PETITION APPENDIX

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APPENDIX A

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PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

January 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TABERON DAVE HONIE,

Petitioner - Appellant,

v.

ROBERT POWELL, Warden, Utah State Prison,

Respondent - Appellee.

No. 19-4158

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:07-CV-00628-JAR-EJF)

Jon M. Sands, Federal Public Defender (Therese M. Day and Eric Zuckerman, Assistant Federal Public Defenders, with him on the briefs), Phoenix, Arizona, for Petitioner-Appellant.

Melissa Holyoak, Utah Solicitor General (Andrew F. Peterson, Assistant Solicitor General, and Sean D. Reyes, Utah Attorney General, on the brief), Salt Lake City, Utah, for Respondent-Appellee.

Before **HOLMES**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

PHILLIPS, Circuit Judge.

One evening twenty-four years ago, Taberon Honie called his ex-girlfriend on the telephone, demanded that she immediately visit him, and threatened to kill

several of her family members if she didn't. When she went to work instead, Honie made good on his threat, brutally murdering her mother hours later. As Honie tried to leave through the garage at the murder scene, police noticed blood covering his hands and forearms and asked him about it. Honie confessed to the murder and kept confessing the next day.

About two weeks before trial, following his lawyer's advice, Honie waived his Utah statutory right to jury sentencing in favor of sentencing by the trial judge. But years later, Honie alleged (1) that soon after he waived jury sentencing, a fellow inmate told him that he had made a mistake in doing so; (2) that a week before trial, Honie asked his trial counsel to withdraw the waiver; and (3) that counsel told him it was too late.

During the defense's opening statement at the murder trial, Honie's counsel conceded that Honie was guilty of the aggravated-murder charge, telling the jury that the case would be about punishment. After hearing the evidence, a Utah state jury convicted him of aggravated murder. Then after considering the parties' evidence presented at the penalty phase, the trial judge imposed a sentence of death. On direct appeal, the Utah Supreme Court upheld the conviction and sentence.

In seeking state postconviction relief, Honie argued under the Sixth Amendment that his trial counsel performed deficiently in two ways: (1) by inadequately explaining his right to jury sentencing, and (2) by not following his direction to retract his waiver. The Utah Supreme Court rejected Honie's first claim, concluding that Honie's counsel had performed competently. On the second, the

court didn't rule on the deficient-performance question. For both claims, the court ruled that Honie had suffered no prejudice.

In evaluating Honie's ineffective-assistance-of-counsel claim, the Utah Supreme Court began by reciting the general standard from *Strickland v. Washington*, 466 U.S. 668 (1984). To show prejudice under that standard, Honie needed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Honie v. State* (*Honie II*), 342 P.3d 182, 192 (2014) (quoting *Strickland*, 466 U.S. at 694). In applying this general standard to Honie's prejudice argument, the Utah Supreme Court treated "the result of the proceeding" as meaning the result of the sentencing proceeding. *Id.* Tracking how *Strickland* applied its general prejudice standard to require a reasonable probability of a change in the case's substantive outcome, the Utah Supreme Court ruled that Honie could show prejudice only if "the sentencer, in this case the trial judge, 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death' in the absence of counsel's deficient performance." *Id.* (quoting *Strickland*, 466 U.S. at 695). The court concluded that Honie had failed to make that showing.

Now before us on federal habeas review, Honie argues that the Utah Supreme Court's application of *Strickland*'s substantive-outcome test for prejudice was contrary to, or involved an unreasonable application of, clearly established law. He argues that the holdings of three more-recent Supreme Court cases required the Utah Supreme Court to instead use the process-based test as done in *Hill v. Lockhart*, 474

U.S. 52 (1985). If *Hill*'s standard applied, Honie would have instead needed to show a reasonable probability that, but for counsel's errors, he would have chosen jury sentencing.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we may grant Honie relief only if the Utah Supreme Court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The general standard provided in *Strickland* provides Honie a first level of clearly established law for prejudice. Under that level, Honie can meet the general prejudice test if he shows that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. But for Honie's claim, that simply invites another legal question—what does "the result of the proceeding" mean?

As mentioned, depending on the context, the Supreme Court cases give two possible meanings: (1) the substantive outcome of the case, that is, the underlying conviction or sentence, or instead (2) the procedural outcome of the decision, that is, whether the defendant would have chosen to plead or go to trial. The key point here is that no one contends that, absent the *Hill* line of cases, the Utah Supreme Court either would have acted contrary to or unreasonably applied *Strickland*'s general-prejudice standard by choosing the substantive-outcome test over the process-based test. For Honie, all depends on *Hill* and its line of cases.

That leads us to the issue before us. In cases like Honie's, which contest the state court's choice of the two applications of *Strickland*'s general standard for

prejudice, the defendant must provide a second level of clearly established law that requires courts to apply the application he advocates for his circumstances. Here, that means Honie must identify a Supreme Court holding that requires courts applying *Strickland* to use a process-based test in evaluating whether counsel's deficient performance leading to a state jury-sentencing waiver prejudices the defendant. To do so, Honie relies on the three Supreme Court cases Judge Lucero lists in the Certificate of Appealability ("COA") question—*Hill*, *Flores-Ortega*, and *Lafler*.

BACKGROUND

I. Factual Background

In 1995, Honie began dating Carol Pikyavit.[1] The relationship ran about two years before sputtering over another year or so. Somewhere along the way, the couple had a daughter, T.H. But by 1998, Honie was living with a new girlfriend, and Carol and T.H. were living with Carol's mother, Claudia Benn. Also living with Claudia were Carol's sister, Benita, and Benita's two preschool-aged daughters, D.R. and T.R.

[1] Along with the record submitted by the Utah District Court covering Honie's federal habeas petition, we have also received two separate records related to Honie's conviction and postconviction-relief efforts in Utah's courts. The first state record covers Honie's jury trial and judge sentencing—Utah Fifth Judicial District Case No. 981500662. We cite that record as "Tr. R." Because the record isn't consecutively paginated, all citations refer to the PDF page number. The second state record covers Honie's postconviction-relief efforts—Utah Fifth Judicial District Case No. 030500157. We cite that record as "PC R." Because that record is consecutively paginated, our citations refer to the Bates-stamped page numbers handwritten on the bottom of each page.

On July 9, 1998, Honie murdered Claudia. That evening, Honie called Carol several times, demanding that she immediately visit him at his girlfriend's house. At least partly because Carol was soon due at work, she refused. Agitated, Honie reinforced his demand with a threat—if she disobeyed his command, he would kill Claudia and Carol's young nieces and steal away with T.H. Carol disregarded Honie's threat. After all, this wasn't the first time Honie had threatened violence. He called twice more before Carol and Benita left for work at 10:30 p.m. While the two mothers worked, Claudia tended the three granddaughters at her house. About an hour after his last telephone call, Honie called a cab and made his way there.

At about 12:20 a.m., police arrived at Claudia's house in response to a neighbor's 911 call. The police saw that someone had smashed a rock through a sliding glass door to gain entry. They ordered everyone inside the house to come outside and soon saw Honie leaving through the garage. After ordering Honie to raise his hands, officers noticed that his hands and forearms were covered in blood. When they asked him about this, Honie responded, "I stabbed her. I killed her with a knife." *Honie v. Crowther* (*Honie III*), No. 2:07-CV-628 JAR, 2019 WL 2450930, at *1 (D. Utah June 12, 2019) (citation omitted).

The officers arrested Honie and went inside. In the living room, they found Claudia's partially nude body lying face down, a bite mark visible on her left arm. Next to her body lay a large, blood-covered butcher knife. Blood had pooled on the floor under her neck. Honie had slit Claudia's throat from ear to ear, beginning with four "start marks" under her left ear. *State v. Honie* (*Honie I*), 57 P.3d 977, 982

(Utah), *cert. denied*, 537 U.S. 863 (2002). The cut was so deep that the knife reached her backbone.

Honie had also mutilated Claudia's lower body and genitalia by repeatedly stabbing her vagina and anus. Two stab wounds penetrated her vagina so deeply that they pierced the pelvic cavity of her abdomen. The medical examiner who performed the autopsy testified that Honie may have inflicted the vaginal injuries before he cut Claudia's throat. Honie later admitted that he had attempted to penetrate Claudia's anus with his penis but "decided not to after realizing the victim had died." *Honie II*, 342 P.3d at 187.

As the officers continued to investigate, Claudia's three granddaughters, aged twenty-two months to four years, ventured from the back of the house to where Claudia's body lay. Though the girls all had blood on them, D.R., Honie's four-year-old niece, "was covered, literally, head to toe with blood." *Id.* at 187. D.R. had been wearing underwear when her mother left for work, but she now wore only a T-shirt. After D.R. was again dressed in clean underwear, someone noticed that she was bleeding into the underwear. At trial, an expert testified that D.R.'s bleeding came from abrasions on her genitals caused by rubbing or fondling within the past twenty-four hours. During the penalty phase, Honie's expert witness, a psychologist, testified

that Honie had admitted to sexually molesting D.R. that night by digitally penetrating her.[2]

The morning after the murder, an officer interrogated Honie three separate times. In each interview, Honie expressed remorse for killing Claudia, repeatedly stating that she wasn't meant to die.

II. Procedural History

A. Trial, Sentencing, and Direct Appeal

The State of Utah charged Honie with aggravated murder. During a pretrial conference about two weeks before trial, Honie's trial counsel informed the trial judge that Honie wished to waive his Utah statutory right to jury sentencing. *See* Utah Code Ann. § 76-3-207(1)(c)(i) (LexisNexis 1995). Further, Honie's counsel told the court that he and Honie had discussed the "whole process" of the jury-sentencing-waiver issue "on several occasions," Tr. R. at 996, including the night before the pretrial conference. Honie's counsel advised the court of "[Honie's] desire" to waive his statutory right to jury sentencing, *id.* at 1003.

Before consenting to Honie's waiver, the prosecuting attorney asked if, on a proper evidentiary showing, the trial judge would be able to impose the death penalty. Though the judge stated that imposing the death penalty was "the last thing a judge would want to do," he confirmed that he would impose that sentence if the

[2] Though these facts are painfully graphic, they are relevant to Honie's choice between jury or judicial sentencing and to his claim that in the end he indeed would have sought to withdraw his jury-sentencing waiver.

facts and circumstances of the case warranted it. *Honie III*, 2019 WL 2450930, at *10 (citation omitted). Satisfied with the judge's answer, the State consented to Honie's waiver of jury sentencing. *See* Utah Code Ann. § 76-3-207(1)(b).

The court then took a brief recess so Honie's counsel could complete a written "Waiver of Jury in Penalty Phase." The waiver stated that Honie was "knowingly and intelligently" waiving his right to have a jury determine his sentence. *Honie III*, 2019 WL 2450930, at *11. It also stated that Honie had discussed the waiver with his attorney; that he had "been advised of the full scope of options and ramifications" of waiving a sentencing jury; that he had waived "the right to have a jury of twelve persons determine the penalty"; and that he understood that if he opted for a jury sentencing, "*it would only take one (1) juror to dissent or vote against imposing the death penalty*, and that ten (10) jurors are sufficient to impose a sentence of life without the possibility of parole." *Id.* (emphasis added) (citation omitted). After privately conferring further with Honie, his counsel orally reviewed the waiver with Honie point by point in open court, asking Honie if he had any questions about it and if he understood it. Counsel highlighted that Honie was "giving up [his] right to have a jury of 12 people decide the penalty," Tr. R. at 1002–03, and that, with a jury, he would avoid the death penalty if one person dissented. Honie stated that he had no questions and that he understood the right he was giving up.

After Honie's counsel reviewed the waiver with him, the trial court asked additional follow-up questions to further ensure that Honie understood the right he was waiving. Specifically, the trial court verified that Honie understood he was

waiving the right to have twelve jurors decide his sentence. Honie confirmed that he was voluntarily waiving the right to have a jury decide his punishment and that his decision was based on counsel's advice but was his decision alone. Honie highlights one brief portion of this lengthy colloquy:

> THE COURT: And then, do you understand that to not receive the death penalty you would have to have—I don't know quite how to put this in layman's terms and still be accurate legally—but with a judge, there is just one person you would have to convince. There is a reasonable doubt with 12 jurors, you got 12 chances to convince somebody that there is a reasonable doubt there. So do you understand that you are reducing your field there for 12 down to one?
>
> HONIE: Yes.
>
> THE COURT: I don't want to insult your intelligence, but do you understand that?
>
> HONIE: Yes, I do.
>
> THE COURT: And you still want to go ahead with the waiver of the jury for the penalty phase?
>
> HONIE: Yes, sir.

Tr. R. at 1005.

At trial, during opening statement, Honie's counsel acknowledged that Honie had committed the charged aggravated murder, telling the jury, "I know in this case there is no question of Mr. Honie's guilt. You are going to find him guilty. The question in this case is going to be one of punishment." *Honie III*, 2019 WL 2450930, at *2. The jury later found Honie guilty of aggravated murder. On a special-verdict form, the jurors found that five aggravators supported Honie's conviction, including burglary, object rape, and forcible sodomy. Those same aggravators also qualified as

"aggravating circumstances" supporting the death penalty. *See* Utah Code Ann. § 76-3-207(3) (defining "aggravating circumstances" as those listed in Utah's aggravated-murder statute, *id.* § 76-5-202).

During the two-day sentencing hearing, the State emphasized both Honie's crime and the harm it had caused Claudia's family and community. Honie, in turn, presented mitigating evidence, including his limited criminal history, his intoxication during the crime, and his youth (Honie was twenty-two years old when he killed Claudia). After concluding that the aggravating circumstances outweighed the mitigating circumstances, the trial judge imposed the death penalty.

Honie appealed his conviction and sentence. In 2002, the Utah Supreme Court upheld both.

B. Postconviction Relief Efforts

1. Utah Courts

In 2003, Honie sought postconviction relief in Utah district court. He based his sprawling petition on dozens of alleged errors committed by his trial and appellate counsel and by the trial court. Relevant here, Honie faulted trial counsel for failing to "adequately advise [him] regarding his right to have the jury decide [his] sentence." PC R. at 68. In 2005, Honie submitted an affidavit in opposition to the State's summary-judgment motion. In this affidavit, he asserted for the first time that he hadn't understood "what aggravators and mitigators were" or the process for determining his sentence. *Honie III*, 2019 WL 2450930, at *12 (citation omitted).

He further recounted—also for the first time—an attempt to withdraw his jury-sentencing waiver about a week after he entered it. According to Honie, a "jailhouse lawyer" had convinced him that he made a mistake by opting for judicial sentencing—on grounds that he needed only one holdout juror to get a life sentence. *Id.* But when Honie allegedly asked his trial counsel to withdraw his waiver, his lawyer told him it was "too late" even though a week remained until trial. *Id.*; *see also id.* at *17. Honie represented that if he "had understood the differences between a judge determination and a jury determination, [he] would have gone with the jury in the penalty phase and not waived the jury." *Id.* at *12 (citation omitted).

In 2011, after a round of summary-judgment briefing, discovery, and then another full round of summary-judgment proceedings, the district court denied relief on each of Honie's claims.

Honie appealed the postconviction-relief denial to the Utah Supreme Court. Citing *Strickland*, Honie argued that his counsel had provided ineffective assistance in violation of the Sixth Amendment. As for the first prong of *Strickland*'s general standard for ineffective assistance of counsel—that his counsel had performed deficiently—Honie alleged two constitutional deficiencies. First, he argued that his counsel had failed to advise him adequately about what waiving his right to jury sentencing meant, making his waiver unknowing and involuntary. Second, he argued that his trial counsel had failed to try to withdraw the waiver of jury sentencing, even after Honie asked him to do so.

Addressing the second prong of *Strickland*'s general standard—that his counsel's deficient performance had prejudiced him—Honie didn't argue that a jury would have spared him the death penalty. Instead, he argued that if competently represented he would have opted for jury sentencing. In response, the State argued that the proper prejudice inquiry was whether Honie could show a reasonable probability that the jury would have spared him the death penalty: "*Strickland* ordinarily requires proving that counsel's mistake undermines confidence in the outcome of the proceeding, meaning Honie must show that waiving the jury undermines confidence in his death sentence." State Ct. Appellee's Br. at 58, *Honie II* (No. 20110620). The State further faulted Honie for citing no authority applying a different prejudice standard. In reply, Honie cited *Hill* as support for his argument that he had been prejudiced by waiving his right to jury sentencing, regardless of whether he could show a reasonable probability that the jury would have instead imposed life imprisonment.

The Utah Supreme Court found no merit in Honie's first ineffective-assistance claim related to his jury-sentencing waiver. In adjudicating the merits of this claim, the court ruled that Honie's counsel hadn't performed deficiently by advising him to waive his right to jury sentencing and that, based on the record, Honie's waiver had been knowing and voluntary.

Addressing Honie's second ineffective-assistance claim—his counsel's failure to try to withdraw Honie's waiver of jury sentencing—the court skipped the deficient-performance prong and rejected Honie's claim based on his failure to

satisfy the prejudice prong: "We need not decide if trial counsel's failure to move to withdraw Mr. Honie's waiver amounts to ineffective assistance of counsel because, even if trial counsel's performance was objectively unreasonable, Mr. Honie cannot show that he was prejudiced." *Honie II*, 342 P.3d at 201. The court applied *Strickland*'s general prejudice standard—which asks whether there was a reasonable probability that the result of the proceeding would have been different—by focusing on the outcome of Honie's sentencing, that is, the decision between the death penalty or life imprisonment. Concluding that Honie had not shown a reasonable probability that the jury would have spared him from the death penalty, the court found no prejudice. The court didn't discuss *Hill*'s prejudice standard.

2. Federal Courts

In May 2015, Honie petitioned for federal habeas relief in the District of Utah, raising fourteen claims for relief. This appeal relates to Claim Three, one of the eight claims that the district court determined Honie had properly exhausted. Again, Honie argued two ways in which his trial counsel had performed deficiently: (1) by failing to advise him adequately about his right to a jury sentencing and (2) by failing to move to withdraw his jury-sentencing waiver. Specifically, Honie maintained that *Hill* provided clearly established law that required the Utah Supreme Court to apply the process-based prejudice standard, not *Strickland*'s substantive-outcome-based one. R. vol. 2, at 439 (quoting *Hill* and concluding that Honie "only needed to demonstrate that if not for counsel's deficient performance, he would have withdrawn his jury waiver and proceeded with a jury during the penalty phase of his trial").

The federal district court denied all of Honie's claims for relief. Addressing the two deficient-performance claims, the court first concluded that the Utah Supreme Court's determination that trial counsel had adequately advised Honie on the jury-waiver decision was neither contrary to nor an unreasonable application of clearly established federal law. Next, the district court ruled that "[t]here is no clearly established federal law extending the *Hill* prejudice standard to jury trial waivers."[3] *Honie III*, 2019 WL 2450930, at *18 (citation omitted).

Honie then moved this court for a COA. Judge Murphy denied Honie's request for a COA but granted him leave to file a renewed request to the merits panel. Honie did so, and Judge Lucero granted a COA on the following issue:

> In assessing whether an attorney's deficient performance in connection with a waiver of the right to a jury sentencing prejudiced a habeas petitioner, is it clearly established under *Hill v. Lockhart*, 474 U.S. 52 (1985); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); and *Lafler v. Cooper*, 566 U.S. 156 (2012), that the relevant inquiry is whether the petitioner would have waived his jury right but for counsel's ineffectiveness?

Order Granting Certificate of Appealability at 1. Our jurisdiction lies under 28 U.S.C. § 2253. And as the COA question reveals, this appeal turns on whether the three Supreme Court holdings clearly establish that the Utah Supreme Court needed to

[3] Alternatively, the district court concluded that Honie couldn't meet his burden even if it were to apply the *Hill* prejudice standard. It found insufficient Honie's bare assertion that he would have withdrawn his waiver had his counsel asked the court to do so. The court agreed with the Utah Supreme Court that "a defendant will often fare better with a trained jurist than a lay jury, especially when the crime is particularly heinous." *Honie III*, 2019 WL 2450930, at *19 (quoting *Honie II*, 342 P.3d at 201). In other words, Honie failed to persuade the district court that he had shown any good reasons why he would really have withdrawn his jury-sentencing waiver. We do not reach that issue.

apply *Hill*'s process-based prejudice standard beyond their underlying claims regarding pleas and appeals, all the way to Honie's waiver of jury sentencing. Critically, we evaluate these cases within the constraints of federal habeas review, 28 U.S.C. § 2254(d).

DISCUSSION

This appeal involves the law governing ineffective-assistance-of-counsel claims and whether Honie can prevail on such a claim under AEDPA, 28 U.S.C. § 2254(d)(1). Specifically, Honie claims that the Utah Supreme Court violated clearly established law in its application of *Strickland*'s general prejudice standard. At a first level of clearly established law, Honie can easily show that *Strickland*'s general standard for ineffective-assistance claims governs his claim. But because courts still must *apply* that general prejudice standard to his circumstances, he must show a second level of clearly established law that would have required the Utah Supreme Court to apply a process-based prejudice test in evaluating his deficient-performance claims arising from his jury-sentencing waiver.

Our COA question pertains to this second level of clearly established law. We invited Honie to show that the holdings of *Hill*, *Flores-Ortega*, and *Lafler* required the Utah Supreme Court to apply the general prejudice standard as requiring a process-based prejudice test to his two deficient-performance claims. If he could do

so, we would then determine whether the Utah Supreme Court acted contrary to or unreasonably applied that clearly established law.[4]

But before we can consider those questions, we must address some preliminary matters. First, the State argues that we lack jurisdiction because no case or controversy exists. Second, the State argues that Honie has failed to preserve his *Hill* prejudice argument for appeal. After rejecting those arguments, we resolve the merits of this appeal: whether the Utah Supreme Court's decision was contrary to or involved an unreasonable application of clearly established federal law.

I. Jurisdiction

To meet *Strickland*'s general ineffective-assistance-of-counsel standard, Honie needed to show (1) that his counsel performed deficiently and (2) that this deficiency prejudiced him. 466 U.S. at 687. But because of the COA's wording, Honie understandably limited his argument to whether the Utah Supreme Court had applied the wrong prejudice standard. With the case in this posture, the State argues that any decision we issue would be advisory: that is, even if we conclude that clearly established law required the Utah Supreme Court to apply the *Hill* prejudice standard,

[4] Though we adopt the parties' moniker of "*Hill* prejudice," we acknowledge that the *Hill* Court merely applied *Strickland*'s general standard, including its prejudice prong, to the factual context and challenge raised before the Court (an accepted plea offer). *See Lee v. United States*, 137 S. Ct. 1958, 1965 n.1 (2017) (noting that in *Hill* the Court did not "depart from *Strickland*'s requirement of prejudice. The issue is how the required prejudice may be shown.").

Honie still couldn't obtain relief, because the court also ruled that he had failed to show that his counsel had performed deficiently.[5]

But the State concedes that our precedents permit us to "expand a COA to cover the necessary but omitted *Strickland* element." Resp. Br. 14. Indeed, in *United States v. Shipp*, 589 F.3d 1084 (10th Cir. 2009), we recognized our authority "to expand the COA to cover uncertified, underlying constitutional claims asserted by an appellant." *Id.* at 1087–88 (collecting cases); *see also United States v. Lozado*, 968 F.3d 1145, 1150 n.1 (10th Cir. 2020) ("The government's position on appeal also presents a question regarding the scope of the certificate of appealability previously issued by a judge of this court. . . . To the extent it might . . . be construed as limited to the assault conviction, we expand the scope of the certificate of appealability to include the parties' arguments respecting the other convictions relied on by the district court at sentencing."). We now exercise our discretion to expand the COA to cover the "uncertified, underlying constitutional claims" that Honie asserts—whether his trial counsel performed deficiently under *Strickland*. Under our expanded COA, we have jurisdiction to resolve the full controversy presented here.

II. State-Court Exhaustion and Preservation of Honie's Jury-Waiver Claim

Next, the State raises two more reasons that we shouldn't reach the merits. First, the State argues that Honie has defaulted his claim by not fairly presenting the

[5] This argument ignores that the Utah Supreme Court didn't rule on Honie's deficient-performance claim related to his counsel's not seeking to withdraw the jury-sentencing waiver after Honie asked counsel to do so.

Utah courts with his argument that *Hill*'s process-based prejudice standard applies. Second, because Honie didn't cite *Flores-Ortega* and *Lafler* in the district court, the State argues that Honie failed to preserve his argument that those cases reinforce that the *Hill* process-based prejudice standard governs ineffective-assistance claims based on counsel's alleged deficient performance tied to jury-sentencing waivers. We reject both arguments.

A. Honie fairly presented his prejudice argument to the Utah Supreme Court.

In asserting that Honie didn't fairly present his *Hill* prejudice argument to the Utah Supreme Court, the State notes that he didn't cite *Hill* until his reply brief. Because Utah courts generally refuse to consider issues raised for the first time in a reply brief, *see Brown v. Glover*, 16 P.3d 540, 545 (Utah 2000), the State insists that Honie didn't fairly present that argument. We disagree.

"For a federal court to consider a federal constitutional claim in an application for habeas, the claim must be 'fairly presented to the state courts' . . . ." *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). Thus, we recognize that we must afford state courts "the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights," which those courts cannot do unless they have been "alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam) (quoting *Picard*, 404 U.S. at 275). A petitioner "need not cite 'book and verse on the federal constitution.'" *Bland v.*

Sirmons, 459 F.3d 999, 1011 (10th Cir. 2006) (quoting *Picard*, 404 U.S. at 278). But he must do "more than present[] 'all the facts necessary to support the federal claim' to the state court or articulat[e] a 'somewhat similar state-law claim.'" *Id.* (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam)). At bottom, "the crucial inquiry is whether *the 'substance'* of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim." *Prendergast*, 699 F.3d at 1184 (emphasis added) (citations omitted).

No one disputes that Honie squarely presented to Utah's courts an ineffective-assistance claim that he based on his jury-sentencing waiver. Rather, the State maintains that Honie failed to fairly present *a subcomponent* of his claim—one before us now—that *Hill*'s process-based prejudice standard applies to waivers of jury sentencing in capital cases. Certainly, Honie's opening brief in the Utah Supreme Court could have done a better job of this. Even so, we can still make out the substance of his process-based prejudice argument.

He argued as follows: "Honie was prejudiced because he was not informed of his right to be sentenced by a jury free from bias and prejudice. Because of this, he waived jury sentencing in favor of the judge." State Ct. Opening Br. of Appellant at 75, *Honie II* (No. 20110620). In other words, Honie asserted that his waiver decision was based on poor advice—and that if he had understood what he was giving up, he would have chosen jury sentencing. Key here, Honie didn't argue prejudice based on grounds that the jury would have spared him from the death penalty. Instead, Honie

argued prejudice on grounds that absent counsel's deficient performance, he wouldn't have waived jury sentencing. That argument mirrors *Hill*'s prejudice standard.

And that's not just our reading of his argument. The State understood it that way too. In its response brief, the State explained that Honie's argument "necessarily assume[d] that merely showing that counsel's advice caused him to forfeit a sentencing jury meets his burden to prove *Strickland* prejudice." State Ct. Resp. Br. of Appellee at 58, *Honie II* (No. 20110620). The State then faulted Honie for not supporting his argument with legal authority and further argued against applying the *Hill* prejudice standard. So even accepting that Honie's opening brief presented only a bare-bones version of his prejudice argument, we can see that the State comprehended it and responded.

That Honie didn't cite *Hill* until his reply brief doesn't change the result. The State argues that because a *Hill* prejudice argument wasn't clear until Honie's reply brief, the Utah Supreme Court could have considered it waived. *See Brown*, 16 P.3d at 545. Putting aside that the Utah Supreme Court never ruled that Honie had waived this argument, the State ignores the rationale for the rule. "When an appellant saves an issue for the reply brief, he deprives the appellee of the chance to respond. And that leaves us without a central tenet of our justice system—adversariness." *Kendall v. Olsen*, 424 P.3d 12, 15 (Utah 2017). That didn't happen here. The State wasn't deprived of the chance to respond; in fact, it devoted two pages of its brief to explain why *Strickland*'s prejudice standard should apply instead of *Hill*'s. And Honie in turn spent four pages of his reply brief clarifying his prejudice argument under *Hill*. Given

that background, we would have been surprised if the Utah Supreme Court ruled that Honie had waived the point.

In short, we're comfortable that once briefing was completed, "the substance of [Honie's] claim ha[d] been presented to [Utah's] courts in a manner sufficient to put the courts on notice of the federal constitutional claim." *See Prendergast*, 699 F.3d at 1184 (internal quotation marks and citations omitted).

B. Honie preserved his prejudice argument in federal district court.

The State next contends that Honie failed to preserve his argument that *Flores-Ortega* and *Lafler* further support his position that the *Hill* prejudice standard extends to a defendant's waiver of jury sentencing. It notes that Honie cited neither *Flores-Ortega* nor *Lafler* in the federal district court, instead first doing so in his COA application. Because of this timing, the State contends that Honie has waived reliance on those cases. We understand the State as arguing that Honie has failed to preserve any argument built on *Flores-Ortega* and *Lafler*.

We conclude that Honie preserved his argument. His theory on appeal mirrors his theory in the district court. In the district court, Honie argued that the Utah Supreme Court contravened clearly established federal law by applying the wrong prejudice standard in assessing his ineffective-assistance claim. He argues the same thing on appeal: "The Utah Supreme Court violated clearly established federal law when it applied the wrong prejudice standard to Honie's claim that trial counsel was ineffective for failing adequately to advise Honie of his right to have a jury determine his sentence . . . ." Opening Br. 6.

The State can't preclude Honie from relying on *Flores-Ortega* and *Lafler* without at least citing authority barring parties from bolstering established arguments with additional reasoning and authority on appeal. And to the contrary, we have acknowledged that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *United States v. Johnson*, 821 F.3d 1194, 1199 (10th Cir. 2016) (brackets omitted) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)). This surely includes citing more legal authorities, provided the litigant's reliance on the new authorities doesn't change its underlying legal theory. *Fish v. Kobach*, 840 F.3d 710, 730 (10th Cir. 2010) ("Theories—as opposed to the overarching claims or legal rubrics that provide the foundation for them—are what matters." (citing *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011))). Here, though Honie initially cited just *Hill*, he later cited *Flores-Ortega* and *Lafler* as further support for his argument that the Utah Supreme Court didn't just make a mistake in ruling on his ineffective-assistance claims—but that it ignored clearly established federal law. Because those cases support the same theory advanced in the district court, he may rely on them on appeal.

Moreover, this isn't a case in which the district court was denied a chance to pass on the issue now before us. *See Johnson*, 821 F.3d at 1199–1200 (declining to consider the defendant's newly raised argument in part because "the district court never ruled on" it). In seven pages of analysis, the district court squarely considered the question now before us, rejecting Honie's argument that the Utah Supreme

Court's decision contravened clearly established federal law. And, as Honie points out, the district court even discussed *Lafler* in assessing whether the Utah Supreme Court had applied the correct prejudice standard. We thus have the benefit of the district court's carefully reasoned decision on this point. And because the State fails to persuade us that Honie has failed to preserve his argument, we now turn to the merits of Honie's claim.

III. The Deficient-Performance Prong: The Utah Supreme Court's decision rejecting Honie's arguments that counsel inadequately advised him about the jury-sentencing waiver and that his plea was unknowing and involuntary wasn't contrary to or an unreasonable application of clearly established federal law.

A. Waiver of Utah Statutory Right to Jury Sentencing

In the Utah Supreme Court on post-conviction relief, Honie argued that "trial counsel improperly advised him to waive his right to a jury at sentencing and that his waiver was not knowing and voluntary." *Honie II*, 342 P.3d at 200. Specifically, Honie claimed that "the colloquy with trial counsel and the court was inadequate in that it failed to make clear that Mr. Honie had a right to be sentenced by an impartial jury, failed to clarify that the jurors would be required to weigh the aggravating and mitigating factors, and failed to ensure that Mr. Honie understood what mitigating and aggravating factors were." *Id.*

The Utah Supreme Court held that "trial counsel's advice to waive a jury at sentencing was not objectively unreasonable under the first prong of *Strickland*." *Id.* The court noted that "[i]f counsel had a reasonable basis for advising a client to waive a jury at sentencing, we will not second-guess that decision." *Id.* (citing

Wiggins v. Smith, 539 U.S. 510, 523 (2003)). After noting that "the jury was confronted with [the details of the crime] during the State's case-in-chief," the court ruled that "[i]t was not unreasonable for trial counsel to conclude, in light of the overwhelming evidence of Mr. Honie's guilt and the gruesome nature of the crime itself, that Mr. Honie would fare better at sentencing with a judge than with a jury." *Id.* at 200–01. Particularly in view of the trial judge's comment that "the last thing a judge would want to do" would be to impose the death penalty, the court noted that "we cannot fault counsel's advice to waive jury sentencing in favor of sentencing by the trial judge." *Id.* at 201. The court summarized that "[i]ndeed, absent specific allegations of personal bias, we cannot conceive of any situation in which choosing a judge over a jury would not constitute a legitimate tactical decision." *Id.* at 200 (quoting *Taylor v. Warden*, 905 P.2d 277, 284 (Utah 1995)).

Next, the court addressed "Mr. Honie's second claim relating to his waiver of jury sentencing" on his asserted grounds that "his waiver was not knowing and voluntary." *Id.* at 201. Here, the court recounted Honie's arguments that "he was never informed of his right to an impartial jury, was never informed that the jury would be required to weigh the aggravating and mitigating factors, and was never properly instructed as to what aggravating and mitigating factors actually are." *Id.* The court agreed with the State that these matters were "not relevant to his choice between a judge and a jury in terms of sentencing." *Id.* As the relevant consideration regarding the jury-sentencing waiver, the court identified "the difference between a single judge and a twelve-person jury." *Id.* The court then reviewed the trial court's

extensive communications with Honie before he waived jury sentencing, concluding that "[w]e cannot say, on this record, that Mr. Honie's waiver was not knowing and voluntary." *Id.*

On review under § 2254(d)(1), the federal district court agreed with Honie that he had supplied clearly established law by which he could proceed with this claim. As such, it relied on *Adams v. United States ex rel. McCann* "for the proposition that a defendant may waive the right to a jury trial when 'there is an intelligent, competent, self-protecting waiver' and an 'exercise of a free and intelligent choice.'" *Honie III*, 2019 WL 2450930, at *12 (quoting 317 U.S. 269, 272–73 (1942)).

From there, the federal district court recounted the steep climb required by § 2254(d)(1). Addressing what qualifies as an objectively unreasonable application of clearly established law, the court stated as follows:

> The Tenth Circuit said it this way: "[u]nder the test, if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied." *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014). The court notes that under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. Thus, for Honie to get relief, he must show that no fairminded jurist would agree that the state court's decision was correct.

Id. (alteration in original).

