

No. 24-581

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF UTAH  
v.  
DOUGLAS A. LOVELL

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

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**Brief in Opposition to Petition for Writ of Certiorari**

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Edwin Wall  
*Counsel of Record,*  
*Pro Bono Publico*  
43 East 400 South  
Salt Lake City, UT 84111  
(801) 746-0900  
[edwin@edwinwall.com](mailto:edwin@edwinwall.com)

Counsel for Respondent

## INTRODUCTION

After upholding the Respondent's conviction, the Utah State Supreme Court found the Respondent's trial counsel rendered ineffective assistance of counsel during the sentencing phase of in his trial before the State District Court and remanded the sentence for further proceedings.<sup>1</sup> The finding of ineffective assistance of counsel was predicated upon Respondent's counsel failing to effectively object, or otherwise respond, to the testimony elicited by the prosecutor regarding Respondent's excommunication from the Church of Jesus Christ of Latter-day Saints ("*LDS*") and the need for Respondent to repent and demonstrate remorse to the ecclesiastical authorities of the church before he could be readmitted. Simply stated, the prosecutor improperly introduced evidence regarding *LDS* doctrine and the Respondents continued excommunication as evidence he was not repentant. As such, the Court held the religiously based evidence unfairly prejudiced the Respondent's ability to have the jury fairly weigh the aggravating and mitigating factors in this capital case. The Utah Court held the verdict could not stand as the ineffectiveness of counsel permitted the State to assert the jury defer to religious doctrine and ideology, depend on ecclesiastical

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<sup>1</sup> In Utah the jury decides both the guilt and sentencing phases in a capital case. References to the "jury trial" and "trial court" relate to the sentencing phase of the District Court proceedings.

determinations of remorse and rehabilitation, and inject the values of the *LDS* church into the deliberations.

In the *Petition for Writ of Certiorari* filed by the State of Utah, Petitioner acknowledges the Utah Supreme Court correctly articulated the standard of review set forth in *Strickland*. However, Petitioner claims the Utah Supreme Court's application of the legal standard to the facts of this case was deficient asserting the Utah Court failed to follow the *Strickland* standard.

The Petition presents no conflict of laws between the federal circuit courts nor a conflict within Utah law that warrants review by the United States Supreme Court. Additionally, the *Petition* does not raise an issue of such importance or any new issue justifying review. The Utah Supreme Court was correct, as a matter of law, in rendering its decision, and there are no other or special grounds warranting a grant of certiorari. The Utah Supreme Court correctly held the introduction of testimony and evidence regarding a defendant's adherence to religious doctrines and principles and the status of the defendant's membership in a religious organization have no relevance and should not be presented to a jury regarding the aggravating and mitigating factors a jury considers in the sentencing phase of a death penalty cases. The petition for writ of certiorari should be denied.

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## QUESTION PRESENTED

Did the Utah State Supreme Court properly apply the *Strickland* standard and correctly find ineffective assistance of counsel in respondent's trial counsel's failure to object to the State's cross-examination based on the religious doctrine of the Church of Jesus Christ of Latter-Day Saints in the penalty phase of a capital murder case?

## STATEMENT OF THE CASE

In a 2015 retrial of an aggravated murder (death penalty) case, a prosecutor cross-examined mitigation witness Dr. John Newton with matters of LDS (Church of Jesus Christ of Latter-Day Saints) policy and doctrine. The cross-examination included exhibits, such as a letter from the First Presidency of the LDS Church, the hierarchical head and Prophet of the LDS faithful, cautioning the “brethren” which includes Dr. Newton not to testify without “Church legal’s” approval. R8850:98. The prosecutor also used a demonstrative exhibit, the “Church Handbook of Instructions,” a reference guide or manual for “priesthood holders.”

