Case No. 20180108-SC

IN THE

UTAH SUPREME COURT

SCOTT PATTERSON,
Petitioner/Appellant,

v.

STATE OF UTAH,
Respondent/Appellee.

Brief of Appellee

Appeal from an order granting summary judgment for the State and denying Scott Patterson post-conviction relief from his convictions for two counts of aggravated sexual abuse of a child, first degree felonies, and two counts of lewdness involving a child, class A misdemeanors, in the Second Judicial District, Davis County, the Honorable Thomas L. Kay presiding

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TABLE OF CONTENTS

ADDENDA

Addendum A — Constitutional Provisions, Statutes, and Rules

Addendum B — Brief of Appellant, *State v. Patterson*, Case No. 20100243-CA

Addendum C — Letter from Edwin S. Wall to Patterson, 22 May 2013

Addendum D — Appellant's Reply Brief, *State v. Patterson*, Case No. 20100243-CA

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

STATE RULES

OTHER AUTHORITIES CITED

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INTRODUCTION

In 2009, a jury convicted Scott Patterson of two counts of aggravated sexual abuse of his ten-year-old stepdaughter E.H., along with two counts of lewdness involving E.H. Over three years after this Court denied certiorari review in the criminal case, Patterson—now with federally funded counsel—brought a petition under Utah's Postconviction Remedies Act (PCRA) to challenge the legality of his convictions.

The post-conviction court correctly denied the petition because it was filed over two years after the PCRA's statute of limitations expired. And Patterson's tolling and constitutional arguments failed as a matter of law to overcome the preclusive effect of the time bar.

Patterson failed as a matter of law to prove entitlement to statutory tolling because he presented no evidence, as required by the statute, that he was prevented from filing a petition due to state action in violation of the Constitution. His arguments for tolling under that provision did not fit within the narrow state-interference parameters of the exception, which is a codification of the right of access to the courts articulated by the United States Supreme Court in *Bounds v. Smith*, 430 U.S. 817 (1977).

While Patterson argued, as he does here, that his privately retained attorney's advice—given after conclusion of Patterson's direct appeal of right—was ineffective, he could not establish that the attorney gave him wrong advice. The attorney spelled out Patterson's options for state post-conviction and federal habeas review in a detailed, comprehensive letter that well exceeded any ethical duties he owed Patterson at that point in the proceedings. In any event, the Sixth Amendment did not attach after Patterson's direct appeal concluded, and the retained attorney was not a state actor for purposes of the tolling provision.

Patterson also failed as a matter of law to show that the prison's contract attorneys prevented him from timely filing because he did not present any evidence that, using reasonable diligence, he sought their help to file a state post-conviction petition before the statute of limitations expired.

He therefore failed to meet the statutory requirements to show the limitations statute tolled.

Patterson also did not show that his cause of action accrued when his federal counsel (1) hired an expert witness to offer testimony on child-interviewing techniques, and (2) obtained a DCFS report that was prepared during the initial police investigation. Patterson conceded that these "evidentiary facts" could have been discovered "in the exercise of reasonable diligence" when he argued that Patterson's trial counsel were constitutionally obliged to obtain them. And Patterson provided no evidence about what efforts he made to obtain these items during the one-year limitations period.

Patterson's arguments for equitable tolling were unavailing because the 2008 amendments to the PCRA abolished equitable, common-law exceptions to the procedural bars and supplanted equitable tolling provisions with statutory ones.

Finally, the post-conviction court correctly ruled that Patterson failed to show entitlement to a still-undefined "egregious injustice" exception because he did not meet *Winward v. State*'s threshold requirement by establishing that he had a "reasonable justification for missing the deadline." 2012 UT 85, ¶14, 293 P.3d 259. He did not show that his private attorney gave

him wrong advice about his options going forward after this Court's denial of certiorari review or that state officials got in Patterson's way of timely filing a petition.

This Court should now expressly repudiate its case law suggesting that an "egregious injustice" exception might exist. That precedent is based on an erroneous assumption that this Court's constitutional authority over writs of habeas corpus empower it to collaterally review criminal convictions beyond statutory authorization and limitations. Habeas corpus, as contemplated by the Utah Constitution's framers, was limited to detention without process and did not extend to review of convictions imposed by courts of competent jurisdiction.

STATEMENT OF JURISDICTION

Patterson appeals from summary judgment against him and the denial of post-conviction relief from his convictions for two counts of aggravated sexual abuse of a child, first degree felonies, and two counts of lewdness involving a child, class A misdemeanors. The Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(i).

STATEMENT OF THE ISSUES

Did the post-conviction court correctly rule that Patterson's petition, filed over two years after the PCRA's statute of limitations expired, was time barred?

Standard of Review. An appellate court reviews a district court's grant of summary judgment for correctness. *Gressman v. State*, 2013 UT 63, ¶6, 323 P.3d 998.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 78B-9-106 (PCRA's procedural bars)
Utah Code Ann. § 78B-9-107 (PCRA's statute of limitations)
Utah R. Civ. P. 56 (Summary judgment)
Utah R. Civ. P. 65C (Post-conviction relief)

STATEMENT OF THE CASE

A. Summary of facts.[1]

Patterson molested his stepdaughter E.H. several times when she was ten and eleven years old. CR146:62,64-71,79,81-83.[2] The first time, when

[1] The trial facts are recited "in a light most favorable" to the jury verdict. *State v. Winfield*, 2006 UT 4, ¶2, 128 P.3d 1171.

[2] The State cites to the underlying criminal record as "CR[page #]" and to the record for this post-conviction appeal as "PCR[page#]."

Patterson inserted his fingers past the outer folds of her vagina, E.H. immediately told her mother, Sanda. CR146:68-74. But because the abuse happened at night and woke E.H. from asleep, and Patterson twice denied committing it to Sanda, Sanda attributed the event to E.H.'s vivid dreaming. CR146:69,76,149-50. She wanted to believe Patterson because he was her "best friend" and "sweetheart," with whom she had been married for five years. CR146:141-42.

The next morning, Sanda told E.H. that she "better be certain" about any accusations, because if she was "mistaken…or she did dream it, that would be bad. You can't just accuse somebody." CR146:151-52. She also told E.H. that if the abuse really happened, they would have to move. CR146:151. E.H. understood her to mean that Patterson "would be thrown in jail and that our life wouldn't be as good." CR146:75. She decided to agree with her mother's suggestion that it "might have been a dream," so she told her mother to "forget about it." CR146:75-76.

"[T]hings kind of got back to normal" over the next few weeks. CR146:77. But that summer, Patterson molested E.H. again, twice in his truck. On the first occasion, Patterson drove E.H. to a secluded spot and asked her if he could see her "privates." CR146:79. When she said no, he pulled her pants down and looked at her pubic area. *Id.* On the other occasion, Patterson

again drove E.H. to a secluded spot, "stuck his hands down [her] pants," and fondled her vagina. CR146:81.

Patterson molested E.H. at least twice more, in her bedroom. On one occasion, Patterson pulled E.H.'s pants down, looked at her vagina, and said it "didn't look like a normal 11 year old's." CR146:83. On another, Patterson pulled both of their pants down and rubbed his penis "on top" of her vagina. CR146:84-85. After a "couple of seconds," Patterson asked if he could see her breasts. CR146:87. She said no, but Patterson pulled up her shirt and licked her breasts. CR146:87-88.

E.H. did not tell her mother about the continuing abuse. Sanda had not believed her the first time, so E.H. thought she would not believe her now. CR146:82. But Sanda noticed significant changes in E.H.'s behavior. E.H. seemed "angry" and "cross" at her "all the time…. It was like all of a sudden she just hated me." CR146:154. E.H. also got into fights at school. CR146:155.

Sanda noticed changes in Patterson as well. His "demeanor" changed, and he "just wasn't the same. He kind of pulled away emotionally" and became "more distant, more depressed, more just kind of sad." CR146:153.

Sanda and Patterson had an argument shortly after Christmas that year, during which Patterson suggested that they consider divorcing. CR146:158-60. As Sanda thought about things later that night, she realized

that their problems had begun in February when E.H. accused Patterson of molesting her. CR146:61.

The next morning, Sanda confronted Patterson and asked him for "the truth" about what had happened. *Id.* Patterson "started to cry," and confessed to molesting E.H. twice. *Id.* He said he was "really sorry." *Id.* Sanda was "very, very, very angry." CR146:163. She "hated" herself for doubting E.H. *Id.* She demanded an immediate divorce, loaded her children into the car, and left. CR146:164.

While driving away, Sanda called their LDS bishop. CR146:165. She told the bishop that she and Patterson were getting divorced and asked if she and her children could stay at his home until she found somewhere to stay. *Id.* The bishop said yes and asked why she was divorcing Patterson. *Id.* Sanda told him that Patterson had confessed to molesting E.H. *Id.*

In early 2009, after the bishop had been told about E.H.'s disclosures, Patterson scheduled an interview with him. CR279:59. Patterson told his bishop that there were some "things that [he] wanted to get off [his] chest." CR279:11. When Patterson later testified in a post-trial hearing, he declined to divulge the specifics of this interview but admitted he had given a "confession" of some sort. CR279:11, 20.

Patterson filed for divorce on December 29, 2008. CR146:178. A short time later, Sanda received a phone call from the Children's Justice Center (CJC) asking to interview E.H. CR146:168-69.

E.H. was interviewed on January 15, 2009. CR146:192. She "didn't want to be there" and was uncomfortable talking about the abuse. CR146:89. She initially downplayed the abuse, hoping to quickly end the interview. *Id.* E.H. particularly did not want to talk about the incident where Patterson rubbed his penis against her vagina, so she made up a story to explain how she had seen his penis: she said that Patterson once asked her to stay in the bathroom and watch him urinate. *Id.* As the interview continued, however, E.H. became comfortable and told the investigators about all the abuse. CR146:197.

B. Procedural history.

Patterson, with the help of his initial trial attorney, obtained a psychosexual evaluation. CR279:118-20. The administering doctor asked Patterson to provide him a list of "collateral" references. CR278:12. The doctor explained that he was looking for people who could act as a "character reference about [Patterson's] ability to be around children." CR279:113.

Patterson listed his LDS bishop as a reference, gave the bishop's contact information, and signed a release allowing the doctor to contact the bishop.

CR278:13;CR279:23,94. The Clinical Notes portion of the report included a verbatim account of the bishop's comments to the doctor:

> We had him and his wife teaching a primary class for 6-8 months and I was never aware of any inappropriate sexual behavior…no incidents. The first I found out anything was when he came and told me about this…. He told me he was in a lot of different leadership positions in the past…. I've never known him to be misleading and has always been upfront…. He told me how sorry he was for what he has done…all that I know of it is…isolated just to this."

Id. at 19-20 (ellipsis in original); *see also* CR279:65-67 (bishop confirming he made these comments).

The administering doctor completed the evaluation in mid-June 2009. *See* State's 23B Exhibit # 1. In his report, the doctor stated that Patterson has been "notified regarding the non-confidential nature of the interview, the purposes to which the results and conclusions were to be used, and his right to decline to answer specific questions." *Id.* at 14.

Patterson's initial trial attorney reviewed the report and discussed it with Patterson. CR279:133. With Patterson's express permission, the attorney faxed the report to the prosecutor's office. CR279:134-35.

After reviewing the report, prosecutors offered to allow Patterson to plead to two second degree felonies with a recommendation from prosecutors for probation. CR143:4;CR279:159. Patterson "extensively talked about this" offer with counsel, but ultimately rejected it. CR143:4-5.

Patterson fired his first attorney before trial and hired Harold Stone and Edwin Wall to represent him. CR24;CR279:127,161.

Defense counsel's trial strategy was clear from the opening line of the opening statement: "Members of the jury, you're going to see the ugly side of our legal system. You're going to see how parties in a divorce action manipulate the criminal courts, try to gain leverage through the divorce proceeding." CR146:53. Defense counsel then claimed that E.H. had been "put up to make these [allegations] because her mother, her mom is getting divorced from Mr. Patterson," and Sanda was a "very vindictive" woman who was "sacrific[ing] her daughter's innocence as a way to get back at her ex-husband." CR146:53-54. Defense counsel continued: "You may have heard the saying, hell hath no fury like a woman scorned, you're going to get to see how that plays out today." CR146:54.

E.H. was the State's first witness and testified in detail about the sexual abuse. CR146:64-88. On direct examination, E.H. also said that Patterson was a "pretty good stepdad" "unless he got mad," but he got "mad a lot."

CR146:89. She was "afraid of him," and this was one reason she had not reported the abuse earlier. CR146:92. [3]

Sanda also testified, corroborating E.H.'s account about E.H.'s initial disclosures of abuse in February 2008. Sanda also recounted Patterson's confession to her in December 2008. CR146:147-63. Like E.H., Sanda also described Patterson's anger issues. CR146:144-46. She described the change in Patterson's demeanor in the months following E.H.'s initial allegations, saying that he had become "depressed," "cranky," and even impotent. CR146:157. Finally, she testified about some details of their divorce: she explained that she had given him the house, even though she felt entitled to some of its equity; she did not ask him for any alimony; and the one major possession they fought over was her truck. CR146:166-68,172-73.

Defense counsel did not object to the testimony about Patterson's anger issues, nor did counsel object to Sanda's account of their divorce. Instead, defense counsel repeatedly suggested that this testimony demonstrated Sanda's bitterness against Patterson, thereby corroborating the defense

[3] Later events showed that E.H. had reason to be afraid. Immediately after the jury announced the guilty verdicts in this case, Patterson attacked E.H. in open court before he could be taken to a holding cell. CR145:241. Patterson later pleaded no contest to a third degree felony charge of retaliating against a witness based on this incident. *See* Docket for district court case no. 101904977.

theory that Sanda had convinced E.H. to make false charges against Patterson to gain leverage in the divorce. CR146:93-95,180-82,184-85;145:220-21.

Patterson planned to testify. CR279:10. But during a recess near the end of the State's case, the prosecutor warned defense counsel that if Patterson testified that he was innocent, the prosecutor would use Patterson's "admissions to his bishop…as impeachment evidence." CR279:145; *see also* 279:79-80. The prosecutor later explained at the rule 23B hearing that he had not had any direct conversations with the bishop, but based his warning on the psychosexual evaluator's account of his conversation with the bishop as detailed in the evaluation. CR189-90;279:142-45. The prosecutor wanted to give the defense "fair notice" so that counsel would not be "surprised" during rebuttal. CR279:146.[4]

[4] Patterson now asserts that the prosecutor's "threat was false," and that he "knowingly lied" about being able to call the bishop as an impeachment witness. Br.Aplt. 4,39. But the accusation is not supported by the record Patterson cites, and he proffers no other evidence of affirmative representation by the prosecutor. *Id.* at 4 (citing PCR658-59, 664-65).

The prosecutor testified at the rule 23B hearing that he made a phone call to the bishop before trial, after reading the psychosexual evaluation and determining that Patterson waived the priest-penitent privilege. PCR658-59. The prosecutor "wanted to talk to the bishop about…what was in the psychosexual evaluation." PCR659. The conversation "lasted about 30 to 45 seconds" because the bishop "refused to speak" to the prosecutor about Patterson. PCR664-65. The prosecutor gathered from this conversation that he would need to "contact the Church's attorneys." PCR664.

Patterson's attorneys immediately conferred with Patterson. CR279:71,80. They told him that it was still his choice whether to testify, but they advised against it because of potential impeachment from the bishop. CR279:76,81-82, 85. Defense counsel did not discuss the possibility of raising the clergy-penitent privilege to bar any rebuttal testimony from the bishop. CR279:73,81. Patterson followed his counsel's advice and chose not to testify. CR59-60;CR145:204-05;CR279:74.

The jury convicted Patterson on all counts—two counts of aggravated sexual abuse of a child, first degree felonies, and two counts of lewdness involving a child, class A misdemeanors. CR61-62.

The Utah Court of Appeals affirmed Patterson's convictions. *State v. Patterson*, 2013 UT App 11, 294 P.3d 662. Patterson raised five claims in that appeal. *See* PCR646-722 (Addendum B).

First, Patterson claimed that the prosecutor violated his right to a fair trial by warning that he would impeach Patterson with testimony from his bishop if Patterson took the stand and asserted his innocence. PCR668.

On this record, Patterson cannot show the prosecutor would not have been able to subpoena the bishop and have him testify about communications that Patterson waived, even if the bishop was initially reluctant to do so. Patterson's accusation of affirmative misrepresentation by a career prosecutor is unsubstantiated.

Patterson called this warning a wrongful act of "intimidation" that "interfered" with his counsel's ability to defend him. PCR668-69,678-79.

The court of appeals held that Patterson had not preserved this claim for appeal and had not shown plain error in the prosecutor's conduct. *Patterson*, 2013 UT App 11, ¶10 n.4.

Second, Patterson claimed that his counsel was ineffective for not acknowledging the existence of a clergy-penitent privilege that he believed protected his communications with the bishop. PCR682-99. Patterson claimed that if counsel had acknowledged and asserted this privilege, he could have testified that he was innocent without fear of contradiction from his bishop. *Id.*

The court of appeals remanded under rule 23B to create a record on this claim only. After two evidentiary hearings, the rule 23B court issued a written order finding that counsel did not perform deficiently and that any deficient performance did not prejudice Patterson. CR271-77. The court of appeals likewise held that Patterson had not proved that his trial counsel was ineffective because both Patterson and the bishop waived any clergy-penitent privilege. *Patterson*, 2013 UT App 11, ¶14. And even if counsel had taken more steps to protect against disclosure of Patterson's statement to the bishop about "how sorry he was for what he had done," Patterson "failed to

convince" the court of appeals "that such a step had a reasonable probability of success, especially in light of Patterson's purposeful, rather than inadvertent, disclosure" of the privileged remarks. *Id.* ¶15.

Third, Patterson challenged the admission of testimony about his "bad character" under rule 404(b), Utah Rules of Evidence. PCR699-707. Patterson complained that that his defense counsel was ineffective, and that the trial court plainly erred, in passing on 28 different statements made by E.H. and her mother that fell into two general categories. PCR706-07. First, Patterson complained of their statements about his anger issues. PCR699-707. Second, Patterson challenged the mother's testimony about their divorce. *Id.*

The court of appeals held that Patterson had not proved ineffective assistance or plain error on his rule 404(b) claim. *Patterson*, 2013 UT App 11, ¶22. Defense counsel could reasonably omit objections to testimony about Patterson's temper and the divorce because it was consistent with the defense's theory that E.H. was "coerced into making false accusations by a scorned mother." *Id.* ¶18. And conducting a plain error review where trial counsel's non-objections were strategic "would be sanctioning a procedure that fosters invited error." *Id.* ¶22.

Fourth, Patterson claimed that the trial court plainly erred and his trial counsel was ineffective in allowing a detective who sat in on E.H.'s interview to allegedly testify about her truthfulness. PCR707-18.

The court of appeals held that trial counsel was not ineffective, nor did the trial court plainly err, in passing on the detective's testimony about E.H.'s character. *Patterson*, 2013 UT App 11, ¶22. Reasonable counsel could determine that some of the challenged testimony fit with the defense's theory that the E.H. fabricated her testimony. *Id.* ¶¶19-21. And conducting a plain error review where trial counsel's non-objections were strategic would again be "sanctioning a procedure that fosters invited error." *Id.* ¶22.

The court of appeals also rejected Patterson's cumulative error claim because he had shown no error. *Id.* at 669 n.7.

On May 6, 2013, this Court denied certiorari review. *State v. Patterson*, 304 P.3d 469 (Utah 2013).

On August 14, 2014, Patterson filed a pro se federal habeas petition in federal court. *See Patterson v. State*, No. 2:14-cv-592-DN, ECF No. 1 (D.Utah Aug. 14, 2014).

On October 22, 2015, the federal district court appointed Patterson counsel to help him with his federal habeas case. *Id.*, ECF No. 23.

On November 2, 2015, attorneys from the Office of the Federal Public Defender entered their appearance in the federal case. *Id.*, ECF Nos. 25,26.

One year later, on November 2, 2016, the federal defenders filed an amended federal habeas petition on behalf of Patterson. *Id.*, ECF No. 47.

A few days before that, on October 28, 2016, they filed a post-conviction petition for Patterson in state court. PCR1-76.

On November 2, 2016, they filed an amended state petition. PCR472-551. The amended petition raised a litany of claims challenging Patterson's trial and Mr. Wall's effectiveness, as well as a claim of prosecutorial misconduct. Patterson claimed that (1) trial counsel ineffectively handled the psychosexual evaluation containing confidences between Patterson and his LDS bishop; (2) Mr. Wall ineffectively handled the psychosexual-evaluation claims on appeal; (3) the prosecutor committed misconduct by warning that he would call the bishop as an impeachment witness if Patterson took the stand; (4) trial counsel ineffectively omitted evidence of what Patterson calls "faulty interviewing techniques" used with the child victim; (5) trial counsel ineffectively did not point out alleged mistruths or inconsistencies in the child victim's and her mother's testimonies; (6) trial counsel ineffectively omitted an objection to an interviewing officer's testimony that Patterson believes improperly bolstered the child victim's testimony; (7) trial counsel

ineffectively omitted an objection to the prosecutor's closing argument; (8) trial counsel was ineffective for allegedly not requesting results from Patterson's polygraph examination; (9) trial counsel ineffectively advised him about the State's plea offer; and (10) trial counsel was ineffective at sentencing. PCR19-68.

The post-conviction court summarily dismissed claims 6 and 7 because they had already been raised and lost in a prior proceeding. PCR552; *see* Utah Code Ann. § 78B-9-106(1)(b) (precluding relief for any claim that was "raised or addressed at trial or on appeal"). The court ordered the State to respond to Patterson's remaining claims. PCR553.

The State moved for summary judgment because Patterson's petition was barred by the Postconviction Remedies Act's one-year statute of limitations and some of the claims that survived the post-conviction court's dismissal order had in fact been raised or addressed in previous proceedings and were thus procedurally barred. PCR607-43.

The court granted the State summary judgment, ruling that Patterson's claims were time barred and rejecting Patterson's statutory, equitable, and constitutional arguments against application of the statute of limitations. *See* PCR992-1001. The court declined to address whether the PCRA's litigated-

and-lost bar independently precluded review of claim 1 (part 3), claim 2 (parts 3 and 4), and claim 3.

Patterson timely appealed. PCR1012-13.

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment for the State. Patterson brought his amended petition over two years after the PCRA's statute of limitations expired. His tolling arguments, proposed accrual dates, and constitutional challenges failed as a matter of law to overcome the preclusive effect of the time bar.

This Court should also affirm in part on the alternative ground, unaddressed by the court below, that claim 1 (part 3), claim 2 (parts 3 and 4), and claim 3 are procedurally barred because they have already been raised or addressed in previous proceedings.

ARGUMENT

I.

The post-conviction court correctly ruled that Patterson's petition was time barred.

Under the PCRA, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107.

This Court denied Patterson certiorari review of his criminal appeal on May 16, 2013. Patterson's cause of action accrued ninety days later, on August 14, 2013, the last day for seeking certiorari review in the United States Supreme Court. *Id.* § 78B-9-107(2)(c); S. Ct. R. 13 (Time for Petitioning). Patterson thus had until August 14, 2014, to file his post-conviction petition. He did not file his petition until October 10, 2016—over two years too late.[5]

Patterson bore the burden to disprove application of the PCRA's statute of limitations. *See* Utah Code Ann. § 78B-9-105(2) (providing that once the State raises the procedural bar, "the petitioner has the burden to disprove its existence by a preponderance of the evidence").

And rule 56, Utah Rules of Civil Procedure, required the post-conviction court to grant the State summary judgment if there was "no genuine dispute as to any material fact" and the State was "entitled to a judgment as a matter of law." Utah R. Civ. P. 56(a).

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[5] The state statute lists other potential times a cause of action can accrue. *See* Utah Code Ann. § 78B-9-107(2). Of those, Patterson argues that the date when he allegedly discovered new "evidentiary facts" applies, but only for claims 4 and 5 of his petition. Br.Aplt. 39-41 (citing Utah Code Ann. § 78B-9-107(2)(e)). The State responds to that later-accrual-date argument below, in section I.B. None of the other PCRA accrual dates are implicated in this appeal.

For reasons set forth below, the post-conviction court correctly determined that Patterson's tolling arguments, proposed accrual dates, and constitutional challenges to the PCRA's time bar failed as a matter of law.

A. The post-conviction court correctly rejected Patterson's statutory tolling arguments as failing to show that unconstitutional state action prevented his timely filing.

The PCRA's one-year "limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution." Utah Code Ann. § 78B-9-107(3). Patterson had the burden of proving statutory tolling by a preponderance of the evidence. *Id*.

Patterson argues that the PCRA's statute of limitations tolled when his previous retained counsel gave him allegedly ineffective advice on how to proceed with post-conviction review following this Court's denial of his petition for a writ of certiorari. Br.Aplt. 12-17. He also argues that alleged difficulties with his access to the prison's contract attorneys constituted state action tolling the limitations period. *Id.* 18-21. The post-conviction court correctly rejected both arguments.

The PCRA tolling provision incorporates the constitutional right of access to the courts articulated by the United States Supreme Court in *Bounds v. Smith*, 430 U.S. 817 (1977). Utah Code Ann. § 78B-9-107(3). *Bounds* held "that

the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828 (footnote omitted). The right of court access guarantees "no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis v. Casey*, 518 U.S. 343, 356 (1996). The Supreme Court has explained that *Bounds* did not create an "abstract, freestanding right to a law library or legal assistance," but rather required an inmate to "demonstrate that the alleged shortcomings in the library or legal assistance program *hindered* his efforts to pursue a legal claim." *Id.* at 351 (emphasis added).

Utah has elected to satisfy its obligation "to assure its prisoner access to the courts by providing legal assistance in lieu of an inmate law library," and this process has been upheld as constitutional. *Carper v. DeLand*, 54 F.3d 613, 617 (10th Cir. 1995). But the State is not "constitutionally obligated to supply assistance beyond the initial pleading or preparation of a petition stage" in federal or state habeas proceedings. *Id*; *see also Love v. Summit County*, 776 F.2d 908, 914 (10th Cir. 1985) ("The Supreme Court has never extended 'the Fourteenth Amendment due process claim based on access to

the courts…to apply further than protecting the ability of an inmate to prepare a petition or a complaint.'").

Patterson's arguments for statutory tolling suffer from a central defect: they construe the right of access to the courts incorporated in the tolling provision as creating an entirely distinct right to effective post-conviction counsel. *See* Br.Aplt. at 12-17 (alleging ineffective assistance of retained counsel after conclusion of direct appeal); *id.* at 18-21 (complaining prison contract attorneys did not provide effective legal advice). Both the PCRA and the United States Supreme Court expressly disavow any such right. Utah Code Ann. § 78B-9-202(4) ("Nothing in this chapter shall be construed as creating the right to effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective."); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings.").