With that in mind, the court later turned to the Utah Supreme Court's decision. It noted that "[t]he state court began its analysis with a strong presumption that trial counsel acted competently." *Id.* at *13. It cited *Strickland*'s direction that "a court

must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (quoting 466 U.S. at 689). The court agreed with the Utah Supreme Court that counsel's advice to waive jury sentencing was objectively reasonable: "A defense counsel's decision to advise a defendant to waive his right to jury and proceed with a non-jury trial is a 'classic example of strategic trial judgment' for which *Strickland* requires highly deferential judicial scrutiny." *Id.* at *14 (quoting *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001)). For counsel's advice to be constitutionally ineffective, "the decision to waive a jury must have been completely unreasonable, not merely, wrong, so that it bears no relationship to a possible defense strategy." *Id.* (internal quotation marks and citation omitted). Because the Utah Supreme Court had a strong basis for concluding that the advice was premised on a possible defense strategy, the federal district court concluded that "[t]he state court's analysis recognized and correctly applied *Strickland*'s performance prong." *Id.*

Next, the federal district court reviewed Honie's claim that "his waiver was not knowing and voluntary." *Id.* Here, Honie asserted that the written waiver and colloquies in the courtroom "were inadequate to ensure that his waiver of jury sentencing was made knowingly, intelligently, and voluntarily, in contravention of the Eighth and Fourteenth Amendments of the United States Constitution." *Id.* The court recited the Utah Supreme Court's ruling that "the relevant distinction between sentencing by a jury or judge was explained to Mr. Honie and he affirmed to the

court that he understood the distinction and wanted to proceed with the judge at sentencing." *Id.* (quoting *Honie II*, 342 P.3d at 201). The federal district court concluded that "the facts of this case show that Honie's jury waiver was knowing and voluntary, and thus the state-court decision was not contrary to or an unreasonable application of clearly established Federal law." *Id.* at *15 (citation omitted). The court highlighted some of Honie's involvements in approving the jury-sentencing waiver in the state trial court. *Id.* Further, the federal district court noted that "Honie cites no Supreme Court precedent that a defendant must be specifically apprised of his right to an impartial jury or of the burden of proof in order to knowingly and intelligently waive his right to a jury for sentencing." *Id.*

Reviewing the district court's decision de novo, we agree with its analysis and conclusions. For Honie's deficient-performance claim pertaining to his counsel's advice regarding waiver of the jury-sentencing right, Honie has not surmounted the "double deference" owed when reviewing a state court's *Strickland* ruling on deficient performance under AEDPA, § 2254(d)(1).[6] *See Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting that the deficient-performance analysis "is 'doubly

[6] Addressing Honie's second claim of deficient performance—that his counsel didn't try to withdraw the waiver of jury sentencing as Honie requested—the Utah Supreme Court chose to rule solely on *Strickland*'s prejudice prong. With the case before it on a grant of summary judgment, the Utah Supreme Court treated as true Honie's statement that he had asked his counsel to try to withdraw the waiver of jury sentencing. But the court ruled that "even if trial counsel's failure to move to withdraw Mr. Honie's waiver constituted deficient performance, we hold Mr. Honie was not prejudiced under the second prong of *Strickland*." *Honie II*, 342 P.3d at 200. As did the federal district court, we will assume counsel's performance was deficient and simply resolve that claim on the prejudice prong alone.

deferential' when, as here, a state court has decided that counsel performed adequately" (citation omitted)). We defer to the state court's *Strickland* determination and doubly defer in applying its merits adjudications under AEDPA, § 2254(d)(1). *Harris v. Sharp*, 941 F.3d 962, 973–74 (10th Cir. 2019) ("When a habeas petitioner alleges ineffective assistance of counsel, deference exists both in the underlying constitutional test (*Strickland*) and the AEDPA's standard for habeas relief, creating a 'doubly deferential judicial review.'" (citation omitted)). Honie hasn't shown that all fairminded jurists would conclude that the Utah Supreme Court's ruling on this deficient-performance-claim test was unreasonable, let alone even as mistaken or wrong.

IV. The Prejudice Prong: The Utah Supreme Court's decision applying a substantive-outcome-based test to Honie's ineffective-assistance claims wasn't contrary to or an unreasonable application of clearly established federal law.

A. Ineffective Assistance of Counsel Under the Sixth Amendment

1. The General Standard for Ineffective-Assistance Claims

In *Strickland*, the Supreme Court announced a general two-pronged test for analyzing ineffective-assistance-of-counsel claims. First, "the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. Second, "the defendant must show that the deficient performance prejudiced the defense." *Id.* To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id.* at 694. Honie asserts an ineffective-assistance-of-counsel claim, so *Strickland*'s general standard applies to it. But whether Honie's claim prevails depends on how the general standard for prejudice applies to his claim.[7]

2. The Two Different *Applications* of *Strickland*'s General Standard for Prejudice

a. Substantive-Outcome-Based Prejudice Standard

After announcing its general two-pronged standard, the Court in *Strickland* next needed to *apply* that standard to the ineffective-assistance claim made in that case. In *Strickland*, the defendant contended that his counsel had performed deficiently by presenting an insufficient mitigation case in a capital case. *Id.* at 699–700. In evaluating prejudice, the Court determined that "[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances *and, hence, the sentence imposed*." *Id.* at 700 (emphasis added). Thus, in the context of that case, the Court "consider[ed] the proper standards for judging a criminal defendant's contention that the Constitution requires *a conviction or death sentence* to be set aside because counsel's assistance at trial or sentencing was ineffective." *Id.* at 671 (emphasis added).

[7] For instance, if a court ruled that the defendant must show prejudice by a preponderance or higher, instead of a reasonable probability of prejudice, that would be contrary to *Strickland*. But Honie's prejudice claim is not of that preliminary sort.

b. Process-Based Prejudice Standard

A year after *Strickland*, the Court decided *Hill v. Lockhart*. There, the defendant's counsel allegedly misadvised him about the length of his statutorily required parole term. *Hill*, 474 U.S. at 55. The defendant asked the court to "reduce his sentence to a term of years that would result in his becoming eligible for parole in conformance with his original expectations." *Id*.

The Court began by holding "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58. But in applying *Strickland*'s general standard on prejudice in the plea setting, the Court departed from *Strickland*'s own application of its general prejudice standard as requiring a substantive-outcome test (a test asking whether the guilt or sentencing determination would have differed absent any deficient performance) for the mitigation-evidence claim. Instead, in *Hill*, the Court applied a process-based prejudice test—which allowed the defendant to prevail on a showing of "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

The Court noted that the two different applications have commonalities. It observed that "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.* For instance, for guilty-plea cases involving counsel's deficient performance in failing to discover favorable evidence, the Court stated that the success of a claim of prejudice for causing the defendant to

plead guilty will depend on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Id.* That assessment "will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.* And along the same line, the Court stated that prejudice from counsel's failing to advise a defendant of an affirmative defense "will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.* (citation omitted).

The Court stated that "these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59–60 (quoting *Strickland*, 466 U.S. at 695). Ultimately, because the defendant hadn't alleged "he would have pleaded not guilty and insisted on going to trial" if correctly informed of his parole-eligibility date, the Court ruled that he had failed to allege prejudice sufficiently "to satisfy the second half of the *Strickland v. Washington* test." *Id.* at 60.

Fifteen years later, in *Roe v. Flores-Ortega*, the Court addressed an ineffective-assistance-of-counsel claim that was "based on counsel's failure to file a notice of appeal without respondent's consent." 528 U.S. 470, 473 (2000). As in *Hill*, the Court ruled that *Strickland*'s general two-pronged standard for ineffective-assistance claims applied. *Id.* at 476–77. Addressing counsel's performance, the Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are

nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. As a "highly relevant factor," the Court pointed to "whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." *Id.* The object is to determine "whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.*

Turning to the prejudice prong, the Court, as it did in *Hill*, applied a process-based prejudice standard. It held that "to show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. In this regard, the Court noted that "[w]e believe this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry" in *Hill* and *Rodriquez v. United States*, 395 U.S. 327 (1969). *Flores-Ortega*, 528 U.S. at 485.[8] In extending the process-based prejudice test to this new setting, the Court compared a defendant's plea and appeal decisions this way: "Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." *Id.*

[8] In *Rodriquez*, counsel failed to file a notice of appeal after being instructed to do so by the defendant. 395 U.S. at 328.

In assessing prejudice in the failure-to-appeal context, the Court characterized as "highly relevant" all "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal." *Id.* at 472. Yet "a defendant's inability to 'specify the points he would raise were his right to appeal reinstated,' will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed." *Id.* at 486 (quoting *Rodriquez*, 395 U.S. at 330).

Twelve years later, the Court decided *Lafler v. Cooper*, 566 U.S. 156 (2012). In that case, the parties stipulated that counsel had performed deficiently by advising the defendant *not* to accept a plea offer. *Id.* at 163. After a trial, the defendant received a harsher sentence than the prosecutor had offered. *Id.* at 160. As with its earlier cases, the Court applied *Strickland*'s two-pronged general standard for ineffective-assistance-of-counsel claims. The issue lay in deciding "how to *apply* *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." *Id.* at 163 (emphasis added).

For a declined-plea-offer situation, the Court described the asserted prejudice as "[h]aving to stand trial, not choosing to waive it." *Id.* at 163–64. To show prejudice in this circumstance, the Court required a defendant to "show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening

circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164. Though the defendant had received a fair trial, the Court emphasized that the Sixth Amendment's guarantee "applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." *Id.* at 165.

Reviewing de novo and unconstrained by § 2254(d)(1)—because the state court had misapplied *Strickland*—the Court ruled that the defendant "ha[d] satisfied *Strickland*'s two-part test." *Id.* at 174. In finding a reasonable probability that the defendant and the trial court would have accepted the offered plea, the Court noted that the defendant's ultimate sentence was "3 & half[] times greater" than he would have received under the offered plea agreement. *Id.* As the "correct remedy," the Court ordered "the State to reoffer the plea agreement." *Id.* Once that was done, the trial court could exercise its "discretion in all the circumstances of the case." *Id.* at 175.

As we turn to Honie's appeal, we must remember that unlike the above trio of Supreme Court cases, Honie's case *is* subject to the stringent dictates of 28 U.S.C. § 2254(d)(1). Accordingly, we are not free to extend Supreme Court holdings as if on direct appeal. Instead, AEDPA's tightly turned screws limit our review. *See White v. Woodall*, 572 U.S. 415, 417 (2014) (referring to § 2254(d) as "a provision of law that some federal judges find too confining, but that all federal judges must obey").

B. AEDPA: General Principles

In reviewing AEDPA claims, the standard of review "depends on how that claim was resolved by the state courts." *Byrd v. Workman*, 645 F.3d 1159, 1165 (10th Cir. 2011) (citation omitted). Where, as here, the state court has adjudicated a claim on the merits, we may grant habeas relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[9] 28 U.S.C. § 2254(d)(1).

We begin by determining whether clearly established law applies to Honie's claim. *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013) (per curiam) ("The starting point for cases subject to § 2254(d)(1) is to identify the clearly established Federal law, as determined by the Supreme Court of the United States that governs the habeas petitioner's claims." (internal quotation marks and citations omitted)); *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) ("Whether the law is clearly established is *the* threshold question under § 2254(d)(1)." (citation omitted)); *see also House*, 527 F.3d at 1017 ("[W]ithout clearly established federal law, a federal habeas court need not assess whether a state court's decision was contrary to or involved an unreasonable application of such law." (internal quotation marks and citation omitted)).

[9] Petitioners may also challenge state-court rulings as being "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Here, Honie makes no such challenge.

Under § 2254(d)(1), clearly established Federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).[10] If we determine that a petitioner has identified clearly established law governing his claim, we next consider whether the state-court decision was "contrary to" or an "unreasonable application" of that law. *See House*, 527 F.3d at 1018.

"A state court decision is 'contrary to' the Supreme Court's clearly established precedent 'if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] on a set of materially indistinguishable facts.'" *Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) (alterations in original) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). In making that assessment, we ask whether the Supreme Court's cases have confronted "the specific question presented by this case"; otherwise, "the state court's decision could not be 'contrary to' any holding from [the Supreme] Court." *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam) (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)). Indeed, the Supreme Court has repeatedly "cautioned the lower courts . . . against 'framing [its] precedents at . . . a high level of

[10] So we may consider only Supreme Court decisions issued before May 30, 2014, when the Utah Supreme Court decided the merits of Honie's ineffective-assistance claim.

generality.'" *Lopez*, 574 U.S. at 6 (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam)).

"A state court decision is an 'unreasonable application' of Supreme Court precedent if 'the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case.'" *Frost*, 749 F.3d at 1223 (alteration in original) (quoting *Williams*, 529 U.S. at 407). Notably, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Williams*, 529 U.S. at 410). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022) (ruling that "to prove the state court's decision was unreasonable," a habeas petitioner "must persuade a federal court that no 'fairminded juris[t]' could reach the state court's conclusion under this Court's precedents" (alteration in original) (citation omitted)).

AEDPA's highly deferential standard is "difficult to meet." *White*, 572 U.S. at 419 (citation omitted). And that's by design. *Harrington*, 562 U.S. at 102 ("If this standard is difficult to meet, that is because it was meant to be."). After all, federal habeas review exists principally to correct "*extreme malfunctions* in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (emphasis added) (internal quotation marks and citation omitted).

Finally, we review de novo the district court's legal analysis of the state-court decision and any factual findings for clear error. *Byrd*, 645 F.3d at 1166–67.

C. Honie fails to surmount AEDPA's bar.

1. Clearly Established Law: General Ineffective-Assistance-of-Counsel Standard Under *Strickland*

We begin by identifying whether clearly established law applies to Honie's claim. On this point, "[i]t is past question that the rule set forth in *Strickland* qualifies as clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391 (internal quotation marks omitted); *see also Padilla v. Kentucky*, 559 U.S. 363, 366 (2010) (declaring that "*Strickland* applies to Padilla's claim," which was based on counsel's failure to advise the defendant of the negative immigration consequences of a guilty plea).

Thus, Honie meets § 2254(d)(1)'s clearly-established-law requirement, because *Strickland*'s general, two-pronged ineffective-assistance-of-counsel standard applies to his claim. But for Honie's particular claim to succeed, he must show that, at the time of its ruling, the Utah Supreme Court unreasonably applied *Strickland*'s general prejudice standard in the context of ineffective-assistance claims stemming from a defendant's waiver of his right to jury sentencing in a capital case. *See* § 2254(d)(1). Or, put differently, the question is whether the Utah Supreme Court was obliged, under clearly established federal law, to apply *Hill*'s process-based approach to *Strickland*'s general prejudice standard when deciding Honie's

ineffective-assistance claim based on his waiver of jury sentencing in his capital case, rather than the substantive-outcome approach originally applied in *Strickland*.[11]

This court's COA question zeroed in on that precise question. As the COA question foretold, Honie's claim rises or falls on whether *Hill*, *Flores-Ortega*, and *Lafler* hold that the process-based prejudice standard applies to waivers of jury sentencing. As spelled out next, none of those cases do.

In *Hill*, the Court held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. The Court continued by stating that the "second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. As seen, the holding is a narrow one about pleas.

In *Flores-Ortega*, the Court began by holding that *Strickland*'s general standard for ineffective assistance of counsel "applies to claims, like respondent's, that counsel was constitutionally ineffective for failing to file a notice of appeal." 528 U.S. at 477. The Court next held that "to show prejudice *in these circumstances*, a

[11] Under § 2254(d), defendants alleging that deficient performance prejudiced them in the plea context are able to show this second level of clearly established law, because the Supreme Court has already applied a process-based prejudice test in the plea context. *See, e.g.*, *Premo v. Moore*, 562 U.S. 115, 129, 131–32 (2011) (applying *Hill*'s process-based prejudice test in a § 2254(d) case involving a plea situation). But Honie offers nothing similar in the jury-sentencing-waiver context.

defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484 (emphasis added). The Court further held that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* As seen, these holdings narrowly apply to appeals.

Finally, in *Lafler*, the Court ruled that "[t]he standard for ineffective assistance under *Strickland* has thus been satisfied," after concluding that "[a]s to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea." 566 U.S. at 174 (citation omitted). After that, the Court ordered "the State to reoffer the plea agreement." *Id.* As seen, the holding is a narrow one about declined plea offers.

The holdings in the three cases are precise to the claims raised—they govern pleas and appeals. Nothing in the holdings addresses a waiver of a state-statutory right to jury sentencing in a capital case. And we may not follow Honie's suggested course and tease out general principles from cases to fashion the needed clearly established law. *See* Opening Br. 16 (arguing that, read together, *Hill*, *Flores-Ortega*, and *Lafler* "clearly establish[] that where ineffective assistance of counsel causes a defendant to forfeit a fundamental right that occurs prior to or after trial, the proper

prejudice inquiry is whether the defendant can demonstrate a reasonable probability that but for counsel's ineffectiveness, he would have opted to exercise that right").

Honie's theory for clearly established law goes far beyond the holdings in these three cases. He says that those cases hold that a process-based prejudice standard applies whenever counsel's deficient performance "result[s] in forfeiture of the decision to exercise a fundamental right that is reserved to the defendant, such as the right to jury sentencing in a capital case."[12] *Id.* at 7. As spelled out above, the cases are far more precise in their holdings.

We acknowledge that in *Flores-Ortega*, the Court states that applying the process-based prejudice test in the appeal context "breaks no new ground, for it mirrors the prejudice inquiry applied in *Hill v. Lockhart*, and *Rodriquez v. United States*." 528 U.S. at 485 (internal citations omitted). But we read this as the Court merely recognizing—in a collateral proceeding—that the process-based prejudice test is not a "new" rule under *Teague v. Lane*, 489 U.S. 288 (1989). *See Chaidez v. United States*, 568 U.S. 342, 353–55, 358 (2013) (concluding that "[t]his Court announced a new rule in *Padilla*" because that case "had to develop new law, establishing that the Sixth Amendment applied at all [to failure to advise about deportation consequences of a conviction], before it could assess the performance of Padilla's lawyer under *Strickland*" (citation omitted)). Because the process-based

[12] We do not decide whether a jury-sentencing right under Utah statutes amounts to a fundamental right.

prejudice was not "new" law in *Flores-Ortega*, the Court had no issue applying it in a new setting.

On the heels of this discussion, *Flores-Ortega* notes that "[l]ike the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." 528 U.S. at 485. But that doesn't mean that process-based prejudice applies universally whenever deficient performance causes a defendant to forfeit a fundamental right in the defendant's control. If the Court in *Hill* had wanted such a broad holding, it could have said so. And had it done so, the Court in *Flores-Ortega* could simply have cited and applied the broad rule. But it did not.

Finally, we note that Honie's claim differs in important ways from those presented in *Hill*, *Flores-Ortega*, and *Lafler*. First, Honie doesn't complain that his counsel's deficient performance caused him to forfeit or participate in a proceeding. He acknowledges the need for a sentencing proceeding and merely complains about *who* was the sentencer. Second, Honie claims that his counsel refused to try to *withdraw* his waiver of jury sentencing. Those situations differ from the situations in *Hill*, *Flores-Ortega*, or *Lafler*. Honie cites no Supreme Court holding requiring that the process-based prejudice standard apply in those circumstances.

Apart from the three cases listed in the COA question, Honie also cites *Jones v. Barnes*, 463 U.S. 745 (1983).[13] As he notes, that case left for counsel the trial-management decisions and for the defendant the decisions regarding fundamental rights. As fundamental rights, Honie lists these mentioned in *Jones*: a defendant's decision "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Reply Br. 9 (quoting *Jones*, 463 U.S. at 751). But *Jones* provides Honie little help. If it set the all-encompassing ruling Honie relies on it for, *Hill* and later cases could just have cited *Jones* and been finished. They didn't. Further, we note (1) that *Jones* preceded *Strickland* so isn't applying it, and (2) that *Jones* didn't have to navigate the shoals of AEDPA, § 2254(d)(1).

In our view, Honie argues as if his case is on direct appeal. If his case were in that posture, he could certainly argue that the next logical step after *Hill*, *Flores-Ortega*, and *Lafler* would be for the Supreme Court to apply the process-based prejudice standard to his ineffective-assistance claim and jury-sentencing waiver. And he might prevail. But AEDPA deference bars federal courts from second-guessing state court decisions until a Supreme Court holding applies the relevant legal rule to the new context applicable to the petitioner.[14] *See Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1250 (10th Cir. 2020).

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[13] On the same point, he also relies on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), but that case was decided after the Utah Supreme Court's decision.

[14] Thus, though *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841 (3d Cir. 2017), might carry weight if Honie's case were before us on de novo review, it didn't involve AEDPA review so isn't on point here.

The Supreme Court emphasized this point in *White*. There, the petitioner, having pleaded guilty to capital murder, called character witnesses at the penalty-phase portion of the trial but declined to testify himself. 572 U.S. at 418. He asked the trial judge "to instruct the jury that '[a] defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way.'" *Id.* (alteration in original) (citation omitted). The trial court refused, and the Kentucky Supreme Court affirmed. *Id.*

The Kentucky Supreme Court and the Sixth Circuit identified three Supreme Court decisions "as the relevant precedents": *Carter v. Kentucky*, 450 U.S. 288 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314, 319 (1999). *White*, 572 U.S. at 420. *Carter* established the Fifth Amendment right to a no-adverse-inference instruction at the guilt phase of a trial. *Id.* at 420 (citing 450 U.S. at 294–95). *Estelle* recognized that the Fifth Amendment applies equally to the penalty phase and the guilt phase of a capital trial. *Id.* (citing 451 U.S. at 456–57). And *Mitchell* "disapproved a trial judge's drawing of an adverse inference from the defendant's silence at sentencing 'with regard to factual determinations respecting the circumstances and details of the crime." *Id.* (quoting 526 U.S. at 317–30). Based on those three cases, the Sixth Circuit ruled that the state trial court needed to give a no-adverse-inference instruction at the penalty phase just as it would in the guilt phase. *Id.*

The Supreme Court reversed. It explained:

> Perhaps the logical next step from *Carter*, *Estelle*, and *Mitchell* would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case. The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1).

Id. at 427.

Though *White* applied § 2254(d)'s "unreasonable application" prong, that case applies with equal force here. The Supreme Court may eventually apply the *Hill* prejudice standard in cases involving jury-sentencing waivers. But it hasn't done so yet, and it may never. The Court has applied process-based prejudice incrementally and outside of § 2254(d)(1). Until the Court issues a holding extending process-based prejudice to jury-sentencing waivers, we can't say that Utah's applying *Strickland*'s substantive-outcome prejudice standard was contrary to or an unreasonable application of the Supreme Court's ineffective-assistance-of-counsel cases.

Nor does the Supreme Court's decision in *Marshall v. Rogers* boost Honie's claim. Honie cites that case for the proposition that "a decision framed in general terms can be deemed to have 'clearly established' a rule with respect to a variety of fact-specific situations that come within the general rule." Opening Br. 16. Though conceding that the Supreme Court has never applied *Hill* prejudice to an ineffective-assistance claim involving a jury-sentencing waiver, Honie implies that a broader rule derived from *Hill*, *Flores-Ortega*, and *Lafler* can be applied to the novel context presented here. But *Marshall* cannot carry that load.

In *Marshall*, the petitioner waived his right to counsel three times in the interval between his arraignment and trial in California state court. 569 U.S. at 59. Ultimately, he elected to represent himself at trial but then sought representation to help him file a motion for a new trial. *Id.* The trial court denied the request for counsel and later denied the pro se motion for a new trial. *Id.* at 60. The petitioner then sought habeas relief, asserting that California's courts had violated his Sixth Amendment right to counsel. *Id.* The Ninth Circuit agreed and granted him relief. *Id.* at 60–61.

The Supreme Court reversed. The parties disputed whether the Supreme Court's ineffective-assistance-of-counsel caselaw constituted clearly established law that resolved "whether, after a defendant's valid waiver of counsel, a trial judge has discretion to deny the defendant's later request for reappointment of counsel." *Id.* at 61. The Court began by noting that the Ninth Circuit had correctly concluded that "the Supreme Court ha[d] never explicitly addressed" that issue. *Id.* at 62.

The Court then reaffirmed that the inquiry doesn't necessarily end simply because it hasn't yet passed on a question of law: "[The Ninth Circuit] (also correctly) recognized that the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from this Court's cases can supply such law." *Id.* (quoting *Yarborough*, 541 U.S. at 664). Even so, the Court reversed the Ninth Circuit's grant of habeas relief. *Id.* at 64–65. In reviewing its Sixth Amendment caselaw, the Court recognized the "tension" between a defendant's constitutional right to counsel and

the right to proceed pro se. *Id.* at 63. California resolved that tension by giving trial judges broad discretion to assess post-waiver requests for counsel based on the totality of the circumstances. *Id.* at 62–63. And because the Supreme Court's holdings don't require state courts to resolve the tension by appointing counsel in these circumstances, the Court reasoned that "it cannot be said that California's approach is contrary to or an unreasonable application of the 'general standard[s]' established by the Court's assistance-of-counsel cases." *Id.* at 63 (alteration in original) (quoting *Alvarado*, 541 U.S. at 664).

So too here. Because the Supreme Court hasn't held that the process-based prejudice standard governs jury-sentencing waivers in capital cases, "it cannot be said that the state court 'unreasonably applied'" *Strickland* in applying the outcome-based prejudice test. *Musladin*, 549 U.S. at 77 (alterations omitted) (quoting § 2241(d)(1)).

In summary, Honie's claim fails for two primary reasons. First, the Supreme Court has never applied *Strickland*'s general prejudice standard in a case involving a waiver of jury sentencing in a capital case. And second, the Supreme Court has never held—including in *Hill*, *Flores-Ortega*, or *Lafler*—that a process-based prejudice test applies to jury-sentencing waivers.

CONCLUSION

For all these reasons, we affirm.

19-4158, Honie v. Powell,
LUCERO, Senior Circuit Judge, concurring in part and dissenting in part:

In 2002, the Supreme Court declared in Ring v. Arizona that the constitutional right to a fair trial in capital cases inherently and fundamentally includes a jury determination of aggravating factors for sentencing. 536 U.S. 584 (2002) (striking down alternative schemes of sentencing that required judicial determination of aggravating factors). In doing so, the Court was unequivocal: "The guarantees of jury trial in the Federal [] Constitution[] reflect a profound judgment about the way in which law should be enforced and justice administered. . . . If the defendant prefer[s] the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he [i]s to have it." Id. at 609. It further declared: "The Sixth Amendment jury trial right [] does not turn on the relative rationality, fairness, or efficiency of potential factfinders." Id. at 607.

Three Supreme Court cases, Hill v. Lockhart, 474 U.S. 52 (1985), Roe v. Flores-Ortega, 528 U.S. 470 (2000), and Lafler v. Cooper, 566 U.S. 156 (2012), establish that when counsel's deficient performance deprives a criminal defendant of a right that only a defendant personally can waive, the proper prejudice inquiry is if, but for counsel's errors, the defendant would have exercised the right at issue. Petitioner Taberon Honie asserts that his trial attorney's deficient performance deprived him of his statutory right to have a jury, not a judge, decide if he should be sentenced to death. In denying Honie relief, both the state court and my respected colleagues erroneously interpret and apply the holdings of Hill, Flores-Ortega, and Lafler. Because my majority colleagues also

erroneously conclude that the prejudice standard clarified by the foregoing cases fails to provide "clearly established Federal law" applicable to Honie's ineffective assistance claim, 28 U.S.C. § 2254(d)(1), I must respectfully dissent.

I would hold that the Utah Supreme Court's application of a purely outcome-focused prejudice inquiry—requiring Honie to show he would have received a lesser sentence, but for counsel's ineffectiveness—was "contrary to" clearly established law, § 2254(d)(1), and that the Antiterrorism and Effective Death Penalty Act (AEDPA) does not preclude us from granting relief. That court applied an incorrect legal standard when it deviated from the clear requirements of Hill, Flores-Ortega, and Lafler. These cases, in turn, are applications of the Supreme Court's command in Strickland v. Washington, 466 U.S. 668 (1984), that the prejudice inquiry in an ineffective assistance case must be tied to the proceeding in which counsel's alleged error occurred. Id. at 694. The Utah court did the opposite, imposing an impossible, outcome-focused prejudice standard that categorically turns the deprivation of Honie's structural and fundamental choice of a capital sentencer into a harmless error inquiry. Honie could not possibly show that a hypothetical jury would have spared him the death penalty when the trial judge did not, nor is he required to do so under Hill and cases that follow.

I further conclude, on de novo review pursuant to Byrd v. Workman, 645 F.3d 1159, 1166-67 (10th Cir. 2011), Honie has demonstrated a violation of his Sixth Amendment right to effective assistance of counsel under Hill. Honie's unrebutted affidavit and corresponding record evidence establish a reasonable probability that, if not for counsel's improper refusal to withdraw Honie's jury sentencing waiver, he would

have exercised his statutory right to have a jury decide his capital sentence. The error is of a structural nature. I would therefore reverse the decision of the district court, grant a writ of habeas corpus, and remand for a new sentencing proceeding in state court in front of a jury.[1]

I

The facts of the murder for which Honie was convicted are not in dispute. But their serious nature does not alter our analysis because the Constitution guarantees rights "to the innocent and the guilty alike." Kimmelman v. Morrison, 477 U.S. 365, 380 (1986). For criminal defendants, these rights include the right to effective assistance of counsel throughout all critical stages of a criminal proceeding, Lafler, 566 U.S. at 165, and the right to make certain fundamental decisions regarding one's representation, see Jones v. Barnes, 463 U.S. 745, 751 (1983); McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018). Such decisions include "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones, 463 U.S. at 751 (emphasis added). Utah law provides capital defendants with the right to be sentenced by a jury. See Utah Code Ann. § 76-3-207(1)(c)(i) (1998).[2] All twelve jurors must find that the death penalty is justified beyond a reasonable doubt, otherwise the punishment may not be imposed. § 76-3-

[1] I agree with my colleagues that we have authority to expand the certificate of appealability in this case to consider Honie's full ineffective assistance claim. I also agree that Honie's claims were preserved below. I therefore join these parts of the majority opinion.

[2] While I cite to the statute as it existed when Honie was tried, a substantially identical version remains in effect. See generally Utah Code Ann. § 76-3-207 (2021).

207(4)(b)-(c). Utah's capital jury sentencing right may be waived by the defendant with the consent of the judge and prosecutor. § 76-3-207(1)(c)(i).

Prior to trial and on his attorney's advice, Honie signed a waiver of his statutory right to a jury sentencing. Honie was convicted, and the trial judge sentenced him to death. But in a 2005 affidavit, Honie claimed that his attorney failed to adequately explain what he was giving up by waiving his jury sentencing right. Honie averred that he asked his attorney to withdraw the jury sentencing waiver a week after he signed it and before the start of trial. However, Honie's trial counsel told him it was "too late" and made no effort to withdraw the waiver—even though the judge and prosecutor repeatedly had stated their intention to defer to Honie's choice of sentencer.

At the post-conviction relief stage, the Utah Supreme Court rejected Honie's ineffective assistance claims. See Honie v. State, 342 P.3d 182, 200-02 (Utah 2014). Applying Strickland, it concluded that Honie's waiver of his jury sentencing right was knowing and voluntary. Id. at 201. It then assumed as true Honie's claim that he asked counsel to withdraw his waiver. Id. Yet it held that, even if Honie's trial counsel performed deficiently, Honie could not establish prejudice because he had "offered no evidence tending to establish that the outcome of his sentencing would have been different had he opted for jury sentencing." Id. (emphasis added). Never mind that such a showing was impossible: Honie's trial jury was dismissed before sentencing and did not hear his mitigating evidence, including Honie's young age (22 years old at the time of the crime), his lack of criminal history, his struggles with drug abuse and depression, and his statements of remorse. See California v. Ramos, 463 U.S. 992, 1008 (1983)

(explaining that, while trials are narrowly focused on guilt or innocence, jurors at capital sentencing proceedings are "free to consider a myriad of factors to determine whether death is the appropriate punishment").[3] This purely outcome-focused approach runs counter to the Supreme Court's commands, beginning in Strickland itself, as to the proper prejudice inquiry in cases like Honie's. See Strickland, 466 U.S. at 693-94 (rejecting a categorical rule requiring defendants to show that counsel's errors "likely . . . altered the outcome in the case," and instead holding that defendants must establish "a reasonable probability that . . . the result of the proceeding would have been different") (emphasis added). The error is patent. Instead of analyzing if the factual issues were presented to the correct (i.e., structural) forum—a jury of twelve or a judge of one—it substituted a harmless error inquiry. In doing so, it also implicitly assumed the trial court would have granted the withdrawal motion.

Utah asks us to bless its state court's adjudication of Honie's claim. But as I explain below, not even AEDPA can justify that court's departure from Supreme Court precedent clearly establishing that a process-focused prejudice test applies to ineffective

[3] The impossibility of this task is relevant in two ways. First, it amounts to a determination that ineffective assistance depriving a defendant of a fundamental right—in this case, the right to a capital jury sentencing—is categorically harmless. If proving prejudice under Strickland is functionally impossible, Sixth Amendment relief will never be available for these types of claims. Second, the Utah Supreme Court's approach highlights the absurdity of using an incorrect, outcome-focused prejudice inquiry for these types of rights, given that the autonomy of the defendant to make certain choices in our criminal justice system is seen as necessary for a fair trial. See McCoy, 138 S. Ct. at 1508-09. As a result, deprivation of the defendant's autonomy to make fundamental decisions renders the trial unfair. See Strickland, 466 U.S. at 686 (in giving meaning to the constitutional requirement of effective assistance, courts "must take its purpose—to ensure a fair trial—as the guide").

assistance claims related to the loss of a fundamental right that only a criminal defendant personally may waive.

II

AEDPA limits our ability to grant habeas relief from a state court's adjudication on the merits unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). When a state court applies a rule that contradicts Supreme Court precedent, its decision is "contrary to" clearly established law and not entitled to AEDPA deference. Lockett v. Trammell, 711 F.3d 1218, 1231 (10th Cir. 2013). "The starting point for cases subject to § 2254(d)(1) is to identify the clearly established Federal law . . . that governs the habeas petitioner's claims." Marshall v. Rodgers, 569 U.S. 58, 61 (2013) (quotations omitted).

The majority argues that Hill, Flores-Ortega, and Lafler fail to clearly establish that a process-based prejudice standard applies to ineffective assistance claims arising out of capital jury sentencing waivers. Only by ignoring the clear language of these cases, of Strickland and of Ring, could my colleagues hope to support such a conclusion. As I proceed to elaborate, Hill, Flores-Ortega, and Lafler leave no doubt a prejudice standard which focuses on process leading to waiver of the right in question applies to Honie's claim. I then show why, contrary to the view of my respected colleagues, such a standard was "clearly established" at the time of the Utah Supreme Court's decision. § 2254(d)(1). Because that court failed to apply the correct prejudice standard to Honie's

claim, its decision was "contrary to" governing Supreme Court caselaw and not entitled to AEDPA deference. Id.

A

Strickland provides the starting point for our analysis. That case established the two-pronged standard for ineffective assistance claims. It requires a defendant to show both (1) that counsel performed deficiently and (2) that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 688, 694. Because the petitioner in Strickland challenged the actions of his attorney at his sentencing hearing, the Supreme Court framed the prejudice inquiry as being whether, but for counsel's errors, the sentencing outcome would have been different. Id. at 695. But the Court cautioned that "the principles we have stated do not establish mechanical rules." Id. at 696. Indeed, it specifically declined to adopt a prejudice standard that required a defendant to "show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. Rather, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696 (emphasis added).

Thus, while the context of the petitioner's claim in Strickland dictated that the prejudice inquiry hinge on the outcome of his sentencing, the opinion made clear that the nature of the prejudice inquiry will vary based on a claim's context and the proceeding in which the attorney's relevant conduct occurred. See id. at 695 ("The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors."). And the Supreme Court has repeatedly heeded this command when faced with ineffective assistance claims involving the deprivation of a

fundamental right which only a criminal defendant may choose to exercise. In each case, the Court has focused the prejudice inquiry not on the ultimate trial or sentencing outcome, but rather on the process leading to the loss of the right in question.

