mr. Scharman acknowledged that parole can be risky because "no one knows for sure," what the parolee will do. Aug. 28, 2019 Hr'g Tr. at 43-44.

b. Mr. Scharman conceded it would not be a problem for him if Mr. Lovell were to receive a sentence of LWOP. Aug. 28, 2019 Hr'g Tr. at 95.

c. Mr. Scharman conceded that the safest alternative for Mr. Lovell would be [117]a sentence of LWOP. Aug. 28, 2019 Hr'g Tr. at 98.

d. Mr. Scharman acknowledged that in light of Mr. Lovell's history of harming others when released from incarceration, it is conceivable that Mr. Lovell will harm others again if paroled. Aug. 28, 2019 Hr'g Tr. at 98.

376. Mr. Scharman's evidentiary hearing testimony would not have persuaded a jury to impose a sentence of life in prison with the possibility of parole.

377. Mr. Lovell alleges that Mr. Young was ineffective for not calling Mr. Scharman to testify. But the Court concludes that Mr. Young did not perform deficiently. And even if he did, Mr. Lovell suffered no prejudice. Consistent with the Court's findings in Subsection F.7, in the middle of trial, Mr. Lovell and the defense team reached an agreement with attorneys at Kirton McConkie, who represented Mr. Scharman and the other ecclesiastical leaders, to call only three of the five ecclesiastical leaders to testify. This was done in exchange for the Kirton McConkie attorneys not filing—and therefore not requiring the parties to litigate—motions to quash subpoenas for all five of the ecclesiastical leaders. As part of that process, the

decision on which three ecclesiastical leaders would testify—and which two would not—was left to Mr. Lovell, not Mr. Young or Mr. Bouwhuis. Mr. Lovell made the decision to not have Mr. Scharman testify. Mr. Young cannot now be faulted for not calling a witness that Mr. Lovell expressly decided would not testify.

378. In addition, based on his evidentiary hearing testimony, Mr. Scharman would [118]have told jurors that Mr. Lovell liked to exercise and improve himself through education, helped with a genealogy indexing project, expressed concern for Ms. Yost's family, was genuinely remorseful, and would be a good candidate for parole in the future. That testimony merely repeated favorable information the jurors already heard from other witnesses.

379. But Mr. Scharman also gave testimony that was at odds with the defense team's goal for Mr. Lovell to receive a sentence that would allow him the possibility of parole. Mr. Scharman testified that parole can be risky because no one knows for sure what the parolee will do once he is released. He also testified that he would not have a problem if Mr. Lovell received a sentence that would keep him incarcerated and conceded that such a sentence would be the safest alternative. Mr. Scharman also acknowledged that, in light of Mr. Lovell's history of harming others when released from incarceration, it is conceivable that Mr. Lovell will harm others again if paroled. This type of testimony would suggest to jurors that keeping

Mr. Lovell incarcerated, rather than allowing him a chance at parole, would be the best sentencing option. But because Mr. Lovell prevented the jury from considering an LWOP sentence, the only alternative for ensuring that Mr. Lovell stayed in prison would be a death sentence. A competent attorney in these circumstances could reasonably conclude that the detrimental effects of Mr. Scharman's testimony would outweigh any marginal benefits his cumulative testimony might provide and [119]choose not to call Mr. Scharman as a witness. Mr. Young therefore did not perform deficiently for not calling Mr. Scharman to testify.

380. The Court also concludes that, even if Mr. Young should have called Mr. Scharman to testify, Mr. Lovell was not prejudiced. As explained, Mr. Scharman's testimony was cumulative. More of the same information would not have so altered the evidentiary picture that a different outcome at the sentencing hearing would be reasonably probable. And in light of the detrimental testimony Mr. Scharman gave at the evidentiary hearing, that picture likely would have been made worse for Mr. Lovell had Mr. Scharman testified. Because Mr. Scharman's testimony would likely have made things worse for Mr. Lovell, not better, there is no reasonable probability that, but for Mr. Young not calling Mr. Scharman to testify, the outcome of the sentencing hearing would have been different. Mr. Lovell therefore suffered no prejudice.

4. Richard Boyer, Judy Humphries, Debra Motteshard, and Paul Kirkpatrick

Richard Boyer, Judy Humphries, Debra Motteshard, and Paul Kirkpatrick were potential witnesses whose names were among those enumerated under Category 1(b) of the rule 23B Order. *See* Rule 23B Order at 1-2. The State has conceded, for purposes of the rule 23B proceedings, that Mr. Boyer was unavailable to testify because he was living outside of the country. Mr. Lovell therefore had no opportunity to call him as a witness. However, Mr. Lovell had the opportunity to call Ms. Humphries, Ms. Motteshard, and Mr. Kirkpatrick to testify at the evidentiary hearing, but opted not to [120]do so for strategic reasons. Oct 28, 2019 Hr'g Tr. at 79. But even though these witnesses did not testify, Mr. Young gave some testimony concerning them. The Court therefore makes the following findings of fact and conclusions of law related to these witnesses.

Richard Boyer

381. Mr. Lovell alleges that Mr. Young was ineffective for not calling Mr. Boyer to testify. The Court concludes that Mr. Young did not perform deficiently. And even if he did, Mr. Lovell suffered no prejudice.

382. Consistent with the Court's findings in Subsection F.7, during trial, Mr. Lovell and the defense team reached an agreement with attorneys at Kirton McConkie, who represented Mr. Boyer and the other ecclesiastical leaders, to call only three of the

five ecclesiastical leaders to testify. This was done in exchange for the Kirton McConkie attorneys not filing—and therefore not requiring the parties to litigate—motions to quash subpoenas for all five of the ecclesiastical leaders. As part of that process, the decision on which three ecclesiastical leaders would testify—and which two would not—was left to Mr. Lovell, not Mr. Young or Mr. Bouwhuis. Mr. Lovell made the decision to not have Mr. Boyer testify. Mr. Young therefore did not perform deficiently for not calling Mr. Boyer as a witness.

383. In addition, because Mr. Boyer did not testify at the evidentiary hearing, there is no evidence showing that, but for Mr. Young's alleged error in not calling him to testify at trial, a reasonably probability exists that the outcome of the [121]sentencing proceeding would have been different. The Court therefore concludes that Mr. Lovell was not prejudiced by Mr. Boyer not testifying at trial.

Judy Humphries

384. Mr. Young reviewed Ms. Sandall-Barrus's interview summary of Judy Humphries, which included a notarized letter from Ms. Humphries detailing her favorable views of Mr. Lovell. Aug. 30, 2019 Hr'g Tr. at 66.

385. Christopher Shaw, one of the prosecutors, recalled generally having discussions with Mr. Bouwhuis at various times regarding the admission of letters

during the mitigation phase of trial. Aug. 7, 2019 Hr'g Tr. at 85–88. Among others, Mr. Shaw and Mr. Bouwhuis stipulated to admission of Ms. Humphries' letter. Aug. 7, 2019 Hr'g Tr. at 87.

386. Although he could not specifically recall, Mr. Shaw believed that Mr. Young was present during the off-the-record discussion about the admission of Ms. Humphries' letter. Aug. 7, 2019 Hr'g Tr. at 87.

387. Ms. Humphries was never going to be called as a live witness; only her notarized letter was going to be given to the jury and that decision was made by Mr. Bouwhuis. Aug. 30, 2019 Hr'g Tr. at 67-71.

388. Mr. Lovell alleges that Mr. Young was ineffective for not calling Ms. Humphries to testify. The Court concludes that Mr. Young did not perform deficiently. And even if he did, Mr. Lovell suffered no prejudice.

[122]389. Mr. Young did not perform deficiently for not calling Ms. Humphries to testify because that decision was made by lead counsel, Mr. Bouwhuis.

390. The Court also concludes that Mr. Lovell suffered no prejudice even assuming that Mr. Young performed deficiently. Ms. Humphries did not testify at the evidentiary hearing and so there is no evidence showing that her live testimony would have been any different or any more compelling than her letter, which the jury already had. Because Ms. Humphries letter did not alter the outcome for Mr. Lovell, there

is no reasonable probability that her live testimony would have made a difference either.

Debra Motteshard

391. On March 5, 2015, Mr. Young received an email from Mr. Bouwhuis with Ms. Sandall-Barrus's summary of her second interview with Ms. Motteshard. Aug. 23, 2019 Hr'g Tr. at 97-98; Aug. 30, 2019 Hr'g Tr. at 48; State's Ex. 20, 41.

392. Mr. Young learned from the second summary that Ms. Motteshard spent most of her time with Mr. Lovell's brother, Royce, had never talked to Mr. Lovell on the telephone, had visited him only twice in 28 years, and she estimated she wrote Mr. Lovell once a month between 1998 and 2006. Aug. 30, 2019 Hr'g Tr. at 48; State's Ex. 22, 41.

393. Mr. Young also learned that Ms. Motteshard would testify that Mr. Lovell was a calm child, which was inconsistent with Dr. Cunningham's testimony that Mr. Lovell had ADHD, and that Mr. Bouwhuis was therefore concerned about [123]her testifying. Aug. 23, 2019 Hr'g Tr. at 98-99, 102, 110; Aug. 30, 2019 Hr'g Tr. at 50; State's Ex. 41; R8849:73-74; 8851:87-89, 118-33, 148-91; 8852:10-45.

394. Mr. Young also learned from the March 5, 2015 email that Ms. Sandall-Barrus believed, after interviewing Ms. Motteshard three or four times, that Ms. Motteshard did not know Mr. Lovell very well and

that Mr. Bouwhuis believed that having her testify would not be worth it. Aug. 23, 2019 Hr'g Tr. at 98-99, 102, 110; Aug. 30, 2019 Hr'g Tr. at 50-51; State's Ex. 20, 22, 37.

395. Mr. Young agreed that not having LWOP as a sentencing option made calling Ms. Motteshard as a witness a risky proposition. Because she was not well-acquainted with Mr. Lovell and her testimony about Mr. Lovell's childhood would be inconsistent with Dr. Cunningham's testimony, her testimony on the life with the possibility of parole sentencing option would not be particularly helpful. The only alternative would be a sentence of death. Aug. 30, 2019 Hr'g Tr. at 50-52.

396. Mr. Lovell alleges that Mr. Young was ineffective for not calling Ms. Motteshard to testify. The Court concludes that Mr. Young's decision not to call Ms. Motteshard as a witness was objectively reasonable. And even if Mr. Young was deficient for not calling her to testify, Mr. Lovell suffered no prejudice.

397. Ms. Motteshard was the type of witness that the defense team had strategic concerns about. Because she did not know Mr. Lovell well, any opinion Ms. [124]Motteshard might give about Mr. Lovell could easily be called into question. Competent counsel could reasonable decide not to call a witness who presented credibility problems. In addition, Ms. Motteshard would have contradicted the expert opinion of Dr. Cunningham that Mr. Lovell had

ADHD and was *not* a calm child, which ran the risk that jurors might believe her over the expert to the detriment of the defense theory. Again, competent counsel could reasonably decide to avoid that risk. The Court concludes that Mr. Young's decision not to call Ms. Motteshard to testify fell well within the wide range of professionally reasonable judgments and was therefore objectively reasonable.

398. The Court also concludes that Mr. Lovell was not prejudiced even assuming that Mr. Young performed deficiently. Ms. Motteshard did not testify at the evidentiary hearing and so there is no evidence showing that her live testimony would have been any different than what is already in the record. Because of the problematic nature of her testimony that justified not calling her in the first place, there is no reasonable probability that, had she testified at trial, the outcome would have been different.

Paul Kirkpatrick

399. On December 18, 2014, Ms. Sandall-Barrus informed Mr. Bouwhuis by email that she spoke to Paul Kirkpatrick. Aug. 23, 2019 Hr'g Tr. at 116-18; State's Ex. 25, 35. Although he asserted that Mr. Lovell was a "good worker," "never [125]caused any problems," and "seemed like a nice guy," Ms. Sandall-Barrus reported that Mr. Kirkpatrick "said he wouldn't really have anything to say" in testimony at Mr. Lovell's trial because his experience with Mr. Lovell "was a long time ago." State's Ex. 25 at 2; Aug. 23, 2019 Hr'g Tr. at 116-17.

400. Responding to Ms. Sandall-Barrus's Kirkpatrick email, Mr. Bouwhuis asked, "Did he act like he didn't want to testify, or just that he felt he didn't have much to offer?" State's Ex. 25 at 2; Aug. 23, 2019 Hr'g Tr. at 117:15-17. Ms. Sandall-Barrus responded that she was not sure. State's Ex. 25 at 2; Aug. 23, 2019 Hr'g Tr. at 117. Mr. Bouwhuis again responded, "I think if he's willing to testify what he has to say is helpful," but if "he's not willing then we obviously don't want to bother." State's Ex. 25 at 3; Aug. 23, 2019 Hr'g Tr. at 118:8-10.

401. Although Mr. Young has no independent recollection of Mr. Kirkpatrick, Mr. Young and the defense team would have talked about him at the January 26, 2015 defense team meeting. Aug. 30, 2019 Hr'g Tr. at 72-74.

402. Mr. Young believes that a decision was made by the defense team at the January 26, 2015 meeting not to call Mr. Kirkpatrick to testify because he did not have much, if anything, to offer. Aug. 30, 2019 Hr'g Tr. at 74-75.

403. Mr. Lovell alleges that Mr. Young was ineffective for not calling Mr. Kirkpatrick to testify. The Court concludes that Mr. Young's decision not to call Mr. Kirkpatrick as a witness was objectively reasonable. And even if Mr. Young's performance was deficient in this regard, Mr. Lovell suffered no [126]prejudice.

404. Mr. Lovell alleges that Mr. Young was ineffective for not calling Mr. Kirkpatrick to testify. The Court

concludes that Mr. Young's decision not to call Mr. Kirkpatrick as a witness was objectively reasonable. And even if Mr. Young's performance was deficient in this regard, Mr. Lovell suffered no prejudice.

405. Mr. Kirkpatrick was the type of witness that the defense team had strategic concerns about. Aug. 23, 2019 Hr'g Tr. at 56; Aug. 27, 2019 Hr'g Tr. at 190-91; Aug. 30, 2019 Hr'g Tr. at 52 (Mr. Young's concern over witnesses who do not know Mr. Lovell well). Because he did not know Mr. Lovell well, any opinion Mr. Kirkpatrick might give about Mr. Lovell could easily be called into question. Competent counsel could reasonable decide not to call a witness who presented credibility problems. The Court concludes that Mr. Young's decision not to call Mr. Kirkpatrick to testify was objectively reasonable because it fell well within the wide range of professionally reasonable assistance.

406. Mr. Kirkpatrick did not testify at the evidentiary hearing, so there is no evidence establishing that Mr. Lovell was prejudiced by Mr. Young's decision not to call him to testify. In the absence of any evidence, the Court concludes that there is no reasonably probability that the outcome of the sentencing proceeding would have been different had Mr. Kirkpatrick testified at trial and, therefore, Mr. Lovell suffered no prejudice.

[127]**D. Category 1(c): Claim that Mr. Young did not adequately cross-examine Carl Jacobsen.**

407. Carl Jacobson testified for the prosecution at the 2015 trial and Mr. Young cross-examined him. Aug. 13, 2019 Hr'g Tr. at 7, 39.

408. Mr. Jacobson worked for the Department of Corrections at the Utah State Prison from 1983 until his retirement in 2005. Aug. 13, 2019 Hr'g Tr. at 7. At the time of his retirement, he was the captain of the Uintah 1 block, which includes death row. Aug. 13, 2019 Hr'g Tr. at 11.

409. Mr. Jacobson recalled two conversations with Mr. Bouwhuis prior to the trial, one very brief one and another that was quite lengthy and that Mr. Bouwhuis recorded. Aug. 13, 2019 Hr'g Tr. at 8-9, 30-31.

410. Mr. Jacobson did not speak to Mr. Young before his trial testimony, and in fact he "didn't know Mr. Young until he stood up and cross-examined" him. Aug. 13, 2019 Hr'g Tr. at 40.

411. But in his lengthy pretrial discussion with Mr. Bouwhuis, Mr. Jacobson made his views of Mr. Lovell known to the defense team, including:

a. That he believes Mr. Lovell is a dangerous person. Aug. 13, 2019 Hr'g Tr. at 26.

b. That he had personal concerns for his and his family's safety given that Mr. Lovell previously murdered a witness in an effort to silence her. Aug. 13, 2019 Hr'g Tr. at 27.

[128]c. That he did not want Mr. Lovell to get out of prison. Aug. 13, 2019 Hr'g Tr. at 21.

d. That in his experience Mr. Lovell was a "master manipulator" who he has personally seen manipulate many situations. Aug. 13, 2019 Hr'g Tr. at 14-15, 20.

e. That Mr. Lovell is both "feared . . . and respected by other inmates." Aug. 13, 2019 Hr'g Tr. at 20:24-25.

f. That he thought one possible explanation for Mr. Lovell's failure to find Ms. Yost's body was because he buried her in a "mass grave." Aug. 13, 2019 Hr'g Tr. at 12.

g. But Mr. Jacobson also characterized Mr. Lovell as "a Dr. Jekyll and Mr. Hyde," Aug. 13, 2019 Hr'g Tr. at 27:22-25, because he is also "very personable and a really nice guy. He's an inmate that's easily managed, polite, well-mannered, well-groomed, no problem" with "a lot of positive qualities." Aug. 13, 2019 Hr'g Tr. at 14:15-19.

h. That he would be both "candid and truthful" with the prosecution if they asked about any of these subjects. Aug. 13, 2019 Hr'g Tr. at 24:13-17.

412. During Mr. Jacobson's trial testimony, the prosecution elicited only some negative testimony, including:

    a. That Mr. Jacobson thought Mr. Lovell was an "escape risk." Aug. 13, 2019 Hr'g Tr. at 38:4-7.