After a lackluster direct examination about Respondent staying physically fit while in prison, volunteering, being a thoughtful friend, and someone who was remorseful, repentant and changed, the prosecutor meticulously built a case that Respondent was irredeemable in the eyes of the LDS Church, which the Utah Supreme Court recognized as the predominant faith in the State, with members likely on Respondent’s jury. *Utah v. Lovell*, 2024 UT 25, ¶135, fn 24.

The prosecutor asked Newton about the Church’s stance about the death penalty, and when Dr. Newton testified he did not know, the prosecutor told Dr. Newton and the jury what it was. R8850:100. When the prosecutor inquired whether the LDS Church doctrine allows the death

penalty, Respondent's counsel weakly objected that Dr. Newton was "not speaking on behalf of the church." R8850:102. The prosecutor did, though. The question about the Church's stance on the death penalty was prefaced with "historically and based on the scriptures..." R8850-101. Then he preached.

The prosecutor's purpose was more than to make Dr. Newton, who had met Respondent when he served as a religious volunteer to the prison, appeared uninformed. There was a premeditated, planned, strategy to showcase to LDS jurors that the LDS Church was not okay with Respondent.

About a month before Newton's testimony, the State filed and served a subpoena *duces tecum* for Respondent's excommunication records from the LDS Church. Exhibit D60. Respondent's counsel knew the State was pursuing those records, and understood the State intended to use the records at trial to attempt to discredit Respondent's mitigation witnesses. Contrary to Petitioner's assertions, this issue was not a surprise, sprung on counsel at trial. It came out of a deliberated plan which the State shared with Respondent's counsel well in advance of trial, as is evidenced by a subpoena for Respondent's excommunication records which was served by the State on the LDS Church with copies filed in the record a month before trial. R7957, 23B Hearing Ex. D8. Lead counsel wrote the mitigation specialist an email saying, "the prosecution intends to try to discredit [LDS Bishop witnesses]



testimony by pointing out that the Church Handbook of Instructions doesn't allow them to testify in court." R14828, 23B Hearing Ex. D61. Respondent's counsel knew it was coming and let it happen.

The trial testimony did not stop at the LDS Church's policy on the death penalty. After the prosecutor confirmed with Dr. Newton that murder was an offense warranting excommunication, the prosecutor chided Dr. Newton for not accomplishing the excommunication himself. R8850-104-05. Dr. Newton acknowledged, when asked, that he was aware Respondent had been excommunicated, later, on some other bishop's watch. R8850:107.

Then, the prosecutor invaded the province of the jury in a way the Utah Supreme Court later found particularly egregious, by making sure that as far as the LDS Church is concerned, there is a particular kind of contrition, remorse, and repentance which is necessary to achieve a full measure of forgiveness, i.e., readmission to the Church. "Godly sorry," is what the prosecutor called it. The prosecutor asserted it requires a "full and complete confession," the kind he asserted was not given by Mr. Lovell to Dr. Newton. R8850:110-11. Dr. Newton testified he was unaware of the term.

Hammering away regarding readmission, the hallmark of real repentance, the prosecutor had Dr. Newton agree that "determination of remorse or change ultimately can only be made in the church by the first presidency, *not by anyone else*," a statement with which Dr. Newton agreed.

R8850:108 (emphasis added.) With the next witness, the State “cleaned up the issue of whether Mr. Lovell was actually and eventually excommunicated. Trial Exhibit D10, pgs. 127-29. He was. Dr. Newton confirmed that Respondent had not been readmitted to the LDS Church following Mr. Lovell’s excommunication. R8850:108.

Respondent’s counsel did nothing to stop the improper examination, then flopped around making objections which missed the mark.

Even without a proper objection, the trial court brought it up. D7, pg. 103. At a sidebar, the trial judge said, “I’m struggling to understand the question that you’re posing to this witness that go to the issue of doctrine or the church’s position with respect to a variety of issues.” R8850:103.

Explaining his motivation, the prosecutor stated,

“I wanted to just make that point very clear that the church’s position may be very different from what these witnesses may say and may be separate from that. That was the purpose of that questions. I think the point is well made, and I would be fine with proceeding forth.”