Nothing can be more fundamental to process than the right to trial by jury, which extends to the right to be sentenced by a jury in capital cases. Ring v. Arizona, 536 U.S. 584, 609 (2002). In Hill, the Supreme Court applied Strickland to a claim that counsel's deficient performance caused the defendant to accept a plea bargain he otherwise would have rejected. Hill, 474 U.S. at 55-56. In analyzing prejudice, the Court did not ask whether, but for counsel's errors, the substantive result of the trial or sentencing would have been different. Nor could it, because accepting the plea caused the defendant to forego these proceedings altogether. Rather, the Court asked "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 59 (emphasis added). It focused, in other words, on the process that led to the waiver of the defendant's right to a voluntary, knowing, and intelligent plea. Accordingly, the petitioner in Hill could demonstrate prejudice if "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

Flores-Ortega subsequently clarified that the prejudice standard in Hill applied beyond the plea-bargaining context. That case involved the waiver of a right to direct appeal due to counsel's failure to file the appropriate notice. Flores-Ortega, 528 U.S. at 474. Recognizing that it would be "unfair to require a[] . . . defendant to demonstrate that his hypothetical appeal might have had merit," the Court held that, to show prejudice, the petitioner need only establish a reasonable probability that "but for counsel's deficient

conduct, he would have appealed." Id. at 486. Crucially, the Court emphasized that "this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry applied in Hill." Id. at 485. This was so, because "the decision whether to appeal, [like] the decision whether to plead guilty (i.e., waive trial) rested with the defendant," and counsel's actions "might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." Id.

Finally, in Lafler, the Supreme Court applied this proceeding-focused prejudice approach when a defendant forfeited a fundamental right prior to trial, but thereafter received a fair adjudication. The petitioner in that case claimed ineffective assistance when his counsel erroneously advised him against accepting a guilty plea he should have taken. See Lafler, 566 U.S. at 163-64. The Court explicitly rejected the argument that a fair adjudication "wipe[d] clean any deficient performance" prior to trial. Id. at 169-70. Rather, it held that the petitioner could establish prejudice by showing that, but for counsel's unreasonable errors, the guilty plea would have been presented to and accepted by the court. Id. at 164. As in Hill and Flores-Ortega, the focus of the Court's prejudice inquiry was "the fairness and regularity of the processes" surrounding trial "which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." Id. at 169.

Lafler "made explicit the principle underlying [the Supreme Court's] decisions in Hill and Flores-Ortega." Vickers v. Superintendent Graterford SCI, 858 F.3d 841, 856 (3d Cir. 2017) (applying Hill's prejudice standard to the waiver of the right to a jury trial). That principle requires that when a defendant claims ineffective assistance arising

out of the waiver of a fundamental right that only the defendant can personally waive, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, they would have opted to exercise that right. See Vickers, 858 F.3d at 857. Moreover, this rule is merely a specific application of Strickland itself, which emphasized that the focus of the prejudice inquiry must be on the "fundamental fairness of the [challenged] proceeding," Strickland, 466 U.S. at 697, including, in Honie's case, a pre-trial process which results in the waiver of a jury right.

In all important respects, Honie's claim is closely analogous to those at issue in Hill, Flores-Ortega, and Lafler. Like decisions to accept a plea or file a direct appeal, the choice of whether to waive a capital jury sentencing is structural and fundamental—only the defendant can make it. See Jones, 463 U.S. at 751; see also State v. Maestas, 299 P.3d 892, 959 (Utah 2012) (recognizing in a capital case that the defendant "has the right to make . . . fundamental decision[s] that go[] to the very heart of the defense"). And as in Hill and its progeny, Honie could not plausibly establish prejudice under Strickland by asking solely whether the attorney's errors altered the court's determination of guilt or the punishment imposed at sentencing. Asking Honie to offer evidence of how a hypothetical jury would have sentenced him makes no more sense than requiring the petitioner in Flores-Ortega to "demonstrate that his hypothetical appeal might have had merit." Flores-Ortega, 528 U.S. at 486. Nor, as Lafler instructs, can the fairness of Honie's ultimate sentencing hearing cure the deprivation of his right to have twelve peers—rather than a judge—decide whether he should be condemned to death. The focus of the prejudice inquiry must be on the process surrounding his jury waiver, which

caused Honie "to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." Lafler, 566 U.S. at 169. To require Honie to speculate about a hypothetical jury's sentence, as the state court did in this case, not only defies logic and relegates the deprivation of a fundamental right to a categorical harmless error—it outright ignores the clear collective command of the Supreme Court's ineffective assistance caselaw.

The Third Circuit's reasoning in Vickers—the only circuit opinion to consider in-depth the application of Hill to jury waivers following Lafler—is instructive. In Vickers, trial counsel improperly failed to ensure that the petitioner, who was convicted following a bench trial, knowingly waived his right to a jury trial. See Vickers, 858 F.3d at 850-52. The Third Circuit determined that, after Lafler, there was "no longer any ambiguity" that Hill's prejudice standard applies to ineffective assistance claims arising out of jury trial waivers—even if the defendant's adjudication in front of a judge is ultimately fair. Id. at 857. The court emphasized it was not extending or creating law, but merely "align[ing its prejudice test] with the Supreme Court's [] decision in Lafler." Id. at 857 n.15. While the Third Circuit was not constrained by AEDPA in its analysis, id. at 849,[4] we have said that we may "consult the precedent of lower courts . . . to ascertain the contours of clearly established Supreme Court precedent." Littlejohn v. Trammell, 704 F.3d 817, 828 n.3 (10th Cir. 2013). Thus, Vickers' reasoning—and its conclusion that it merely aligned its

[4] Prior to analyzing the merits, the Third Circuit determined that the state court had failed to apply Strickland altogether in evaluating the petitioner's claim, resulting in a decision that was contrary to clearly established law. See Vickers, 858 F.3d at 849.

prejudice test with the Supreme Court's—is persuasive in our determination of the scope of clearly established law at the time of Honie's claim.[5]

B

My colleagues acknowledge that Hill, Flores-Ortega, and Lafler have applied Strickland's prejudice requirement to the procedural contexts in which they arose—guilty pleas, notices of appeal, and plea offers. But the majority nonetheless concludes that, under AEDPA, these cases fail to provide clearly established law applicable to ineffective assistance claims involving waivers of a right to capital jury sentencing. I not only disagree, I consider such a determination both unreasonable and unfair.

We have said that clearly established law under AEDPA is limited to "Supreme Court holdings in cases where the facts are at least closely-related or similar to the case sub judice." House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). Utah and my colleagues take this to mean that AEDPA requires us to ignore the essential reasoning of Hill and its progeny, cabining our analysis to rote recitations of these cases' narrow holdings. Thus, the majority states that "[u]ntil the [Supreme] Court issues a holding extending [Hill] process-based prejudice to jury-sentencing waivers, we can't say that

[5] The majority brushes aside Vickers by noting that it "didn't involve AEDPA review so [it] isn't on point here. Nonetheless, a case that isn't on point can serve as an illustrative persuasive authority. See Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003), overruled on other grounds by Lockyer v. Andrade, 538 U.S. 63 (2003) ("circuit law may be 'persuasive authority' [in AEDPA cases] for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law" even though "only the Supreme Court's holdings are binding on the state courts"); see also Littlejohn, 704 F.3d at 828 n.3.

Utah's appl[ication of] Strickland's substantive-outcome prejudice standard was contrary to or an unreasonable application of the Supreme Court's assistance-of-counsel cases." Again, I respectfully disagree and consider that language unreasonable, unfaithful to clear Supreme Court jurisprudence, and unfair.

Respectfully, I believe the majority oversimplifies AEDPA's clearly established inquiry in this case. The Supreme Court has repeatedly emphasized that a holding based on "identical facts" is not required to find clearly established law. Marshall, 569 U.S. at 62; Panetti v. Quarterman, 551 U.S. 930, 953 (2007); see also Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."). Rather, a "general standard" set forth by the Court can supply clearly established law to a variety of factual scenarios. Marshall, 569 U.S. at 62. Strickland is the paramount example of this. See Murphy v. Royal, 875 F.3d 896, 922 (10th Cir. 2017) ("Although claims of lawyer ineffectiveness are each unique and require fact-intensive analysis, Strickland's framework still applies, and the variety of fact patterns obviates neither the clarity of the rule nor the extent to which the rule must be seen as established by [the Supreme] Court." (internal quotations omitted)). Our circuit has recognized the difficult judgments inherent in AEDPA's clearly established law analysis. In House, for example, we cautioned against "mechanistically seek[ing] to determine whether there are Supreme Court holdings that involve facts that are indistinguishable from the case at issue." House, 527 F.3d at 1015 n.5. Instead, judges must "exercise a refined judgment

and determine the actual materiality of the lines (or points) of distinction between existing Supreme Court cases and the particular case at issue." Id.

Relatedly, the Supreme Court has distinguished between extending clearly established law to new contexts absent a Supreme Court holding—which AEDPA forbids—and applying a clearly established rule to fact patterns it already encompasses. See Yarborough v. Alvarado, 541 U.S. 652, 666 (2004). "The difference between applying a rule and extending it is not always clear, but certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." White v. Woodall, 572 U.S. 415, 427 (2014) (cleaned up). The Supreme Court has thus recognized that a standard can be clearly established even if it has not been previously applied to the specific claim at issue. Williams v. Taylor, 529 U.S. 362, 390-91 (2000); Yarborough, 541 U.S. at 666. For present purposes there can be no distinction among the right to a jury trial for sentencing, and the right to a jury trial on guilt itself. Honie asks us to apply an existing legal rule, employed consistently across a specific type of ineffective assistance case (those involving the waiver of fundamental trial rights), to a claim substantially analogous to those the Supreme Court has considered previously. See Ring, 536 U.S. at 609.

The majority pays lip service to the Supreme Court's command that clearly established law does not require a case consisting of "identical facts." Marshall, 569 U.S. at 62. But my colleagues all but demand as much by holding that the Supreme Court must address a claim identical to Honie's before it finds Hill's rule clearly established as to jury sentencing waivers. Nor does the majority consider the consequences of its

mechanical approach to ineffective assistance claims under AEDPA. Imagine a defendant unknowingly and unintelligently waived their right to a jury trial due to counsel's deficient performance. See Vickers, 858 F.3d at 845 (presenting such a scenario). Under the majority's rationale, a state court could deny postconviction relief unless the petitioner could make the utterly impossible showing that a hypothetical jury would have found them innocent. This illogical result—which renders the deprivation of a constitutional right as harmless error—contravenes Strickland and is exactly what Hill and its progeny avoided by clarifying the prejudice standard for ineffective assistance claims involving the waiver of fundamental rights belonging to a criminal defendant.

Of course, we have never required the Supreme Court to apply Strickland to a specific ineffective assistance theory before finding its two-part test clearly established as to a claim based on that theory. Williams, 529 U.S. at 390-91; Murphy, 875 F.3d at 922. Rather, it is "past question" that Strickland provides clearly established law for all ineffective assistance claims—even those based on theories of attorney error not previously considered by the Supreme Court. Williams, 529 U.S. at 390. Hill is itself an application of Strickland. And the Supreme Court has made clear that Hill's rule was never limited purely to the plea-bargaining context. This is why the Court in Flores-Ortega emphasized that its application of Hill's prejudice standard to a waiver of the right to direct appeal "[broke] no new ground." Flores-Ortega, 528 U.S. at 485. Rather, Hill's rule applies to scenarios involving a trial decision that "rest[s] with the defendant," and where counsel's actions lead to the waiver of trial rights "to which [the defendant] was otherwise entitled." Id. In other words, it applies to a claim like Honie's.

In short, the Supreme Court has clearly established a rule that squarely answers "the specific question presented by this case." Woods v. Donald, 575 U.S. 312, 317 (2015) (quotation omitted). Hill, Flores-Ortega, and Lafler together make clear that when counsel's errors cause the waiver of a fundamental right which can be waived only by a criminal defendant personally, the appropriate prejudice standard is whether, but-for counsel's errors, the defendant would have exercised the right in question. As explained more below, there is no doubt that the choice Honie faced in this case—whether a jury or judge should decide if he ought to be condemned to die—implicated a fundamental right that, once vested, only the defendant could choose to exercise. See Jones, 463 U.S. at 751. Honie merely asked the Utah Supreme Court to apply the rule clarified by Hill and its progeny, and rooted in Strickland, to a set of facts clearly within its ambit. The court's failure to do so was "contrary to . . . clearly established Federal law." § 2254(d)(1).

C

Because Hill's prejudice standard provides clearly established law as to Honie's claim, I am compelled to conclude that the Utah court's opinion was "contrary to" Supreme Court precedent and therefore not entitled to AEDPA deference.[6] As described

[6] Unlike my colleagues, I believe the state court's failure to analyze trial counsel's pre-waiver conduct under Strickland was contrary to clearly established law and not entitled to AEDPA deference. The state court concluded that because Honie's waiver was "knowing and voluntary," his attorney's performance prior to the waiver's signing was not deficient under Strickland. See Honie, 342 P.3d at 201. In Lafler, however, the Supreme Court held that merely asking whether the rejection of a plea was knowing and voluntary "is not the correct means by which to address a claim of ineffective assistance of counsel." Lafler, 566 U.S. at 173 (citing Hill, 474 U.S. at 57). The state court's failure in that case to analyze trial counsel's conduct under Strickland was therefore contrary to clearly established law, and its opinion was not entitled to AEDPA deference.

above, a state court decision is "contrary to . . . clearly established Federal law" when it applies a rule that contradicts the Supreme Court's governing caselaw. Lockett, 711 F.3d at 1231; see also Trammell v. McKune, 485 F.3d 546, 550 (10th Cir. 2007) ("AEDPA's deferential standard does not apply if the state court employed the wrong legal standard in deciding the merits of the federal issue." (quotation omitted)).

My colleagues and I agree that Honie fairly presented to the Utah Supreme Court his argument that Hill's prejudice standard should apply to his ineffective assistance claim. That court nonetheless rejected Honie's claim because he failed to offer "evidence tending to establish that the outcome of his sentencing would have been different" with a jury. Honie, 342 P.3d at 201 (emphasis added). As I explain above, Hill and its progeny clearly establish that the correct prejudice standard in this case—and the one the Utah court was bound to apply—required asking whether, but for his attorney's unreasonable conduct, Honie would have exercised his right to a capital jury sentencing. In fact, he did so. He told his attorney he insisted on being sentenced by a jury and asked his attorney to take the necessary steps to bring the matter to the trial judge's attention and withdraw his waiver. His attorney refused to do so. This is ineffective assistance of counsel. Because the state court applied the wrong legal standard, AEDPA does not bar our ability to grant habeas relief in this case.

Id.; see also Vickers, 858 F.3d at 849 (holding that a state court violated Strickland and Lafler by summarily concluding that the defendant's jury trial waiver was "knowing and voluntary"). The same result should apply here.

Ultimately, however, I need not reach this issue. Rather, I conclude that the state court's prejudice analysis was contrary to clearly established law and, further, that Honie is entitled to relief based on his attorney's failure to seek withdrawal of his jury waiver.

III

Having concluded that the Utah Supreme Court's decision was not entitled to AEDPA deference, I would proceed to the final step of the habeas inquiry: de novo review of Honie's federal claim to determine whether relief is warranted. See Panetti, 551 U.S. at 953-54. Because this review is de novo, the habeas court "can determine the principles necessary to grant relief." Lafler, 566 U.S. at 173. For the reasons described above, I would hold the appropriate legal standard Honie must satisfy to demonstrate ineffective assistance of counsel is Hill's two-part test. That test requires Honie to show that (1) his attorney performed deficiently and (2) a reasonable probability exists that, but for his attorney's ineffective assistance, Honie would have exercised the fundamental right in question. See Hill, 474 U.S. at 58-59. I consider these requirements in turn, determining that Honie is indeed entitled to habeas relief based on his trial attorney's failure to petition the court to withdraw his jury sentencing waiver.

A

To assess deficient performance under Strickland, we consider whether counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms." Strickland, 466 U.S. at 688. This inquiry requires us to analyze "the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Honie satisfies this standard because, given the importance of the capital sentencing right and the timing and circumstances of his withdrawal request, his attorney was obligated to petition the court to withdraw his jury sentencing waiver.

Longstanding professional rules and norms require defense counsel to allow clients to make certain fundamental decisions regarding their defense. See Criminal Justice Standards § 4-5.2 (Am. Bar Ass'n 1993, 3d ed.); accord Jones, 463 U.S. at 751. At the time of Honie's trial, those decisions reserved to the defendant included whether to waive a jury trial. See Criminal Justice Standards § 4-5.2(a)(iii);[7] see also Utah Rules of Pro. Conduct 1.2(a) (1999) ("[A] lawyer shall abide by the client's decision . . . to waive jury trial . . . ."). And the Supreme Court has emphasized that capital sentencing proceedings resemble a trial and require commensurate substantive and procedural protections. See Strickland, 466 U.S. at 686 (calling capital sentencing proceedings "sufficiently like a trial"); Bullington v. Missouri, 451 U.S. 430, 445-46 (1981) (extending the double jeopardy clause to capital sentencing determinations). Take Honie's case. Utah law required that his sentencer weigh aggravating and mitigating evidence and determine whether the death penalty was justified beyond a reasonable doubt. Utah Code Ann. § 76-3-207(4)(b)-(d) (1998). Honie's choice of a sentencer was therefore just as fundamental as the choice of a factfinder at trial. In fact, the choice of the sentencing forum was arguably more important, given that Honie conceded his guilt at trial. For Honie, the sentencing was the whole ballgame. Clearly his lawyer thought Honie's best chance at saving his life was before the judge. At first, Honie agreed. But

[7] The ABA's standards have been updated to include among those fundamental decisions reserved to the defendant "any . . . decision that has been determined in the jurisdiction to belong to the client." Criminal Justice Standards § 4-5.2(b)(ix) (Am. Bar Ass'n 2017, 4th ed.). This would include, in Honie's case, Utah's law reserving to capital defendants the decision of whether to waive jury sentencing.

well before trial, he changed his mind. Honie unequivocally and unimpeachably asked that his hearing be held before a jury. In declining to make this request to the court, counsel arrogated unto himself the ultimate decision. It was not his decision to make. Professional rules required counsel to carry out Honie's wishes regarding his desired sentencer. Counsel's obligation is not altered by the above fact that Honie had previously signed a waiver of his capital jury sentencing right. See Garza v. Idaho, 139 S. Ct. 738, 746 (2019) (holding that counsel performs deficiently by not complying with a defendant's request to file a notice of appeal, even when a defendant has waived appellate rights as an express condition of a plea agreement).

The record contradicts counsel's explanation to Honie that it was "too late" to withdraw his jury sentencing waiver. See Criminal Justice Standard 4.5-1(a) (requiring that defense counsel "advise the accused with complete candor"). Nothing before us contradicts Honie's declaration that he requested withdrawal of the waiver a week before jury selection and nearly two weeks before trial was to begin. A prompt request would have allowed the trial court to honor Honie's wishes without causing undue delay. See United States v. Mortensen, 860 F.2d 948, 950 (9th Cir. 1988) (withdrawal of a jury trial waiver "is timely [if] granting the motion would not unduly interfere with or delay the proceedings."); Zemunski v. Kenney, 984 F.2d 953, 954 (8th Cir. 1993) (same). It well could have been inconvenient to do so. But inconvenience is not the appropriate measure to balance against a defendant's life. In addition, the judge and prosecutor repeatedly stated their intent to defer to Honie's choice of sentencer. At the pre-trial hearing where Honie signed his waiver, the prosecutor emphasized that his intent "in a case of this

magnitude is to give the defendant the benefit of the doubt on every request," and that "the only reason the state has consented and stipulated and agreed to [waiving jury sentencing] is because it is this defendant's choice and desire." The judge responded that Honie's wishes were "partly why I am going in this direction too," and added "[i]t's the state's case and your case. But it's your life that's on the line, if you are convicted . . . ." Given these facts, counsel's stated reasoning for not petitioning the court was unfounded, at best.

Taking the above into account, the refusal by Honie's attorney to seek withdrawal of his jury sentencing waiver, despite Honie's express request, clearly "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Honie therefore has shown deficient performance under Strickland and Hill.

B

Turning to the prejudice inquiry under Hill, we ask whether the petitioner has shown a reasonable probability that "counsel's constitutionally ineffective performance affected the outcome of the . . . process" which resulted in the waiver of a fundamental right. Hill, 474 U.S. at 59. In other words, has Honie demonstrated a reasonable probability that, but for his counsel's deficient performance, he would have exercised his right to capital sentencing by a jury? Given that Honie claims his attorney's inaction deprived him of a jury right he previously waived,[8] Honie must show a reasonable

[8] I assume for the sake of argument in this section that Honie's jury sentencing waiver was in fact voluntary, knowing, and intelligent. See Adams v. U.S. ex rel. McCann, 317 U.S. 269, 276-77 (1942) (stating such a requirement for jury trial waivers).

probability that (1) he would have petitioned to withdraw the waiver, and (2) the court would have assented. See Lafler, 566 U.S. at 163-64 (requiring the petitioner show that, but for counsel's ineffectiveness, his erroneously rejected plea would have been presented to and accepted by the court). Honie has met this burden.

In assessing a claim of prejudice under Hill, we consider "all of the factual circumstances" to determine whether a criminal defendant would have in fact chosen to exercise a fundamental right but for counsel's errors. Heard v. Addison, 728 F.3d 1170, 1183 (10th Cir. 2013) (quotation omitted). This includes, as an initial matter, asking whether the exercise of that right was objectively "rational under the circumstances." Id. at 1184 (quoting Padilla v. Kentucky, 599 U.S. 356, 372 (2010)). A "mere allegation" that a defendant would have exercised a fundamental right is insufficient to show prejudice under Hill. Miller v. Champion, 262 F.3d 1066, 1072 (10th Cir. 2001). However, a court will not "blind [itself] to the individual defendant's statements and conduct" if the exercise of that right would have been objectively rational. Heard, 728 F.3d at 1184.

At the post-conviction stage, the federal district court determined that Honie could not show a reasonable probability under Hill that he would have withdrawn his waiver. See Honie v. Crowther, 2019 WL 2450930, at *19 (D. Utah June 12, 2019). In doing so, the court effectively concluded it would be irrational for Honie to seek withdrawal of his waiver because his waiver was knowing and intelligent—meaning he had a sufficient understanding of the difference between judge and jury sentencing. I cannot agree.

As an initial matter, and as the district court noted, the fact that a waiver of a right is knowing and intelligent does not imply that a defendant knows every detail about that right. See Honie, at *16 (citing United States v. Ruis, 536 U.S. 622, 629-30 (2002)). A waiver of a constitutional right may "satisf[y] the constitutional minimum" even if a defendant "lack[s] a full and complete appreciation of all of the consequences flowing from [a] waiver." Patterson v. Illinois, 487 U.S. 285, 294 (1988) (quotation omitted). Even if Honie's initial waiver of his jury sentencing right was knowing and intelligent, this does not render irrational his decision to seek to withdrawal based on an enhanced understanding of this right.

Moreover, Honie's briefing and the record offer credible reasons to believe he did not understand all aspects of his jury sentencing right at the time it was waived. Honie claims he did not know that he would have an opportunity to participate in selecting the jury, that the jury's role at sentencing would be to weigh aggravating and mitigating factors, or that the state would need to convince all twelve jurors beyond a reasonable doubt that the totality of the aggravating factors justified imposing the death penalty. These assertions are not contradicted by Honie's waiver or his in-court colloquy. If anything, confusion about the burden of proof was likely exacerbated by the trial judge's statement implying that it would be the defense's task to "convince" jurors that the death penalty was not warranted.[9] But Utah law places the burden on the prosecution to

[9] Specifically, the trial judge stated during Honie's colloquy:

> "[D]o you understand that to not receive the death penalty you would have to have—I don't know quite how to put this in layman's terms and still be

"persuad[e] the sentencer beyond a reasonable doubt" that the death penalty is justified. State v. Lafferty, 749 P.2d 1239, 1260 (Utah 1988). In short, it is hardly a stretch that, after speaking with a jailhouse lawyer, Honie gained a better understanding of the advantages of jury sentencing. I therefore conclude that Honie's decision to withdraw his waiver was rational. See Heard, 728 F.3d at 1184. Having surpassed this "objective floor," Honie's sworn affidavit establishes a reasonable probability that he would have sought withdrawal of the waiver but for counsel's unreasonable refusal to do so. Id.

Finally, had Honie's counsel petitioned the court for withdrawal of the waiver, the record indicates a reasonable probability that the trial court would have granted the request. As noted above, both the prosecutor and the judge had expressed a desire to defer to Honie's choice of sentencer, see supra at 20-21, and Honie's request would have been timely.

I would hold, therefore, that Honie has shown a reasonable likelihood that, but for his attorney's ineffectiveness, (1) the request to withdraw the waiver would have been filed, and (2) the court would have granted the request. As stated above, the Utah Supreme Court assumed as true Honie's claim that he asked counsel to withdraw his

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> accurate legally—but with a judge, there is just one person you would have to convince. There is reasonable doubt with 12 jurors, you got 12 chances to convince somebody there is a reasonable doubt there." (Emphasis added.)

By contrast, Honie's affidavit stated that a jailhouse lawyer informed him that he only needed one juror to "hold out" to avoid the death penalty. This is consistent with the notion that, after the waiver, Honie gained a better understanding of the benefits of jury sentencing—including that it would be the state's burden to convince all twelve jurors that the death penalty was justified.

waiver, and in utilizing what essentially amounts to harmless error review, the Utah Supreme Court implicitly assumed grant of the motion to withdraw the waiver. Because Honie was denied his Sixth Amendment right to effective assistance of counsel, he is entitled to habeas relief. In this case, the proper remedy is to remand for a new state capital sentencing proceeding by a jury. See United States v. Morrison, 449 U.S. 361, 364 (1981) (stating that Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation"); see also Ring, 536 U.S. at 609 (determining right to trial by jury guaranteed by the Sixth Amendment was violated and "remand[ing] for further proceedings").

IV

By ignoring Hill, Flores-Ortega, and Lafler, the Utah Supreme Court's decision defied governing Supreme Court caselaw and forced upon Honie an impossible, purely outcome-based prejudice standard incompatible with precedent and logic alike. Hill and its progeny clearly establish that when an attorney's deficient performance deprives a criminal defendant of a fundamental right that only the defendant personally can waive, the proper prejudice standard is whether, but for the attorney's errors, the defendant would have exercised that right. The right that Utah reserved to Honie in this case—to choose the forum which will decide whether he should be sentenced to death—was undoubtedly fundamental. Therefore, the Utah court's failure to apply the prejudice standard clarified by Hill and its progeny was "contrary to . . . clearly established Federal law," § 2254(d)(1), and AEDPA does not preclude our ability to grant relief.

On de novo review, I would hold that Honie has established a reasonable probability that, but for his attorney's deficient performance in failing to withdraw his waiver, he would have exercised his statutory right to have a jury decide his capital sentence. I would therefore reverse the district court, grant a writ of habeas corpus, and remand for a new sentencing proceeding in state court before a jury of his peers.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

TABERON DAVE HONIE, Petitioner, v. SCOTT CROWTHER, Warden, Utah State Prison, Respondent.	MEMORANDUM DECISION AND ORDER Case No. 2:07-CV-628 JAR Judge Julie A. Robinson

Petitioner Taberon Dave Honie is in the custody of the Utah Department of Corrections ("UDOC"), pursuant to a sentence of death for his 1999 conviction for the aggravated murder of Claudia Benn. He filed this Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and the Local Rules for the United States District Court for the District of Utah, challenging his conviction and death sentence as being in violation of his rights under the United States Constitution. Mr. Honie submits that the State of Utah has violated and arbitrarily refused to correct violations of his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby resulting in his unconstitutional conviction and sentence of death. This court, for the reasons set forth below, concludes that Honie has failed to make a substantial showing of a denial of a constitutional right with regards to the claims in his Amended Petition.

I. FACTUAL HISTORY

On July 9, 1998, Honie broke into Claudia Benn's home and brutally murdered her. Prior to the murder, Honie telephoned the victim's daughter, Carol Pikyavit, at 8:00 p.m., asking her to

come and see him. Carol refused because she needed to go to work, so Honie became upset and threatened to kill her mother and nieces. Honie telephoned twice more before Carol and her sister left to go to work at 10:30 p.m., leaving Carol's daughter and the sister's two children with Claudia. TR ROA 607:239-43, 258.[1]

Around 11:20 p.m., Rick Sweeney, a cab driver, picked up Honie. The driver could tell that Honie was "really drunk," but Honie was still able to give him directions to Claudia's neighborhood. TR ROA 607:267-69.

At approximately 12:20 a.m. several police officers responded to a 911 call from a neighbor and arrived at the victim's home. The officers noticed that the sliding glass door had been broken, allowing entry into the home. The officers ordered the occupants of the house to exit, and they discovered Honie leaving the home through the garage. TR ROA 607:288-92, 316-22.

An officer ordered Honie to put his hands up, and when he complied, the officer noticed that his arms—from fingertips to elbows—had blood on them. The officer asked him about the blood, and Honie replied, "I stabbed her. I killed her with a knife." TR ROA 607:293, 304, 321. The officer said he asked about the blood because he was concerned about Honie's safety. He thought Honie may have been cut on the glass from the broken door. He did not see a knife. And when Honie said, "I stabbed her. I killed her with a knife," the officer "didn't know who" the "her" was and did not know "what we had." TR ROA 607:319-22.

After arresting Honie, the officers inspected the victim's home. Inside, they discovered the victim's partially nude body lying face down on the living room floor. Officers observed a rock

[1] A copy of Honie's trial record, Utah Fifth Judicial District, Iron County case no. 981500662, is filed with the clerk's office in conjunction with ECF No. 89. The court will cite to the transcript of the proceedings as "TR ROA," the Bates-stamped numbers, and the page numbers (for example TR ROA 580:431). The Court will cite to any pleadings as PL ROA, the volume number, and the page number (for example PL ROA IV:517).

on the living room floor and saw a large blood-stained butcher knife by Claudia's body. TR ROA 607:294, 299, 314.

Assistant Medical Examiner Maureen Frikke, M.D., did the autopsy. She identified knife wounds that began under Claudia's left ear and went all the way across her neck to her right ear. She observed at least four start marks under the left ear that merged under the right "into this big, huge, deep cut." TR ROA 606:441. The wounds penetrated to the backbone, cutting everything between; skin, fat, muscle, and organs. Claudia's larynx had two, separate, horizontal cut marks. Her esophagus was severed. The carotid arteries and jugular veins were sliced. TR ROA 606:440-42.

Dr. Frikke concluded that the neck wounds were caused by something linear with a sharp edge and with enough strength and substance to cut through all the tissue, including the voice box bones, and with enough rigidity to make three cuts in the back bone behind the voice box and esophagus. TR ROA 608:442. Dr. Frikke also observed multiple blunt force injuries on Claudia's head and face, and a bite mark on her left forearm. TR ROA 608:445-49. Dr. Frikke also detailed numerous stabbing and cutting wounds to Claudia's lower body and genitals.

After his arrest, Honie was taken to the Iron County Jail where Officer Lynn Davis interviewed and photographed him. Officer Davis interrogated Honie three separate times on the morning following the murder. Honie expressed remorse for killing Claudia, stating repeatedly that she was not meant to die.

II. PROCEDURAL HISTORY

The State charged Honie with aggravated murder. TR ROA 597:59-60. Prior to trial, the State offered to stipulate to the inadmissibility at trial of three statements that Honie made while

he was in custody. TR ROA 598:7. Honie's counsel, Stephen McCaughey, stated that he intended to admit at least two of the statements to present a more accurate account of what happened the night of the murder and to show evidence of Honie's remorse. He moved to suppress the statements, however, and asked for a ruling on their admissibility to create a record that he was aware of the issue. TR ROA 598:6. The trial court held a hearing and denied the motion to suppress.

Also, in Mr. McCaughey's opening statement, he admitted, "I know in this case there is no question of Mr. Honie's guilt. You are going to find him guilty. The question in this case is going to be one of punishment." He admitted that Honie murdered Claudia during a burglary or an aggravated burglary. McCaughey stated that Honie contested some of the aggravators, that the State had the burden of proving those beyond a reasonable doubt, and that they would be relevant to Honie's penalty, which the judge would decide. TR ROA 607:233-34.

The jury convicted Honie of aggravated murder. PL ROA IV:517. Honie waived a sentencing jury. At the penalty phase, the State relied on the circumstances of the crime; Honie's criminal history, primarily a prior violent assault on Carol; evidence of how the murder had affected the granddaughters who were in Claudia's home that night; and evidence of how Claudia's loss affected her community. TR ROA 605; 606.

Honie presented evidence about his family and personal background. He presented evidence of counseling and attempts to curb his substance abuse, and of an attempted rape by John Boone, a trusted male figure in Honie's life who was later convicted of sexually abusing more than 140 boys. Honie also presented extensive evidence from Nancy Cohn, a credentialed psychologist with forensic training. Among other things, Dr. Cohn testified that Honie's average intelligence and the absence of brain damage meant he presented a low risk for future violence.

She also testified that Honie's violence coincided with intoxication, and that he would not have access to liquor in prison. *Id.*

The trial court sentenced him to death. PL ROA IV:543-52, 556-57. The Utah Supreme Court affirmed Honie's conviction and death sentence. *State v. Honie (Honie I),* 57 P.3d 977 (Utah 2002), *cert denied* 537 U.S. 863 (2002).

Honie sought state post-conviction relief. He filed an amended petition in 2003. PCR 19-92.[2] The state district court granted the State's summary judgment on most of the petition four years later. PCR 965-1070. After discovery on the remaining claims, the State again moved for summary judgment on the outstanding claims. PCR 1266-1362. In 2011, the state district court granted summary judgment in full and denied Honie post-conviction relief. PCR 3315-48. Honie appealed that ruling. PCR 3349-51; Docket case no. 20110620-SC.

While that appeal was pending, Honie filed a motion to set aside the judgment under Rule 60(b), Utah Rules of Civil Procedure. PCR 3320-3556. After full briefing, the district court denied the motion. ECF No. 70-2, ex. B. Honie appealed that ruling as well. Docket case no. 20120220-SC. The Utah Supreme Court consolidated both appeals, and on May 30, 2014, the court affirmed. *Honie v. State (Honie II),* 342 P.3d 182 (Utah 2014).

Honie filed his petition for federal habeas relief on May 18, 2015. ECF No. 47. He raised 14 claims for relief. *Id.* Concurrent with the petition, Honie filed a motion to expand the record with 32 exhibits not considered by the State court. ECF No. 48, ex. A-FF. Respondent opposed both the petition and the motion. ECF No. 70 and 72. Honie later filed a second motion to

[2] The court will cite to the record of Honie's state post-conviction proceedings, Utah Fifth Judicial District, Iron County case no. 030500157, as "PCR" and the Bates-stamped page numbers, for example PCR 431. A copy of this record is filed with the clerk's office in conjunction with ECF No. 89.

expand the record with seven additional exhibits, which Respondent opposed. ECF No. 75, ex. GG-LL; ECF No. 87.