Neither the tolling provision nor *Bounds*, on which the provision was patterned, imported the Sixth Amendment into a pro se petitioner's right of access to the courts. Instead, *Bounds* required the States to provide prisoners access to the courts and basic legal materials sufficient to bring claims. The tolling provision does not smuggle into the PCRA all constitutional issues, giving petitioners a safe harbor from the statute of limitations so long as they

can allege ineffective assistance by prior counsel. And retained counsel is the defendant's agent, not the state's, and his advice does not implicate the court-access concerns inherent in the tolling provision. As set forth below, none of Patterson's arguments show that a state actor unconstitutionally prevented his access to the courts.

1. Patterson's retained attorney gave him detailed, comprehensive, and accurate advice about his options following this Court's denial of certiorari review.

Patterson's primary argument for statutory tolling is that Edwin Wall, his previous retained counsel, was ineffective in advising him about which options to pursue after this Court denied his petition for a writ of certiorari. Br.Aplt. 12-17.

Putting aside, for the moment, other problems with this argument—i.e., its failure to show that a retained attorney can be a state actor or that Patterson had a right to effective assistance at the post-certiorari stage—this Court can affirm because Mr. Wall exceeded whatever duties he owed Patterson by writing him a detailed, comprehensive, and accurate letter explaining his post-conviction options. Patterson fails as a matter of law to establish the basic factual predicate of his own argument—that Mr. Wall gave him wrong advice, let alone "prevented" him from filing a timely state petition. *See* Utah Code Ann. § 78B-9-107(3).

Patterson has not disputed that Mr. Wall, when informing him about this Court's denial of his petition for a writ of certiorari, told him that he could file a federal habeas petition, a state post-conviction petition, or both. PCR201 (Letter from Edwin S. Wall to Patterson, 22 May 2013) (Addendum C). Nor has Patterson disputed that Mr. Wall told him that if he wanted to pursue state post-conviction relief, he would have to file a state petition within one year. *Id.* at 205.

Mr. Wall's advice was also correct on the relevant issue—whether Patterson had satisfied the exhaustion requirement for federal habeas purposes by presenting to this Court his claim that trial counsel was ineffective in handling the clergy-penitent privilege. *Id.* at 202. This was the central contested issue in Patterson's criminal appeal and in his petition for certiorari review that this Court denied. Mr. Wall was correct in advising Patterson that he could proceed directly to federal habeas on this claim because he had exhausted it in this Court. *Id.*; *see Brown v. Shanks*, 185 F.3d 1122, 1124 (10th Cir. 1999) (recognizing that exhaustion for federal habeas purposes is satisfied "if the issues have been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack") (citation and quotations omitted).

Indeed, Patterson is procedurally barred from relitigating this claim in state post-conviction, as Mr. Wall's letter made plain when it told Patterson that a state petition would "have to be based on matters that have not already been litigated." PCR201. Advising Patterson to file a state petition with this claim would have been unreasonable.

While Mr. Wall "recommend[ed]" that Patterson pursue federal habeas relief, that recommendation did not "prevent" Patterson from filing a state petition, even assuming he wanted to raise the new grounds that his current counsel presented for the first time two years after the state statute expired. Indeed, the letter made plain in its conclusion, "*You* will need to decide how you wish to proceed." PCR206 (emphasis added).

That Patterson's current counsel drummed up new claims two years after the statute of limitations expired says exactly nothing about Mr. Wall's reasonableness in advising Patterson about his options. Indeed, Patterson's second declaration does not say that he wished to pursue any claim other than the attorney-ineffectiveness claim that he raised in his petition for writ of certiorari, which was thus already exhausted and well-poised for a federal petition. *See generally* PCR855-61 (Second Declaration of Scott Kirby Patterson, 6 September 2017).

Given that these facts were not genuinely disputed, the post-conviction court correctly ruled that Patterson failed to show that Mr. Wall's advice actually prevented him from filing a state post-conviction petition within the one-year statute of limitations, even if that mattered under the statutory tolling provision. Mr. Wall told him that he had one year to file a state petition and left it up to Patterson to decide how he wanted to proceed and what claims to pursue. That was more than sufficient to satisfy any ethical obligations he had.

2. Patterson's retained attorney's advice following this Court's denial of certiorari could not amount to unconstitutional state action preventing timely filing.

Patterson's ineffective assistance argument fails for more fundamental legal reasons to show that unconstitutional state action prevented him from timely filing: (1) the PCRA's express language and structure make clear that there is no ineffective-assistance tolling provision for the time bar; (2) Mr. Wall was not a state actor; and (3) Patterson had no constitutional right to counsel after his direct appeal concluded.

First, the plain language of the PCRA forecloses Patterson's tolling argument. Courts read the plain language of a statute as a whole and interpret its provisions in harmony with other provisions in the same statute. *LPI Servs. v. McGee*, 2009 UT 41, ¶11, 215 P.3d 135. Each term of the statute is

presumed to be used "advisedly" and each omission "purposeful." *Bagley v. Bagley*, 2016 UT 48, ¶10, 387 P.3d 1000 (citation and quotations omitted). Statutory construction presumes that the expression of one term should be interpreted as the exclusion of the other. *Id.* (citation and quotations omitted).

Section 106 lists five circumstances where a post-conviction claim will be procedurally barred: when the claim

> (a) may still be raised on direct appeal or in a post-trial motion;
>
> (b) was raised or addressed at trial or on appeal;
>
> (c) could have been but was not raised at trial or on appeal;
>
> (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
>
> (e) is barred by the limitation period established in Section 78B-9-107.

Utah Code Ann. §§ 78B-9-106(1)(a)-(e). Section 106 allows a single ineffective-assistance exception for subsection (c). If a claim would otherwise be procedurally barred because it was not raised at trial or on appeal, then a petitioner may still be eligible for relief if trial or appellate counsel was ineffective for omitting the claim. *Id.* § 78B-9-106(3). But by specifically limiting the ineffective-assistance exceptions to claims omitted from trial or appeal under section 78B-9-106(1)(c), the PCRA necessarily excluded that

exception for the time bar under subsection (e). Therefore, ineffective assistance cannot excuse Patterson's untimely filing as a matter of law.

Second, Mr. Wall was not engaged in state action when he represented Patterson. Federal courts uniformly recognize that "ineffective assistance of counsel cannot constitute a state-created impediment" under the statute of limitations governing federal habeas petitions. *Finch v. Miller,* 491 F.3d 424, 427 (8th Cir. 2007); *Irons v. Estep,* No. 05-1412, 2006 WL 991106, at *4-*5 (10th Cir. Apr. 17, 2006) (same); *Crawford v. Jordan,* No. 04:04-CV-346-TCK-PJC, 2006 U.S. Dist. LEXIS 78204, at *12 (N.D. Okla. Oct. 24, 2006) (same); *Dunker v. Bissonnette*, 154 F. Supp. 2d 95, 106 (D. Mass. 2001) (same).

That conclusion follows from the Supreme Court's holding that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). "The limited case law applying [the federal habeas statute] has dealt almost entirely with the conduct of state prison officials who interfere with inmates' ability to prepare and to file habeas petitions by denying access to legal materials." *Shannon v. Newland*, 410 F.3d 1083, 1087 (9th Cir. 2005)). And ineffective assistance of counsel is "not the type of State impediment envisioned in § 2254(d)(1)(B)." *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005), *aff'd on other grounds*,

549 U.S. 327 (2007); *see also Outler v. United States*, 485 F.3d 1273, 1280 (11th Cir. 2007) (stating that State's appointment of an "incompetent attorney" was "not the type of impediment contemplated by" section 2244(d)(1)(B))).

If a public defender is not a state actor for tolling purposes, then *retained* counsel like Mr. Wall, who are not paid or employed by a governmental agency, do not qualify as state actors. *See Polk County*, 454 U.S. at 318-19 (acknowledging that defense attorney's role in opposing the State's representatives "is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed"); *see also id.* at 319 n.9 ("Although lawyers are generally licensed by the States, 'they are not officials of the government by virtue of being lawyers.'") (*quoting In re Griffiths*, 413 U.S. 717, 729 (1973)).

Patterson relies on *Murray v. Carrier*, as he did below, to propose that Mr. Wall's allegedly ineffective advice must be "imputed to the state." Br.Aplt. 12-13 (citing 477 U.S. 478, 488 (1986)). But the post-conviction court correctly observed that *Carrier* dealt with a "cause and prejudice" standard unique to federal habeas default provisions, and it did not address statutory tolling. PCR998. *Carrier* held—among other things—that in order for a prisoner to show "cause" for his failure to exhaust a federal claim in state court, he has to prove that "some objective factor external to the defense

impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. at 488. And *Coleman v. Thompson*, 501 U.S. 722 (1991), made explicit that attorney errors—made in contexts where the Sixth Amendment does not attach, such as during post-conviction proceedings—are not "external to the defense" and not attributable to the State under traditional principles of agency. *Id.* at 253-54. As discussed below, Mr. Wall's advice came after Patterson's Sixth Amendment right to counsel extinguished, and Mr. Wall was retained counsel in any event. The state does not bear responsibility for Patterson's litigation decisions made in consultation with private counsel after conclusion of the criminal case.[6]

Rather than relying on an irrelevant federal cause and prejudice standard, this Court should find guidance from federal courts that have uniformly interpreted an analogous timing provision in the AEDPA and found that ineffective assistance does not constitute a cognizable state impediment to timely filing.

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[6] In any event, *Carrier* went on to recognize that the ineffective assistance claim must generally be presented to the state courts "as an independent claim" before it can be used to establish cause in federal habeas. 477 U.S. at 489. Patterson did not raise Mr. Wall's alleged misinformation about post-conviction remedies as an independent claim for relief in his state petition.

Third, Patterson cannot show any constitutional violation in Mr. Wall's post-conviction advice because the Sixth Amendment no longer attached when Mr. Wall gave it. Controlling United States Supreme Court authority unequivocally limits the constitutional right to counsel "to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Thus, Patterson had no constitutional right to attorney assistance, let alone effective assistance, after the conclusion of his criminal case. *See* Utah Code Ann. § 78B-9-202(4) ("Nothing in this chapter shall be construed as creating the right to effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective."); *see also Coleman*, 501 U.S. at 752 ("There is no constitutional right to an attorney in state post-conviction proceedings."). Thus, any advice Mr. Wall gave Patterson—whether correct or incorrect—could not form the basis of a claim of ineffective assistance of counsel, even if this were a relevant inquiry under the tolling statute.

Patterson nevertheless argues that even if Mr. Wall was not constitutionally obliged to inform him of what post-conviction route to take, he violated Patterson's constitutional rights by "affirmatively misrepresenting" those options. Doc. no. 99 at 12-14. As discussed, Mr. Wall correctly explained Patterson's options—both in the procedures available to

him and in the timeframe he had for filing. Furthermore, Patterson bases his proposed rule on the misconception that he had a "constitutional right to seek postconviction relief." Br.Aplt. 15. The United States Supreme Court has made clear that there is no such right. *Finley*, 481 U.S. at 557; *Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 402-03 (2001). And, as discussed, Patterson had no constitutional right to counsel in post-conviction, much less effective counsel. The Court should thus decline to adopt Patterson's proposed rule.[7]

[7] Patterson claims to find support for his proposed "affirmative misrepresentation" rule in an abrogated opinion by this Court, where it once held that a defense counsel's failure to advise a defendant about all possible deportation consequences does not amount to ineffective assistance of counsel, but affirmative misrepresentation of those consequences does. Br.Aplt. 15-16 (citing *State v. Rojas-Martinez*, 2005 UT 86, ¶20, 125 P.3d 930). *Rojas-Martinez* is of no help to Patterson because it was abrogated by the United States Supreme Court in *Padilla v. Kentucky*, which held that a trial attorney's failure to advise a defendant about the risk of deportation amounts to deficient performance. As *Padilla* illustrates, the Sixth Amendment attaches to the guilty-plea phase of criminal proceedings. 559 U.S. at 364 ("Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.") (internal quotations and citations omitted). But, as discussed, it does not attach in discretionary proceedings or post-appeal, post-conviction contexts. In any event, Mr. Wall did not misrepresent Patterson's options; Patterson has now, with the benefit of new counsel and hindsight, merely pointed out additional claims that Mr. Wall might have told Patterson to pursue in post-conviction. But this does not show that Mr. Wall erroneously explained what procedural options Patterson had.

3. The post-conviction court correctly rejected Patterson's claim that the prison's contract attorneys denied him access to the courts.

Patterson argued below that the state prison unconstitutionally prevented him from filing a timely petition because he was not made aware that contract attorneys were available to assist with his legal filings until the limitations statute expired. PCR819 (*see* Utah Code Ann. § 78B-9-107(3)). The post-conviction court was correct to reject this argument because none of the authorities guaranteeing prisoners right of access to the courts obliges contract attorneys to offer their services to inmates who have not sought them out. And Patterson provided no evidence about what efforts he took to seek assistance in filing his court papers within the one-year limitations period, other than getting help from a fellow inmate "a few weeks before" filing his federal petition. PCR857. Thus, Patterson provided no evidence that the State prison actually prevented him from meeting the PCRA's filing deadline.

Nothing in *Bounds* obliges prison contract attorneys to *advertise* their services, as Patterson's brief suggests they must. Br.Aplt. 18-19. Rather, they are constitutionally obligated only to confer a "capability" to file initial pleadings once prisoners enlist their services. *See Lewis*, 518 U.S. at 356; *Carper*, 54 F.3d at 617. In short, Patterson cannot show unconstitutional state

interference with the filing of his petition by complaining that the prison's contract attorneys never reached out to him unsolicited.

Rather, as the post-conviction court correctly noted, Patterson's failure to enlist their services until the statute of limitations expired reflected a lack of diligence on his part in bringing his claims to court. His declaration states that he was "unaware" of the contract attorneys' presence, but Patterson's silence on what efforts he took before the "few weeks" leading up to his deadline constituted a complete failure of proof that he was reasonably diligent in pursuing state remedies. *See Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶25, 284 P.3d 630 (holding that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

Patterson argues that the post-conviction court improperly drew this inference against him, where he was the non-movant. Br.Aplt. 19-20. But a "district court is not required to draw every possible inference of fact, no matter how remote or improbable, in favor of the nonmoving party." *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶19, 196 P.3d 588. "Instead, it is required to draw all *reasonable* inferences in favor of the nonmoving party." *Id.* (emphasis in original). And those inferences must be drawn from evidence that is more than pure speculation. *See USA Power, LLC v. PacifiCorp*,

2016 UT 20, ¶137, 372 P.3d 629; *State v. Hester*, 2000 UT App 159, ¶16, 3 P.3d 725 (noting the difference between drawing a reasonable inference and "merely speculating about possibilities").

The post-conviction court based its lack-of-diligence conclusion, in part, on Patterson's affidavit statement that "'it came to [his] attention from other inmates that the prison had contract attorneys,'" ruling that he could have discovered the contract attorneys' services with reasonable diligence sooner. PCR994. Patterson left the court with no other inference to draw because he had proffered no evidence about what affirmative steps he took to seek legal help until just weeks before the federal and state deadlines. Patterson bore the burden to disprove application of the time bar. Utah Code Ann. § 78B-9-105. Since he provided no evidence about his diligence in seeking legal help, the court could not reasonably draw an inference in his favor on this point.

Patterson also makes the broad assertion that the prison's contract attorneys "generally fail to provide legally sufficient advice" and that his case is but one example. Br.Aplt. 18. But he provides no citation to the record, caselaw, or other authorities for the proposition. The Court should not consider the unsubstantiated claim about the prison's contract attorneys and their general quality of assistance. In any event, as discussed, the Supreme

Court has made clear that "*Bounds* did not create an abstract, freestanding right to a law library or legal assistance." *Lewis*, 518 U.S. at 351. Thus, nothing in *Bounds* required the prison to provide effective legal "advice," as Patterson argues.

And the Tenth Circuit has approved Utah's contract attorney system on at least three occasions. *See Carper*, 54 F.3d at 614 (upholding constitutionality of a Utah prison plan providing two private attorneys—including one of the current contract attorneys—to assist inmates in the preparation and filing of state or federal petitions for writs of habeas corpus); *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987) (holding that "Utah prison's legal assistance program adequately assists all inmates in the preparation and filing of initial pleadings. Through that stage, the program places literate and illiterate inmates on equal footing and provides them access to the courts."); *Nordgren v. Milliken*, 762 F.2d 851, 854 (10th Cir. 1985) (holding that procedures employed by the state prison to assist inmates to prepare and file their initial pleading complied with *Bounds*).

Even if Patterson could show some systemic defect in the prison's contract attorney program, that would be insufficient on its own to show that he was denied access. *Lewis*, 518 U.S. at 351. The contrary rule—that a poorly designed legal assistance program could in itself count as a constitutional

violation—"would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary." *Id.* An "inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program *hindered his efforts* to pursue a legal claim." *Id.* (emphasis added).

Patterson's complaint about the contract attorneys' response to his eventual request for services is irrelevant. Br.Aplt. at 18-20. As Patterson acknowledged below, he did not make this request until March 20, 2015—well after the PCRA's statute of limitations expired. PCR859. Thus, even if he had established a genuine dispute of fact about state interference at this point, it could not have tolled a limitations period that had already expired.

B. Patterson failed to identify any new facts that triggered a later PCRA accrual date—he already knew about them or could have discovered them earlier with reasonable diligence.

Patterson argues that his cause of action did not accrue for claims 4 and 5 in his petition until his current federal counsel obtained (1) a child-interview expert's report, and (2) a DCFS report prepared during the criminal investigation where Sanda discussed the circumstances of their divorce. Br.Aplt. 39-41. He claims, as he did below, that his indigency as an inmate prevented him from obtaining these records. *Id.*

The PCRA provides as a possible accrual date "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." Utah Code Ann. § 78B-9-107(2)(e) (emphasis added). Patterson identifies no new facts that were previously unavailable to him or that he could not have obtained with reasonable diligence.

E.H.'s Children Justice Center (CJC) interview has been available to Patterson as early as trial because the State gave his defense team a transcript of it. CR146:115-16 (trial counsel stating, "The State gave us a transcript of the interview from the CJC"). His trial attorneys already used the CJC interview in an effort to impeach E.H. *See, e.g.*, CR115-18. And Patterson does not say what diligence he exercised, if any, to raise a challenge to trial counsel's handling of the CJC interview.

To the extent he means to argue that his new expert's report gives rise to a different accrual date, the argument is incorrect. He has conceded the opposite by arguing that trial counsel were ineffective for not hiring an expert and getting a similar report. PCR504-06,512-13. Patterson's ineffectiveness claim assumes that the expert and the report "should have" been obtained with reasonable diligence because, under Patterson's theory, they *had* to be obtained under the Sixth Amendment.

Likewise, with Ground 5, Patterson has shown no efforts made within the one-year period to collect records or obtain evidence concerning his ex-wife's alleged dishonesty. His declarations show no efforts whatsoever to pursue these specific claims until he met with his current counsel. The declarations also do not show that Patterson lacked a reason to seek the evidence due to not knowing it existed or it being otherwise entirely unavailable to him. Patterson therefore failed to meet his burden to show either (1) reasonable diligence in pursuing the evidence, or (2) that no amount of reasonable diligence could have produced this evidence earlier.

Patterson's indigency while incarcerated is not a sufficient reason to find safe harbor in section 107(2)(e). Patterson exercised at least some diligence to enlist the services of the prison's contract attorneys, albeit too late. PCR859-60. And he procured help in filing his federal habeas petition, first from a fellow inmate "a few weeks before" it was due, and then from attorney Ross Anderson in filing an amended federal petition. PCR857-60. These efforts show that Patterson was capable of seeking assistance to file legal papers and pursue claims. But the record is entirely silent on his efforts with respect to the CJC interview and his ex-wife's alleged impeachment within the one-year limitation period. Indigency alone is insufficient to secure a new accrual date under section 107(1)(e). A petitioner must show that,

despite his indigency, he took reasonable steps to pursue his claims within the statutory period. Because Patterson did not do that, he cannot show that Grounds 4 and 5 accrued when he consulted with his current counsel.[8]

C. Equitable tolling no longer exists for post-conviction petitioners—the PCRA's 2008 tolling provisions supplanted it.

Patterson argues that this Court retains common law authority to apply equitable tolling beyond the PCRA's tolling provisions. Br.Aplt. 21-26. But 2008 amendments to the PCRA abolished all common law exceptions to the time bar, and it supplanted any common law tolling discretion by codifying specific tolling provisions that occupy the field.[9]

In 2009, this Court amended rule 65C(a), Utah Rules of Civil Procedure. That rule now provides that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and

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[8] Patterson has abandoned his argument that his cause of action for all claims in the petition accrued when federal counsel appeared in the federal case and informed him about "the details regarding the advice" Mr. Wall gave him and "the correctness" of that advice, which Patterson said were "'evidentiary facts on which the petition is based.'" PCR843-44 (quoting Utah Code Ann. § 78B-9-107(2)(e)).

[9] The post-conviction court did not address the State's argument that the PCRA, with its express tolling provisions, supplanted any equitable tolling authority that Utah courts had before 2008. *See* PCR630. The State maintains that equitable tolling is no longer available to post-conviction petitioners in Utah. In any event, the court addressed Patterson's equitable tolling argument under the PCRA's tolling provisions, PCR997, thus implying that equitable tolling had been entirely subsumed by the statute.

sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The current rule also deleted language in the prior subsection (c) that allowed a petitioner, whose previous post-conviction petition had been denied, to file a successive petition raising additional claims if he could demonstrate "good cause" for doing so. *Compare* Utah R. Civ. P. 65C(c) (2008) *with* Utah R. Civ. P. 65C(d) (2010). The Advisory Committee Notes to Rule 65C state that the rule amendments "embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." This Court's rule thus adopted the PCRA as the vehicle by which any judicial powers will be exercised.

Although the common law provided "'exceptions' to the limitations of the PCRA," those "exceptions, in turn, were repudiated by the legislature in 2008, in a provision clarifying that the PCRA is the 'sole remedy' for post-conviction relief." *Pinder v. State*, 2015 UT 56, ¶56, 367 P.3d 968 (citing Utah Code § 78B–9–102(1)); *Taylor v. State*, 2012 UT 5, ¶11 n.3, 270 P.3d 471 (noting that Utah Code subsection 102(1) renders the common law exceptions inapplicable for all claims filed on or after May 5, 2008).

The current version of the PCRA does not recognize equitable tolling. Rather, it has codified two circumstances when tolling applies: when a petitioner cannot file his petition due to (1) unconstitutional state action, or

(2) mental or physical incapacity. Utah Code Ann. § 78B-9-107(3). Patterson has not demonstrated that Utah courts have discretion to exercise tolling power outside of these provisions, which supplanted the courts' common law tolling authority.

While he correctly notes that federal habeas courts apply equitable tolling, *see* Br.Aplt. 21-22, they do so because Congress has not abolished their equitable powers. The federal limitations statute, unlike the PCRA, did not codify comprehensive tolling provisions and thereby occupy the field. The federal statute mentions only a "different kind of tolling," where a pending state petition for post-conviction relief suspends the federal clock. *Holland v. Florida*, 560 U.S. 631, 648 (2010) (citing 28 U.S.C. § 2244(d)(2)). The Utah Legislature, on the other hand, has codified the tolling measures that it deemed appropriate to supplant former, common law remedies. *See* Utah Code Ann. § 78B-9-107(3) (tolling the statute for unconstitutional state action and physical or mental incapacity that prevents timely filing). The reason for the difference is obvious: federalism and comity concerns require petitioners to present their claims first to the state court. The state post-conviction regime has no corresponding obligation to the federal system.

And this Court, through its rule-making authority, has established that section 107(3), among others, "sets forth the manner and extent to which a

person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed on appeal." Utah R. Civ. P. 65C(a). Patterson's reliance on federal equitable tolling is thus unavailing. The PCRA, with its express tolling provisions, supplanted any equitable tolling courts exercised on post-conviction petitions before 2008.

Even if tolling provisions equivalent to those at federal habeas common law were available to post-conviction petitioners, Patterson failed as a matter of law to show that any applied to his state petition. As discussed, Mr. Wall correctly told him that he had exhausted his claim that trial counsel ineffectively handled the clergy-penitent privilege issue, and Mr. Wall left it up to Patterson whether to file in federal or state court, or both. Patterson also failed as a matter of law to show reasonable diligence in seeking out legal assistance in prison before his state deadline expired.[10]

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[10] Patterson argues that time-barring his state petition will render his federal petition "ineffectual." Br.Aplt. 24. But Patterson has not demonstrated that he is without remedy in federal habeas, where he already timely filed his pro se petition and may yet get review of any claims there. He does not need to re-exhaust here the central contested issue in his criminal appeal and petition for state certiorari review—whether trial counsel ineffectively handled the priest-penitent privileged. As discussed, Patterson has already exhausted that claim. To the extent he has properly raised it in his pro se federal petition, it will be subject to AEDPA review. For other unexhausted or time-barred federal habeas claims, Patterson may yet demonstrate that he is entitled to an exception or tolling provision under federal law. In any event, extinction of federal remedies is not a claim for relief under the PCRA.

Patterson nevertheless asks this Court to recognize an equitable remedy analogous to that created by the United States Supreme Court in *Martinez v. Ryan*, 566 U.S. 1, 7-8 (2012). Br.Aplt 22-23. In *Martinez*, the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's default of a claim of ineffective assistance at trial." 566 U.S. at 8. This rule applies only where a federal habeas petitioner has to postpone his trial ineffective assistance claims until his "initial-review collateral proceeding." *Id*. at 13. And the rule stemmed from a well-recognized equitable power federal courts have to "excuse the prisoner from the usual sanction of default" where they could show cause for and prejudice from the default. *Id.*

Even if this Court had discretion to exercise extra-statutory, equitable powers over late PCRA petitions, Patterson has not justified using that discretion in the manner *Martinez* authorized because *Martinez* is unique to the demands of federal habeas procedure—specifically, its procedural default doctrine—and can do no work in Utah's state post-conviction regime.