    [129]b. That Mr. Lovell was "probably the number one of the top two" most manipulative inmates Mr. Jacobson had encountered in his career. Aug. 13, 2019 Hr'g Tr. at 38:1-2.

    c. That he believed Mr. Lovell knew where Ms. Yost's body was, Aug 13, 2019 Hr'g Tr. at 36, and that he thought Mr. Lovell's "excuses" for not locating the body were "fucking bullshit." Aug. 13, 2019 Hr'g Tr. at 35:9-15.

413. At the evidentiary hearing, Mr. Young could not recall how much information he had about Carl Jacobson prior to his testimony. Aug. 20, 2019 Hr'g Tr. at 85:15-21.

414. However, Mr. Young was both clear and credible that the assignment to cross-examine Mr. Jacobson came from Mr. Bouwhuis, just as all of his assignments did. Aug. 20, 2019 Hr'g Tr. at 88.

415. Though it was Mr. Bouwhuis and not Mr. Young who had been communicating with Mr. Jacobson, at the evidentiary hearing, Mr. Young could not recall if he knew any of the information that Mr. Bouwhuis had gathered from Mr. Jacobson. Aug. 20, 2019 Hr'g Tr. at 88-89.

416. But when Mr. Young cross-examined Mr. Jacobson, he elicited only favorable testimony, including:

    a. That Mr. Lovell "has never been a management or a disciplinary problem." Aug. 13, 2019 Hr'g Tr. at 40:21-22.

    [130]b. That Mr. Jacobson recommended that Mr. Lovell participate in "inmate review panels," which are public awareness forums conducted at the prison with approximately 100 high school student body officers and their parents and counselors, where there is discussion about prison life with four inmates, of which Mr. Lovell was the inmate representing maximum security. Aug. 13, 2019 Hr'g Tr. at 41.

    c. Mr. Jacobson testified that Mr. Lovell participated in at least two inmate review panels, possibly more, and that he wrote up a positive "C-note," or chronological note, for placement in Mr. Lovell's prison file. Aug. 13, 2019 Hr'g Tr. at 41, 43. Copies of those C-notes were not presented at trial or admitted into evidence, though they were admitted during the evidentiary hearing. Aug. 13, 2019 Hr'g Tr. At 42-43.

417. Mr. Young's cross-examination of Mr. Jacobson at trial was brief, exploring only the topics of Mr. Jacobson's general view of Mr. Lovell as a cooperative and easy to manage inmate and his selection of Lovell for

participation in the inmate review panels. Mr. Young did not expand on topics or otherwise open the door to new topics that provided fertile ground for redirect examination and, at the conclusion of his cross-examination, the State asked no further questions of Mr. Jacobson. R8854:243-51.

418. Mr. Jacobsen testified on direct examination that he believed Mr. Lovell refused to divulge where he disposed of Ms. Yost's body because there were other [131]bodies there of people Mr. Lovell had killed. Mr. Young chose not to challenge Mr. Jacobsen's testimony because he did not want the jury focusing on Mr. Jacobsen's opinion, for which no evidence had ever been presented. Aug. 20, 2019 Hr'g Tr. at 91-92.

419. At the evidentiary hearing, Mr. Jacobson recounted the testimony described above. However, on cross-examination by the State, Mr. Jacobson's testimony was credible and much more damaging to the defense than it was at trial. For example, the State elicited the following:

    a. Mr. Jacobson testified that Mr. Lovell knows he is "anti-death penalty," and suspected that is why Mr. Lovell wanted him as a witness; however, Mr. Jacobson would "make an exception for Mr. Lovell" because of his continued "victimization" of people over the duration of his prison time and his refusal to take investigators to Ms. Yost's body. Aug. 13, 2019 Hr'g Tr. at 49-51.

b. He testified that the C-notes he authored only memorialized Mr. Lovell's participation in the inmate review panels, which he testified to at trial, and they did not suggest that Mr. Lovell would "be safe in the community" or that he "should get parole." Aug. 13, 2019 Hr'g Tr. at 52:9-14.

c. He testified that when he spoke to Mr. Bouwhuis Mr. Jacobson refused to give Mr. Bouwhuis his home address or even his email address out of concern for his safety and family because Mr. Lovell "kidnapped, raped, [132]and killed his witness" and therefore Mr. Jacobson would "do whatever it takes for precautionary effort" to prevent the release of his private information to Mr. Lovell. Aug. 13, 2019 Hr'g Tr. at 53-54.

d. He testified that of the "probably tens of thousands" of inmates he dealt with in his career, including many rapists, murderers, and kidnappers, Mr. Lovell was "at the top of the list of the most manipulative individuals" he had ever dealt with and "among the most dangerous." Aug. 13, 2019 Hr'g Tr. at 55-56.

e. That he has personally seen Mr. Lovell manipulate people and that "he writes well" which would help him manipulate people with letters where "he could work his craft." Aug. 13, 2019 Hr'g Tr. at 57:12-14.

f. That, in his view, Mr. Lovell would be perfectly capable of donating money or gifts to organizations in a effort to manipulate them into helping him, particularly because other inmates do that as well. Aug. 13, 2019 Hr'g Tr. at 57-58.

420. Mr. Young was not deficient in cross-examining Mr. Jacobson. Although he did not meet with Mr. Jacobson ahead of his trial testimony, Mr. Bouwhuis had spoken at length with Mr. Jacobson. Although neither Mr. Young nor Mr. Bouwhuis could recall any communications between them regarding Mr. Jacobson, it is clear to the Court that Mr. Young elicited the best possible version of Mr. Jacobson's testimony on cross-examination without opening any [133]doors to the much more damaging statements that the prosecution could have elicited based on his testimony at the evidentiary hearing.

421. Furthermore, Mr. Young was not deficient for not introducing the C-notes from Mr. Lovell's prison file because those C-notes added nothing of substance to Mr. Jacobson's testimony about Mr. Lovell's participation in the inmate review panels and were therefore cumulative.

422. Finally, Mr. Lovell has not shown that he was prejudiced in any way by Mr. Young's handling of Mr. Jacobson's cross-examination and certainly has not proven any likelihood of a more favorable outcome at trial had Mr. Jacobson testified as he did at the evidentiary hearing. Quite the contrary, had Mr.

Jacobson testified as he did at the evidentiary hearing, his testimony would have been very damaging to the defense.

423. **E. Category 1(d): Claim that Mr. Young did not adequately assist and prepare Marissa Sandall-Barrus in her role as mitigation specialist.**

As the Court found in Subsection A.7 above, Mr. Lovell was unable to lay foundation connecting Ms. Sandall-Barrus to Mr. Young. The Court specifically found that Mr. Young was never assigned to assist Ms. Sandall-Barrus or to prepare her to do her work on the *Lovell* case, and that it was clear that Mr. Young was not in charge of Ms. Sandall-Barrus in any way. Aug. 6, 2019 Hr'g Tr. at 65-66, 183. The Court therefore concluded that Mr. Young was not deficient in connection with Ms. Sandall-Barrus, as it was not his job to assist or prepare her. In addition, Mr. Lovell was not prejudiced in [134]any way by Mr. Young with regard to Ms. Sandall-Barrus.

F. Category 1(e): Claim that Mr. Young did not timely or adequately object to alleged interference by attorneys for the Church of Jesus Christ of Latter-day Saints with testimony of Church ecclesiastical leaders.

1. Rebecca Douglas

Mr. Lovell argued, and the Court agreed, that Ms. Douglas's testimony was potentially relevant to the question of possible interference by Church attorneys with

the testimony of witnesses who, in March 2015, were Mr. Lovell's current or former Church ecclesiastical leaders at the prison. On that topic, the Court makes the following findings related to Ms. Douglas:

424. Ms. Douglas testified that the Church's General Counsel, Lance Whitman, initially did not give her permission to leave her mission in the Dominican Republic to testify at Mr. Lovell's trial. Aug. 12, 2019 Hr'g Tr. at 21, 26.

425. Ms. Douglas told Elder Cornish, an ecclesiastical leader in the Church, "I think I need to let you know that I'm going to testify. And if you need to excommunicate me, so be it. But I feel like I have to go speak what I know." Aug. 12, 2019 Hr'g Tr. at 26:21-23.

    a. No one told Ms. Douglas that she would be excommunicated if she testified on Mr. Lovell's behalf at trial. Aug. 12, 2019 Hr'g Tr. at 91.

426. After additional discussions between Ms. Douglas and Church counsel, the decision was made to allow Ms. Douglas to leave her mission in the Dominican Republic to testify for Mr. Lovell. Aug. 12, 2019 Hr'g Tr. at 31.

[135]427. Elder Cornish counseled Ms. Douglas to simply tell the truth when she testified. Aug. 12, 2019 Hr'g Tr. at 31.

428. When Ms. Douglas arrived at the courthouse, she spoke with a Kirton McConkie attorney, Daniel McConkie, who told her that she should tell the truth when she testified. Aug. 12, 2019 Hr'g Tr. at 35, 91-92.

429. Ms. Douglas testified that she felt intimidated by Mr. McConkie's presence in the courtroom. Aug. 12, 2019 Hr'g Tr. at 93.

    a. As Ms. Douglas was called from the gallery to testify, Mr. McConkie told her "I'm sure you'll do just fine." Aug. 12, 2019 Hr'g Tr. at 35:16-17.

    b. Mr. McConkie did nothing in the courtroom except watch and listen to the testimony. Aug. 12, 2019 Hr'g Tr. at 95.

    c. After Ms. Douglas testified at trial, on March 30, 2015, Ms. Douglas sent an email to Chuck Thompson stating that she was calm and at peace during her trial testimony and that she "was able to share the things that [she] had come to share." Aug. 12, 2019 Hr'g Tr. at 38:9-13, 99-100.

    d. Ms. Douglas's view on March 30, 2015, was that she was able to testify at trial to the one thing that was most important to her, which was that Mr. Lovell was a changed person. Aug. 12, 2019 Hr'g Tr. at 100.

430. Mr. McConkie did not obstruct or interfere with Ms. Douglas's trial testimony, but merely encouraged her to tell the truth.

[136]**2. Ecclesiastical Leaders**

a. Dr. John Newton

431. Dr. Newton received a telephone call from an attorney at Kirton McConkie and he attended a meeting with several others—including Brent Scharman and Chuck Thompson—to discuss his involvement in the *Lovell* matter. Aug. 16, 2019 Hr'g Tr. at 22, 30, 58.

432. At the meeting, Kirton McConkie attorneys gave Dr. Newton "general suggestions" about testifying including keeping his "answers simple and not wander[ing] off into things that didn't pertain to the question." Aug. 16, 2019 Hr'g Tr. at 23:4-8, 59.

a. The advice from the Kirton McConkie attorneys was "very general." Aug. 16, 2019 Hr'g Tr. at 58:22-24.

b. Kirton McConkie attorneys never told Dr. Newton what to say at trial. Aug. 16, 2019 Hr'g Tr. at 59.

c. Kirton McConkie attorneys did not try to intimidate Dr. Newton and Dr. Newton never felt intimidated. Aug. 16, 2019 Hr'g Tr. at 59.

d. Kirton McConkie attorneys never told Dr. Newton his membership in the Church would be in jeopardy if he testified. Aug. 16, 2019 Hr'g Tr. at 59.

433. Dr. Newton's meeting with the Kirton McConkie attorneys was "low key" and "cordial." Aug. 16, 2019 Hr'g Tr. at 23:8-9.

434. Dr. Newton opted not to have Kirton McConkie attorneys represent him. Aug. [137]16, 2019 Hr'g Tr. at 27.

435. Dr. Newton always felt like he was free to speak his mind, the Kirton McConkie attorneys were not heavy-handed, and he never felt like he was being strong-armed into saying something. Aug. 16, 2019 Hr'g Tr. at 27-28, 41.

436. Dr. Newton knew that he did not speak for the Church. Aug. 16, 2019 Hr'g Tr. at 59.

437. On the day Dr. Newton testified, the Kirton McConkie attorneys sat in the gallery, but they did not talk to Dr. Newton. Aug. 16, 2019 Hr'g Tr. at 60.

a. Dr. Newton never felt threatened by the presence of the Kirton McConkie attorneys when he testified. Aug. 16, 2019 Hr'g Tr. at 60.

b. The Kirton McConkie attorneys never tried to stop Dr. Newton from testifying. Aug. 16, 2019

Hr'g Tr. at 60.

438. Dr. Newton believed the Kirton McConkie attorneys were legitimately focused on the Church's interests, and he was focused on what was best for Mr. Lovell. Aug. 16, 2019 Hr'g Tr. at 27-28.

439. Sometime after Dr. Newton and the other bishops met with the Kirton McConkie attorneys, Stake President Richard Boyer met with Dr. Newton and the other bishops and showed them a letter from the Church indicating that if an ecclesiastical leader believes that there are reasons to testify in a legal matter, the leader should not testify without obtaining clearance from the office of general counsel at Church headquarters. Aug. 16, 2019 Hr'g Tr. at 29-31.

[138]a. Kirton McConkie attorneys were not present at that meeting. Aug. 16, 2019 Hr'g Tr. at 30.

440. Dr. Newton decided what he wanted to testify to on his own and not based on any letter from the Church. Aug. 16, 2019 Hr'g Tr. at 40.

441. The Kirton McConkie attorneys did not obstruct or interfere with Dr. Newton's trial testimony.

b. Gary Webster

442. Gary Webster became acquainted with Mr. Lovell when he was serving as bishop at the Utah State Prison. Aug. 12, 2019 Hr'g. Tr. at 136.

443. He was executive secretary to the Board of Pardons starting in 1979, and thereafter a member of the Board of Pardons, eventually serving as Chairman of the Board of Pardons, and ultimately retiring from the Board of Pardons. Aug. 12, 2019 Hr'g Tr. at 139-53.

444. He spent 9 to 10 hours a month with Mr. Lovell during his bishop call 2007 to 2011, and he was the inmate Mr. Webster saw the most. Aug. 12, 2019 Hr'g Tr. at 137-59.

445. When Mr. Webster first met with Mr. Lovell, he had some reticence based on prior experience with death row inmates at commutation proceedings, but he was pleasantly surprised, finding Mr. Lovell, "a nice guy . . . a gentleman." Aug. 12, 2019 Hr'g Tr. at 160.

446. Mr. Lovell consistently expressed remorse about his crimes. Aug. 12, 2019 [139]Hr'g Tr. at 138.

447. He stated he was sorry in words as well as tears. Aug. 12, 2019 Hr'g. Tr. at 139.

448. Mr. Webster was impressed with the lengths Mr. Lovell took to improve himself while incarcerated including extensive coursework through BYU and other institutions under circumstances that such programming is not available through the prison for death row inmates. Aug. 12, 2019 Hr'g. Tr. at 139, 161-62.

449. Mr. Webster heard Mr. Lovell enthuse about Rising Star Outreach which caused he and two of his counselors involved in donating, which Mr. Webster continues to do. Aug. 12, 2019 Hr'g Tr. at 162-64).

450. Mr. Lovell was successful in getting other inmates to donate to Rising Star. Aug. 12, 2019 Hr'g. Tr. at 162-64.

451. As volunteer in the Prison, Mr. Webster oversaw a project whereby volunteer inmates would extract data from old records, and record it for purposes of genealogy study. Aug. 12, 2019 Hr'g Tr. at 156-57.

452. Mr. Webster worked toward expanding availability of the program in other areas of the prison and once it was available to death row inmates, he believes Mr. Lovell is one of a very few row inmates working on the project. Aug. 12, 2019 Hr'g Tr. at 164.

453. Employment is generally not available for death row inmates, but Mr. Lovell had secured paid employment serving other inmates their food. Aug. 12, 2019 [140] Hr'g Tr. at 164..

454. When Mr. Webster's bishop call ended, he waited a year as required by prison policy, and then signed on to be a visitor on Mr. Lovell's visitor roster. Aug. 12, 2019 Hr'g Tr. at 164-65.

455. Mr. Webster filled out the visitor paperwork because he wanted to be able to visit Mr. Lovell. Aug. 12, 2019 Hr'g. Tr. at 166).

456. Mr. Webster sees Mr. Lovell as a man with potential who has been very consistent, and has changed his behavior for the good. Aug. 12, 2019 Hr'g Tr. at 166.

457. Mr. Webster considers Mr. Lovell his friend. Aug. 12, 2019 Hr'g Tr. at 166-67.

458. Mr. Lovell cares about Mr. Webster and his family. Aug. 12, 2019 Hr'g Tr. 167, 168.

459. Mr. Lovell writes Mr. Webster and his wife consistently, and sends cards for special occasions that Mr. Lovell makes himself out of magazine clippings. Aug. 12th, 2019 Hr'g Tr. at 167.

460. Kirton McConkie attorneys called Mr. Webster and asked if he would like to be represented and he said "yes." Aug. 12, 2019 Hr'g Tr. at 174, 184.

461. Mr. Webster remembers seeing a letter from the Church about ecclesiastical leaders testifying, but stated that it was directed only to current leaders (and Mr. Webster was not a current leader), it did not say that leaders could not testify, and he did not need to get clearance from Church attorneys in order to [141]testify at Mr. Lovell's 2015 trial. Aug. 12, 2019 Hr'g Tr. at 175.

462. Mr. Webster talked with the Kirton McConkie attorneys on the phone and in person. Aug. 12, 2019 Hr'g Tr. at 177. Mr. Webster was Mr. Lovell's bishop when Mr. Lovell was excommunicated, so that Mr.

Lovell could "start afresh in his repentance." Aug. 12, 2019 Hr'g Tr. at 175-76.

463. Mr. Webster met with the Kirton McConkie attorneys by himself. Aug. 12, 2019 Hr'g Tr. at 177.

464. Mr. Webster does not believe the Kirton McConkie attorneys had any concerns about the subject matter of his testimony. Aug. 12, 2019 Hr'g Tr. at 177-78.