After briefing on the petition and expansion motions concluded, this court denied without prejudice Honie's record-expansion motions. ECF No. 105. This court also ruled on the procedural status of the claims in Honie's petition, determining that only claims 1, 2, 3, 4, 5, 6, 7, and 12 were exhausted in State court. ECF No. 103 at 1-2.

Honie next moved for a stay and abeyance under the procedure approved in *Rhines v. Weber*, 544 U.S. 269 (2005), so that he could return to state court to exhaust claims 8, 9, and 11. ECF No. 107. This court denied the *Rhines* motion, concluding that claims 8, 9, and 11 were not potentially meritorious. ECF No. 120 at 1, 10-16. Honie then amended his petition, formally withdrawing claims 8, 9, 10, 11, 13, and 14 and adding additional factual allegations and argument to support his remaining claims. ECF No. 121.

III. LEGAL FRAMEWORK

A. Standard of Review

This court has determined that claims 1, 2, 3, 4, 5, 6, 7, and 12 were denied on the merits by the Utah Supreme Court and are thus exhausted. These claims are governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996. Under AEDPA, federal habeas relief on claims adjudicated on the merits may only be granted if the State court's decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Under the 'contrary to' clause, a federal

habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. The state court can therefore run afoul of either prong only if the Supreme Court has clearly answered the question at issue. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented . . . 'it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law."'" (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (alteration in the original))).

In order to prevail on any of his claims, Honie must show that no fairminded jurist would agree that the Utah courts correctly resolved the federal issue. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). Furthermore, the Supreme Court has noted that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 101. The standard is intentionally "difficult to meet" and "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* at 102.

IV. ANALYSIS

FIRST CLAIM FOR RELIEF

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT A REASONABLE INVESTIGATION INTO A VIABLE TRIAL DEFENSE OF VOLUNTARY INTOXICATION PRIOR TO CONCEDING HONIE'S GUILT TO AGGRAVATED MURDER

Honie asserts that trial counsel was ineffective for deciding to concede Honie's guilt early in the case, prior to investigating a viable defense of voluntary intoxication under Utah law, and for failing to consult with Honie about his decision to proceed to trial on a concession-of-guilt theory. Honie argues that he was prejudiced because he had a viable defense of voluntary intoxication under section 76-2-306 of the Utah Code that should have been presented at trial because it could have negated the existence of the mental state necessary to be convicted of aggravated murder.

A. Exhaustion

Honie raised this claim during his state post-conviction proceedings to the Fifth Judicial District Court and to the Utah Supreme Court. PCR ROA 64-66, 724-726, 733-743, 766-771; Opening Brief of Appellant, at 22-26, 45-50, Oct. 1, 2012. The Utah Supreme Court denied the claim on the merits. *Honie II*, 342 P.3d at 195-97. This court found that this claim was exhausted and properly before this court. ECF No. 103.

B. "Clearly established" rule of law

Once the court determines that the state court adjudicated the claim on its merits, the next step under § 2254(d) is to decide whether the decision was based upon "clearly established Federal law." If it was not, habeas relief is foreclosed. Without clearly established federal law, as determined by the United States Supreme Court, the habeas court need not even consider whether the state court decision was "contrary to" or "involved an unreasonable application of"

such law. Honie's first claim for relief was based on clearly established federal law. *See Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court squarely addressed what constitutes ineffective assistance of counsel. It was the law at the time the Utah Supreme Court adjudicated Honie's case on the merits.

Honie claimed in the state courts that his trial counsel overlooked a viable voluntary intoxication defense. To succeed on his claim under *Strickland*, Honie had to prove that counsel's representation was both deficient and prejudicial. *See id.* at 687. In order to prove that it was deficient, Honie had to overcome a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. He had to prove that specific acts or omissions fell below an objective standard of reasonableness. *Id.* at 687-88, 690. Furthermore, he had to meet that burden based on the practice standards in Utah at the time of his trial and on the facts and law available to his trial counsel. *Id.* at 689 (explaining that courts must evaluate counsel's conduct from counsel's perspective at the time). Finally, to prove prejudice, Honie had to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Utah Supreme Court concluded that Honie did not meet that burden on the voluntary intoxication defense. To get relief in this court, he must show that no fairminded jurist would agree. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011). The Supreme Court stated that "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (citations omitted). Further, "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* "Federal habeas courts must guard against the danger of equating unreasonableness under

Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* The court finds that the Utah Supreme Court decision was based upon clearly established Federal law.

C. "Contrary to" clearly established Supreme Court precedent

The next step under § 2254(d) is to determine whether the state court's adjudication of the claim was "contrary to" the clearly established Supreme Court precedent, which in Honie's case it clearly was not. The Supreme Court has held that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams v. Taylor*, 529 U.S. 362, 406 (2000). The state court decision on Honie's first claim was precisely that, "a state-court decision on a prisoner's ineffective-assistance claim [that] correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim." *See id.* Because the state court's ruling on this claim does not fit within the "contrary to" clause, the court will review it under the "unreasonable application" clause of § 2254(d)(1).

D. "Objectively unreasonable" application of Supreme Court precedent

This court may grant a writ of habeas corpus only if the state-court decision "involved an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). A decision may be incorrect or even clearly erroneous, without being unreasonable. If fairminded jurists could disagree on whether the state court's decision was correct, the decision is not unreasonable. *Harrington,* 562 U.S. at 102. The Court in *Harrington* stated:

> If this standard is difficult to meet, that is because it was meant to be. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists

> could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 102–03.

The Tenth Circuit said it this way: "[u]nder the test, if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied." *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014). The court notes that under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. Thus, for Honie to get relief, he must show that no fairminded jurist would agree that the state court's decision was correct.

The state court held that to prevail on a voluntary intoxication defense, Honie would have had to show that his state of intoxication deprived him of the capacity to form the mental state necessary for aggravated murder. *Honie II*, 342 P.3d at 195. Under Utah law, "[v]oluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense." Utah Code Ann. § 76-2-306(1). Thus, trial counsel would have had to produce "evidence showing that Mr. Honie was so intoxicated that he neither intended to kill nor knew he was killing a person at the time of the murder." *Honie II*, 342 P.3d at 196, s*ee* Utah Code Ann. § 76-5-202 (stating that aggravated murder is committed "if the actor intentionally or knowingly causes the death of another").

Honie argues that there was significant evidence of his level of intoxication at the time of the crime and during his custodial interrogation that was readily available to trial counsel. Given the amount of strong evidence that trial counsel had, Honie asserts that based on *Strickland*, trial counsel had an obligation to investigate voluntary intoxication as a possible defense at trial before deciding on a concession theory. *See Strickland*, 466 U.S. at 690-91.

The Utah Supreme Court held that Honie did not establish that trial counsel's performance was objectively unreasonable and affirmed the postconviction court's grant of summary judgment on this issue. *Honie II*, 342 P.3d at 195. The court discussed in detail all the evidence that would have alerted counsel that Honie had been drinking when he committed the murder. But the court then noted that evidence of intoxication is not enough:

> Although this evidence may serve to establish that Mr. Honie had been drinking at the time he committed the murder, Mr. Honie has not provided any evidence showing that his "intoxication at the time of the offense prevented him from understanding that his actions were causing the death of another." Evidence of intoxication, be it witness testimony or a numerical measure of the defendant's actual blood alcohol content, is not sufficient to establish a voluntary intoxication defense without actual evidence of the defendant's mental state. Thus, even though Mr. Honie had consumed both alcohol and marijuana prior to committing the murder, "there is no evidence [showing that] he was so intoxicated at the time of the crime that he was unable to form the specific intent necessary to prove the crime of [aggravated murder]."

Honie II, 342 P.3d at 196-97 (citation omitted).

The court noted that Honie had presented no evidence that he was so intoxicated that he was unable to form the requisite intent for aggravated murder. In fact, the evidence suggested the opposite. *Id* at 197. Before the police even knew that there was a stabbing victim, Honie told officers that, "I stabbed her. I killed her with a knife." *Id.* The court agreed with the postconviction court that "this statement 'clearly show[ed] that [Honie] understood he had engaged in lethal conduct upon a human being.'" *Id.* Although at first Honie claimed that he had

blacked out during the murder, he eventually admitted to the defense team expert that he wished he had blacked out so that he would not remember what he had done. *Id.* The state court found this to be evidence that he was not so intoxicated that he did not know he was killing a human. *Id.* Although the taxi driver, Mr. Sweeney, told police that Honie was intoxicated, he also testified that Honie was able to give him directions to the victim's neighborhood. *Id.* Honie also responded to and obeyed officers' commands at the scene. *Id.* Officer Davis testified that during his first interview with Honie he could tell that he had been drinking, but that "it was clear that he was fully aware of his situation. Moreover, the defendant's physical appearance and actions did not indicate that his mental state was out of the ordinary." *Id.* Finally, Honie threatened to kill the victim only hours before he killed her. *Id.* According to the state court, this threat showed that "Mr. Honie not only had the capacity to form an intent to murder the victim, but that he in fact acted on that intent." *Id.*

The court found that all this evidence demonstrated that Honie had the ability to form the necessary mens rea for trial counsel to reasonably conclude that a voluntary intoxication defense was unwarranted. *Id.* The court emphasized that Honie had not pointed to any evidence that he was so intoxicated that he was unable to form that intent. *Id.* Honie still has not proffered any evidence that he did not know that he was killing a person. Without that evidence, he cannot overcome the strong presumption that trial counsel properly ruled out a voluntary intoxication defense.

Under *Strickland's* deferential standard and its "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" (*Strickland*, at 689), Honie has not shown "beyond any possibility for fairminded disagreement" that trial counsel were deficient when they omitted a voluntary intoxication defense or that the omission

undermines confidence in the outcome. Honie has failed to establish that the Utah Supreme Court contradicted or unreasonably applied United States Supreme Court precedent in denying this claim. Therefore, the first claim for relief is denied.

SECOND CLAIM FOR RELIEF

TRIAL COUNSEL WAS INEFFECTIVE FOR INTRODUCING HONIE'S INCULPATORY STATEMENTS AT TRIAL DESPITE ACKNOWLEDGING THEY WERE INVOLUNTARILY GIVEN, AND DESPITE THE STATE'S WILLINGNESS TO STIPULATE TO THEIR INADMISSIBILITY

Honie asserts that trial counsel was ineffective for introducing at trial his custodial statements, without first investigating the facts and circumstances of the crime, arrest and custodial interrogation, and even though the state agreed to stipulate to their inadmissibility at trial. TR ROA 598:7. The state, on the other hand, argues that trial counsel believed the statements exhibited Honie's remorse and that counsel made a legitimate strategic decision to introduce them.

A. Exhaustion

Honie presented this claim during his post-conviction proceedings before the Fifth Judicial District Court and the Utah Supreme Court. PCR ROA 66-68, 724-733; Opening Brief of Appellant, 10/01/12, at 8-17, 50-56; Reply Brief of Appellant 05/16/13, at 11-20. The Utah Supreme Court denied this claim on the merits. *Honie,* 342 P.3d at 198-99. This court found that Claim Two was exhausted and properly before this court. ECF No. 103.

B. "Clearly established" rule of law

The Utah Supreme Court based its ruling on this claim on *Strickland,* noting that Honie had not demonstrated "that counsel's representation fell below an objective standard of reasonableness." *Honie II,* 342 P.3d at 195 (quoting *Strickland,* 466 U.S. at 687-88). The Utah

Supreme Court reiterated *Strickland's* command that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Honie II*, 342 P.3d at 195 (quoting *Strickland*, 466 U.S. at 687-88). As stated above, *Strickland* is clearly established law.

C. "Objectively unreasonable" application of Supreme Court precedent

Honie argues that the state court's denial of this claim constituted an "unreasonable application of clearly-established federal law." § 2254(d). He argues that before deciding to introduce his statements, trial counsel should have accepted the state's offer to stipulate to the inadmissibility of his custodial statements and should have investigated the facts and circumstances of the crime and his arrest (implying, without supporting evidence, that trial counsel did not do so). Honie asserts that trial counsel's performance was deficient and prejudicial because it was only through trial counsel's actions that jurors heard inflammatory and prejudicial details about the crime, through Honie's own statements, which would never have come into evidence at trial but for trial counsel's actions. The court finds Honie's arguments unpersuasive.

Trial counsel Mr. McCaughey made clear from the beginning that he intended to admit at trial two of the three custodial statements in order to (1) present a more accurate account of what happened the night of the murder and (2) provide evidence of Honie's remorse. McCaughey moved to suppress the statements, however, and asked for a ruling on their admissibility to create a record that he was aware of the issue. TR ROA 598:6. He informed the court, "So I am sort of doing this for the record, so the record's clear that we are aware, that is, there may be some *Miranda* violations in this case. And I want the record to reflect that we are pointing those out." *Id.* In response to trial counsel's position, the state prosecutor stated:

> This is a capital case . . . [and] the state will concede if counsel feels that in the best interest of his client, the accused, that these are statements that should be suppressed[,] [t]he state does not want to overreach or push or anything that may be on the edge of denying the defendant his fair day in court or violating his constitutional rights. So I will concede to strike, omit, not use and not refer to the three statements of Officer Davis in any of the proceedings if that's the request of the defendant.

Id. at 7. Trial counsel refused the prosecutor's offer to stipulate to the inadmissibility of the statements and reiterated that the only reason he was challenging the use of the statements at trial was because "I don't want two years down the road somebody coming back saying, hey, you should have moved to suppress those statements, because there was no *Miranda* given." *Id.* at 11.

The court held a hearing on the motion to suppress, denying it on the merits. *Id.* at 12. The court ruled that Detective Davis properly advised Honie of his *Miranda* rights before taking the first statement, and that Honie validly waived them. The court also found that under relevant legal considerations, Davis was not required to re-advise Honie before the second and third interviews. The court relied on Davis's unopposed testimony that Honie appeared to understand what was going on and concluded that his intoxication did not invalidate either his statements or the waiver of his rights. Honie argues that he was too intoxicated to voluntarily confess. But his intoxication would have made his statements involuntary only if Davis exploited Honie's intoxication to extract his statements. The trial court credited Davis's testimony that he did not do so. The court denied the motion to suppress, and counsel introduced the statements during trial.

The Utah Supreme Court reiterated that under *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 688. In addition, the court noted that, "strategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. The court cited *Ayala v. Hatch*, 530 Fed. Appx. 697 (10th Cir. 2013); *Gardiner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007); and *United States v. Fulks*, 683 F.3d 512 (4th Cir. 2012), and held that trial counsel's strategic choice to admit a defendant's inculpatory statements may be reasonable if it furthers the defendant's interests. *See Honie*, 342 P.3d at 198-199. In holding that trial counsel's decision was not objectively unreasonable, the court stated the following:

> Like the defense counsel in *Fulks*, Mr. Honie's trial counsel was dealt a similarly "unpalatable hand." As we have discussed, Mr. Honie's trial counsel was presented with a client who was clearly guilty of committing a heinous crime. Here, trial counsel adopted a mitigation strategy, attempting to highlight Mr. Honie's feelings of remorse through the admission of statements Mr. Honie made to police. In addition, unlike trial counsel in *Gardner*, Mr. Honie's trial counsel not only had a specific strategic purpose for admitting these statements, but counsel also used them to further his client's interest by attempting to present mitigating evidence for both the judge and jury to consider.

Honie II, 342 P.3d at 199. Honie has not shown that no fairminded jurist would agree that the Utah courts correctly resolved this issue. Nor has he overcome the double deference owed to trial counsel's decision to admit the statements.

Honie repeatedly asserts that trial counsel decided to concede guilt and introduce his client's inculpatory statements at trial without reviewing the discovery or conducting the necessary investigation required of reasonable counsel. However, he cites no record evidence in support of this assertion. He presents no evidence about what investigation trial counsel did or when, or why trial counsel made the strategic decisions that they did. Honie argues that trial counsel could have called witnesses to testify that he was extremely intoxicated. He does not show, however, that their testimony would have refuted the arresting officer's testimony that Honie appeared responsive at the scene and able to follow his directions, which, in his

experience, intoxicated persons usually cannot do. Nor has he shown that the testimony of these witnesses would have refuted Davis's testimony that Honie appeared aware of the situation, and that his mental state did not appear to be out of the ordinary. Thus, Honie cannot show that all fairminded jurists would have found the investigation deficient.

Honie also argues that he was prejudiced because his statements to Davis presented damaging evidence at the guilt phase. ECF No. 47 at 107-108. To prove prejudice, Honie would have to show that absent his statements, there would have been a reasonable probability that the jury would have had a reasonable doubt about his guilt. *See Strickland*, 466 U.S. at 695. And he would have to meet that burden in the context of "the totality of the evidence before the . . . jury." *Id.* Honie has not met that burden. Overwhelming evidence of Honie's guilt independent of any admissions to Davis ensured his conviction for aggravated murder. *See* ECF No. 70 at 69-70. Even without Honie's admissions, it was undisputed and indisputable that, at a minimum, Honie killed Claudia (1) after breaking into her home, and (2) while committing object rape. Excluding his statements to Davis could not have made a better guilt-phase result reasonably probable.[3]

Honie also argues that there was no purpose for the jury in the merits phase to hear Honie's admissions to Davis, which were "highly prejudicial evidence," when that jury would not be deciding the penalty. ECF No. 121 at 116. He argues that the jurors at the merit phase were only determining guilt or innocence, not considering mitigation, and therefore, they could not consider evidence of remorse. Honie argues that because the jurors could not consider

[3] Honie argues again that counsel should have challenged his statement at the scene that he stabbed her and killed her with a knife. However, that argument is not exhausted, because he never made it to the state courts—he never claimed that counsel should have challenged that statement. Also, trial counsel could have reasonably concluded that the trial court would find that the officer was not interrogating Honie when he asked where he got the blood. The officer testified at trial that he asked about the blood because he was concerned about Honie's safety.

evidence of remorse at this stage of the trial, the statements only provided proof that he committed the murder and furthered the State's allegations of aggravating circumstances.

Once again, Honie has not overcome the double deference owed to trial counsel's decision to admit the custodial statements. Counsel used the three statements, along with Honie's later full admission to the defense mental health expert to support a mitigation theme—Honie's progression to full disclosure showed his remorse for the murder. Because the evidence of Honie's guilt was overwhelming, trial counsel legitimately chose to focus on penalty mitigation. *See Florida v. Nixon*, 543 U.S. 175, 190-91 (2004) ("[T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. . . In such cases, 'avoiding execution [may be] the best and only realistic result possible.'").

Honie attempts to distinguish *Nixon* by arguing that the Court did not address whether such a decision could be strategic when the jury that hears the mitigation evidence does not decide the sentence during the penalty phase. The court finds this distinction irrelevant in this case. The evidence of Honie's guilt was overwhelming for several reasons. He admitted at the scene that he killed Claudia; he was the only surviving adult at the murder scene; his arms were covered in blood; and Claudia's young grandchildren were the only other persons present. The evidence of Honie's guilt is strengthened by the fact that he has never even suggested that someone else committed the murder. Finally, because the sentencer for whom the evidence of remorse would be relevant—the judge—was also present for Davis's guilt-phase testimony, counsel had no reason to wait to begin developing the mitigation case until the penalty phase. Thus, trial counsel was justified in conceding Honie's guilt and admitting the statements in order to develop the mitigation remorse theme.

Honie has not met his burden of showing that all fairminded jurists would have decided this case contrary to the way the Utah Supreme Court did. The state court's denial of this claim did not constitute an unreasonable application of clearly-established federal law. Therefore, the second claim for relief is denied.

THIRD CLAIM FOR RELIEF

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE HONIE OF HIS RIGHT TO HAVE A JURY DETERMINE HIS PENALTY, RESULTING IN A JURY WAIVER THAT WAS NOT KNOWINGLY AND VOLUNTARILY GIVEN

In Utah, capital defendants have a statutory right to jury sentencing, which a defendant may waive with approval of the court and consent of the prosecution. Utah Code Ann. § 76-3-207(1)(b). At a pre-trial scheduling conference held approximately two weeks before trial, counsel informed the court that he anticipated waiving the jury in the penalty phase to "eliminate the need to death qualify this jury" and so that the evidence would only have to be put on once, thereby simplifying the process. TR ROA 602:3-4. Trial counsel described it as "short circuit[ing] things quite a bit, especially the death qualification of the jury." *Id.* at 4. After discussing the relatively new statute with the trial court, trial counsel explained that the court's decision to accept the waiver was determined by whether the waiver is knowingly and intentionally made. *Id.* Trial counsel informed the court that he had discussed the waiver with Honie who agreed to it and that the State had provided the necessary statutory consent. *Id.* at 4-5. The prosecutor then asked for assurances that the court would consider imposing the death penalty. The judge noted that imposing the death penalty was "the last thing a judge would want to do," but said that he would impose the death penalty if, after listening to the aggravating and mitigating factors, he felt it was appropriate and the facts and circumstances of the case

warranted it. *Id.* at 7-8. When asked by the trial judge whether the number of witnesses would be the same with either a judge or a jury determining sentence, trial counsel noted that he would call fewer witnesses during the penalty phase if the judge, rather than a jury, were to consider sentencing. *Id.* at 9. The judge responded, "That's not a factor in my decision."

The prosecutor noted that time was not an issue with him either. He said that in a case of this magnitude, he wanted to give the defendant the benefit of the doubt on every request. He said, "If the defendant wants it, and the state can, within the bounds of ethical and moral and legal restraints do it, then I want to do it. If this defendant wants to waive a jury, I want to give him that opportunity and err on the said [sic] of caution to the defendant. . . . I don't want to make him face a jury in the penalty phase if he doesn't want to." *Id.* at 9-10. In response, trial counsel said, "[t]he other thing, the time factor with us, that doesn't really enter into it. . . . the decision was made for other reasons than that." *Id.* at 10. Trial counsel then requested more time to review the waiver with Honie before the colloquy with the judge. *Id.* at 10–11.

Honie signed a written "Waiver of Jury in Penalty Phase." *Id.* at 11; TR424. The waiver form stated that pursuant to § 76-3-207, Honie "knowingly and intelligently waives his right to have a jury determine the sentence, in the above-entitled case, in the event the Defendant is found guilty of Aggravated Murder in the guilt phase of the proceedings." TR424. The waiver further stated that Honie had discussed the waiver with trial counsel; had "been advised of the full scope of options and ramifications" of waiving a sentencing jury and allowing the judge to determine the penalty; had specifically waived "the right to have a jury of twelve persons determine the penalty"; understood that "it would only take one (1) juror to dissent or vote against imposing the death penalty, and that ten (10) jurors are sufficient to impose a sentence of life without the possibility of parole." *Id.*

In court, trial counsel reviewed the jury waiver form that Honie had signed. TR603:11. Honie affirmed that he had read the waiver, executed it, talked to his counsel about it, told his counsel that he had no questions about it, and understood its consequences. Trial counsel asked Honie if he had read and understood the waiver, and whether he understood that he was giving up his right to have a jury of twelve people decide the penalty phase of his case if he was convicted. Honie was also asked whether trial counsel had explained to him the ramifications of the twelve- person jury: if one person dissents, the death penalty will not be imposed; if ten people can agree, then life in prison without parole will be imposed; and if fewer than ten people agree, life imprisonment with the possibility of parole will be imposed. *Id.* at 11–12. Honie answered affirmatively and confirmed that he was voluntarily waiving his right to have a jury decide the penalty. *Id.* at 12. Honie confirmed that no one coerced or forced him to waive his right; that he was not under the effects of alcohol or drugs; that he had no questions for counsel or the trial court; that there was no doubt in his mind this was what he wanted to do; and that his decision was based on counsel's advice but was his decision alone. *Id.* at 13.

The trial court then followed up with this exchange with Honie:

> THE COURT: And then, do you understand that to not receive the death penalty you would have to have—I don't know quite how to put this in layman's terms and still be accurate legally—but with a judge, there is just one person you would have to convince. There is a reasonable doubt with 12 jurors, you got 12 chances to convince somebody that there is a reasonable doubt there. So do you understand that you are reducing your field there for 12 down to one?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I don't want to insult your intelligence, but do you understand that?
>
> THE DEFENDANT: Yes, I do.

> THE COURT: And you still want to go ahead with the waiver of the jury for the penalty phase?
>
> THE DEFENDANT: Yes, sir.

Id. at 14.

In state post-conviction review, Honie submitted an affidavit in which he attested (1) he did not understand the term "mitigation," "what aggravators and mitigators were," or what the process would be; (2) trial counsel and the defense investigator told him it would be a good thing to waive the jury because "the judge was young and likely to go for a life without parole sentence"; (3) counsel told him "it would have to be [his] decision to waive the jury"; (4) no one told him the jury's role at sentencing "and what was necessary for a death sentence"; (5) after waiving the jury, a "jailhouse lawyer" told him that he had made a mistake, and that he only needed one holdout juror to get a life sentence; and (6) about one week after getting the "jailhouse lawyer's input," he asked trial counsel to withdraw the waiver, but trial counsel told him it was too late. PRC811–12. Honie concluded, "[i]f I had understood the differences between a judge determination and a jury determination, I would have gone with the jury in the penalty phase and not waived the jury." *Id.* 811–12.[4]

Honie argues that trial counsel was ineffective for failing to properly and adequately advise Honie of his right to have a jury determine his sentence, and for failing to move to withdraw his jury waiver upon the request of Honie prior to trial. Honie argues he was prejudiced by trial counsel's actions, because but for trial counsel's deficient performance, he would have withdrawn his jury waiver and had his sentence decided by a jury of twelve peers, rather than one judge.

[4]Mr. Honie later said that the court's misstatement led him to believe that he could more easily convince the judge than twelve jurors. This statement was not included in Honie's post-conviction affidavit.

A. Exhaustion

Honie presented this claim during his post-conviction proceedings to the Fifth Judicial District Court and the Utah Supreme Court. PCR ROA at 68, 752-766; Opening Brief of Appellant, 10/01/12 at 17-22, 67-75. The Utah Supreme Court denied the claim on the merits. *Honie,* 342 P.3d at 200-02. This court found that this claim was exhausted and is now properly before the court. ECF No. 103.

B. "Clearly established" rule of law

The Utah Supreme Court based its decision on *Strickland*, holding that "trial counsel's advice to waive a jury at sentencing was not objectively unreasonable under the first prong of *Strickland,"* and that even if it did constitute deficient performance, "Mr. Honie was not prejudiced under the second prong of *Strickland." Honie II*, 342 P.3d at 200. As described above, *Strickland* is clearly established Federal law.

Honie also relies on *Adams v. United States ex rel. McCann,* 317 U.S. 269, 272-73 (1942), for the proposition that a defendant may waive the right to a jury trial when "there is an intelligent, competent, self-protecting waiver" and an "exercise of a free and intelligent choice." *McCann* is a Supreme Court decision that was the law at the time of the state-court adjudication on the merits and that squarely addresses the issue of what is required for a defendant to waive his right to a jury trial. It is clearly established Federal law.

C. "Objectively unreasonable" application of Supreme Court precedent

As discussed in Claim One, above, this court may grant a writ of habeas corpus *only* if the state-court decision involved an "unreasonable application" of "clearly established Federal law." § 2254(d)(1). A decision which is incorrect or even clearly erroneous, may not necessarily be unreasonable. *Lockyer v. Andrade,* 538 U.S. 63, 71 (2003). A state court's decision is not an

unreasonable one if *fairminded jurists* could disagree about whether it was decided correctly. *Harrington*, 562 U.S. at 101. The Supreme Court has stated that the standard is intentionally difficult to meet, preserving the authority to issue the writ only in cases where every fairminded jurist would agree that the state court decision was incorrect. *Id.* at 102. The fairminded jurist standard is extremely deferential, requiring Honie to show that the Utah court's decision amounted to an "extreme malfunction[ ] in the state criminal justice system" that is "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id* at 102-03. The Tenth Circuit described the standard as follows: "Under the test, if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, some fairminded jurists could *possibly* agree with the state court decision, then it was not unreasonable and the writ should be denied." *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014).

The State of Utah provides a right to jury sentencing in its capital murder sentencing statute, Utah Code Ann. § 76-3-207(1)(c) and (5), and thus any waiver of this right must comport with the demands of Fourteenth Amendment Due Process and Equal Protection. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985). In the recent *Hurst* case, the United States Supreme Court held that a capital defendant has a constitutional right to be sentenced by a jury. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2015). And because this case deals with capital sentencing procedure, the Eighth Amendment requirement for reliability in capital cases is also implicated. The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), noted that "[t]here is no question that death as a punishment is unique in its severity and irrevocability." Thus, "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Id.* The Supreme Court has also found that other constitutional rights are implicated

during the sentencing phase of a capital trial given its trial-like nature, providing capital defendants with greater protections during capital sentencing than in ordinary sentencing proceedings. *See Strickland*, 466 U.S. at 686-87 (finding that because a capital sentencing proceeding is more like a trial than an ordinary sentencing proceeding, the Sixth Amendment right to the effective assistance of counsel exists during capital sentencing proceedings).

In Honie's case, the state court held that trial counsel's advice to waive a jury at sentencing was not objectively unreasonable under the first prong of *Strickland*, that Honie's waiver was knowing and voluntary, and even if trial counsel's failure to move to withdraw Honie's waiver was deficient performance, Honie was not prejudiced under the second prong of *Strickland*.

1. *Strickland* Performance Prong

The state court began its analysis with a strong presumption that trial counsel acted competently. Under *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. When assessing whether a petitioner has demonstrated that his attorney's representation was constitutionally deficient, the court looks to "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. In order to overcome that presumption, Honie must show that trial counsel's "representation fell below an objective standard of reasonableness" under "prevailing professional norms." *Id.* at 688.

a. Advice to Waive Jury Sentencing

First, the state court reasoned why trial counsel's advice to waive the sentencing jury was objectively reasonable. The state court acknowledged that "[i]f counsel had a reasonable basis for advising a client to waive a jury at sentencing, we will not second guess that strategic

decision." *Honie II*, 342 P.3d at 200 (citing *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)). The state court relied on *Taylor v. Warden*, 905 P.2d 277, 284 (Utah 1995), where the Utah Supreme Court held that counsel may reasonably presume that a trial judge "will apply the law justly and make an impartial decision in both the guilt and penalty phases of a capital trial,"and "will disregard any personal beliefs and discharge his or her duty to apply the law," *Honie II*, 342 P.3d at 200 (citing *Taylor v. Warden*, 905 P.2d 277, 284 (Utah 1995)). The state court continued, noting that "[i]ndeed, absent any specific allegations of personal bias, we cannot conceive of any situation in which choosing a judge over a jury would not constitute a legitimate tactical decision." *Id.* Citing *Taylor*, the state court held that given "the overwhelming evidence of Mr. Honie's guilt and the gruesome nature of the crime," and the judge's statement that imposing a death sentence was "the last thing a judge would want to do," it "was not unreasonable for trial counsel to conclude . . . that Mr. Honie would fare better with a judge rather than with a jury." *Honie II*, 342 P.3d at 201. The state court further noted that at the scheduling conference in which Honie waived his right to a jury, the trial judge "acknowledged that, although he was not philosophically opposed to the death penalty, he would only impose it if the facts and circumstances of the case warranted it." *Id.*

A defense counsel's decision to advise a defendant to waive his right to jury and proceed with a non-jury trial is a "classic example of strategic trial judgment" for which *Strickland* requires highly deferential judicial scrutiny. *See Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001)). Counsel's advice to his client to waive a trial by jury "constitutes a conscious, tactical choice between two viable alternatives." *Id.* For counsel's advice to rise to the level of constitutional ineffectiveness, the decision to waive a jury must have been "completely

unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." *Id.* The state court concluded that in this case, given the gruesome nature of the murder Honie committed, as well as the trial judge's statements on the record, trial counsel could have reasonably believed that it was better strategy for Honie's sentence to be tried by the judge rather than a jury.

Honie argues that this is an unreasonable fact determination because while it is true that such a motive would not be unreasonable, there is nothing in the record to indicate that this was counsel's *actual* reason for advising Honie to waive a jury at sentencing. "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington*, 562 U.S. at 110. Honie proffers no evidence that counsel's advice was objectively unreasonable. Honie points to trial counsel's comments to the state court that waiving the sentencing jury would streamline the trial. After both the court and the prosecutor clearly expressed that saving time and shortening the trial were not a concern to them, trial counsel told the trial court that the time required to death-qualify the jury did not enter into the defense decision to waive the jury, and that "the decision was made for other reasons than that." TR ROA 602:10. Honie argues that trial counsel never indicated what those "other reasons" might be and his statement at this time contradicted statements that he made before and afterward, which indicate his reasons for the advice to waive a jury was that he wanted to shorten the time it would take to try the case. But these comments referred to the *effect* of waiving the jury, not the reason for the waiver; trial counsel's comments were made in the context of a scheduling hearing, where the judge wanted to discuss timing and security issues involving the capital trial and jury selection. TR 602:4–6.

If trial counsel advised Honie to waive the jury for reasons that were not objectively reasonable, Honie has not proffered what those reasons were. Without more, trial counsel's comments do not show that counsel's advice bore "no relationship to a possible defense strategy." *Hatch*, 58 F.3d at 1459. Rather, without any evidence to the contrary, Honie has not demonstrated that the state court decision contradicted or unreasonably applied clearly established federal law. The state court's analysis recognized and correctly applied *Strickland's* performance prong.

b. Knowing and Voluntary Waiver

Second, the state court rejected Honie's argument that his waiver was not knowing and voluntary. Honie argues that the jury waiver form that was executed and the colloquy that occurred were inadequate to ensure that his waiver of jury sentencing was made knowingly, intelligently, and voluntarily, in contravention of the Eighth and Fourteenth Amendments of the United States Constitution. Specifically, Honie argued to the state court that he was not informed that (1) he had the right to an impartial sentencing jury; (2) the jury would have to weigh aggravating and mitigating factors; and (3) he was never properly instructed on what aggravating and mitigating factors actually are. *Honie II*, 342 P.3d at 201. The state court reasoned that Honie's claim that he was not notified regarding his right to an impartial jury and the use of aggravating and mitigating factors "is not relevant to his choice between a judge and a jury in terms of sentencing" because either one "guaranteed the right to an impartial sentencer who would weigh the aggravating and mitigating factors." *Id.* The state court held the relevant consideration in Honie's decision to waive jury sentencing "was the difference between a single judge and a twelve-person jury," which was described to Honie during the scheduling hearing where the trial court specifically asked whether "Honie understood that he was reducing his

chances of convincing a person to vote against the death penalty from '12 [sic] down to one." *Id.* Thus, the state court held, "the relevant distinction between sentencing by a jury or a judge was explained to Mr. Honie and he affirmed to the court that he understood the distinction and wanted to proceed with the judge at sentencing." *Id.*

The Supreme Court has emphasized the importance of a criminal defendant's Sixth Amendment right to a trial by jury and that this right may only be ceded by a knowing, voluntary, and intelligent waiver. *United States ex rel. McCann*, 317 U.S. 269, 272–73 (1942). The importance of this fundamental right is reflected in Federal Rules of Criminal Procedure 23, which mandates that all waivers of jury trials be in writing, signed by both parties, and approved by the court on the record. Utah Rules of Criminal Procedure 17 mandates felony cases be tried by a jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution. At issue in this case, Utah Code Ann. § 76-3-207(1)(c)(i) provides a right to a jury sentencing in capital felony cases, which the defendant may waive with the approval of the court and consent of the prosecution. "Under prevailing professional norms, competent defense counsel is expected to ensure a criminal defendant receives the benefit of those well-established [jury waiver] procedures." *Vickers v. Superintendent Graterford Sci*, 858 F.3d 841, 851 (3d Cir. 2017).