Martinez was not a statute of limitations case. And creating an equitable rule like *Martinez*'s under Utah post-conviction law would not have any operative effect because Utah post-conviction proceedings are not "initial review collateral proceedings." As Patterson's own direct appeal shows, Utah

law permits convicted persons to raise trial ineffective assistance claims on appeal. *See, e.g.*, *State v. Litherland*, 2000 UT 176, ¶16, 12 P.3d 92 (Utah 2000); Utah R. App. P. 23B, effective October 1, 1992 (adopting a procedure for a remand to develop additional facts on an appellate challenge to trial counsel's representation). The prohibition from raising trial counsel's ineffectiveness on direct appeal that *Martinez* requires for its new "cause" exception to apply does not exist under Utah law. *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (*Martinez* did not apply to excuse defaulted claims "because Oklahoma law permitted Mr. Banks to assert his claim of ineffective assistance of trial counsel on direct appeal"). In fact, challenging trial counsel's effectiveness on direct appeal has become ubiquitous in Utah. Patterson's own case is an example. He raised three claims of ineffective assistance of trial counsel on appeal and got a rule 23B hearing on one of them—the clergy-penitent claim.

Thus, the *Martinez* exception does not apply in Utah even under federal law because, as Patterson's own direct appeal demonstrates, defendants may challenge their trial attorney's effectiveness on appeal. Patterson has offered no reason to import into Utah's post-conviction law an inapplicable federal habeas doctrine that does no work here because the defects it remedies do not

exist in Utah in the first place.[11] In any event, as discussed, Patterson has not shown that Mr. Wall gave incorrect advice on federal habeas and post-conviction options.[12]

D. The post-conviction court correctly ruled that Patterson failed to show entitlement to a still-undefined "egregious injustice" exception that this Court should now affirmatively disavow.

Patterson argues that this Court retains independent constitutional authority over the writ to override the PCRA's limitations. Br.Aplt. 26-27 (citing *Winward v. State*, 2012 UT 85, ¶14, 293 P.3d 259; *Gardner v. State*, 2010 UT 46, ¶93, 234 P.3d 1115). And he suggests that this authority is coextensive with common-law habeas procedure. *Id.* at 9-10,26-27,34-39. From there, he asserts that the post-conviction court improperly rejected his argument that

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[11] Even if *Martinez* could apply in Utah state courts, it would apply only to claims of ineffective assistance of trial counsel. *Davila v. Davis*, ___ U.S. ___, 137 S.Ct. 2058, 2068 (2017) (holding that *Martinez* responded "to an equitable consideration that is unique to claims of ineffective assistance of trial counsel and accordingly inapplicable to claims of ineffective assistance of appellate counsel" and other non-trial-IAC claims). Thus, it could not as a matter of law apply to Patterson's grounds 2, 3, 6 (partial), and 12, which do not challenge trial counsel's effectiveness.

[12] Patterson argues that applying equitable tolling would enable this Court to avoid the constitutional question he has raised about this Court's authority to go outside the PCRA's provisions. Br.Aplt. 26. But applying an extra-statutory equitable tolling provision would directly implicate a separation of powers issue—the very constitutional question Patterson says he hopes to avoid.

he met an "egregious injustice" exception to the time bar discussed by this Court in *Gardner v. State* and *Winward v. State*. *Id.* at 26-34.

But Patterson failed as a matter of law to meet *Winward*'s stringent criteria to even have his proposed exception considered, much less applied, to excuse his untimely filing. In any event, *Winward* was incorrectly decided, and this Court should now expressly disavow it.

1. Even if there were an egregious injustice exception to the PCRA's procedural bars, Patterson's petition could not meet it.

Under the present state of the law, the judiciary has constitutional authority over post-conviction, post-appeal review of a criminal conviction. *See Gardner v. Galetka*, 2004 UT 42, ¶17, 94 P.3d 263 (stating "the power to review post-conviction petitions '[q]uintessentially … belongs to the judicial branch of government'") (quoting *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989) (discussing the scope of the writ of habeas corpus in the Utah Constitution)). In reliance on that conclusion, this Court has reasoned that "'the legislature may not impose restrictions which limit [post-conviction

relief] as a judicial rule of procedure, except as provided in the constitution.'" *Id.* (citation omitted).[13]

But the judicial branch's ownership of the writ does not inexorably give rise to a constitutional exception to the statutory time bar. To the contrary, this Court, through its rule making authority, has determined that the judiciary will exercise its constitutional power over post-conviction cases within the confines of the PCRA.

Again, this Court has announced through its rule-making authority that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a). And it has acknowledged that the 2009 amendments did away with common law exceptions to procedural bars. *See Pinder*, 2015 UT 56, ¶56.

The Advisory Committee Notes to Rule 65C state that the rule amendments "embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." They continue that "[i]t is the committee's view that the added restrictions which the Act places on post-conviction

[13] Respondent has recently asked this Court to disavow the validity of this precedent in *Archuleta v. State*, No. 20160419-SC (Utah filed May 12, 2016), which is currently pending. Respondent renews its request here, as set forth in the next subsection.

petitions do not amount to a suspension of the writ of habeas corpus." By itself, current rule 65C(a) defeats Patterson's claim that the PCRA intrudes on this Court's constitutional powers because this Court has embraced the PCRA as the vehicle for exercise of its powers.

This Court has suggested in dicta that it can suspend rule 65C when application of the PCRA's procedural rules would result in an "egregious injustice." *See Gardner*, 2010 UT 46, ¶93. This Court elaborated in *Winward* what would be required to establish the existence of such an exception to the time bar, but it did not purport to actually promulgate an exception that could be applied in the lower courts. *See* 2012 UT 85, ¶¶17-19.

Patterson argues that *Gardner* and *Winward* "reasoned" that this Court "could still grant relief, despite the PCRA, if doing so would avoid an egregious injustice." Br.Aplt. 37 (citing *Gardner*, 2010 UT 46, ¶93). Patterson's synopsis of this Court's reasoning is inaccurate. *Gardner* explicitly declined to decide whether any exception to the PCRA's procedural bars survived the 2008 amendments to the PCRA. 2010 UT 46, ¶¶93-94; *see also Winward*, 2012 UT 85, ¶14 (observing that *Gardner* "explicitly declined to decide" this issue). And *Winward* was clear about the limited scope of its inquiry, stating it would be "improvident" for this Court to address its "constitutional authority to consider the merits of claims that are barred by the PCRA's procedural

limitations in a case that does not raise a meritorious claim." 2012 UT 85, ¶17. *Winward* provided only a "framework for considering a petitioner's claim that he qualifies for an exception to the PCRA's procedural bars." *Id.* Neither case held that an egregious injustice exception existed or that the Court in fact had constitutional authority to consider the merits of untimely post-conviction claims. In both, the Court did not need to decide these issues because neither petitioner met the threshold criteria. *See id.* ¶19.

So too here. Patterson has not satisfied *Winward*'s standard to have his egregious injustice complaint considered by this Court. *Winward* required Patterson to (1) show "as a threshold matter…his case presents the type of issue that would rise to the level that would warrant consideration of whether there is an exception to the PCRA's procedural bars," (2) "fully brief the particulars" of the exception he seeks, and (3) "demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." *Winward*, 2012 UT 85, ¶18. Patterson fails all three.

Patterson does not meet the first, threshold criterion, which requires him to show a "reasonable justification for missing the deadline combined with a meritorious defense." *Winward,* 2012 UT 85, ¶18. This threshold test has two elements: (1) a reasonable justification for missing the deadline, and (2) a meritorious defense.

This Court need not reach the second element because Patterson failed as a matter of law to prove the first. As discussed, Mr. Wall accurately advised him about his options following this Court's denial of certiorari, including that he had a year to file his state petition if he chose that option. Patterson cannot show that Mr. Wall "prevented" him from filing a timely post-conviction petition, where Mr. Wall expressly left it up to Patterson to decide which course to take after correctly advising him about the procedure and timeframe for filing a state petition. Patterson decided not to file one and instead waited until the last minute to file a federal habeas petition. Thus, Patterson cannot make even the threshold showing to get his proposed exception considered in this Court.

Under the second criterion, Patterson had to "fully brief the particulars of this exception," and had to "include an articulation of the exception itself, its parameters, and the basis for this court's constitutional authority for recognizing such an exception." *Winward*, 2012 UT 85, ¶18. Patterson proposes two frameworks for an egregious injustice analysis. Both are unworkable. And Patterson does not identify any constitutional origins of the exceptions he proposes, as *Winward* requires.

He first argues that the exception should be the same as *Winward*'s threshold—so long as the petitioner establishes a reasonable justification for

missing the state deadline combined with a meritorious claim, any untimeliness should be excused. Br.Aplt. 28-29. The proposition violates *Winward* because it would render the threshold itself superfluous. Furthermore, the standard—as Patterson acknowledges—is the same as the "interests of justice" exception that this Court expressly abandoned after the 2008 amendments to the PCRA. *Winward* itself determined that the parameters of the proposed exception could not be identical to those in the former, repudiated "interests of justice" exception. 2012 UT 85, ¶20 n.5 (stating that the "egregious injustice" standard is "more rigorous" than the "former interest of justice exception," which this Court "expressly abandoned" after the 2008 amendments).

Patterson next proposes a multi-factored test that he purports to derive from *Gardner* and *Winward*. Br.Aplt. 32-34. Under this framework, a post-conviction court would consider "(1) the length of the delay; (2) the petitioner's explanation for the delay; (3) the petitioner's diligence in seeking relief; (4) the nature of the petitioner's claims; and (5) whether the petition is a first or successive petition." *Id.* Patterson also asks this Court to consider a sixth factor that he concedes does not appear in *Gardner* or *Winward*: (6) "the length of the petitioner's sentence." *Id.*

But Patterson does not argue, much less establish, "the basis for this court's constitutional authority for recognizing such" a multi-factored test. *Winward*, 2012 UT 85, ¶18. Instead, he has cobbled together factors that he believes were "suggest[ed]" in *Winward* and *Gardner*. Br.Aplt. 32. He does not identify their constitutional provenance, as *Winward* required him to do. It was not enough for him to argue that this Court has broad habeas corpus powers to consider *an* exception; he had to show the constitutional genesis of his proposed factors themselves. To justify this Court's consideration of its constitutional authority to override the Legislature's prerogative, Patterson had to ground the "parameters" of his test in the constitution. *See Winward*, 2012 UT 85, ¶18. He has not done this with any of his factors. *Winward* did not invite petitioners to invent frameworks—on which to base the Court's constitutional powers—out of whole cloth. The Court should thus not address its constitutional authority to consider Patterson's proposed frameworks.

Furthermore, it is not clear—indeed, Patterson does not explain—how these factors would help a post-conviction court distinguish an injustice from an *egregious* injustice. *Gardner* suggested that the latter required a showing at least as demanding as the pre-2008 "good cause" standard for consideration of successive post-conviction petitions. *See* 2010 UT 46, ¶94. Under that

standard, the petitioner had to show that an "obvious injustice" would result from not reviewing the new claims and that it would be "unconscionable" not to review them on their merits. *Id.* (quoting *Gardner v. Galetka*, 2007 UT 3, ¶17, 151 P.3d 968). None of Patterson's proposed factors help to delineate obvious and unconscionable injustices. Indeed, his factors bear more resemblance to the former interests of justice test this Court has abandoned.

Finally, Patterson has not—either here or in the district court—fully briefed the merits of his claims under his second proposed exception. *Winward* required that he "demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." 2012 UT 85, ¶18. He bore the "heavy burden" of showing that his case presented "such significant issues" that this Court should address its "constitutional authority to consider exceptions to the PCRA's procedural bars." *Id.* The PCRA and *Winward* thus imposed on Patterson the burden to present the merits of each of his claims through the lens that *Windward* created. *See* Utah Code Ann. § 78B-9-106 (placing the burden on Patterson to disprove preclusive effect of the time bar). Patterson has not attempted to brief his post-conviction claims according to *Winward*'s instructions. His egregious injustice argument thus fails as a matter of law.

Patterson faults the State for not responding to the merits of his claims for relief in the district court. Br.Aplt. 30. But Patterson's late-filed petition, and his failure to establish that Mr. Wall gave him anything but correct advice post-certiorari, obviated any need to consider the merits of his claims. Indeed, that is the whole point of procedural bars.

2. This Court should now expressly repudiate *Winward*.

As discussed, the 2008 amendments revised the PCRA to make it the exclusive source for post-conviction remedies in Utah. *See Pinder*, 2015 UT 56, ¶56. Despite the explicit language of the PCRA and cases interpreting it as providing the "'sole remedy' for post-conviction relief" in Utah, *id.*, arguments persist that common law remedies must somehow remain available. Petitioners like Patterson have been encouraged by *Winward* and its predecessor *Gardner*. In each of those cases, the State did not concede that some vestige of the common law exceptions to the procedural bars might have survived the 2008 amendments in cases of egregious injustice—by virtue of the judiciary's constitutional writ authority.

And arguments over the existence of an "egregious injustice" exception to the PCRA's procedural bar have become ubiquitous in the district courts, the court of appeals, and this Court. In each instance, the State has had to brief the question. *See, e.g., Archuleta v. State*, case nos. 20160419-

SC, 20160992-SC; *Maestas v. State,* district case no. 130907856; *Lynch v. State*, district case no. 150900245; *Brown v. State,* case no. 20150266-CA; *Collum v. State*, 2015 UT App 229, 360 P.3d 13; *Benavidez v. State,* district case no. 130901184; *Jacob v. State*, district case no. 130901368; *Lucero v. State,* district case no. 130404567, appellate case no. 20150197-CA; *Sandoval v. State*, district case no. 130907469, appellate case no. 20150617-CA; *Williams v. State,* case no. 20140135-CA; *Dyches v. State*, district case no. 140901822; *Leger v. State*, district case no. 130500137; *Noor v. State*, district case no. 130907566, appellate case no. 20160797-CA; *McNair v. State*, district case no. 100901725.[14]

The "egregious injustice" question thus multiplies litigation in the district courts. And this case is yet one more instance of substantial resources wasted on this question that continually evades resolution. The State thus

[14] Another petitioner—death-sentenced Troy Kell—recently appealed a summary judgment order denying post-conviction relief on a successive petition and rejecting the same constitutional arguments Patterson has argued here. *See Kell v. State*, appellate case no. 20180788-SC.

suggests that deciding the question once and for all would broadly serve judicial economy.[15]

In *Winward* and *Gardner*, as here, the claims at issue were a hodgepodge of time-barred, previously-litigated, or otherwise procedurally-barred claims unsupported by any new evidence of any significance. Like Patterson's claims here, the claims in *Winward* and *Gardner* were weak enough that this Court could easily avoid the difficult constitutional question by merely finding that, whatever might have survived the 2008 amendments—if anything—the claims in those particular cases did not rise to the level of an egregious injustice. As discussed, Patterson failed as a matter of law to satisfy *Winward*'s threshold test for consideration of any proposed exception to the time bar. However, the analytical underpinning for the *Winward* test is also incorrect and should be overruled.

The *Winward* opinion purported to avoid deciding whether an egregious injustice exception to the PCRA's procedural bar exists. Yet the

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[15] The State acknowledges that this Court may be inclined to invoke constitutional avoidance principles since, as shown, Patterson could not benefit from a constitutional holding. *See Gardner*, 2010 UT 46, ¶93 (noting this Court's "obligation to 'avoid addressing constitutional issues unless required to do so'" (quoting *State v. Anderson*, 701 P.2d 1099, 1103 (Utah 1985)). But for the reasons stated, the State expressly asks the Court to reach the issue anyway, repudiate prior statements indicating judicial ownership of post-conviction remedies, and deny Patterson relief on statutory grounds.

court also stated that it "would be improvident for us to address our constitutional authority to consider the merits of claims that are barred by the PCRA's procedural limitations in a case that does not raise a meritorious claim" and then set out its three-pronged "framework for considering a petitioner's claim that he qualifies for an exception." 2012 UT 85, ¶¶16-19. This analysis resulted in the oddity of establishing a test to determine whether a petitioner qualifies for an exception that has never been determined to exist. Justice Lee's concurrence in the judgment in *Winward* pointed this out and provided a useful approach for thinking through what portions, if any, of the common law of habeas corpus survived the PCRA's 2008 amendments. *Id.* ¶¶44, 48-64 (Lee, J., concurring).

Post-conviction relief is "a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review" and it "is not part of the criminal proceeding itself." *Finley*, 481 U.S. at 557. As a result, the constitutional rights that attach to criminal trials, pleas, and direct review, do not attach to the post-conviction process. In fact, "States have no obligation to provide this avenue of relief." *Id*; *accord Murray v. Giarratano*, 492 U.S. 1, 8 (1989). Because the post-conviction process is a creation of state law not mandated by the constitution, states have plenary power to regulate it or do away with it altogether.

While it is true that the Utah Constitution's Suspension Clause vests the power to review and adjudicate the writ of habeas corpus with this Court, Patterson conflates the historical writ—which is protected in the constitution—with the post-conviction relief process—which is entirely a creature of statute, subject to regulation.

a. Historical underpinnings of Utah's writ of habeas corpus show that it is an extremely narrow procedure distinct from post-conviction review.

The critical question is whether post-conviction review is part of the constitutional writ enshrined in the Utah Constitution. If it is, then there is arguably some area of "lingering judicial power" beyond the PCRA that belongs solely to the Utah Supreme Court that *may* include the power to find an egregious injustice exception to the PCRA's bars. *Winward*, 2012 UT 85, ¶49 (Lee, J., concurring). If it is not, then the PCRA's statement that it is the sole remedy for post-conviction review in Utah usurps no constitutional authority belonging to this Court and nothing, including the power to find an egregious injustice, survived the PCRA's 2008 amendments.

This is critical because the notion of an egregious injustice exception was not embedded in the constitutional writ; rather, it was conceptually invented in *Gardner* and expounded in *Winward*. The phrase "egregious injustice" appears in only four cases before *Gardner* in 2010. Only two of those

were criminal cases, and in each the phrase was used to describe the "egregious injustice" that would result from allowing a convicted person to go free because of technical noncompliance with the timeframes set out for sentencing. *See State v. Tyree*, 2000 UT App 350, ¶7, 17 P.3d 587; *State v. Helm*, 563 P.2d 794, 797 (Utah 1977). That alone shows there was no longstanding tradition of allowing noncompliance with the procedural bars based on an egregious injustice. There was nothing analogous to it embedded in the writ either.

As set forth below, historically there was no post-conviction, post-appeal error review process at all. For most of its history, the writ of habeas corpus was an extremely limited procedure for challenging confinement when no other judicial process was available. At the time the Utah Constitution was drafted and ratified, the framers understood it only in this limited fashion. The "privilege of the writ of habeas corpus" enshrined in Article I, section 5 of the Utah Constitution encompassed almost none of the avenues for relief later developed at common law or currently enumerated in the PCRA.

Neither did the federal common-law writ by the 19th Century. In *Ex parte Kearney*, 20 U.S. 38 (1822), the United States Supreme Court addressed an application for the writ at a time when there was no right of appeal from

the federal circuit courts to the Supreme Court in criminal cases. The Court noted that if "this Court cannot *directly* revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose, that [the writ] was intended to vest it with the authority to do it indirectly?" *Id*. at 42. It then noted that the writ is not intended to act as a form of appeal to review errors, stating "[i]f this were an application for a *habeas corpus*, after judgment of an indictment for an offence within the jurisdiction of the Circuit Court, it could hardly be maintained, that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner." *Id*. at 43.

The Court then turned to an English case setting out that the writ was limited to challenges of the jurisdiction of the court, concluding that the writ "can do nothing, when a person is in execution by the judgment of a Court having a competent jurisdiction." *Id*. at 44. It then specifically declined to expand the scope of the writ, stating instead it was "entirely satisfied to administer the law as we find it." *Id*. at 45. That was the scope of the writ of habeas corpus as originally incorporated into American law and the United States Constitution. *Accord Ex parte Watkins*, 28 U.S. 193 (1830) (denying petition for writ of habeas corpus from a convicted prisoner because the "judgment of the circuit court in a criminal case is of itself evidence of its own

legality"); *see generally*, 6 Wayne R. LaFave, Criminal Procedure, § 28.1(a), at 6-7 (2nd ed. West 2004).

The first expansion of the federal writ came in 1867, but not from expansion of the common law. Rather, Congress passed an act making the writ available to all cases of detentions in violation of the constitution, laws, or treaties of the United States. *Felker v. Turpin*, 518 U.S. 651, 659 (1996). Yet even as late as *Thompson v. Harris*, 144 P.2d 761 (Utah 1943), *cert. denied*, 324 U.S. 845 (1945), this Court stated "[o]n habeas corpus this court is generally limited to the question of whether the committing court had jurisdiction to try and commit." *Id*. at 765. Although the *Thompson* court did note federal cases in which the writ had been held to apply, post-conviction, to petitioners "deprived of one of [their] constitutional rights such as due process of law," it did not explicitly hold that the writ had expanded in Utah to encompass such claims. *Id*. at 766. Thus, the federal writ expanded statutorily along a separate track from the state writ, which remained much narrower, and for much longer.

A large body of common law built up around the kinds of claims that could be brought in the post-conviction process since the adoption of the Utah Constitution, including rules surrounding procedural default and methods for overcoming those defaults in successive post-conviction

petitions. However, much of that development has occurred since the 1940s and virtually none of it rests on the historical nature of the writ. It instead constitutes a body of judicially-developed post-appeal process wholly unrelated to the writ itself and well within the power of the legislature to regulate. Most importantly, none of it includes an egregious injustice or other analogous exception to statutory bars.

b. The Utah Constitution's plain language, its framers' intent, and pre-*Thompson* cases show the writ of habeas corpus to redress only incarceration without process.

In assessing the scope of the right guaranteed by the Utah Constitution, courts must first look to the language's plain meaning. Courts also may look to the "framers' intent, the common law, particular traditions of our state, and decisions by our sister states and federal counterparts." *State v. Poole*, 2010 UT 25, ¶12, 232 P.3d 519.

The text of the Utah Constitution itself shows that the framers understood the writ to redress only incarceration without process. The Suspension Clause provides: "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Utah Const. art. I, § 5. By explicitly permitting suspension of the writ during times of "rebellion or invasion," the framers agreed that the government should have the authority to incarcerate someone without giving

any reason and, as a corollary, to remove the means to challenge that incarceration.

The need to incarcerate someone without any reason has nothing to do with post-appeal collateral attack on a criminal conviction or sentence. Conviction and sentence constitute the most compelling reason to incarcerate a person: the person has been found guilty of and sentenced for committing a crime. *Watkins*, 28 U.S. 193 at 194 (stating the "judgment of the circuit court in a criminal case is of itself evidence of its own legality"). And unlike enemies of the state who could be held without process during times of emergency, criminal defendants automatically receive judicial review of their incarceration by bail review, preliminary hearing, arraignment, trial, direct appeal, and the whole panoply of procedures and associated rights available to criminal defendants.

The state constitutional convention debates show that the Utah Constitution's framers understood the writ only in its narrow historical terms. In discussing article I, section 5's proscription on suspending the writ of habeas corpus, the framers characterized it as "depriv[ing] [a person] of his liberty without [the writ's] particular redress." Official Report of the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah ("Official Report") at 253 (1898). The

framers continued that the writ should be suspended "if the emergency is grave enough" to give "those in authority the use of their best judgment" and "not to be forced to give any reason for their acts." *Id.* at 256.

The focus of the framers' debate demonstrates that they understood habeas corpus to be a means to challenge pre-conviction incarceration, not a means to challenge the legality of a conviction or sentence imposed after trial and affirmed on appeal. This, of course, was entirely consistent with the larger body of federal habeas common law—as distinct from Congressional expansion of the writ—extant during the nineteenth century.

Indeed, during the constitutional debates, the Utah framers explicitly avoided inserting innovations into the Utah writ that deviated from the historical writ. *See, e.g.*, Official Report at 255 (Mr. Evans opposing unusual writ language on grounds that "to make the amendment would be an innovation upon other constitutions or a majority of them all"); *id.* (Mr. Goodwin opposing unusual writ language because the "gentlemen who formed the Constitution of the United States had been through very trying times for a good many years. They fixed it and considered it sufficient. Without being at all sarcastic, I do not believe we as a body can…improve on that original instrument."); *id.* (Mr. Evans arguing that certain innovative language "might be considered in a different way" from the federal writ).

Despite the framer's understanding, this Court later expanded the scope of the constitutional writ of habeas corpus to incorporate post-appeal review of a conviction or sentence for constitutional error. In *Hurst v. Cook*, the Court recognized that "[i]nitially, the Writ was not available to collaterally attack a criminal conviction, except on the ground that the court lacked jurisdiction or that a sentence was unlawful." 777 P.2d at 1034. But it continued, "habeas corpus has become a procedure for assuring that one is not deprived of life or liberty in derogation of a constitutional right, irrespective of whether the error was categorized as jurisdictional or nonjurisdictional." *Id*.

To support its recitation of the evolution of habeas corpus, the *Hurst* court relied on *Thompson v. Harris*, which, as discussed above, merely referenced federal cases expanding the writ without expressly incorporating them into Utah law. *See Thompson*, 144 P.2d at 766 (citing *Bowen v. Johnston*, 306 U.S. 19 (1939); *Johnson v. Zerbst*, 304 U.S. 458 (1938)). Neither the *Hurst* court nor the *Thompson* court undertook to discern whether the Utah framers understood habeas corpus to incorporate post-conviction, post-appeal review of a criminal conviction for constitutional error. Those cases merely referenced federal cases and both substantially post-dated ratification of Utah's constitution (*Thompson* by more than forty years and *Hurst* by more

than ninety). And nothing in the debates indicates that the Utah framers intended to track the federal writ's development. *See Poole*, 2010 UT 25, ¶12 ("In evaluating the Utah Constitution, we have rejected a presumption that 'federal construction of similar language is correct.'") (citation omitted). Finally, the framers gave no hint that they meant either to commit the constitutional writ to keep lock-step with the federal writ or to incorporate federal statutory expansion of the common law. Instead, as noted, the framers scrupulously rejected innovations that deviated from the writ's historical use and understanding.

Prior to *Thompson*, this Court did not rely on habeas corpus for broad post-appeal review of a criminal conviction's constitutional validity. Twelve years after ratification, this Court recognized that a person in confinement on "judicial process" could use habeas corpus only as a means to challenge whether the issuing court had jurisdiction to issue the process. *Winnovich v. Emery*, 93 P. 988, 993 (Utah 1908). The Court emphasized that the "writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of review, unless some statute specially authorizes this to be done." *Id*. And *Winnovich* involved the validity of pre-trial bindover. *Id*. at 993-94. It was not a post-appeal review case.

Pre-*Thompson* cases that did rely on the writ for a post-appeal review applied a far more restrictive review than the federal cases the *Thompson* court cited. For example, the supreme court in *Connors v. Pratt* set aside a conviction on habeas review because the information on which it was based was "of no force or effect." 112 P. 399, 399-400 (Utah 1910). The court also relied on habeas corpus to set aside a sentence that exceeded that which the relevant statutes permitted in *Roberts v. Howells,* 62 P. 892, 892-93 (Utah 1900).