Trial Exhibit D4, pg. 103. R8850:103. Despite the trial court’s stated concerns, Respondent’s counsel put up no fight.

The prosecutor explained he wanted to showcase “whether [Newton] was acting properly in accordance with his duties as a bishop at the time he was officiating in that capacity.” Trial Exhibit D4, pg. 105. In other words, the prosecutor confessed he was intentionally injecting into the case, before

the jury, matters of religious doctrine and policy, i.e., “duties” of the bishop, to show deviations from the Church’s policies, directives, and doctrines. The prosecutor proceeded to make sure the jury understood that because Respondent was not readmitted after his excommunication; Respondent hadn’t gotten to that “godly sorrow” measure necessary for the “only” body with authority to confirm true repentance (the First Presidency) to grant absolution in the form of readmittance. Respondent’s counsel let the prosecutor proceed without objection.

Four years later, at the evidentiary remand hearing on ineffective assistance of counsel, the prosecutor testified about his motives, strategies and actions related to Church doctrine during the penalty phase. The Utah Supreme Court noted in the opinion, a majority of Utahans considered themselves members of the LDS Church as of Mr. Lovell’s sentencing. *Utah v. Lovell*, 2024 UT 25, fn. 24. The prosecutor was trying to reach LDS jurors *Utah v. Lovell*, 2024 UT 25, ¶ 23. The Utah State Supreme Court noted that based on the jury questionnaire, “[t]he 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.” *Utah v. Lovell*, 2024 UT 25, ¶ 135. The prosecutor confirmed he displayed the LDS “handbook of instructions” in front of the jury during Dr. Newton’s cross-examination, and that he read a 2010 letter

from the LDS First Presidency that stated “priesthood holders” such as Dr. Newton should not even testify. Trial exhibit D9, Dr, pgs. 98-100. The prosecutor feigned he wanted to stress the LDS Church was “neutral” on Respondent. R13651. However, the excommunication records the prosecutor obtained from the Church were used to fashion the prosecutor’s examination and to highlight that as far as the LDS Church was concerned, Respondent was a cast off from the faithful, excommunicated, damned because he didn’t show the right kind of redemptive qualities to the only body who mattered, according to the testimony- the First Presidency of the LDS Church.

At oral argument February 9<sup>th</sup>, 2024, the State of Utah conceded that that introduction of the religious based doctrine at the jury trial was improper, even asserting it was “not defending,” what the prosecutor did at trial. Then, in an abrupt about face, the State filed this petition for writ of certiorari. Now, the State argues to this Court that the admission of that evidence was *not* improper and defends its introduction.

Petitioner faults the Utah Supreme Court for failing to reweigh aggravating and mitigating evidence the way it sees things. Had it done so, argues Petitioner, Respondent’s counsel’s ineffectiveness would not matter.

Respondent disagrees. Mr. Lovell is entitled to a fundamentally fair sentencing proceeding governed by the laws of the State of Utah, without regard to the Doctrine of the Church of Jesus Christ of Latter-Day Saints or

any other faith. Respondent's attorneys were ineffective when they failed to object and instead sat idly by and listened along with the jury while the prosecutor read them chapter and verse on how Mr. Lovell is irredeemable, in the eyes of the LDS Church.

The Utah Supreme Court's remand for a fair sentencing hearing devoid of "improper and prejudicial evidence," is a legally correct and proper decision. As such, petition for a *writ of certiorari* is without merit and should be summarily denied.

## **REASONS FOR DENYING THE PETITION**

### **A. The Petition Offers No Conflict of Law between Circuits or Within Utah Law Warranting Review.**

Petitioner asserts it disagrees with the Utah Supreme Court on numerous cases involving ineffective assistance. Pet. 22, fn. 3. The State maintains it is "right" in those cases, and the high court of Utah is "wrong." Petitioner asks this Court to take up the task of grinding that ax. No decision of any other court in any jurisdiction is cited by the Petitioner that conflicts with the decision of the Utah Supreme Court.