This same standard for waiver of a jury at trial applies to capital sentencing proceedings, given that capital sentencing proceedings are more like a trial than an ordinary sentencing proceeding. *See Strickland*, 466 U.S. at 686 (Holding that while an ordinary sentencing "may involve informal proceedings and standardless discretion in the sentencer," a capital sentencing proceeding "is sufficiently like a trial in its adversarial format and in the existence of standards for decision, [internal citations omitted], that counsel's role in the proceeding is comparable to

counsel's role at trial.") (citations omitted). Thus, because Honie had a state statutory right to be sentenced by a jury in his capital murder case, it was incumbent upon trial counsel to ensure that Honie was fully informed about his options and the consequences of waiving a jury.

Under the Utah capital sentencing scheme, consideration of guilt-phase aggravators is permissible during the penalty phase. Utah Code Ann. § 76-5-202(1). Once a defendant has been found guilty of a capital felony, the case then goes to a sentencing phase where the aggravating circumstances found in the guilt phase may be considered. Utah Code Ann. § 76-3-207(1), (3) (1995). The United States Supreme Court and the Utah Supreme Court have held that the consideration of aggravating circumstances in both the guilt phase and the penalty phase of a trial does not *de facto* shift the burden of proof to the defendant or render the sentencing scheme unconstitutional. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *Parsons v. Barnes*, 871 P.2d 516, 528 (Utah 1994). Instead, "a defendant is simply given an opportunity to present additional, less obvious mitigation evidence if he so chooses. The burden of proof is never shifted to the defendant." *State v. Lafferty*, 20 P.3d 342, 376 (Utah 2001). Before the death penalty may be imposed, a jury (or judge) must determine beyond a reasonable doubt that (1) the aggravating factors in their totality outweigh the mitigating factors in their totality, and (2) the imposition of the death penalty is justified and appropriate under the circumstances. *Id.* at 376–77. "Then, having weighed *all* the circumstances, the jury may choose to impose the death penalty. Such a punishment is never mandated or imposed automatically, regardless of whether evidence is offered in mitigation. The burden never shifts to the defendant." *Id.* at 377.

The Court concludes the facts of this case show that Honie's jury waiver was knowing and voluntary, and thus the state-court decision was not contrary to or an unreasonable application of clearly established Federal law. § 2254(d)(1). Honie argues that his federal

constitutional rights were violated when trial counsel failed to inform him (1) that he had a statutory right to an impartial jury that would have to find that the totality of the aggravating factors outweighed the mitigating factors beyond a reasonable doubt for the death penalty to be considered; and (2) that the state carried the burden of proving that the death penalty was appropriate. These arguments are without merit.

First, as the state court explained, Honie's claim that he was not notified regarding his right to an impartial jury and the use of aggravating and mitigating factors is not relevant to his choice between a judge and jury in terms of sentencing, because regardless of whether he was sentenced by a judge or jury, he was guaranteed the right to an impartial sentencer who would weigh the aggravating and mitigating factors. *Honie II*, 342 P.3d at 201. Honie's argument that the state court failed to explain how Honie would know he was entitled to an unbiased jury presupposes that a judge is not unbiased or is somehow held to a different standard of proof in deciding what penalty to impose.

Second, the state court decision did not unconstitutionally shift the burden to Honie to "convince" someone to vote against the death penalty. Honie affirmed both in writing and in court that he understood the dissenting vote of only one of twelve jurors would foreclose a death sentence. As the trial court explained, with twelve jurors, there were "12 chances to convince somebody that there is reasonable doubt," but with a judge he had "reduc[ed] his field" of chances down from "12 to one." TR 602:14. The state court found the trial court explained to Honie the relevant distinction between sentencing by a jury or a judge. *Honie* II, 342 P.3d at 201. While inartfully phrased, the trial court's question to Honie whether he understood that he was reducing his chances of convincing a person to vote against the death penalty from twelve down

to one did not shift the burden of proof to Honie or otherwise invalidate his waiver. Honie understood that with a single judge, a split decision was not possible.[5]

In *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-78 (1942), the Supreme Court held that a defendant may waive the right to a jury trial when "there is an intelligent, competent, self-protecting waiver" and an "exercise of a free and intelligent choice." The Supreme Court has explained that a waiver is "knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general circumstances—even though the defendant may not know the specific detailed consequences of invoking it." *United States v. Ruis*, 536 U.S. 622, 629–30 (2002). Even if a criminal defendant "lack[s] a full and complete appreciation of all the consequences flowing from his [Sixth Amendment] waiver, it does not defeat the State's showing that the information provided to him satisfied the constitutional minimum." *Patterson v. Illinois*, 487 U.S. 285, 294 (1988) (citation omitted).

Honie cites no Supreme Court precedent that a defendant must be specifically apprised of his right to an impartial jury or of the burden of proof in order to knowingly and intelligently waive his right to a jury for sentencing. None of the cases Honie cites describes a particular colloquy necessary to validate a defendant's waiver of a right to a sentencing jury. On the contrary, the Tenth Circuit has explained that when insuring such waivers are knowing, voluntary, and intelligent, courts should inform defendants that a jury is composed of twelve

[5]Honie did not raise the burden of proof issue with the state court. Although Honie now argues before this Court that the trial judge's statement led him to believe it would be easier to convince the judge than the jury, Honie did not attest that he believed that. Instead, he argued only the impartiality issue before the state court and attested that "if I had understood the differences between a judge determination and a jury determination, I would have gone with the jury in the penalty phase and not waived the jury."

members of the community, defendant may take part in jury selection, jury verdicts must be unanimous, and a waiver means the court alone decides guilt or innocence. *United States v. Robertson*, 45 F.3d 1423, 1432 (10th Cir. 1995). Utah courts look to the totality of the circumstances to determine whether a defendant validly waived his right to a jury trial; while a court should advise a defendant of the implications of his waiver, it is "under no obligation to provide an exhaustive explanation of all the consequences of a jury waiver." *State v. Hassan*, 108 P.3d 695, 699 (Utah 2004). Therefore, Honie has not demonstrated that the state court decision is contrary to or involves an unreasonable application of clearly established federal law.

2. *Strickland* Prejudice Prong

Honie argues that his constitutional rights were also violated when trial counsel failed to withdraw the jury waiver once Honie genuinely understood—after talking to "a jailhouse lawyer"—that "all [he] needed was one juror to hold out and [he] would get life without parole" and he told trial counsel that he wanted to withdraw the waiver. The state court accepted Honie's assertion that he attempted to withdraw his jury waiver, and that his counsel refused to act on his request, telling him it was too late even though the trial was still a week away. *Honie II*, 342 P.3d at 201. The state court did not, however, decide whether this amounted to ineffective assistance of counsel because it found that Honie was not prejudiced because he did not establish "that the outcome of his sentencing would have been different had he opted for jury sentencing." *Id.* Honie argued in state court that he was prejudiced because, but for trial counsel's error, he would not have waived his right to a jury determination of sentence. PCR 811-812. Honie argues that the state court applied an incorrect prejudice standard in the context of a waiver of a constitutional right to a sentencing jury. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

When assessing *Strickland* prejudice, the court asks "whether the petitioner has shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with "a reasonable probability" meaning "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Applying *Strickland*, the state court held that in the context of Honie's claim regarding failure to file a motion to withdraw his jury waiver, Honie failed to satisfy the prejudice prong because he "offered no evidence tending to establish that the outcome of his sentencing would have been different had he opted for jury sentencing." *Honie II*, 342 P.3d at 201.

Honie argues the state court misapplied the term "proceeding" to mean that he needed to establish that he would have received a more favorable sentence had he been sentenced by a jury instead of a judge, when instead, the correct inquiry under *Hill v. Lockhart* is whether the result of the waiver proceeding, not the sentencing, would have been different. In *Hill*, the Supreme Court addressed an ineffective assistance of counsel claim based on counsel's failure to inform a petitioner of the consequences of his guilty plea. Similar to Honie, the petitioner alleged that this lack of information about the right he was relinquishing made his entire guilty plea "involuntary" and "unintelligent." 474 U.S. at 56. The Court concluded that the appropriate focus was on the process that led to the petitioner forfeiting a constitutional right, and thus the "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id. a*t 59. The Court focused on the outcome of the guilty plea proceeding, rather than requiring the defendant to demonstrate that but for counsel's error, he would not have pleaded guilty and would have achieved a better result at trial. *Id.*

Honie argues that the guilty plea context is an appropriate analog to the context of his case because he had a statutory right to jury sentencing under Utah's capital murder sentencing statute, Utah Code Ann. § 76-3-207(1)(c) and (5), and thus any waiver of this right must comport with the demands of Fourteenth Amendment Due Process and Equal Protection. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Honie argues the relevant proceeding when considering an ineffectiveness of counsel claim in the context of a jury sentencing waiver is the sentencing waiver proceeding and not the trial itself; thus, the proper showing of prejudice need only demonstrate that but for counsel's deficient performance, he would have withdrawn his jury waiver and had his sentence decided by a jury of twelve peers, rather than one judge.

Honie has not demonstrated that the state court contradicted or unreasonably applied clearly established Supreme Court precedent. *Hill* was decided in the context of counsel's advice to plead guilty and addressed the appropriate way to frame *Strickland* prejudice when counsel's ineffective assistance caused a defendant to agree to conviction and forego a judicial proceeding altogether. However, a guilty plea and a waiver of jury trial are not a set of facts that are "materially indistinguishable." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). *Hill* does not squarely address Honie's situation, where, despite counsel's assumed pre-trial ineffective assistance, Honie did not agree to a sentence of death and forego a judicial proceeding altogether but waived his right to be sentenced by a jury and instead had the judge determine his sentence.

Honie cites no cases extending the *Hill* prejudice analysis to jury waivers. Circuit courts have applied the usual *Strickland* prejudice analysis in the context of jury waivers. *See Correll v. Thompson*, 63 F.3d 1279, 1292 (4th Cir. 1995) (denying relief on petitioner's claim that counsel improperly advised him to waive a jury trial because "the evidence against Correll was overwhelming, and we have no doubt that had the case been presented to a jury the same result

would have obtained."); *Green v. Lynaugh*, 868 F.2d 176, 178 (5th Cir. 1989) (holding petitioner failed to establish prejudice from counsel's advice to waive the jury when nothing in the record established that, but for counsel's errors, "a *different* factfinder (i.e. a jury) would have been reasonably likely to arrive at a different outcome.") (emphasis in original); *Brown v. Pitcher*, 19 F. App'x 154, 157–58 (6th Cir. 2001) ("[E]ven if it is assumed that counsel should have advised [petitioner] to withdraw waiver of jury trial, [petitioner] has failed to demonstrate prejudice to his defense, i.e., that the result of a jury trial would have been different.").

Notably, the Third Circuit recently revised its prejudice test in the context of jury waiver. In *United States v. Lilly*, 536 F.3d 190 (3d Cir. 2008), the court rejected the application of the *Hill* prejudice standard to jury waiver. Applying *Strickland*, the court held that whether or not a petitioner was prejudiced by ineffective counsel when deciding to waive the right to a jury trial is determined by looking at whether "in the absence of counsel's advice, another fact finder (i.e. a jury) would have been reasonably likely to arrive at a different outcome." *Id.* at 196. In *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841 (3d Cir. 2017), the court modified *Lilly's* prejudice test for ineffective assistance claims in jury waivers to whether defendant established a reasonable probability that but for his counsel's failure to ensure a proper waiver of his Sixth Amendment right to be tried before a jury, he would have exercised that right. *Id.* at 857. The court reasoned that after the Supreme Court's decision in *Lafler v. Cooper*, 566 U.S. 156 (2012), the process-based test of *Hill* is not limited to situations in which counsel's ineffectiveness prevented a judicial proceeding from occurring at all, but also applies when the defendant ultimately received a fair adjudication, so long as counsel's ineffectiveness affects not the propriety of the proceeding itself, but "the fairness and regularity of the processes that preceded it." *Vickers*, 858 F.3d at 857 (quoting *Lafler*, 566 U.S. at 169). *Lafler* also addressed a guilty

plea, albeit an allegation that counsel's deficient performance caused defendant to reject a plea and go to trial. In *Vickers*, the Third Circuit held the *Hill* standard applies to any ineffective assistance claim based on a pre-trial process that causes a defendant to forfeit a constitutional right; the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would have opted to exercise that right. *Id.*

Of course, *Vickers* is not a holding of the Supreme Court that was the law at the time of the state-court adjudication. There is no clearly established federal law extending the *Hill* prejudice standard to jury trial waivers. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). Thus, the state court did not unreasonably apply clearly established federal law when it applied the usual ineffective assistance prejudice standard in accord with *Strickland*—whether the outcome of Honie's sentencing would have been different had he opted for jury sentencing. *Strickland*, 466 U.S. at 694. Honie clearly has not met his burden under that standard.

Even assuming that Honie articulates the correct prejudice standard, he cannot meet his burden. Honie asserts that he need only demonstrate that if not for counsel's deficient performance, he would have withdrawn his jury waiver and proceeded with a jury during the penalty phase of his trial. Under *Hill*, however, "[a] mere allegation that [a defendant] would have insisted on a trial . . . is ultimately insufficient to entitle him to relief." *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001). Instead, in determining whether trial counsel's ineffectiveness was prejudicial, the court asks "whether going to trial would have been objectively 'rational under the circumstances.'" *Heard v. Addison*, 728 F.3d 1170, 1183 (10th Cir. 2013) (quoting *Padilla v. Kentucky*, 599 U.S. 356, 372 (2010)). To determine rationality, the court should assess "objective facts specific to a petitioner." *Id.* The Tenth Circuit "remain[s]

suspicious of bald, post hoc and unsupported statements that a defendant would have changed his plea absent counsel's errors." *Id.* at 1184.

Honie's showing of prejudice falls short. Honie attested that he would not have waived a sentencing jury if he had understood the difference between judge and jury sentencing. Honie presents no argument in support of how he was actually prejudiced as a result of trial counsel's failure to move to withdraw his waiver; without more, Honie effectively asks the Court to presume prejudice because trial counsel failed to move to withdraw. But as previously discussed, the state court found that he did understand the difference. Moreover, the circumstances of Honie's crime weighed heavily in favor of imposing a death sentence. As the state court recognized, "a defendant will often fare better with a trained jurist than a lay jury, especially when the crime is particularly heinous." *Honie II*, 342 P.3d at 201 (citing *Taylor v. Warden*, 905 P.2d 277, 284 (Utah 1995)). Honie does not allege the judge harbored any personal bias in this case.

Finally, as previously discussed, a defendant has a constitutional right to a jury trial that is waivable as long as the waiver is knowing and intelligent. *Patton v. United States*, 281 U.S. 276, 312 (1930), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78, 90 (1970). The Supreme Court has not addressed the issue of whether an accused who has knowingly waived a jury trial must be permitted to withdraw the waiver. Courts that have addressed the issue have held that withdrawal of a jury waiver is ordinarily within the discretion of the trial court and thus the constitutionally guaranteed proceeding at issue is a defendant's right to jury trial, not the right to withdraw the waiver. *See, e.g., Sinistaj v. Burt*, 66 F.3d 804, 808 (6th Cir. 1995) (finding no authority for the proposition that "when a state court abuses its discretion in denying a defendant's motion to withdraw a previously filed waiver of jury trial, the result is a violation of

the United States Constitution."); *Crosby v. Schwartz*, 678 F.3d 784, 790–91 (9th Cir. 2012) ("We reject [petitioner's] argument that the state court's conclusion as to the withdrawal of jury waiver was contrary to or an unreasonable application of Supreme Court precedent."). Similarly, Honie does not cite any Supreme Court case that deals squarely with the issue in the context of withdrawal of his waiver of right to jury sentencing. Honie's waiver was knowing and voluntary, and he has not addressed much less demonstrated whether the state court would have exercised its discretion to grant any such motion to withdraw. Accordingly, Honie has failed to demonstrate that he was prejudiced by counsel's ineffectiveness under the standard articulated in *Hill*. Honie has failed to establish that the Utah Supreme Court contradicted or unreasonably applied United States Supreme Court precedent in denying this claim. The court therefore denies the third claim for relief.

FOURTH CLAIM FOR RELIEF

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE EVIDENCE OF AGGRAVATED SEXUAL ABUSE OF A CHILD, WHICH THE STATE INTENDED TO INTRODUCE AS AN AGGRAVATING CIRCUMSTANCE IN SUPPORT OF THE DEATH PENALTY, AND FOR INTRODUCING THIS EVIDENCE DURING THE PENALTY PHASE DESPITE THE FACT THAT THE JURY DID NOT FIND IT AS AN AGGRAVATING CIRCUMSTANCE DURING THE MERITS PHASE.

Honie argues that trial counsel was ineffective for allegedly failing to investigate evidence that Honie sexually abused a minor at the scene of the crime, and for introducing, at sentencing, Honie's confession to the defense expert, Dr. Cohn, regarding the sexual abuse. During the merits phase of the trial, the jurors did not find aggravated sexual abuse of a child as an aggravating circumstance. During the penalty phase, however, the defense expert, Dr. Cohn, testified that Honie had tearfully admitted to her that he digitally penetrated D.R. while he hid from police. Trial counsel argued that the admission was evidence of Honie's remorse. Honie

asserts that trial counsel was ineffective for introducing the confession without first investigating claims that D.R.'s father, and not Honie, had molested her.

In a Child Abuse Neglect Report that was part of the Cedar City Police Department homicide file, it was reported that Tom Vaughn, the on-call worker for the Department of Child and Family Services, reported to the scene at the request of the Cedar City Police Department to take custody of the three children who were present. PCR 3518; Cedar City Police Department Records. According to the report:

> In route to the Family Support Center, Dakota told this worker her daddy (name unknown at the time of intake) does this to her: "my daddy does this to me," she then demonstrated with her hand the finger[.] We were discussing the circus then [D.R.] out of the blue mentioned her daddy does the finger to her.

PCR 3518; Cedar City Police Department Records at 140. Honie argues that trial counsel should have investigated this evidence that could have exculpated him as to the charge of aggravated sexual abuse of a child.

A. Exhaustion

Honie presented this claim during his post-conviction proceedings before the Fifth Judicial District Court. PCR 65, 743-747; Opening Brief of Appellant, 10/01/12, at 25-26, 56-67. The Utah Supreme Court denied this claim on the merits. *Honie II,* 342 P.3d at 199-200. This Court found this claim was exhausted and properly before this Court. ECF No. 103.

B. "Objectively unreasonable" application of Supreme Court precedent

The Utah Supreme Court concluded that Honie failed to demonstrate unreasonable performance under *Strickland* concerning trial counsel's decision to admit Honie's confession to Dr. Cohn. The court held that "trial counsel's decision to admit potentially damaging statements during trial in an attempt to demonstrate a defendant's remorse is a legitimate trial strategy." *Honie II,* 342 P.3d at 199. The court noted that it would be especially unlikely to "question a

valid strategic choice . . . when the challenged statements are double-edged, containing both inculpatory and exculpatory elements." *Id.* Trial counsel's decision to admit Honie's confession to Dr. Cohn was just such a legitimate trial strategy. Dr. Cohn testified that Honie expressed remorse as he "began crying when he admitted to her that he had molested D.R." *Id.* at 200. The court held that "trial counsel's actions were not objectively unreasonable." *Id.* While the court said that it did not need to reach the prejudice element, it observed that the sentencing court "was prepared to find that Honie molested D.R., even without Mr. Honie's confession," and thus, Honie "cannot demonstrate that, but for trial counsel's decision to introduce his inculpatory statements, the court would not have found that Mr. Honie molested D.R." *Id.* at 200, n. 11.

Honie fails to establish that no "fairminded jurists" would agree that the Utah courts incorrectly resolved this issue. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). He has not even argued that there would be a reasonable probability of a more favorable sentencing outcome without the sexual abuse aggravating circumstance. He has not refuted the Utah court's conclusion that the sentencing court "was prepared to find" independent of his admission that he molested D.R. And he has not shown that no fairminded jurist would agree that trial counsel made an objectively reasonable decision to present and rely on his admission as evidence of remorse.

At the guilt phase, the state presented evidence in support of the sexual-abuse aggravating circumstance. When Carol and Benita left for work, D.R. was wearing underwear and a t-shirt. Carol testified that she had never seen D.R. without her underwear. D.R. did not complain to Benita about her private parts, despite their relationship where D.R. would tell Benita if something were wrong. TR ROA 607:238, 244-45, 257-58. After the murder, D.R. was no longer wearing her underwear. At the family shelter, a worker gave D.R. new underpants. When the

worker removed them later, she observed fresh blood drops on the crotch. D.R talked about it the next morning but did not identify who injured her. TR ROA 607:382-83.

D.R. was taken to Primary Children's Medical Center and examined by a pediatric emergency physician. He found abrasions on the area around D.R.'s hymen, which he described as evidence of mild trauma, but sufficient to cause bleeding. He concluded that the abrasions were consistent with "rubbing," most commonly with a finger or penis. While he agreed that that kind of injury could take twenty-four to seventy-two hours to heal, he testified that D.R.'s injury was consistent with one inflicted less than twenty-four hours before the examination because the abrasions were still oozing. TR ROA 607:390, 392-94, 396-99.

In its written decision, the trial court found that Honie sexually abused D.R. The court noted that Benita left D.R. "clothed and healthy" at 10:30 p.m., and that D.R. was found "in her injured condition" shortly after midnight. The court recognized that the only other persons in the home were Claudia; two cousins, ages twenty-two months and three years; and Honie "who, just a few hours earlier, had threatened to kill this very child and who murdered and sexually assaulted" Claudia. The court, even without reference to Honie's admission to Cohn, concluded that it was "not plausible to believe anyone other than [Honie] injured the child." In a single sentence at the end of its analysis that D.R.'s injury could not have been accidental, the trial court noted that Honie admitted to Cohn that he fondled D.R. TR ROA 549-548. Although Honie has claimed that trial counsel was ineffective for eliciting Dr. Cohn's testimony that he admitted sexually abusing D.R., he has not claimed that he in fact did not sexually abuse her.

To get relief here, Honie must overcome the double deference standard under §2254(d). To do so, he must show that (1) all fairminded jurists would agree that (2) he had overcome the strong presumption of constitutionally compliant representation. *Harrington*, 562 U.S. at 105.

The defense theme of remorse as evidence of Honie's capacity to change was objectively reasonable. The defense team presented the admission in a way that supported that theme. Dr. Cohn testified that Honie started to cry and stated, "[t]hat happened to me and I can't believe I did that. I don't know why I did that. I can't believe I did that." TR 605:192-193.

Honie claims ineffective assistance of counsel because trial counsel failed to present evidence of D.R.'s statement to the caseworker that her father may have sexually abused her. He says that there is no evidence that counsel investigated the statement. Honie says that counsel should have asked him whether he actually abused D.R. or actually admitted the abuse to Dr. Cohn. He points to his 2011 proffer that he did not abuse D.R. and that Dr. Cohn pressured him into admitting to the sexual abuse. ECF No. 47 at 126-37.

None of these overcome the double deference owed to trial counsel's choices. Honie supports his argument with a misstatement about D.R.'s accusation. He states that counsel was ineffective for failing to investigate "when he knew that D.R. had made a statement to social services staff that her father was the one who molested her." ECF No. 121 at 146. This is not what D.R. said. The report shows only that D.R. said that at some unspecified time her father did something to her with his middle finger. As stated above, the examining physician believed the injury he observed had been inflicted less than 24 hours earlier. There is no evidence in the record to show that D.R.'s father had access to her in that period. The indisputable evidence shows that Honie did.

Honie's argument that his counsel should have questioned him about whether he actually molested Dakota also fails to overcome the double deference standard. Counsel knew that Honie admitted to the defense expert that he sexually abused D.R. Honie says that counsel should have asked him whether that was true, but he does not explain why he did not tell counsel that it was

not true. In fact, Honie waited 11 years to challenge Dr. Cohn's sworn testimony about his tearful admission. Under *Strickland*, the reasonableness of counsel's investigation "depends critically" on the information that the client provides. 466 U.S. at 691. Honie has failed to establish that the Utah Supreme Court contradicted or unreasonably applied United States Supreme Court precedent in denying this claim. Therefore, the fourth claim for relief is denied.

FIFTH CLAIM FOR RELIEF

TRIAL COUNSEL FAILED TO CONDUCT A REASONABLE MITIGATION INVESTIGATION

Honie asserts that trial counsel failed to conduct an adequate mitigation investigation by (1) relinquishing this duty to people who were not qualified to perform and who did not perform a reasonable mitigation investigation, and (2) by failing to follow up on red flags revealed during the investigation that warranted further exploration.

A. Exhaustion

Honie presented this claim during his post-conviction proceedings before the Fifth Judicial District Court and the Utah Supreme Court. PCR ROA 65-68, 766-784; Opening Brief of Appellant, 10/01/12, at 76-91; Reply Brief of Appellant, 05/16/13, at 26-33. The Utah Supreme Court denied this claim on the merits. *Honie II*, 342 P.3d at 192-95. This court found this claim was exhausted and properly before the court. ECF No. 103.

B. Clearly Established Law

The Utah Supreme Court based its ruling on this claim on *Strickland*, noting that Honie had not demonstrated "that counsel's representation fell below an objective standard of reasonableness." *Honie II*, 342 P.3d at 195 (quoting *Strickland*, 466 U.S. at 687-88). The court also reiterated that "a court must indulge a strong presumption that counsel's conduct falls within

the wide range of reasonable professional assistance." *Honie II*, 342 P.3d at 195 (quoting *Strickland*, 466 U.S. at 689). *Strickland* is clearly established law.

C. Procedural History

The trial court sentenced Honie to death in a detailed ruling. PL ROA IV:552-543. The court found as aggravating circumstances (1) that Honie murdered Claudia while engaged in object rape, aggravated sexual assault based on the attempted forcible sodomy, and aggravated burglary; (2) Honie's criminal history, principally a previous attack on Claudia's daughter, Carol; (3) that Honie committed the murder while children were present; and (4) that Honie committed aggravated sexual abuse of one of the children. PL ROA IV:551-546.

The court agreed that while Honie's criminal history was not significant in number, it was significant in nature. The court noted that the evidence indicated that Honie "suffered from both alcohol abuse and depression." PL ROA IV:545. The court recognized that Honie was "somewhat intoxicated," noting that it used the qualifier "somewhat" because there was no breath test and because of conflicting witness testimony. The court stated, however, that Honie was sufficiently sober to give the taxi driver directions, converse with police, and determine a way to get into Claudia's house. Importantly, Honie also eventually admitted that he remembered the crime details. The court thus concluded that his intoxication did not prevent him from appreciating that what he did was wrong or from conforming his conduct to the law. PL ROA IV:545-544.

The court noted that although Honie was relatively young, none of the prior attempts at counseling "had a discernible [e]ffect on" him. PL ROA IV:544. The court found as additional mitigation that Honie was kind as a child, that he carried water and chopped wood for older

people, and that his family loved him. The court also found Honie's remorse as a mitigating factor. PL ROA IV:544.

The trial court discredited the allegation that John Boone attempted to rape Honie. The court reasoned that (1) Boone kept a meticulous chart of his predatory crimes, but did not include Honie among his victims; (2) Honie was the only person not on the chart who claimed Boone had molested him; (3) only Honie alleged that Boone's first and only attack was an attempted anal intercourse—his other victims described Boone working his way up to sodomy; and (4) Honie never mentioned the sodomy in his weekly counseling sessions. PL ROA IV:544-543.

The trial court found "beyond a reasonable doubt" that "the totality of aggravating circumstances outweigh the totality of mitigating circumstances," not in terms of their relative numbers, "but in terms of the respective substantiality and persuasiveness." TR ROA 606:86 The court then found "beyond a reasonable doubt" that a death sentence was "justified and appropriate under the circumstances." *Id.*

During state post-conviction proceedings, Honie challenged trial counsel's mitigation investigation as being constitutionally inadequate. In support of this claim, he introduced the affidavit of a post-conviction mitigation investigator, Bruce Whitman, who identified several areas of the mitigation case that he felt were inadequate given Honie's background, life history and experiences. *See* ECF No. 121 at 156-159. The State moved to dismiss Honie's Amended Petition and moved for summary judgment on most of his claims, including his mitigation claims. PCR ROA 212-217. The state district court denied the State's motion as to Honie's claims involving ineffective assistance of counsel for failing to conduct an adequate mitigation investigation. Because neither party submitted an affidavit from trial counsel, indicating the scope of his investigation, the district court concluded that there was "little in the record" to

contradict Whitman's assessment of trial counsel's investigation. The court held that "Whitman's affidavit raise[d] a genuine issue with respect to whether trial counsel's less-than-complete investigation was reasonable and, therefore, whether he failed to comply with prevailing norms of professional practice in conducting his mitigation workup." PCR ROA 1037-1038.

The court then granted the State leave to do discovery. During discovery, the State asked Honie to identify the witnesses he intended to call to provide evidence in support of his outstanding claims and to detail the testimony each would give. *See* ECF No. 70 at 106-110 for the list of witnesses and their testimony. The State proffered an affidavit from Honie's lead trial counsel, describing his qualifications, and the qualifications of and investigation done by Dr. Cohn and Ted Cilwick. Based on that affidavit and Mr. Honie's discovery responses, the State moved for summary judgement on the outstanding penalty-phase ineffective-assistance claims. Honie responded that he could not oppose the motion without additional funds. After extensive litigation over funding, the state district court denied Honie's request for more funds. The court reasoned that Honie could not show that additional funds were likely to develop evidence that would support post-conviction relief. This was so, according to the court, because trial counsel's uncontroverted affidavit showed that he reasonably relied on the advice of his mitigation expert. Therefore, Honie could not, as a matter of law, prove deficient performance. Mr. Honie responded to the summary judgment motion, and in June 2011 the district court granted summary judgment and denied all relief. Honie timely appealed.

While the post-conviction appeal was pending, Honie moved to set aside the post-conviction judgment, arguing that the district court's funding decisions denied him the effective assistance of post-conviction counsel. With the motion he proffered some of the additional evidence he argued he could have proffered with the summary judgment opposition if the district

court had given him the money he requested. The district court denied 60(b) relief, concluding, among other things, that Honie had not shown that the funding decisions prevented counsel from developing the evidence because he had developed and proffered most of it with the 60(b) motion even without additional state funds. The court also reasoned that the proffer was still not enough to create a fact issue on either element of Honie's penalty-phase ineffective-assistance claims. ECF No. 70-2, Exhibit 2.

The Utah Supreme Court affirmed, holding that Honie had not proved deficient performance. The court reasoned that trial counsel had hired a credentialed psychologist with forensic training as a mental health and mitigation consultant and relied on her advice. She did a thorough examination that included psychological testing and a review of Honie's background. The court also found that trial counsel properly relied on Honie and his family to provide information about his personal life and mental state. *Honie II*, 342 P.3d at 192-95.

Honie has not shown that no fairminded jurists would agree. He only suggests additional background witnesses trial counsel could have called and proffers a different mental health diagnosis—frontal lobe dysfunction that limits his ability to control his conduct and contributes to aggression. Honie bases his argument primarily on an evidentiary proffer he did not make to the state courts.

The Utah courts rejected Honie's challenge to trial counsel's penalty-phase investigation on the merits. Therefore, this court must restrict its review of that decision to the record before the Utah courts. *See Cullen v. Pinholster*, 563 U.S. 170, 180-87 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."). Thus, under *Cullen*, this court cannot consider Honie's proffer of new evidence. Furthermore, Honie has not explained how, on the

record before the Utah courts, no fairminded jurist could agree that he failed to prove penalty-phase ineffective assistance. Thus, the court must deny the claim.

Honie seems to argue that the *Cullen* restriction does not apply because the state courts denied him further funding to investigate the post-conviction case. ECF No. 47:145-50. However, *Cullen* does not limit the record restriction to claims developed with funding. Rather, by its plain language, *Cullen*'s record restriction applies so long as the state court adjudicated the claim on its merits. Furthermore, even if state funding limits could avoid *Cullen*'s restriction, Honie has not shown that the restrictions he actually faced justify disregarding *Cullen.* The Utah courts only denied funding to develop evidence to prove *Strickland* prejudice because Honie had not proven *Strickland* deficient performance.

Before 2008, funding for litigation costs in Utah death-penalty post-conviction cases had an absolute cap of $20,000 set by administrative rule. Utah Code Ann. § 78-35a-202(2)(c) (West 2004); Utah Admin. Code r. 25-14-4, -5 (2007). Honie received the full $20,000. In 2008, the Utah legislature amended the funding statute to provide funds for reasonable litigation costs. The revision set a presumptive $20,000 limit but gave courts authority to exceed that amount on a showing of "good cause." Utah Code Ann. § 78B-9-202(c). To determine "good cause" courts must consider two factors: (1) the extent to which a petitioner requests funds to duplicate work done in the criminal case; and (2) the extent to which the funds will allow a petitioner to develop evidence and legal arguments to support post-conviction relief. §78B-9-202(3)(a), (e).

After those amendments, Honie requested funds beyond $20,000 to develop penalty phase evidence in addition to and different from the evidence trial counsel presented. The state district court denied his funding requests after the State submitted trial counsel's affidavit. The court reasoned that considering the affidavit, Honie could not prove deficient performance. And

if he could not prove one element of ineffective assistance, there was no reason to provide him funds to develop evidence in support of the other.

The Utah post-conviction courts determined that trial counsel's mitigation case was not deficient as a matter of law. *Honie II*, 342 P.3d at 203. Therefore "an award of funds would have been inappropriate." *Id.* at 204 n. 13. Honie argues that he could not rebut trial counsel's affidavit "[w]ithout funding to develop his colorable [ineffective assistance] claims." ECF No. 47 at 147. But in the three years between the time Utah allowed additional funds and when Honie responded to the State's second summary judgment motion, he never asked for funds to rebut the affidavit. In all that time, he never asked for funds to develop any evidence about what his defense team actually did and why. He only asked for funds to develop an alternative mitigation case, not to develop evidence that no objectively reasonable attorney would have developed the case his trial team did. Even now, he has proffered no evidence from lead trial counsel about the decisions he made and why.

Honie has not overcome the double deference owed to trial counsel's penalty-phase representation. Trial counsel hired an experienced investigator and a psychologist with forensic training, both of whom he had worked with previously. With their assistance, counsel developed and presented a case that covered Honie's personal history, his family history, his substance abuse problems, and his mental health issues, both generally and specifically related to the crime. They also presented evidence of his and his family's good qualities.

Dr. Cohn also proffered evidence that Honie would not likely be violent in prison. She relied on her conclusion that he did not have brain damage and that he was of average intelligence, and then she said that in prison Honie could not get the only thing that made him violent—alcohol. She testified that she could reliably predict that he would age out of his

aggression. The Utah Supreme Court concluded that this was objectively reasonable, and Honie has not shown that no reasonable jurist would agree.

Honie argues that because trial counsel admitted in his affidavit that he turned the mitigation investigation over to Dr. Cohn and also relied on the investigation by Mr. Cilwick for mitigation leads, his affidavit was insufficient to determine whether the mitigation investigation was adequate or reasonable. Honie asserts that the State was also required to present affidavits from Dr. Cohn and Mr. Cilwick before the state court could determine whether the investigation was reasonable. But Honie does not explain why he waited so long to present those affidavits.

