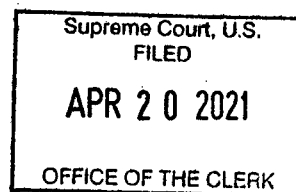


No. **20-8300** **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES



Lonnie Norton — PETITIONER
(Your Name)

vs.

Utah — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the State of Utah
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

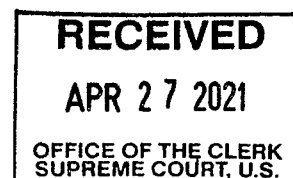
PETITION FOR WRIT OF CERTIORARI

Lonnie Norton, 222007
(Your Name)

CUCF, P.O. Box 550
(Address)

Gunnison, Utah 84634
(City, State, Zip Code)

none
(Phone Number)



QUESTION(S) PRESENTED

- (A) Do this Court's rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 577 U.S. 99 (2013) require that when a state statute creates a tiered sentencing scheme, and where evidence and instructions are given that qualify for more than one tier, a special verdict form must be given before a court is permitted to sentence a defendant to an increased minimum sentence above the lowest tier?
- (B) Contrary to United States Circuits, are state courts correct in holding that a defendant is required to object prior to sentencing to a general verdict or jury instructions, thus assisting in his prosecution, in order to preserve an *Alleyne* error for review?
- (C) When state statutes define an attempt as a substantial step in furtherance of a crime and an allegation that a crime was completed is not a defense to an attempt, do allegations of a completed crime preclude a jury from forming a rational basis for a finding of guilt of attempt?
- (D) Is a jury precluded from finding guilt of crimes which are fairly included in the allegations presented to it?
- (E) When state statute prescribes a downward departure in minimum mandatory sentence if a court finds such departure is in the interests of justice, and a state supreme court interprets this statute based on the United States Supreme Court's proportionality analysis announced in *Solem v. Helms*, 463 U.S. 277 (1983), what should this interest of justice analysis consist of?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Alleyne v. United States, 570 U.S. 99 (2013)	9, 12-13, 15
Apprendi v. New Jersey, 530 U.S. 466 (2000)	9, 12, 15
Boyd v. Cal., 110 S.Ct. 1190 (1990)	23-25
Cup v. Naughton, 94 S.Ct. 396 (1973)	22-23
Francis v. Franklin, 471 U.S. 307 (1985)	23
Hopper v. Evans, 456 U.S. 605 (1982)	22
LeBeau v. State, 2014 UT 39, 337 P.3d 254	8, 27-30, 33, 35-36, 38-42
Mistretta v. United States, 488 U.S. 361 (1989)	28
Solem v. Helm, 463 U.S. 277 (1983)	27, 29-30, 36, 38-41
State v. Burks, 510 P.2d 532 (1973)	21
State v. Gardner, 947 P.2d 630 (Utah 1997)	41
State v. Garnick, 619 P.2d 1383 (Utah 1980)	21
State v. Norton, 2018 UT App 82	6-7, 10, 19, 21-22
State v. Norton, 2020 UT 46	9-10, 19
State v. Norton, 2021 UT 02	11-13, 18-19, 22, 34, 37, 40
State v. Strunk, 846 P.2d 1297 (Utah 1993)	36
Strickland v. Washington, 466 U.S. 668 (1984)	25
United States v. Barnes, 158 F.3d 662 (2d Cir. 1998)	19
United States v. Borrero-Isaza, 887 F.3d 152 (2d Cir. 1989)	31
United States v. Bowman, 722 Fed. Appx. 599 (8th Cir. 2018)	13
United States v. Cleaves, 299 F.3d 564 (6th Cir. 2002)	19
United States v. Chaves-Morales, 894 F.3d 1206 (10th Cir. 2018)	40
United States v. Delgado-Marrero, 744 F.3d 167 (1st Cir. 2014)	13, 16
United States v. Ellis, 868 F.3d 1155 (10th Cir. 2017)	13, 15, 17-19
United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994)	19
United States v. Gomez, 797 F.2d 417 (7th Cir. 1986)	31
United States v. Haymond, 139 S.Ct. 2369 (2019)	12
United States v. Jackson, 167 F.3d 1280 (9th Cir. 1999)	19
United States v. Kaba, 480 F.3d 152 (2d Cir. 2007)	31
United States v. Maples, 501 F.2d 985 (4th Cir. 1974)	31

STATUTES AND RULES

Utah Code §76-1-402	15
Utah Code §76-1-501	
Utah Code §76-1-601	
Utah Code §76-2-101	
Utah Code §76-4-101	15, 20, 25-26
Utah Code §76-5-102	
Utah Code §76-5-103	
Utah Code §76-5-301	
Utah Code §76-5-302	
Utah Code §76-5-304	
Utah Code §76-5-306	
Utah Code §76-5-402	13, 16
Utah Code §76-5-402.2	
Utah Code §76-5-403	
Utah Code §76-5-404	13, 16, 26, 38
Utah Code §76-5-405	5-7, 13-14, 16, 18, 26, 31, 34-35, 38
Utah Code §76-6-202	
Utah Code §76-6-203	38
Utah Code §76-6-206	
Utah Code §76-9-702.1	26

OTHER

Sentencing Decisions: Matching the Decisionmaker to the
Decision Nature, 105 COLUM. L. REV.
1174, 1136 (2005). 28-29

INDEX TO APPENDICES

APPENDIX A State v. Norton, 2021 UT 02

APPENDIX B State v. Norton, 2020 UT 46

APPENDIX C State v. Norton, 2018 UT App 82

APPENDIX D Const. Amendments and Statutes

APPENDIX E Information, Sentence, Warrant

APPENDIX F Final Jury Instructions and Verdict

APPENDIX G Defendant's Proffered Jury Instructions

APPENDIX H Plaintiff's Requested Jury Instructions

APPENDIX I Transcript of Jury Trial Volume III

APPENDIX J Related Cases

APPENDIX K Unpublished Case United States v. Bowman

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
CONCLUSION.....	40

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☒ reported at State v. Norton, 2021 UT 2; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the The Utah Court of Appeals 82 court appears at Appendix C to the petition and is

- ☒ reported at State v. Norton, 2018 UT App; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Jan. 7, 2021.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

(Appendix D)

U.S. Const. amend. XIV

(Appendix D)

STATEMENT OF THE CASE

On November 14, 2012, the State of Utah charged Norton with eight counts related to a domestic violence incident with special circumstances between he and his newly estranged wife, Heidi Norton, which occurred on November 11, 2012. R.1-7. A jury trial was held on February 18-20, 2015. After four hours of deliberation, the jury convicted Norton of three counts as charged and three lesser offenses. R. 697-99. Of the three offenses for which Norton was convicted as charged, one was a misdemeanor, one was reversed, and the remaining charge is the one at issue here. This charge is aggravated sexual assault, Utah Code §76-5-405.

Utah's aggravated assault statute creates a three-tiered sentencing scheme depending on the underlying offense committed. In the information (charging document), and at trial, the State charged, and the court instructed the jury, on the underlying offenses of rape, forcible sexual abuse, attempted rape, and attempted forcible sexual abuse. R.632. The elements of these offenses overlap. No special verdict was given. R.600-02; 697-99. The jury convicted Norton of aggravated sexual assault on Count 3 but could not specify which underlying offense it relied on because no special verdict was given. R.593-94; 699:120-22. At sentencing, defense counsel asked the court to sentence under the lowest tier, which carries a sentence of six-years-to-life, and counsel argued that, in the interests of justice, the sentence should be reduced to three-years-to-life. R.700:5-13.