Similarly, *In re Maxwell*, 57 P. 412 (Utah 1899), and *In re James McKee*, 57 P. 23 (Utah 1899), reviewed the entire judicial regime upon which the prosecutions proceeded to determine if "the petitioner was tried and convicted" under "legal proceedings." *McKee*, 57 P. at 27. Specifically, the court considered whether a criminal case may proceed under information, rather than indictment. *Id.*; *see also Maxwell*, 57 P. at 414-15 (holding that proceeding by information, rather than indictment, did not violate constitution). *McKee* and *Maxwell* concerned whether the prosecution as a whole proceeded under constitutionally permissible legal machinery, not whether any technical error invalidated the convictions within an otherwise valid legal proceeding. The Court did not countenance habeas proceedings as a collateral attack of convictions or sentences. It was not until *Thompson*

that this Court referenced the possibility of post-conviction, post-appeal review addressing trial-related errors.

In short, over the past seventy years, this Court slowly developed a body of common law post-conviction relief that began with *Thompson* and culminated in *Hurst*. But all of it was beyond the boundary of the constitutional writ and therefore fully subject to regulation. The 2008 amendments to the PCRA do not encroach on the scope of the constitutional writ of habeas corpus, but merely regulate the body of post-conviction law residing beyond the scope of the constitutional writ.

The United States Congress has done the same with the federal writ. The United States Supreme Court has already found congressional regulation of using the writ for post-conviction review is constitutional because it has "long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law,'…and we have likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 518 U.S. at 664 (citation omitted). The same is true under Utah law.

The PCRA is therefore the "sole remedy" for post-conviction relief in Utah and nothing remains of the common law remedies and procedures that developed from *Thompson* forward, other than what was expressly provided

in the PCRA. This did not include an egregious injustice exception to the procedural bars. *Winward*, *Gardner,* and any other cases suggesting otherwise are therefore incorrect and should be overruled.[16]

Patterson nevertheless cites a 1984 amendment to the Utah Constitution, which gave this Court jurisdiction to issue "all extraordinary writs," as evidence of this Court's authority to promulgate exceptions to the PCRA's procedural bars. Br.Aplt. 10 (citing Utah Const. Art. VII, §§ 3, 5 (1984)). Whereas the 1896 constitution listed each type of writ within this Court's jurisdiction, including the writ of habeas corpus, the 1984 amendment reflected a "movement toward simplification" in civil pleading, where the practice of listing available common law writs had been abandoned. *State v. Barret*, 2005 UT 88, ¶¶10-11, 127 P.3d 682.

Patterson's argument on the relevance of this amendment is inadequate to meet his burden of persuasion on appeal. *See* Utah R. App. P. 24; *State v. Roberts*, 2015 UT 24, ¶¶18-20, 345 P.3d 1226. He does not say whether he believes the 1984 amendment broadened the scope of habeas

[16] This includes Patterson's cited cases—*Brown v. Cox*, 2017 UT 3, ¶14, 387 P.3d 1040; *Julian v. State*, 966 P.2d 249, 259 (Utah 1998); and *Petersen v. Utah Bd. of Pardons*, 907 P.2d 1148, 1152 (Utah 1995)—which followed *Hurst*'s and *Thompson*'s development of common law outside the scope of the writ. *See* Aplt.Br. 9-11.

corpus to include post-conviction relief or if he believes that it merely re-codified constitutional habeas authority over post-conviction relief that supposedly existed in 1896.

To the extent he means the latter, the argument is incorrect. As discussed, Utah's framers intended that the writ of habeas corpus cover only pretrial detention without process. And to bring the constitution in line with modern pleading practices, the 1984 amendment merely simplified the writ process by dispensing with chancery-type specificity and giving this Court jurisdiction over "all extraordinary writs." The amendment did not transform the scope of the writ as contemplated by the original framers. Indeed, Patterson does not say as much. And it would go too far to say that the People in 1984 transformed the nature of the writ by ratifying caselaw that misconstrued the writ's constitutional provenance.

Even if the 1984 amendment gave this Court new constitutional authority over post-conviction review, this Court has expressed in rule 65C, Utah Rules of Civil Procedure, that any such authority must be exercised within the parameters of the PCRA. Utah R. Civ. P. 65C(a). Patterson has not challenged the constitutionality of this Court's rule.

E. Patterson fails to show any Suspension Clause violation because post-conviction relief is not part of the constitutional writ that the clause protects.

Patterson argues that enforcing the PCRA's statute of limitations would suspend the writ of habeas corpus. Br.Aplt. 34-39. But, as discussed, the 2008 amendments to the PCRA—including its time limitations—do not encroach on the scope of the constitutional writ of habeas corpus, but merely regulate the body of post-conviction law residing beyond the scope of the constitutional writ. Because post-conviction review is not part of the constitutional writ, the PCRA's statement that it is the sole remedy for post-conviction review in Utah usurps no constitutional authority belonging to the Utah Supreme Court, and no extra-statutory exceptions survived the PCRA's 2008 amendments.

But even if the constitutional writ embraced post-conviction remedies, the PCRA's procedures, including its time bar, are a reasonable substitute for the writ of habeas corpus. *See Swain v. Presley*, 430 U.S. 372, 381 (1977) (holding that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus"). Across the board, courts have upheld post-conviction time bars because they give petitioners a meaningful opportunity to contest their confinement. *See Baker v. Grams*, No.

10-CV-412, 2010 WL 4806992, at *3 (E.D.Wis. Nov. 22, 2010) (recognizing that "courts have…unanimously upheld the constitutionality of the ADEPA's limitations period"). Under Utah's PCRA, petitioners have ample time to bring their claims, along with flexible accrual dates and tolling provisions. *See Winward*, 2012 UT 85, ¶¶63-65 (Lee, J., concurring in the judgment) (determining that the PCRA's time bar "survives scrutiny under the Suspension Clause" because it "imposes rational and reasonable processes to make [inquiries into illegal detention] manageable and speedy").

Courts considering the constitutionality of time bars like the PCRA's have uniformly upheld them against Suspension Clause challenges. *See Delaney v. Matesanz,* 264 F.3d 7, 12 (1st Cir.2001) (holding that the AEDPA's one-year limitation does not offend the federal Suspension Clause and citing Eleventh, Second, Fifth, and Tenth Circuit Court cases in accord); *Commonwealth v. Zuniga,* 772 A.2d 1028, 1031-32 (Pa.Super.Ct. 2001) (upholding one-year statute of limitations on PCRA petitions); *In re Runyan,* 121 Wash.2d 432, 853 P.2d 424, 444–45 (1993) (en banc) (same); *see also People v. Wiedemer,* 852 P.2d 424, 435 (Colo. 1993) (en banc) (upholding three-year statute of limitations); *Davis v. State,* 443 N.W.2d 707, 709-10 (Iowa 1989) (same); *Battrick v. State,* 267 Kan. 389, 985 P.2d 707, 714–15 (1999) (upholding thirty-day limitation); *Bartz v. State,* 314 Or. 353, 839 P.2d 217, 224-25 (1992)

(holding that 120-day time limit for post-conviction collateral attacks did not violate state Suspension Clause); *Potts v. State,* 833 S.W.2d 60, 61–62 (Tenn. 1992) (holding that three-year statute of limitations was not an unconstitutional suspension of the writ of habeas corpus). Patterson provides no reason for this Court to deviate from this uniform trend, where Utah's PCRA provides petitioners a full year for filing, flexible accrual dates, and statutory tolling mechanisms that excuse delay during any periods of mental incapacity or unconstitutional state interference.

Because post-conviction relief has an entirely different pedigree than the constitutional writ of habeas corpus, regulations within the PCRA do not offend the writ. Alternatively, the PCRA provides a reasonable substitute for the writ of habeas corpus and imposes reasonable time limitations on filing. Enforcing those limitations on Patterson does not violate the Suspension Clause.

Patterson nevertheless relies on dicta from *Julian v. State*, a twenty-year-old post-conviction case, to argue that the current version of the PCRA is constitutionally infirm. Br.Aplt. 37-38 (citing 966 P.2d 249 (Utah 1998)). But *Julian*'s dicta has since been repudiated, and this Court has never held that application of the PCRA's procedural bars or its current one-year statute of limitations is unconstitutional.

In *Julian*, this Court ruled that an "inflexible" four-year statute of limitations applicable to civil claims not otherwise provided for by law could not be constitutionally applied to bar a post-conviction petition. 966 P.2d at 252-53. But the Court did not hold that the PCRA's one-year limitations period was unconstitutional—indeed, Julian had not put its constitutionality directly at issue. *See id.* at 254. Nevertheless, this Court stated that "if the proper showing is made, the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights." *Id.* at 254. The Court added, "[i]t necessarily follows that *no* statute of limitations may be constitutionally applied to bar a habeas petition." *Id.*

That additional language did not control the outcome of Julian's case because he had not directly challenged the constitutionality of the PCRA's one-year limitations period; instead, he had argued only that a then-available "interests of justice" exception excused his untimely filing. *Id.*; *see Swart v. State*, 1999 UT App 96, ¶¶3-4, 976 P.2d 100 (acknowledging that *Julian*'s statements about the constitutionality of the were "dicta" and that "no court ha[d] yet actually declared the [PCRA's] statute of limitations…unconstitutional"). The district court agreed with Julian, and this Court found no abuse of discretion in applying the interests-of-justice exception. *Julian*, 966 P.2d at 254.

This Court next considered the "interests of justice" language in *Frausto v. State*, 966 P.2d 849 (Utah 1998). Unlike Julian, Frausto directly challenged the one-year time-bar's constitutionality. *Id*. at 851. The *Frausto* plurality author quoted his language from *Julian* that "'no statute of limitations may be constitutionally applied to bar a habeas petition.'" *Id*. (Russon, J., with one justice concurring). However, that opinion did not carry a majority. Two justices concurred only in the result, *id*. at 851, and one wrote separately that he "disagree[d] with the main opinion's holding that 'a petitioner's failure to comply with a statute of limitations may never be a proper ground upon which to dismiss a habeas corpus petition,'" *id*. at 852; *Swart*, 1999 UT App 96, ¶3 (recognizing that the language at issue did not carry a majority).

This Court effectively disavowed the *Julian* dicta in *Adams v. State*, 2005 UT 62, ¶17, 123 P.3d 400. There, the district court dismissed Adams's petition for post-conviction relief as untimely under the PCRA's statute of limitations. *See id.* ¶¶4,7. Adams claimed that the PCRA's statute of limitations was unconstitutional. *Id.* ¶9. In resolving Adams's claims, this Court did not rely on its prior language in *Julian* to hold that the PCRA's statute of limitations was unconstitutional. *Id.* ¶9. Instead, it declined to reach the constitutional issue, choosing to interpret the then-available "interest of justice" exception. *See id.* The Court affirmed the dismissal of two of Adams's three claims as

untimely under the PCRA's statute of limitations, holding that he had failed to satisfy the "interests of justice" exception. *See id.* ¶27. Therefore, contrary to the dicta in *Julian*, this Court has affirmed the dismissal of post-conviction claims based solely on the statute of limitations.

This Court has never held that a time or procedural bar to a post-conviction claim would be unconstitutional without an "interests of justice" exception. The Court's real concern in cases addressing prior statutes of limitations was a lack of sufficient flexibility in the time-bar provisions found to be unconstitutional.

That concern is no longer relevant because the PCRA has flexible accrual dates and tolling provisions. While some of its accrual dates look to fixed events, others postpone accrual to account for later occurring events, such as new evidence or new legal rules. *See* Utah Code Ann. § 78B-9-107. The statute tolls the year for any time the petitioner is unable to bring suit because of mental or physical disability, or because unconstitutional state action prevents a petitioner from filing. *Id.* It also tolls the year while a DNA or factual innocence petition is pending. *Id*. This flexibility affords petitioners all the opportunity to present a claim that fairness reasonably requires.

***

Because post-conviction relief has an entirely different pedigree than the constitutional writ of habeas corpus, regulations within the PCRA do not offend the writ. Alternatively, the PCRA provides a reasonable substitute for the writ of habeas corpus and imposes reasonable time and procedural limitations on filing. Enforcing those limitations on Patterson does not violate the Suspension Clause.[17]

II.

This Court may affirm for Ground 1 (parts 1 and 3), Ground 2 (parts 1, 3, and 4), and Ground 3 on the alternative basis that they were already raised or addressed in the criminal appeal.

The State asserted another procedural bar for Ground 1 (parts 1 and 3); Ground 2 (parts 1, 3, and 4); and Ground 3 in the case below because those grounds had already been raised or addressed in previous proceedings. PCR635-42 (citing Utah Code Ann. § 78B-9-106(1)(b)). The post-conviction court did not address section 106(1)(b), instead granting summary judgment in full under section 107's time bar. But this Court may affirm on any ground apparent from the record. *Dipoma v. McPhie*, 2001 UT 61, ¶18, 29 P.3d 1225. And it should do so here.

The PCRA precludes relief for claims that have already been raised or

[17] Patterson has abandoned his argument that the PCRA's time bar violates Equal Protection and Utah's Uniform Operation of Laws. *See* PCR997.

addressed in prior proceedings. Any claim that "was raised or addressed at trial or on appeal" is procedurally barred. Utah Code Ann. § 78B-9-106(1)(b). The PCRA also bars claims that could have been raised at trial or on appeal, but were not. *Id.* § 78B-9-106(1)(c).

A petition for post-conviction relief "is a collateral attack of a conviction and/or sentence and is not a substitute for direct appellate review." *Carter v. Galetka*, 2001 UT 96, ¶6, 44 P.3d 626 (citing *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994)). Society has a compelling interest in the finality of judgments, and the general rule is that a defendant must raise, at trial or on direct appeal, all of the errors that allegedly occurred. *See Litherland*, 2000 UT 76, at 11,16-17. If he does not, a petitioner cannot receive relief for the alleged violation. *See Johnson v. State*, 2011 UT 59, ¶12, 267 P.3d 880 (affirming procedural bar of claim of ineffective assistance of counsel that was not, but could have been, raised on direct appeal).

The PCRA recognizes a single exception for claims that could have been but were not raised at trial or on appeal when "the failure to raise the [claim] was due to ineffective assistance of counsel." Utah Code Ann. § 78B-9-106(3). This exception does not apply to claims that have already been raised and lost under section 106(1)(b). *See id.* § 78B-9-106(3) (providing exception only for claims barred under section 106(1)(c)—i.e. claims that

could have been but were not raised at trial or on appeal). Indeed, "even claims relating to ineffective assistance of counsel may be procedurally barred under the PCRA." *Johnson*, 2011 UT 59, ¶10.

This Court has never required an exact overlap with the previous claim to bar a post-conviction claim. *See Kell v. State*, 2008 UT 62, ¶17, 194 P.3d 913; *Myers v. State*, 2004 UT 31, ¶14, 94 P.3d 211; *Gardner*, 888 P.2d at 615-16. Rather, if a claim is in "essence" the same as one that was raised earlier, it is barred. *Gardner*, 888 P.2d at 615. Thus, Patterson may not avoid the procedural bar by putting an ineffective-assistance-of-counsel label on claims that have already been litigated and lost. Even if the claim is "framed somewhat differently," it will be barred if it is "substantially similar," and "rest[s] on arguments" used for a claim raised on direct appeal. *Myers v. State*, 2004 UT 31, ¶¶14, 18. *Cf. Taylor v. State*, 2012 UT 5, ¶52, 270 P.3d 471 (affirming dismissal of several claims in Taylor's second post-conviction petition that were "merely variations" on claims already raised in his first post-conviction petition).

This Court has unwaveringly upheld section 106(1)(b)'s bar on claims that merely added an ineffective-assistance gloss to already-litigated claims of error. *Kell* , 2008 UT 62, ¶¶15-17; *Myers*, 2004 UT 31, ¶14 (rejecting appellate claims that, "though framed somewhat differently, rest[ed] on arguments

identical to" his trial court claims); *Gardner*, 888 P.2d at 615 ("A claim of ineffective assistance of counsel may not, therefore, be used simply to relitigate 'under a different guise' an issue already disposed of on direct appeal.") (citation and quotations omitted). For instance, it does not matter that a claim raised earlier was poorly argued or that it could be argued better in a post-conviction attack. *Kell*, 2008 UT 62, ¶17 (barring previously-raised claims "regardless of whether [petitioner's] counsel raised them in the most effective manner" in earlier proceedings). A substantive claim that was raised earlier and then is raised on post-conviction as an ineffective assistance claim is "essentially the same" and is barred. *Gardner*, 888 P.2d at 616. This Court may not consider the merits of claims that merely add an ineffective-assistance gloss.

A. Ground 1 (part 1) and Ground 2 (part 1) are procedurally barred because Patterson already raised and lost his claim that trial counsel ineffectively protected his clergy-penitent statements.

On direct appeal, Patterson argued that trial counsel "never considered" the clergy-penitent privilege, and that Patterson was harmed by trial counsel's "complete failure to be cognizant of" the privilege. PCR691; PCR729,731 (Appellant's Reply Brief, 18 July 2012) (Addendum D). Indeed, Patterson argued that trial counsel "utterly failed in asserting the privilege and protecting Mr. Patterson." PCR730.

In his petition, Patterson again argued that that his trial counsel was ineffective for not protecting his confidential statements to his bishop. PCR492-93 (Ground 1, part 1). He purported to make a novel argument: that trial counsel should have prevented any privileged communications between the bishop and the forensic psychologist. Patterson says Mr. Wall was ineffective for not adding this argument to the claim that trial counsel ineffectively handled the clergy-penitent privilege. PCR498 (Ground 2 (part 1)).

But Patterson's post-conviction claim is of a piece with his complaints on appeal that trial counsel was completely unaware that a clergy-penitent privilege existed. Patterson's new gloss on the ineffectiveness claim does not materially differ from his argument on appeal that trial counsel should have been cognizant that a privilege existed and taken steps to protect his client's clergy-penitent communications. Because the post-conviction claims are "essentially the same" as Patterson's appellate challenge to trial counsel's handling of the clergy-penitent privilege, they are barred. *Gardner*, 888 P.2d at 616.

B. Ground 1 (part 3) and Ground 2 (part 3) are procedurally barred because Patterson already raised and lost his claim that trial counsel was ineffective with regard to the prosecutor's allegedly "empty" threat to impeach him with clergy-penitent communications.

On direct appeal, Patterson argued his trial counsel was ineffective because the prosecutor's threat of impeaching him with his admissions to his bishop was an empty one. PCR690. He argued that the prosecutor "did not have any admissions or confessions by Mr. Patterson to the bishop upon which to base his assertion." *Id.* Patterson made this argument based on evidence adduced in a rule 23B hearing, which targeted trial counsel's effectiveness in handling the psychosexual evaluation and clergy-penitent privilege. *Id.* Patterson expressly argued that counsel was ineffective with respect to the prosecutor's threats. PCR692-93.

In post-conviction, Patterson purported to argue a different point: that his trial counsel should have actually verified that the prosecutor was making "an empty threat." PCR495-96. He said that trial counsel should have called the bishop or the prosecutor to find out how much the prosecutor actually knew about the clergy-penitent communications. *Id.* But this claim amounts to a *de minimis* variation on Patterson's appellate claim. Patterson already argued that the prosecutor's threat of impeachment was illusory because he did not actually know what the clergy-penitent communications entailed.

And he already tied this directly to trial counsel's alleged ineffectiveness. Patterson's new claim is not really new at all. It is barred under section 106(1)(b).

C. Ground 2 (part 4) is procedurally barred because Patterson already raised and lost his claim that he never waived his clergy-penitent privilege.

On direct appeal, Patterson argued that he "never waived the clergy-penitent privilege." PCR694-95. This was so, he claimed, because his bishop "never related, in any way, any clergy-penitent privileged information to [the evaluator] about Scott Patterson." PCR693-94.

In post-conviction, Patterson merely re-litigated this issue, arguing that he never waived the privilege because the evaluating doctor "agreed" that the bishop "never disclosed any confidential communications." PCR500. Patterson said that Mr. Wall never challenged the trial court's finding that he waived the privilege, but Mr. Wall did just that by arguing that one "fatal flaw" with the district court's finding on rule 23B remand was "that Mr. Patterson waived the clergy-penitent privilege by consenting to…having the psychologist communicate with the Bishop." PCR730. The PCRA does not allow Patterson to make the same claim and merely add an appellate-ineffectiveness label. *Kell*, 2008 UT 62, ¶¶15-17; *Myers*, 2004 UT 31, ¶14; *Gardner*, 888 P.2d at 608. It is barred.

D. Ground 3 is procedurally barred because Patterson already raised and lost his prosecutorial misconduct claim on appeal; alternatively, he could have raised it on appeal, but did not.

On appeal, Patterson argued that the prosecutor engaged in misconduct that violated Patterson's right to a fair trial by threatening to impeach him with the clergy-penitent communications. PCR673-81. Based upon the prosecutor's testimony at the rule 23B evidentiary hearing, Patterson claimed that the prosecutor did not actually know what Patterson discussed with the bishop and thus improperly threatened Patterson with those alleged communications. *Id.* Patterson specifically argued on appeal that "[i]ntimidating a defendant, or any witness, with the threat of using communications with clergy for impeachment on cross-examination is a breach of the prosecutor's duty not to strike foul blows." PCR681.

Patterson then merely relitigated this claim in post-conviction when arguing that the prosecutor committed misconduct by threatening to call the bishop without knowing what Patterson had actually said to the bishop. PCR501-02. Patterson admitted in his petition that he "raised a similar prosecutorial misconduct claim" on appeal, and he did not offer the post-conviction court any legitimate reason for reviewing that claim again. PCR502.

Even if the Court determines that the claim materially differs from Patterson's prosecutorial misconduct claim in the criminal appeal, the claim is nevertheless barred because Patterson could have raised it then, but did not. Utah Code Ann. § 78B-9-106(1)(c).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on December 4, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1) and (h), Utah R. App. P., this brief contains 19,097 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

/s/ Daniel W. Boyer

DANIEL W. BOYER
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on December 4, 2018, two copies of the Brief of Appellee were ☑ mailed ☐ hand-delivered to:

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(counsel for Patterson)

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melissa Walkingstick Fryer

Addenda

Addendum A

Utah Code Annotated § 78B-9-106. Preclusion of relief--Exception

(1) A person is not eligible for relief under this chapter upon any ground that:
(a) may still be raised on direct appeal or by a post-trial motion;
(b) was raised or addressed at trial or on appeal;
(c) could have been but was not raised at trial or on appeal;
(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
(e) is barred by the limitation period established in Section 78B-9-107.

(2) (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.
(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) (a) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel; or
(b) Notwithstanding Subsections (1)(c) and (1)(d), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial, on appeal, or in a previous request for post-conviction relief, if the failure to raise that ground was due to force, fraud, or coercion as defined in Section 76-5-308.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

Utah Code Annotated § 78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.
(2) For purposes of this section, the cause of action accrues on the latest of the following dates:
(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;
(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;
(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;
(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;
(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or
(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.
(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, due to physical or mental incapacity, or for claims arising under Subsection 78B-9-104(1)(g), due to force, fraud, or coercion as defined in Section 76-5-308. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).
(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:
(a) exoneration through DNA testing under Section 78B-9-303; or
(b) factual innocence under Section 78B-9-401.
(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

Utah R. Civ. P. 56. Summary Judgment

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(1) *Supporting factual positions.* A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials not cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it without prejudice;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the moving party is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmoving party;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

Utah R. Civ. P. 65C. Post-Conviction Relief

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;
(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h) (1) *Summary dismissal of claims.* The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claim has no arguable basis in fact; or

(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a

copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.
(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:
(1) consider the formation and simplification of issues;
(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Addendum B

UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	Case No. 20100243 CA
Plaintiff/Appellee,	)	
v.	)	
SCOTT KIRBY PATTERSON,	)	
Defendant/Appellant.	)	

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APPELLANT'S OPENING BRIEF

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On Appeal from the Second Judicial District Court in and for the County of Davis, State of Utah, Honorable Thomas L. Kay Presiding

- - - - -

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

STATEMENT OF JURISDICTION

Court of Appeals Jurisdiction

The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. § 78A-4-103(2)(j), as this case was transferred to the Court of Appeals from the Supreme Court of the State of Utah.

STATEMENT OF THE ISSUES

Issue 1: Whether the prosecutor violated the defendant's constitutional right to testify in his own defense by asserting they would impeach him with purported clergy-penitent privileged statements.

Preservation of the Issue: This issue was preserved pursuant to the Rule 23B hearing.

Standard of Review: Federal and state constitutional interpretation is a question of law. *State v. Timmerman,* 218 P.3d 590, 592 (Utah 2009). The appellate court reviews the district court's decision for correctness, giving no deference to the district court's legal conclusions. *Id.* See *State v. Ross*, 174 P.3d 628, 631 (Utah 2007). *See also*, *State v. Pena Garcia,* 2012 WL 89082, 2012 N.D. 11 ¶6 ("[a] de novo standard of review applies to whether facts rise to the level of a constitutional violation, including a claim that prosecutorial misconduct denied a defendant's due process right to a fair trial.")

Issue 2: Whether Mr. Patterson received ineffective assistance of counsel when his attorneys failed to assert the clergy-penitent privilege and instead advised him not to testify in his own defense.

Preservation of the Issue: This issue was preserved pursuant to the Rule 23B hearing.

Standard of Review: When a defendant asserts a constitutional claim of ineffective assistance of counsel, the claim is a mixed question of law an fact. The

appellate court reviews the trial court's application of the law to the facts under a correctness standard. If there are factual findings to review, the court will not typically set them aside unless they are clearly erroneous. *State v. Lenkart*, 262 P.3d 1 (Utah 2011). However, in this case the ineffectiveness of counsel is predicated upon the deprivation of a federal and state constitutional right to testify, a subject of constitutional interpretation which is reviewed as a question of law for correctness, giving no deference to the district court's legal conclusions. *Timmerman, Ross, supra*.

Issue 3: Whether it was plain error for the trial court to admit testimony of the defendant's bad character that served no purpose other than to inflame jury.

Preservation of the Issue: This issue was not preserved by an objection at trial.

Standard of Review: An issued that is not preserved before the trial court is reviewed for plain error. *Ross*, 174 P.2d at 631-632. To prevail under plain error, the appellant "must demonstrate that, (1) error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error there is a reasonable likelihood of a more favorable outcome." *Id.*

Issue 4: Whether it was ineffective assistance of defense counsel to fail to object and exclude the inadmissible character evidence introduced by the prosecution.

Preservation of the Issue: This issue is raised for the first time on appeal.