A prosecutor premeditatedly making religious doctrinal appeals in the sentencing phase of a death penalty case appears to be a one off, unique and clearly improper under the jurisprudence of the United States. Neither Petitioner nor Respondent can cite any similar case. As such, this Court's

decision on the case at bar would provide no useful assistance to the legal community nor advance American jurisprudence, and the Court should deny the Petition.

In a footnote the Petitioner suggests the Utah appellate courts are “wrong” about ineffective assistance in epidemic proportions. However, the Petitioner provides no particulars which would lead to a conclusion that the holdings in those cases are even remotely related to the facts or issues in this case. The petition simply rearticulates its position that it is “right” in those dissimilar cases, without any legal justification.

Even a cursory glimpse at the cases reveals the concocted “conflict” advanced to this Court. True to Petitioner’s own description that they have “mixed results,” in such cases, the Utah Supreme Court agreed with their position in *State v. Ray*, 469 P.3d 871, 876 (Utah 2020). Contrary to the proposition that the Utah Courts need plumbing, Petitioner presumably agrees no plumbing is necessary there. Petitioner criticizes *State v. Baugh*, but did not petition this Court for a writ of certiorari in that case. *State v. Baugh*, 556 P.3d 35 (Utah 2024). A decision in this case could not speak to *Baugh*, because that case was about a failure to ensure adequate unanimity instructions. *Baugh*, 556 P.3d at 43. *State v. Grunwald*, cited by the State, is about inadequate jury instructions. *State v. Grunwald*, 478 P.3d 1, 9 (Utah 2020). This case is about a prosecutor improperly arguing religious doctrine

to a entice a jury to vote for death. A decision here would shed no light on issues related to jury instructions.

Petitioner cites *State v. Beames*, claiming support of its proposition this case is an example of a “conflict” in Utah which needs deciding. Pet 23, fn 3. *State v. Beames*, 511 P.3d 1226 (Utah Ct. App. 2022). *Beames* is a decision from the State’s intermediate appellate court, which the State criticizes for an alleged departure from *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Pet. 23. However, the State did not request the *Beames* decision be reviewed by the Utah Supreme Court by seeking a writ of certiorari. Having failed to request the State’s highest court correct the intermediate appellate court, *Beames* provides no support for the State’s arguments before this Court, particularly since it related to ineffectiveness for failing to file a motion to suppress. *Beames*, 511 P.3d at 1231-32.

Providing insufficient facts and no analysis of the cases, the State catalogues other decisions in apparent support of its proposition that the Utah Supreme Court needs correction in its analysis of ineffective assistance of counsel cases. Pet. 23, fn. 3. The catalogue of cases concern matters unrelated to this case, and equally are unanalyzed as to ineffective assistance of counsel. Moreover, in some of the catalogued cases the Petitioner’s arguments won the day. *See, State v. Paule*, 554 P.3d 844, 847 (Utah 2024). *State v. Jordan*, 493 P.3d 683, 692 (Utah 2021). *State v. Hunter*, 496 P.3d

119, 122 (Utah 2021). *State v. McCloud*, 496 P.3d 179, 183 (Utah 2021).

Even if this Court were willing to entertain an intra-state ineffective assistance of counsel case, the Utah Supreme Court's decision in this case does not support an assertion there is any "conflict" among the intra-state ineffective assistance of counsel cases within the state, no such conflict exists. The Petitioner's claim of a conflict among the legal authorities, both within and outside of the State of Utah, is without merit.