Defense counsel argued that since the jury was instructed on four theories of underlying offenses and no special verdict was given, there is no way to determine which offense they found beyond a reasonable doubt, therefore the rule of lenity requires the court to sentence under the lowest tier of the aggravated sexual assault statute. R.700:5-13. The court said that counsel made an important point, but the court chose not to follow the

law and sentenced on the highest tier. R.700:10-14, 18.

The lowest sentencing tier imposes a sentence of six-years-to-life but permits a lesser term of three-years-to-life if the court finds that a lesser term "is in the interests of justice." Utah Code §76-5-405(5)(a). Defense counsel asked the court to impose a sentence of three-years-to-life and to run all sentences concurrently. R.700:21-23, 28-29. Defense argued that such sentence was in the interests of justice because (1) there was only one victim, Norton's wife, (2) penalties of 6, 10, and 15-years-to-life were given for conduct far more severe than Norton's, (3) Norton's actions were far less severe than those in intentional murder, manslaughter, sex offenses against children, or those with serious injury, (4) Norton reacted to strong provocation, (5) Norton had excellent work history, job skills and education, (6) Norton planned to use his time to improve himself, (7) Norton had strong community support, (8) Norton had no criminal history, (9) Norton's divorce was three years ago and he had accepted it, (10) a 15-years-to-life sentence is equivalent to life without parole for Norton, who was 51 at the time. R.700:22-23, 29-32; R.716-20.

The trial court's "interests of justice" analysis consisted of the court's statements that Norton had "a good past" and "very little" criminal history and that people in the community considered Norton "a wonderful guy," but the court reasoned that Norton was "good at showing one face in public and another in private," and Norton was "running with the foxes and hunting with the hounds." R.700:32-33. The court concluded this subjective analysis with the arbitrary and capricious statement that Norton was entitled to "some mercy," but Norton went "way, way, [?] way, over the line." R.700:33-34. Wanting to send a message to society that Norton's conduct was "intolerable," R.700:34, the court imposed the maximum, 15-years-to-life.

The Utah Court of Appeals affirmed the trial court's sentence under the highest tier, see Norton, 2018 UT App 82, ¶¶151-66,

and affirmed sentencing on an erroneous presumption that the trial court conducted the statutory interests of justice analysis. Id. ¶¶ 67-86.

In opening brief in the Utah appeals court, Norton raised the sentencing tier issue as follows: "Whether sentencing Norton under Utah Code §76-5-405's highest tier violated his right to due process and a jury determination of guilt on every element of the offense." Aplt.Br.2. In the preservation section, Norton explained that this issue was preserved or, if not, could be reviewed under ineffective assistance or plain error. Aplt.Br.2. In the argument section, Norton argued the issue was preserved or, if not, the error should be reversed under ineffective assistance or plain error. Aplt.Br.41-44.

In Norton's opening brief in the Utah appeals court, he raised the interests of justice issue as follows: "Whether the court abused its discretion by imposing two terms of 15 years to life on Counts 3 and 4 without conducting the statutorily mandated interests of justice analysis." Aplt.Br.2. In the preservation section, Norton explained that this issue was preserved. Aplt.Br.2.

The Utah appeals court held the sentencing tier issue was preserved. State v. Norton, 2018 UT App 82, ¶159 n.15. It then addressed the merits of the issue and affirmed. Id. ¶¶ 58-66.

Here, the court of appeals erred in concluding that the trial court conducted an interests of justice analysis. Rather than assessing the sentence to determine whether the court considered the interests of justice factors, the appeals court "presume[d] that the sentencing court made all the necessary considerations." Norton, 2018 UT App 82, ¶¶ 67-86. The court of appeals was incorrect.

In his petition for certiorari in the Utah Supreme Court, Norton raised the sentencing tier issue as follows: "Issue III: Did the court of appeals err by affirming the

trial court's decision to sentence Norton under Utah Code §76-5-405's highest sentencing tier?" Cert. Pt. 1. Norton then argued that the court of appeals incorrectly upheld sentencing under the highest tier. Cert. Pt. 17-18.

In opposition, the State didn't challenge the preservation holding, rather, it challenged the merits and argued that the appeals court's merits analysis was correct. Cert. Opp. 15. Rather, it reiterated that "the Court of Appeals correctly affirmed [Norton's] sentences." Cert. Opp. 15.

Norton's opening brief on certiorari focussed on the sentencing tier issue as defined by the Utah Supreme Court in the order granting certiorari:

Whether the Court of Appeals erred in concluding that the district court could apply presumptive sentences of fifteen years to life for Petitioner's convictions for aggravated sexual assault without a special verdict form.

Pet. Br. 2 (quoting order, Oct. 8, 2018). Norton argued that "the court of appeals erred in concluding that the district court could apply presumptive sentences of fifteen years to life for petitioner's convictions for aggravated sexual assault without a special verdict form. Order, Oct. 8, 2018." See Pet. Br. 37-43.

In the State's reply brief on certiorari, it challenged preservation even though they didn't raise preservation in their opposition to certiorari. Resp. Br. 56-59. The State expressly argued this as an "alternative ground for affirmance." Resp. Br. 4, 59. It then addressed the merits through the lenses of plain error and ineffective assistance - the exceptions Norton timely raised on appeal. Resp. Br. 59-61.

In reply on certiorari, Norton argued the Court should reject the State's alternative preservation argument for affirmance. Pet. Rply. 16-17. Norton also argued the

Court should affirm the court of appeals' holding that the sentencing tier issue is preserved. Pet. Rply. 17-18. In the event the Court addressed the alternate ground and reversed the appeals court's preservation decision, Norton fully briefed plain error and ineffective assistance. Pet. Rply. 18-21.

In his petition for certiorari in the Utah Supreme Court, Norton raised the interests of justice issue as follows:

"Issue IV: Did the court of appeals err by presuming the sentencing court conducted the statutorily mandated interests of justice analysis?" Cert. Pt. 1 Norton then argued that the court of appeals' decision should be reversed because "[i]t was incorrect for the court of appeals to presume that the trial court conducted the necessary analysis. And 'the record shows that the trial court did not conduct the necessary interests-of-justice analysis. Cert. Pt. 19-20.

In Norton's brief in the Utah Supreme Court, he argued that the Court's current controlling case, *LeBeau v. State*, 2014 UT 39, 9129, 337 P.3d 254, interpreted the phrase "interests of justice." Norton highlighted that *LeBeau* held that "the interests-of-justice language" dictates that, when sentencing under a section that permits reduced sentencing, the "court" must engage in the interests-of-justice analysis. *Id.* ¶¶ 21-24.

Further, *LeBeau* held that the interests of justice analysis "necessarily requires the court to consider (1) proportionality; and (2) potential for rehabilitation." *Id.* ¶ 37. Norton went on to point out the *LeBeau* court's reasoned guidance to lower courts and the required factors of an interests of justice analysis and the Court's attention to the statutory mandate that the trial court "state[] the reasons for [its] finding on the record."

In its opinion, the Utah Supreme Court "affirm[ed] the court of appeals' conclusion that the district court applied the correct sentencing tier" on the "alternative basis" "that Norton did not preserve this issue in the district court."

State v. Norton, 2020 UT 46, ¶¶87, 91-94. The Court then ruled Norton's claim failed because he "has not argued any exception to the preservation requirement." Id. ¶94. In footnote 12, the Court ruled that Norton also failed to demonstrate plain error because he "relie[d] on Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 570 U.S. 49 (2013)," but did not "explain why Apprendi and Alleyne require a special verdict under the circumstances here." Norton, 2020 UT 46, ¶94 n.12. The Court did not address ineffective assistance.