465. The Kirton McConkie attorneys did not tell Mr. Webster what to say, only to tell the truth, and reminded him that he did not speak for the Church and should not testify about Church policy, which Mr. Webster found helpful. Aug. 12, 2019 Hr'g Tr. at 178-79, 185-86.

466. The Kirton McConkie attorneys never tried to prevent Mr. Webster from testifying. Aug. 12, 2019 Hr'g Tr. at 186.

467. The Church of Jesus Christ of Latter-day Saints never told Mr. Webster what to say. Aug. 12, 2019 Hr'g Tr. at 211.

468. Mr. Webster knew that he neither spoke for nor represented the Church. Aug. 12, 2019 Hr'g Tr. at 211-12.

469. The Kirton McConkie attorneys did not obstruct or interfere with Mr. Webster's trial testimony.

[142]**c. Chuck Thompson**

470. Mr. Thompson stated to Ms. Douglas in an email at the time of trial that he was careful not to say too much in light of his position as Mr. Lovell's bishop at the prison. He indicated, "I was instructed to say as little opinion as I could and followed counsel." Aug. 12, 2019 Hr'g Tr. at 37:11-12.

d. Brent Scharman

471. Brent Scharman is a retired psychologist with extensive experience in treatment of people with various disorders. Aug. 28, 2019 Hr'g Tr. at 6.

472. He became acquainted with Mr. Lovell when he was a volunteer at the Utah State prison. Aug. 28, 2019 Hr'g Tr. at 14.

473. Before he met Mr. Lovell, his predecessor bishops had commented on him, that he was "the only one," they were meeting on death row, that they felt good about the visits, and it changed the experience of visiting death row for them. Aug. 28, 2019 Hr'g Tr. at 24.

474. He was bishop after Dr. Newton, starting in 2005, and ending in 2008, when a friend, Dr. Richard Boyer, Stake President released him. Aug. 28, 2019 Hr'g Tr. at 8, 24, 33.

475. He or an assistant would meet with Mr. Lovell one-on-one virtually every week, their meetings starting

with a greeting of hands pressed against the glass, a prayer, and talk of both of their lives and "the world at large." Aug. 28, 2019 Hr'g Tr. at 24-27.

[143]476. Dr. Scharman learned Mr. Lovell consistently exerciser, a reader, who took 60 different classes, some through BYU, which his wife helped to arrange. Aug. 28, 2019 Hr'g Tr. at 27.

477. Because of the nature of a death sentence, educational opportunities are not provided by the prison, and Mr. Lovell had to secure learning opportunities for himself. Aug. 28, 2019 Hr'g Tr. at 27-28.

478. Mr. Scharman learned about Mr. Lovell's family, that he was raised LDS, his parent's divorce, and death of his older brother. Aug. 28, 2019 Hr'g Tr. at 29, 31.

479. Mr. Lovell spoke positively about his own family members and learned about Dr. Scharman's. Aug. 28, 2019 Hr'g Tr. at 29-30.

480. Early on, Mr. Lovell shared details of his offense but because "it's not like a disciplinary action" he felt it was not appropriate to dig into every detail. Aug. 28, 2019 Hr'g Tr. at 30.

481. Dr. Scharman was also aware of details of Mr. Lovell's crimes through media sources. Aug. 28, 2019 Hr'g Tr. at 32.

482. Mr. Lovell revealed significant problems with drugs and alcohol which led him to poor choices. Aug. 28, 2019 Hr'g Tr. at 31.

483. Mr. Lovell expressed concern for the victim and her family, including that when, in 2010, his death sentence was overturned, while he was glad for himself, he was "devastated for the family," recognizing how painful for them [144]it must be. Aug. 28, 2019 Hr'g Tr. at 32.

484. Mr. Lovell has turned down requests for media interviews to keep himself from cropping up as a reminder to the family. Aug. 28, 2019 Hr'g Tr. at 32.

485. Following his release from his bishop call, Dr. Scharman continued a relationship with Mr. Lovell as a visitor and through correspondence. Aug. 28, 2019 Hr'g Tr. at 35-36.

486. Dr. Scharman counted 56 letters he has received from Mr. Lovell, and he's sent 26 back, signing the first "Bishop," and then, "Brent," in an evolution of their relationship. Aug. 28, 2019 Hr'g Tr. at 39-40.

487. Over the eleven years Dr. Scharman has visited Mr. Lovell, he has remained largely the same, a self-professed "work-in-progress," a designation with which Dr. Scharman agrees. Aug. 28, 2019 Hr'g Tr. at 36.

488. Mr. Lovell is pleasant, extroverted, busy, and involved with many things. Aug. 28, 2019 Hr'g Tr. at 36.

489. Mr. Lovell expresses the same theme of wanting "to learn, to grow, to change." Aug. 28, 2019 Hr'g Tr. at 36.

490. Dr. Scharman is aware that Mr. Lovell's commitment to meeting with the LDS Church volunteers has continued, that he has meet with his predecessor, Dr. Newton, himself, Gary Webster, and Chuck Thompson. Aug. 28, 2019 Hr'g Tr. at 37.

491. Dr. Scharman personally knows all of the LDS bishop volunteers that met with [145]Mr. Lovell, and knows that they maintained friendships with Mr. Lovell. Aug. 28, 2019 Hr'g Tr. at 37.

492. Dr. Scharman was contacted by voicemail prior to the 2015 trial, and recalled that person to be female. Aug. 28, 2019 Hr'g Tr. at 40.

493. August 22nd, 2014, he provided information for a mitigation witness summary. Aug. 28, 2019 Hr'g Tr. at 41; Defense Exhibit 49.

494. He reported to the mitigation specialist he believes Mr. Lovell is genuinely remorseful. Aug. 28, 2019 Hr'g Tr. at 43.

495. Dr. Scharman told the mitigation specialist that he believes Mr. Lovell could be paroled, but acknowledges parole is risky, and knows of another inmate who was paroled and reoffended. Aug. 28, 2019 Hr'g Tr. at 43-44.

496. Dr. Scharman also told the mitigation specialist that he is impressed with his work on the genealogy project, a landmark work, and finds Mr. Lovell to be a "strong and humble man Aug. 28, 2019 Hr'g Tr. at 44-45.

497. Dr. Scharman also told the mitigation specialist that Mr. Lovell offers a significant positive contribution to others around him. Aug. 28, 2019 Hr'g Tr. at 45.

498. Based on the behaviors Dr. Scharman has seen in the time he has known Mr. Lovell, he would predict positively about Mr. Lovell's future behavior. Aug. 28, 2019 Hr'g Tr. at 44.

499. When Mr. Lovell asked, Mr. Scharman said he would testify for Mr. Lovell. [146]Aug. 28, 2019 Hr'g Tr. at 38.

500. Mr. Scharman was contacted by attorneys at Kirton McConkie to talk about testifying in Mr. Lovell's case. Aug. 28, 2019 Hr'g Tr. at 45-46.

501. The purpose of the contact was to inform Mr. Scharman of the Church "guidelines about testifying and cautions that would be appropriate in that process." Aug. 28, 2019 Hr'g Tr. at 47:1-3.

502. At the meeting with the Kirton McConkie attorneys, the atmosphere was cordial, Mr. Scharman did not feel threatened or intimidated, the attorneys never

said his membership in the Church was at stake if Mr. Scharman testified, and while the attorneys were cautious about Mr. Scharman testifying, they did not prevent Mr. Scharman from testifying. Aug. 28, 2019 Hr'g Tr. at 87-89.

503. Unlike Dr. Newton, Mr. Scharman was more cautious about testifying because he is not in a position to really know what another person is like on the inside. Aug. 28, 2019 Hr'g Tr. at 47-48.

504. The Kirton McConkie attorneys advised Mr. Scharman not to testify regarding Church doctrine, policy, or procedure. Aug. 28, 2019 Hr'g Tr. at 50.

505. Mr. Scharman was not subpoenaed and did not testify at trial, but he would have testified had he been called. Aug. 28, 2019 Hr'g Tr. at 51-52.

506. The Kirton McConkie attorneys did not obstruct or interfere with Mr. Scharman's trial testimony.

[147]**e. Richard Boyer**

Richard Boyer was a potential witness whose name was among those enumerated under category 1(e) of the rule 23B Order. *See* Rule 23B Order at 1-2. But the State has conceded, for purposes of the rule 23B proceedings, that Mr. Boyer was unavailable to testify because he was living outside of the country. Mr. Lovell therefore had no opportunity to call him as a witness.

3. Jeff Thomson

507. Jeff Thomson was one of three Weber County prosecutors handling Mr. Lovell's case between 2013 and 2015. Aug. 7, 2019 Hr'g Tr. at 4–5.

508. In preparation for trial, Mr. Thomson and the two other prosecutors divided among themselves the witnesses that had been announced by the defense. Thomson was responsible for the religion-related witnesses, including John Newton and Becky Douglas. Aug. 7, 2019 Hr'g Tr. at 5–6.

509. Prior to trial, Weber County prosecutors issued a subpoena duces tecum to Mr. Thompson for Mr. Lovell's church records in the Church of Jesus Christ of Latter-day Saints. Aug. 7, 2019 Hr'g Tr. at 8–9, 18–20.

510. Counsel from Kirton McConkie responded to the subpoena and provided the church records to Mr. Thomson. Aug. 7, 2019 Hr'g Tr. at 8–9.

511. Prior to cross-examining Dr. Newton, Mr. Thomson spoke to him outside the courtroom. Also present were two attorneys from Kirton McConkie as well as other bishops who were scheduled to testify. Thomson's conversation entailed [148]"mostly greetings" and not "a substantive discussion." Aug. 7, 2019 Hr'g Tr. at 7–8.

512. During cross-examination, Mr. Thomson asked Dr. Newton questions about, among other topics, the hierarchy of the Church and the "handbook of instructions." Aug. 7, 2019 Hr'g Tr. at 23; *see* Def's Ex. 7.

513. Mr. Thomson asked Dr. Newton about a letter, dated June 3, 2010, issued by leaders of the Church. Aug. 7, 2019 Hr'g Tr. at 24–25; Def's Ex. 9. The first two paragraphs of the letter were quoted at trial, but not the third. Aug. 7, 2019 Hr'g Tr. at 25.

514. Mr. Thomson testified that this letter preceded Mr. Lovell's trial and was not directed at any one named individual, but to leaders holding certain positions and acting within that capacity in the Church. Aug. 7, 2019 Hr'g Tr. at 49. Mr. Thomson further affirmed that the letter does not say that persons in the categories listed in the letter's heading cannot testify. Aug. 7, 2019 Hr'g Tr. at 64.

515. Mr. Thomson asked Dr. Newton "whether the LDS church has a policy on capital punishment and the death penalty." Aug. 7, 2019 Hr'g Tr. at 26:3-7. Dr. Newton did not know the answer to this question. *Id.* at 26:8-10. Mr. Thomson then read the policy to Dr. Newton, stating:

> the Church of Jesus Christ of Latter-Day Saints regards the question of whether and in what circumstances the state should impose capital punishment as a matter to be decided solely

> by the [149]prescribed processes of the civil law. We neither promote nor oppose capital punishment.
>
> Aug. 7, 2019 Hr'g Tr. at 64:18-22.

516. Mr. Thomson testified that this policy was not directed at Mr. Lovell or his case, but "available publicly" on the internet and it "simply states the church's policy that anyone can go read regarding capital punishment." Aug. 7, 2019 Hr'g Tr. at 50:11-17.

517. Mr. Thomson asked Dr. Newton about the circumstances of Mr. Lovell's murder of Ms. Yost and whether Mr. Lovell should have been excommunicated by Dr. Newton for this crime. Aug. 7, 2019 Hr'g Tr. at 27–28. As to this line of questioning, Mr. Thomson stated that he was cross-examining Dr. Newton about whether Dr. Newton was "acting within the scope of his duties as a bishop." Aug. 7, 2019 Hr'g Tr. at 28:12-14.

518. Mr. Thomson asked Dr. Newton about the process of repentance and readmission into the Church following excommunication. Aug. 7, 2019 Hr'g Tr. at 28–29.

519. Mr. Thomson asked Dr. Newton whether a "full and complete confession [was] part of that process to church leaders and victims[.]" Aug. 7, 2019 Hr'g Tr. at 29:10-13. And since Dr. Newton was unaware of the full details of Mr. Lovell's crimes, Mr. Thomson

suggested that Mr. Lovell had not "reached that level of repentance." Aug. 7, 2019 Hr'g Tr. at 29–30.

[150]520. Mr. Thomson testified that he prepared to cross-examine Dr. Newton and the other ecclesiastical leaders "about why they had failed to follow [Church] policy and procedure" to attack their credibility. Aug. 7, 2019 Hr'g Tr. at 31–32.

521. Mr. Thomson further testified that his examination of Dr. Newton was directed at helping the jury understand that the ecclesiastical leaders "were coming and testifying on their own, and not as agents of the Church of Jesus Christ of Latter-day Saints." Aug. 7, 2019 Hr'g Tr. at 32:18-23.

522. In a telephone discussion with Mr. Thomson, an attorney for the Church explained that they had "instructed these former bishops" that the bishops were not "testifying on behalf of the church, because you're not acting as an agent of the church." Aug. 7, 2019 Hr'g Tr. at 36:22-25.

523. In his questioning of Dr. Newton, Mr. Thomson was not trying to prevent Newton from opining about his sense about whether or not Mr. Lovell was sorry or felt bad about his actions. Aug. 7, 2019 Hr'g Tr. at 44. Mr. Thomson affirmed that the prosecution had no problem with Dr. Newton's expressions of his personal view of Mr. Lovell but wanted to make clear to the jury that the Church was not "putting its thumb on the scales in this case." Aug. 7, 2019 Hr'g Tr. at 52.

524. Neither the Church nor its counsel directed Mr. Thomson to ask or refrain from asking certain questions of the former-ecclesiastical-leader witnesses. Aug. 7, 2019 Hr'g Tr. at 46–47.

[151]525. Thomson testified that no attorney representing the Church asked questions of witnesses during Mr. Lovell's trial. Aug. 7, 2019 Hr'g Tr. at 54–55.

4. Christopher Shaw

526. Christopher Shaw was one of three Weber County prosecutors handling Mr. Lovell's case. Aug. 7, 2019 Hr'g Tr. at 68.

527. During Mr. Thomson's cross-examination of Dr. Newton, Mr. Shaw and the third prosecutor, Gary Heward, determined that they "didn't want to go down the road that [Mr. Thomson] was going down with Mr. Newton." Aug. 7, 2019 Hr'g Tr. at 69:21-23. Consequently, Mr. Shaw cross-examined the two remaining ecclesiastical leaders. Aug. 7, 2019 Hr'g Tr. at 69–70.

528. Mr. Shaw explained that the decision to cross-examine the remaining two ecclesiastical leaders himself instead of having Thomson do them "wasn't necessarily the subject matter of [Mr. Thomson's] questioning, it was—it was more the style." Aug. 7, 2019 Hr'g Tr. at 72:15-17. Mr. Shaw testified that, in his view, the prosecution didn't need to spend that much time with these ecclesiastical leaders and that

he wasn't concerned about "the fact that Mr. Lovell wasn't excommunicated when we see others who do far less and are." Aug. 7, 2019 Hr'g Tr. at 73:7-9.

529. Mr. Shaw was aware that Dan McConkie, a friend and colleague, was present at the court before the proceedings started. Aug. 7, 2019 Hr'g Tr. at 73. He and Mr. McConkie exchanged pleasantries but did not discuss the nature of Mr. [152]McConkie's representation. Aug. 7, 2019 Hr'g Tr. at 73–74. Mr. Shaw assumed that Mr. McConkie was present as an observer on behalf of the Church because he understood that McConkie worked for Kirton McConkie, a law firm that did some work for the Church. Aug. 7, 2019 Hr'g Tr. at 73–75. But he did not know why McConkie was present and they had no substantive conversation beyond a greeting. Aug. 7, 2019 Hr'g Tr. at 81.

530. Mr. McConkie did not tell Mr. Shaw what questions to ask of the ecclesiastical leaders or what questions to avoid. Aug. 7, 2019 Hr'g Tr. at 81-82.

531. Mr. Shaw cross-examined Gary Webster, a former ecclesiastical leader, at trial. Aug. 7, 2019 Hr'g Tr. at 70–71; Def's Ex. 10.

532. As a prosecutor, putting himself in the shoes of the jurors, Mr. Shaw "[didn't] think Mr. Webster or any other bishops added anything of real value to the mitigation part of the case." Aug. 7, 2019 Hr'g Tr. at 80:5-8. Although "these bishops are God-fearing

souls trying do right for a murderer, I guess that might mean something to a jury." Aug. 7, 2019 Hr'g Tr. at 80:12-13.

533. Mr. Shaw recalled generally having discussions with Mr. Bouwhuis at various times regarding the admission of letters during the mitigation phase of trial. Aug. 7, 2019 Hr'g Tr. at 85–88. Among others, Mr. Shaw and Mr. Bouwhuis stipulated to admission of a letter from Judy Humphries. Aug. 7, 2019 Hr'g Tr. at 87.

534. Although he couldn't specifically recall, Mr. Shaw believed that Sean Young [153]was present during the off-the-record conversation about the admission of the Humphries letter. Aug. 7, 2019 Hr'g Tr. at 87. Mr. Shaw expressed a vague recollection that Humphries was a relative of Mr. Lovell and may have been ill at the time of trial. Aug. 7, 2019 Hr'g Tr. at 88.

5. Gary Heward

535. Gary Heward was one of three Weber County prosecutors handling Mr. Lovell's case. Aug. 14, 2019 Hr'g Tr. at 4.

536. Following Mr. Thomson's cross-examination of one of the ecclesiastical witnesses, Mr. Heward had a discussion with Mr. Shaw and determined that it might be better if Mr. Shaw cross-examined the other ecclesiastical witnesses. Aug. 14, 2019 Hr'g Tr. at 5.