After the state district court granted judgment against him on his penalty-phase ineffective-assistance claim, Honie moved to set the judgment aside. He supported it with a proffer of some alternative penalty-phase evidence developed by his federal habeas counsel and an affidavit from his trial investigator, Cilwick. But Honie never explained why he could proffer that evidence only after the state district court entered judgment against him or why even then he could proffer only part.

Honie moved to appoint federal habeas counsel three and a half years before he opposed the second summary judgment motion in the state case. ECF No. 1. Honie represented that the "immediate appointment of counsel" was "necessary to begin the investigation into Honie's case." *Id.* 4. The court granted the motion the same day. ECF No. 3. It was three and a half years after the "immediate appointment" of federal habeas counsel to investigate his case, and only after the state court entered judgment against him, that he presented anything from that investigation to oppose the State's motion.

The court finds that Honie has not shown that, on the record before the state courts, no reasonable jurist could agree with their disposition. And his arguments about funding are legally

and factually insufficient to justify disregarding *Cullen*'s mandate restricting this court's review to the record before the state courts. For the above reasons, the court hereby denies claim five.

SIXTH CLAIM FOR RELIEF

THE TRIAL COURT'S FINDINGS OF FACT AND DETERMINATIONS OF LAW REGARDING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DID NOT COMPLY WITH DUE PROCESS OR THE NEED FOR AN INDIVIDUALIZED SENTENCING PROCEDURE WHICH GIVES FULL EFFECT TO ALL OF THE EVIDENCE PRESENTED AT TRIAL

Honie claims that the trial court failed to provide a proper, individualized sentence, and that the Utah Supreme Court failed to correctly review the case according to the constitutional standard identified by the United States Supreme Court. Honie argues that instead the Utah Supreme Court simply reiterated the trial court's findings.

A. Exhaustion

This claim was raised as Argument III in Honie's direct appeal brief. Opening Brief of Appellant, 04/11/00, at 91-138. The Utah Supreme Court considered Honie's challenges to the trial court's sentence, both collectively and individually. It rejected some and held that others were harmless regardless of whether they were correct. *Honie I, 57 P.3d at 991-95.*

B. "Clearly Established" Rule of Law

The state court relied on *Tuilaepa v. California,* where the Supreme Court held that as a matter of federal constitutional law, aggravating factors must meet two requirements: "First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague."*Honie I*, 57 P.3d at 992 (quoting *Tuilaepa v. California,* 512 U.S. 967, 972 (1994)). The Utah court then stated that it would first determine whether the trial court had

weighed any improper factors, and if it had, then they would evaluate whether the error was harmless, non-prejudicial error. *Honie I*, 57 P.3d at 992

The state court also relied on *Zant v. Stephens*, for the proposition that "a death sentence supported by multiple aggravating circumstances need not always be set aside if one aggravating factor is invalid." *Honie I*, 57 P.3d at 994 (quoting *Zant v. Stephens*, 462 U.S. 862, 890 (1983)). The state court noted that in applying *Zant*, it would "afford a measure of discretion to the conclusion reached by the trial judge who weighs evidence received regarding aggravating and mitigating factors presented during the penalty phase." *Honie I*, 57 P.3d at 994.

***C.* "Objectively unreasonable" application of Supreme Court precedent**

Honie argues that the Utah Supreme Court took the stance that if there was one aggravating factor that was properly found, it would not review the other aggravating or mitigating factors for error in application but would defer to the lower court's determination of the sentence. He also argued that the state court conducted no individualized review of the non-statutory aggravating and mitigating factors, but simply reiterated the trial court's findings. This is not what the state court did. The court stated that if one of multiple aggravating factors were constitutionally or statutorily improper to consider, the error would not undermine their confidence in the trial court's sentence. *See Honie I*, quoting *Zant*, 462 U.S. at 890 for the proposition that a death sentence supported by multiple aggravating circumstances need not always be set aside if one aggravating factor is invalid.).

The Utah Supreme Court considered Honie's challenges to the trial court's sentence, both collectively and individually. It rejected some and held that others were harmless regardless of whether they were correct. The trial court did what was required for an individualized determination—it allowed and considered Honie's mitigation evidence. *See Tuilaepa v.*

California, 12 U.S. 967, 972 (1994) (holding that the right is satisfied if the sentencer "can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime"). The state court's decision was not an unreasonable application of *Tuilaepa* such that no reasonable jurist could agree with it.

Honie was particularly concerned about the language used in the trial court's exclusion of the prosecutor's closing statement that Claudia was not a "drunken Indian in the park," but rather an asset to the Paiute community. ECF No. 121 at 226-27. After clarifying that it was excluding the statement from its sentencing calculus, the court said, "The murder of any victim under the circumstances of this case, no matter what the victims [sic] status, would have been just as painful, traumatic, and reprehensible, and would require the same punishment." TR ROA 546. Honie says that this statement shows that the court was not treating *him* as a "uniquely individual human being." ECF No. 121 at 227. However, it is clear from the statement itself that the court was saying that the *victim*'s social status, not Honie's, was irrelevant to it sentencing calculus.

Honie has not shown that the Utah Supreme Court violated clear United States Supreme Court precedent when rejecting his individualized sentencing claim. The trial court allowed Honie to present his mitigation evidence, and the court considered the evidence. That was all that was required for an individualized determination. *See Tuilaepa,* 12 U.S. at 972. The state court's decision on this claim was not an unreasonable application of *Tuilaepa* such that no reasonable jurist could agree with it. Therefore, the Court denies the sixth claim.

SEVENTH CLAIM FOR RELIEF

HONIE'S DEATH SENTENCE WAS THE PRODUCT OF PROSECUTORIAL RACIAL DISCRIMINATION

Honie asserts that his death sentence violates the Equal Protection clause of the Fourteenth Amendment because the prosecution's pursuit of capital punishment was motivated by racial animus. He argues that racially disparaging comments made by the prosecutor in closing argument provide sufficient evidence to show that the decision to pursue the death penalty in this case was motivated, at least in part, by racial discrimination.

At trial, during closing arguments, the prosecutor stated that Honie "did not murder a drunken Indian in the park. . . . He did not murder a woman who, ah, had spent her live [sic] drinking alcohol and puking and walking the streets and shoplifting at Wall-Mart [sic]. He murdered someone that these people look up to." TR ROA 606 at 54. Honie argues that the clear intent of this statement was to draw a relative comparison between him—described with racist comments—and the victim. Honie asserts that the prosecutor drew a comparison between a person whom he believed deserved to live, and one whom he believed deserved to die, partially for reasons not related to the offense.

A. Exhaustion

This claim was raised on direct appeal (Opening Brief of Appellant, 04/11/00, at 79-81) and the Utah Supreme Court denied it on the merits. *Honie I*, 57 P.3d at 986. This court found that this claim was exhausted and properly before this court. ECF No. 103.

B. "Clearly established" rule of law

The Utah Supreme Court based its ruling on this claim on *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), stating that Honie "offered no indication that he was treated any differently than another person of a different race or ethnicity in similar circumstances." *Honie I*, 57 P.3d at 986. The clearly established rule of *Yick Wo* and its progeny states that facially fair and impartial laws "may be unconstitutional as applied if administered in such a way so as to cause unjust and

illegal discriminations between persons in similar circumstances." *Id*. (citing *Yick Wo*, 118 U.S. at 374; *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Wayte v. United States*, 470 U.S. 598,608-10 (1985); *Oyler v. Boles*, 368 U.S. 448, 455-56 (1962). The parties agree that on this claim the Utah Supreme Court correctly identified the applicable clearly established federal law. ECF No. 123 at 86; *see also* ECF No. 122 at 184-87.

C. "Objectively unreasonable" application of Supreme Court precedent

While the parties agree that the Utah Supreme Court correctly identified applicable federal law, Honie argues that the application of that law was unreasonable. He argues that evidence of racially negative commentary during closing argument alone is sufficient to show that the prosecution's pursuit of the death penalty was motivated by racial animus. He additionally identifies the court's observation that the "racially-related comments… were clearly offensive and distasteful" as evidence of the unreasonableness of its decision to uphold the capital ruling. *Honie I*, 57 P.3d at 986. He asserts that in light of such a statement, any reasonable court would find that the prosecutorial pursuit of the death penalty was racially motivated in violation of *Yick Wo* and the Fourteenth Amendment. These arguments do not persuade this Court.

In each Supreme Court case cited by Honie, the party asserting unfair application of a facially impartial law presented some form of evidence of individuals in similar circumstances who were treated differently to show that the law was being applied discriminatorily. *McCleskey v. Kemp*, 481 U.S. at 286-87; *Wayte*, U.S. at 604; *Oyler v. Boles*, 368 U.S. at 454-55; *Yick Wo*, 118 U.S. at 374. However, in the instant case, Honie has offered no evidence to suggest that other individuals in similar situations have been, or are being, treated differently. The Utah Supreme Court noted this when it stated that the "defendant has offered no indication that he was

treated any differently than another person of a different race or ethnicity in similar circumstances." *Honie I*, 57 P.3d at 986. Additionally, Honie has provided no authority to suggest that this claim may be upheld without such evidence. In fact, the Supreme Court has previously held the opposite. *United States v. Armstrong*, 517 U.S. 456, 457 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."). Based on the evidence presented, the Utah Supreme Court was reasonable in determining that Honie had not met his burden to show that the prosecution's actions were motivated by race. Honie's seventh claim for relief is denied.

TWELTH CLAIM FOR RELIEF

THE UTAH AGGRAVATED MURDER STATUTE FAILS TO NARROW THE CLASS OF ELIGIBILITY FOR THE DEATH PENALTY, RESULTING IN SENTENCES THAT ARE ARBITRARY AND ARE IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION

Honie asserts that the Utah aggravated murder statute, U.C.A. §76-2-202, is unconstitutional under due process and equal protection because it fails to genuinely narrow the class of persons eligible for the death penalty from the class of persons guilty of criminal homicide generally.

A. **Exhaustion**

Honie raised this claim at trial (TR ROA 304-08) and on direct appeal (ECF 103 at 4) ("Mr. Honie incorporated his pre-trial motion and memorandum by reference in his direct appeal brief, thus exhausting it."). The Utah Supreme Court denied the claim on the merits. *Honie I*, 57 P.3d 986. This court found that this claim was exhausted and properly before this court. ECF No. 103.

B. "Clearly established" rule of law

The state court's ruling on this claim relied on the United States Supreme Court's ruling in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), as it was applied in *State v. Young*, 853 P.2d 327, 352 (Utah 1993). *Lowenfield*, and its predecessors, required that capital sentencing schemes must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield*, 484 U.S. at 244 (citing *Zant*, 462 U.S. at 877. Particularly in *Lowenfield*, the court determined that the Louisiana capital murder statute was constitutional even when the aggravating factor justifying the death penalty was an element of the underlying crime in the guilt phase, because the statute narrowed the class of persons eligible for the death penalty by legislative articulation at the guilt phase. The Louisiana statute at issue required specific intent combined with one of ten other aggravating circumstances to establish qualification for the death penalty. The court's standards in *Lowenfield* are clearly applicable to Honie's claim that the Utah aggravated murder statute, which requires an intentional or knowing homicide combined with an aggravating circumstance from any of twenty subsections, fails to narrow the class of persons eligible for the death penalty.

As *Lowenfield* and its predecessors provide the appropriate federal precedent applicable to this claim, the remaining question is whether reasonable jurists could agree that the Utah Supreme Court correctly resolved the federal issue. *See Harrington*, 562 U.S. at 101.

B. **"Objectively unreasonable" application of Supreme Court precedent**

While Honie agrees that *Lowenfield* and its predecessors are the applicable precedent to this case, he argues that the Utah Supreme Court unreasonably applied that precedent to Utah's aggravated murder statute. In evaluating this issue, the Utah Supreme Court stated:

> In *State v. Young* we held that so long as the initial narrowing of death-eligible defendants occurs at the guilt phase in Utah's statutory scheme, any expanded consideration of factors at sentencing is constitutional. 853 P.2d 327, 352 (Utah 1993); *see also State v. Lafferty*, 20 P.3d 342. With respect to the statutory scheme applicable to defendant, the narrowing of death-eligible defendants occurs at the guilt phase, *see* Utah Code Ann. §§ 76–5–202, 76–3–206, and 76–5–203, and therefore we reject defendant's argument.

Honie I, 57 P.3d at 986.

To succeed on this claim, Honie "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 786-87. Honie argues that 1) the court was unreasonable because the broad expanse of aggravating circumstances in the Utah statute encompasses nearly every homicide; 2) the court was unreasonable in relying on *Young*, which addressed a previous version of the statute; and 3) the arbitrary nature in which the death penalty has been applied makes clearly unreasonable the determination that the statute does narrow the class of death eligible individuals. These arguments do not overcome the high burden of § 2254, that no fairminded jurist would agree with the determination of the Utah Supreme Court.

While the list of aggravating circumstances in the statute at issue in *Lowenfield* is less comprehensive than the list in the Utah statute, the structure of the statute is similar in nature, requiring a showing of intent plus one of the aggravating factors. Honie himself states in his petition, "[t]raditionally, when the merits phase is used as the narrowing mechanism, the requirement to prove an aggravator to establish eligibility for the death penalty has been determined to be enough of a check on the decisionmaker." ECF No. 121 at 253. He then states, however, that when the list of aggravators becomes as comprehensive as the list included in the Utah statute, that check is no longer effective, and the application becomes arbitrary. While

Honie may disagree with the Utah Supreme Court about the point at which a list of aggravators becomes so comprehensive that it does not narrow the class of death eligibility, the Utah court's determination that it is similar to the statute in *Lowenfield* is not clearly or objectively unreasonable.

Honie also claims that the court's reliance on *Young* undermines the reasonableness of its determination. But the court refers to its reasoning in *Young* and then applies that reasoning "to the statutory scheme applicable to defendant." *Honie I*, 57 P.3d at 986. The reference to *Young* implies that the reasoning in this case is also centered on *Lowenfield* and this court is not to grant a writ simply because of a lack of adequate citation. *See Bell v. Cone*, 543 U.S. 447, 455 (2005) ("[F]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.").

Finally, Honie claims that the arbitrary application of the statute shows that the statute fails to narrow the class. However, Honie does not provide adequate evidence of this claim and so this court cannot state that no reasonable jurist could agree with the Utah Supreme Court's determination.

Under the high bar of § 2254, Honie has not shown "beyond any possibility for fairminded disagreement" that the Utah aggravated murder statute which applied to his conviction unconstitutionally fails to narrow the class of eligibility for the death penalty. *See Harrington*, 562 U.S. at 103. The twelfth claim for relief is denied.

V. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing Habeas Corpus Cases Under Section 2254, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." U.S.C.S. Sec. 2254 Cases R. 11(a).

Rule 22(b) of the Rules of Appellate Procedure states that an applicant in habeas corpus proceedings "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." The Rule also states that "[i]f the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate." Rule 22(b)(1). A number of courts have held that unless the district court has ruled upon whether a certificate of appealability should issue, the circuit court is without jurisdiction to consider an appeal. *United States v. Mitchell,* 216 F.3d 1126, 1130 (D.C. Cir. 2000) ("Rule 22(b) requires initial application in the district court for a COA before the court of appeals acts on a COA request."); *United States v. Youngblood,* 116 F.3d 1113, 1115 (5th Cir. 1997) ("[J]urisdiction is not vested in this Court because the district court has not yet considered whether COA should issue.").

Under AEDPA, a certificate of appealability (COA) may issue only if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Supreme Court has said that the "substantial showing" standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle,* 463 U.S. 880, 893, and n. 4 (1983). When a district court rejects on the merits a petitioner's constitutional claims—which this court did with claims 1, 2, 3, 4, 5, 6, 7, and 12 —the requirement for satisfying 2253(c) is straightforward: "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

This court, having considered the above standard, concludes that Honie has failed to make a substantial showing of the denial of a constitutional right with regards to these claims

for the reasons set forth in this Memorandum Decision and Order denying Honie's Amended Petition.

VI. CONCLUSION

For the reasons set forth above, the court hereby **denies** Mr. Honie's claims in his Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. ECF. No 121. The court also **denies** Mr. Honie a certificate of appealability. He now "may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." U.S.C.S. Sec. 2254, Cases R. 11(a).

SO ORDERED this 12th day of June, 2019.

BY THE COURT:

s/ Julie A. Robinson
Judge Julie Robinson
United States District Judge

APPENDIX C

This opinion is subject to revision before final publication in the Pacific Reporter

2014 UT 19

IN THE

SUPREME COURT OF THE STATE OF UTAH

TABERONE DAVE HONIE,
Petitioner and Appellant,

v.

STATE OF UTAH,
Respondent and Appellee.

No. 20110620
Filed May 30, 2014

Fifth District, Cedar City
The Honorable G. Michael Westfall
No. 030500157

Attorneys:

Jon M. Sands, Therese M. Day, David A. Christensen,
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Thomas B. Brunker, Salt Lake City, for respondent and appellee

JUSTICE PARRISH authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE DURHAM, and JUSTICE LEE joined.

JUSTICE PARRISH, opinion of the Court:

INTRODUCTION

¶1 In May 1999, Petitioner Taberone Dave Honie was convicted of aggravated murder. Mr. Honie waived his right to a jury at sentencing and was subsequently sentenced to death by the trial judge. Following an unsuccessful direct appeal, Mr. Honie sought postconviction relief pursuant to the Utah Post Conviction Remedies Act (PCRA). This case comes before the court on appeal from a grant of summary judgment denying Mr. Honie postconviction relief on the basis of ineffective assistance of counsel. Mr. Honie also brought a motion under rule 60(b) of the Utah Rules of Civil Procedure to set aside the postconviction court's final judgment. That motion was also denied and Mr. Honie appealed. We have consolidated the appeals for review and decision.

¶2 On appeal, Mr. Honie argues that the postconviction court erred when it granted the State's motions for summary judgment. He also claims that the postconviction court abused its discretion in denying his rule 60(b) motion. We hold that Mr. Honie has failed to raise a genuine issue of material fact as to the first set of claims and that the district court did not abuse its discretion in regard to its rule 60(b) denial. We accordingly affirm the postconviction court's grant of summary judgment and denial of rule 60(b) relief.

BACKGROUND

¶3 Mr. Honie was convicted of aggravated murder and sentenced to death. This court affirmed his conviction and sentence on direct appeal. *State v. Honie*, 2002 UT 4, 57 P.3d 977 (*Honie I*). Mr. Honie subsequently filed a petition for postconviction relief, alleging ineffective assistance of trial counsel. Although we previously detailed the facts of Mr. Honie's crime in *Honie I*, we briefly restate the relevant facts here.

I. THE MURDER OF CLAUDIA BENN

¶4 On July 9, 1998, Mr. Honie murdered Claudia Benn. At approximately 8:00 p.m. on the evening of the murder, Mr. Honie telephoned Carol Pikyavit, the victim's daughter, asking her to come see him at the house where he was staying. Carol refused, telling Mr. Honie she needed to go to work. Mr. Honie became upset and threatened that if Carol did not come to meet him, he would kill her mother and her nieces.

¶5 Between his first telephone call at 8:00 p.m. and the time Carol left for work, Mr. Honie telephoned twice more. Carol and her sister, Benita, left for work at approximately 10:30 p.m., leaving their three children with Claudia.[1] The children were dressed and ready for bed when Carol and Benita left.

¶6 Around 11:20 p.m., a cab driver picked up Mr. Honie. Although the cabdriver could tell that Mr. Honie was intoxicated, Mr. Honie was still able to give him directions to the victim's neighborhood.

¶7 At approximately 12:20 a.m., several police officers arrived at the victim's home in response to a neighbor's 911 call. Upon arriving at the victim's home, the officers noticed that a sliding glass

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[1] One of the children, T.H., is the daughter of Carol and Mr. Honie. The other two children, D.R. and T.R., belong to Benita.

door had been broken, permitting entry to the home. The officers ordered the occupants of the house to exit and discovered Mr. Honie leaving the home through the garage. An officer commanded Mr. Honie to put his hands up and ordered him to the ground. Mr. Honie complied. Upon seeing blood on Mr. Honie's arms from his fingertips to his elbows, the officer asked Mr. Honie where he got the blood. Mr. Honie responded, "I stabbed her. I killed her with a knife."

¶8 After arresting Mr. Honie, the officers inspected the victim's home. Inside, they discovered the victim's partially nude body lying face down on the living room floor. A large blood-stained kitchen knife lay near her head.

¶9 The victim's three grandchildren were also found inside the home. Two of the children had some blood on them, and one child, D.R., "was covered, literally, head to toe with blood." In addition, D.R. was found only wearing a t-shirt; she was not wearing the underwear she had on when her mother left for work. D.R.'s underwear was never recovered from the scene of the murder. D.R. was given new underwear the night of the murder, but the social worker taking care of D.R. later noticed blood on them. The blood was later determined to be D.R.'s. Upon examining D.R., a physician at Primary Children's Medical Center determined that the bleeding was caused by abrasions in her genital area that were consistent with rubbing or fondling. The physician also estimated that D.R.'s injury was inflicted less than twenty-four hours before her examination.

¶10 The postmortem examination of the victim revealed that Mr. Honie brutally slit the victim's throat, cutting her neck from ear to ear. Four "start marks" on the victim's neck ran together into a deep cut that ran from the front of her neck through to her backbone. In addition to the neck wounds, Mr. Honie mutilated the victim's lower body, stabbing her multiple times in her genitalia.

¶11 After his arrest, Mr. Honie was taken to the Iron County Jail where Officer Lynn Davis interviewed and photographed him. Officer Davis interrogated Mr. Honie three separate times on the morning following the murder. Over the course of his interviews with Officer Davis, Mr. Honie admitted he had argued with the victim prior to breaking into her home by smashing the sliding glass door with a rock. Mr. Honie also told Officer Davis that he attempted to penetrate the victim's anus with his penis, but decided not to after realizing the victim had died. In each of the interviews,

however, Mr. Honie expressed remorse for killing the victim, stating repeatedly that Claudia was not meant to die.

II. MR. HONIE'S TRIAL, CONVICTION, AND DEATH SENTENCE

¶12 The State charged Mr. Honie with aggravated murder in violation of Utah Code section 76-5-202. At trial, the State presented evidence of numerous aggravating factors,[2] including the evidence of D.R.'s condition the night of the murder. The State argued that Mr. Honie had molested D.R. on the night of the murder and urged the jury to find aggravated sexual abuse of a child as an aggravating factor.

¶13 Mr. Honie's counsel openly admitted his client's guilt, stating, "I know in this case there is no question of Mr. Honie's guilt. You are going to find him guilty. The question in this case is going to be one of punishment." Thus, rather than contesting Mr. Honie's guilt, trial counsel chose to focus on the sentencing phase of the trial by highlighting Mr. Honie's expressions of remorse and attempting to counter the aggravating factors proffered by the State.

¶14 The jury convicted Mr. Honie of aggravated murder, finding five aggravating factors: (1) object rape, (2) forcible sodomy, (3) aggravated sexual assault, (4) burglary, and (5) aggravated burglary. The jury, however, could not reach unanimity on a sixth aggravating factor: aggravated child sexual abuse.

¶15 Mr. Honie waived his right to a jury at the sentencing phase. Following an extensive colloquy with the judge prior to trial, Mr. Honie signed a jury waiver indicating that he had discussed the waiver and its ramifications with trial counsel. In the colloquy, Mr. Honie stated he understood that he was waiving his right to be sentenced by a twelve-person jury and that his sentence would instead be determined by a single judge. Mr. Honie also stated that he waived the jury voluntarily.

¶16 During the sentencing phase, trial counsel chose to highlight Mr. Honie's family and personal background, as well as Mr. Honie's statements of remorse to the police following his arrest.

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[2] The State argued that Mr. Honie committed aggravated murder because he killed Claudia while also committing rape, object rape, forcible sodomy, sexual abuse of a child, aggravated sexual abuse of a child, aggravated sexual assault, aggravated burglary, and/or burglary. *Honie I*, 2002 UT 4, ¶ 46, 57 P.3d 977.

Dr. Nancy Cohn, a forensic psychologist, testified on Mr. Honie's behalf. In addition to proffering testimony concerning Mr. Honie's personal history, including his mental and physical condition, Dr. Cohn testified as to Mr. Honie's remorse. Specifically, Dr. Cohn indicated that Mr. Honie began crying when he admitted to her that he molested D.R. the night of the murder.

¶17 The trial judge found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Honie to death in accordance with section 76-3-207 of the Utah Code. The judge specifically found four aggravating factors: (1) that the murder involved object rape, (2) that the murder was committed in the course of an aggravated sexual assault, (3) that Mr. Honie was engaged in committing aggravated burglary at the time of the murder, and (4) that during the murder Mr. Honie also engaged in aggravated sexual abuse of D.R. The court also noted Mr. Honie's criminal history, including a prior drunken assault on Carol, and the impact Mr. Honie's crime had on the victim's family. In addition, the court considered the mitigation evidence offered by Mr. Honie, including evidence of his intoxication at the time of the murder, his personal background, his relative youth at the time of the crime, and Mr. Honie's expressed remorse for his conduct. Ultimately, the trial judge determined, beyond a reasonable doubt, that the death penalty was appropriate and so sentenced Mr. Honie. We affirmed Mr. Honie's sentence on direct appeal, *Honie I*, 2002 UT 4, 57 P.3d 977, and the U.S. Supreme Court denied certiorari, *Honie v. Utah*, 537 U.S. 863 (2002).

III. MR. HONIE'S POSTCONVICTION PROCEEDINGS

¶18 Mr. Honie began his postconviction appeals process in February 2003, raising a variety of ineffective assistance of counsel claims.[3] In response to Mr. Honie's December 2003 Amended Petition for Post Conviction Relief, the State filed a motion to dismiss or for summary judgment. Most of Mr. Honie's claims were dismissed when the postconviction court granted, in part, the State's motion for partial summary judgment. The postconviction court also denied part of the State's motion based on an affidavit submitted by a defense mitigation consultant, which asserted that trial

[3] In his first petition for postconviction relief, Mr. Honie brought nine claims. In his amended petition for postconviction relief, Mr. Honie brought sixty-seven claims. We will address only those claims raised on appeal. *See infra* ¶ 24.

counsel's mitigation investigation had been inadequate. Because the State proffered no evidence to contradict the consultant's assessment of trial counsel's investigation, the postconviction court held that Mr. Honie had established a factual dispute sufficient to survive summary judgment as to the adequacy of trial counsel's mitigation investigation.

¶19 Following the postconviction court's ruling, the State moved for discovery on Mr. Honie's surviving claims. Mr. Honie's postconviction counsel subsequently filed a motion requesting additional funds to complete discovery. In November 2006, the postconviction court denied Mr. Honie's request for additional funds, holding in part that Mr. Honie had already received the maximum amount of funding allowed for postconviction investigation under the PCRA. In addition, the court held that it did not have jurisdiction to consider Mr. Honie's motion for additional funding because he had not exhausted his administrative remedies with the Utah State Division of Finance.

¶20 In June 2007, the State filed a second motion for summary judgment, supported by an affidavit from Mr. Honie's trial counsel in which he testified as to the mitigation investigation he had conducted prior to Mr. Honie's trial. Mr. Honie subsequently filed a motion to stay the proceedings, arguing that he could not oppose the State's motion without additional funding. Extensive litigation ensued, in which Mr. Honie argued that he needed additional funds to hire experts to testify as to his state of intoxication at the time of the murder, as well as to conduct a more complete investigation into potential mitigating factors in his background.

¶21 In the midst of Mr. Honie's funding dispute, the Legislature amended the PCRA, granting courts authority to exceed the statutory $20,000 limit on litigation costs in death penalty postconviction cases upon a showing of "good cause." Utah Code § 78B-9-202(3)(c).[4] The postconviction court determined that the revised PCRA applied retroactively to Mr. Honie's case, thereby allowing Mr. Honie to petition for additional funding.

¶22 In March 2010, the postconviction court again denied Mr. Honie's request for more funds. The court reasoned that Mr. Honie could not demonstrate good cause because he was unable

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[4] Prior to 2008, funding for litigation costs in death penalty postconviction cases had an absolute cap of $20,000. Utah Code § 78-35a-202(2)(c) (2004); UTAH ADMIN. CODE r. 25-14-5 (2004).

show that additional funds were likely to lead to the development of evidence that would support postconviction relief. Following its denial of Mr. Honie's request for additional funds, the postconviction court considered the State's second motion for summary judgment. The court determined that, with the addition of trial counsel's affidavit testimony, the State was entitled to judgment as a matter of law and granted the State's motion.

¶23 Two months after he filed a notice of appeal in his postconviction proceedings, Mr. Honie filed a rule 60(b)(6) motion with the postconviction court, seeking relief from the court's summary judgment order on the basis of ineffective assistance of his postconviction counsel. In his rule 60(b) motion, Mr. Honie argued that his postconviction counsel had been rendered ineffective as a result of the court's failure to grant additional funding, which would have allowed counsel to further pursue Mr. Honie's ineffective assistance of trial counsel claims. The postconviction court denied Mr. Honie's motion,[5] holding that lack of funding did not render Mr. Honie's postconviction counsel ineffective.

¶24 Mr. Honie timely appealed the postconviction court's 60(b) ruling, and we consolidated his postconviction and rule 60(b) appeals. In his consolidated appeal, Mr. Honie raises six separate claims of ineffective assistance of counsel: (1) trial counsel improperly decided on a concession strategy too early, which caused him to inadequately investigate potential defenses or mitigating factors; (2) trial counsel failed to investigate or pursue a voluntary intoxication defense to the aggravated murder charge; (3) trial counsel failed to object to the destruction of evidence demonstrating Mr. Honie's intoxication on the night of the murder; (4) trial counsel failed to request suppression of Mr. Honie's inculpatory statements to the police; (5) during the penalty phase of trial, trial counsel introduced Mr. Honie's inculpatory statement to Dr. Cohn in which Mr. Honie

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[5] The postconviction court exercised jurisdiction in accordance with our decision in *White v. State*, 795 P.2d 648, 650 (Utah 1990). In *White*, we held that although filing a notice of appeal divests a district court of jurisdiction to make any additional rulings in a case, the district court "has jurisdiction to consider a rule 60(b) motion after an appeal has been filed and also has power to deny it. But if the motion has merit, the trial court must so advise the appellate court, and the moving party may then request a remand." *Id.* at 649–50.

admitted to molesting D.R.; and (6) trial counsel failed to properly advise Mr. Honie about his right to have a jury determine his sentence. In addition to his ineffective assistance of counsel claims, Mr. Honie argues that the postconviction court erred when it refused to approve additional funds that would have allowed him to further develop his claims of ineffective assistance of counsel. Finally, Mr. Honie argues that the postconviction court erred when it denied his motion for relief pursuant to rule 60(b)(6) of the Utah Rules of Civil Procedure.

¶25 The State counters that Mr. Honie's trial counsel was not ineffective under the U.S. Supreme Court's *Strickland* jurisprudence. And the State argues that the postconviction court did not err when it denied Mr. Honie additional funds because Mr. Honie failed to show that additional funds were likely to develop evidence in support of his ineffective assistance of counsel claims. Finally, the State argues that the postconviction court properly denied Mr. Honie's rule 60(b) motion.

¶26 We hold that Mr. Honie has failed to raise a genuine issue of material fact as to his ineffective assistance of counsel claims and that the postconviction court was correct in denying him additional funds. In addition, we hold that the postconviction court did not err when it denied Mr. Honie's rule 60(b) motion. Accordingly, we affirm the postconviction court's grant of summary judgment.

STANDARD OF REVIEW

¶27 Under the PCRA, "[t]he petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." UTAH CODE § 78B-9-105(1). As stated above, Mr. Honie challenges three of the postconviction court's rulings: (1) the court's dismissal of his claims of ineffective assistance of counsel, (2) the court's denial of his motion for additional funding under the PCRA, and (3) the court's denial of his rule 60(b) motion. We apply the following standards of review to each of these claims.

A. Ineffective Assistance of Counsel Claim

¶28 In this case, Mr. Honie's ineffective assistance of counsel claims were dismissed on summary judgment. We therefore review the postconviction court's grant of summary judgment for correctness. *See Hoyer v. State*, 2009 UT 38, ¶ 7, 212 P.3d 547 ("When reviewing a grant of summary judgment, we review the district

court's conclusions of law for correctness and give them no deference.").

B. PCRA Funding Claim

¶29 This appeal presents our first opportunity to review a funding determination under the 2008 amendment to the PCRA. As amended, the PCRA authorizes a district court to "exceed the maximum [funding for postconviction review of a death penalty case] only upon a showing of good cause" and provides a list of factors to be considered "[i]n determining whether good cause exists." UTAH CODE § 78B-9-202(3)(b), (e). This statutorily granted discretion is comparable to other contexts in which district courts have been given discretion to depart from a general rule based on a showing of good cause. Examples include decisions of whether to impose sanctions for failure to follow disclosure requirements, whether to grant a motion for a continuance, and whether to waive the notice requirements for an alibi witness. *See Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 34, 215 P.3d 933 (explaining that a district court has discretion to impose sanctions where it finds that a party's failure to disclose was harmful to the opposing party and was not supported by good cause); *Brown v. Glover*, 2000 UT 89, ¶ 43, 16 P.3d 540 (explaining that "[t]rial courts have substantial discretion in deciding whether to grant continuances," which, under Utah Rule of Civil Procedure 40(b), turns on whether good cause has been shown (internal quotation marks omitted)); *State v. Ortiz*, 712 P.2d 218, 219 (Utah 1985) (reviewing for abuse of discretion a district court's decision that "good cause had not been shown for the alibi witness substitution"). In light of the similarity between these decisions and the decision of whether to award additional funding under the PCRA, we will review the postconviction court's denial of Mr. Honie's funding request for an abuse of discretion.

C. Motion for Relief Under Rule 60(b)

¶30 We review a district court's dismissal of a rule 60(b) motion for abuse of discretion because these motions are inherently fact intensive and involve principles of fairness and equity that are not easily reviewable at the appellate level. *Kell v. State*, 2012 UT 25, ¶ 7, 285 P.3d 1133. But we review for correctness the district court's legal determinations made as part of a 60(b) ruling. *Id.*

ANALYSIS

I. MR. HONIE'S TRIAL COUNSEL WAS NOT INEFFECTIVE

¶31 We first turn to Mr. Honie's contention that his trial

counsel was ineffective. We evaluate each of Mr. Honie's ineffective assistance of counsel claims under the Supreme Court's two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Honie must establish for each of his claims (1) that trial counsel's performance was objectively deficient and (2) that such deficient performance was prejudicial. *Id.* at 687. Because failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim, we are free to address Mr. Honie's claims under either prong. *Id.* at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

¶32 As to the first *Strickland* prong, Mr. Honie must show that trial counsel's "representation fell below an objective standard of reasonableness" when measured against prevailing professional norms. *Id.* at 687–88. The *Strickland* Court conspicuously refused to establish explicit guidelines, instead noting that the proper "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. Because of the temptation to second-guess trial counsel's decisions with the benefit of hindsight, "[j]udicial scrutiny of counsel's performance must be highly deferential" and courts must acknowledge a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." *Id.* at 689. Thus, we examine the reasonableness of trial counsel's conduct in light of the particular facts of the case, viewed as of the time of counsel's conduct. *Id.* at 690.