Regarding the interests of justice issue, the Court ruled that "the district court considered all the evidence and arguments Norton presented at sentencing." Further, the Court claimed that "Norton did not ask the district court to compare his sentence to sentences for other offenses. . . . Accordingly, this issue is unpreserved."

Finally, the state Supreme Court ruled "[t]he district court adequately addressed the arguments Norton raised at sentencing." The Court therefore affirmed the appeals court's ruling that the trial court didn't fail to conduct a proper interests of justice analysis. Norton, 2020 UT 46, ¶101.

Norton petitioned for, and was granted, a rehearing in the Utah Supreme Court. (order Jan. 7, 2021).

In his petition, Norton argued that the Court should reconsider its preservation holding on Norton's Alleyne error issue because it misapprehended preservation law under Apprendi and Alleyne when the Utah Supreme Court faulted Norton for failing to "request a special verdict form at trial." Id.

Norton also argued that the Court erred in ruling that Norton had not raised exceptions to preservation because Norton had, in fact, raised plain error and ineffective assistance in both the appellate court and the Utah Supreme Court. See Aplt.Br. 2, 41-44; Pet.Rply. 16-17. Norton also pointed out that the appeals court did not

reach these exceptions to preservation because it held the issue was preserved. Norton, 2018 UT App 82, ¶159 n.15. Further, the State failed to challenge preservation in its opposition to Norton's petition for certiorari.

Given the appeals court's holding that the Alleyne error was preserved and the State's failure to challenge it, Norton argued that preservation was not fairly before the Court. Pet. Rtg. 7-8.

Failing to follow the appeals court's lead, the Utah Supreme Court concluded that the sentencing issue under Alleyne didn't apply because "[t]he sentencing tiers here have the same statutory maximum: life, this is of course irrelevant." [a]nd the ranges are presumptive, not mandatory. The Court then reasoned, incorrectly, that Apprendi and Alleyne didn't apply because "[t]he sentencing court can impose a lower sentence if it finds it is in the interests of justice to do so." State v. Norton, 2021 UT 02, ¶197.

Finally, the Utah Supreme Court concluded that "Norton has not explained why [the Alleyne error] is a sentencing issue rather than a jury instruction issue." And the Court reasoned that "[h]ad Norton objected to the jury instructions or requested a special verdict form at trial, the district court could have responded to his concerns, but at sentencing, it was too late," and "Accordingly, Norton's [Alleyne] claim is unpreserved." Id. ¶199.

The Utah Supreme Court then addressed Norton's Alleyne error under plain error and held that the evidence was "unequivocal" and had a special verdict form been given "there is no reasonable likelihood that the jury would have specified anything other than rape." Norton, 2021 UT 02, ¶104.

REASONS FOR GRANTING THE PETITION

State courts need guidance from this Court because state courts are misinterpreting this Court's rulings in *Apprendi*, *Alleyne*, *Haymond* and *Solem*. As a result, courts are deciding cases in conflict with federal courts.

(A) The Utah Supreme Court's decision in *State v. Norton*, 2021 UT 02 conflicts with this Court's decisions in *Apprendi*, *Alleyne*, and *Haymond*, and those of several federal circuit courts.

The rights to due process and a jury trial grant each defendant the right to "a jury determination that [he] is guilty of every element of the crime" charged. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); See U.S. Const. amend's. VI, XIV; *Alleyne v. United States*, 570 U.S. 99, 107-08; *United States v. Haymond*, 139 S.Ct. 2369, ¶10 (2019).

"As this Court has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter what the government chooses to call the exercise.' *United States v. Haymond*, 139 S.Ct. 2369, ¶10 (2019).

This principle "applies with equal force to facts increasing the mandatory [or presumptive as Utah calls it] minimum." *Alleyne*, 570 U.S. at 111-12. In *Alleyne*, the Supreme Court addressed a three-tiered sentencing scheme that imposed different mandatory minimum sentences depending on whether the defendant carried, brandished, or discharged a firearm. See *Id.* at 103-04. In *Norton*,

1. Note that Utah's statute allows a downward departure if the court finds such departure is in the "interests of justice." Thus, the Utah Court claims, incorrectly, that the sentences are not "mandatory." However, the court's discretion to impose sentences corresponding to higher tiers is removed on conviction of the lowest tier.

2021 UT 02, the Utah Supreme Court addressed a three-tiered sentencing scheme that imposed different "presumptive minimum sentences depending on whether the defendant attempted to touch the genitals with intent to arouse, gratify, or cause pain; touched the genitals with intent to arouse, gratify, or cause pain; attempted sexual intercourse, or completed intercourse; without consent. See Utah Code §§ 76-5-404, 76-5-402, 76-5-405. In *Alleyne*, this Court reversed because "[t]he judge, rather than the jury, found brandishing." *Alleyne*, 570 U.S. at 117-18. In *Norton*, the court affirmed even though the judge, rather than the jury, found completed intercourse. *Norton*, 2021 UT 02, ¶¶ 97, 102-04.

Where a statute, such as those in *Alleyne* and *Norton*, creates a tiered sentencing scheme and the jury is instructed on versions that qualify for more than one tier, a special verdict form is needed to satisfy *Alleyne*. See *United States v. Ellis*, 868 F.3d 1155, 1169 n.12 (10th Cir. 2017). For example, in *United States v. Delgado-Marrero*, 744 F.3d 167 (1st Cir. 2014), the First Circuit reversed for plain error sentencing under a higher tier because the special verdict form didn't require the jury to make the finding beyond a reasonable doubt. There, the statute created a three-tiered sentencing scheme, like the statute in *Norton*. *Id.* at 186. The jury returned a special verdict triggering the highest tier, but the special verdict form, given as an afterthought, didn't inform "the jury that they were required to make this special finding beyond a reasonable doubt." *Id.* at 186. Thus, the First Circuit reversed and remanded for resentencing under the lowest tier or retrial. *Id.* at 190-93. See also *United States v. Bowman*, 722 Fed. Appx. 599, 599-600 (8th

Cir. 2018)(per curiam)(same). (Addendum J). This Court should do the same in Norton.

Here, the Utah Supreme Court disregarded United States Supreme Court precedent in concluding that Utah trial courts can impose 15-years-to-life sentences in cases like Norton's case without a special verdict form. Under Utah Statute, a person commits aggravated sexual assault if he commits an aggravator in the course of committing an underlying offense. See Utah Code §76-5-405(1). (Addendum D). The underlying offenses include rape, attempted rape, forcible sexual abuse, and attempted forcible sexual abuse. Id. §76-5-405(1). Section 76-5-405 created a three-tiered sentencing scheme. See Id. §76-5-405(2). If the underlying offense is rape or forcible sexual abuse, the mandatory minimum is 15 years. See id. §76-5-405(2)(a)(i). And if the underlying offense is attempted rape or attempted forcible sexual abuse, the minimum mandatory sentences are 10 years and six years, respectively. See id. §76-5-405(2)(b)(i), (2)(c)(i).

At trial, the court instructed on rape, forcible sexual abuse, attempted rape, and forcible sexual abuse as underlying offenses of aggravated sexual assault. R.615, 632. Evidence was presented of rape, forcible sexual abuse, attempted rape, and attempted forcible sexual abuse. The factual and legal theories for aggravating factors for attempted rape and rape were clearly and plainly flawed. The jury was instructed that "[they] are not bound to believe all of the testimony to which any or some of the witnesses have testified . . . If you believe a witness has willfully testified falsely . . . you may

disregard the whole of the testimony of that witness or you may give it the weight to which you think it is entitled.