537. Mr. Heward believed Mr. Thomson's examination was lengthier than it needed to be. Aug. 14, 2019 Hr'g Tr. at 5. Mr. Heward testified, specifically, that he and Mr. Shaw agreed that the ecclesiastical witnesses:

    a. "[H]ad no idea about what had happened in [Mr. Lovell's] case." Aug. 14 Hr'g Tr. at 5:18-19.

    b. "[H]ad no idea of the aggravation in this case." Aug. 14, 2019 Hr'g Tr. at 5:19.

    c. "[H]ad no idea of Mr. Lovell's actions in April of 1985, his actions in the summer of 1985 in trying to hire two people to kill Ms. Yost." Aug. 14, 2019 Hr'g Tr. at 5:20-22.

    [154]d. "[H]ad no idea of his actions in August of 1985 in breaking into her home, sexually assaulting her again, kidnapping her, removing her from there and ultimately killing her." Aug. 14, 2019 Hr'g Tr. at 5:22-25.

538. Mr. Heward testified, "Those were, frankly, the facts that we thought they should be made aware of as it mattered in regards to their opinion of Mr. Lovell. And Mr. Thomson's cross-examination went beyond that." Aug. 14, 2019 Hr'g Tr. at 5–6.

539. Leading up to the 2015 *Lovell* trial, Mr. Heward recalled "numerous discussions about potential [resolutions] of this case." Aug. 14, 2019 Hr'g Tr. at 8:20-21. But "[t]he only way the case would have been

resolved is if Mr. Lovell would have agreed to LWOP, or life without parole. All of the information coming back from counsel indicated he was not willing to do that." Aug. 14, 2019 Hr'g Tr. at 8:21-24.

540. On March 19, 2014, Mr. Heward sent an email to Mike Bouwhuis suggesting the availability of an offer of life without parole. Aug. 14, 2019 Hr'g Tr. at 14–15. This offer was available "if Doug [Lovell] will take us to the real burial site this time." Aug. 14, 2019 Hr'g Tr. at 15:14-15. Mr. Heward "remember[ed] specifically that the responses back that we got were Mr. Lovell is not pleading to life without parole." Aug. 14, 2019 Hr'g Tr. at 12:21-23.

6. Jeanne Thompson

541. Jeanne Thompson was married to Charles G. Thompson (Chuck Thompson). [155]Oct 28, 2019 Hr'g Tr. at 5.

542. Due to inoperable glioblastoma, a brain tumor, Chuck Thompson passed away in July 2017. Oct 28, 2019 Hr'g Tr. at 5–6. He was diagnosed in 2015. Oct 28, 2019 Hr'g Tr. at 9.

543. Ms. Thompson testified that Chuck Thompson had an operation in which an operable portion of his brain tumor was removed. Oct 28, 2019 Hr'g Tr. at 12. She also affirmed that Chuck Thomson received chemo treatments for approximately six months to a year. Oct 28, 2019 Hr'g Tr. at 13. The chemo treatments

were provided shortly after his diagnosis in the hopes of curing the inoperable portion of the brain tumor. Oct 28, 2019 Hr'g Tr. at 13–14, 31.

544. Ms. Thompson testified that physicians initially indicated Chuck Thompson had approximately six months to live. Oct 28, 2019 Hr'g Tr. at 10, 13. "[N]o one knew" when he was going to pass. Oct 28, 2019 Hr'g Tr. at 35–36.

545. When Chuck Thompson "got his cancer, he would just go down on his computer and would write his thoughts." Oct 28, 2019 Hr'g Tr. at 19–20. And Chuck Thompson had been journaling "for years." Oct 28, 2019 Hr'g Tr. at 20:23. Ultimately, "he decided that he wanted to have a book made." Oct 28, 2019 Hr'g Tr. at 20:3-4. Ms. Thompson did not know if any material from Chuck Thompson's earlier journaling—prior to his diagnosis—ended up in Chuck Thompson's book. Oct 28, 2019 Hr'g Tr. at 31.

546. Ms. Thompson testified, "As we decided to put the book together with the [156]writer, she said we need to have somebody that can put a forward in the front. So Chuck just asked certain people if they wouldn't mind doing that." Oct 28, 2019 Hr'g Tr. at 22:4-7. She explained that "Chuck was not a writer, . . . he was just a journaler," and that he found an editor and "they would sit down and write it together." Oct 28, 2019 Hr'g Tr. at 29:17-19.

547. Chuck Thompson's book entitled "The Mountain" was published posthumously. Oct 28, 2019 Hr'g Tr. at 19, 23–24; Def's Ex. 114. The veracity of the statements in the book are not challenged, and the Court finds them to have been made in good faith. Oct 28, 2019 Hr'g Tr. at 43.

548. Chuck was in control of what was put in the book, and the editor had no authority to change it. Oct. 28, 2019 Hr'g Tr. at 25).

7. Sean Young

549. Issues involving the Kirton McConkie attorneys and how many ecclesiastical leaders should testify arose shortly before trial, but those issues did not become clear until after the trial had started. Aug. 30, 2019 Hr'g Tr. at 16.

550. In the middle of trial—around March 17, 2015—Mr. Bouwhuis asked Mr. Young to take care of the issues raised by the Kirton McConkie attorneys and the number of ecclesiastical leaders who should testify. Aug. 30, 2019 Hr'g Tr. at 13-14, 16; State's Ex. 38.

551. Kirton McConkie attorneys told Mr. Young that they thought the testimony of [157]five ecclesiastical leaders was excessive, suggested that three would be enough, and stated that they would move to quash any subpoenas unless an agreement could be reached. Aug. 19, 2019 Hr'g Tr. at 128-29; Aug. 30, 2019 Hr'g Tr. at 20.

552. Mr. Young testified that the Kirton McConkie attorneys also told him that "they were willing to not fight us if we picked three, not having all five come down and testify." Aug. 20, 2019 Hr'g Tr. at 98:18-20.

553. Mr. Young weighed the options of having three ecclesiastical leaders testifying against the possibility that none of them would testify and advised Mr. Lovell of these potential outcomes. Aug. 20, 2019 Hr'g Tr. at 100-01.

554. During a break in the trial proceedings, Mr. Young spoke with Mr. Bouwhuis and Mr. Lovell and explained to them the position of the Kirton McConkie attorneys. Aug. 20, 2019 Hr'g Tr. at 98-99; Aug. 30, 2019 Hr'g Tr. at 20.

    a. Mr. Young told Mr. Lovell that the Kirton McConkie attorneys were threatening to quash subpoenas for all five ecclesiastical leaders. Aug. 30, 2019 Hr'g Tr. at 20.

    b. Mr. Young told Mr. Lovell that he could fight the motions to quash, possibly prevail, but if not, then none of the ecclesiastical leaders would testify. Aug. 30, 2019 Hr'g Tr. at 21.

    c. Mr. Lovell identified the three ecclesiastical leaders who were most important to him. Aug. 30, 2019 Hr'g Tr. at 21.

555. "After much discussion" Mr. Lovell and his counsel reached an agreement with [158]the Kirton McConkie attorneys that three ecclesiastical leaders would testify—John Newton, Gary Webster, and Chuck Thompson—in exchange for the Kirton McConkie attorneys not pursuing motions to quash the subpoenas for all five ecclesiastical leaders. Aug. 19, 2019 Hr'g Tr. at 128-29; Aug. 20, 2019 Hr'g Tr. at 95, 98-99; Aug. 30, 2019 Hr'g Tr. at 19-21.

556. Had Mr. Lovell insisted, Mr. Young would have litigated the motions to quash the subpoenas of all five ecclesiastical leaders. Aug. 30, 2019 Hr'g Tr. at 22.

557. Mr. Young sent the Kirton McConkie attorneys subpoenas for the three ecclesiastical leaders that Mr. Lovell and counsel chose to testify. Aug. 20, 2019 Hr'g Tr. at 4-6.

558. Kirton McConkie attorneys never filed motions to quash any of the subpoenas. Aug. 20, 2019 Hr'g Tr. at 100.

559. The Kirton McConkie attorneys did not want the ecclesiastical leaders testifying about Church policy and doctrine or in a way that suggested they represented the Church. Aug. 19, 2019 Hr'g Tr. at 130.

560. It was never Mr. Young's examination strategy to focus on religion or religious doctrine or policy. His goal was to have the ecclesiastical leaders testify about their relationship with Mr. Lovell, their

knowledge of his behavior and rehabilitation, his personality, the positive things Mr. Lovell has done since the commission of his crimes, and how Mr. Lovell would do if he were ever paroled. Aug. 20, 2019 Hr'g Tr. at 101.

[159]561. The Kirton McConkie attorneys were dismayed with the *prosecutor's* cross-examination of Mr. Thompson and indicated to Mr. Young that they were considering immediately filing motions to quash the other subpoenas; but this statement did not alter the way Mr. Young questioned the ecclesiastical leaders. Aug. 20, 2019 Hr'g Tr. at 105.

562. Mr. Lovell alleges that Mr. Young was ineffective for not timely or adequately objecting to alleged interference with the testimony of Church ecclesiastical leaders by attorneys at Kirton McConkie. The Court concludes that Mr. Young's performance was not objectively unreasonable. And even if it were, Mr. Lovell was not prejudiced.

563. Mr. Young did not perform deficiently for not objecting to the alleged interference Mr. Lovell claims occurred because the Kirton McConkie attorneys never took any legal action—like filing motions to quash subpoenas—to limit the ecclesiastical leaders' testimony or to prevent them from testifying altogether. Mr. Young cannot be faulted for not objecting where the necessary legal antecedent for raising an objection never happened. *See* Aug 30, 2019 Hr'g Tr. at 108-09.

564. In any event, no legitimate basis existed for Mr. Young to object and therefore his not objecting could not have been deficient. First, apparently believing that the testimony of five ecclesiastical leaders was excessive, attorneys at Kirton McConkie suggested to Mr. Young in the middle of trial that the testimony of [160]three leaders would be enough. They told Mr. Young that unless an agreement could be reached, they would move to quash any subpoenas for the ecclesiastical leaders. Mr. Young weighed the options—an assurance that three leaders would testify, against the possibility that none would testify—and informed Mr. Lovell. Mr. Lovell opted to agree, selected the three ecclesiastical leaders he wanted to have testify, and the two he did not—Mr. Scharman and Mr. Boyer—and the matter was settled. Yet, had Mr. Lovell insisted on having Mr. Scharman and Mr. Boyer testify in addition to the other three leaders, Mr. Young would have objected to any motions to quash. Because Mr. Lovell chose not to pursue that course, no basis existed for Mr. Young to object to the Kirton McConkie attorneys' actions, nor to Mr. Scharman and Mr. Boyer not testifying.

565. Second, the ecclesiastical leaders were consistent in their testimony at the evidentiary hearing that attorneys for Kirton McConkie did not seek to prevent them from testifying and did not attempt to tell them what to say. Nor did the Kirton McConkie attorneys try to intimidate the ecclesiastical leaders or tell them their membership in the Church was in jeopardy if they testified at trial. All of the ecclesiastical leaders

understood that they did not represent the Church and knew—even without advice from the attorneys—that they were not authorized to speak on behalf of the Church or about Church policy and doctrine. Again, Mr. Young did not perform deficiently for not objecting to non-existent interference from the Kirton McConkie attorneys.

[161]566. But even assuming Mr. Young's performance was deficient, Mr. Lovell suffered no prejudice. Mr. Boyer did not testify at the evidentiary hearing and so there is no evidence to establish a reasonable probability that testimony from him would have altered the outcome of the sentencing proceeding. Had Mr. Scharman testified at trial consistent with his evidentiary hearing testimony, much of his testimony would have been cumulative of information already presented to the jury, and some of it would have been detrimental to the defense. As for the other three ecclesiastical leaders, the best version of their testimony was the one they provided at trial. In other words, the ecclesiastical leaders' evidentiary hearing testimony—either alone or in combination—would not have so altered the evidentiary picture presented to the jury that there would be a reasonable likelihood of a different outcome at the sentencing proceeding. The Court therefore concludes that, even if Mr. Young performed deficiently, Mr. Lovell was not prejudiced.

Appendix A

CONCLUSION

Based on the Court's findings, made after carefully considering the testimony presented and the evidence received at the evidentiary hearings, the Court concludes that Mr. Young's representation was not ineffective as alleged by Mr. Lovell.

Mr. Lovell asserts that Mr. Young performed deficiently in interviewing, preparing, and examining several witness—Holly Neville, Kent Tucker, Dr. John Newton, Chuck Thompson, and Gary Webster. But it is clear to the Court that Mr. [162]Young's performance was not deficient. Against the backdrop of the damaging testimony these same witnesses provided at the evidentiary hearing, Mr. Young's examination of them at trial produced the best version of their testimony available.

Mr. Lovell alleges that Mr. Young was deficient for not calling numerous witnesses to testify. But this claim was clearly overstated. For nine of the witnesses—Colleen Bartell, Betty Tucker, Blake Nielsen, Jack Ford, Brian Morris, Tony Milar, Rebecca Douglas, Amy Humphrey, and Marissa Sandall-Barrus—Mr. Lovell was unable to lay any foundation connecting them to Mr. Young. And for the rest of the witnesses—Russ Minas, Leon Denney, Brent Scharman, Richard Boyer, Judy Humphries, Debra Motteshard, and Paul Kirkpatrick—either Mr. Bouwhuis or Mr. Lovell himself made the decision not to have them testify, or they were the type of witnesses that presented serious strategic concerns justifying Mr. Young's decision not to call them as witnesses.

Mr. Lovell also alleges that Mr. Young performed deficiently for not adequately cross-examining Carl Jacobsen and for not assisting and preparing Ms. Sandall-Barrus in her role as the mitigation specialist. But again, based on the testimony the Court heard at the evidentiary hearing, Mr. Young's performance was not deficient. It is clear that Mr. Young elicited the best possible version of Mr. Jacobsen's trial testimony on cross-examination without opening any doors to the much more damaging statements that the prosecution could have elicited based on Mr. Jacobsen's evidentiary hearing testimony. As for not assisting and preparing Ms. Sandall-Barrus, the evidentiary [163]hearing testimony firmly established that Mr. Young was never assigned to assist or prepare her to do her work as a mitigation specialist.

Mr. Lovell faults Mr. Young for not timely or adequately objecting to alleged interference with the ecclesiastical leaders' testimony by attorneys at Kirton McConkie. But no basis existed for Mr. Young to object. While the Kirton McConkie attorneys threatened to file motions to quash if all five ecclesiastical leaders were called to testify, it was Mr. Lovell who settled that issue by agreeing to call only three of the leaders to testify. Consequently, no motions to quash were ever filed. And for those leaders who did testify, they stated at the evidentiary hearing that they already knew they were not authorized to speak for the Church of Jesus Christ of Latter-Day Saints or about church policy and doctrine. In addition, they consistently testified that the Kirton McConkie attorneys never tried to prevent them from testifying, never told them what to say, and only advised them to tell the truth. Mr. Young did

not perform deficiently for not objecting to non-existent interference.

But even assuming that Mr. Young performed deficiently, Mr. Lovell suffered no prejudice. None of the testimony at the evidentiary hearing—either alone or in combination—was so momentous that it would have altered the evidentiary picture in such a way that there would be a reasonable probability of a different outcome. Some of the testimony, while favorable, was cumulative of testimony the jury already heard. More of the same would not have made a difference. Because of the egregious nature of Mr. Lovell's crimes, coupled with his staunch refusal to allow the jury the sentencing [164]option of LWOP, only witnesses who could unequivocally—and believably—testify that Mr. Lovell would not be a danger if released into the community would be genuinely helpful to the defense objective of saving Mr. Lovell's life. None of the witnesses who testified fit this bill. Even assuming Mr. Young performed deficiently, there is no reasonable probability that the outcome of the sentencing proceeding would have been different. Accordingly, the Court's confidence in the fairness of the sentencing proceeding is not undermined.

DATED February 26, 2021.

BY THE COURT

/s/ Michael D. DiReda
Judge Michael D. DiReda
Second Judicial District Court

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF UTAH, FILED JULY 25, 2024

IN THE
SUPREME COURT OF THE STATE OF UTAH

2024 UT 25

STATE OF UTAH,

Appellee,

v.

DOUGLAS A. LOVELL,

Appellant.

No. 20150632
Heard February 9, 2024
Filed July 25, 2024

On Direct Appeal

Second District, Weber County
The Honorable Michael D. DiReda
No. 921900407

Associate Chief Justice Pearce authored the opinion of the Court, in which Justice Petersen, Justice Hagen, Judge Johnson, and Judge Kelly joined.

Having recused themselves, Chief Justice Durrant and Justice Pohlman do not participate herein; District Court Judges Christine S. Johnson and Keith A. Kelly sat.

Appendix B

ASSOCIATE CHIEF JUSTICE PEARCE, opinion of the Court:

INTRODUCTION

¶1 Douglas Lovell appeals his 2015 conviction and death sentence for the murder of Joyce Yost. Lovell first argues that his conviction should be overturned because the district court improperly admitted testimony he provided in connection with his now-vacated 1993 guilty plea. Even if we assume that this testimony should not have been admitted, its admission did not prejudice Lovell in light of the overwhelming evidence of his guilt. We affirm Lovell's conviction.

¶2 Lovell also argues that, even if his conviction is not overturned, he is entitled to a new sentencing proceeding. He contends that his counsel was constitutionally deficient in various ways. We agree that Lovell did not receive the representation the United States Constitution guarantees him. Lovell's two attorneys provided ineffective assistance when they failed to object to, among other things, testimony regarding Lovell's excommunication from the Church of Jesus Christ of Latter-day Saints (the Church). This prejudiced Lovell's ability to have a fair sentencing hearing. Lovell is entitled to a sentencing hearing free from this improper and prejudicial evidence. We therefore vacate Lovell's sentence and remand for further proceedings.