Standard of Review: A claim of ineffective assistance of counsel that is presented for the first time on appeal presents a question of law. *State v. Ott*, 247 P.3d 344, 348-349 (Utah 2010)(noting the distinction between an ineffective assistance of counsel raised for the first time on appeal and one addressed by the trial court in a 23B hearing, "both categories bearing different standards of review.")

Issue 5: Whether it was plain error for a law enforcement officer to give opinion testimony regarding the truthfulness of E.H.'s testimony at trial.

Preservation of the Issue: This issue was not preserved by an objection at trial.

Standard of Review: An issued that is not preserved before the trial court is reviewed for plain error. *Ross*, 174 P.2d at 631-632. To prevail under plain error, the appellant "must demonstrate that, (1) error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error there is a reasonable likelihood of a more favorable outcome." *Id.*

Issue 6: Whether Mr. Patterson received ineffective assistance of counsel when his attorneys failed to object to Detective Hernandez's opinion regarding the truthfulness of E.H.'s testimony.

Preservation of the Issue: This issue is raised for the first time on appeal.

Standard of Review: A claim of ineffective assistance of counsel that is presented for the first time on appeal presents a question of law. *Ott*, 247 P.3d at 348-349.

Issue 7 Whether the cumulative error arising from the ineffective assistance of defense counsel, prosecutorial interference with the defendant's right to testify, introduction of inadmissable and irrelevant character evidence and improper opinion testimony as to the truthfulness of testimony require reversal of Mr. Patterson's conviction.

Standard of Review: The standard of review for the cumulative error doctrine is that the reviewing court will only reverse if the commutative effect of the several errors undermines the appellate court's confidence that the defendant has had a fair trial. *State v Toki*, 263 P.3d 481, 492-493 (Utah App. 2011).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS
(See Addendum, Rule 24, U.R.App.P.)

Constitutional Provisions:

Statutory Provisions:

Rules:

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from the Judgment of the Second Judicial District Court, District of Utah, entered following a jury verdict finding Mr. Scott K. Patterson guilty of two counts of Aggravated Sex Abuse of a Child, both first degree felonies and two counts of lewdness involving a child, both class A misdemeanors.

Course of Proceedings

On February 9, 2009, the State of Utah filed an Information charging Mr. Scott K. Patterson with four counts: Count 1, Aggravated Sex Abuse of a Child, a first degree felony pursuant to U.C. § 76-5-404.1(3); Count 2, Aggravated Sex Abuse of a Child, a first degree felony pursuant to U.C. § 76-5-404.1(3); Count 3, lewdness involving a child, a Class A misdemeanor pursuant to U.C. § 76-9-702.5, and Count 4, lewdness involving a child, a Class A misdemeanor pursuant to U.C. § 76-9-702.5. *Information,* R. at 1; Add. at 26. The case was originally assigned to Judge Page. *Docket,* R. at 2.

Initially, Mr. Patterson was assigned counsel by the court, Mr. Ryan J. Bushell, who entered an appearance and filed a request for discovery on February 12, 2009. *Docket,* R. at 2; Add. at 10. Mr. Patterson waived his preliminary hearing, he was bound on April 3, 2009. *Docket,* R. at 4; Add. at 12; *Prelim. Hrg.*

Tr., at 3-4. He was arraigned and entered a plea of not guilty on April 21, 2009. *Docket,* R. at 4; Add. at 12*; Arr. Hrg. Tr.,* at 4-5. Following several continuances, a pretrial conference was held on September 8, 2009, at which time Mr. Harold W. Stone, III, appeared on behalf of Mr. Patterson and Mr. Bushell withdrew from the case. *Docket,* R. at 6; Add. at 14. Another pretrial conference was held on September 29, 2009, at which time Mr. Stone requested the matter be set for a Jury Trial and the case was transferred to Judge Kay. *Docket,* R. at 7; Add. at 15.

Only the government filed a motion requesting discovery on October 29, 2009, *Docket,* R. at 8; Add. at 16, and the motion was granted on November 4, 2009. *Docket,* R. at 8; Add. at 16.

A final pretrial conference was held on November 12, 2009, at which time Mr. Greg S. Law appeared for Mr. Patterson, a final pretrial was set for January 7, 2010, and trial was set to begin on February 1, 2010. *Docket,* R. at 8; Add. at 16.

The final pretrial was continued and held on January 21, 2010, at which time the district court ordered jury instructions were due January 28, 2010 and held that the trial would proceed as scheduled. *Docket,* R. at 10; Add. at 18.

Jury trial commenced on February 1, 2010, with Mr. Stone and Mr. Law appearing for Mr. Patterson and Mr. Rick T. Westmoreland appearing on behalf of the State of Utah. *Docket,* R. at 10; Add. at 18. The State of Utah filed jury instructions on February 1, 2010. *Docket,* R. at 11; Add. at 19. No jury instructions were filed on behalf of Mr. Patterson.

Defense counsel made no objections during trial.

On February 2, 2010 the jury returned its verdict finding Mr. Patterson guilty on all counts. *Verdict,* R. at 61; Add. at 26. Mr. Patterson was sentenced on March 18, 2010. *Docket*, R. at 13; Add. at 21; *Sent. Hrg. Tr.* at 16-17. On March 19, 2010, the court entered its Judgment, Sentence and Commitment. *Docket,* R. at 14; Add. at 22. A timely Notice of Appeal was filed on March 22, 2010. *Docket,* R. at 14; Add. at 22; *Notice of Appeal*, R. at 128; Add. at 31.

A Motion for a temporary remand pursuant to Rule 23B was granted by the Court of Appeals, and the temporary remand for taking evidence regarding ineffective assistance of counsel was entered in the trial court on April 4, 2011. *Order Granting Temporary Remand,* R. at 151; Add. at 33. The evidentiary hearing was held on June 24, 2011, *Docket,* R. at 15; Add. at 23; *Evid. Hrg. 23B Tr.* and an additional hearing was held on September 2, 2011. *Docket,* R. at 17; Add. at 25; *see also, Supp. Evid. Hrg. 23B Tr.* The trial court entered its findings of fact and transmitted them to the Court of Appeals on October 26, 2011. *Findings of Fact,* R. at 271; Add. at 64.

Disposition in the District Court

On February 2, 2010 the jury returned its verdict finding Mr. Patterson guilty on: Count 1, Aggravated Sex Abuse of a Child, a first degree felony pursuant to U.C. § 76-5-404.1(3); Count 2, Aggravated Sex Abuse of a Child, a first degree felony pursuant to U.C. § 76-5-404.1(3); Count 3, lewdness involving a child, a Class A misdemeanor pursuant to U.C. § 76-9-702.5, and Count 4,

lewdness involving a child, a Class A misdemeanor pursuant to U.C. § 76-9-702.5. *Verdict,* R. at 61; Add. at 29.

Mr. Patterson was sentenced on March 18, 2010. *Docket,* R. at 13; Add. at 21. The trial court sentenced Mr. Patterson to an indeterminate term of not less than fifteen years and which may be life on Count I for the conviction of Aggravated Sex Abuse of a Child, an indeterminate term of not less than fifteen years and which may be life on Count II for the conviction of Aggravated Sex Abuse of a Child, and a term of one year each on Counts III and IV, for Lewdness Involving a Child. The Court ordered Counts I and II to run consecutive to each other, with Counts III and IV to run concurrent with each other and concurrent with Counts I and II. *Docket,* R. at 13; Add. at 21; *see also, Sent. Hrg. Tr.* at 16-17.

STATEMENT OF THE FACTS

During Mr. Patterson's trial, just before he was to testify, the prosecutor told defense counsel outside of the courtroom that if Mr. Patterson testified he would be impeached on cross examination by statements Mr. Patterson purportedly made to his bishop. *Evid. Hrg. 23B Tr.* at 78-79. Defense counsel failed to object or consider, much less raise, the clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 73, 81. They did not discuss the privilege with one another or Mr. Patterson. *Id.* They did not indicate to Mr. Patterson there was any way they could prevent the prosecutor from impeaching him with what had been said to the bishop. *Evid. Hrg. 23B Tr.* at 13-14. Mr. Patterson's defense plan depended upon him testifying in his own defense. He and his attorneys had always planned that he would testify in his own defense. *Evid. Hrg. 23B Tr.* at 9-10; 70-74, 77-82. With the assertion made by the prosecutor, defense counsel advised Mr. Patterson not to testify and he followed their advice. *Evid. Hrg. 23B Tr.* at 10, 74-75. 81-82. Instead, they advised Mr. Patterson that he would be impeached with what he had discussed with his bishop if he testified. *Evid. Hrg. 23B Tr.* at 13-14.

In actuality, the prosecutor never talked to the bishop about anything Mr. Patterson said and was not privy to what Mr. Patterson said to his bishop. *Evid. Hrg. 23B Tr.* at 147, 153-154. The bishop never told anyone what the communications were. *Evid. Hrg. 23B Tr.* at 62-63. Rather, the prosecutor relied on information in a psychosexual report, *Evid. Hrg. 23B Tr.* at 141, which appeared to be admissions. *Evid. Hrg. 23B Tr.* at 142, l. 23-25. They were not

admissions. Moreover, the prosecutor did not have anything stating Mr. Patterson had waived his clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 150. Actually, the report was entirely miss-apprehended as being admissions of Mr. Patterson and even during the Rule 23B hearing the prosecution continued to suffer from this misapprehension until Dr. Hawks pointed out the information in the psychosexual report were recitations of what Mr. Patterson was accused of, *Evid. Hrg. 23B Tr.* at 100-101, and a computer generated, cut and paste copy, of language in the MPI2, *Evid. Hrg. 23B Tr.* at 101-103. Actually, Mr. Patterson always adamantly denied he ever sexually touched his step-daughter or that she had never seen him nude. *Evid. Hrg. 23B Tr.* at 109-110; *see, Evid. Hrg. 23B Exhibit 1*, Add. at 035. If Mr. Patterson had testified at trial he would have denied all the allegations. *Evid. Hrg. 23B Tr.* at 15-16.

Mr. Patterson had discussed something confidentially and subject to the clergy-penitent privilege with his bishop, *Evid. Hrg. 23B Tr.* at 11-12 (Mr. Patterson), 58-60 (Bishop Crandall). However, the content of those communications was never disclosed by Mr. Patterson or the bishop to anyone, *Evid. Hrg. 23B Tr.* at 16-17, 62-63, and Mr. Patterson never waived his clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 61-62.

The reason the psychologist contacted the bishop was because Mr. Patterson gave Dr. Hawks the name of Bishop Crandall as a collateral contact. *Supp. Evid. Hrg. 23B Tr.* at 19, *Supp. Evid. Hrg. 23B Exhibits 2-4*, Add. at 060-063. Dr. Hawks testified that the HIPAA forms he had Mr. Patterson sign do not waive the

clergy-penitent privilege. *Supp. Evid. Hrg. 23B Tr.* at 24; *see also, Supp. Evid. Hrg. 23B Exhibits 2-4*, Add. at 060-063.

During trial the prosecutor introduced through E.H. and Sanda Patterson, Mr. Patterson's step-daughter and ex-wife, a litany of irrelevant evidence regarding his character *Trial Tr.* at 89 (he got mad a lot); *Trial Tr.* at 89-90 (that he got mad, yelled, called E.H.'s brother stupid for not taking care of trash or cleaning his room); *Trial Tr.* at 90 (that he was nicer when the mother was around); *Trial Tr.* at 92 (he was really mean if the house was not clean); *Trial Tr.* at 92 (that E.H.'s mother told her regarding the divorce that if Mr. Patterson found out where they lived he and his biker buddies would kill them).

Likewise, the prosecutor introduced an enormous amount of unduly prejudicial inadmissible character evidence regarding Mr. Patterson through his ex-wife, Sanda Patterson. *Trial Tr.* at 144 (that he was ego centrical); *Trial Tr.* at 144 (things were "his way or the highway"); *Trial Tr.* at 144 (the house had to be "model house clean," which they called "Scott Clean"); *Trial Tr.* at 145 (that he would get angry, scream, say disparaging things and throw thing in the garbage if the house was not clean); *Trial Tr.* at 146 (that he would yell at her son); *Trial Tr.* at 146 (that he would call her son certain disparaging names); *Trial Tr.* at 146 (that he would take it out on the children if they did not say good night to him); *Trial Tr.* at 157 (that in getting divorced he was cranky and crotchety, "suffering from impotence," and what their sex life was like); *Trial Tr.* at 158-160 (a diatribe that he did not invite her to his family's Christmas party); *Trial Tr.* at 160 (that they

got into an argument the day after Christmas for reasons she could not remember); *Trial Tr.* at 161 (that she called and told one of her friends about the divorce, that she wasn't happy, and that she stayed up all night thinking about the last time she was happy); *Trial Tr.* at 162 (that he tried to get a gun to kill himself when she said they could no longer live together); *Trial Tr.* at 164 (that she had to type the divorce papers); *Trial Tr.* at 166 (ownership of the house before their marriage); *Trial Tr.* at 166 (her equity in the house); *Trial Tr.* at 167 (that in the divorce she received only a car, beds, a sofa, loveseat, personal belonging, decorations off the walls, and a pickup); *Trial Tr.* at 168 (she did not get alimony); *Trial Tr.* at 168 (she did not get the house); *Trial Tr.* at 168 (she did not get any equity from the house); *Trial Tr.* at 168 (she did not get any other assets from the divorce); *Trial Tr.* at 168 (she did not get any stocks); *Trial Tr.* at 168 (she did not get any jewels); *Trial Tr.* at 168 (that he kept a motorcycle he had given her for Mother's Day); *Trial Tr.* at 171 (that he changed the locks on the house at some point during the divorce); and *Trial Tr.* at 171-172 (that he had a pickup that her mother had loaned money on and he was not paying for it, that she tried to get the police to arrest him for having the truck, and that she told him her mother was considering grand theft auto charges against him). None of this evidence had anything to do with the case.

Mr. Patterson's defense counsel did not raise a single objection at trial, even when the prosecution introduced without objection irrelevant and unduly

prejudicial character evidence into the case. Ineffective assistance of counsel is also asserted with respect to these facts.

At trial the government's final witness in its case-in-chief was Detective Hernandez. She testified about her general qualifications and experience investigating child sex abuse cases and how she became involved in investigating the matter at hand. *Trial Tr.* at 190-192. None of the testimony elicited of Detective Hernandez pertained to training as to how to determine whether a witness or victim's statements were truthful. At the time E.H. was first interviewed in the case, the detective had only received a report on the case. The interview of E.H. was conducted at the Children's Justice Center ("CJC"). *Trial Tr.* at 192-194. While Detective Hernandez did not conduct the interview, she sat in on it. Detective Hernandez acknowledged she had sat through and heard the testimony of E.H. and her mother Sanda Patterson. *Trial Tr.* at 194. The prosecutor asked Detective Hernandez to give the jury her opinion about the comparison of what E.H. said at the CJC interview and what E.H. testified to in court to the jury. *Trial Tr.* at 197. The prosecutor asked her whether, in her opinion, E.H.'s testimony was consisted with what she had said on the day she was interviewed. *Id.* Commenting on the candor of E.H.'s testimony, Detective Hernandez told the jury, "I would except for some of the obvious lies that were told that day [referring to the day of the CJC interview]." According to Hernandez, the only "lie" E.H. had told was "about Scott having her stay in the bathroom or stay in the bedroom while he urinated." *Trial Tr.* at 197.

Again, defense counsel did not object. Defense counsel did not move for a mistrial, move to strike, or ask for an instruction that the testimony of Detective Hernandez as to the truthfulness of E.H. not be considered. Instead, the cross-examination by defense counsel of Detective Hernandez was whether she thought E.H. had been telling the truth. *Trial Tr.* at 199-200. Consequently, the issue of plain error is asserted with regard to this issue and ineffective assistance of counsel is raised regarding the testimony of Detective Hernandez.

SUMMARY OF THE ARGUMENTS

Summary of Argument I

The prosecutor violated Mr. Patterson's right to testify in his own defense when they asserted they would impeach him with purported clergy-penitent privileged statements if he took the stand. A defendant has a constitutional right to testify in his own defense. The clergy-penitent privilege is also provided to a defendant under Utah law and the clergy-penitent privilege is broadly construed by the Utah Supreme Court. *Scott v. Hammock*, 870 P.2d 947 (Utah 1994). There is no dispute in this case that the communications at issue were privileged clergy-penitent communications.

Mr. Patterson's clergy-penitent communications were wholly beyond any purview of cross-examination by the government. The government violates the right to effective assistance when it interferes with the ability of counsel to make independent decisions about how to conduct the defense. In light of the clergy-penitent privilege, the prosecutor impermissibly interfered with Mr. Patterson's right to the assistance of counsel by asserting that if he testified he would be impeached by his clergy-penitent privileged communications with his bishop.

The prosecutor's assertion he would cross-examine Mr. Patterson on clergy-penitent communications was prosecutorial misconduct as Mr. Patterson did not waive the clergy-penitent privilege. Moreover, the prosecutor was mistaken, as he had incorrectly construed a psychosexual report to contain admission, and was not

privy to what the communications were - nor have any clergy-penitent privileged communications ever been disclosed by Mr. Patterson or the bishop to anyone. Prosecutors have a duty to ensure a fair trial. Moreover, absent any waiver of the privilege, Mr. Patterson's clergy-penitent communications were beyond the purview of any cross-examination that could have been conducted by the prosecutor. Intimidating a defendant, or any witness, with the threat of using communications with clergy for impeachment on cross-examination breaches the prosecutor's duty. In this case the prosecutor disregarded the clergy-penitent privilege and interfered with Mr. Patterson's right to testify at trial in his own defense.

Summary of Argument II

Mr. Patterson was denied effective assistance of counsel when they failed to advise him of the clergy-penitent privilege and did not assert it at trial. In assessing counsel's performance under the first component of the *Strickland* test. In this case defense counsel did not consider the clergy-penitent privilege when confronted by the prosecutor's assertion he would use privileged communications to impeach him and failed to advise him of the privilege. This failure by defense counsel utterly fails to meet the standard of performance required by defense counsel.

The second component of the test, that there be prejudice is also met. Mr. Patterson had planned on testifying at trial, and his testimony was the core of his

defense. Because of the prosecutor's assertion Mr. Patterson would be impeached by his clergy-penitent communications, defense counsel improperly advised Mr. Patterson not to testify and he did not take the stand. Prejudice should be presumed because the prosecutor interfered with defense counsel's representation by asserting that the government would impeach Mr. Patterson with clergy-penitent privileged communications, defense counsel failed to assert the privilege, and consequently Mr. Patterson was deprived of the substantial constitutional right to testify in his own defense.

There is no legitimate reason for defense counsel to have failed to assert the clergy-penitent privilege. Both of the standards required by the *Strickland* test are soundly present and the ineffectiveness of counsel a violated Mr. Patterson's right to testify in his own defense at trial.

Summary of Argument III

It was plain error for the trial court to admit character evidence against Mr. Patterson that had no purpose under Rule 404(b), U.R.E., and only served to cast Mr. Patterson in the worst light possible. Enormous amounts of evidence were introduced at trial that had no purpose other than to demean the character of Mr. Patterson. The defense counsel did not make a single objection during trial, but the impermissible nature of the evidence should have been obvious to the trial court.

During the direct examination of Mr. Patterson's step-daughter and ex-wife, the trial court permitted evidence that had no relevance to the charges. A plethora of irrelevant character damaging evidence was introduced at trial- all elicited just to make Mr. Patterson look like a monster. None of this evidence bolstered, supported, or pertained in any way to the facts and show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. It should have been obvious to the trial court that this evidence was irrelevant and highly prejudicial to Mr. Patterson. Because of the enormity of bad character evidence admitted to trial and considered by the jury, it is highly likely the outcome of the trial would have been different if it had not been introduced.

Summary of Argument IV

Defense counsel were ineffective in their failure to object to the character evidence introduced by the prosecutor against Mr. Patterson. Moreover, defense counsel failed to even request notice from the prosecutor of their intention to introduce Rule 404(b) evidence, as provided by the rule. The circumstances in this case show a complete failure on the part of defense counsel to appreciate the nature of inadmissible character evidence and to permit its admission with complete abandon. The performance of defense counsel in failing to object failed to meet the standards required of trial counsel and prejudiced Mr. Patterson.

Summary of Argument V

It was plain error for the trial court to admit the testimony of Detective Hernandez's testimony that the minor child was telling the truth when she testified and that she was credible. When the prosecutor asked the Detective, who had sat through the trial, to give her opinion as to whether the minor's testimony was consistent with what she had said during her first testimony, the Detective stated, "I would except for some of the obvious lies that were told that day." The purported "lie" was not part of the minor's testimony before the jury. The clear and direct implication from this testimony is that the minor had testified truthfully at trial. It is improper to introduce the opinion of either a lay witness or an expert that a witness testified truthfully at trial. It invades the province of the jury and runs afoul of rule 608(a). The error should have been obvious to the trial court and the opinion testimony clearly prejudiced Mr. Patterson.

Summary of Argument VI

Mr. Patterson was denied effective assistance of counsel when defense counsel failed to object to Detective Hernandez's opinion testimony that the minor had testified truthfully. The testimony was grounds for a mistrial pursuant to *Rimmasch*, which defense counsel should have sought, and which was entirely warranted. At the very least, defense counsel should have objected to the testimony, moved to strike the testimony and obtained a jury instruction that the testimony should not be considered in deliberations. Instead, defense counsel did

nothing and the testimony went to and was considered by the jury. Under the *Strickland* test, the failure of defense counsel to object failed to meet the standards for trial counsel and prejudiced Mr. Patterson.

Summary of Argument VII

The cumulative effect of the various errors in this case warrants reversal. Under the cumulative error doctrine, an appellate court will reverse if the cumulative effect of the several errors undermines the courts confidence that a fair trial was had. Multiple errors exist in this case. Collectively, the errors undermine any confidence Mr. Patterson received a fair trial. Error arose when the prosecutor interfered with Mr. Patterson's right to testify by claiming he would impeach him with un-waived clergy-penitent privileged communications, with the introduction of irrelevant character evidence, and the testimony of the detective that in her opinion the minor testified truthfully. These errors are compounded by the manifest ineffectiveness of defense counsel with respect to each of these errors. Collectively, the errors in ths case are so rampant that Mr. Patterson could in no way have had a fair trial.

ARGUMENTS

ARGUMENT I

THE PROSECUTOR VIOLATED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE BY ASSERTING THEY WOULD IMPEACH HIM WITH PURPORTED CLERGY-PENITENT PRIVILEGED STATEMENTS.

a. The Right to Testify at Trial

A defendant has a constitutional right to testify in his own defense. A defendant's right to testify on his own behalf is essential to our adversary system. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948). "The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 2709 (1987). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id.* 483 U.S at 52, 107 S.Ct. At 2709; *see also,* U.S. Const, Amend. VI In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Id.*

The right to testify is expressly established in the Utah Constitution. Utah Const. art I, § 12 ("In criminal prosecutions the accused shall have the right to testify in his own behalf . . . ."). It is further guarded by the Utah Rules of

Criminal Procedure. U. C. § 77-1-6(1)(c) ("In criminal prosecutions the defendant is entitled . . . [t]o testify in his own behalf . . . ."). Under Utah law, when a defendant is denied his right to testify the court may presume prejudice. *State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996).

b. The Utah Clergy-Penitent Privilege.

The clergy-penitent privilege is expressly provided and codified in Utah law. The statute provides:

> A member of the clergy or priest cannot, without the consent of the person making the confession, be examined as to any confession made to either of them in their professional character in the course of discipline enjoined by the church to which they belong.

U.C. § 78B-1-137(3). Furthermore, the clergy-penitent privilege is embodied in the Rule 503 of the Utah Rules of Evidence. Rule 503, U.R.E. There is no dispute in this case that the communications at issue were privileged clergy-penitent communications.

The broad scope of the clergy-penitent privileged recognized in Utah was addressed by the Utah Supreme Court in *Scott v. Hammock*, 870 P.2d 947 (Utah 1994). In *Scott* an adopted daughter brought a civil action in the United States Federal District Court for the District of Utah alleging that the adopted father engaged in various forms of abuse during her childhood. *Scott* at 949. Prior to filing the civil complaint, Steven Hammock was charged criminally with forcible sexual abuse. *Id.* While the criminal case was pending, Hammock had three conversations with his bishop. *Id.* One conversation took place at the bishop's

office with no one else present. *Id.* The other two conversations took place at Hammock's home. *Id.* Hammock's wife was present during one of the communications. *Id.* In the federal civil case when Hammock's deposition was taken he invoked the clergy-penitent privilege and refused to disclose the substance of his comminations with the bishop, except to say that the communications were not made in the context of his confessing or seeking forgiveness. *Id.* "The record is therefore clear that his communications to the bishop were not 'penitential." *Id.*

After Hammock invoked the privilege, Scott subpoenaed documents from the Church of Jesus Christ of Latter-Day Saints regarding Hammock's excommunication. *Id.* The LDS Church moved to quash the subpoena on the ground that the information was privileged under the clergy-penitent privilege. *Id.* Hammock then filed a motion for a protective order against the disclosure of the substance of his disclosures with the bishop. *Id.*

Federal Magistrate Judge Ronald N. Boyce wrote an opinion on the scope of the Utah clergy-penitent privilege, and held the communications between Hammock and his bishop and the church documents relating to his excommunication were privileged under Utah law. *Id.* At that time, the clergy-penitent privilege was codified in U. C. § 78-24-8(3). Scott objected to Judge Boyce's decision, and the United States District Judge David A. Sam certified to the Utah Supreme Court the question of whether non-penitential communications

to clergy are protected by the Utah clergy-penitent privilege from compelled disclosure in a legal proceeding. *Scott,* 870 P.2d at 949.

The Utah Supreme Court, agreed with Judge Magistrate Boyce, and broadly construed Utah's clergy-penitent privilege. *Id.* at 954. Noting the clergy-penitent relationship "depends on a sense of complete confidentiality . . . ." *Id*. at 955. The Court held that Utah's statutory law

> ". . . does not require communications to clergy by the communicant be penitential to be privileged, but it does require that they be made in confidence and for the purpose of seeking or receiving religious guidance, admonishment, or advice and that the cleric was acting in his or her religious role pursuant to the practice and discipline of the church."

Scott, 870 at 956.

In *Scott* the adoptive father enjoyed a privilege which precluded requiring him to give testimony concerning his communications with the bishop, as well as precluding inquiry of the cleric or obtaining documents from the church regarding the communications or the excommunication proceedings. In Utah the clergy-penitent privilege applies to penitential and non-penitential communications, and the privilege enjoys the highest degree of protection affording those who seek clerical guidance complete confidentiality.

c. Mr. Patterson's clergy-penitent communications were wholly beyond the purview of cross-examination by the government.