Petitioner logged "wins" in ineffectiveness challenges in the intermediate appellate court of the State of Utah in the two months prior to their filing of their petition in this case. *See, State v. Zimpfer*, 558 P.3d 111, 128 (UT App. 2024). *State v. Cissel*, 558 P.3d 911, 917-18 (UT App. 2024). *State v. Corry*, 558 P.3d 128, 141 (UT App. 2024). The Petitioner agrees the appellate court was right in those cases because the court agreed with their argument. At least one case the State cites in support of the appellate court's "wrongness" was a lower appellate court decision Petitioner did not ask to be reviewed. *See, Beamas*, 511 P.3d 1226. Another is pending certiorari in the Utah Supreme Court, a potential "future win" for the State. *See, State v. Gourdin*, 549 P.3d 685 (UT App. 2024). Pet. 23. A closer examination of the cases cited by Petitioner reveals a melodrama of pretended legal catastrophe evidenced by an occasional loss wholly unrelated to the facts of this case. *State v. Elkface*, involved a finding of ineffectiveness for not moving to



recuse, or at least get clarification on the record regarding a conflict under circumstances where the presiding Judge had previously appeared as a prosecutor against *Elkface*, filing at least six adversarial pleadings in one case against her alone. *State v. Elkface*, 527 P.3d 820, 822 (UT App. 2023).

Stripped down, the Petitioner disagrees with the Utah Supreme Court's application of a correctly stated legal standard simply because the Utah Court ruled against them. A "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." [I am just citing the rule of the Supreme Court] Rule 10, S.Ct. In this case, the Utah State Supreme Court correctly decided the issue regarding ineffective assistance of counsel, correctly applied the state rule of law, and correctly made findings in accordance with the record in the case.

The Utah Supreme Court, considering the facts of the case, held as a matter of law Mr. Lovell's trial counsel was ineffective. Simply stated, the Utah Supreme Court disagreed with the trial judge's conclusions of law, which the Utah State Supreme Court has every right to do. The Petitioner has attached the trial court's factual findings as Exhibit A to the petition. *See*, (Pet. Appendix A). And, though the Petitioner disagrees with the Utah Supreme, Petitioner cites no authority for the proposition that even in light of the findings the Utah Supreme Court erred in its analysis as a matter of law.

## **B. The Petition Offers No Issue of Importance Justifying Review by the United States Supreme Court.**

Petitioner fails to point to similar cases in other states or circuits which were decided differently. Such a showing would provide some basis for an asserted conflict in decisions the Court may find worthy of deciding, and which might guide the legal community in other cases. Having searched for similar cases and finding none, what occurred in this case appears to be an anomaly.

As near as can be determined by the dearth of caselaw, prosecutors uniformly do not parade religious doctrine and religious ideals in front of a jury; moreover, defense attorneys know to object. This resulted in reversible error in this case, but this was an aberration. A grant of certiorari is overkill to correct the one prosecutor who thought introduction of this religious appeal evidence was a good idea and the two defense attorneys who did not care to correct him.

## **C. The Utah Supreme Court was Correct as a Matter of Law.**

The State utilized much of its fact recitation to impress how “guilty” Mr. Lovell is. It then advances the notion that the Utah Supreme Court “failed” to analyze whether the jury would have handed down a death sentence without the error. Pet. 30-36.

However, the Utah Court correctly recognized the applicable legal standard in *Strickland*, which requires the “defendant to show that (1)

counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *Utah v. Lovell*, 2024 UT 25, ¶59, citing, *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Petitioner asserts a belief that Respondent's offense is so reprehensible that there is absolutely no way any jury would not give him the death penalty, irrespective of the errors committed. Pet. 30. The Utah Supreme Court guided Petitioner away from focusing on the dramatic facts establishing Respondent's guilt and demanded answers and analysis of the destructive effect on Respondent's penalty phase, of the State sponsored hijacking of the matter from a court of law to Church Court. When pressed at oral argument, Petitioner's counsel conceded multiple times that the religious doctrinal evidence was improperly admitted. Counsel undeniably said, "I'm not defending what the prosecutor did here," at 1:17:25 and 1:23:55 in the February 9<sup>th</sup>, 2024, oral argument.