BACKGROUND

¶3 In 1985, Lovell kidnapped Joyce Yost and raped her. *See State v. Lovell* (*Lovell I*), 1999 UT 40, ¶¶ 3-8, 984

P.2d 382. Yost reported these crimes to the police. *Id.* Lovell then attempted to hire two individuals to kill Yost to prevent her from testifying against him. *Id.* ¶¶ 4-5. After those attempts failed, Lovell kidnapped Yost and killed her in a canyon outside of Ogden. *Id.* ¶¶ 6-7.

¶4 Eight years later, Lovell pled guilty to the aggravated murder of Yost and was sentenced to death. *Id.* ¶ 2. After he was sentenced, Lovell moved to withdraw his guilty plea. *State v. Lovell* (*Lovell II*), 2005 UT 31, ¶¶ 4, 12, 114 P.3d 575. The district court dismissed the motion to withdraw, concluding that it lacked jurisdiction to consider the merits of Lovell's motion. *Id.* ¶ 12. Lovell appealed. We reversed the district court's determination and remanded for the district court to conduct a hearing on the merits of Lovell's motion to dismiss. *Id.* ¶ 29.

¶5 On remand, Lovell argued that good cause existed to withdraw his plea "because the trial court failed to strictly comply with Utah Rule of Criminal Procedure 11(e)." *State v. Lovell* (*Lovell III*), 2011 UT 36, ¶ 3, 262 P.3d 803, *abrogated on other grounds by State v. Guard*, 2015 UT 96, ¶¶ 52, 61, 371 P.3d 1. Lovell contended that the district court erred because it failed to inform him of the rights he would be waiving by pleading guilty. *Id.* Lovell also argued that the court erred because it did not inform him of his right to appeal or the time limit to withdraw his plea. *Id.* Lovell further contended that the district court "did not properly determine what plea agreement was reached by . . . Lovell and the State." *Id.* The district court did not permit Lovell to withdraw his plea. *Id.* ¶ 4. Lovell appealed again, and we reversed, holding that the district court failed to comply with rule 11(e). *Id.* ¶ 80. We

concluded that this failure presented good cause for Lovell to withdraw his plea. *Id.*

¶6 With his plea withdrawn, Lovell's case proceeded to trial. In this trial, Lovell did not plead guilty, but neither did he contest his guilt, telling the jury during opening statements that he "is in fact guilty." As part of the guilt phase of Lovell's trial, the State presented the jury with evidence of Lovell's crimes. The State introduced surreptitious recordings of Lovell that it obtained while he was in prison. In those recordings, Lovell admitted that he murdered Yost.

¶7 Rhonda Buttars, Lovell's former spouse, testified that Lovell had told her that Yost had accused him of rape and that he wanted to kill Yost to prevent her from testifying against him. Buttars also testified that Lovell attempted to hire two people to murder Yost before ultimately killing her himself.

¶8 The State introduced Yost's testimony from the preliminary hearing on Lovell's rape charges. Yost testified that Lovell had raped her twice. The State offered Tom Peters's testimony from Lovell's 1993 sentencing. Peters was one of the men Lovell had tried to hire to kill Yost. Peters explained that Lovell told him Yost "was trying to accuse him of raping her . . . and that something had to be done."

¶9 The State also introduced transcripts of Lovell's testimony following his 1993 guilty plea. During that testimony, Lovell confessed to kidnapping, sexually

assaulting, and murdering Yost to keep her from testifying against him.

¶10 Lovell did not cross-examine any of the State's witnesses at trial, although the transcript of Yost's prior testimony contained cross-examination. The jury convicted Lovell of aggravated murder.

¶11 After establishing Lovell's guilt, his trial entered the penalty phase.[1] There, the State presented additional evidence to support its burden of demonstrating that death was the appropriate punishment for Lovell's crimes.[2]

¶12 The State first presented victim-impact testimony from Yost's son, daughter, and two granddaughters. They testified about the effect Yost's murder had on them and their family.

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1. Pursuant to Utah Code section 76-3-207(1), Lovell's trial was split into a guilt phase, where the jury determined whether Lovell was guilty of the crime, and a penalty phase, where the jury considered whether the death penalty should be imposed.

2. We note that because Lovell committed the murder before April 27, 1992, but was sentenced after that date, Utah law allowed Lovell "to proceed either under the law which was in effect at the time the offense was committed or under the additional sentencing option of life in prison without parole." UTAH CODE § 76-3-207.5(2). The punishments available to Lovell when he committed his crime were life in prison with the opportunity of parole or death. *See id.* § 76-3-207.5(1)(b). Lovell elected to proceed under the old law, removing life without parole as a possible sentence.

¶13 The State presented testimony from two law enforcement witnesses who investigated Yost's death. The State also called Kim Holden, an adult probation and parole officer. These witnesses testified about Lovell's lengthy criminal history and opined that he was untruthful, manipulative, and self-centered. Holden told the jury that if Lovell's sentence held open the possibility of parole, the parole board would "have the authority to release [him] immediately."

¶14 Carl Jacobson—a correctional supervisor at the prison—testified that, in his opinion, Lovell is manipulative, cold, calculating, and controlling. Jacobson also opined that Lovell was an escape risk.

¶15 Lovell then presented his case for mitigation. Lovell's theme was that he was a changed person who had shown remorse and accepted responsibility for his crimes.

¶16 Lovell began his argument by presenting testimony from three of his former ecclesiastical leaders. Each witness described Lovell as very remorseful, a model prisoner, a hard worker, and a caring individual. They testified that he was continually trying to improve himself and that he was involved with several charitable organizations.

¶17 Dr. John Newton was the first to testify. Newton testified that Lovell had expressed remorse for his crimes "[m]any times" during their interactions and that he believed Lovell "was very remorseful." Newton explained that Lovell had "turned down an opportunity to have the details of his case aired because he was concerned that . . . it would affect the victim's family." Newton also testified

that based on conversations he had with the officers in the prison, he "think[s] [Lovell] was regarded as a model prisoner." And he testified that Lovell "was involved with two or three charitable organizations."

¶18 On direct examination, Lovell did not elicit any testimony about Newton's religious affiliation. Indeed, it appears that Lovell's counsel assiduously avoided asking Newton any questions about his role as a Church bishop.[3] Nor did Lovell's counsel ask Newton any questions about Lovell's religious affiliation or status. The only suggestion that Newton's interactions with Lovell involved the Church was Newton's response when counsel asked him, "what did your discussions with Mr. Lovell entail when you met with him?" Newton testified that he talked with Lovell about "religion on a fairly basic level" and "things [Lovell] had read in the Bible and the Book of Mormon."[4]

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3. In the Church, "A bishop is the leader of a local congregation (known as a ward) with duties similar to those of a pastor, priest or rabbi." *Bishop*, The Church Of Jesus Christ Of Latter-Day Saints Newsroom, https://newsroom.churchofjesuschrist.org/article/ bishop [https://perma.cc/8P7M-9CCQ].

To provide context, we will explain or define terms witnesses used that refer to Church teachings or practices. To the extent any of these might be considered adjudicative facts, we can take judicial notice of them because they are generally known in the jurisdiction where trial occurred or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *See* Utah R. Evid. 201(b).

4. The Book of Mormon is one of the Church's books of scripture. *Book of Mormon*, Encyc. Britannica, https://www.britannica.com/topic/Book-of-Mormon [https://perma.cc/77B6-K9VP].

¶19 The State, on the other hand, used cross-examination as an opportunity to explore both Newton's and Lovell's religious backgrounds. The State established that Newton was a Church bishop and that the Church has a handbook "that outlines the policies and procedures" for bishops to follow. The State then asked Newton whether "the handbook requires the convening of [a] disciplinary council when evidence suggests that an individual has committed murder?"[5] Lovell's counsel objected to this line of questioning for lack of foundation and was overruled. Newton then replied that he did not convene a disciplinary council to have Lovell removed from Church membership.

¶20 The prosecutor asked Newton if Lovell had been excommunicated from the Church.[6] After confirming

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5. Church disciplinary councils are held "to consider a member's standing in the Church following serious transgression[s]." M. Russell Ballard, *A Chance to Start Over: Church Disciplinary Councils and the Restoration of Blessings*, Ensign, Sept. 1990, at 15. According to the Church, the purpose of a disciplinary council is "to save the soul of the transgressor, to protect the innocent, and to safeguard the Church's purity, integrity, and good name." *Id.* A "disciplinary council 'must be held in cases of murder, incest, or apostasy.'" *State v. Hood*, 2018 UT App 236, ¶ 23, 438 P.3d 54 (quoting *id.*). These councils are now referred to as "membership councils" within the Church, although they have the same function, requirements, and purpose. *See* The Church Of Jesus Christ Of Latter-Day Saints, General Handbook: Serving In The Church Of Jesus Christ Of Latter-Day Saints 297, 302-04 (2023).

6. In the Church, excommunication refers to the "loss of Church membership." *Church Discipline*, The Church Of Jesus Christ Of Latter-Day Saints Newsroom, (Dec. 10, 2018), www.mormonnewsroom.org/article/church-discipline [https://perma.cc/

that Lovell had been excommunicated, the State asked Newton if Lovell had been readmitted into Church membership. The State also asked Newton what the process for readmittance after excommunication entails. By this questioning, the jury heard that "the [F]irst [P]residency is the body" that determines whether a person is "remorseful and changed enough" to rejoin the Church.[7]

¶21 The State then elicited testimony from Newton that "repentance" is "the process of changing one's life," that it requires "feeling sorrow or remorse," and that it is necessary to be readmitted to Church membership after excommunication. Following this testimony, the State asked Newton what "kind of sorrow" was required to show repentance.

J8XZ-WW84]. Excommunication is "[t]he most serious sanction [a] disciplinary council may prescribe," and it is "a course of last resort . . . only taken when less serious disciplinary measures are insufficient." *Id.*

7. The First Presidency is comprised of the President of the Church and two counselors. *First Presidency*, The Church Of Jesus Christ Of Latter-Day Saints Newsroom, https://newsroom.churchofjesuschrist.org/topic/first-presidency?cp=hrv-hr [https://perma.cc/69CP-FZNY]. The First Presidency holds "the supreme governing power of the Church" and they "supervise the work of the entire Church in all matters of policy, organization, and administration." The Church Of Jesus Christ Of Latter-Day Saints, Teachings Of The Living Prophets Student Manual 45 (2016) (quoting Joseph Fielding Smith, *The First Presidency and the Council of the Twelve*, 69 The Improvement Era 977, 978 (1966)). A basic tenet of Church doctrine instructs that members of the First Presidency "are the living oracles of God and the supreme adjudicators . . . of the law of the Church." *Id.*

¶22 When Newton responded that he was confused by the State's question, the State asked Newton if he was familiar with the phrase "[g]odly sorrow."[8] Newton said he was familiar with the phrase but could not define it. Newton responded affirmatively when the State asked if repentance requires "a full and complete confession." Newton also confirmed that Lovell had not told him "all of the facts related to this case." Lovell's counsel again objected, arguing that this question was outside the scope of cross-examination. The district court again overruled the objection.

¶23 Lovell next called Gary Webster, another Church bishop. On direct examination, Lovell's trial counsel asked Webster about Lovell's excommunication from the Church. Webster explained that he had been involved in Lovell's excommunication, and that he believed Lovell "understood clearly what [excommunication] meant and . . . was comfortable with it." He also testified that he was not aware if Lovell had ever asked to be readmitted to Church membership.

¶24 Lovell's counsel asked Webster, "what was your impression of [Lovell's] progress towards remorse and

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8. The Church teaches that "godly sorrow" is a principle of repentance that "leads to conversion and a change of heart," requiring "heartfelt regret and true remorse." Dieter F. Uchtdorf, *Godly Sorrow*, New Era, Sept. 2019, at 32; *see also* Dieter F. Uchtdorf, *You Can Do It Now*!, Ensign, Nov. 2013, at 55-56. The term "godly sorrow" is taken from a New Testament passage: "For godly sorrow worketh repentance to salvation not to be repented of: but the sorrow of the world worketh death." 2 *Corinthians* 7:10 (King James).

repentance as it pertains to the process and the church?" Webster testified that during their discussions, Lovell "was consistent in expressing remorse . . . . He never made light, never made fun, always was contrite, was concerned about the crime, the impact . . . and he was always consistent."

¶25 On cross-examination, the State elicited testimony from Webster confirming that he did not represent the Church and that he believed that "no man knows what's in another man's heart."

¶26 Lovell then called Charles Thompson, a third Church bishop. Lovell's trial counsel asked Thompson about Lovell's excommunication from the Church. Thompson testified that he knew that Lovell was excommunicated, and that Lovell never spoke to him about being readmitted. Thompson also testified that "[he] see[s] [Lovell] as a model prisoner." And he testified that every time he met with Lovell, "[Lovell] has talked about remorse, particularly for the members of the family."

¶27 On cross-examination, Thompson testified that his opinions did not represent the Church and that he "cannot read what's in [Lovell's] mind or heart."

¶28 Lovell continued his mitigation case by calling Becky Douglas, the founder of one of the charities Lovell had donated to while in prison. Douglas testified that she had corresponded with Lovell for several years and that she had met with him in person on one occasion. While recounting that meeting, Douglas said that she asked Lovell if he had read the New Testament.

¶29 The State objected, arguing that "if she's going to give an exposition on the doctrinal basis of the New Testament, I think it's inappropriate." Lovell's counsel explained that Douglas would not be discussing religious doctrine. The court overruled the objection but explained that it didn't "want to get into her interpretation of scriptures and other things any more than [it] wanted to get into the church's stance on the death penalty."

¶30 The court added that it "thought there were areas that we covered with the three ecclesiastical leaders" that were "not probative at all" and "out of bounds, but no one seemed to feel that way, so I let it go."

¶31 Douglas continued her testimony, saying that when she had met with Lovell "he just felt so, so desponden[t]" and that she felt "this incredible remorse, this sadness [from Lovell] . . . that there was so much despair of what he had done."[9] She shared her belief that "by going through 30 years of prison" he has become a gentle, kind, sincere, and thoughtful man. During her testimony, Douglas explained that in her interactions with Lovell, he consistently expressed sorrow for Yost and her family. And she testified that if Lovell were ever released from prison, she "wouldn't have any hesitation to invite him into [her] home." She continued by saying she has "absolute confidence that the [Lovell] I know is the real [Lovell] now."

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9. The State again objected to this testimony for relevance and was overruled.

¶32 On cross-examination, Douglas reaffirmed her belief that Lovell had changed, saying Lovell "felt like he'd done so much evil, that he felt like he needed to do as much good as he could possibly do."

¶33 Lovell presented other mitigation witnesses, including his caseworker and an officer at the prison. The officer testified that Lovell was a good inmate and that he would often resolve disputes between inmates and even guards. Lovell presented evidence that in his thirty years of imprisonment, he had only received two write-ups: one for having an unbuttoned shirt and another for having too many socks in his cell. And one of these witnesses talked about an instance where Lovell had helped a guard who had been accidentally sprayed in the eyes with insecticide. These witnesses uniformly testified that Lovell was polite, respectful, and took responsibility for his actions.

¶34 Lovell's relatives testified that he was kind, humble, and positive. They also testified that, in their opinion, he would not be a risk if released and that they would support him if he were paroled. Lovell also read to the jury letters from seven of his pen-pals. These letters described Lovell as encouraging, supportive, understanding, respectful, courteous, and a good friend. They also talked about how Lovell had a positive outlook on life, he was constantly trying to improve himself, he had a lot to offer, and that he would be a beneficial addition to society if he were ever paroled.

¶35 In addition to the witnesses who testified about their personal relationships with Lovell, two

expert witnesses testified in favor of mitigation. Lovell first elicited testimony from Dr. Mark Cunningham, a clinical and forensic psychologist, who testified that Lovell was not as morally culpable as other individuals. Cunningham described multiple causes of Lovell's diminished culpability, explaining that Lovell had a genetic predisposition to substance abuse and dependence, along with mood disorders and personality disturbance. Cunningham also explained that Lovell was exposed to amphetamines while his mother was pregnant. And he opined that Lovell likely suffered from a learning disability and neuropsychological deficits from recurrent head injuries.

¶36 Cunningham further testified that Lovell has diminished culpability because of his traumatic family life. He explained that Lovell had witnessed parental substance abuse and mental illness, the chronic absence of his father, and chronic dysfunction between his parents with "perverse sexuality." He also explained that Lovell was subject to the "corruptive influence of his older brothers." Cunningham testified that Lovell had inadequate family structure, supervision, and guidance, along with inadequate community interventions. Cunningham also detailed the harm Lovell suffered when his brother died. Cunningham testified that, in his opinion, there was a very low likelihood that Lovell would be violent in prison and that there was also little risk he would be violent if he were ever paroled.

¶37 Lovell's second expert was Dr. Vickie Gregory, a neuropsychologist. Gregory testified that Lovell had

sustained multiple head injuries throughout his life, at ages four, six, eleven, sixteen, and nineteen. She explained that prior tests had shown that Lovell suffered from moderate brain damage, which impaired his memory and executive functioning. Gregory also testified that she had tested Lovell, and in her opinion, he suffered from mild neurocognitive deficits due to traumatic brain injury. Gregory opined that she did not believe Lovell was a psychopath. And she testified that during her interactions with Lovell, she learned that he had completed forty-six high school and college-level classes and that he is involved in three charities.

¶38 Following the presentation of evidence, the jury retired to determine the appropriate punishment. They returned a verdict of death.

¶39 Lovell appealed, and we remanded under rule 23B of the Utah Rules of Appellate Procedure. We directed the district court to conduct an evidentiary hearing and make findings of fact concerning the representation Lovell's trial counsel provided. After conducting an evidentiary hearing, the district court issued its findings of fact related to counsel's performance. We now consider Lovell's arguments on appeal with the benefit of the 23B court's factual findings.