In the present case, Mr. Patterson had the clergy-penitent privilege with regard to his communications with the bishop. Moreover, the completely confidential status of those communications is beyond refute. Consequently, the prosecutor was prohibited from asking anything of Mr. Patterson about his

communications with the bishop during cross-examination. Therefore, it was entirely improper for the prosecutor to assert to defense counsel that the government would cross-examine Mr. Patterson on the stand regarding his communications with his bishop, and thereby prevent Mr. Patterson from testifying.

The government violates the right to effective assistance when it interferes with the ability of counsel to make independent decisions about how to conduct the defense. *See, e.g., Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). In light of the clergy-penitent privilege, the prosecutor impermissibly interfered with Mr. Patterson's right to the assistance of counsel under the Sixth Amendment by asserting the government would impeach Mr. Patterson with what he said to his bishop. Even the mere suggestion Mr. Patterson would be impeached by clergy-penitent communications constitutes impermissible and prejudicial prosecutorial interference with the defense. Clergy-penitent communications are beyond the purview of consideration with respect to cross-examination, much less the threat thereof. To hold otherwise would be devastating to the "sense of complete

confidentiality" that is the cornerstone of the clergy-penitent privilege, recognized in *Scott*. *Scott,* 870 P.2d at 955.

d. The prosecutor's assertion he would cross-examine Mr. Patterson on clergy-penitent communications was prosecutorial misconduct as Mr. Patterson did not waive the clergy-penitent privilege.

The prosecutor breached his duty and violated Mr. Patterson's right to a fair trial when he asserted he would impeach Mr. Patterson's testimony with clergy-penitent privileged communications, when the prosecutor had nothing establishing the privilege had been waived. In *State v. Saunders*, 992 P.2d 951 (Utah 1999) the Utah Supreme Court noted that prosecutors have a duty to ensure a fair trial. Quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 625, 79 L.Ed. 1314 (1935), the *Saunders* Court stated,

> "[A prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Saunders, 992 P.2d at 961.

Rule 510, U.R.E., sets forth the criteria under which a privilege is deemed waived.

> (a) Waiver of Privilege. A person who holds a privilege under these rules waives the privilege if the person or a previous holder of the privilege:

(1) voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or
(2) fails to take reasonable precautions against inadvertent disclosure.

This privilege is not waived if the disclosure is itself a privileged communication.

(b) Inadmissibility of Disclosed Information. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or made without opportunity to claim the privilege.

(c) Comment or Inference Not Permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from any claim of privilege.

(d) Claiming Privilege Without the Jury's Knowledge. To the extent practicable, jury cases shall be conducted to allow claims of privilege to be made without the jury's knowledge.

(e) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to a jury instruction that no inference may be drawn from that claim of privilege.

(f) Privilege Against Self-Incrimination in Civil Cases. In a civil case, the provisions of paragraph (c)-(e) do not apply when the privilege against self-incrimination has been invoked.

Rule 510, U.R.E.

Mr. Patterson did not disclose or consent to the disclosure of any clergy-penitent communications to anyone. Nor did Mr. Patterson engage in the communications with his bishop in such a manner that those communications would inadvertently be disclosed (e.g. making the communications in a public place where they could be overheard). While he consented to the psychiatrist contacting the bishop as a character reference, agreeing to that contact did not waive the privilege. Mr. Patterson's clergy-penitent privilege was wholly intact and never waived.

When the bishop was contacted by the psychiatrist, the bishop did not relate any clergy-penitent communications to the psychiatrist; nor did the psychiatrist ask for privileged communications. Further, the bishop was not told that Mr. Patterson has waived the clergy-penitent privilege when the psychiatrist spoke with him. Apparently the prosecutor perceived the report contained clergy-penitent communications. Even so, the psychosexual report does not contain any statement that the clergy-penitent privilege had been waived. Despite the prosecutor's mistaken perception that clergy-penitent communications were contained in the psychosexual report, the prosecutor should never have assumed those communications could be used for impeachment because he had absolutely nothing establishing waiver of the privilege.[1] Absent any waiver of the privilege, Mr. Patterson's clergy-penitent communications were beyond the purview of any cross-examination that could have been conducted by the prosecutor.

The prosecutor's assertion that he would use clergy-penitent communications for impeachment was wholly unfounded, without a waiver, and constitutes prosecutorial misconduct. It is incumbent upon the prosecutor to assure those means used to obtain a conviction are legitimate. A prosecutor's assertion that he would impeach a defendant using the defendant's clergy-penitent communications unconstitutionally chills a defendant's constitutional right to

[1]The government subpoenaed the psychiatrist's consent forms for the psychosexual report during the Rule 23B, U.R.App.P. proceedings. Even so, the forms do not contain any statement or language waiving the clergy-penitent privilege

testify in their own defense. Intimidating a defendant, or any witness, with the threat of using communications with clergy for impeachment on cross-examination is a breach of the prosecutor's duty not to strike foul blows. In this case the prosecutor disregarded the clergy-penitent privilege and interfered with Mr. Patterson's right to testify at trial in his own defense.

ARGUMENT II

MR. PATTERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO ASSERT THE CLERGY-PENITENT PRIVILEGE AND INSTEAD ADVISED HIM NOT TO TESTIFY IN HIS OWN DEFENSE.

Mr. Patterson was denied effective assistance of counsel. A defendant's right to the assistance of counsel is recognized as "the right to the effective assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). In *Strickland* the United States Supreme Court established a two-part test for determining when a defendant's Sixth Amendment right to effective assistance of counsel has been violated. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. That two part test, known as the *Strickland* test, was adopted by the Utah Supreme Court as articulated in *Bundy v. Deland,* 763 P.2d 803, 805 (Utah 1988); *see, e.g., State v. Templin,* 805 P.2d 182, 186-87 (Utah 1990); *State v. Carter,* 776 P.2d 886, 893 (Utah 1989); *State v. Frame,* 723 P.2d 401, 405 (Utah 1986).

> To prevail, a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which

> performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant.

Bundy, 763 P.2d at 805.

In assessing counsel's performance under the first component of the test, the Utah Supreme Court recognizes "'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant.'" *Templin,* 805 P.2d at 186 (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065). For this reason, a defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock,* 791 P.2d 155, 159-60 (Utah 1989), *cert. denied,* 497 U.S. 1024, 110 S.Ct. 3270, 111 L.Ed.2d 780 (1990). In this case defense counsel did not consider the clergy-penitent privilege when confronted by the prosecutor's assertion he would use privileged communications to impeach him and failed to advise him of the privilege. This failure by defense counsel utterly fails to meet the standard of performance required by defense counsel.

To show prejudice under the second component of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Templin,* 805 P.2d at 187; *Carter,* 776 P.2d at 894 n. 30. In *Strickland,* the Supreme Court recognized that "in certain Sixth Amendment contexts, prejudice is presumed." *Strickland*,

466 U.S. at 692, 104 S.Ct. at 2067. These circumstances include the "[a]ctual or constructive denial of the assistance of counsel altogether," as well as "various kinds of state interference with counsel's assistance." *Id. Strickland* recognized that prejudice may be presumed when there has been actual or constructive denial of counsel, when the government has interfered with counsel's assistance, or when counsel has acted with a conflict of interest. *See, Strickland,* 466 U.S. at 692, 104 S.Ct. at 2067.

In addition, the Utah Supreme Court has noted that it holds supervisory powers to address ineffectiveness, "pursuant to our 'inherent supervisory power over the courts,' we may presume prejudice in circumstances where it is 'unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice.' " *Arguelles*, 921 P.2d at 442 (*citing, Parsons v. Barnes,* 871 P.2d 516, 523 n. 6 (Utah 1994) and *State v. Brown,* 853 P.2d 851, 857, 859 (Utah 1992)).

As discussed above, prejudice should be presumed because the prosecutor interfered with defense counsel's representation by asserting that the government would impeach Mr. Patterson if he testified with communications subject to the clergy-penitent privilege. Moreover, prejudice exists because of defense counsel's failure to assert the clergy-penitent privilege and failed to advise Mr. Patterson of his right to assert the privilege if he testified. This error constituted prejudicial ineffective assistance of counsel.

e. Mr. Patterson Establishes Sufficient Evidence to Support a Reasonable Probability That, But For Counsel's Unprofessional Errors, the Result of the Proceeding Would Have Been Different.

It was always Mr. Patterson's intention to testify, and it was defense counsel's plan to have him testify. The only thing that kept Mr. Patterson off the stand was prosecutor's assertion to defense counsel Mr. Patterson would be impeached by clergy-penitent communications with his bishop. There was no discussion regarding the clergy-penitent privilege when the prosecutor asserted he would use clergy-penitent communications to impeach Mr. Patterson. Moreover, the privilege was never asserted. At the evidentiary hearing held on June 24, 2011, pursuant to Rule 23B, U.R.App.P. Mr. Patterson testified on direct examination that he intended to testify but did not because of the threatened impeachment using communications with the bishop.

Q. During that trial, did you testify.

A. [MR. PATTERSON:] I did not.

Q. Prior to that trial, had you been prepared to testify?

A. Absolutely.

Q. And was it your intention to testify at that trial?

A. Absolutely.

Q. What happened to result in your not testifying?

A. On the morning of the second day, Mr. Stone and Mr. Law approached me in that room right there, and Mr. Stone said that he had just come out of Mr. Westmoreland's office and that he had been - - that Mr. Westmoreland said that he had a written letter from the bishop and he told me that I cannot allow you to testify in this case.

Q. So, did you end up testifying?

A. I did not.

Q. Why not?

A. Because I followed the counsel that I had hired.

Evid. Hrg. 23B Tr. at 9-10.

Mr. Law, second chair defense counsel also testified at the Rule 23B evidentiary hearing regarding the prosecutor's threatened clergy-penitent impeachment.

Q. In February of 2010, did you represent Mr. Patterson?

A. [MR. LAW:] I was one of the attorneys representing him, yes.

Q. And I gather you represented him in the case that was on trial on February 1st and 2nd?

A. Yes.

Q. Were you first chair or second chair?

A. Second.

Q. Okay, and you participated and assisted in the preparation for trial in that matter?

A. Yes.

Q. And at that time, was Mr. Rick Westmoreland the prosecutor in the case?

A. Yes.

Q. At trial, did you become aware of there having been a conversation between Mr. Rick Westmoreland and Mr. Stone concerning whether or not Scott Patterson should testify?

A. I wasn't privy to the conversation. I was told of the conversation by my then law partner, Harold Stone, after the fact.

Q. Once you became aware of that conversation, what happened?

A. Then Harold, myself and Mr. Patterson went in one of the conference rooms and discussed with Scott his options with regard to him taking the stand in his own defense.

Q. Concerning what you became aware of related in that conversation, what was it that had happened.

A. My understanding, from what I got from Harold [Stone], was that he was told by Mr. Westmoreland that if Scot[t] took the stand, that they would bring in either statements or bring his former bishop in to impeach his testimony regarding prior - - actually, regarding statements or an admission.

* * *

Q. - - at trial? To the best of your memory, what specifically, was your understanding as to what would happen if Mr. Patterson had testified?

A. That [if] he took the stand and testified that, you know, the allegations never took place, that his bishop would be called as a rebuttal witness to offer testimony that he had, basically, made admissions that would be contrary to what his testimony was going to be.

* * *

Q. Do you recall there being any discussion about asserting the clergy-penitent privilege with the Court?

A. No.

Q. And with regard to saying no, I gather there was no discussion in the presence of Mr. Patterson?

A. No discussion about that. Nothing that Harold and I discussed about invoking that privilege.

Q. Was there ever an effort on your behalf, or were you aware of an effort by someone asserting ... the clergy-penitent privilege?

A. No.

Q. Prior to that time, was it the plan of the defense to call Mr. Patterson to testify?

A. Yes.

Q. Had you prepared him to testify?

A. We certainly talked about it, you know, gone through what we anticipated, you know, direct would be and potential cross-examination. So, it was part of the plan that he would take the stand.

***

Q. As a result of this information that was presented to him concerning having the bishop either testify or this document come in, did Mr. Patterson, then, testify?

A. No, he didn't.

Q. Do you know why.

A. Based on the advice of counsel.

Evid. Hrg. 23B Tr. at 70-74.

Additionally, Harold Stone testified about what occurred. Mr. Stone, who was first chair at trial, testified at the Rule 23B hearing as follows:

Q. And in preparing for the case, was it the plan that Mr. Patterson would testify in his own defense?

A. [MR. STONE:] It was, yes.

Q. And had Mr. Patterson been prepared to testify?

A. He had, yes.

Q. Now, at the trial, did there come a time when you had a conversation with Mr. Westmoreland regarding whether or not Scott Patterson should testify?

A. Yes.

Q. Where did that occur?

A. Out in the hallway out there.

Q. And during that time, what transpired?

A. Basically, I was in a meeting with Scott and Mr. Westmoreland said, hey, - - I don't remember the exact verbiage, but he, basically, said hey, I just want to let you know, just so you are on notice, that, basically, he said some things to his bishop about this and, you know, so you might want to, you know, I'm just giving you a warning if you are thinking about putting him on the stand, kind of that sort of thing.

Q. Okay. Was this the first time you had heard anything from the prosecution about there being a communication with the bishop?

A. Yeah, yeah, yeah.

Q. Do you know what the communication was?

A. I don't know, no.

Q. Did Mr. Westmoreland give you any specific ideas as to what the bishop would testify to?

A. No. There was nothing specific other than he said he had, basically, sort of confessed to his bishop. That's kind of what he left it at is something like that.

Q. Did you have an understanding what Mr. Westmoreland was going to do in order to address that?

A. He didn't say specifically. He didn't say if you do this I will do this, you know. It was more of a tacit implication that if he were to get up there, then there would probably be questioning or cross-examination or perhaps impeachment by the bishop concerning those statements.

Q. And did you related to Mr. Patterson that those are the kinds of things that the prosecution was intending to do if he testified?

A. Yeah, yeah, after we finished our conversation, I then went back and talked with Scott about that.

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Q. Did you talk to Mr. Patterson about the clergy-penitent privilege?

A. At that point?

Q. Yes.

A. No. We didn't really go into that, no.

Q. So, you didn't mention it to Mr. Patterson when you were talking to him about what Mr. Westmoreland intended to do?

A. No.

Q. Is that fair to say?

A. That's fair to say, yes.

Q. Did you raise the issue in Court in any way?

A. No.

Q. Either on or off the record?

A. No.

Q. Did you even consider whether or not to assert the clergy-penitent privilege at that time?

A. To be quite honest, it may have been a fainting thought, but I didn't put really any - - no, not - - no.

Q. Did you advise Mr. Patterson not to take the stand because of this issue?

A. Yeah. Me and my partner, I had spoken with him first, and we both decided at that point that that's probably the best thing to do, and then we went in and talked to Scott about that and said, you know, it's ultimately up to you, but this is our recommendation based on what we just heard.

Q. Prior to the time that you talked to Mr. Westmoreland, were you even aware that Mr. Patterson had ever talked to his bishop?

A. No, not at all, no.

Q. And I take it you had received the case file from a prior attorney?

A. Yeah.

Q. There's nothing in that case file indicating that, to your knowledge?

A. There was nothing in there that I was aware of, no. I went through the file several times.

Q. Do you know how Mr. Westmoreland learned of this communication between Mr. Patterson and the Bishop?

A. No. He never told me and I didn't ask him, no.

Evid. Hrg. 23B Tr. at 77-82.

It is clear from the record the defense planned to rely Mr. Patterson's testimony at trial and that defense counsel never considered nor asserted the clergy-penitent privilege.

The staggering factor is that Mr. Westmoreland's assertion was not based on anything the bishop said. Moreover, what Mr. Patterson said to the bishop is not known as it was never disclosed by either Mr. Patterson or Bishop Crandall to anyone. The bishop testified at the Rule 23B hearing that he never told Dr. Hawks or the prosecutor what the clergy-penitent communications were that he had with Mr. Patterson. *Evid. Hrg. 23B Tr.* at 62-63.

Mr. Westmoreland did not have any admissions or confessions by Mr. Patterson to the bishop upon which to base his assertion. Rather, Mr. Westmoreland had inaccurately read a psychological report he had been provided by the defense prepared by Dr. Hawks. While preparing for trial he came across a psychosexual evaluation of Mr. Patterson. *Evid. Hrg. 23B Tr.* at 141. In part of

the report, it "appeared" to him that "there were at [least] some admissions by the defendant." *Evid. Hrg. 23B Tr.* at 142, l. 23-25. Mr. Westmoreland testified he thought the report contained admissions by Mr. Patterson made "both to Dr. Hawks [the psychologist] and to what appeared to be his bishop, Scott Crandall." *Evid. Hrg. 23B Tr.* at 143, l. 1-8. During the psychosexual examination Dr. Hawks testified Mr. Patterson had adamantly denied having ever done anything inappropriate, never sexually touched and had never even been seen nude by his step-daughter. *Evid. Hrg. 23B Tr.* at 109-110. What Mr. Westmoreland thought was a confession was actually the section of the psychologist's notes about what Mr. Patterson was *accused* of having done.

The government's mistaken perceptions are reflected by the cross-examination of the state's attorney at the Rule 23B hearing following Mr. Patterson's direct testimony. Mr. Patterson testified on direct, stating,

> Q. If you had testified with regard to the allegations that were made in this case, what would your testimony have been?
>
> MR. PATTERSON: I absolutely did not do this. I am an innocent man, and I believe I would have - - my testimony would have been absolutely critical in this case.
>
> Q. With regard to your step-daughter, what, if anything would you have testified to with regard to inappropriate touching of your step-daughter?
>
> A. Did not occur.
>
> Q. With regard to your step-daughter, what would you have testified with regard to sexual contact with your step-daughter?
>
> A. None.

Q. With regard to your step-daughter, did you ever inappropriately touch her?

A. Did not.

Q Did you ever have any sexual contact with her?

A. None.

Evid. Hrg. 23B Tr. at 15-16.

Mr. Larson, the state's attorney at the Rule 23B hearing, likewise misconstrued the information in Dr. Hawk's psychosexual report when he cross-examined Mr. Patterson with respect to the information in the clinical notes. *Evid. Hrg. 23B Tr.* at 34-36 (asking about statements and suggesting sexual misconduct from pages 18 and 22 of the psychosexual clinical notes, *see Evid. Hrg. 23B Exhibit 1*, Add. at 035). Mr. Patterson denied each point. *Id.* What Mr. Larson failed to understand, is that the clinical notes contained what Mr. Patterson had related to Dr. Hawks about what he was *accused* of doing by the state, not what Mr. Patterson had done. *Evid. Hrg. 23B Tr.* at 100-101 (Dr. Hawk's testimony that the report on page 18 in the first paragraph reflects what Mr. Patterson related the state had said he had done). Furthermore, Mr. Larson misconstrued the clinical notes on page 22 to be a statement made by Mr. Patterson, when in fact Dr. Hawks testified it was a computer generated statement, a computerized statement in the form of a "hypotheses that the computer generated," that had been cut from the MSI1 and stuck into the clinical notes *Evid. Hrg. 23B Tr.* at 101-103 (stating it is a "cut and paste from the MSI2."). The state entirely misunderstood and misread the psychosexual examination report prepared by Dr. Hawks to

contain admissions by Mr. Patterson. *See*, *Evid. Hrg. 23B Tr.* at 109-110, *see Evid. Hrg. 23B Exhibit 1*, Add. at 035. Dr. Hawks testified that Mr. Patterson had always maintained that his step daughter had never seen him nude, and had "adamantly denied any inappropriate sexual touching of the victim." *Evid. Hrg. 23B Tr.* at 110.

What is clear from the record is that the prosecutor claimed to know what those communications with the bishop were, and asserted he would impeach Mr. Patterson with those communications. He wrongfully intimidated Mr. Patterson from taking the stand. Additionally, Mr. Patterson's counsel were ineffective and utterly failed to consider the clergy-penitent privilege, much less assert it.

There is no doubt, Mr. Patterson would have testified that he was innocent of the charges and did not commit the offenses for which he was charged. Mr. Patterson's testimony would have refuted the allegations directly. This evidence establishes a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The prosecutor's assertion that Mr. Patterson would be impeached by statements he made to his bishop improperly prevented Mr. Patterson from testifying. Mr. Patterson could only imagine how far the prosecutor might delve with respect to his communications and was not advised the could assert his clergy-penitent privilege. No doubt, they were very personal and spiritually significant matters. Mr. Patterson was given to understand his communications were known to the prosecutor. He was told his communications would be used

against him if he testified. This threat chilled Mr. Patterson's right to testify for fear that his most intimate personal and spiritual communications would end up exposed in open court. The prosecutor improperly and illegally prevented Mr. Patterson from presenting his testimony and his defense to the allegations against him by interjecting the claim that clergy-penitent privileged communications would be used to impeach Mr. Patterson if he testified, in violation of the fundamental constitutional right to testify in ones own defense.

f. Mr. Patterson Never Waived the Clergy-Penitent Privilege.

In this case, Mr. Patterson never waived the clergy-penitent privilege. Mr. Patterson had spoken privately with Bishop Crandall in his clerical capacity for the purpose of spiritual guidance in early 2009. *Evid. Hrg. 23B Tr.* at 11-12 (Mr. Patterson), 58-60 (Bishop Crandall). Clearly, Mr. Patterson held the clergy-penitent privilege with respect to what he discussed with his bishop. *See*, U.C. § 78B-1-137(3) & Rule 503, U.R.E.

When Dr. Hawks contacted Bishop Crandall for the psychosexual examination, he was "looking for information to the background and the character of Scott Patterson." *Evid. Hrg. 23B Tr.* at 61. Dr. Hawks did not provide Bishop Crandall with any document signed by Mr. Patterson waiving the clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 61-62. Dr. Hawks did not indicate to the bishop verbally that Mr. Patterson had waived the clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 62. Additionally, Mr. Patterson had never indicated to Bishop Crandall that he waived the clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 62. Bishop

Crandall never related, in any way, any clergy-penitent privileged information to Dr. Hawks about Scott Patterson. *Evid. Hrg. 23B Tr.* at 62-63. Dr. Hawks testified that the communications he had with Bishop Crandall had to do with the bishop's observations of Mr. Patterson around children. *Evid. Hrg. 23B Tr.* at 113. Mr. Patterson testified he has never waived the clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 16.

Mr. Westmoreland had no grounds to believe the clergy-penitent privilege was waived. When Mr. Westmoreland contacted the bishop during trial preparation, Bishop Crandall refused to talk to him about what Mr. Patterson discussed. *Evid. Hrg. 23B Tr.* at 147, 153-154. The bishop did not treat the matter as if the clergy-penitent privilege was waived. Moreover, the fact the bishop refused to talk to Mr. Westmoreland shows the bishop did not consider the privilege waived. Furthermore, Mr. Westmoreland did not have any documentation, not even a note, suggesting a waiver of the clergy-penitent privilege. *Evid. Hrg. 23B Tr.* at 150.

At the Rule 23B hearing the government attempted to suggest Mr. Patterson waived the clergy-penitent privilege by providing Bishop Crandall as a character reference. Dr. Hawks testified at the Rule 23B hearing that he had some forms that he has a client sign when they meet with him. Dr. Hawks did not bring those forms with him to the Rule 23B hearing on June 24, 2011. *Evid. Hrg. 23B Tr.* at 96. Consequently, a supplemental Rule 23B hearing was held. At the supplemental Rule 23B hearing held on September 2, 2011, Dr. Hawks again

appeared and testified with respect to the forms. He testified that they constitute HIPAA forms and indicate those collateral contacts for whom his client has given permission for him to contact. *Supp. Evid. Hrg. 23B Tr.* at 13. Mr. Patterson gave Dr. Hawks the name of Bishop Crandall as a collateral contact. *Supp. Evid. Hrg. 23B Tr.* at 19, *Supp. Evid. Hrg. 23B Exhibits 2-4*, Add. at 060-063. Dr. Hawks testified that the forms do not waive the clergy-penitent privilege. *Supp. Evid. Hrg. 23B Tr.* at 24. Nothing in the forms contains a waiver of the clergy-penitent privilege, nor do the forms contain language that authorizes Dr. Hawks to discuss clergy-penitent privileged information with Bishop Crandall. Dr. Hawks testified that though he did not recall talking to Bishop Crandall, that his practice is merely to ask a collateral contact, "What do you want me to know?" *Supp. Evid. Hrg. 23B Tr.* at 26. Dr. Hawks's HIPAA forms do not waive the clergy-penitent privilege Mr. Patterson holds with his bishop.

In actuality, the bishop had never discussed or related any confidential communications he had with Mr. Patterson with anyone. The content of those communications have never been disclosed and are not known. Additionally, Mr. Patterson has never waived his clergy-penitent privilege. Whether that communication pertains to any specific matter in the case, or is merely a deeply personal and religious matter that would be spiritually troubling if disclosed, is purely a matter of speculation.

g. There Is No Legitimate Reason for Defense Counsel to Have Not Asserted the Clergy-penitent Privilege.

Defense counsel are charged with knowing the prosecutor could not delve into privileged clergy-penitent communications that have not been waived by the penitent. Mr. Patterson, Mr. Law and Mr. Stone all testified that the defense in the case was based on Mr. Patterson testifying in his own defense. *Evid. Hrg. 23B Tr.* at 9-10, 70-74, 77-82. Moreover, it was the intention of the defense that Mr. Patterson testify until they were informed Mr. Patterson would be impeached by the prosecution based on clergy-penitent privileged communications; and defense counsel failed to consider, much less assert, the privilege. *Id.*

Mr. Patterson could not be cross examined by the prosecutor about his communications with the bishop, nor could the prosecution call the bishop to testify regarding the clergy-penitent communications. Defense counsel should have asserted the clergy-penitent privilege. Instead, the clergy-penitent privilege was overlooked by defense counsel. Instead of asserting the privilege, defense counsel improperly advised Mr. Patterson to not testify.

This case comes down to a simple and straightforward reading of the privilege with regard to clergy-penitent communications. Impeachment as well as the threat of impeachment through clergy-penitent communications is prohibited under Utah law unless the privilege is expressly and clearly waived. Defense counsel's failure to raise and assert the privilege was far below the acceptable standard of practice - constituting prejudicial ineffectiveness of counsel. Both of the standards required by the *Strickland* test are soundly present in this case. Due

to this ineffectiveness of counsel, a violation of Mr. Patterson's right to testify in his own defense occurred at the trial in this case. This violation of Mr. Patterson's constitutional right to testify in his own defense requires reversal upon remand.