¶33 Under *Strickland's* second prong, Mr. Honie is required to affirmatively demonstrate that trial counsel's actions prejudiced him. *Id.* at 693. To do so, he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When assessing prejudice, we will assume that the decisionmaker "reasonably, conscientiously, and impartially" applied the proper governing standards. *See id.* at 695. Thus, in the context of a postconviction challenge to a death sentence, the proper inquiry is whether the sentencer, in this case the trial judge, "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" in the absence of counsel's deficient performance. *Id.*

A. Mr. Honie's Trial Counsel Was Not Ineffective in Investigating the Facts of Mr. Honie's Case

¶34 Mr. Honie claims that his trial counsel improperly decided to pursue a concession strategy following an inadequate investigation into potential defenses and mitigating factors,[6] including (1) the degree of Mr. Honie's intoxication at the time of the murder and during subsequent police interrogation;[7] (2) evidence related to Mr. Honie's potential mental illness, including cognitive defects resulting from Fetal Alcohol Syndrome (FAS); (3) the degree to which Mr. Honie might have been affected by long-term polysubstance abuse; (4) the potential that Mr. Honie suffered brain damage resulting from a fall; and (5) evidence relating to Mr. Honie's background, family history, social situation, and mental state. Specifically, Mr. Honie challenges the postconviction court's determination that trial counsel reasonably relied on expert advice from Dr. Cohn and Mr. Ted Cilwick during his investigation. Mr. Honie argues that it was unreasonable for counsel to rely on

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[6] Though Mr. Honie's argument on this point is somewhat unclear, he seems to argue that trial counsel's decision to pursue a concession strategy early in the investigatory process colored the entirety of trial counsel's subsequent investigation, causing him to inadequately investigate a number of potential defenses and mitigating factors. But defense counsel in a capital case often faces the daunting task of defending a client whose guilt is clear. In such cases, counsel "may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." *Florida v. Nixon*, 543 U.S. 175, 191 (2004). If counsel's decision to pursue a concession strategy comports with the demands of *Strickland*, such a strategic decision will not give rise to a successful claim of ineffective assistance of counsel. *Id.* at 192. In this case, we cannot fault trial counsel's decision to pursue a concession strategy in the face of the overwhelming evidence of Mr. Honie's guilt.

Also, to the extent Mr. Honie challenges the *timing* of trial counsel's decision to pursue a concession strategy, he has not directed us to any authority—nor have we discovered any such authority—that would support the proposition that timing alone would invalidate trial counsel's otherwise legitimate strategic choice.

[7] Mr. Honie's claims relating to his potential voluntary intoxication defense will be addressed below. *See infra* Section I.B.

Dr. Cohn "as the sole mental health and mitigation expert because she was not qualified to do all that was required in Honie's case." Additionally, Mr. Honie argues that trial counsel's reliance on Mr. Cilwick was unreasonable because Mr. Cilwick is not a trained mitigation expert, but is instead only a private investigator.

¶35 We conclude that Mr. Honie's trial counsel was not ineffective in his mitigation investigation. We therefore affirm the postconviction court's grant of summary judgment on this issue.

¶36 An attorney has a duty to conduct a reasonable investigation into the facts of his client's case and to make reasonable decisions regarding the proper scope of that investigation. *See Taylor v. State*, 2007 UT 12, ¶ 47, 156 P.3d 739 (citing *Strickland*, 466 U.S. at 691). Counsel's investigation is especially important in death penalty cases. *Id.* Though trial counsel is not required to present all evidence uncovered during the investigation of a client's case, an attorney is required to perform any investigation competently and thoroughly. *Archuleta v. Galetka*, 2011 UT 73, ¶ 125, 267 P.3d 232.

¶37 In evaluating the reasonableness of counsel's investigation, "we consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Taylor*, 2007 UT 12, ¶ 48 (internal quotation marks omitted). Our focus is not on counsel's decision regarding whether to present certain evidence, but rather on "whether the investigation supporting counsel's decision . . . *was itself reasonable*." *Id.* ¶ 47 (internal quotation marks omitted). Accordingly, though we grant counsel wide discretion in trial strategy, "strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* (internal quotation marks omitted).

¶38 In *Archuleta*, the defendant raised ineffective assistance of counsel claims very similar to those raised by Mr. Honie. First, Mr. Archuleta challenged his defense counsel's mitigation investigation on the basis that counsel relied solely on the advice of a single expert to evaluate Mr. Archuleta's mental health and personal history. *Archuleta*, 2011 UT 73, ¶ 126. Mr. Archuleta argued that trial counsel should have retained the services of a neuropsychologist to determine whether Mr. Archuleta suffered from brain damage or other mental health problems. *Id.* In rejecting Mr. Archuleta's claim, we noted that trial counsel reasonably relied on the advice of a highly qualified forensic psychologist, who

recommended against further psychological testing. *Id.* ¶ 127. Specifically, we held that

> it is reasonable for counsel to rely on the judgment and recommendations of qualified experts with expertise beyond counsel's knowledge. If an attorney had the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney was entitled to make decisions based on that conclusion, the role of the expert would be superfluous.

Id. ¶ 129 (internal quotation marks omitted).

¶39 Just as it was reasonable for Mr. Archuleta's trial counsel to rely on a qualified expert, so was it reasonable for Mr. Honie's trial counsel to rely on Dr. Cohn and her findings. Dr. Cohn holds both a masters degree and a Ph.D. in psychology from the University of Utah. She also completed a postdoctoral fellowship at the University of Southern California in forensic psychology. In her investigation, Dr. Cohn examined Mr. Honie's medical and psychotherapy reports, his history of past criminal behavior, and "a very detailed file" on the murder itself, including all police reports. Dr. Cohn interviewed Mr. Honie, his former therapist, his parents, and other family members. She traveled to the Hopi Reservation, where Mr. Honie was raised and examined tribal court records detailing Mr. Honie's criminal history, his mental health records from the Hopi Guidance Clinic dating from 1990 through 1995, Mr. Honie's complete medical records from 1975 through 1996, and what school records were available.

¶40 Dr. Cohn also conducted a "very detailed psychological evaluation" of Mr. Honie over the course of two days. She spent a total of approximately fourteen hours in face-to-face interviews with Mr. Honie and another six hours conducting psychological tests. Dr. Cohn conducted an intellectual screening and concluded that Mr. Honie had an IQ in the average range. She also conducted a neuropsychological screening looking for signs of brain damage stemming from Mr. Honie's extensive history of drug abuse. These tests offered no indication that Mr. Honie suffered from brain damage or any other cognitive defects.

¶41 Given this extensive examination of Mr. Honie and his personal history, we cannot say that Dr. Cohn's mitigation investigation was deficient or that trial counsel was objectively unreasonable in relying on her conclusions. Mr. Honie has failed to raise a factual dispute as to the reasonableness of trial counsel's reliance. It is not

enough to speculate that another expert might have explored other areas of mitigation. Absent facts to support a finding that trial counsel's reliance on his chosen expert was objectively unreasonable, Mr. Honie cannot survive summary judgment on this issue.

¶42 Mr. Honie also claims that trial counsel was deficient in failing to retain a mitigation specialist to conduct the investigation. We disagree. First, trial counsel hired Dr. Cohn, who *is* a mitigation specialist. Second, trial counsel is not required to hire a mitigation specialist in order to comply with his Sixth Amendment obligations.

¶43 We addressed this issue in *Archuleta* as well. Mr. Archuleta's trial counsel hired an investigator who had never before prepared a mitigation case. *Archuleta*, 2011 UT 73, ¶¶ 123–24. We nevertheless rejected Mr. Archuleta's claim that counsel's reliance on his investigator's findings was unreasonable. *Id.* We specifically rejected the argument that defense counsel is required to hire a mitigation specialist to fulfill Sixth Amendment requirements. *Id.* ¶ 125 ("[S]uch specialists are not the only reasonable manner in which a mitigation workup may be accomplished."). Rather, we made clear in *Archuleta* that a defendant must establish that the investigator "rendered unreasonably deficient performance or . . . failed to pursue leads that a reasonably trained mitigation specialist would have pursued." *Id.*

¶44 Mr. Honie has failed to establish that Dr. Cohn and Mr. Cilwick rendered unreasonably deficient performance or failed to pursue valid mitigation leads. Mr. Honie argued before the postconviction court that trial counsel should have investigated the effects on Mr. Honie's behavior of his long-term drug and alcohol abuse, his dysfunctional upbringing and family life, his poverty and cultural background, and his various psychological disorders. But Dr. Cohn's trial testimony establishes that she investigated these areas of Mr. Honie's life. Moreover, beyond his general claim that Dr. Cohn and Mr. Cilwick were too inexperienced to effectively conduct a mitigation investigation, Mr. Honie points to no specific facts that would support a finding that they performed deficiently or failed to follow up on valid leads. Absent such a showing, Mr. Honie cannot survive summary judgment on this issue.

¶45 Finally, Mr. Honie argues, in a cursory fashion, that it was inappropriate for trial counsel to rely on Mr. Honie and his family to supply potential mitigation leads. To the contrary, the Supreme Court has long recognized that counsel's investigatory decisions are usually based on information supplied by the defendant. *Strickland*,

466 U.S. at 691. Indeed, it would be difficult to conceive of a more appropriate source of information as to the defendant's personal background and mental state. Absent some showing that trial counsel completely abdicated his investigatory responsibilities in favor of relying on the unguided contributions of Mr. Honie and his family, we find it perfectly reasonable for trial counsel to have relied on the defendant and his family to assist in his own mitigation investigation.

¶46 In sum, Mr. Honie has failed to raise a factual dispute as to whether trial counsel's mitigation investigation was objectively deficient. Trial counsel was entitled to rely on the advice of qualified experts and did so. We reaffirm that trial counsel is not required to retain a mitigation specialist to satisfy his Sixth Amendment obligations. Moreover, trial counsel may reasonably rely on the defendant and his family to help guide the mitigation investigation. Because we conclude that trial counsel did not render deficient performance in his mitigation investigation, we need not reach the second *Strickland* prong of prejudice and affirm the postconviction court's grant of summary judgment on this issue.

B. Trial Counsel Was Not Objectively Unreasonable in Choosing Not to Pursue a Voluntary Intoxication Defense at Trial

¶47 Mr. Honie next argues that trial counsel was ineffective for failing to pursue a voluntary intoxication defense at trial. Specifically, Mr. Honie argues that there was "strong evidence of intoxication available to trial counsel," and that "trial counsel had an obligation to investigate voluntary intoxication as a possible defense at trial before deciding on a concession theory." We hold that Mr. Honie has not established that trial counsel's performance was objectively unreasonable and affirm the postconviction court's grant of summary judgment on this issue.

¶48 Mr. Honie has failed to show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. In evaluating the reasonableness of trial counsel's representation, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Relevant to Mr. Honie's claims, "the law does not require counsel to raise every available nonfrivolous defense." *Knowles v. Mirzayance*, 556 U.S. 111, 124–27 (2009) (holding that in the insanity defense context, counsel is not

obligated to raise claims that he "reasonably believed [were] doomed to fail"); *see also Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (explaining that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant . . . . [or even to] present mitigating evidence at sentencing in every case").

¶49 In order to prevail on a voluntary intoxication defense, Mr. Honie's state of intoxication must have deprived him of the capacity to form the mental state necessary for aggravated murder. *See* UTAH CODE § 76-2-306 ("Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense . . . ."). Thus, trial counsel would have needed to present evidence showing that Mr. Honie was so intoxicated that he neither intended to kill nor knew he was killing a person at the time of the murder. *See* UTAH CODE § 76-5-202 (stating that aggravated murder is committed "if the actor intentionally or knowingly causes the death of another").

¶50 It is not enough to merely present evidence showing that the defendant had been drinking. Rather, to establish a viable voluntary intoxication defense, the defendant must point to evidence showing that he was so intoxicated that he was incapable of forming the requisite mental state for the crimes committed. *See Adams v. State*, 2005 UT 62, ¶ 22, 123 P.3d 400 (stating that "mere proof of drinking or being drunk is not enough in many cases" to mount a voluntary intoxication defense); *see also State v. Wood*, 648 P.2d 71, 90 (Utah 1982) (noting that the defendant must "prove much more than [the fact that] he had been drinking" before committing the offense to be entitled to a voluntary intoxication defense, and that the defendant must "show that his mind had been affected to such an extent that he did not have the capacity to form the requisite specific intent or purpose").

¶51 In arguing that counsel was ineffective in failing to pursue a voluntary intoxication defense, Mr. Honie primarily relies on a toxicology report showing that his blood alcohol content was 0.07 and that he had both active and metabolized THC in his blood four and one-half hours after the murder. Mr. Honie argues that, given the length of time between the murder and the blood test, his blood alcohol level would have been "significantly higher" at the time of the murder. As a result, Mr. Honie argues that trial counsel had a duty to hire an expert to conduct a retrograde extrapolation to show

that his actual blood alcohol level was approximately 0.15 at the time of the murder.

¶52 Mr. Honie also argues that trial counsel knew that he was highly intoxicated at the time of the murder. Specifically, Mr. Honie contends that he told trial counsel that on the day of the murder he consumed an eighteen pack of beer with a friend from 8:00 a.m. to 11:00 a.m. and that between 12:00 p.m. and 1:00 p.m. he and his friend purchased another eighteen pack and continued to drink beer. Mr. Honie also represented that, during this time, he smoked four to five bowls of marijuana and that later in the day he consumed liquor, smoked more marijuana, and also took methamphetamine before consuming more beer.

¶53 Mr. Honie also relies on his actions and statements the night of the murder to demonstrate that he had a high level of intoxication. For example, during his first interrogation, approximately one and one-half hours after the murder, Mr. Honie made numerous nonsensical statements to Officer Davis, telling him the Mexican Mafia was responsible for killing the victim. According to Officer Davis, Mr. Honie "was all over the place," and talked about being a member of the occult and playing with Ouija boards. In subsequent interrogations, however, Mr. Honie admitted to Officer Davis that these statements were not true.

¶54 Finally, Mr. Honie argues that testimony at the preliminary hearing should have alerted trial counsel that Mr. Honie's level of intoxication on the night of the murder was significant. For example, Mr. Honie states that the taxi driver who took Mr. Honie to the victim's neighborhood testified that Mr. Honie was intoxicated. Similarly, Mr. Honie points to the testimony of Carol Pikyavit, the victim's daughter, who stated that Mr. Honie was intoxicated when she spoke with him by phone on the night of the murder. Carol stated that Mr. Honie was not at the point of extreme intoxication, but that she believed "he was getting there."

¶55 Although this evidence may serve to establish that Mr. Honie had been drinking at the time he committed the murder, Mr. Honie has not provided any evidence showing that his "intoxication at the time of the offense prevented him from understanding that his actions were causing the death of another." Evidence of intoxication, be it witness testimony or a numerical measure of the defendant's actual blood alcohol content, is not sufficient to establish a voluntary intoxication defense without actual evidence of the defendant's mental state. Thus, even though

Mr. Honie had consumed both alcohol and marijuana prior to committing the murder, "there is no evidence [showing that] he was so intoxicated at the time of the crime that he was unable to form the specific intent necessary to prove the crime of [aggravated murder]." *Wood*, 648 P.2d at 90.

¶56 Indeed, the evidence suggests the contrary. When the police arrived at the scene of the crime, one of Mr. Honie's first statements to police was "I stabbed her. I killed her with a knife." As the postconviction court noted, this statement "clearly show[ed] that [Mr. Honie] understood he had engaged in lethal conduct upon a human being."

¶57 Similarly, although Mr. Honie claimed at first that he had blacked out during the murder, he later admitted to Dr. Cohn that he remembered the details of the crime and that he wished he had blacked out so that he would not remember what he had done. Again, this evidence shows that Mr. Honie was not so intoxicated that he did not know he was killing the victim.

¶58 In addition, the State points to evidence showing Mr. Honie knew what he was doing immediately before and after the murder. For example, although Mr. Sweeney, the cab driver, could tell that Mr. Honie was intoxicated, he also testified to the fact that Mr. Honie was still able to give him directions to the victim's neighborhood. Similarly, after the commission of the crime, Mr. Honie conversed coherently with police officers and obeyed their commands.

¶59 Officer Davis testified that although Mr. Honie smelled of alcohol during his first interview, Officer Davis did not believe that Mr. Honie was intoxicated to the point that he was unable to understand what Officer Davis was saying or what was going on. Officer Davis stated, "I mean, he was intoxicated, yes, but not—he was not inebriated. I mean he knew what was going on." And the trial court credited Officer Davis's testimony concerning Mr. Honie's level of intoxication, stating, "[W]hile [Officer Davis] knew the defendant had been drinking, it was clear that he was fully aware of his situation. Moreover, the defendant's physical appearance and actions did not indicate that his mental state was out of the ordinary."

¶60 Finally, the fact that Mr. Honie intended to kill is supported by the testimony showing that Mr. Honie threatened to kill the victim on the day of the murder. Carol testified that Mr. Honie called her the day of the murder wanting her to come see him. When

Carol said she could not come because she had to go to work, Mr. Honie threatened to kill her mother. Though Carol testified that Mr. Honie seemed intoxicated during their conversation, Mr. Honie's threat to kill the victim, made only hours before he did kill her, shows that Mr. Honie not only had the capacity to form an intent to murder the victim, but that he in fact acted on that intent. Thus, even though Mr. Honie has pointed to evidence that he was intoxicated at the time of the murder, there was sufficient evidence of his ability to form the requisite mens rea that trial counsel could reasonably decide that a voluntary intoxication defense was untenable.

¶61 In sum, Mr. Honie has pointed to no evidence showing he was so intoxicated that he was unable to form the requisite intent to commit aggravated murder. On the contrary, there is significant evidence demonstrating that Mr. Honie knew what he was doing and had the intent necessary to commit aggravated murder. We accordingly conclude that Mr. Honie would have been unable to establish a viable voluntary intoxication defense and trial counsel was not unreasonable in choosing not to pursue that defense. Because trial counsel's decision not to pursue a voluntary intoxication defense fell well within the range of acceptable performance, we affirm the postconviction court's grant of summary judgment on this issue.[8]

C. Mr. Honie Was Not Prejudiced by Trial Counsel's Failure to Object to the Destruction of Evidence Relating to Mr. Honie's Level of Intoxication

¶62 Mr. Honie next argues trial counsel was ineffective for failing to object to the destruction of evidence relating to Mr. Honie's level of intoxication at the time of the murder. Because we have concluded that Mr. Honie could not establish a viable voluntary intoxication defense, *supra* ¶ 61, he has not raised a genuine factual dispute as to trial counsel's effectiveness on this issue. Even if we assume trial counsel's decision not to object constituted unreasonably deficient performance, Mr. Honie cannot establish that he was prejudiced by counsel's actions unless he can demonstrate that the

[8] Though we need not determine whether Mr. Honie was prejudiced by trial counsel's decision, we note that, in the absence of a viable voluntary intoxication defense, Mr. Honie would be hard pressed to show how the outcome of his trial would have been different had trial counsel pursued such a defense.

evidence was potentially exculpatory. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Because Mr. Honie did not have a viable voluntary intoxication defense, any error on trial counsel's part in failing to object to the destruction of evidence of Mr. Honie's intoxication was harmless. Again, the absolute amount of alcohol or drugs in Mr. Honie's system is insufficient to establish a voluntary intoxication defense when the evidence so strongly demonstrates that Mr. Honie intended to kill Claudia. Because Mr. Honie has not raised a genuine issue of material fact as to the prejudice prong of the *Strickland* analysis, we affirm the postconviction court's grant of summary judgment on this issue.

D. Trial Counsel's Strategic Decision to Introduce Mr. Honie's Inculpatory Statements to Police Was Not Objectively Unreasonable

¶63 Mr. Honie next argues that trial counsel was ineffective for introducing during the guilt phase of trial inculpatory statements that Mr. Honie made to the police. Specifically, Mr. Honie contends that trial counsel was ineffective for admitting the statements despite the fact that the statements were potentially obtained in violation of Mr. Honie's *Miranda* rights and were highly prejudicial in nature. Because the State had previously agreed to stipulate to the inadmissibility of the statements at trial, Mr. Honie faults trial counsel's choice to introduce them voluntarily.

¶64 Conversely, the State argues that trial counsel made a legitimate strategic decision to admit the statements as part of his concession strategy because he believed the statements exhibited Mr. Honie's remorse. We agree. We hold that trial counsel's strategic choice to voluntarily admit Mr. Honie's inculpatory statements was not objectively unreasonable.

¶65 Mr. Honie has not demonstrated "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. As noted previously, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In addition, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690; *see also Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1408 (2011) (noting that strategic decisions of trial counsel "are due a heavy measure of deference" on appellate review (internal quotation marks omitted)).

¶66 Trial counsel may make the strategic choice to use potentially inculpatory evidence if it furthers the client's interest. *See Ayala v. Hatch*, 530 F. App'x 697, 701 (10th Cir. 2013) (approving of trial counsel's strategic choice not to move to suppress inculpatory statements made to the police). As long as such evidence furthers his client's interests, the use of the potentially damaging evidence is not objectively unreasonable. *See Gardner v. Ozmint*, 511 F.3d 420, 430 (4th Cir. 2007) ("An attorney's insistence upon the admission of evidence that significantly damages his client, without using that evidence in any manner to further his client's interest cannot be considered 'sound trial strategy' and certainly does not comport with 'prevailing professional norms.'" (quoting *Strickland*, 466 U.S. at 689)).

¶67 In *Gardner*, the Fourth Circuit held that trial counsel was objectively unreasonable in allowing the admission of inflammatory statements when trial counsel had no strategic reason for doing so. *Id.* at 430. Trial counsel insisted on the admission of damaging statements given by a witness to impeach that witness's testimony, but never used the statements to impeach the witness on cross-examination. *Id.* Because of this, the Fourth Circuit held that trial counsel's agreement to the admission of the inflammatory statements at trial was objectively unreasonable.[9] *Id.*

¶68 But trial counsel's strategic choice to admit a defendant's inculpatory statements may be reasonable if doing so serves the defendant's interests. *See United States v. Fulks*, 683 F.3d 512, 519 (4th Cir. 2012). In *Fulks*, trial counsel advised that the defendant confess his guilt to authorities in a pretrial meeting. *Id.* at 517. When the defendant challenged this advice as unreasonable in postconviction proceedings, trial counsel asserted that his advice was part of an overall strategy designed to avoid the death penalty for his client. *Id.* at 517–18. Moreover, having the defendant confess to authorities prior to trial allowed trial counsel to introduce the defendant's version of events at trial without subjecting the defendant to cross-examination. *Id.* Furthermore, trial counsel stated that "we wanted the statement to be used at trial" because it demonstrated "acceptance of responsibility [and] . . . some true indicia of remorse." *Id.*

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[9] The Fourth Circuit nevertheless held that the defendant in *Gardner* failed to show ineffective assistance of counsel because he could not prove that he was prejudiced by trial counsel's strategic decision. *Id.* at 430–31.

at 518 (alterations in original)(internal quotation marks omitted). Because of the overwhelming evidence of guilt in the case, the Fourth Circuit recognized the "unpalatable hand the defense team was dealt" and held that trial counsel's strategic choice was not an objectively unreasonable litigation tactic. *Id.* at 519.

¶69 Like the defense counsel in *Fulks*, Mr. Honie's trial counsel was dealt a similarly "unpalatable hand." As we have discussed, Mr. Honie's trial counsel was presented with a client who was clearly guilty of committing a heinous crime. Here, trial counsel adopted a mitigation strategy, attempting to highlight Mr. Honie's feelings of remorse through the admission of statements Mr. Honie made to police. In addition, unlike trial counsel in *Gardner,* Mr. Honie's trial counsel not only had a specific strategic purpose for admitting these statements, but counsel also used them to further his client's interest by attempting to present mitigating evidence for both the judge and jury to consider.

¶70 Even though the statements Mr. Honie made to Officer Davis were inculpatory, because trial counsel had a legitimate strategy for their admission, trial counsel's decision was not objectively unreasonable.[10] We therefore affirm the postconviction court's grant of summary judgment on this issue.

E. Trial Counsel's Strategic Decision to Introduce During Sentencing Mr. Honie's Confession to Dr. Cohn Was Not Objectively Unreasonable

¶71 Mr. Honie next argues that trial counsel was ineffective for introducing, during sentencing, Mr. Honie's confession to Dr. Cohn that he had molested D.R. on the night of the murder. Specifically, Mr. Honie argues that trial counsel was ineffective for introducing his confession without first investigating claims that D.R.'s father, and not Mr. Honie, had molested her. We hold that trial counsel's performance was not objectively unreasonable.

¶72 As discussed above, trial counsel's decision to admit potentially damaging statements during trial in an attempt to demonstrate a defendant's remorse is a legitimate trial strategy. *See*

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[10] Because we find that trial counsel did not render objectively unreasonable performance, we need not determine whether Mr. Honie was prejudiced by the admission of his inculpatory statements. But we note that, in order to establish prejudice, Mr. Honie would need to show that he could have prevented the State from introducing the statements.

supra ¶¶ 63–70. So long as trial counsel uses such statements to further his client's interests, we will not question a valid strategic choice. This is especially true when the challenged statements are double-edged, containing both inculpatory and exculpatory elements. The decision whether to admit such statements is an inherently strategic discretion.

¶73 Trial counsel's decision to admit Mr. Honie's confession to Dr. Cohn falls within this category of legitimate trial strategy. During the sentencing phase, trial counsel presented evidence of Mr. Honie's remorse. Specifically, Dr. Cohn testified about Mr. Honie's expressions of remorse, such as the fact that Mr. Honie began crying when he admitted to her that he had molested D.R. Because trial counsel admitted Mr. Honie's confession to Dr. Cohn as part of a legitimate trial strategy in an attempt to highlight Mr. Honie's feelings of remorse, we hold that trial counsel's actions were not objectively unreasonable.

¶74 Accordingly, we conclude that Mr. Honie has failed to demonstrate unreasonable performance under *Strickland* concerning trial counsel's decision to admit Mr. Honie's confession to Dr. Cohn.[11] We therefore affirm the postconviction court's grant of summary judgment on this issue.

F. Trial Counsel's Advice to Waive Jury Sentencing Did Not Constitute Ineffective Assistance of Counsel

¶75 Mr. Honie asserts trial counsel improperly advised him to waive his right to a jury at sentencing and that his waiver was not knowing and voluntary. Specifically, Mr. Honie argues that the colloquy with trial counsel and the court was inadequate in that it failed to make clear that Mr. Honie had a right to be sentenced by an impartial jury, failed to clarify that the jurors would be required to weigh the aggravating and mitigating factors, and failed to ensure that Mr. Honie understood what mitigating and aggravating factors were. Further, Mr. Honie claims that he changed his mind and wanted to withdraw his waiver prior to trial, but was told by

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[11] Though we need not reach the issue of whether Mr. Honie demonstrated that he was prejudiced by counsel's strategic decision, we note that the trial court was prepared to find that Mr. Honie molested D.R., even without Mr. Honie's confession. As such, Mr. Honie cannot demonstrate that, but for trial counsel's decision to introduce his inculpatory statements, the court would not have found that Mr. Honie molested D.R.

counsel that it was too late. First, we hold that trial counsel's advice to waive a jury at sentencing was not objectively unreasonable under the first prong of *Strickland.* Second, even if trial counsel's failure to move to withdraw Mr. Honie's waiver constituted deficient performance, we hold Mr. Honie was not prejudiced under the second prong of *Strickland*.

¶76 We begin our analysis with the strong presumption that trial counsel acted competently. *See Strickland*, 466 U.S. at 689. If counsel had a reasonable basis for advising a client to waive a jury at sentencing, we will not second-guess that strategic decision. *See Wiggins*, 539 U.S. at 523 (indicating that counsel's strategic choices made following a thorough review of the relevant facts and law surrounding the issue "are virtually unchallengeable" (internal quotation marks omitted)). We previously have held that counsel may reasonably presume that a trial judge "will apply the law justly and make an impartial decision in both the guilt and penalty phases of a capital trial." *Taylor v. Warden*, 905 P.2d 277, 284 (Utah 1995). Similarly, it is reasonable for counsel to presume that a judge "will disregard any personal beliefs and discharge his or her duty to apply the law." *Id.* "Indeed, absent specific allegations of personal bias, we cannot conceive of any situation in which choosing a judge over a jury would not constitute a legitimate tactical decision." *Id.*

¶77 In *Taylor*, the defendant claimed his counsel was deficient in advising him to waive a jury at both the guilt and sentencing phases of his capital trial. *Id.* Mr. Taylor was convicted of capital homicide and sentenced to death for sexually assaulting an eleven-year-old girl and strangling her with a telephone cord. *Id.* at 281. We rejected Mr. Taylor's ineffective assistance claim in part because we thought it reasonable for counsel to prefer a trained jurist to a lay jury when the crime was particularly gruesome. *Id.* at 288 ("Taylor had very little going for him in the penalty phase, and the determination that his chances were better with a judge than a jury was perfectly plausible.").

¶78 Mr. Honie was charged with a particularly gruesome crime. Though there is no need to reiterate the details of that crime again here, the jury was confronted with those details during the State's case-in-chief. It was not unreasonable for trial counsel to conclude, in light of the overwhelming evidence of Mr. Honie's guilt and the gruesome nature of the crime itself, that Mr. Honie would fare better at sentencing with a judge than with a jury. Moreover, during the April 30, 1999 scheduling conference in which Mr. Honie waived his right to a jury, the trial judge specified that imposing the

death penalty was "the last thing a judge would want to do." The judge acknowledged that, although he was not philosophically opposed to the death penalty, he would only impose it if the facts and circumstances of the case warranted it. Particularly in light of the trial judge's statements on the record, we cannot fault counsel's advice to waive jury sentencing in favor of sentencing by the trial judge.

¶79 Mr. Honie's second claim relating to his waiver of jury sentencing is that his waiver was not knowing and voluntary. Specifically, Mr. Honie claims he was never informed of his right to an impartial jury, was never informed that the jury would be required to weigh the aggravating and mitigating factors, and was never properly instructed as to what aggravating and mitigating factors actually are. The State correctly notes that Mr. Honie's claim that he was not notified regarding his right to an impartial jury and the use of aggravating and mitigating factors is not relevant to his choice between a judge and a jury in terms of sentencing. With either a judge or jury at sentencing, Mr. Honie was guaranteed the right to an impartial sentencer who would weigh the aggravating and mitigating factors.

¶80 The relevant consideration in Mr. Honie's decision to waive jury sentencing was the difference between a single judge and a twelve-person jury. And this difference was described to Mr. Honie during the April 30, 1999 hearing. The trial judge specifically asked whether Mr. Honie understood that he was reducing his chances of convincing a person to vote against the death penalty from "12 [sic] down to one." Thus, the relevant distinction between sentencing by a jury or a judge was explained to Mr. Honie and he affirmed to the court that he understood the distinction and wanted to proceed with the judge at sentencing. We cannot say, on this record, that Mr. Honie's waiver was not knowing and voluntary.

¶81 Finally, Mr. Honie argues that trial counsel rendered ineffective assistance when he failed to move to withdraw Mr. Honie's waiver as requested. According to Mr. Honie, a week after he submitted his jury waiver, he told trial counsel that he had changed his mind and wanted to withdraw the waiver. But trial counsel told Mr. Honie it was too late, even though trial was still a week away. The only record evidence of Mr. Honie's desire to withdraw the waiver is his statement that he told trial counsel he had changed his mind. Because this case comes before us on appeal from a grant of summary judgment, we assume that Mr. Honie did,

in fact, attempt to withdraw his waiver. We need not decide if trial counsel's failure to move to withdraw Mr. Honie's waiver amounts to ineffective assistance of counsel because, even if trial counsel's performance was objectively unreasonable, Mr. Honie cannot show that he was prejudiced. We have previously recognized that the decision to waive a jury is inherently strategic because a defendant will often fare better with a trained jurist than a lay jury, especially when the crime is particularly heinous. *Taylor*, 905 P.2d at 284 ("[A]bsent specific allegations of personal bias, we cannot conceive of any situation in which choosing a judge over a jury would not constitute a legitimate tactical decision."). Mr. Honie has offered no evidence tending to establish that the outcome of his sentencing would have been different had he opted for jury sentencing. Because Mr. Honie has failed to satisfy the prejudice prong of *Strickland*, we affirm the postconviction court's ruling.

¶82 In summary, we hold that Mr. Honie failed to raise a genuine issue of material fact for each of his ineffective assistance of counsel claims, namely: (1) trial counsel's decision to adopt a concession strategy rather than focusing on other potential defenses or mitigating factors, (2) trial counsel's decision not to investigate or pursue a voluntary intoxication defense, (3) trial counsel's failure to object to the destruction of evidence of Mr. Honie's intoxication the night of the murder, (4) trial counsel's failure to suppress Mr. Honie's inculpatory statements to police, (5) trial counsel's introduction of Mr. Honie's inculpatory statements to Dr. Cohn concerning the molestation of one of the children present the night of the murder, and (6) trial counsel's failure to properly advise Mr. Honie of his right to have a jury determine his sentence. We therefore affirm the postconviction court's grant of summary judgment for the State on each of these issues.

II. THE POSTCONVICTION COURT DID NOT ERR WHEN IT DENIED MR. HONIE'S REQUEST FOR ADDITIONAL FUNDS

¶83 Mr. Honie next argues that the postconviction court erred when it denied him additional funding to develop his ineffective assistance of trial counsel claims. Prior to 2008, the PCRA set an absolute limit on funding for litigation costs in a capital postconviction case of $20,000. UTAH CODE § 78-35a-202(2)(c) (2004); UTAH ADMIN. CODE r. 25-14-5 (2004). In 2008, the Legislature amended the statute to allow for additional funding beyond the $20,000 cap "upon a showing of good cause." *Id.* § 78B-9-202(3)(c). The statute provides that, when considering "whether good cause

exists to exceed" the $20,000 limit, the court shall consider:

> (i) the extent to which the work done to date and the further work identified by the petitioner duplicates work and investigation performed during the criminal case under review; and
>
> (ii) whether the petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will support postconviction relief.

Id. § 78B-9-202(3)(e).

¶84 Shortly after the amendment went into effect, the parties in this case submitted briefing on the issue of whether the amendment applied retroactively to allow Mr. Honie to petition for additional funding. On November 28, 2008, the postconviction court issued a memorandum decision ruling that the 2008 amendment to the PCRA applied retroactively[12] and that Mr. Honie was thus "entitled to seek payment . . . for all work completed and litigation expenses incurred prior to the [amendment's] affective date for which payment had not yet been received." Mr. Honie subsequently filed two motions—one in April 2009 and one in May 2009—requesting that the postconviction court "approve the payment of both past and future litigation expense beyond the statutory cap." In his April 9, 2009 motion, Mr. Honie asked the postconviction court to approve payment for work that his postconviction expert, Mr. Whitman, had already performed. In his May 2009 request, Mr. Honie asked for additional funding to allow for continued investigation and litigation regarding the adequacy of trial counsel's mitigation investigation.