R.607. And the jury was instructed that "[a] person 'attempts' a criminal act if the person, acting with the mental state otherwise required for the commission of the offense, engages in conduct constituting a substantial step toward commission of the offense." R.620. Factoring in the above, and considering the split verdict, ambiguities, and underwhelming evidence, a special verdict form was needed to identify which underlying offense the jury found. See Ellis, 868 F.3d at 1169 n.12.

The trial court failed to give a special verdict and the State, whose burden it is to request one, failed to request a special verdict. R.600-62; 697-99; Ellis, 868 F.3d at 1171. Norton's constitutional rights obligated the court to sentence under the tier for which the jury found him guilty of every element. See *Alleyne*, 570 U.S. at 117-18; *Apprendi*, 530 U.S. at 476-77.

The underlying offenses, rape, attempted rape, forcible sexual abuse, and attempted forcible sexual abuse have unique elements to each and a person must necessarily, as a logical exercise, commit every one of them in committing rape, especially as the jury was instructed. The difference in these offenses is necessarily in the number of elements found, thus, in sentencing Norton to the highest tier, the trial court found the elements of rape which attempted forcible sexual abuse lacks, i.e., actual touching of genitals and penetration.² See Utah Code §§76-1-402; 76-4-101;

2. Note that Norton and his wife Heidi were married 21 years and had engaged in sexual intercourse several thousand times, and, had in fact

76-5-402, 76-5-404, 76-5-405. (Addendum D). Without a special verdict, the only tier with a finding of guilt on every element was the lowest. R.600-62. Thus, the court should have sentenced under the lowest tier. See Delgado-Marrero, 744 F.3d at 184-93.

The Utah Supreme Court rationalized that "Norton simply assumes that Apprendi and Alleyne apply here." This is a willful misrepresentation of Apprendi, Alleyne, and the facts. Norton clearly provided an analysis that, as in Norton's case, Alleyne involved a three-tiered sentencing scheme that imposed different minimum mandatory sentences based on whether the defendant possessed, brandished, or discharged the firearm. Alleyne, 570 U.S. at 103-04. As here, there was no special verdict, so the record did not show which act — possession, brandishing, or discharging — the jury believed the defendant committed. Id. at 103-04. And, as here, the district court sentenced Alleyne under a higher tier based on its own finding. Id. at 117. The U.S. Supreme Court reversed because "[t]he judge, rather than a jury, found brandishing, thus violating petitioner's Sixth Amendment rights." Id. at 117-18. Thus, the Utah Supreme Court had an explanation of why Alleyne applies in Norton's case but decided this important federal question in a way that conflicts with this Court and a United States court of appeals.

The Utah Supreme Court also demurred by done so mere days prior. Thus, Norton's DNA would of necessity show up in Heidi's vagina. There is no unequivocal evidence here.

claiming Norton's Alleyne error issue is "a jury instruction issue" and that "[i]f Norton felt the instructions are not clear that the underlying offense applicable to Count 3 was rape, then Norton needed to object to the jury instructions." The Utah Supreme Court further rationalized that "if Norton thought the general verdict permitted ambiguity in the jury's verdict, he should have raised it when the district court had an opportunity to address the issue."

The Utah Supreme Court's "Norton needed to object to the jury instructions" argument is incorrect for several reasons. First, Norton submitted attempted forcible sexual abuse, forcible sexual abuse, attempted rape, and rape as lesser offenses of Count 3 in "Defendant's Proffered Jury Instructions." DPJI. 82-93. Norton also argued extensively over the lessors of Count 3. R. 699:8-20. Second, this is not a jury instruction issue, it is a special verdict issue, i.e., an Alleyne error. The error would not have occurred had the trial court included a special verdict form. Norton did not have an issue with the jury being instructed on attempted forcible sexual abuse, forcible sexual abuse, and attempted rape. Why would he have issue, he requested these offenses as lesser included offenses. See DPJI:82-93 (Addendum G), R. 699:8-20. Third, an Alleyne error occurs at sentencing, not at trial. See Ellis, 868 F.3d at 1171. This is addressed next.

THEREFORE, this Court should rule that in a state statutory tiered sentencing scheme, where a jury is instructed on versions of the offense

that qualify for more than one tier, a special verdict is required before a court may sentence above the lowest tier. In short, state courts are bound by Apprendi and Alleyne. This Court should also remand to the trial court with instructions to resentence consistent with this Court's opinion.

(B) The Utah Supreme Court's decision in Norton, 2021 UT 02, ruling that an Apprendi error, or an Alleyne error occurs at trial rather than at sentencing conflicts with this Court's and federal court precedent.

As the Tenth Circuit explained in *United States v. Ellis*, 868 F.3d 1155, 1171 (10th Cir. 2017). There is "no reason to require" the defendant to "object [] during the jury instructions or the general-verdict form to preserve an Alleyne objection." *Id.* "If the government want[s] a heightened sentence, it is "obliged to ensure the jury received proper jury instructions and a special-verdict form." *Id.* Thus, in *Ellis*, "[t]he district court did not commit an Alleyne error until it subjected Ellis to an increased mandatory minimum sentence." *Id.* Similarly, the court in Norton did not commit an Alleyne error until it sentenced Norton to an increased minimum sentence.

Requiring Norton to request a special verdict to preserve the Alleyne error for appeal would essentially put the burden on Norton to prosecute himself. The State had the burden of proving Norton guilty beyond a reasonable doubt. If the state wanted Norton to be sentenced under the highest

3. A sentence on §76-5-405's lowest tier removes the trial court's discretion to reject the interests of justice analysis and sentence to 10 and 15 year minimum sentences.

tier, it was the state's duty to request a special verdict. See, e.g., *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998) (holding that it's the government's burden to request a special verdict); *United States v. Cleaves*, 299 F.3d 564, 567 n.2 (6th Cir. 2002) ("The burden of requesting a special verdict logically falls on the government."); *United States v. Garcia*, 37 F.3d 1359, 1369-70 (9th Cir. 1994) ("When the information sought in the special verdict is relevant to the sentence to be imposed, it is the duty of the government to seek a special verdict.") (limited on other grounds in *United States v. Jackson*, 167 F.3d 1280 (9th Cir. 1999)); *Ellis*, 868 F.3d at 1171 (providing additional citations).

The Utah Supreme Court identified no federal cases to the contrary, but incestuously relied on their own Utah decisions which also conflict with federal law. See *Norton*, 2021 UT 02.

Norton's only duty was to preserve this issue for appeal, which he did by arguing at sentencing that, without a special verdict, the court was obliged to sentence under the lowest tier. See *Norton*, 2018 UT App 82, ¶159 n.15; *Norton*, 2020 UT 46, ¶¶92.

In *Ellis*, the Tenth Circuit said that "[i]n determining whether *Ellis* preserved an *Alleyne* objection, we must determine when an *Alleyne* error arises. Here, the *Alleyne* error arose when the district court sentenced *Ellis*." The *Ellis* court saw "no reason to require that *Ellis* have objected during trial to the jury instructions or the general verdict form to preserve an *Alleyne* objection." This is in direct conflict with the Utah Court's decisions in *Norton*.

where they ruled "[t]ad Norton objected to the jury instructions or requested a special verdict form at trial, the district court could have responded to his concerns." The Utah court then ruled that "[a]ccordingly, Norton's claim is unpreserved." For the above reasons, the Utah Supreme Court is wrong.