ARGUMENT III

IT WAS PLAIN ERROR FOR THE TRIAL COURT TO ADMIT TESTIMONY OF THE DEFENDANT'S BAD CHARACTER THAT SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURY.

Rule 404(b) of the Utah Rules of Evidence provides,

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith .... [but] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

Utah R. Evid. 404(b). Thus, under rule 404(b), evidence of a defendant's bad acts is not admissible to prove that a defendant has a propensity for bad behavior and has acted in conformity with his dubious character. *See, State v. Hildreth*, 238 P.3d 444, 454 (Utah App. 2010). Rather, evidence is admissible under Rule 404(b) if it is offered for a proper, noncharacter purpose. *See, Hildreth,* 238 P.2d at 454.

Whether testimony regarding prior bad acts is admissible requires a three-part analysis. *Hildreth,* 238 P.2d at 454. The first inquiry is whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in Rule 404(b). *Id*. (*citing, State v. Nelson–Waggoner*, 2000 UT 59, ¶ 18, 6 P.3d 1120; see also *State v. Marchet,* 2009 UT App 262, ¶ 29, 219 P.3d 75). "If the purpose is deemed proper, 'the court must [next] determine

whether the bad acts evidence meets the requirements of rule 402, which permits admission of only relevant evidence.' " *Id.* (*quoting, Marchet*, 2009 UT App 262, ¶ 29, 219 P.3d 75 and *Nelson–Waggoner*, 2000 UT 59, ¶ 19, 6 P.3d 1120). Finally, "the court must analyze the evidence in light of rule 403 to assess whether its probative value is substantially outweighed by the risk of unfair prejudice to the defendant." *Id*.

Defense counsel did not make a single objection during trial. Consequently, the prosecutor was unbridled with regard to the introduction of testimony and evidence, and as well be shown the court failed to rein in the proceedings. The result was the introduction of a plethora of evidence that's only purpose was to inflame the jury and put Mr. Patterson's character in the worst possible light.

Specifically, during the direct examination of E.H., the government's victim in this case, the prosecutor introduced testimony from her that: (1) Mr. Patterson was a good step dad unless he got mad, and he got mad a lot, *Trial Tr.* at 89; (2) when he got mad he would "yell a lot" and would call E.H.'s brother "stupid because he didn't take out the trash or clean up his room right, *Trial Tr.* at 89-90; (3) that Mr. Patterson was "nicer" when E.H.'s mom was around than when she wasn't, *Trial Tr.* at 90; (4) that Mr. Patterson would be "really mean" if the house was not clean, *Trial Tr.* at 92; (5) E.H.'s hearsay testimony regarding the divorce

that Mr. Patterson purportedly told her mother, "that if he ever found where [they] lived that him [sic] and biker buddies would come and kill us." *Trial Tr.* at 92[2]

When Sanda Patterson, Mr. Patterson's ex-wife and E.H.'s mother testified, the prosecutor introduced a mountain of unduly prejudicial inadmissible character evidence through her, including: (1) Mr. Patterson was "a little ego centrical as far as if you're doing it his way, then everything was great." *Trial Tr.* at 144; (2) that it was "his way or the highway;" *Trial Tr.* at 144; (3) that the house had to be "model house clean," which they called "Scott Clean," *Trial Tr.* at 144 (for which an elaboration was elicited by the prosecutor); (4) that when the house was not "Scott Clean" Mr. Patterson would "get angry and he'd yell and he'd scream" and say "this house is a shit hole," and would throw personal items in the garbage it they were left out, *Trial Tr.* at 145; (5) eliciting testimony that Mr. Patterson would yell at her son, *Trial Tr.* at 146; (6) that Mr. Patterson would call her son disparaging names, (e.g. "dumb shit or whatever"), *Trial Tr.* at 146; (7) that Mr. Patterson would be upset and take it personally if the children did not say "good night" to him, *Trial Tr.* at 146; (8) what Mr. Patterson's relationship was like with Sanda Patterson when they were getting their divorce, *Trial Tr.* at 157, including

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[2] Q. Did he ever threaten you?
[E.H.] No. Well, after my mom and him got divorced, he told my mom that if he ever found where we lived that him and biker buddies would come and kill us.
Q. Did you hear im say that?

A. No.
Trial Tr. at 92

(a) he was cranky and crotchety, (b) "suffering from impotence," (c) and what their sex life was like, *Trial Tr.* at 157; (9) a lengthy and detailed diatribe about how Mr. Patterson left a Christmas party with his wife to attend a Christmas party with his own family and did not invite her to attend; *Trial Tr.* at 158-160; (10) that she got into an argument the day after Christmas, ("I don't remember what we were arguing about but we started arguing and he just said, Fine, maybe we should get a divorce" and relating comments about getting attorneys, etc, *Trial Tr.* at 160; (11) that she called and told one of her friends about the divorce, that she wasn't happy, and that she stayed up all night thinking about the last time she was happy, *Trial Tr.* at 161; ; (12) that Mr. Patterson tried to get a gun when Sanda Patterson told him she could no longer live with him, *Trial Tr.* at 162; (13) that Sanda Patterson typed-up the divorce papers and that it was because "it was just too much to be in the house with all the commotion and all the mess and sorry but he was divorcing their mother," *Trial Tr.* at 164; (14) about who owned the house prior to their marriage, *Trial Tr.* at 166; (15) about how much equity she had in the house, *Trial Tr.* at 166; (16) that in the divorce Sanda Patterson was awarded a car that $35,000.00 was owed on, beds, a sofa, loveseat, personal belongings, decorations off the walls, and a pickup, *Trial Tr.* at 167; (17) that she did not get alimony, *Trial Tr.* at 168; (18) that she did not get the house, *Trial Tr.* at 168; (19) that she did not get any equity from the house, *Trial Tr.* at 168; (20) that she did not get any other assets in the divorce, *Trial Tr.* at 168; (21) that she did not get any stocks, *Trial Tr.* at 168; (22) she did not get any jewels, *Trial Tr.* at 168; (23)

she did not get the motorcycle Mr. Patterson bought for Mother's Day, *Trial Tr.* at 168; (23) that Mr. Patterson had changed the locks on the house when she returned to it at some point, *Trial Tr.* at 171; and (24) that she called him to have him pay for a truck, for which they borrowed money from her mother, and he would not pay them back, and that her name along with her mother's was on the truck, and that she never said she would not prosecute him for stealing the truck, and that she called the police because he stole the truck but they said it was a civil matter and she called him "and said to Scott, you don't want my mom to file grand theft auto charges, pay up or give me back the truck. There you go and he never returned my call." *Trial Tr.* at 171-172. After which the prosecutor asked:

Q. Did you ever tie any of that stuff to the case?

A. No, it had nothing to do with this.

Trial Tr. at 172.

Mr. Patterson was confronted with an onslaught of entirely immaterial, unduly prejudicial - character damning testimony - all of which should have been excluded pursuant to Rule 404(b), 402 and 403.

In this case all of the above testimony should have been excluded pursuant to Rule 404(b). All the testimony does is show Mr. Patterson's bad behavior, and cast him in a disparaging light as a dubious character. There are no grounds pursuant to Rule 404(b) for which any of these statements would be admissible.

There is no relevance to the case for the admission of any of the testimony under Rule 402. The fact Mr. Patterson is deemed to be "really mean" because he

wanted the house "Scott Clean," yells or used demeaning terms when upset, purportedly made a hearsay statement regarding the divorce that he would bring his biker buddies and kill them if he found them, all of the excessive statements about the divorce, assets, alimony, unhappy Christmas party, impotence, ownership of the pickup and who paid on its loan etc. have no relevance to this case. They do not bolster, support, or pertain in any way to the facts or show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. They serve only the purpose of putting Mr. Patterson in as bad a light as possible before the jury.

Worse yet, pursuant to Rule 403, U.R.E., the statements are extremely unduly prejudicial. Evidence should be excluded pursuant to Rule 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, needless presentation of cumulative evidence." Rule 403. The testimony elicited by the prosecutor set forth above served no probative value in the case. However, the unfair prejudice is enormous as it painted Mr. Patterson as a very mean, self-destructive, homicidal, grudge-bearing and abusive husband, father and divorcee. There was so much testimony regarding the divorce and division of the marital assets that the testimony would cause a juror to not know whether it was a divorce or criminal case.

Defense counsel raised no objection. Thus, his issue is brought as a matter of plain error. To succeed on a claim of plain error Mr. Patterson must show that

there was an error, that it was obvious, and that it was prejudicial. *State v. Adams*, 257 P.3d 470, (Utah App. 2011)(*citing*, *State v. Low*, 2008 UT 58, ¶ 20, 192 P.3d 867). Collectively and independently the irrelevant evidence introduced through E.H. and Sanda Patterson regarding Mr. Patterson's bad character constitute obvious error. The litany of egregious testimony without any relevance that occurred in this case is abundant and obvious. Sanda Patterson went so far as to acknowledge on the stand that it had nothing to do with the case when the prosecutor attempted to tie it in and asked whether "that stuff" had anything to do with this case - responding, "No, it had nothing to do with this." *Trial Tr.* at 172 The error in admitting this irrelevant evidence should have been obvious to the trial court. The prosecutor, not meeting with any resistance, should have pulled back - instead the prosecutor introduce overwhelming quantities of inadmissible and irrelevant character evidence with such excessive overreaching that in this case that it is at the point of absurd. This character evidence painted Mr. Patterson's character as that of a monster, and as a very controlling, angry, threatening person - putting Mr. Patterson in the worst possible light.

It is incontestable, none of this character testimony had a thing to do with this case. It was all testimony exclusively intended to besmirch Mr. Patterson's character and to make him look as bad as humanly possible in the eyes of the jury, to inflame the jury, and it prejudiced the jury against him to such a degree he did not receive a fair trial. The profound, obvious and unjustified plethora of

violations of Rule 404(b), U.R.E., clearly requires reversal of this case on plain error grounds.

ARGUMENT IV

IT WAS INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL TO FAIL TO OBJECT AND EXCLUDE THE INADMISSIBLE CHARACTER EVIDENCE INTRODUCED BY THE PROSECUTION.

Defense counsel were ineffective in their failure to object to the character evidence introduced by the prosecutor against Mr. Patterson. Moreover, defense counsel failed to even request notice from the prosecutor of their intention to introduce Rule 404(b) evidence, as provided by the rule. The circumstances in this case show a complete failure on the part of defense counsel to appreciate the nature of inadmissible character evidence.

Evidence of a defendant's bad acts is not admissible to prove that a defendant has a propensity for bad behavior and has acted in conformity with his dubious character. *Hildreth*, 238 P.3d at 454. Despite defense counsel's failure to object, there can be no plausible reason for the prosecution to introduce testimony that Mr. Patterson is: "really mean" because he wanted the house "Scott Clean," yells or used demeaning terms when upset, purportedly made a hearsay statement regarding the divorce that he would bring his biker buddies and kill them if he found them, all of the excessive statements about the divorce, assets, alimony, unhappy Christmas party, impotence, ownership of the pickup and who paid on its loan etc.

The failure to object by defense counsel to this mountain of irrelevant and unduly prejudicial character evidence fails to meet the standard required of defense

counsel. Pursuant to the *Strickland* test, Mr. Patterson's rendered an entirely deficient performance in failing to address, object to, and prevent the admission of the character evidence introduced in this case. Consequently, to Mr. Patterson's prejudice, the prosecution was improperly allowed to completely besmirch and demean Mr. Patterson's character before the jury without objection. Mr. Patterson was painted in such a bad light due to the character evidence that, in its absence, the outcome of the trial would have been different.

ARGUMENT V

IT WAS PLAIN ERROR FOR A LAW ENFORCEMENT OFFICER TO GIVE OPINION TESTIMONY REGARDING THE TRUTHFULNESS OF E.H.'S TESTIMONY AT TRIAL.

The trial court erred in admitting Detective Hernandez's testimony that E.H. testified truthfully and credibly. As indicated previously, trial counsel did not object to the improper testimony. Consequently, this issue is raised as plain error.

At trial the prosecution first laid a foundation regarding Detective Hernandez's qualifications and experience investigating child sex abuse cases and how she became involved in investigating the matter at hand. *Trial Tr.* at 190-192. None of the testimony elicited from Detective Hernandez establishes her qualification or training to determine whether a witness or victim testified truthfully to a jury. Detective Hernandez had received a report on the case, then sat in during the interview of E.H. at the Children's Justice Center ("CJC"). *Trial Tr.* at 192-194. Detective Hernandez sat in during the trial and heard the testimony of

E.H. and her mother Sanda Patterson, and testified about the testimony she had heard as compared with the interview of E.H. at the CJC.

> Q. Okay. Now, talking about the interview a little bit, you've been in here for the testimony of both E.H. and Sanda.
>
> A. [DETECTIVE HERNANDEZ:] Correct.
>
> Q. I want to talk to you a little bit about that interview and what [E.H.] said in the interview.
>
> A. Okay.
>
> Q. Let me - I guess not so much said. How would you describe her demeanor during that interview.
>
> A, Her demeanor was, in the beginning was very calm and collected and she knew detailed. She had, you know, during a lot of interviews they can't tell what the victim or the suspect told them or conversations that were spoken, they just remember details about the crime where she could actually tell things that were said and comments that were made . . .
>
> Q. Now, is that typical in these types of interviews?
>
> A. Usually with a young child it is.
>
> Q. When you say young child what do you mean?
>
> A. Well, it's very normal for them to love and forgive the person whose abused them because they are their caretaker and they know what the person is doing to them is wrong but they still love them and respect them and don't want to see anything happen to them.
>
> * * *
>
> Q. Okay. In your opinion, would you say that the testimony you heard from [E.H.] today is consistent with what she told you in that interview?
>
> A. Yes, I would except for some of the obvious lies that were told that day, yes.
>
> Q. And which lies are you talking about?

A. The lie about Scott having her stay in the bathroom or stay in the bedroom while he urinated.

Q. Is that your opinion, and again with your experience and training, is that uncommon?

A. No, not to a certain degree, no.

Trial Tr. at 194-197.

Detective Hernandez's does not refer to inconsistencies between the testimony given by E.H. and the statements during her CJC interview. Instead, Detective Hernandez testified about the candor of E.H.'s testimony, stating E.H. told only one "lie" during the interview at the CJC about having to stay in the bathroom while Mr. Patterson urinated. This "lie" was not part of the testimony E.H. gave in court. As it was omitted from the court testimony, the clear implication is that E.H. only testified in court about the true statements made during the interview. The clear and direct implication from Detective Hernandez's testimony is that E.H. told the truth during her testimony to the jury.

It is unclear what specific type of expert, if any, Detective Hernandez is, or whether the detective is giving lay opinion with respect to E.H.'s candor and truthfulness on the stand.

Lay witness opinion as to whether a witness has testified truthfully at trial is not admissible. Under rule 701 of the Utah Rules of Evidence, a lay witness may give opinions "rationally based on the perception of the witness." Utah R. Evid. 701. A lay witness may testify in the form of fact or opinion to information within her personal knowledge or perception when it is helpful to the finder of fact and it

is "not based on scientific, technical, or other specialized knowledge." Utah R. Evid. 701; *see, State v. Rothlisberger,* 2006 UT 49, ¶ 9, 147 P.3d 1176. In other words, if "an average bystander would be able to provide the same [type of] testimony," an expert is not required. *Rothlisberger,* 2006 UT 49, ¶ 34, 147 P.3d 1176. In *State v. Sellers*, the Utah Court of Appeals noted with respect to a detective giving lay witness opinion regarding intoxication that "a lay person is capable of recognizing intoxication in cases where the person personally observed the behaviors that led her to that conclusion." *State v. Sellers*, 248 P.3d 70, 80 (Utah App. 2011). The *Seller's* court held that in that case, because the detective did not personally observe the witness on the occasion when they were intoxicated the detective's testimony exceeded the scope of permissible lay opinion testimony under Rule 701, U.R.E.. *Id.* In this case, while Detective Hernandez might be able to offer some kind of opinion as to which interview statements of E.H. were consistent or not with her in-court testimony, Detective Hernandez had no basis for determining which statements were lies and which were truthful.

Experts, likewise, cannot give an opinion that a witness testified truthfully at trial. The seminal case in this area with respect to the scope of admissible expert testimony as to truthfulness is *State v. Rimmasch,* 775 P.2d 388 (Utah 1989). In *Rimmasch,* the defendant was convicted of forcible sexual abuse, rape, forcible sodomy and incest of a child based in part on expert opinion testimony, over the objection of the defendant, that the child truthfully testified abut the abuse. In analyzing the challenged expert testimony, the *Rimmasch* court discussed three

distinct categories: (1) testimony concerning the truthfulness of a child witness on a particular occasion, (2) testimony that there is a psychological and behavioral profile of the typical child sexual abuse victim, and that the victim conformed to the profile and therefore had been abused; and (3) testimony that, based on the expert's subjective "credibility appraisal" of the child during an interview, the child had truthfully described the abuse and therefore had been abused. *Id.* at 391.

Focusing on the first area, the *Rimmasch* court held Dr. Tyler's testimony ran "afoul of Rule 608(a)," *id.* at 392, since she commented on the truthfulness of the child victim on a particular occasion. The court specifically condemned Dr. Tyler's testimony that a child typically does not give such detailed information as the victim gave unless the child had experienced the abuse. *Id.* at 393. The court also expressed concern about her statement that she thought the child victim had nothing to gain by lying about the abuse. *Id.*

The *Rimmasch* court rejected the second and third type of "scientific" opinion testimony, concluding the state had not laid an adequate foundation to establish the reliability of the expert testimony to the effect that the child matched the profile of an abused child or, based on their expert "credibility appraisal," that she had truthfully described incidents of abuse and, therefore, had been abused. The *Rimmasch* court concluded that neither "credibility assessment" testimony nor child abuse profile testimony has been generally accepted by the legal or scientific communities, nor could the court say it was nevertheless inherently reliable and, therefore, judicial notice of the reliability of such opinion evidence would be

inappropriate. *Id.* at 403. The court found the admission of this unreliable expert testimony violated Utah Rule of Evidence 702. *Id.* In discussing the "scientific" expert testimony concerning the profile of a typical sexual abuse victim offered by Dr. Palmer and Dr. Tyler, the same experts who testified in this case, the court found "little foundation was offered or demanded by the court as to the scientific basis for the profile of the typical sexually abused child, [or] the ability of the profile to sort the abused from the nonabused with any degree of accuracy." *Id.* at 395.

Finally, in discussing the "credibility appraisal" of the child victim made by the experts, the court concluded that "nothing has come to our attention suggesting a general acceptance of the proposition that those who regularly treat symptoms of sexual abuse are capable of determining with a high degree of reliability the truthfulness of allegations that one has been abused." *Id.* at 406. The court ultimately concluded that the cumulative evidentiary errors were harmful error and, thus, reversed and remanded the case for retrial. *Id.* at 407–08.

In *State v. Van Matre,* 777 P.2d 459 (Utah 1989), the Utah Supreme Court again reversed a conviction for sexual abuse of a child and sodomy based upon the improper admission of expert opinion evidence. The court concluded that, under *Rimmasch,* "it was reversible error to permit the experts to assess [the child's] credibility and to testify that [the child] matched certain profile characteristics of a typical sex abuse victim." *Id.* at 461. Summarizing its holding in *Rimmasch,* the court stated:

> We concluded ... that experts may not give a direct opinion about the truthfulness of a child's description of the incidents of sexual abuse. We determined also that the inherent reliability of the scientific principles and techniques upon which credibility appraisals and profile-based opinion testimony are predicated must be determined before a trial court can admit that evidence.

Id. Interestingly, the court does not comment on whether defendant had objected to this testimony at trial.

State v. Stefaniak, 900 P.2d 1094 (Utah App. 1995), is on all fours with the present case. In *Stefaniak* the defendant was convicted of lewdness involving a child. The Court of Appeals reversed the conviction and remanded the case holding that testimony regarding the victim's credibility was inadmissible, and that the admission of the evidence was prejudicial. *Id.* at 1097. At the trial in *Stefaniak* a social worker of some fourteen years of experience and supervisor of child welfare services testified that he had interviewed 3000 to 4000 children alleged to be the victims of sexual abuse. He testified, over the objection of defense counsel, that the minor "volunteered information readily" and "seemed to be quite candid" during the interview. *Id.* at 1095. Next the minor's father testified over defense counsel's objections that he had listened to his daughter testify in court and she did not deviate at all from the story she had initially told him concerning Stefaniak's lewd conduct. *Id.*

On appeal, *Stefaniak* contended that the testimony of the social worker violated U.R.E. 608(a) and invaded the province of the jury. The Court of Appeals agreed,, holding that "the admission of [the social worker's] testimony as part of the State's case-in-chief constitutes error because the witness improperly vouched

for the victim's credibility. *Id*. (*citing, Rimmasch*, 775 P.2d at 392; *State v. Iorq*, 801 P.2d 938, 939-42 (Utah App. 1990)). The Court noted that "[l]ay witnesses are no more entitled to offer opinions about credibility than are experts - Rule 608(a) applies across the board." *Id.* n. 2.

Rule 608(a) permits the credibility of a witness to be attacked or supported by evidence in the form of opinion or reputation "subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attached by opinion or reputation evidence or otherwise." Rule 608(a), U.R.E. Furthermore, Rule 608(b) prohibits introduction of specific instances of conduct excepting only convictions for certain crimes. "Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of a crime provided in Rule 609, may not be proved by extrinsic evidence." Rule 608(b), U.R.E. *See also,* Rule 609, U.R.E.

The *Stefaniak* court focused on the testimony that arose when the prosecutor asked the social worker at trial to testify regarding the minor's demeanor during the interview, to which the social worker responded:

> She was a fairly normal child for her age. She was pretty open in her responses to my questions. She volunteered information readily. She seemed quite candid about what she was telling me.

Stefaniak, 900 P.2d at 1095. To this statement the *Stefaniak* court held:

> The prosecutor improperly elicited Bartholomew's comments concerning C.C.'s candor during the prior interview to suggest that

> C.C. was an open, honest, and credible witness.[FN3] *See, State v. Rammel,* 721 P.2d 498, 500 (Utah 1986). It is for the factfinder to determine witness credibility. *See State v. Workman,* 852 P.2d 981, 984 (Utah 1993). Allowing Bartholomew to testify as he did, over the objection of Stefaniak's counsel, had the potential to "usurp the fact-finding function of judge or jury." *Rimmasch,* 775 P.2d at 392. Therefore, the testimony was inadmissible.

Id. at 1095-1096.

Expert opinion testimony that statements during an interview were truthful is also not admissible. In *State v. Nelson,* 777 P.2d 479 (Utah 1989), the court reversed a sodomy on a child conviction because it found error in the admission of expert testimony evaluating the credibility of the victim's out-of-court statements. The expert witness attempted to satisfy the foundational requirements subsequently delineated in *Rimmasch* for a "credibility assessment" by detailing the methodology he used in determining whether a person was telling the truth. He testified that he considered internal consistency, external consistency, the amount of detail, and the child's motivation. *Id.* at 480–81. He applied these factors to the victim's statements and concluded the child was telling the truth. *Id.* at 481. The court concluded, however, that under *Rimmasch,* there was inadequate foundation as to the reliability of the expert's methodology. *Id.*

Based on *Rimmasch* and its progeny expert opinion testimony that either the statements made during an interview or testimony given at trial are truthful are violations of Rules 608(a) or 702. The law with respect to opinion testimony as to the truthfulness of a witness is well settled and clear. It should have been obvious to the trial court that detective Hernandez's testimony was inadmissable.

Moreover, the prejudice to Mr. Patterson is manifest. A law enforcement officer's testimony not only vouching for, but declaring E.H.'s testimony was true because she did not include "lies" made during her interview prejudiced Mr. Patterson before the jury. In this case, the government called Detective Hernandez as its final witness and she opined to the truthfulness and candor of E.H. Such testimony is both impermissible and unduly prejudicial to Mr. Patterson, causing there is plain error in this case.

ARGUMENT VI

MR. PATTERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS FAILED TO OBJECT TO DETECTIVE HERNANDEZ'S OPINION REGARDING THE TRUTHFULNESS OF E.H.'s TESTIMONY.

Mr. Patterson was denied effective assistance of counsel when defense counsel failed to object to Detective Hernandez's opinion testimony that E.H. was telling the truth. The testimony was grounds for a mistrial pursuant to *Rimmasch*, which defense counsel should have sought, and which was entirely warranted. At the very least, defense counsel should have objected to the testimony, moved to strike the testimony and obtained a jury instruction that the testimony should not be considered in deliberations. Instead, defense counsel did nothing and the testimony went to and was considered by the jury.

Pursuant to the two part *Strickland* test, defense counsel fell far below the objective standard of reasonable professional judgment and clearly prejudiced Mr. Patterson, as Detective Hernandez's opinion testimony violated U.R.E. 608(a), was

inadmissible under Rules 701 and 702, U.R.E., and invaded the province of the jury.

A defendant's right to the assistance of counsel is recognized as "the right to the effective assistance of counsel." *Strickland,* 466 U.S. at 685, 104 S.Ct. At 2063. In *Strickland* the United States Supreme Court established a two-part test for determining when a defendant's Sixth Amendment right to effective assistance of counsel has been violated. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. That two part test, known as the *Strickland* test, was adopted by the Utah Supreme Court in *Bundy,* 763 P.2d at 805.

> To prevail, a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant.

Bundy, 763 P.2d at 805.

In assessing counsel's performance under the first component of the test, the Utah Supreme Court recognizes " 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant.' " *Templin,* 805 P.2d at 186 (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065). For this reason, a defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *Bullock,* 791 P.2d at 159-60.

Mr. Patterson's conviction rested on whether the jury found E.H. to be credible. Detective Hernandez's testimony, claiming to know at what point E.H.

lied or not, violated Mr. Patterson's right to a fair trial under the Sixth Amendment. She had no way of knowing what was true or not, and defense counsel should have objected and kept such evidence from going to the jury. The *Strickland* standard requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Templin,* 805 P.2d at 187; *Carter,* 776 P.2d at 894 n. 30, is fully met.

ARGUMENT VII

THE CUMULATIVE ERROR ARISING FROM THE INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL, PROSECUTORIAL INTERFERENCE WITH THE DEFENDANT'S RIGHT TO TESTIFY, INTRODUCTION OF INADMISSABLE AND IRRELEVANT CHARACTER EVIDENCE AND IMPROPER OPINION TESTIMONY AS TO THE TRUTHFULNESS OF TESTIMONY REQUIRE REVERSAL OF MR. PATTERSON'S CONVICTION.