<https://legacy.utcourts.gov/opinions/streams/index.php?court=sup>

Fast-forward, the petition for writ of certiorari most certainly, and inconsistently "defends" what the prosecutor did at trial. The petition revives the argument that the Utah Supreme Court rejected, that it was somehow a "tactical decision," in furtherance of a defense effort to admit religious-based evidence.

Petitioner argues that because defense witness, Rebecca Douglas, touched on religious topics in her testimony the day after Dr. Newton’s testimony, the defense attorneys decided not to object to Newton’s cross, so that maybe, hopefully, they could introduce religious-based evidence. There are many problems with Petitioner’s argument. First, the argument is premised on an alleged aim of both to admit irrelevant and prejudicial religious evidence. The analysis should stop right there, in the context of ineffectiveness analysis. Second, the argument is contrary to the finding of the Utah Court, as the Court held the defense actually *did not* introduce religious-based evidence. “Lovell’s questioning of [Dr.] Newton never strayed into religion.” *Utah v. Lovell*, 2024 UT 25, ¶75. When *sua sponte* the witness, Rebecca Douglas, injected that she asked the Respondent if he had read the New Testament, defense counsel explained she “would not be discussing religious doctrine,” and nothing more was said on the topic. *Utah v. Lovell*, 2024 UT 25, ¶, 113. The Utah Supreme Court observed,

[a]lthough 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 Rebecca 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 he was remorseful.

*State v. Lovell*, 2024 UT 25, at ¶115.

On the other hand, the Court found “the State questioned Dr. Newton almost exclusively about religious topics...” asking if he was an LDS bishop, then about church hierarchy, then the church’s stance about the death penalty, murder being an offense justifying excommunication, what kind of “remorse” is “godly,” and on and on. *Utah v. Lovell*, 2024 UT 25, at ¶ 71-92.

Accordingly, Petitioner’s argument that allowing the religious doctrine-appeal evidence was a strategic choice is not supported by any facts and was rejected based on the facts of the case, by the Utah Court.

The Utah Court specifically acknowledged failing to object might be a strategic decision, but since the defense did not pursue questioning to elicit religious-based testimony when the State did, it clearly was not a defense strategy. *Utah v. Lovell*, 2024 UT 25, at ¶¶73-86. The Utah Court rejected the assertion there is any validity to a strategy by defense counsel in this case and held the failure to object, move for a mistrial, or ask for curative instruction unreasonable and ineffective. *Id.*

Contrary to the State’s asserted facts, the introduction of religious overtures and appeals to religious doctrines to the jury obfuscated whether the laws of Utah or the doctrine of the LDS Church governed was premeditated and planned. The State subpoenaed Mr. Lovell’s excommunication records the month before trial and notified both defense counsel of that fact. The State presented a copy of the letter from the First

Presidency of the LDS Church (the “Prophet”) which the State used to impress upon the jury that Dr. Newton should not have been testifying in the first place. State’s counsel went through a whole litany of religious topics including the LDS Church’s policy on the death penalty: that murder is an offense warranting excommunication; that Dr. Newton essentially “violated the rules” in not seeing Respondent excommunicated; that it takes a very special kind of remorse which the prosecutor denominated “godly sorrow,” for someone excised from the fold to be embraced again; and, that Respondent had not achieved that, in light of his status as excommunicated.

Significantly, the Petitioner fails to inform this Court that it conceded during oral argument before the Utah Supreme Court that the religiously based evidence was improperly admitted.

The Utah Court’s opinion assigned numerous errors to the trial court, specifically finding Respondent’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).” The insertion of “among other things,” in the Utah Court’s opinion evidences the Utah Court viewed failure to object to the described religious appeal evidence as sufficient to reverse the death sentence, but that it was not the only error.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Submitted this 14th day of January, 2025.

/S/Edwin S. Wall  
Edwin S. Wall  
Counsel for Respondent