THEREFORE, this Court should rule that a defendant is not required to object prior to sentencing to the general verdict form or jury instructions or request a special verdict form to preserve an Alleyne objection or an Apprendi objection. This Court should remand to the trial court for resentencing consistent with this Court's opinion.

(C) When a state statute defines an attempt as a substantial step in furtherance of a crime and that a completed crime is not a defense to an attempt, do allegations of a completed crime preclude a jury finding of attempt?

Utah Code §16-4-101(1)(a), and (b) state: "For purpose of this part, a person is guilty of an attempt to commit a crime if he: (a) engages in conduct constituting a substantial step toward commission of the crime; and (b)(i) intends to commit the crime; or (ii) when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result.

The Utah Supreme Court has ruled that "[t]his section specifically provides that a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt." State v.

Burks, 510 P.2d 532 (1973). The court later held that "[a] defense to the offense of attempt does not arise . . . because the offense attempted was actually committed." State v. Garnick, 619 P.2d 1383, 1385 (Utah 1980).

THEREFORE, this Court should rule that, when a state statute defines an attempt as a substantial step in furtherance of a crime and that a completed crime is not a defense to an attempt, a jury is not precluded from a finding of attempt by allegations of a completed crime. This Court should also remand for resentencing consistent with this Court's opinion.

(D) Is a jury precluded from finding guilt of lesser crimes which are fairly included in the allegations presented to it.

The Utah Appeals Court held that there was no evidence presented at Norton's trial to support a verdict on aggravated sexual assault based on any underlying offense other than rape because "it is undisputed at trial that the sexual intercourse occurred." Norton, 2018 UT App 82, ¶¶62.

There are, again, several issues with the Utah court's analysis. First, as explained above, evidence that sexual intercourse occurred doesn't bar the jury from returning a verdict of attempt. See Utah's attempt statute, Utah Code §76-4-101. The jury could have believed that intercourse occurred, but based on Utah law, Norton was only guilty of attempted rape, attempted forcible sexual abuse, or forcible sexual abuse. See *id.*; Burks, *supra*; Garnick, *supra*;

R.607, 620. Indeed, that is likely what the State anticipated when it requested rape, attempted forcible sexual abuse, and forcible sexual abuse. R.429. See *Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence").

In fact, the jury was instructed that they are "not required to believe all that a witness said," and they "are entitled to believe one witness as against many or many against one." R.617. In other words, the jury was free to believe any reasonable combination of testimony. See *Cupp v. Naughton*, 94 S.Ct. 396, 401 (1973) (regarding instructions on weight accorded testimony).

The Utah Supreme Court, ignoring these fundamental concepts, concluded that "there is no factual basis in the record to support a conclusion that the jury could have determined that the sexual acts underlying Count [7] 3 . . . constituted only attempted forcible sexual abuse." Further, "there is no evidence in the record to support a conclusion that the jury's guilty verdict reflected a finding beyond a reasonable doubt of an underlying aggravated sexual assault offense other than rape." *Norton*, 2021 UT 02, ¶102. (citing *Norton*, 2018 UT App 82, ¶¶61-62).

The Utah Supreme Court completely ignored the fact that in order for Norton to rape his wife, he has to take a "substantial step" in achieving that result, which step necessarily includes all of the elements of every one of the instructed underlying offenses of aggravated sexual assault, i.e., attempted forcible sexual abuse,

forcible sexual abuse, attempted rape, and rape. See R.601-661. See *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985) ("This analysis requires careful attention to the words actually spoke to the jury... depends on the way in which a reasonable juror could have interpreted the instruction.") (citations omitted).

This explains the errors in the Utah Supreme Court's analysis and ruling based only on the jury instructions and related Utah law. But the Utah Supreme Court's ruling on Norton's Alleyne error has a much larger problem, and so does the State's conviction.

The State's allegations of rape, attempted rape, forcible sexual abuse, and attempted forcible sexual abuse as underlying offenses of aggravated sexual assault, as well as the alleged aggravators rely on multiple legal and factual theories, one or more of which are unconstitutional. See e.g., *Boyd v. California*, 110 S.Ct. 1190, 1197-98 (1990) (stating "when a case is submitted to a jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.") (citations omitted); *Cupp v. Naughten*, 94 S.Ct. 396, 401 (1973) ("Due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") (citations omitted). The problem for the State's case is in the sequence of events described in Norton's wife's testimony.

To begin with, the jury was instructed that to convict Norton of aggravated sexual assault, they must find that "if in the course of a rape or attempted rape or forcible sexual abuse or attempted forcible sexual abuse, the

person uses or threatens the victim with the use of a dangerous weapon or compels or attempts to compel the victim to submit by threat of kidnapping, death or serious bodily injury to be inflicted imminently." R.699:46.

The State's only theory for the aggravating factor for Count 3 was that Norton used or threatened to use a gun. This is reflected in the evidence presented and in the State's closing in which the prosecutor instructed the jury that "the next three counts are three counts of aggravated sexual assault. And in order to prove that, we must prove that in the course of committing rape or forcible sexual abuse, the defendant used or threatened to use a — or threatened the victim with the use of a dangerous weapon. "[C]learly a gun is a dangerous weapon." R.699:75. The State referenced the "gun" 29 times during closing. R.699:71-89, 110-118.

The State also argued in closing, based on inferences from the evidence, that "[w]hen he pointed the gun at her and forced her [sic] take off her shirt, he committed aggravated sexual assault." R.699:75. And the State said that "when he pointed the gun at her and ask [sic] her to take off -- told her to take off her pants, he committed aggravated sexual assault." R.699:76. No sexual intercourse, or even touching, had occurred at this point in the allegations, yet the State was telling the jury that based on the State's analysis of the evidence, there was a rational basis for a finding of guilt of aggravated sexual assault in only the elements of Norton pointing a gun at Heidi and telling her to take off her pants, which she did. See *Boyd*, 110 S.Ct. at 1200. (arguments by counsel . . . must be judged in the context in which

they are made").

It would have been entirely rational for the jury to have followed this instruction and argument of the prosecutor given just prior to deliberations, which is not based on a completed rape, but rather using a gun to compel Norton's wife to undress. Thus, there is a rational basis for a jury determination of guilt based on the underlying offense of forcible sexual abuse or attempted forcible sexual abuse. See Utah Code §§ 76-4-101, 76-5-404.

The next problem for the State is that, after the above alleged conduct, Norton allegedly stripped the magazine from the gun and placed the gun and magazine in a drawer, which he closed. R. 697:131-135. There had been no touching yet, and thus, Norton did not start the alleged rape until he was unarmed. Therefore, had the jury followed their instructions from the court, as we must presume they did, See *Strickland v. Washington*, 466 U.S. 668, 671 (1984), they could not have found Norton guilty of aggravated sexual assault based on the underlying offenses of rape or attempted rape. If the jury had made this finding, they did so in error and Norton's conviction must be reversed. See *Boyd*, 110 S.Ct. at 1197-98.