¶85 The postconviction court denied both of Mr. Honie's requests for additional funding. In its memorandum decision, the court explained that Mr. Honie was required, but had failed, to show that the work Mr. Whitman had already done and the future work that he and other experts planned to do were "reasonably likely to develop evidence or legal arguments in support of [Mr. Honie's]

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[12] Because neither party has challenged on appeal the postconviction court's ruling that the 2008 amendment to the PCRA applied retroactively, we need not review whether that determination was correct. We merely assume for purposes of this appeal that the 2008 amendment did apply to Mr. Honie's funding requests.

claim that trial counsel was ineffective in conducting the mitigation investigation and presenting the mitigation case during trial." Although Mr. Honie had shown that his postconviction mitigation investigators and experts would have followed a *different* mitigation strategy than that of trial counsel, Mr. Honie had failed to show how the additional funding would support his argument that trial counsel's mitigation investigation and counsel's presentation of Mr. Honie's mitigation case were ineffective. In the postconviction court's view, Mr. Honie had not and could not "demonstrate good cause to exceed the maximum sums authorized for litigation expenses under the PCRA."

¶86 We agree with the postconviction court that Mr. Honie failed to show good cause to increase his postconviction funding beyond the $20,000 statutory limit. Where the only issue raised was whether trial counsel had provided ineffective assistance in its mitigation investigation and presentation of Mr. Honie's mitigation case, Mr. Honie was required to show how the additional funding would have likely supported that claim. But Mr. Honie's requests for additional funding merely described that the requested funding would be used to conduct a different mitigation investigation. And because there is a "wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), simply showing "that some different strategy or procedure might have brought about a better result . . . . is not sufficient to sustain a claim of ineffective assistance of counsel," *Opie v. Meacham*, 419 F.2d 465, 467 (10th Cir. 1969). Because Mr. Honie failed to show good cause, we hold that the postconviction court correctly denied Mr. Honie's requests for additional funding.

III. THE POSTCONVICTION COURT DID NOT ERR WHEN IT DENIED MR. HONIE'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6)

¶87 Finally, Mr. Honie argues that the postconviction court abused its discretion by denying his rule 60(b)(6) motion. Under rule 60(b) of the Utah Rules of Civil Procedure, a district court may set aside a final judgment for reasons such as mistake, newly discovered evidence, or fraud. Where none of rule 60(b)'s enumerated errors are present, a party may seek relief from final judgment under a catch-all provision, which provides that a party may be relieved from a final judgment for "any other reason justifying relief from the operation of the judgment." UTAH R. CIV. P. 60(b)(6).

¶88 Here, Mr. Honie filed a rule 60(b)(6) motion following the district court's order denying his petition for postconviction relief. The basis for his rule 60(b)(6) claim was that his postconviction counsel had been rendered ineffective by the district court's denial of his request for additional funding. Mr. Honie also asserted that the PCRA provision rejecting a right to effective assistance of postconviction counsel violates both the Utah and federal constitutions. *See* UTAH CODE § 78B-9-202(4) (explaining that "[n]othing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective"). In essence, Mr. Honie argued that his postconviction judgment should be set aside because he had a constitutionally protected right to the effective assistance of postconviction counsel—despite the language of the PCRA saying otherwise—and because he was deprived of that right when his postconviction counsel was denied the additional funding necessary to effectively represent him.

¶89 On February 9, 2012, the postconviction court issued its order denying Mr. Honie's rule 60(b)(6) motion. The postconviction court did not reach the constitutional issue, but instead held that regardless of whether a right to effective assistance of postconviction counsel exists, under the *Strickland* standard, Mr. Honie's postconviction counsel was not rendered ineffective by limited investigatory funding.

¶90 We affirm the postconviction court's ruling, but we do so on the alternative ground that a rule 60(b)(6) motion is not an appropriate vehicle for bringing a claim of ineffective assistance of postconviction counsel under the facts of this case. In *Menzies v. Galetka*, we reversed the denial of a postconviction rule 60(b)(6) motion where postconviction counsel behaved in such a grossly negligent manner that the defendant was essentially deprived of postconviction review at both the district court and on appeal. 2006 UT 81, 150 P.3d 480. In *Menzies*, postconviction counsel "willfully disregarded nearly every aspect of Menzies' case," and therefore "defaulted Menzies' entire post-conviction proceeding, resulting in the dismissal of Menzies' case." *Id.* ¶¶ 1, 24. And although Menzies' postconviction counsel timely filed a notice of appeal, he later failed to file a docketing statement, resulting in the dismissal of Menzies' appeal. *Id.* ¶ 39. Because postconviction counsel's egregious behavior not only led to the dismissal of Menzies' case at the district court, but also deprived him of appellate review, we held

that the case rose to the level of "unusual and exceptional circumstances" necessary to allow for rule 60(b)(6) relief. *Id.* ¶¶ 71–77.

¶91 Our subsequent cases have essentially limited *Menzies* to its facts. For example, in *Archuleta v. Galetka*, we held that only where an ineffective assistance of counsel claim rises to the level of "willful and deliberate" inaction or gross negligence, will a rule 60(b)(6) motion be appropriate. 2011 UT 73, ¶ 166 & n.14, 267 P.3d 232. Similarly, in *Kell v. State*, we discussed the limited scope of our holding in *Menzies* and concluded that rule 60(b)(6) relief is most common when a deficiency in either representation or notice precluded appellate review. 2012 UT 25, ¶ 18, 285 P.3d 1133. Unlike the defendant in *Menzies*, the defendant in *Kell* had "moved to set aside a [postconviction] judgment that had been heard, ruled on, and appealed." *Id.* ¶ 20. As a result, we held that *Menzies* was not controlling and affirmed the district court's denial of Kell's 60(b)(6) motion. *Id.*

¶92 Like the defendant in *Kell*, Mr. Honie is seeking to set aside a postconviction judgment that has been heard, ruled on, and appealed. And as with the alleged deficiencies of counsel's performance in *Kell*, the claimed deficiencies of Mr. Honie's counsel did not result in a dismissal of Mr. Honie's postconviction case or in a waiver of his right to appellate review. Although the denial of additional funding may have limited the scope of postconviction counsel's investigation, such limitation did not amount to a complete default of counsel's obligations. We thus reiterate that, short of a complete default in representation, a rule 60(b)(6) motion is an inappropriate vehicle for bringing a claim of ineffective assistance of postconviction counsel. Because Mr. Honie's claims of ineffective assistance of postconviction counsel do not rise to the level of a complete default, we affirm the postconviction court's denial of his rule 60(b)(6) motion.[13]

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[13] Mr. Honie's argument concerning postconviction counsel's ineffectiveness is unpersuasive for an additional reason. Mr. Honie relies solely on the contention that postconviction counsel was rendered ineffective because of the denial of additional funds that would have enabled counsel to further investigate Mr. Honie's ineffective assistance of trial counsel claims. Yet, as explained above, *supra* ¶¶ 83–86, an award of funds would have been inappropriate (continued...)

CONCLUSION

¶93 We hold that Mr. Honie has failed to raise a genuine issue of material fact as to his ineffective assistance of counsel claims and that the postconviction court was correct in denying Mr. Honie additional funds. In addition, we hold that the postconviction court did not err when it denied Mr. Honie's rule 60(b)(6) motion. Accordingly, we affirm the postconviction court's grant of summary judgment on all claims.

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[13] (...continued)
because, as a matter of law, Mr. Honie cannot show that trial counsel was ineffective. Therefore, even if a rule 60(b) motion were an appropriate vehicle for these claims, Mr. Honie's contentions concerning postconviction counsel's ineffectiveness fail.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

TABERON DAVE HONIE, Petitioner, v. LARRY BENZON, Warden, Utah State Prison, Respondent.	MEMORANDUM DECISION AND ORDER Case No. 2:07-CV-628 JAR Judge Julie A. Robinson

Petitioner Taberon Dave Honie, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, has filed a motion to alter or amend the judgment entered on June 12, 2019. ECF No. 135. Honie asks for reconsideration of two claims in his federal petition: that trial counsel had and neglected constitutional obligations to consult with Honie, first, about the guilt-concession trial strategy (claim 1, partial); and second, about admission at the penalty phase of evidence of Honie's confession to child sex abuse (claim 4, partial). ECF No. 136 at 2, 7. Honie argues that the court's memorandum decision denying habeas relief (ECF No. 135) overlooked and therefore "committed clear error" in denying these partial claims. ECF No. 136 at 2.

I. LEGAL STANDARD

Pursuant to Rule 59(e), the court may alter or amend a judgment it has entered if there is "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp v. Samson Res. Corp.*, 57 F.3d

924, 948 (10th Cir. 1995)). Mr. Honie submits that relief pursuant to Rule 59(e) is appropriate here because the court committed clear error in its denial of Claims 1 and 4. A Rule 59(e) motion is "appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* "It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id. (citing Van Skiver v. United States,* 952 F.2d 1241, 1243 (10th Cir. 1991)).

II. ANALYSIS

A. Claim 1

In Claim 1 of his amended petition, Mr. Honie argued (1) that trial counsel was ineffective for failing to conduct a reasonable investigation into a viable trial defense of voluntary intoxication prior to conceding guilt to aggravated murder; and (2) that trial counsel was ineffective for failing to consult with Honie about the decision to proceed to trial on a concession of guilt theory. Honie argues that this court did not address the second aspect of this claim.

This court, however, did not overlook the second portion of claim 1. The court's memorandum decision described the claim it was reviewing as follows: "Honie asserts that trial counsel was ineffective for deciding to concede Honie's guilt early in the case, prior to investigating a viable defense of voluntary intoxication under Utah law, *and for failing to consult with Honie about his decision to proceed to trial on the concession-of-guilt theory*." ECF No. 135 at 8 (emphasis added). This court had considered the entire claim, including the lack-of-consultation allegation, when it disposed of claim 1.

This court reviewed all the evidence before the Utah Supreme Court regarding Honie's level of intoxication. This court then found that the Utah court reasonably concluded that a voluntary intoxication defense would not undermine mens rea because "Honie had not pointed to any evidence," indeed "still has not proffered any evidence that he did not know that he was killing a person." ECF No. 135 at 13. This court held that without that evidence, Mr. Honie cannot overcome the strong presumption that trial counsel properly ruled out a voluntary intoxication defense. Under *Strickland's* deferential standard and its "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" (*Strickland*, at 689), Honie has not shown "beyond any possibility for fairminded disagreement" that trial counsel were deficient when they omitted a voluntary intoxication defense or that the omission undermines confidence in the outcome.

With regard to the second portion of claim 1, Mr. Honie relies on *Florida v. Nixon*, 543 U.S. 175 (2004), in arguing that trial counsel was under a duty to consult with Mr. Honie regarding his trial strategy, especially when that strategy was to expressly concede that Mr. Honie was guilty of Aggravated Murder. *Nixon*, however, stands for the opposite proposition: "When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Id.* at 192.

Honie has failed to provide any evidence that his defense counsel proceeded forward with a concession-of-guilt theory without his explicit consent. Honie has pointed to no evidence in the State court record or in any other previous proceedings that his counsel proceeded without consulting him about the strategy on which the trial defense counsel built their case. Honie has also provided no evidence that he objected to this strategy.

Additionally, Honie has not shown that counsel decided to proceed in spite of his objections because Honie had no competing viable defenses to choose between, since the voluntary intoxication theory was not viable.

Mr. Honie argues in this motion that "the state post-conviction court found that counsel did not consult with [Mr. Honie] prior to conceding his guilt." ECF No. 141 at 5. In his petition, Honie has also argued that the district court ruled "that trial counsel's concession strategy *was not appropriate*" because it was not clear that he explained his concession strategy to Honie. ECF No. 121 at 94. But as the Respondent correctly notes, these arguments rest on a mischaracterization of the state court record. The state post-conviction court did not, as Honie implies, *find* that trial counsel deficiently failed to consult with Honie. *See* ECF No. 136 at 4 (stating that the Utah Supreme Court "ignored the post-conviction court's findings"). Rather, the state post-conviction court made no finding, instead resolving the claim on prejudice. And the Utah Supreme Court disregarded the comment because, in the absence of evidence, no finding could be made on it and counsel was strongly presumed to have complied with his constitutional obligation. And to the extent it was "unclear" what advice counsel gave Honie, it was only unclear because Honie failed to proffer evidence as was his burden. *See Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.").

Finally, Mr. Honie's reliance on *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510 (2018), is misplaced. *McCoy* held that trial counsel may not admit guilt at trial, no matter how well-advised that strategy, "over the client's intransigent objection to that admission." Mr. Honie has not presented any evidence that (1) he objected to the concession-of-guilt strategy or (2)

counsel did not explain that strategy to him in the first place. It should also be noted that Honie has not even alleged, much less demonstrated, that *McCoy* would be retroactive under *Teague v. Lane*, 489 U.S. 288 (1989).

B. Claim 4

In Claim 4 of his petition, Mr. Honie argued that trial counsel was ineffective for failing to investigate evidence of aggravated sexual abuse of a child (D.R.), and for introducing alleged admissions by Mr. Honie related to this charge during the penalty phase, despite the fact that the jury did not find this as an aggravating circumstance during the guilt phase of the trial, and despite the fact that Mr. Honie denied he was guilty of this charge. ECF No. 121 at 140-43. As part of this claim, Mr. Honie argued that "[t]rial counsel was ineffective for failing to consult with Mr. Honie about this allegation before admitting his alleged statement during the penalty phase." ECF No. 121 at 140-43.

In his motion to alter or amend, Mr. Honie asserts that this court did not address the second aspect of this claim, that trial counsel failed to consult with Mr. Honie regarding the admission of this aggravating circumstances during the penalty phase of his trial. ECF No. 136 at 7. The problem with this assertion is that the court did address, and reject, the second aspect of claim 4.

The court first stated that Honie "has not even argued that there would be a reasonable probability of a more favorable sentencing outcome without the sexual abuse aggravating circumstance." ECF No. 135 at 42. Trial counsel presented the sex abuse evidence to show Honie's remorse. Honie's failure to allege prejudice from that evidence is fatal to any challenge to the inclusion of the evidence at sentencing. And the evidence was clearly not prejudicial because "the sentencing court 'was prepared to find' independent of his admission that he

molested D.R.," and because fairminded jurists could agree that counsel's decision to use the remorse evidence was reasonable. *Id.* Even in this motion, the only prejudice that Honie has come up with is the claim that "had trial counsel consulted with Mr. Honie about this, as he was required to do, Mr. Honie would have vehemently opposed [] this concession at sentencing." ECF No. 136 at 9.

Honie cites *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), for the proposition that counsel's admission of guilt over the client's objection is structural error, and that this court's failure to apply *McCoy* to this aspect of the claim constitutes clear error. However, Honie relies on *McCoy* without establishing the critical factual predicate that he intransigently objected to trial counsel's use of the molestation evidence. And as Respondent points out, "*McCoy* was not about 'opportunity to object,' which is Honie's specific complaint, it was about intransigent objections which Honie waited 11 years to make." ECF No. 140 at 8. And as noted above, Honie has not even alleged, much less demonstrated, that *McCoy* would be retroactive under *Teague v. Lane*, 489 U.S. 288 (1989).

This court held, "Honie's argument that his counsel should have questioned him about whether he actually molested Dakota also fails to overcome the double deference standard." ECF. No. 135 at 42. "Counsel knew that Honie admitted to the defense expert that he sexually abused D.R. Honie says that counsel should have asked him whether that was true, but he does not explain why he did not tell counsel that it was not true. In fact, Honie waited 11 years to challenge Dr. Cohn's sworn testimony about his tearful admission." *Id.* Honie has never suggested any reason counsel should have doubted Dr. Cohn's testimony under those circumstances. Under *Strickland*, the reasonableness of counsel's investigation "depends critically" on the information that the client provides. 466 U.S. at 691.

III. CONCLUSION

For the above reasons, the court hereby DENIES Respondent's Motion to Alter or Amend (ECF No. 136). The court also DENIES Mr. Honie's request, in the alternative, that the court grant certificates of appealability on Claims 1 and 4.

SO ORDERED this __8th___ day of October, 2019.

BY THE COURT:

s/ Julie A. Robinson__
Judge Julie Robinson
United States District Judge

APPENDIX E

FILED
United States Court of Appeals
Tenth Circuit

April 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TABERON DAVE HONIE,

Petitioner - Appellant,

v.

ROBERT POWELL, Warden, Utah State Prison,

Respondent - Appellee.

No. 19-4158
(D.C. No. 2:07-CV-00628-JAR-EJF)
(D. Utah)

ORDER

Before **HOLMES**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

CRIMINAL PROSECUTIONS

Coverage

Criminal prosecutions in the District of Columbia [1] and in incorporated territories [2] must conform to this Amendment, but those in the unincorporated territories need not do so. [3] In upholding a trial before a United States consul of a United States citizen for a crime committed within the jurisdiction of a foreign nation, the Court specifically held that this Amendment reached only citizens and others within the United States or who were brought to the United States for trial for alleged offenses committed elsewhere, and not to citizens residing or temporarily sojourning abroad. [4] It is clear that this holding no longer is supportable after *Reid v. Covert*, [5] but it is not clear what the constitutional rule is. All of the

[1] Callan v. Wilson, 127 U.S. 540 (1888).

[2] Reynolds v. United States, 98 U.S. 145 (1879). *See also* Lovato v. New Mexico, 242 U.S. 199 (1916).

[3] Balzac v. Puerto Rico, 258 U.S. 298, 304–05 (1922); Dorr v. United States, 195 U.S. 138 (1904). These holdings are, of course, merely one element of the doctrine of the Insular Cases, De Lima v. Bidwell, 182 U.S. 1 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901), concerned with the "Constitution and the Advance of the Flag," supra. *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

[4] In re Ross, 140 U.S. 453 (1891).

[5] 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in time of peace for capital offenses committed abroad). Four Justices, Black, Douglas, Brennan, and Chief Justice Warren, disapproved *Ross* as "resting . . . on a fundamental misconception" that the Constitution did not limit the actions of the United States Government wherever it acted, id. at 5–6, 10–12, and evinced some doubt with regard to the *Insular Cases* as well. Id. at 12–14. Justices Frankfurter and Harlan, concur-

APPENDIX G

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts [Statutory Text & Notes of Decisions subdivisions I to XIV]

Effective: April 24, 1996
Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in multiple documents.>

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX H

1998 Utah Code Ann. § 76-3-207

1998 Utah Code Archive

UTAH CODE ANNOTATED > TITLE 76. CRIMINAL CODE > CHAPTER 3. PUNISHMENTS > PART 2. SENTENCING

§ 76-3-207. Capital felony -- Sentencing proceeding

(1) (a) When a defendant has pled guilty to or been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of sentence.

(b) In the case of a plea of guilty to a capital felony, the sentencing proceedings shall be conducted before a jury or, upon request of the defendant and with the approval of the court and the consent of the prosecution, by the court which accepted the plea.

(c)

(i) When a defendant has been found guilty of a capital felony, the proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury with the approval of the court and the consent of the prosecution, in which event the hearing shall be before the court.

(ii) If, however, circumstances make it impossible or impractical to reconvene the same jury for the sentencing proceedings, the court may dismiss that jury and convene a new jury for the proceedings.

(d) If a retrial of the sentencing proceedings is necessary as a consequence of a remand from an appellate court, the sentencing authority shall be determined as provided in Subsection (5).

(2) (a) In capital sentencing proceedings, evidence may be presented on:

(i) the nature and circumstances of the crime;

(ii) the defendant's character, background, history, mental and physical condition;

(iii) the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims; and

(iv) any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence.

(b) Any evidence the court considers to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against the sentence of death.

(3) Aggravating circumstances include those outlined in Section 76-5-202. Mitigating circumstances include:

(a) the defendant has no significant history of prior criminal activity;

(b) the homicide was committed while the defendant was under the influence of mental or emotional disturbance;

(c) the defendant acted under duress or under the domination of another person;

(d) at the time of the homicide, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease, intoxication, or influence of drugs;

(e) the youth of the defendant at the time of the crime;

(f) the defendant was an accomplice in the homicide committed by another person and the defendant's participation was relatively minor; and

(g) any other fact in mitigation of the penalty.

(4) (a) The court or jury, as the case may be, shall retire to consider the penalty. Except as provided in Subsection 76-3-207.5(2), in all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous decision for death and that the penalty of either life in prison or life in prison without parole, shall be imposed if a unanimous decision for death is not found.

(b) The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death.

(c) If the jury is unable to reach a unanimous decision imposing the sentence of death, except as provided in Subsection 76-3-207.5(2), the jury shall then determine whether the penalty of life in prison without parole shall be imposed. The penalty of life in prison without parole shall only be imposed if the jury determines that the sentence of life in prison without parole is appropriate. If the jury reports agreement by ten jurors or more to impose the sentence of life in prison without parole, the court shall discharge the jury and shall impose the sentence of life in prison without parole. If ten jurors or more do not agree upon a sentence of life in prison without parole, the court shall discharge the jury and impose the sentence of life imprisonment with the possibility of parole.

(d) If the defendant waives hearing before the jury as to sentencing, with the approval of the court and the consent of the prosecution, the court shall determine the appropriate penalty according to the standards of this subsection.

(5) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court for new sentencing proceedings to the extent necessary to correct the error or errors. No error in the sentencing proceedings shall result in the reversal of the conviction of a capital felony. In cases of remand for new sentencing proceedings, all exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing proceedings shall be admissible in the new sentencing proceedings, and if the sentencing proceeding was before a:

(a) jury, a new jury shall be impaneled for the new sentencing proceeding unless the defendant waives the hearing before the jury with the approval of the court and the consent of the prosecution, in which case the proceeding shall be held according to Subsection (5)(b) or (c), as applicable;

(b) judge, the original trial judge shall conduct the new sentencing proceeding; or

(c) judge, and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding, and the new proceeding will be before a jury unless the defendant waives the hearing before the jury with the approval of the court and the consent of the prosecution.

(6) In the event the death penalty is held to be unconstitutional by the Utah Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause the person to be brought before the court, and the court shall sentence the person to life in prison, if the death penalty is held unconstitutional prior to April 27, 1992, or life in prison without parole if the death penalty is held unconstitutional on or after April 27, 1992, and any person who is thereafter convicted of a capital felony shall be sentenced to life in prison or life in prison without parole.

History

C. 1953, 76-3-207, enacted by L. 1973, ch. 196, § 76-3-207; 1982, ch. 19, § 1; 1991, ch. 10, § 6; 1992, ch. 142, § 3; 1995, ch. 352, § 5; 1997, ch. 286, § 1; 1998, ch. 137, § 1.

1998 Utah Code Ann. § 76-3-207

End of Document

APPENDIX I

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

TABERONE DAVE HONIE, Petitioner, v. CLINT S. FRIEL, Warden of the Utah State Prison, Respondent.	:	AFFIDAVIT OF TABERONE DAVE HONIE Case No. 030500157 Judge Westfall

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

COMES NOW, TABERONE DAVE HONIE, who upon oath, deposes and states as follows:

1. I am the Petitioner in the in this matter.

2. During interviews with my trial counsel, with his investigator and with Dr. Cohn, I provided the following information concerning my alcohol and drug consumption between 8:00 a.m. on June 10, 1998 and the time of my arrest on June 11, 1998:

a. At approximately 8:00 a. m. on my way to the Work Force Services in Cedar City, Utah, a man named Eric who I had worked with a Work Force picked

me up and we went to a Maverick gag station where I purchased an 18-pack of Budweiser beer in cans.

b. We finished the 18-pack at about 11:00 a.m. and went to Eric's trailer house where Eric's wife fixed me a cup of tea. Between 12:00 and 1:00 p.m., we drove back to the Maverick store where Eric purchased another 18-pack of Budweiser. We had Eric's three children with us on this trip.

c. We then went to the home of a man named Diamond who Eric knew from work. Eric's brother Albert was there as well. I continued to drink beer while at Diamonds' house.

d. Albert then produced and offered marijuana to those present. I smoked four to five bowls of marijuana while at Diamonds.

e. After about 30 minutes at Diamonds, Eric drove me to the liquor store where I purchased two ½ pint bottles of Everclear and one ½ pint of Jack Daniels whiskey.

f. We went back to Diamonds where Eric and I hung out outside the trailer with Diamond and Albert. Albert and I continued to drink beer and whiskey and smoke marijuana.

g. A friend of Diamond's, a Navajo man named Gene, came be and someone brought out some meth. I snorted two lines of meth smoked meth once.

h. Eric Gene and I and the children left Diamond's trailer and Gene and I were

dropped off at my girlfriend Shilo's house. Shilo was not at home. Gene and I walked to the store and bought another 18-pack of beer. We returned to Shilo's where we drank beer and watched T.V. I drank beer with Everclear in it.

i. I then went to the Sportsman Tavern. I purchased a pitcher of beer and then was asked to leave by the bartender and a bouncer. I chugged the pitcher and left the bar.

j. I went across the street to the apartment where there was a white guy that I had purchased marjjuana from before. I do not recall what happened there, but I was told afterward that I smoked some "Sherm" (PCP), and was given money to go purchase more marijuana. According to the white man, when I did not return, he found me passed out on the lawn at Shilo's trailer.

3. I do not remember the police advising me of any rights. My mind was not clear until the morning of June 12, 1998.

4. Mr. McCaughey told me it was an open and shut case.

5. During the preliminary hearing, the prosecutor showed the judge and McCaughey some photos. One in particular showed the victim with her throat slashed. McCaughey and the prosecutor joked about having it admitted into evidence. The photo was not admitted but the judge saw it as well as other photos which were not admitted into evidence at the trial.

6. I was shown the photograph and told Mr. McCaughey, "if that is what I did, I should

plead guilty." I never told Mr. McCaughey that I wanted to plead guilty, although Mr. McCaughey did tell me he was not worried about guilt, that most of the defense work would be done on mitigation.

7. I did not understand what the term "mitigation" meant or what aggravators and mitigators were or what the process would be. I did not understand nor was I told what was gong on during my trial.

8. McCaughey told me that it would be a good thing to waive the jury as the judge was young and likely to go for a life without parole sentence.

9. The investigator said the same thing and that this was the judge's first death penalty trial.

10. McCaughey told me that it would have to be my decision to waive the jury.

11. Nobody on the defense team explained to me what would be the jury's role in sentencing and what was necessary for a death penalty sentence but encouraged me to go with the judge.

12. Based upon the advice of my counsel, I waived the jury.

13. After I returned to custody after waiving the jury, a "jailhouse lawyer" told me that I had made a mistake and that all I needed was one juror to hold out and I would get life without parole.

14. The next time I saw Mr. McCaughey, about one week later, I ask him to withdraw the waiver. He told me it was too late.

15. If I had understood the differences between a judge determination and a jury determination, I would have gone with the jury in the penalty phase and not waived the jury.

Dated this 11th day of March, 2005.

Taberone Honie

TABERONE DAVE HONIE
Petitioner/Affiant

SUBSCRIBED AND SWORN to before me, a Notary Public, this 11th day of March, 2005.

NOTARY PUBLIC

MICHAEL D ESPLIN
Notary Public
State of Utah
My Commission Expires July 30, 2005
43 East 200 North, Provo UT 84606

APPENDIX J

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR IRON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	
VS.	CASE NO. 981500662
TABERONE DAVE HONIE, Defendant.	

BEFORE THE HONORABLE ROBERT T. BRAITHWAITE

FIFTH DISTRICT COURT

CEDAR CITY HALL OF JUSTICE

40 North 100 East

Cedar City, Utah 84720

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SCHEDULING CONFERENCE

APRIL 30, 1999

ORIGINAL

REPORTED BY: Russel D. Morgan

990497-SC

602

APPEARANCES

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

STEPHEN McCAUGHEY
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JAMES M. PARK
KEITH BARNES
PARK, PARK & BARNES
141 NORTH MAIN, #200
CEDAR CITY, UTAH 84720

up this in case. I am not saying that, but that's the answer I gave then. I don't have a philosophical opposition to the death penalty. That's not what I would want to do, but I would do it if it's appropriate.

MR. BURNS: Sufficient for the state.

THE COURT: We'll be in recess until 10 o'clock.

(Whereupon, a brief recess was taken.)

THE COURT: We'll go back on the record with State vs. Taberone Honie. And have you had a chance -- we talked a little bit in chambers. But I assume you have had a chance to talk with your client about the waiver?

MR. McCAUGHEY: I have, Your Honor. I was just sort of waiting on you. And then if I could have a couple more minutes with him? But, yeah, we have gone over that.

THE COURT: Okay. Let me just run one more idea by counsel. I am not sure that we'll shorten things. Won't even, if I think this way, even if I approve the change, won't there -- if there is a conviction, won't there still be the need for the same witnesses, whether it's the judge determining the penalty after hearing -- not as the trier of fact, but

having been in the courtroom and having heard all the testimony, won't it be the same procedure, the same length as if the jury who has been present during the presentation of the evidence would then do the penalty phase? Isn't it the same amount of time either way? Wouldn't the witnesses be the same?

MR. McCAUGHEY: My guess is that if it was a jury being present, there would probably be maybe more witnesses presented. And Scott and I feel the need to call a couple of them, three or four back.

THE COURT: That's not a factor in my decision. But I just thought of something I thought to share with both sides. But both of you still want to go this way?

MR. BURNS: It's not a time issue with me, Your Honor. And, for the record, State's position is, and maybe it's philosophical with respect to the prosecution of the case of this nature, my personal feeling is in a case of this magnitude is to give the defendant the benefit of the doubt on every request. If the defendant wants it, and the state can, within the bounds of ethical and moral and legal restraints do it, then I want to do it. If this defendant wants to waive a jury, I want to give him that opportunity and err on the said of caution to the defendant.

That's why. I don't want to make him face a jury in the penalty phase if he doesn't want to. And I think it's an act of fairness and it's also a precaution for an appeal.

THE COURT: All right.

MR. McCAUGHEY: The other thing, the time factor with us, that doesn't really enter into it.

THE COURT: Right.

MR. McCAUGHEY: You know, the decision was made for other reasons than that.

THE COURT: Okay. And I understand that. And that's the court's view too. I am more addressing what we are going to do here in a minute no matter what happens on this. And that is jury questionnaire we discussed in chambers. I think that still needs to be pretty much as lengthy as it is. We haven't finalized it. We'll do that shortly here. But I think we'll get to those issues. And I just wanted to be clear on that.

All right. I'll go along with the request of both sides. And we'll undertake receiving the waiver of jury in the penalty phase. But you have indicated you want some more time?

MR. McCAUGHEY: Just to give me a couple minutes.

THE COURT: That's right. Fine.

(Whereupon, an off the record discussion took place.)

THE COURT: Oh, I have maybe the original of that. Feels like it.

MR. McCAUGHEY: Can we have his cuffs off, Your Honor?

THE COURT: Yes. Do you want to make any kind of record on -- we need to make a record.

MR. McCAUGHEY: Right. Mr. Honie, you have executed a document entitled Waiver of Jury in the Penalty Phase. You have read that document, have you not?

THE DEFENDANT: Yes, sir.

MR. McCAUGHEY: And you have talked to me about it?

THE DEFENDANT: Yes.

MR. McCAUGHEY: And I have asked you if you had any questions about it. And you said you do not. Is that right?

THE DEFENDANT: Yes.

MR. McCAUGHEY: Do you understand what that does?

THE DEFENDANT: Yes.

MR. McCAUGHEY: You understand you are giving up your right to have a jury of 12 people decide the

penalty aspect of this case if, in fact, you are convicted, and agree to allow the judge to decide what penalty would be imposed if there is a conviction?

THE DEFENDANT: Yes.

MR. McCAUGHEY: And you and I have talked about that. In fact, we talked about it for a while last night, did we not?

THE DEFENDANT: Yes, we did.

MR. McCAUGHEY: And I explained to you the ramifications of the 12 person jury, if one person descends, then the death penalty won't be imposed, and that 10 people can agree and impose life in prison without parole. I have explained that to you?

THE DEFENDANT: Yes.

MR. McCAUGHEY: And if 10 or more people do not agree, then life imprisonment with the possibility of parole will be imposed?

THE DEFENDANT: Yes.

MR. McCAUGHEY: In spite of that, it's your decision to waive your right to have a jury decide to waive the penalty and have the court decide the penalty?

THE DEFENDANT: Yes.

MR. BURNS: You are doing that voluntarily?

THE DEFENDANT: Yes.

MR. McCAUGHEY: Nobody's coerced you or forced you?

THE DEFENDANT: No.

MR. McCAUGHEY: You are not under the effects of any alcohol or drugs; is that correct?

THE DEFENDANT: No.

MR. McCAUGHEY: Are you thinking clearly today?

THE DEFENDANT: Yes.

MR. McCAUGHEY: Any questions you want to ask me or the judge about this?

THE DEFENDANT: Not right now.

MR. McCAUGHEY: Okay. So there is no doubt in your mind that this is what you want to do; is that correct?

THE DEFENDANT: Yes.

MR. McCAUGHEY: And it's based on my advice as I explained to you last night. It has to be your decision and not mine?

THE DEFENDANT: Yes.

MR. McCAUGHEY: And it is your decision?

THE DEFENDANT: Yes, it is.

MR. McCAUGHEY: And that's what you want to do?

THE DEFENDANT: Yes.

THE COURT: Let me just add a couple of follow-up questions. You said you weren't on any drugs, and that includes any prescription medication I assume; is that right?

THE DEFENDANT: Yes, sir. No drugs at all.

THE COURT: And, then, do you understand that to not receive the death penalty you would have to have -- I don't know quite how to put this in layman's terms and still be accurate legally -- but with a judge, there is just one person you would have to convince. There is a reasonable doubt with 12 jurors, you got 12 chances to convince somebody that there is a reasonable doubt there. So do you understand that you are reducing your field there for 12 down to one?

THE DEFENDANT: Yes.

THE COURT: I don't want to insult your intelligence, but do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: And you still want to go ahead with the waiver of the jury for the penalty phase?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Burns, do you want to ask any additional questions?

MR. BURNS: I think the court and Mr. McCaughey have covered it. And just supplemented

the record again by saying that the only reason the state has consented and stipulated and agreed to this is because it is this defendant's choice and desire.

THE COURT: All right. That's partly why I am going in this direction too. It's the state's case and your case. But it's your life that's on the line, if you are convicted at the guilt or innocence phase.

Okay.

MR. McCAUGHEY: Thank you.

MR. BURNS: Thank you.

THE COURT: Let's shift then, and let me see if I can locate the outline agenda in the letter that I wrote to counsel back on April 16th. The jury questionnaire, discussion, final changes, and the adoption. Since we looked at this last, have you seen some things in there that you want to reconsider or delete or add? Either side? I'll open it up to either side. And we can just go numerically if you do have some concerns.

MR. BURNS: I don't, Your Honor. I thought the court did a good job in deleting those that we objected to, and rephrasing the two areas that we wanted consolidated. But I am willing to go through it question by question.

THE COURT: I mean, if you have some in the

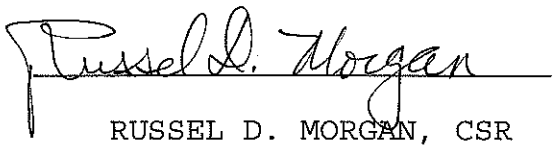
C E R T I F I C A T E

STATE OF UTAH

COUNTY OF WASHINGTON

THIS IS TO CERTIFY THAT THE FOREGOING PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

THAT THE PROCEEDINGS WERE REPORTED BY ME IN STENOTYPE, AND THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED IS SET FORTH IN THE FOREGOING PAGES NUMBERED FROM 3 TO 31 INCLUSIVE.



RUSSEL D. MORGAN, CSR

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