ISSUES AND STANDARDS OF REVIEW

¶40 Lovell first argues that the district court erred when it admitted statements in the guilt phase of his trial that Lovell had made following his guilty plea in

his earlier trial. We review a court's decision to admit evidence for abuse of discretion. *State v. Griffin*, 2016 UT 33, ¶ 14, 384 P.3d 186. But we review "the legal questions underlying the admissibility of evidence" for correctness. *Id.* (cleaned up).

¶41 Lovell next argues that his trial attorneys were constitutionally ineffective when they failed to adequately object to improper testimony during the penalty phase. An ineffective assistance of counsel claim "presents a question of law that we review for correctness." *State v. Carter*, 2023 UT 18, ¶ 25, 535 P.3d 819. When a claim for ineffective assistance of counsel has been developed upon rule 23B remand, we defer to the 23B court's factual findings, reviewing them for clear error. *See State v. Drommond*, 2020 UT 50, ¶ 46, 469 P.3d 1056.[10]

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10. In our 23B remand order, we directed the district court "to make all findings of fact necessary to resolve: 1. Whether [trial counsel] performed deficiently" regarding multiple claims; and "2. Whether Lovell was prejudiced by [trial counsel's] deficient performance, if any." The district court not only made the factual findings we requested, but it analyzed legal arguments and entered conclusions of law.

As much as we appreciate the court's initiative, we must emphasize that rule 23B does not contemplate, or indeed permit, a district court to make legal conclusions based upon the factual findings it enters. *See* UTAH R. APP. P. 23B(a), (e). Rule 23B remands are conducted for the purpose of developing facts related to the claims of ineffective assistance, and a district court's role is limited to making these findings. *Id.* R. 23B(e). This process permits appellate counsel, armed with the facts developed on remand, to craft its appellate arguments to an appellate court.

Appendix B

ANALYSIS

I. The Admission Of Lovell's Prior Testimony In The Guilt Phase Of His Trial Was Harmless

¶42 Lovell first contends that his conviction should be overturned because the district court improperly admitted the testimony he gave after he was convicted in 1993. Following his 1993 guilty plea, Lovell was called as a witness in the sentencing phase. Lovell first read the court a letter he wrote to plead for leniency. Lovell was then questioned under oath by both the State and his own attorneys.

¶43 During that examination, Lovell admitted to specific facts of the crime. Lovell testified that he kidnapped and sexually assaulted Yost and that he later murdered her. He described the details of the murder, how he hid Yost's body, and how he later attempted to locate her body as part of his plea agreement. He also testified about his attempt to solicit others to murder Yost. Lovell admitted that he decided to murder Yost himself after these attempts fell through. And he testified that he murdered Yost to keep her from testifying that he had raped her.

The district court's willingness to decide legal issues on rule 23B remand is perhaps understandable given that on at least one occasion we stated that we review the 23B court's factual findings for clear error and its legal conclusions for correctness. *See State v. Drommond*, 2020 UT 50, ¶ 46, 469 P.3d 1056. This is, however, an incorrect description of the law. If a rule 23B remand hearing proceeds as the rule contemplates, there should be no legal conclusions for us to review. As much as we appreciate the district court's efforts, we disregard its legal conclusions because they are outside the scope of both rule 23B and the remand order.

¶44 In 2011, this court vacated Lovell's guilty plea and remanded for a new trial. *Lovell III*, 2011 UT 36, ¶ 80, 262 P.3d 803. During his new trial—the trial Lovell asks us to review here—Lovell's counsel sought to suppress the admission of the testimony he provided in the sentencing phase of his previous trial. Lovell argued that this testimony arose in the context of allocution and that the admission of allocution testimony would violate his constitutional rights.[11]

¶45 The district court allowed the admission of Lovell's testimony, reasoning that it was not allocution because the statements were made under oath and subject to cross-examination.[12] The transcripts of Lovell's testimony were subsequently used to establish guilt at the trial that is the subject of this appeal.

¶46 Lovell argues that the district court erred when it determined that the testimony did not qualify as allocution. He further contends that because the testimony was obtained in connection with his vacated guilty plea, its admission violated his "right to appear and defend in person" under article I, section 12 of the Utah Constitution.

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11. "Allocution is a defendant's right to speak on his or her own behalf after the fact finder determines guilt but before the judge pronounces sentence." 24 C.J.S. *Criminal Procedure and Rights of the Accused* § 2255 (2024). "It is designed to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances." 21 Am. Jur. 2D *Criminal Law* § 723 (2024).

12. The district court concluded that the letter Lovell read into the record should be considered allocution and excluded it.

¶47 Lovell points to our decision in *State v. Maestas* and argues that we concluded there that the constitutional right to allocution prevents using allocution statements in a subsequent prosecution. *See* 2002 UT 123, ¶¶ 3, 48-49, 140, 63 P.3d 621.[13] Lovell explains that the testimony contained admissions that "Lovell . . . sexually assaulted Joyce Yost, conspired to kill her, ultimately killed [her] and attempted to conceal the crime." And Lovell appears to argue, although it is far from clear, that the admission of this testimony requires reversal of his conviction, reasoning that if "this testimony were excluded, the jury would have little [sic] of the crime or its circumstances."[14]

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13. The *Maestas* court considered whether the State could use inculpatory allocution statements Maestas had made in the sentencing phase of a prior trial after that trial had been reversed and was being retried. *State v. Maestas*, 2002 UT 123, ¶¶ 14, 42, 63 P.3d 621. While a majority of the court recognized a constitutional right to allocution that "would be meaningless" if allocution statements could be used in a future prosecution, the court did not rest its holding on this principle. *See id.* ¶¶ 48-50, 140-41. The court instead held that Maestas's allocution statements were inadmissible under rule 24(d) of the Utah Rules of Criminal Procedure, which says, "If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument." *See id.* ¶¶ 51, 56 (cleaned up).

14. We note that Lovell does not explicitly argue that this error would require the reversal of his conviction, and the rest of his arguments challenge the penalty phase of the trial. Nevertheless, Lovell concludes his briefing by asserting, "*[a]t the very least*, the Court must reverse and remand for a new sentencing phase." Because Lovell's prior testimony was admitted during the guilt phase, we treat his challenge to its admission as an argument that the error requires us to overturn his underlying conviction.

¶48 The State contends that the district court did not err because Lovell's sworn statements did not qualify as allocution, and therefore our holding in *Maestas* did not prevent using the statements at Lovell's trial. Alternatively, the State argues that even "if the trial court erred, the error was harmless beyond a reasonable doubt because admission of Lovell's prior testimony was cumulative of evidence eleven other witnesses provided." The State also argues that it was harmless because the prior testimony "supported [Lovell's] trial strategy to concede guilt in order to convince the jury at the penalty phase that he had taken responsibility for the crimes he committed."

¶49 Lovell does not respond to either of the State's arguments, nor does he explain how the exclusion of this evidence would have altered Lovell's decision to not contest his guilt.

¶50 In part because of the lack of briefing from Lovell on this topic, we will assume, without deciding, that the district court erred when it admitted Lovell's 1993 sentencing testimony. We are willing to make this assumption because the State has demonstrated that even if the admission of this evidence violated Lovell's constitutional rights, its admission was harmless beyond a reasonable doubt.[15]

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15. As the State points out, we have not conclusively determined that violations of the Utah Constitution require the application of the harmless beyond a reasonable doubt standard used for violations of the United States Constitution. *See State v. Bell*, 770 P.2d 100, 106 n.12 (Utah 1988). We will assume, without deciding, that this is the correct standard to apply because Lovell fails to clear the hurdle he argues should apply.

¶51 "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Mitchell v. Esparza*, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (cleaned up). Here, that means the admission of Lovell's 1993 sentencing testimony was harmless if the State shows, beyond a reasonable doubt, that the jury would have convicted him even if the challenged evidence had been excluded.

¶52 The State presented overwhelming evidence of Lovell's guilt to the jury. The jury heard from William Holthaus, who investigated the kidnapping and sexual assault of Yost. Holthaus testified that he interviewed Yost and that she provided a description that matched Lovell and his vehicle. Holthaus told the jury that Lovell was ultimately charged with these crimes and bound over for trial during a preliminary hearing. He also testified that Lovell had told him "[t]his is not going to trial" and that a month later, Yost had gone missing.

¶53 The jury also heard from Rhonda Buttars, Lovell's former spouse, who had spoken with the police in exchange for immunity. Buttars testified that Lovell had told her that Yost accused him of rape and that he wanted to kill her because he didn't want to go back to prison.

¶54 Buttars also testified that Lovell had contacted a friend, Billy Jack, offering him several thousand dollars to kill Yost. Buttars explained that Billy Jack did not follow through with the murder. She further testified that Lovell then hired Tom Peters to murder Yost. But Buttars stated

that Peters, like Billy Jack, did not do it.[16] Buttars testified that, after these attempts to hire someone failed, Lovell decided to kill Yost himself. Buttars told the jury that she went with Lovell to surveil Yost's apartment.

¶55 Buttars testified that Lovell told her, "I'm going to do it tonight, so drive me over there," and that she drove Lovell to Yost's apartment, dropped him off, and did not hear from him again for several hours. She explained that when she picked Lovell up, he told her that it "was pretty easy" to kill Yost. Lovell recounted to Buttars that he entered Yost's home through an unlocked window, and that he drove her up the canyon and strangled her, stomping on her neck once she fell to the ground. Buttars also testified that Lovell took Yost's watch and tried to pawn it.

¶56 The State then called Detective Terry Carpenter. Carpenter explained that the police fitted Buttars with a hidden recording device to record her conversations with Lovell while he was in prison. Portions of these recordings were played for the jury, and transcripts were admitted into evidence. During these conversations, Lovell admitted to raping Yost. Lovell also detailed that he had plotted to, and eventually did, murder Yost. The jury heard Lovell tell Buttars that he "committed a first-degree felony to cover another felony. It's the death penalty. At the very least they're going to give me life without parole if I cooperate with them and go to them."

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16. The State also introduced Tom Peters's earlier testimony that Lovell had told him "this lady was trying to accuse him of raping her and that she was trying to break up his family and that something had to be done." Peters also testified that he took this to mean that Lovell wanted Yost killed, and that Lovell offered him eight hundred dollars after which Peters said he would take care of it.

¶57 Considering the totality of the evidence before the jury, the admission of the challenged testimony did not cause the jury to convict when it otherwise might have acquitted. Even without Lovell's 1993 testimony, the jury heard recorded statements of Lovell admitting to the crime. Buttars and others testified about Lovell's crimes. Lovell did not cross-examine these witnesses.[17] As such, there is nothing in the record that would allow us to conclude that the jury would not have credited the truth of their testimony. On this record, the State has shown that the admission of Lovell's prior testimony was harmless beyond a reasonable doubt. We affirm Lovell's conviction.

II. Lovell Received Ineffective Assistance Of Counsel During The Penalty Phase Of His Trial

¶58 Lovell argues that his death sentence must be overturned, and that he must be given a new sentencing hearing because his counsel provided ineffective assistance during the penalty phase of his trial. While Lovell raises multiple claims of ineffectiveness, we focus on one—whether trial counsel was ineffective for failing to adequately object to testimony about Church doctrine and Lovell's status within the Church.[18]

¶59 Essential to a criminal defendant's Sixth Amendment "right to counsel is the right to the effective

17. The sole exception was the cross-examination of Yost, which appeared on the preliminary hearing transcript; however, that cross-examination was brief, and did not seek to challenge her credibility.

18. Because we vacate Lovell's sentence, we do not opine on any of his other challenges.

assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (cleaned up); *see also State v. Gallegos*, 2020 UT 19, ¶¶ 33, 35, 463 P.3d 641. To assess whether a defendant has been denied the representation the United States Constitution promises, we apply the two-part test *Strickland* established. *Strickland* requires the defendant to show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." 466 U.S. at 687.

¶60 Under *Strickland*'s first prong, our inquiry focuses on "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. This is "a deliberately stringent standard that requires us to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Carter*, 2023 UT 18, ¶ 27, 535 P.3d 819 (quoting *Strickland*, 466 U.S. at 689). A defendant must overcome this presumption by "identify[ing] the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

¶61 "In short, the question of deficient performance is not whether some strategy other than the one that counsel employed looks superior given the actual results of trial. It is whether a reasonable, competent lawyer could have chosen the strategy that was employed in the real-time context of trial." *State v. Nelson*, 2015 UT 62, ¶ 14, 355 P.3d 1031 (cleaned up). Even if counsel fails to object to inadmissible testimony, that decision might—under the circumstances—fall within "the range of legitimate

decisions regarding how best to represent a criminal defendant." *See Strickland*, 466 U.S. at 689; *State v. Bermejo*, 2020 UT App 142, ¶ 47, 476 P.3d 148.

¶62 *Strickland* instructs us to look at "all the circumstances" of the allegedly deficient representation. 466 U.S. at 690. It is therefore helpful to review the constitutional limitations on imposing a death sentence and Utah's statute governing sentencing in a capital case.

A. The Constitutional Limitations on Capital Punishment

¶63 The death penalty is profoundly different from any other punishment that the State can impose because it is unique "in both its severity and its finality." *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (plurality opinion); *Monge v. California*, 524 U.S. 721, 732, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). The United States Supreme Court has "recognized an acute need for reliability in capital sentencing proceedings." *Monge*, 524 U.S. at 732. This need for reliability also "requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper v. Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

¶64 The United States Supreme Court has explained that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its

law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (plurality opinion). This requires that the death penalty "be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper*, 543 U.S. at 568 (cleaned up).

¶65 A death sentence will generally satisfy these constitutional limitations if it meets two requirements. *See Kansas v. Marsh*, 548 U.S. 163, 173-74, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). The Constitution first requires "that a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Loving v. United States*, 517 U.S. 748, 755, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) (cleaned up). This narrowing is accomplished "by requiring that the sentencer find at least one aggravating circumstance." *Id.*

¶66 The State "must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper*, 543 U.S. at 568. Otherwise, "a death penalty system could have standards so vague that . . . a pattern of arbitrary and capricious sentencing . . . could occur." *Godfrey*, 466 U.S. at 428 (cleaned up). For example, in *Godfrey*, the Court overturned a death sentence that was "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* The Court explained that this finding

was insufficient to impose a death sentence because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.* at 428-29, 433.

¶67 Finding an aggravating circumstance "is not an end in itself." *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988). A death sentence cannot be automatically imposed merely because the sentencer finds a narrow and precisely defined aggravating factor. *See Blystone v. Pennsylvania*, 494 U.S. 299, 304-05, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990). Instead, the Constitution imposes a second requirement—that the sentencer "render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Marsh*, 548 U.S. at 174; *see also Lockett v. Ohio*, 438 U.S. 586, 606, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion) (holding that the Constitution demands an "individualized consideration of mitigating factors" to impose a death sentence).

¶68 Considering this second principle, the Supreme Court has held "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (quoting *Lockett*, 438 U.S. at 604). Put differently, a defendant has "the right to present sentencers with

information relevant to the sentencing decision," and the sentencer is "oblige[d] . . . to consider that information in determining the appropriate sentence." *Marsh*, 548 U.S. at 175.

¶69 Further, a jury in a capital proceeding must make its sentencing determination "with the appropriate awareness of its truly awesome responsibility" to determine whether death is the appropriate punishment in a specific case. *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (cleaned up). We generally assume that jurors will take their role seriously and "act with due regard for the consequences of their decision." *Id.* at 330 (cleaned up). But if a jury's sense of responsibility has been diminished, a decision to impose the death penalty might not meet "the Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 340-41 (cleaned up).

¶70 In an effort to conform with these constitutional requirements, Utah provides statutory guidance on when the death penalty may be imposed. In Utah, the State must convince the jury of two elements beyond a reasonable doubt: (1) that the aggravating circumstances outweigh the mitigating circumstances, and (2) that the death penalty is justified and appropriate under the circumstances.[19] UTAH CODE § 76-3-207(5)(b). In weighing

19. The statute provides a non-exclusive list of mitigating circumstances, including:

> (a) the defendant has no significant history of prior criminal activity; (b) the homicide was committed

the aggravating and mitigating circumstances, the jury does not simply compare their numbers, but rather it considers "the totality of the . . . circumstances in terms of their respective substantiality and persuasiveness." *State v. Maestas*, 2012 UT 46, ¶ 265, 299 P.3d 892 (cleaned up).

¶71 A death sentence is "never mandated or imposed automatically," even if no evidence is offered in mitigation. *State v. Lafferty*, 2001 UT 19, ¶ 128, 20 P.3d 342. And "[t]he burden never shifts to the defendant." *Id.* In other words, in Utah capital cases, death is never the default. The State

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> while the defendant was under the influence of mental or emotional disturbance; (c) the defendant acted under duress or under the domination of another person; (d) at the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of a mental condition, intoxication, or influence of drugs . . . (e) the youth of the defendant at the time of the crime; (f) the defendant was an accomplice in the homicide committed by another person and the defendant's participation was relatively minor; and (g) any other fact in mitigation of the penalty.

UTAH CODE § 76-3-207(4).

The statute also allows the jury to consider aggravating circumstances outlined in section 76-5-202. *Id.* § 76-3-207(3). For example, the statute allows the jury to consider if "the actor committed homicide for the purpose of . . . preventing a witness from testifying." *See id.* § 76-5-202(2)(a)(xi)(A).

The jury may also consider "any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence." *Id.* § 76-3-207(2)(a)(iv).

must prove beyond a reasonable doubt that death is the appropriate sentence on the individual facts of each case.

B. Trial Counsel's Failure to Adequately Object to Testimony Regarding Church Doctrine and Lovell's Excommunication from the Church Was Unreasonable

¶72 Lovell argues that his counsel were deficient because they failed to adequately object to testimony that he had been excommunicated from the Church and testimony concerning the Church's doctrine regarding forgiveness and readmission to Church membership. Lovell recognizes that his counsel attempted to object to some of this testimony. But Lovell asserts that these objections were "ineffective."