Other than the State's own arguments based on inferences from the evidence, there is the evidence itself. Norton's wife testified that Norton ordered her at gunpoint to remove her shirt and she did so. Norton then "squeezed her breasts." Norton was charged and acquitted for this conduct. R. 593. Heidi testified that

Norton then took her across the hall to an office and ordered her at gunpoint to remove her pants, which she did. According to Heidi's testimony, while she removed her pants, Norton removed all his clothing. She said Norton then told her they were going to have sex. She refused and asked if he was going to rape her, to which Norton replied "you can't rape someone you're married to." She testified that he then removed the magazine from the gun, put the gun and magazine in a drawer and closed the drawer. R.697:131-135, 197-207. Importantly, no touching, attempting to have intercourse, or intercourse had occurred at this point, only clothing removal.

The above discrete sequence describes an aggravated sexual assault based on the underlying offense of attempted forcible sexual abuse with a gun as an aggravator. It also describes a sexual battery. Id. See Utah Code §§76-4-101; 76-5-404; 76-5-405; 76-9-702.1.

Only after Norton was unarmed, and had not touched his wife yet, Heidi alleges Norton then pulled her on top of him and "attempted" to have intercourse with her on top of him. He then turned her over and had intercourse with her. R.697:133-135, 203-207.

This discrete sequence does not allege an aggravated sexual assault, but rather an attempted rape, or a rape. Id. Thus, once again, there is no rational basis in the evidence for a jury finding of guilt of aggravated sexual assault based on the underlying offenses of rape or attempted rape. If the jury had

made these findings, it is in error, and Norton's conviction must be reversed. See *Boyd*, *supra*.

THEREFORE, this Court should declare that a jury is not precluded from finding guilt of lesser crimes which are fairly included in the allegations presented to it. This Court should also remand to the trial court for resentencing under the lowest tier of Utah's aggravated sexual assault statute, or reverse Norton's conviction on Count 3 for a new trial with instructions to correct this count consistent with this Court's opinion.

(E) When state statute prescribes a downward departure in minimum mandatory sentence if a court finds such departure is in the interests of justice, what should this interests of justice analysis consist of?

"It is important to note, first that the Supreme Court's proportionality jurisprudence arose in a very different context than that with which we are now confronted. Typically, the Court was confronted with a challenge to the constitutionality of a legislatively enacted sentencing statute." "Instead, our task is to ensure that the courts properly comply with the Legislature's instruction to undertake a proportionality analysis when sentencing defendants pursuant to state statutes. *LeBeau v. State*, 2014 UT 39, ¶¶39, 337 P.3d 254.

In *LeBeau*, *supra*, the Utah Supreme Court developed a comprehensive framework for performing a statutorily mandated "interests-of-justice" analysis to "ensure that courts" comply with this mandate. To the United States Supreme Court's and several Circuit Courts' proportionality analyses, (see *Solem v. Helm*, 463 U.S. 277,

290-92 (1983) for instance), the Utah Court tacked on the "weigh[ing] a defendant's potential for rehabilitation," minus *Solem's* third factor. The Utah Court then defined a detailed criteria for their new "interests-of-justice" analysis. See *LeBeau*, 2014 UT 39, ¶¶42-55.

In its consideration of the issue of what this "interests of justice" analysis consisted of, the *LeBeau* Court stated at the outset that "while we take guidance from the Supreme Court's proportionality jurisprudence, we do so with the understanding that our analysis is necessarily different." 2014 UT 39, ¶39.

Most often, the notion of "interests-of-justice" is used to impart discretion for a judge to depart downward from a presumptive statutory sentence for a particular crime. The implication, without more, is simply to reinforce the broad range of a judge's discretion.

The flipside of broad discretion is the potential for inconsistency, partiality, and disproportionality. And that potential has generated a number of responses to the traditional regime of discretionary sentencing. One well known response is "sentencing guidelines" aimed at replacing arbitrary and capricious decision making, perhaps leading to radical inconsistencies, manifest injustice, in turn leading to racial imbalances, subjectivity, retaliatory sentencing, plea trading, etc. See *Mistretta v. United States*, 488 U.S. 361 (1989) (discussing federal sentencing guidelines and upholding them against constitutional attack).

Proponents of sentencing reform have been advocating for decades the downside of discretion is the potential for arbitrariness. See Paul H. Robinson & Barbara A. Spellman,

Sentencing Decisions: Matching the Decisionmaker to the Decision Nature, 105 COLUM. L. REV. 1124, 1136 (2005)
("[B]oth judges and juries are properly excluded as decisionmakers because of the disparity problem: To rely on either is to allow offenders brought before different decisionmakers to be subject to different punishment rules.

The Utah Court in deciding LeBeau, interpreted the phrase "interests of justice." 2014 UT 39, ¶29 (addressing aggravated kidnapping and related statutes). LeBeau held that, when sentencing under a section that permits reduced sentencing, the "court must engage in the interests-of-justice analysis." Id. ¶¶21-24. Further, LeBeau held that the interests of justice analysis "necessarily requires the court to consider" (1) proportionality, (2) potential for rehabilitation, and (3) traditional mitigating factors. The Court stated that "as an initial matter, we concluded that the Legislature did not intend the phrase 'interests of justice' as a mere substitute for weighing aggravating and mitigating circumstances."

The following is a summary of the Utah Supreme Court's "interests-of-justice" factors announced in LeBeau:

(1) A Proportionality Analysis of the Seriousness of the Defendant's Conduct compared to the Severity of his Sentence and Sentences Imposed for Different Offenses including:

(a) the seriousness of the defendant's conduct in relation to the severity of the sentence imposed.

See Solem, 463 U.S. at 290-292.

(b) the severity of the sentence compared to sentences imposed for other crimes in same jurisdiction. See *Solem*, 463 U.S. at 290-292;

(c) the gravity of the offense and the harshness of the penalty. See *Solem*, 463 U.S. at 290-291;

(d) nonviolent crimes are less serious than violent crimes. *Id.* at 292-293;

(f) culpability of the offender, i.e., "negligent conduct is less serious than intentional conduct." *Id.* at 293;

(g) a defendant's motivation for committing the crime. See *LeBeau*, 2014 UT 39, ¶¶45;

LeBeau, 2014 UT 39, ¶¶41-46. (citing *Solem v. Helm*, 463 U.S. 277 (1983)).

(2) Potential For Rehabilitation including:

(a) deference to the role of the board of pardons and parole. *LeBeau*, 2014 UT 39, ¶¶51-52;

(b) "Utah's long standing sentencing philosophy of indeterminate sentencing." *Id.* at ¶53;

(c) defendant's age at the time of the commission of the crime. *Id.* at ¶54;

(d) extent to which defendant's crime was tied to alcohol or drug addiction. *Id.* at ¶54;

(e) whether defendant's criminal history evinces continual violence. *Id.* at ¶54.

(f) the Utah Sentencing Commission Guidelines. *Id.* at ¶54;

(g) all other relevant factors, *Id.*

LeBeau, 2014 UT 39, ¶¶51-54.

(3) In addition to the above, the court should consider traditional mitigating factors. *Id.* at ¶56.

(a) community support;

- (b) family ties;
- (c) employment history;
- (d) community service;
- (e) length in residence;
- (f) education and job skills;
- (g) number and age of victims;
- (h) dependents;
- (i) relationship to victim(s).

Courts have identified additional factors that may not be considered at sentencing without offending the constitution — factors such as race, national origin, and sex. Other suspect factors are deterrence and sending a message to society. See *United States v. Kaba*, 480 F.3d 152, 156 (2d Cir. 2007); *United States v. Borrero-Isaza*, 887 F.3d 1349, 1355 (9th Cir. 1987); *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986); *United States v. Maples*, 501 F.2d 985, 985-86 (4th Cir. 1974).