Finally, the cumulative effect of the various errors in this case warrants reversal. "Under the cumulative error doctrine, the Court of Appeals will reverse if the cumulative effect of the several errors undermines our confidence ... that a fair trial was had." *State v. Dunn,* 850 P.2d 1201, 1229 (Utah 1993) (omission in original). Where the combined prejudicial impact of the various errors, when multiple yet individually harmless, undermines confidence that the defendant received a fair trial, a case will be reversed and remanded for a new trial. *Id. See also, State v. Killpack,* 191 P.3d 17, 29 (Utah 2008).

Multiple errors exist in this case. Collectively, the errors undermine any confidence Mr. Patterson received a fair trial. Error arose when the prosecutor interfered with Mr. Patterson's right to testify by claiming he would impeach him with clergy-penitent privileged communications. The prosecutor had no indication the privilege was waived. And, as shown, the prosecutor did not actually posses any privileged communications. Further, error arose when the prosecutor introduced character evidence against Mr. Patterson that served no purpose other than to cast Mr. Patterson in a bad light, inflame the jury and prejudice them against Mr. Patterson. Yet more error occurred when the prosecutor introduced through Detective Hernandez, her opinion as to the truthfulness of statements by E.H. All of these errors were clear, obvious and prejudicial.

Compounding the unfairness of Mr. Patterson's trial is the manifest ineffectiveness of defense counsel. Defense counsel failed to assert the clergy-penitent privilege and improperly advised Mr. Patterson not to testify. Defense counsel failed to object at all to the plethora of testimonial evidence placing Mr. Patterson's character in the most dubious light. Furthermore, they failed to object, seek a mistrial, move to strike or in any way limit the jury's consideration of Detective Hernandez's opinion as to the truthfulness of E.H.'s testimony.

Collectively, the errors in this case are so rampant that Mr. Patterson could in no way have had a fair trial. For these reasons, cumulative error should be found and the case reversed and remanded for a new trial.

CONCLUSION

Mr. Patterson did not receive a fair trial in this case. The prosecutor interfered with Mr. Patterson's right to testify by claiming he would impeach him with clergy-penitent privileged communications. The prosecutor had no indication the privilege was waived and in fact did not posses - as it has never been disclosed - Mr. Patterson's communication with his bishop. Not only was this plain error, but further plain error arose when the prosecutor introduced character evidence against Mr. Patterson that served no purpose other than to cast Mr. Patterson in bad light, inflame the jury and prejudice them against Mr. Patterson. Yet more plain error occurred when the prosecutor introduced through Detective Hernandez her opinion as to the truthfulness of statements by E.H. All of these errors were clear, obvious and prejudicial.

Compounding the unfairness of Mr. Patterson's trial is the manifest ineffectiveness of defense counsel. Defense counsel failed to assert the clergy-penitent privilege and improperly advised Mr. Patterson not to testify on his own behalf, which was his only defense. Defense counsel failed to object at all to a plethora of testimonial evidence placing Mr. Patterson's character in the most dubious light. Furthermore, defense counsel failed to object, seek a mistrial, move to strike or in any way limit the jury's consideration of Detective Hernandez's opinion as to the truthfulness of E.H.'s testimony. These errors individually, and commutatively, warrant reversal in this case.

Statement Relief Sought

The foregoing reasons establish Mr. Patterson's convictions in the trial court should be vacated, the case should be reversed and the matter remanded for a new trial.

Respectfully submitted January 25, 2012

_____
Edwin S. Wall,
Attorney for Defendant/Appellant

Certificate of Type-Volume Limitation

I hereby certify pursuant to Rule 24(f)(1) that this brief is written in 14 point Times New Roman font and using the automated Word Count function for WordPerfect that this brief contains 13,508 words, not counting those words contained in the table of contents, table of citations, addendum containing statutes, rules regulations or portions of the record required pursuant to Rule 24(a).

Respectfully submitted January 25, 2012.

_____
Edwin S. Wall,
Attorney for Defendant/Appellant

Certificate of Service

I hereby certify that two copies of the foregoing was furnished by U.S. Mail, first class postage prepaid, to the following on January 25, 2012:

Laura B. Dupaix, Utah Bar No. 5195
Criminal Appeals Division Chief
Utah Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorney for Plaintiff/Appellee

Additionally, on the same date, a copy of the digital submission in electronic form was emailed to:

Laura B. Dupaix, Utah Bar No. 5195
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_____
Erica N. Beatty, Legal Assistant

Addendum C

Edwin Stanton Wall
Utah & Wyoming

Kelly Ann Fowler
Utah

Edwin S. Wall, P.C.

A PROFESSIONAL LAW CORPORATION

650 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

May 22, 2013

Scott Patterson
Inmate Number 195465 **Legal Mail**
Utah State Prison
P.O. Box 205
Draper, Utah 84020

Regarding - Petition for Writ of Certiorari, Case Number 20130220 SC

Dear Scott:

This is not the letter I wanted to be sending you. The Utah Supreme Court has denied your petition for a writ of certiorari. Enclosed is the court's order denying the petition.

At this point, to challenge the state criminal conviction, you may file a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 or you may pursue post-conviction relief through Rule 65 C of the Utah Rules of Civil Procedure, or both.

Because these are post-conviction proceedings you will have to retain counsel and pay filing fees. My fee for pursuing federal habeas relief in your case would be $10,000.00. As state post conviction relief would be more complicated and have to be based on matters that have not already been litigated I do not know what claims could be made so I have not determined what my fee might be. If you cannot afford counsel you may obtain some relief from the fee requirements if you file affidavits establishing your indigence and the inability to pay with the respective courts. If you are found indigent they may waive all or part of your filing fees. In some cases the courts will also appoint counsel, although there is no right to counsel.

In order to give you an idea as to what might be done and help you decide how to proceed, I have taken this opportunity to lay out some basic information. In this letter I will discuss both of the proceedings for federal habeas and those for state post-conviction relief so that you may consider how you wish to proceed.

Federal Habeas

If you pursue a federal petition of habeas corpus, the petition may challenge the validity of either the conviction or sentence. In your case, the issue would pertain to the validity of the conviction due to the deprivation of your right to testify in your own defense. I recommend you pursue federal habeas relief in your case.

28 U.S.C. § 2244(d)(1) provides for a one-year statute of limitation for federal habeas corpus petitions. The Court entered its order on May 16, 2013. This means you must file your petition with the federal district court within one year of May 16, 2013, or it will be barred.

The petition must allege that the conviction or sentence was in violation of the United States Constitution, a United States Supreme Court case law, or a federal law. The federal court does not have jurisdiction to consider claims which are based solely on state law or on the state constitution. This means the Utah State Appellate Court's interpretation of state law with respect to the clergy-penitent privilege will not be subject to reversal in a habeas procedure. Rather, the focus would be on the violation of your federal constitutional right to testify.

The federal court cannot grant relief on habeas corpus claims unless the the Utah Supreme Court has first had an opportunity to rule on the same federal claims. This is called *exhaustion of state court remedies*. 28 U.S.C. § 2254(b)(1)(A). The Supreme Court explained the exhaustion requirement in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 1732 (1999). You have now exhausted your state court remedies.

After your federal habeas corpus petition is filed, a federal district or magistrate judge reviews the petition to determine whether it is subject to summary dismissal. See 28 U.S.C. § 2243. Summary dismissal is appropriate where "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4 of the Rules Governing § 2254 Cases. Summary dismissal is also appropriate where the allegations in the petition are vague, conclusory, palpably incredible, patently frivolous, or false. Summary dismissal is also appropriate where it is evident from the petition that the claims have been procedurally defaulted.

The Court's initial review order will determine whether you can proceed. Your case cannot proceed until this order is issued. Some habeas cases are not allowed to proceed after the initial review order; your case may be dismissed if it is clear that amendment could not cure the deficiencies.

Even if the initial review order grants the opportunity to proceed in the case, the state can still file a motion for summary dismissal. The Court usually does not have access to the full state court record when it performs its initial review, and the full record may reveal grounds for summary dismissal. At the same time, if the state seeks summary dismissal the full record may bolster the grounds for the petition. In your case we are fortunate to have transcripts of the events that arose due to the Rule 23B hearing.. The initial review process may take several months due to the federal court's heavy caseload and current budget limitations.

It is important to know that the habeas corpus claims are determined by a federal court's review of the written state court record. The federal habeas corpus action is not an opportunity to re-litigate the criminal case. See 28 U.S.C. § 2241, *et seq.* As the petitioner, you bear the burden of proof to show that your conviction or sentence violates the federal Constitution, United States Supreme Court case law, or federal law. If your case is unsuccessful, then you may wish to appeal it to the Tenth Circuit Court of Appeals. There is not an automatic right to appeal a habeas corpus case in the federal court system. You may begin the process to seek the right to appeal only after *judgment* has been entered in your case in the federal district court.

The appellate process in habeas proceedings is different from the typical appellate process in a criminal case. It requires obtaining a certificate of appealability rather than merely filing a notice of appeal after entry of the federal district court's order. If the appellate process is not properly followed, you will lose your opportunity to seek appeal. The *certificate of appealability* is a request for authorization to file an appeal. This process is unique to federal habeas corpus proceedings. This is filed in the federal district court, not in the Tenth Circuit Court of Appeals.

When a denial or dismissal of a habeas corpus petition was based upon the merits of the claims in the petition, it is necessary to show that the appeal presents a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). To satisfy the "substantial showing" standard, it is necessary to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). In your case, the violation of your right to testify in your own defense goes to such a constitutional claim.

When the denial or dismissal of a habeas corpus petition is based upon a procedural ground, it is necessary to show (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 120 S.Ct. at 1604. In your case, there is a procedural issue with regard to your defense counsel's failure to timely object to the prosecutor's assertion that they would impeach you if you took the stand.

If you elect to do the petition on your own, *pro se*, you should also be aware that prisoners are usually entitled to the benefit of the "mailbox rule," which provides that a legal document is deemed filed on the date a petitioner delivers it to the prison authorities for filing by mail, rather than the date it is actually filed with the clerk of court. *See Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988).

You should be aware that if you do not bring all federal claims related to a particular judgment in a single federal habeas corpus action, you will not be able to bring a second action without first obtaining court permission.

◆

State Post-Conviction Relief

Rule 65C of the Utah Rules of Civil Procedure provides for civil proceedings under Utah law to pursue post-conviction remedies. The rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

Utah Code Section 78B-9-107(1) requires a petition for post-conviction relief be filed "within one year after the cause of action has accrued." The Court entered its order on May 16, 2013. This means Scott must file your petition within one year of May 16, 2013, or it will be barred.

Procedurally, if the court comments on the merits of a post-conviction claim, it must first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106. The petition for post conviction relief must be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

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The petition must set forth all of your claims in relation to the legality of the conviction or sentence. On the filing of the petition, the clerk of court is required to promptly assign and deliver it to the judge who sentenced you. That would be Judge Kay. Understandably, it would be prudent to seek the case be transferred to another judge. However, such transfers are not automatic and I anticipate it would have to be litigated.

The first consideration of the Post Conviction petition by the judge is whether to summarily dismiss the claims. The assigned judge reviews the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court summarily dismisses the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order of dismissal need not recite findings of fact or conclusions of law. Because of these limitations, those issues that have been addressed in the appeals we have taken would likely be summarily dismissed.

If, on review of the petition, the state court concludes that all or part of the petition should not be summarily dismissed, the court designates the portions of the petition that are not dismissed and directs the clerk to serve a copy of the petition, attachments and memorandum by mail upon the state, which is the respondent.

Any final judgment or order entered upon the state post-conviction petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

◆

You will need to decide how you wish to proceed. I urge you to do so, and to do so promptly. It is very disappointing and disconcerting that the Utah Supreme Court did not grant certiorari in your case. The Utah Supreme Court should have granted certiorari, and its failure to do so will result in severe consequences to those who confide in their clergy believing that they,

alone, hold the privilege. I have no doubt in time the Court will correct this error. Regardless of how you decide to take your next step, I adamantly urge you to seek relief at the very least through a federal habeas petition.

What has happened in your case and to you is an injustice. I appreciate the confidence and you have had in me in taking your cause forward. It is tragic your initial trial counsel did not understand and appreciate the significance of your clergy-penitent privilege. What is even more tragic is that you did not get to tell the jury at trial what really happened - your side of the case was completely gutted and never heard. I know you have always told the truth and testified with honor and integrity. You must fight on!

Edwin S. Wall
Attorney at Law

Enclosure: *Order*

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NOTICE OF DECISION

State of Utah

Respondent,

v. Case No. 20130220-SC

Scott Kirby Patterson,

Petitioner.

The above-entitled case was submitted to the court for decision and the attached order has been issued.

Order Issued: May 16, 2013

Notice of Decision Issued: May 16, 2013

Record: None

SECOND DISTRICT, FARMINGTON, #091700223

Andrea R. Martinez
Clerk of Court

By Marilyn Hammond
Judicial Assistant

May 16, 2013
Date

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2013, true and correct copies of the foregoing ORDER and NOTICE OF DECISION were deposited in the United States mail to the parties listed below:

RYAN D TENNEY
ASSISTANT ATTORNEY GENERAL
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EDWIN S WALL
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and a true and correct copy of the foregoing ORDER and NOTICE OF DECISION was placed in the State Interdepartmental mail service to the trial court listed below:

SECOND DISTRICT, FARMINGTON
ATTN: KELLY ROGERSON
800 W STATE ST BX 0442
PO BOX 769
FARMINGTON UT 84025

and a true and correct copy of the foregoing ORDER and NOTICE OF DECISION was hand delivered to the court listed below:

LISA COLLINS
COURT OF APPEALS
450 S STATE ST
PO BOX 140230
SALT LAKE CITY UT 84114-0230

By Marilyn Hammond
Judicial Assistant

Case No.: 20130220-SC
SECOND DISTRICT, FARMINGTON, #091700223
Court of Appeals Case No. 20100243-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah

Respondent,

v. Case No. 20130220-SC

Scott Kirby Patterson,

Petitioner.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on March 12, 2013.

The Petition for Writ of Certiorari is denied.

FOR THE COURT:

5/16/13
Date

Ronald E. Nehring
Associate Chief Justice

Addendum D

UTAH COURT OF APPEALS

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STATE OF UTAH, Plaintiff/Appellee, v. SCOTT KIRBY PATTERSON, Defendant/Appellant.	)	Case No. 20100243 CA

- - - - -

APPELLANT'S REPLY BRIEF

- - - - -

On Appeal from the Second Judicial District Court in and for the County of Davis, State of Utah, Honorable Thomas L. Kay Presiding

- - - - -

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Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

None

Other

None

ARGUMENT I

MR. PATTERSON'S CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE WAS UNCONSTITUTIONALLY VIOLATED WHEN THE STATE ASSERTED THEY WOULD IMPEACH HIM WITH CLERGY-PENITENT PRIVILEGED STATEMENTS AND WHEN HIS COUNSEL FAILED TO OBJECT.

The State argues that Mr. Patterson failed to preserve the issue of prosecutorial misconduct in the record, and that it would be improper to raise the issue upon it coming to light at the Rule 23B hearing. (Aplee. Br. 21, ""Moreover, a rule 23B remand does not allow a defendant to raise any kind of claim (such as prosecutorial misconduct).", *sans citation*). The State would put the purview of the issue beyond review.

Trial is an onerous ordeal, it should not be made more so by the States claim that it has obtained, knows and will use confidences made in penitence with clergy for impeachment should the accused dare testify in their own defense. In its brief, the State does not address, nor refute, the breadth and strength of the penitent privilege under Utah law recognized in *Scott v. Hammock*, 870 P.2d 947 (Utah 1994). The penitent privilege has a potent purpose, to assure complete confidence for those seeking spiritual guidance from clergy. As stated in *Scott*, the clergy penitent relationship 'depends upon a sense of complete confidentiality.'" Id. at 955. The penitent privilege is not waived merely by identifying one's bishop or clergy as a character reference to a psychologist, or anyone else. Moreover, complete confidence in the privilege is undermined if the State can intimate that

an accused's privileged penitent statements will be used against them for impeachment if they testify. In this case the privilege was not waived.

Coinciding with the prosecutor's misconduct, Mr. Patterson's trial counsel were ineffective in their failure to raise the clergy-penitent privilege. Defense counsel utterly failed in asserting the privilege and protecting Mr. Patterson. Instead of objecting and litigating the matter, they incorrectly advised Mr. Patterson that they could not preclude the impeachment if he testified and advised him to not testify. The State claims Mr. Patterson failed to adequately marshal the facts with respect to the trial courts finding that defense counsel were ineffective. Marshaling the facts requires an appellant to "present the facts in a comprehensive and fastidious order, every scrap of competent evidence which supports the findings ... and ferret out the fatal flaw in the evidence." *State v. Willey,* 2011 UT App. 23, ¶ 11, 248 P.3d 1014. In the present case the evidence has been properly marshaled to identify the fatal flaw in the evidence.

As marshaled, the relevant evidence in the light most favorable to the State is that the prosecutor never talked to the bishop about anything Mr. Patterson said and was not privy to what Mr. Patterson said to his bishop. (Aplt. Br. at 9). The prosecutor relied on information which appeared to be, but were not, admissions by Mr. Patterson in the psychosexual report. (Aplt. Br. at 9). The prosecutor did not have anything stating Mr. Patterson had waived his clergy-penitent privilege. (Aplt. Br. at 10). It is true that Mr. Patterson had discussed something confidential and subject to the clergy-penitent privilege with his bishop. (Aplt. Br. at 10).

However, the content of those communications was never disclosed by Mr. Patterson or the bishop to anyone. (Aplt. Br. at 10).

Further marshaled are the facts that just before Mr. Patterson was to testify, the prosecutor told defense counsel outside of the courtroom that if Mr. Patterson testified he would be impeached on cross examination by statements Mr. Patterson purportedly made to his bishop. (Aplt. Br. at 9). Defense counsel failed to object or consider, much less raise, the clergy-penitent privilege. (Aplt. Br. at 9). Defense counsel did not discuss the privilege with one another or Mr. Patterson (Aplt. Br. at 9). They did not indicated to Mr. Patterson in any way they could prevent the prosecutor from impeaching him with what had been said to his bishop. (Aplt. Br. at 9). Instead, defense counsel told Mr. Patterson he would be impeached with what he had discussed with his bishop if he testified. (Aplt. Br. at 9). Mr. Patterson's defense had always depended upon him testifying in his own defense. (Aplt. Br. at 9). Because of the prosecutor's statement, defense counsel advised Mr. Patterson not to testify and he followed their advice. (Aplt. Br. at 9). These are the facts, properly marshaled and presented on appeal.

Mr. Patterson has asserted ineffective assistance of counsel because of defense counsel's failure to assert the clergy-penitent privilege and erroneous advice that he not exercise his constitutional right to testify in his defense. The first fatal flaw as to the evidence in the findings is that defense counsel did not raise or even consider the clergy-penitent privilege. The second fatal flaw as to the findings is that neither the bishop nor Mr. Patterson ever disclosed the content

of the confidential penitent communication, so the prosecutor did not know what the communication was - though he claimed he did and that he would use it for impeachment. The third fatal flaw is that the psychosexual report contained the privileged confidential communication. The fourth fatal flaw as to the findings is that Mr. Patterson waived the clergy-penitent privilege by consenting to the having the psychologist communicate with the Bishop, as the clergy penitent relationship depends upon a sense of complete confidentiality which cannot, and should not, so readily be compromised.[1]

The State argues Mr. Patterson failed to make adequate efforts to "maintain confidentiality." (Aplee. Br. at 33). The State argues Mr. Patterson had a duty to "timely object" if 'inadvertent disclosure occurs during litigation." (Aplee. Br. at 33, citing *Gold Standard Inc. V. American Barrick Res. Corp*. 805 P.2d 164, 172 (Utah 1990)). In this case, the issue is whether a prosecutor in a criminal case can assert they will impeach a defendant with a penitent communication, absent a waiver; and whether upon such assertion Mr. Patterson's counsel were ineffective when they failed to raise an objection. The State's citation to *Gold* concedes Mr. Patterson's counsel had a duty to object and acknowledges defense counsel's performance fell below the standard that was their duty.

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[1]As a corollary, were someone to provide a psychologist the like reference to their attorney for purposes of a similar psychological evaluation, it would be untenable that the attorney would then be at liberty to disclose their client's confidential communications and that such a referral would constitute a waiver of the attorney-client privilege.

Prejudice should be presumed in this case. In *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) the Court acknowledged "prejudice may be presumed when there has been actual or constructive denial of counsel, when the government has interfered with counsel's assistance, or when counsel has acted with a conflict of interest. In addition, ... pursuant to our inherent supervisory power over the courts, we may presume prejudice in circumstances where it is unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice." (citations omitted). In this case the State interfered with counsel's assistance by suggesting that Mr. Patterson would be impeached if he took the stand by what he confided in his bishop.

Mr. Patterson was deprived of competent counsel by defense counsels' complete failure to be cognizant of the clergy-penitent privilege. Additionally, due to the strength of the clergy-penitent privilege under Utah law, prosecutors should be prohibited from intimating, much less endeavoring, to impeach a defendant who testifies in their own defense based on confidential clergy-penitent communications absent anything less than a direct manifest waiver of the privilege.[2] Additionally, even applying the second prong of *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), Mr. Patterson's testimony would have established that he did not commit the charged offenses, and his testimony would have been admissible. In this case, Mr.

[2]The best practice, perhaps, would be to hold a hearing outside of the presence of the jury should a prosecutor, or any litigant, perceive a defendant or witness has directly manifest a waiver of their clergy-penitent privilege.

Patterson has shown actual prejudice; moreover, that prejudice should be presumed.

ARGUMENT II

THE TRIAL COURT IMPROPERLY ADMITTED TESTIMONY OF THE DEFENDANT'S BAD CHARACTER THAT SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURY

The State acknowledges that Rule 404(b) evidence of other acts is prohibited "where the sole reason it is being offered is to prove bad character or to show that a person acted in conformity with that character." (Aplee. Br. at 46). The State argues that the testimony about Mr. Patterson's anger issues was relevant to show why the victim did not report the abuse, and that the testimony about the divorce was relevant for rebutting Mr. Patterson's claim that the false charges were motivated by divorce. (Aplee. Br. at 46). Yet, nothing the State argues, or could argue, rebuts the fact that Sandra Patterson's testimony, elicited by the prosecutor, was that her disparaging testimony had nothing to do with the case. (Aplt. Br. at 50, *Trial Tr.* at 172). The State correctly states "unfair prejudice" occurs when evidence has "an undue tendency to suggest decision on an improper basis." (Aplee. Br. at 47, *citing State v. Maurer*, 770 P.2d 981,984 (Utah 1989)). And that, "'[o]nly when evidence poses a danger of rous[ing] the jury to overmastering hostility does it reach' this level." (Aplee. Br. at 47, *citing State v. Killpack*, 2008 UT 48, ¶53, 191 P.3d 17). In this case, the excess of inadmissible character damaging testimony is manifest, and clearly acknowledge

as having nothing to do with the case. It was clear plain error that it was admitted and counsel was ineffective in failing to object.

ARGUMENT III

LAW ENFORCEMENT OFFICERS SHOULD BE PROHIBITED FROM INTERJECTING OPINION TESTIMONY VOUCHING FOR THE VERACITY OF A VICTIM AT TRIAL

At trial, Detective Hernandez was asked to give her opinion about whether the victim's statements in court were consistent with what she said during her interview. Detective Hernandez was asked a very specific question, "Okay. In your opinion, would you say that the testimony you heard from [E.H.] today is consistent with what she told you in that interview?" *Trial Tr.* at 197. The response was not simply that the victim has been inconsistent, consistent or substantially consistent. Rather, Detective Hernandez stated,

> A. Yes, I would except for some of the obvious lies that were told that day, yes.
>
> Q. And which lies are you talking about?
>
> A. The lie about Scott having her stay in the bathroom or stay in the bedroom while he urinated.

Trial Tr. at 197.

Detective Hernandez's response asserts her ability, though not a witness to the actual events, of distinguishing between which statements were truthful and which were not. Law enforcement officers should not be opportunistic when asked about the consistency of statements, and seize it as an opportunity to vouch

for the victim's testimony at trial. Detective Hernandez's testimony directly violated the prohibition in *State v. Rimmasch*, 775 P.2d 388, 391-93 (Utah 1989). The State does not argue, nor claim, that the prohibition in *Rimmasch* was not violated.

Instead, the State argues that the non-objection was strategically motivated. Admittedly, the defense clearly asserted to the jury that the victim's testimony was fabricated, that she lied to the police and moreover, was not telling the truth to the jury.

The problem with Detective Hernandez's testimony is that the detective vouched for the veracity of the victim's testimony at trial. Detective Hernandez testified to having conducted investigations for five years, with four years working with sex crimes. *Trial Tr.* at 190. The detective's testimony was not that of a layperson overzealously responding to a question. Nothing in the question seeks testimony distinguishing which statements were true and which were not.

The government suggests the defense would have a strategic reason for not objecting. There is no theory that justifies defense counsel's failure to object to testimony so clearly in violation of *Rimmasch*, wherein an officer for the law affirms the veracity of a victim's testimony against a defendant at trial. Moreover, the strong prejudice arising from a law enforcement officer affirming the veracity of a child victim before a jury is manifestly and unduly prejudicial to the defendant's right to a fair trial.

The State acknowledges in its brief that "truth" and "consistency" are different concepts. (Aplee. Br. at 52, n. 14). The distinction is all too abundantly clear. The record shows that despite the marked and important difference, the officer used it as an opportunity to interject testimony supporting the veracity of the victim's trial testimony. Such testimony should be clearly prohibited and grounds for a mistrial pursuant to *Rimmasch*. The consequence for interjecting such testimony in this case should be a reversal of Mr. Patterson's conviction.

ARGUMENT IV

CUMULATIVE ERROR

Ths State argues that there was no error, much less cumulative error in this case. (Aplt. Br. at 53-54). As shown here and in the *Opening Brief*, there were multiple errors in this case such that there can be no confidence Mr. Patterson received a fair trial. *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

CONCLUSION OF RELIEF SOUGHT

The foregoing reasons establish Mr. Patterson's convictions in the trial court should be vacated, the case should be reversed and the matter remanded for a new trial.

Respectfully submitted July 18, 2012

_____
Edwin S. Wall,
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Certificate of Type-Volume Limitation

I hereby certify pursuant to Rule 24(f)(1) that this brief is written in 14 point Times New Roman font and using the automated Word Count function for WordPerfect that this brief contains 2,231 words, not counting those words contained in the table of contents, table of citations, addendum containing statutes, rules regulations or portions of the record required pursuant to Rule 24(a).

Respectfully submitted July 18, 2012.

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Certificate of Service

I hereby certify that two copies of the foregoing was furnished by U.S. Mail, first class postage prepaid, to the following on July 18, 2012:

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