¶73 Lovell's mitigation strategy was clear. The State had presented evidence of his heinous crimes. To impose the death penalty, the State needed to convince every juror that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. To escape the death penalty, Lovell needed only a single juror to conclude that the State had not met its burden. Lovell sought to seed that doubt, in part, by presenting himself as a different person from the one who had kidnapped, raped, and murdered Yost. Lovell tried to show he had changed by admitting to and showing remorse for those crimes. And he called witnesses who attempted to paint a picture of a model prisoner who had made genuine steps toward rehabilitation.

¶74 Lovell began his mitigation case by calling Dr. Newton. Newton was "a religious volunteer" at the prison, where he acted as Lovell's "clergy leader." Newton testified that, based on conversations with prison officers, he thought that Lovell "was regarded as a model prisoner." He explained that the officers "all spoke very highly of" Lovell. Newton also explained that Lovell had taken multiple classes while in prison and that he was "involved with two or three charitable organizations." And he testified that he believed Lovell "was very remorseful." Indeed, Lovell had expressed remorse for his crimes "many times."

¶75 Lovell's questioning of Newton never strayed into religion. Beyond the background information necessary to explain that Newton met Lovell as his "clergy leader," the only hint of religion from Newton's direct examination came from Newton's response to a general question:

> Q. So what did your discussions with Mr. Lovell entail when you met with him at the prison?
>
> A. . . . We talked about religion on a fairly basic level, like Ten Commandment kind of stuff . . . at some point [Lovell] had some questions about things he had read in the Bible and the Book of Mormon, so we would talk about that on occasion. Sometimes we talked about his family.

¶76 Despite the lack of religious testimony during Lovell's direct examination of Newton, the State

questioned Newton almost exclusively about religious topics. The State began its cross-examination by asking Newton if he "w[as] a bishop for the Church of Jesus Christ of Latter-[d]ay Saints." After Newton said he was, the State began a long line of questioning about the Church and its doctrine.

¶77 The State first questioned Newton about Church organization and policy, eliciting the following testimony:

> Q. . . . [I]n the LDS Church what is the highest governing body?
>
> A. Well, the [F]irst [P]residency.

¶78 The prosecutor then questioned Newton about Lovell's relationship with the Church, asking:

> Q. . . . [I]s the defendant currently a member of the LDS Church?
>
> A. [He] [i]s not.
>
> Q. Okay. Was he ever a member of the church?
>
> A. Yes, he was.

¶79 The prosecutor then asked Newton:

> Q. . . . [A]re you aware that the handbook [of instructions for Church leaders] requires the convening of [a] disciplinary council when

> evidence suggests that an individual has committed murder?

Lovell's counsel objected for lack of foundation, arguing that "[Newton] has no expertise or knowledge of the facts." The court overruled the objection and allowed the State to continue its questioning.

¶80 Newton testified that he did not convene a disciplinary council and that he would "have to just say that's a fault of mine."

¶81 Following this testimony, the prosecutor shifted its focus to Lovell's eventual excommunication from the Church, asking:

> Q. You are aware that the defendant has since been excommunicated by the church?
>
> A. I am aware of that.
>
> Q. Okay. Now, in order for an individual to be readmitted into the church after being excommunicated for murder, do you know who makes that decision, that ultimate decision, if they're remorseful and changed enough that they can join the church again?
>
> A. . . . Well, I would assume that it would start with the local bishop . . . . And then the bishop would talk to the stake president . . . . And then the stake president would talk to someone

> higher up in the church. The decision wouldn't be made at the local level. It would be made higher up in the church.[20]
>
> Q. Would it surprise you at all that . . . the [F]irst [P]residency is the body that makes that determination?
>
> A. No, that doesn't surprise me.

Lovell's counsel did not object.

¶82 The State persisted in this line of questioning, eliciting the following testimony:

> Q. So you would agree, then, that the determination of remorse or change ultimately can only be made by the [F]irst [P]residency, not by anyone else within the church?
>
> A. Well, they certainly are the ones that have the ultimate say about reinstatement. So, yes.
>
> Q. Okay. And you're aware that the defendant has not been readmitted into the church?

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20. A stake president "oversees Church programs in a defined geographic area composed of individual congregations called wards . . . . He also oversees the activities of the bishops or ward leaders, counseling them as needed." *Stake President*, The Church Of Jesus Christ Of Latter-Day Saints Newsroom, https://newsroom.churchofjesuschrist.org/article/stake-president [https://perma.cc/24VJ-XGYJ].

A. Yes.

Q. He has not been rebaptized?

A. I knew that.

Lovell's counsel did not object.

¶83 The State continued its questioning:

Q. In the LDS Church what is that process called, the process of changing one's life, essentially?

A. You could call it repentance.

Q. . . . Would you say that feeling sorrow or remorse is part of that process?

A. Yes.

Q. . . . Is there a particular kind of sorrow that the person has to have?

A. I don't understand your question.

Q. Okay. Are you familiar with the phrase "[g]odly sorrow"?

A. Well, I've heard of it. I'm not sure I know what that means.

Again, counsel did not object.

¶84 The State continued:

> Q. That's fine. Would you agree that there is a difference between expressing remorse . . . and actually being remorseful? . . .
>
> A. Sure. People can say anything.
>
> Q. Okay. Okay. Now, the defendant has made expressions of remorse to you. He's expressed remorse to you, correct?
>
> A. Yes.
>
> Q. . . . [B]ut you can't say that he is in fact totally remorseful; is that correct?
>
> A. I don't think anyone can.

¶85 The State then began questioning Newton about Lovell's repentance, asking:

> Q. As part of that process of repentance, is a full and complete confession part of that process to church leaders and victims?
>
> A. Sure. Yes.
>
> Q. Okay. And you had indicated earlier that the defendant hasn't told you all of the facts related to this case, the murder of Joyce Yost; is that correct?
>
> A. That's correct.

Lovell's counsel objected to this question, arguing that it was outside the scope of cross-examination because "the crime took place prior to Mr. Newton's involvement with Lovell." The court overruled the objection.

¶86 Lovell posits that counsel should have lodged additional challenges to this testimony because it "[s]uggest[ed] the church is in charge of adequacy of remorse and acceptance of responsibility." And that the testimony therefore called on the jury to base its decision on religious principles, "usurp[ing] the jury's function, [and] depriving Mr. Lovell of a fair and independent jury." Lovell also argues that the objections his counsel made were ineffective.

¶87 We agree that reasonable counsel would have recognized both the problems with this testimony and its potential to invite the jury to base its decision on something other than its own assessment of Lovell. And we agree that reasonable counsel would have done something—either object to the entire line of questioning, seek curative instructions, or move for a mistrial—to protect their client.[21]

21. Lovell does not clearly identify what objection trial counsel should have made. At one point, he argues that the testimony amounted to prosecutorial misconduct. And at other times, he argues that the testimony "usurped the jury's function, depriving Lovell of a fair and independent jury." Typically, the failure to identify specifically how trial counsel erred will preclude succeeding on a claim of ineffective assistance. As we explained in *State v. Gallegos*, the defendant "has the burden to overcome a strong presumption of reasonableness which he must do by identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable

¶88 During the penalty phase of a capital case, the evidence allowed is exceedingly broad. The court may admit "[a]ny evidence the court considers to have probative force . . . regardless of its admissibility under the exclusionary rules of evidence." UTAH CODE § 76-3-207(2)(b). This statute naturally limits counsel's ability to challenge evidence. The broad discretion of the court does not, however, mean all evidence is admissible. At the very least, evidence must be probative. *See id.* And we have contemplated that evidence may be inadmissible during the penalty phase if it is "unduly prejudicial" by being confusing or inflammatory to the jury. *Maestas*, 2012 UT 46, ¶ 286; *see also Lafferty*, 2001 UT 19, ¶¶ 105-06.

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professional judgment." 2020 UT 19, ¶ 37, 463 P.3d 641 (cleaned up). We, under the United States Supreme Court's instruction, have a greater concern for reliability when the death sentence is imposed. *See Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion); *see also State v. Wood*, 648 P.2d 71, 81 (Utah 1982). This greater concern for reliability "requires a correspondingly greater degree of scrutiny" when reviewing a death sentence. *California v. Ramos*, 463 U.S. 992, 998-99, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983).

As such, we "have the sua sponte prerogative in [death penalty] cases to notice, consider, and correct manifest and prejudicial error which is not objected to at trial or assigned on appeal, but is palpably apparent on the face of the record." *State v. Tillman*, 750 P.2d 546, 552-53 (Utah 1987). Here, we are not called upon to notice, consider, or correct an unobjected-to error; trial counsel weakly objected to some of the problematic questioning, and appellate counsel generally identified and briefed the issue. We are, however, required to look past briefing deficiencies that might have doomed a similar argument in a non-capital case.

¶89 We first note that the objections trial counsel made to Newton's testimony missed the mark. Counsel objected to the State asking Newton if he was "aware that the handbook requires the convening of [a] disciplinary council when evidence suggests that an individual has committed murder?" Counsel argued that Newton "has no expertise or knowledge of the facts." But the State had laid foundation—without objection—that Newton was a Church bishop and that the Church handbook "outlines the policies and procedures" for bishops and other Church leaders. The State laid sufficient foundation to ask Newton about his duties as a bishop within the handbook.

¶90 Counsel's second objection was similarly anemic. Counsel objected to the State asking Newton "that the defendant hasn't told you all of the facts related to this case, the murder of Joyce Yost; is that correct?" Counsel argued that this question was beyond the scope of cross-examination because "the crime took place prior to Mr. Newton's involvement with Mr. Lovell." However, this question was not outside the scope of cross-examination because Newton testified about his knowledge of Lovell's crimes during direct examination.

¶91 Lovell's counsel asked Newton: "in you[r] discussions with Mr. Lovell about the crimes he was involved in, did you have a chance to discuss those issues with him at some time?" And Newton testified: "I don't recall that [Lovell] and I ever discussed his crimes. I heard about it from guards and others. But he and I never discussed any of the details of his crime other than, like I say, I knew why he was there." This testimony was

sufficient to defeat an objection based upon exceeding the scope of direct examination.

¶92 Even more troubling than the misaimed objections are the many instances counsel neglected to object at all. Counsel did not object to the testimony regarding Lovell's excommunication nor the testimony about Church doctrine concerning repentance and remorse. The problem with Newton's testimony was not that he lacked foundation to provide it, nor that it exceeded the scope of direct examination—it was that the entire line of questioning and the testimony it elicited was unduly prejudicial.

¶93 We have explained that counsel's performance may be deficient when they fail to challenge testimony that is "obviously improper." *State v. Larrabee*, 2013 UT 70, ¶ 26, 321 P.3d 1136. Here, reasonable counsel would have recognized the obvious impropriety of Newton's religious testimony and challenged it.

¶94 That Newton's religious testimony was unduly prejudicial would have been apparent to reasonable counsel. The United States Supreme Court has instructed that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29. This is precisely what the unobjected-to testimony invited the jury to do.

¶95 The State's cross-examination suggested that Lovell's excommunication from the Church and

subsequent failure to be readmitted by its First Presidency was evidence that he lacked genuine remorse. It insinuated that the jury could consider whether the Church had found Lovell sufficiently remorseful as a proxy for deciding themselves whether he was truly a changed person. This testimony invited the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" because the Church had already determined that Lovell was not remorseful by not readmitting him to membership. *See id.* at 329.

¶96 In other words, this testimony encouraged the jury to not thoroughly consider Lovell's evidence of his remorse. By inserting a religious test for remorse into the proceedings, the State gave the jury a way out of making a decision that is difficult for any person to make about another: whether a defendant has truly changed. The State offered jurors an off-ramp by intimating that it could use readmission to Church membership as a gauge for whether Lovell was actually remorseful and had changed his ways. The testimony also invited the jury to discredit Newton's (and the other witnesses') assessment of Lovell by substituting an ecclesiastical determination of Lovell's rehabilitation for the jurors' own review of the evidence. Any reasonable attorney would have recognized the risk Newton's testimony posed to Lovell's mitigation case and challenged it.

¶97 We are not the only court to have underscored the potential for religious doctrine to undermine a defendant's right to a fair trial. Indeed, the use of religiously charged arguments supporting death has been "universally condemned . . . as confusing, unnecessary,

and inflammatory"; they "have no place in our non-ecclesiastical courts and may not be tolerated there." *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996). In *Romine v. Head*, the Eleventh Circuit reversed a sentence of death because "the prosecutor argued Biblical law to the jury as a basis for urging it to eschew any consideration of mercy and sentence [the defendant] to death." 253 F.3d 1349, 1358, 1371 (11th Cir. 2001).

¶98 The Superior Court of Pennsylvania has likewise held that referring to testimony as "God's truth" improperly "inject[ed] a court proceeding with religious law." *Commonwealth v. Chmiel*, 2001 PA Super 34, 777 A.2d 459, 467 (Pa. Super. Ct. 2001). In that case, the court found that "[b]y arguing that [the witness] speaks 'God's truth,' . . . [t]he prosecutor elevated [the witness's] testimony to that of God," interjecting religious law for the jury's consideration. *Id.* And in *Commonwealth v. Chambers*, the Pennsylvania Supreme Court considered a prosecutor's argument that, as "the Bible says, 'and the murderer shall be put to death.'" 528 Pa. 558, 599 A.2d 630, 644 (Pa. 1991). The court concluded that this argument was improper because it "advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment." *Id.* The court further held that this argument was "a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured." *Id.*

¶99 In *People v. Hill*, the California Supreme Court explained that "an appeal to religious authority in support of the death penalty is improper because it tends

to diminish the jury's personal sense of responsibility for the verdict." 17 Cal. 4th 800, 72 Cal. Rptr. 2d 656, 952 P.2d 673, 693 (Cal. 1998). The court made its determination based on the State's closing argument where it said that "the biblical maxim 'Vengeance is mine sayeth the Lord' should not dissuade the jury from imposing the death penalty, for the Bible also says 'an eye for an eye, a tooth for a tooth.'" *Id.* at 692 (cleaned up).

¶100 Furthermore, here there was no reasonable basis for Lovell's trial counsel to forego objecting to Newton's religious testimony. The State was eliciting evidence that undermined the entire theory of mitigation—that Lovell was a changed man who was remorseful for his crimes. The district court suggested that counsel should have continued challenging this testimony, saying that it "thought there were areas that we covered with the three ecclesiastical leaders that . . . were not probative at all," but the court "let it go" because "no one seemed to feel that way."

¶101 The State does not defend the admissibility of the challenged testimony, but it contends that Lovell's counsel were not ineffective because they had a strategic reason to not challenge the testimony. "If it appears counsel's actions could have been intended to further a reasonable strategy, a defendant has necessarily failed to show unreasonable performance." *State v. Ray*, 2020 UT 12, ¶ 34, 469 P.3d 871. The State posits that reasonable counsel could have decided not to object because doing so could have "risked excluding testimony Lovell wanted to present."

¶102 The State claims that "[r]eligious matters played a central role in Lovell's defense," and therefore "counsel could reasonably think that if he argued that discussion of religious matters was improper, the court would also prevent Lovell from presenting evidence he wanted to present." The State argues that "[r]eligious references permeated the testimony of Becky Douglas" and that "competent counsel could choose not to argue that it was improper for the State to ask about religious matters because counsel knew Douglas would be talking about religious matters."

¶103 We credited a similar argument in a dissimilar case. *See generally State v. Vallejo*, 2019 UT 38, 449 P.3d 39. In *Vallejo*, we determined that defense counsel made a reasonable decision not to object to religious testimony because the defense sought to introduce "Vallejo's own religion and role as a religious leader." *Id.* ¶ 77. We noted that "[d]uring the opening statement, Vallejo's trial counsel commented that Vallejo 'had received his church calling and was his ward's bishop.'" *Id.*

¶104 We explained that "Vallejo also introduced evidence of his own religious conduct, testifying that he 'went on a mission for a couple years' and that later he 'was a bishop,' which he 'loved.'" *Id.* Vallejo "testified that his responsibilities as a bishop took 'fifteen to twenty hours of his week.'" *Id.* (cleaned up). We found that trial counsel's decision to promote this religious theme, referenced from the very beginning of Vallejo's case, indicated that counsel could have reasonably not objected to other religious testimony. *Id.* That is, Vallejo's counsel could

have reasonably feared that if he objected to the State's religious-themed questions, he could lose a large portion of what he hoped to present to the jury.

¶105 Unlike in *Vallejo*, Lovell's mitigation case did not rely on religion. Indeed, it appears that the defense carefully attempted to avoid wading into religious waters during its direct examination of Newton. During Newton's direct examination, the defense elicited minimal testimony about religion, limited to Newton forming a relationship with Lovell as his "clergy leader" and as a "religious volunteer" at the prison. Newton's direct examination was the most overtly religious when counsel asked Newton to describe his discussions with Lovell. Newton volunteered that when he and Lovell would meet, they would talk about things Lovell had "read in the Bible and the Book of Mormon." At no point during their examination of Newton did Lovell's counsel seek to talk about repentance or the Church as an organization. In fact, at no point did counsel even identify the Church, much less that Newton had been Lovell's bishop. This testimony only came in through the State's questioning.

¶106 To be sure, Lovell's counsel asked the next two witnesses, Lovell's former Church bishops Webster and Thompson, about Lovell's status with the Church. Both witnesses testified that Lovell had been excommunicated and that they were not aware whether Lovell had asked to rejoin the Church. Lovell's counsel even asked Webster about his "impression of [Lovell's] progress towards remorse and repentance." But this questioning can be explained as Lovell's counsel attempting to mop up after

the disastrous testimony that the State elicited from Newton. That is, after the State put evidence before the jury that only the Church's First Presidency could readmit someone like Lovell into Church membership and that this decision would turn on whether the First Presidency concluded that Lovell had repented and shown remorse, Lovell's counsel needed to try and convince the jury that Lovell had not sought readmission.[22] The questions posed to Webster and Thompson appear to be a gambit to explain to the jury that the Church's First Presidency had made no assessment of Lovell's repentance because Lovell had not started the process to be readmitted. Unlike in *Vallejo*, Lovell's counsel did not open the door to religious themes. They tried to make the best of the situation once the State had thrown that door open.