Utah's aggravated sexual assault statute creates a three-tiered sentencing scheme. See Utah Code §76-5-405 (2). The court may impose a lesser prison term if it "finds that a lesser term . . . is in the interests of justice and states the reason for this finding on the record." *Id.* §76-5-405(3)(a), (4)(a), (5)(a). Instead of 15-years-to-life, the court may impose 10-years-to-life or 6-years-to-life. See *Id.* §76-5-405(4)(a). And instead of 6-years-to-life, the court may impose 3-years-to-life. See *Id.* §76-5-405(5)(a).

Note that, although this statute allows a downward departure in each subsection, *Id.* §76-5-405(3)(a), (4)(a), (5)(a), a conviction under subsections (4) and (5) removes the court's discretion to impose sentences of 15-years-to-life or 10-years-to-life, respectively. Thus, there is a material difference between tiers for Alleyne error purposes.

The Utah Supreme Court's holding in LeBeau dictates that Norton's trial "court must engage in the interests-of-justice analysis." Id. ¶¶ 21-24. The court must also "state[] the reasons for [its] finding on the record." Id. Further, LeBeau held that the interests of justice analysis "necessarily requires the court to consider" (1) proportionality, (2) potential for rehabilitation, (3) traditional mitigating factors. Id. ¶ 37.

First, the following factors guide the proportionality analysis: "(1) the seriousness of the defendant's conduct in relation to the severity of the sentence imposed, [and] (2) the severity of the sentence imposed in light of sentences imposed for other crimes in the same jurisdiction." Id. ¶¶ 37-38, 41. When considering the seriousness of defendant's conduct, "courts should consider 'the gravity of the offense and the harshness of the penalty.'" Id. ¶ 42. "This factor necessarily includes an examination of the nature and circumstances of the defendant's crime." Id. But "courts should consider all relevant facts raised by the parties about the defendant's crime." Id. One important consideration is "culpability." Id. ¶ 45. "[A] defendant's motivation for committing his crime is highly relevant." Id. For example, the court should consider whether defendant was provoked, "taking into account both [defendant's] subjective experience and the objective reasonableness of that experience." Id. ¶¶ 57-58. Defendant's "subjective emotional state [i]s relevant to the mitigating factor of provocation." Id. ¶ 60. When considering the severity of the sentence, "[a] key proposition . . . is fairness." Id. ¶ 47. "Defendant's who commit more serious offenses should be punished more severely, and conversely." Id.

Second, a factor for evaluating rehabilitative potential is "the important role the Board [of Pardons] plays in Utah's indeterminate sentencing scheme." Id. ¶ 52. "[T]he Board is in a far better position than a court to monitor

a defendant's subsequent behavior and possible progress toward rehabilitation while in prison and to "adjust the maximum [or minimum] sentence accordingly." *Id.* Other factors include "a defendant's age," "the extent to which a defendant's crime was tied to alcohol or drug addiction and the defendant's prospects for treatment," "[t]he extent to which the defendant's criminal history evidences continual violence," and "the Sentencing Commission's guidelines," to the extent they "relate to a defendant's capacity for rehabilitation." *Id.* ¶154.

In Norton's case, the Utah Supreme Court erred in concluding that the trial court conducted an interests of justice analysis; in fact, the trial court merely delivered an impromptu ad hoc diatribe consisting of clichés applied to scant aggravating and mitigating factors. Rather than assessing the sentence to determine whether the court considered the interests of justice factors, the Utah Supreme Court presumed that "[t]he district court adequately addressed the arguments Norton raised at sentencing" and the LeBeau factors the trial court is required to consider sua sponte. See Norton, 2021 UT 02 at ¶111.

While appellate courts "traditionally afford[] the trial court wide latitude and discretion in sentencing," reversal is required when the court abuses its discretion by sentencing outside the bounds imposed by law. *State v. Helms*, 2002 UT 12, ¶18. Generally, "the Utah Supreme Court upholds the trial court even if it failed to make findings on the record." But this professional courtesy should be extended only when "it would be reasonable to assume the court actually made such findings." *Id.* at ¶11. A party may overcome this presumption by showing one of the following: "(1) an ambiguity of facts make the assumption unreasonable, (2) a statute

explicitly provides that [] findings must be made, or (3) a prior case states that findings on an issue must be made. *Id.*

The presumption was inappropriate here because the charged statute, Utah Code §76-5-405, "explicitly provides that [] findings must be made. *Id.* "If, when imposing a sentence under subsection[§] 2(a)(i), "(2)(b)(i)," or "(2)(c)(i)," a court finds that a lesser term than the term[§] described in subsection[§] (2)(a)(i), "(2)(b)(i)," or "(2)(c)(i)" "is in the interests of justice and states the reasons for this finding on the record, the court may impose" a lesser term. Utah Code §76-5-405(3)(a), (4)(a), (5)(a).

In *LeBeau*, the Utah Supreme Court interpreted the statute to require courts to conduct an interests of justice analysis in every case. *LeBeau*, 2014 UT 39, ¶¶21-24. Likewise, the language requiring the court to "state [] the reasons for [its interests of justice] finding on the record" applies in every case, including *Norton's*. Utah Code §76-5-405(3)(a), (4)(a), and (5)(a). Otherwise, the interests of justice "exception provided by the legislature would be rendered meaningless." *LeBeau*, 2014 UT 39, ¶21. As the Utah Supreme Court stated in *State v. Strunk*, "being aware of [a sentencing factor] and taking it into account are not the same thing." 846 P.2d 1297, 1300 (Utah 1993).

The presumption was also indefensible because "an ambiguity of facts makes the assumption unreasonable." *Helm's*, 2002 UT 12, ¶11. It would not be "reasonable to assume" the court conducted an interests analysis, especially considering that the record is silent other than the arbitrary, capricious, and subjective nature of the few comments the court did make on the record. *Id.* Where the record was silent in *LeBeau*, the Utah court didn't assume the trial court made the missing

findings. LeBeau, 2014 UT 39, ¶25. Nor did the LeBeau court assume from the evidence that the trial court reviewed the PSR (presentence report) that the court made the necessary findings. See Id. ¶¶42-55, 61. On the contrary, the Utah Supreme Court reversed. Id. at ¶25. The same result is warranted here because the record shows the court did not conduct the necessary interests of justice analysis.

Ironically, the Utah Supreme Court, in its zeal to affirm the lower court opinions, contradicted its own rulings in LeBeau, 2014 UT 39, at ¶¶41-55, in which the Utah Court ruled that "sentencing courts should consider 'the gravity of the offense and the harshness of the penalty,'" and "sentencing courts should compare the sentence being imposed to the sentences imposed for other crimes in Utah, and also 'courts must consider all of the factors relevant to a defendant's rehabilitative potential,'" when the Utah Supreme Court in Norton rationalized that "the district court should [not] have sua sponte analyzed the proportionality of [Norton's] sentence and his potential for rehabilitation." Instead, the Utah Supreme Court held that "the district court need only consider the arguments and issues [Norton] raised at sentencing." Norton, 2021 UT 02, ¶¶107, 108. This rationalization contradicts the Utah court's own holding in LeBeau where it held "we read" the legislature's "interests-of-justice language" "found in the aggravated kidnapping statute [and] in at least eight other criminal statutes" as requiring that sentencing courts consider the interests of justice to determine whether a lesser sentence is appropriate. Id. ¶¶21, 29.

Logic dictates that if: (1) a court is required to conduct an interest of justice analysis in every case in which a charged statute contains this language, (2) a sentencing court must consider proportionality and

rehabilitative potential as defined above; and (3) a defendant doesn't raise every conceivable detail included in the factors of the interests of justice analysis defined in LeBeau, as above. Then a sentencing court must sua sponte analyze the interests of justice factors regardless of what the defendant failed to raise. This would require a sentencing court to bring some knowledge to the table, utilize this knowledge objectively, and state its findings on the record. This did not occur in Norton's case.

First, the trial court failed to consider whether Norton's sentence was proportional in light of other Utah crimes. See LeBeau, 2014 39, ¶¶ 41, 47; Solem, 463 U.S. at 290-92. Fifteen years to life is given for intentional murder, LeBeau, 2014 UT 39 at ¶ 48; Utah Code § 76-6-203(3)(b), and aggravated sexual abuse of a child. Id. § 76-5-404(5)(a); and stranger rape in which the victim is severely beaten and left for dead. Id. § 76-5-405(1)(b)(i). Norton's wife was no stranger and was certainly not severely beaten, as the verdict shows. R. 698:234-43; R. 593-95; R. 624; R. 641; R. 647.

Here, Norton's conduct didn't rise anywhere near the level of murder, aggravated sexual abuse of a child, or stranger rape, nor did it cause serious bodily injury. Though Norton struck his wife in the face, this conduct did not occur during the conduct alleged in Count 3. R. 697-99. The only injuries Norton's wife received during the conduct alleged in Count 3 were bruises and rug burns, the kind which Norton and his wife Heidi had received hundreds of times during the thousands of instances of normal, for them, marital sex during their 21 year marriage. R. 698:234-43; R. 684:44-45. Further, the jury didn't believe serious bodily injury occurred—it acquitted of interrupting a communication device by using

"force, intimidation or other forms of violence," R.593-94; R.654; Kidnapping with intent "to inflict bodily injury," R.593-95; R.624; causing "bodily injury" during a burglary, R.593-95; R.641; and committing assault using "means or force likely to produce death or serious bodily injury," R.593-95; R.647. Thus, 15-years-to-life was not proportionate.

Second, the trial court failed to consider whether 15-years-to-life was proportional to Norton's conduct. See LeBeau, 2014 UT 39, ¶¶41; Solem, 463 U.S. at 290-92.

The court acknowledged some mitigating evidence, but disregarded it with sarcastic comments such as, "hunting with the hounds and running with the foxes." R.700:32-35. The court failed to consider how the mitigating factors affected proportionality. This case only one victim, Norton's wife, and one criminal episode. R.697-99; R.721. Norton had a "good past" and "very little" criminal history. R.700:32. The offense occurred while Norton was under severe emotional distress from his wife absconding with his children; not allowing them to see or talk to him; lying to get an ex parte protective order; R.684:44-45; villifying him to his children and manipulating the court system to deny Norton his family, home, income, and reputation. R.697-99; R.700:29-32; R.716-20; R.684:44-45; See LeBeau, 2014 UT 39, ¶¶60; Solem, 463 U.S. at 290-92. And Norton had, after 30 months in jail, come to terms with his divorce and just wanted to return to being a productive member of society. R.700:29-32.

The trial court failed to objectively consider any of these mitigating factors. R.700:32-33. The mitigation it did consider, it wrongly dismissed as aggravating factors because, in the court's view, Norton's community support, lack of criminal history and

community service, strong work history and professional job skills, Law Enforcement certification and BCI clearance, and education suggested that Norton, who was 51 years old, must present himself as "one thing to some people and another thing to other [s]." R. 700:33. But the verdict recognized there were two sides to the story. R. 593-95. Norton's strong community support, lack of criminal history, community service, work history, passing a thorough background check, etc., should have been weighed as mitigating factors. LeBeau, 2014 UT 39, ¶¶ 61-64; Solem, 463 U.S. at 290-92; United States v. Chaves-Morales, 894 F.3d 1206, 1212 (10th Cir. 2018) (sentence appealable because defendant alleged district court did not consider economic motivation as mitigating factor).

But the Utah Supreme Court rubber-stamped the trial court's nonfeasance in a single paragraph in which the supervisory court invented an interests of justice analysis for the trial court out of thin air.

The district court acknowledged letters [from disparate authors] describing Norton as a good guy, as well as letter [from victim's family] describing Norton as a violent person. The court also acknowledged Norton was going through a devastating divorce but determined [non-methodically] Norton's behavior was still "way, way, way over the line." Further, the court noted that a factor of the sentence was Norton's "inability and unwillingness to follow the truth [AKA exercising his right to jury trial]." Ultimately, the district court decided Norton was "entitled to some mercy, but not what [his] lawyer [was] asking for."

Norton, 2021 UT 02, ¶ 109. This extremely charitable paragraph is a complete fiction.

Ignoring the trial court's dismissive treatment of Norton's community support, extreme emotional distress, and the court's punitive attitude toward Norton's 6th amendment right to jury trial, the Utah Supreme Court, in this paragraph, ignored proportionality and rehabilitation, the primary focus of an interests of justice analysis.

Clearly, the trial court "winged it" at sentencing and disregarded the clearly established interests of justice law. The court's conclusion that Norton deserved the highest sentencing level focused on deterrence rather than proportionality. The court reasoned that Norton was deserving of the highest level because he "went way, way, way over the line," R.700:33-34. The court wanted to send a message to "all of society" that conduct like Norton's is "intolerable," R.700:34. But deterrence is not a good tool for measuring the "proportionality of a punishment" because "even punishments that are clearly excessive" can be "justified under the principles of deterrence." *State v. Gardner*, 947 P.2d 630, 634 (Utah 1997); *Solem*, 463 U.S. at 290-92.

Finally, the trial court failed to consider "all the factors relevant to [Norton's] rehabilitative potential" and the important role the [Utah] Board of Pardons will play in monitoring Norton's "progress toward rehabilitation." *LeBeau*, 2014 UT 39, ¶¶52, 54. Norton has strong rehabilitative potential. At the time of sentencing he was 51 years old. R.701. Other than a misdemeanor from 25 years prior, he had no criminal history, passed an extensive background check with the Unified Police Department prior to serving from October 2008 through July, 2012. R.708-09. At the time of sentencing, he had 16 years experience as an IT Director at the University

of Utah, strong community support, and college education. R.716-20. Moreover, as explained, the offense occurred after Norton had endured extreme emotional distress from his wife absconding with his children and gaming the court system in divorce court by filing a proven-false ex parte protective order, defying terms of visitation, skipping court ordered marriage counselling, and vilifying Norton to his minor children. But he'd been in jail three years and just wanted to move forward. R.700:29-32.

But the court focussed only on punishment and deterrence rather than justice, proportionality and rehabilitative potential. R.700:32-35. By sentencing Norton to 15-years-to-life, the court "deprived the Board of Pardons of discretion to take into account [Norton's] future conduct and possible progress toward rehabilitation," LeBeau, 2014 UT 39, ¶178, and release him after 3 years, instead of 15 years, a time when he will no longer be able to support his children, and will be a financial burden on society. Thus, the trial court abused its discretion by ignoring the law when it sentenced Norton without conducting the statutorily mandated interests of justice analysis.

THEREFORE, this Court should provide guidance to lower courts by defining what an interests of justice analysis should consist of and under what circumstances courts are required to conduct one. This Court should reverse and remand with instructions to perform an interests of justice analysis whether Norton's sentence should be reduced, not only to 6-years to life for the

Alleyne error described above, but to 3-years-to-life
for the interests of justice departure appropriate
here or grant a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

Date: May 26, 2021