¶107 The State also argues that reasonable counsel could have decided not to object to Newton's testimony because they feared they would lose the ability to elicit favorable testimony from Becky Douglas. Though some of Douglas's testimony certainly had a religious flavor, that was not the sole, or even primary, purpose of her testimony. Indeed, Lovell's counsel focused their questioning of Douglas on her relationship with Lovell and his volunteer work with her organization.

¶108 In essence, Douglas testified that when she met with Lovell, she felt "this incredible remorse, this

22. We also note that neither Webster nor Thompson presented their opinions on Lovell's remorse as anything but their personal beliefs. To the contrary, both witnesses testified that they did not represent the Church and that they could not truly know what was in Lovell's heart.

sadness, [from Lovell]," explaining that "he just felt so, so desponden[t], that there was so much despair of what he had done." She also testified "that by going through 30 years of prison, [Lovell] has become literally a gentle and a kind man." She also testified that she "ha[s] absolute confidence that the [Lovell] I know is the real [Lovell] now" and that she "wouldn't have any hesitation to invite him into [her] home" if he were ever released.

¶109 Unlike the testimony the State sought to elicit from Newton, Douglas's testimony was not about religious doctrine, and, to the extent her testimony possessed a religious tinge, Douglas volunteered that in her responses. For example, on direct examination Lovell's counsel asked Douglas questions to which Douglas provided religiously flavored responses.

¶110 Lovell's counsel asked:

> Q. I understand that in 2012 that you made a visit to [Lovell] in the prison?
>
> A. I did.
>
> Q. Can you tell us how that came about?

Douglas then explained that an employee with her charity had a relative who was "a stake president . . . in the Mormon Church" and that "[p]art of [his] ministry" is working at the prison. She continued explaining that her employee was invited to meet Lovell and that her employee "was very touched by th[e] experience," after which Douglas asked the stake president "if he could arrange for me to go see [Lovell]."

¶111 Douglas recounted how she was put in touch with Lovell's bishop, who helped arrange for her to visit Lovell. After Douglas had explained this background information, Lovell's counsel asked:

> Q. Did you have any concerns about this visit with [Lovell] coming up about what you would talk about?
>
> A. Yeah. I—I mean, I'd been writing to him, but I didn't really feel like I knew him. I—what was I going to talk about? I mean, I literally had no idea what I was going to talk about. . . .
>
> Q. Did you have a discussion about that concern with [Lovell's] bishop?
>
> A. I did. Well—yes, with both his bishop and his stake president . . . . And they both suggested that if I should get in, that I should talk to him about the atonement.
>
> And I said, "Well, I mean, you all haven't done this?" And they said, "Well, yes, but he seems to be stuck spiritually. He just simply cannot forgive himself."
>
> His bishop . . . said ["]he's recently been rereading the transcripts of his trial, and he has just reached the conclusion that he will never, ever be able to forgive himself. And we just feel he's—spiritually, he's just kind of stuck

> there. He can't move past that and maybe you could talk to him about the atonement and Jesus Christ."

¶112 Trial counsel asked Douglas to describe her visit with Lovell, and she testified that: "He was teary. He was so excited to meet me. We had been corresponding at this point for, I guess, probably five years, close to five years, and he was very excited. And he sat and I sat and we—we talked." She explained that they talked for a while, and after a break in the discussion she said, "I would like to talk to you about the atonement if that's okay." Douglas then testified:

> [Lovell] immediately became very guarded. He hung his head down and he said, "You know, I'd honestly rather not talk about that."
>
> And I said, "Oh, well, you know, I don't want to upset you any. Why?"
>
> And he—he literally and tears just started rolling down his face, and he said, "You are going to tell me I need to forgive myself. Everybody keeps telling me I need to forgive myself." And he said, "I will never forgive myself." He said, "I have tried. So I cannot forgive myself. So I don't want to talk about it." He said, "I've been through this and through this and through this." And he said, "Let's talk about something else."

> And I said, "Well"—and by now he was just—I mean he was weeping. And I said, "Would it be okay if I just talked and you listened? Would that be all right?"
>
> And he said, "Well, okay." He kind of shrugged basically. And I said, "Okay. Well, [Lovell] have you read the New Testament?"

¶113 At this point, the State objected, arguing that "if she's going to give an exposition on the doctrinal basis of the New Testament, I think it's inappropriate." Lovell's counsel explained that Douglas would not be discussing religious doctrine but that she would explain how after she mentioned the New Testament, Lovell "recall[ed] a letter she wrote to him years before." Lovell's counsel also explained that this testimony "goes to the strength of the connection between the two of them."

¶114 With this explanation, the court allowed the testimony to continue, and Lovell's counsel asked:

> Q. You had a brief discussion with [Lovell] about the New Testament?
>
> A. Yes. And the reason I mentioned it is because I was specifically talking about Paul. When I mentioned Paul's name, [Lovell] brightened and he said, "Oh, you wrote about Paul in your letter of" whatever, November 2007.
>
> And I said, "Really?" And he had my letters in a little folder right there and he opened it and

> they were just pristine and he pulled it out. He said, "Yes, you wrote that even though Paul was in prison, he did a lot of good in the world through his letters, and because of that we know Christian doctrine today."
>
> And I said, "You are in prison, but you are already trying to do good by supporting a child in India affected by leprosy. You are also reaching out."
>
> And so I thought that was very interesting.
>
> The reason I brought this up, and I've only met [Lovell] one time. So as a character witness, I don't have—I don't have a whole lot. I just have this one meeting I had with [Lovell]. But it was a powerful meeting and that's why I'm here today.

¶115 Although Douglas's narration of her visit certainly contained numerous religious references, the important testimony—that Lovell was remorseful, along with her opinion that he had changed—did not rely on religion. Had Douglas simply never mentioned anything religious, her testimony would still provide evidence that Lovell felt remorse for his crime. And unlike the State's questioning of Newton, Douglas's testimony did not devolve into religious doctrine or whether Lovell's ecclesiastic leaders had decided that he was remorseful.

¶116 Additionally, during the 23B hearing, the district court found that there was an abundance of religious testimony that Douglas "wanted to share with

the jury" but was not given the opportunity to provide. The court found that Douglas wanted to tell the jury that "Lovell took religious instruction courses for four years, he studied the scriptures, he reconciled himself to God, he watched a PBS series on the New Testament and was moved by it, [and] he encouraged inmates who were discouraged and did not have God in their lives." The court also found that "Douglas wanted to tell the jury that because of . . . Lovell's actions, over forty inmates wrote to her telling her that . . . Lovell had told them, 'There is a way for you spiritually to come back to the Lord.'"

¶117 Had Lovell intended to use Douglas to present an overtly religious theme at trial, as the State contends, it stands to reason that he would have sought to solicit at least some of this testimony from Douglas. And the fact that Lovell avoided this religious testimony leads us to believe that the religious aspects of Douglas's testimony were not part of counsel's trial strategy.

¶118 If the district court were to remove all religious references from Newton and Douglas's testimony, the State could not have established Lovell's excommunication or the doctrine of repentance. But Lovell could have still established his remorse and changed character through Douglas. Consequently, continued objections to Newton's testimony did not present a risk of excluding the mitigating evidence in Douglas's testimony.

¶119 Moreover, even if further objections to Newton's religious testimony presented a risk of excluding evidence that Lovell wanted to present, the failure to object was still

unreasonable. Reasonable counsel in these circumstances would not have foregone objecting to prejudicial religious testimony based on a hope of introducing the religious testimony Douglas had to offer.[23] The severe prejudicial nature of Newton's cross-examination testimony, challenging the defense theme that Lovell was remorseful, and implying that the jury could look to the actions of ecclesiastical leaders to decide whether Lovell had changed belies any reasonable strategy.

¶120 In the end, reasonable counsel might have done something other than raise additional objections in response to Newton's testimony, such as move for a mistrial or seek a curative instruction. But because of the life-or-death stakes of the proceeding and the potential for such obviously improper testimony to prejudice the jury, reasonable counsel would have done *something* more to try and neutralize it. Lovell's trial counsel lodged two misaimed objections and tried to clean-up with subsequent witnesses. That was objectively unreasonable.

C. The Admission of Improper Testimony Prejudiced Lovell

¶121 To prevail on an ineffective assistance of counsel claim, a defendant must show more than deficient performance. Counsel must also demonstrate that the

23. This opinion should not be read to suggest that all evidence with a religious tinge is categorically improper. Rather, we recognize that religiously themed testimony can sometimes exert a powerful pull, and counsel and courts must be on-guard for religious testimony that might unduly prejudice a defendant.

error had a prejudicial effect on the outcome. *Strickland*, 466 U.S. at 687. This requires that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the specific circumstances of a challenge to a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. And "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Put differently, the prejudice prong is satisfied when the defendant shows "that counsel's errors were so serious as to deprive the defendant of . . . a trial whose result is reliable." *Id.* at 687.

¶122 The State argues that even if trial counsel's performance was deficient, Lovell fails to show prejudice because the jurors were faced with "overwhelming evidence in favor of the death penalty." The State also argues that this is especially true considering that the alternative sentence was life with the opportunity of parole. The State avers that "no reasonable probability exists that even one juror would have voted for life with parole if only the challenged evidence had been excluded."

¶123 We reiterate that the death penalty is "never mandated or imposed automatically," even if no evidence is offered in mitigation. *Lafferty*, 2001 UT 19, ¶ 128. The State must convince the entire jury—beyond a reasonable doubt—that the aggravating circumstances outweigh the

mitigating circumstances, and that the death penalty is justified and appropriate under the circumstances. UTAH CODE § 76-3-207(5)(b).

¶124 Without the improper religious testimony, there is a reasonable probability that at least one member of the jury would not have been convinced that the State had met its burden.

¶125 Prejudice is always a difficult inquiry, requiring reconsideration of the entire evidentiary picture to determine whether the outcome might have been different absent counsel's deficient performance. *See Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). But here, we can see that counsel's errors altered the balance between the aggravators and the mitigators in a way that likely impacted at least one juror's decision. Moreover, these errors created a reasonable probability that at least one juror's sense of responsibility regarding the decision to impose death was diminished.

¶126 The bulk of the aggravating evidence before the jury focused on the nature of the crime and the severe and lasting impact it had on Yost's family. The jury heard the details of how Lovell attempted to hire two people to murder Yost and eventually murdered her himself. The State highlighted that Lovell took Yost's life to prevent her from testifying that he had raped her. The State also offered witnesses who opined that Lovell was untruthful, manipulative, cold, calculating, and an escape risk.

¶127 Lovell attempted to counter this testimony, in part, with two experts opining and explaining why they believed Lovell experienced diminished culpability. But the overwhelming majority of Lovell's mitigation evidence was testimony from people who had met Lovell while he was in prison and believed that he was remorseful for his crime and that he had taken steps to change his life.

¶128 Therefore, the primary dispute during Lovell's sentencing proceedings was the depth of his remorse and the sincerity of his efforts to rehabilitate. While remorse is not something that can be determined for certain, the improper religious testimony gave jurors a proxy to use in lieu of personally deciding whether Lovell was remorseful. The religious testimony told them they could look to the Church and its leaders who, Newton's testimony suggested, had evidently determined that Lovell had not shown the requisite remorse for readmittance to Church membership. Newton, together with the State's questions, informed the jury that Lovell would have to repent and show remorse to be readmitted. The State's questioning and Newton's responses invited the jury to conclude that Lovell had not been readmitted into the Church because he was not sufficiently remorseful.

¶129 This highlights why many courts have ruled that certain religious testimony can distort a jury's deliberations. *See, e.g.*, *Bennett*, 92 F.3d at 1346; *Hill*, 952 P.2d at 693; *Romine*, 253 F.3d at 1358; *Chambers*, 599 A.2d at 644; *Chmiel*, 777 A.2d at 467. It calls on jurors to rely on something other than their own consideration of the evidence to answer the difficult questions put to them. *See Caldwell*, 472 U.S. at 328-29; *see also Chandler v. Florida*,

449 U.S. 560, 574, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). And Newton's testimony altered the entire evidentiary picture by weakening all the evidence Lovell presented about his remorse and efforts to rehabilitate. *See Strickland*, 466 U.S. at 695-96 (explaining that "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture").

¶130 Even though Lovell's counsel attempted to mitigate the harm from the excommunication testimony by eliciting testimony from Newton and the other bishops that they were not aware if Lovell had sought readmittance, the harm had already been done. Because Newton's excommunication testimony went to the entirety of Lovell's mitigation argument, it could not be isolated. And the follow-up testimony only served to remind the jury of the State's implicit assertion—that Lovell had not sufficiently changed because he had not sought to repent and rejoin the Church. And, perhaps more to the point, the fact that Lovell had not sought to be readmitted suggested to the jury that Lovell knew he could not convince the Church's First Presidency that he was truly remorseful.

¶131 The prejudicial nature of Newton's testimony is even more acute considering our State's religious demographics.[24]

24. At the time Lovell was sentenced, a majority of Utahns considered themselves to be members of the Church. *See Religious Landscape Study*, Pew Rsch. Ctr., http://www.pewforum.org/religious-landscape-study/state/utah/ [https://perma.cc/W9L3-R2ZK].

¶132 The prosecution's cross-examination of Newton suggested to the jurors that they could look to the Church and its leaders, who "are the living oracles of God" according to Church doctrine. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, TEACHINGS OF THE LIVING PROPHETS STUDENT MANUAL 45 (2016) (quoting Joseph Fielding Smith, *The First Presidency and the Council of the Twelve*, 69 THE IMPROVEMENT ERA 977, 978 (1966)). A juror who was a faithful Church member might reasonably have believed that Lovell's excommunication and the fact that he had not been readmitted could be interpreted as evidence of divine guidance that he was not remorseful. Or, at the very least, that Lovell did not believe that he could demonstrate to the First Presidency that his remorse was genuine.

¶133 Under different circumstances, our court of appeals has found that testimony of a defendant's excommunication likely had a prejudicial effect on a conviction in part because of Utah's unique religious demographics. *See State v. Hood*, 2018 UT App 236, ¶ 25 n.6, 438 P.3d 54. In *Hood*, the court of appeals held that testimony of a defendant's excommunication from the Church was improperly admitted. *Id.* ¶ 52. The court concluded that there was a reasonable probability that this testimony affected the outcome of the trial. *Id.* ¶ 57. The court's conclusion rested, at least in part, on the fact that a Utah jury is "likely to be familiar with the type of conduct that would trigger church discipline." *Id.* ¶ 25 n.6.

¶134 In some instances, general demographic information on its own might be sufficient to undermine our confidence in the proceedings because there is a reasonable probability that at least one juror would be

swayed by improper religious testimony. But we need not rely on just general demographics in this case. The record before us indicates that at least two of the seated jurors were familiar with the Church's religious materials, with one indicating that they read "anything on www.lds.org" and another saying they read the "Ensign."[25] And while not specific to the Church, another juror indicated that they read "religious based material."

¶135 The record developed at the 23B hearing establishes that the State believed that there would be members of the Church on the jury.[26] The prosecutor who questioned Newton testified at the 23B hearing that "in the State of Utah there are many individuals who are members of the Church . . . and so some of the members of the jury, very likely, would be affiliated with that particular faith." The prosecutor evidently decided that the religious testimony he elicited from Newton would be persuasive to the jury because of their apparent religious affiliation, and we have no reason to conclude otherwise.[27]

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25. Ensign magazine was a monthly magazine the Church published from 1971 until 2021 that contained material and articles related to the Church and its teachings. *See* Sean P. Means, *LDS Church Phasing Out Ensign, Its 50-Year-Old Magazine, for New Global Publications*, Salt Lake Trib. (Aug. 14, 2020), https://www.sltrib.com/religion/2020/08/14/lds-church-phasing-out/ [https://perma.cc/2RWE-MJ7G].

26. The prosecutor "was . . . in a much better position to gauge how these particular . . . jurors might respond to this evidence than we are." *See State v. Vallejo*, 2019 UT 38, ¶ 79, 449 P.3d 39.

27. We also find it informative that the State did not, after Newton's testimony had concluded, elicit any similar testimony from Lovell's other bishops, who were all questioned by different

¶136 At its core, this religious testimony called on the jury to assign Lovell's mitigation evidence little weight because they could look to Lovell's Church status to determine that Lovell lacked remorse and that he had not changed. The testimony impermissibly risked diminishing the jury's sense of responsibility for determining the appropriateness of death, and it is reasonably likely that a juror either based their sentencing decision on this testimony or used Newton's testimony to discount the mitigation evidence Lovell presented. Our confidence in the sentencing hearing has been undermined because there is a reasonable probability that at least one juror would have opposed imposition of the death penalty if the jury had not been exposed to this evidence. Lovell has met his *Strickland* burden of establishing that his counsel's errors prejudiced his sentencing.

CONCLUSION

¶137 Lovell has not shown that his conviction for the murder of Joyce Yost should be overturned. We affirm his conviction.

¶138 Lovell's trial counsel rendered ineffective assistance when they failed to effectively object, or

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prosecutors than the one that examined Newton. At the 23B hearing, one of the senior prosecutors testified that they made "an on-the-fly decision" to change who would cross-examine the other bishops because they "didn't want to go down the road" that they did with Newton's cross-examination. This suggests that the State immediately recognized the prejudicial nature of the testimony it had elicited from Newton.

otherwise sufficiently respond, to testimony regarding Lovell's excommunication from the Church of Jesus Christ of Latter-day Saints and regarding the need for him to repent and demonstrate remorse to the Church's First Presidency before it could readmit him to membership. This evidence prejudiced Lovell's ability to have a jury fairly weigh the aggravating and mitigating factors, as Utah's capital sentencing statute requires, before it sentenced him to death. We vacate Lovell's sentence and remand for further proceedings.