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State of Utah v. Riqo M. Perea : Brief of Appellant

Utah Supreme Court

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State of Utah, Plaintiff
Riqo M Perea, Defendant

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellee, **v.** RIQO M. PEREA Defendant/Appellant.	Case No. 20100891-SC

BRIEF OF THE APPELLANT

Appeal from a conviction for two counts of Aggravated Murder in violation of Utah Code Ann. § 76-5-202, two counts of Attempted Murder in violation of Utah Code Ann. § 76-5-203 and a Dangerous Weapon Enhancement in violation of Utah Code Ann. § 76-4-203 in the Second District Court, State of Utah, the Honorable Ernie W. Jones, Judge, presiding.

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CONSTITUTIONAL PROVISIONS

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellee, v. RIQO M. PEREA Defendant/Appellant.	Case No. 20100891-SC

NATURE OF THE PROCEEDINGS AND JURISDICTION

Appeal from a conviction for two counts of Aggravated Murder in violation of Utah Code Ann. § 76-5-202, two counts of Attempted Murder in violation of Utah Code Ann. § 76-5-203 and a Dangerous Weapon Enhancement in violation of Utah Code Ann. § 76-4-203 in the Second District Court, State of Utah, the Honorable Ernie W. Jones, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-3-102(3)(i).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

I. Whether the trial court erroneously denied the defendant's ability to present his defense by limiting an expert's testimony on crime scene reconstruction.

a. Standard of Review. The trial court's decision to exclude expert witness testimony is reviewed for abuse of discretion. *See Eskelson v. Davis Hosp. & Med. Ctr*, 2010 UT 59, ¶ 5, 242 P.3d 762; *State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103. This Court will "disturb the district court's decision to

strike expert testimony only when it exceeds the limits of reasonability." *Eskelson*, 2010 UT 59, ¶ 5 (quoting *State v. Hollen*, 2002 UT 34, ¶ 66, 44 P.3d 794) (internal quotations omitted).

b. Preservation of the Argument. The State initially filed a motion asking to exclude the expert's testimony. R. 1039, 1279. The defendant also filed a motion to arrest judgment and a motion for new trial, which in both, he asserted a violation. R. 1478, 1563, 1570.

II. Whether the trial court erroneously excluded the testimony of defense expert Richard G. Ofshe, an expert in false confessions.

a. Standard of Review. The trial court's decision to exclude expert witness testimony is reviewed for abuse of discretion. *See I.a of this section.*

b. Preservation of the Argument. The State filed a motion *in limine* asking the trial court to exclude Dr. Ofshe's testimony. R. 1064. Defendant opposed the motion. R. 1171. The defendant also filed a motion to arrest judgment and a motion for new trial, which in both, he asserted a violation. R. 1478, 1563, 1570.

III. Whether this Court should require recording of police interrogations that occur at police stations.

a. Standard of Review. A constitutional interpretation constitutes a question of law that this Court reviews for correctness, affording no deference to the trial court. *See, e.g., State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519

(interpreting state and federal constitutions); *Ford v. State*, 2008 UT 66, ¶¶ 6, 18, 199 P.3d 892; *Hatch v. Davis*, 2004 UT App 378, ¶ 19, 102 P.3d 774 (interpreting federal constitution).

b. Preservation of the Argument. Defense counsel's motion to suppress the confession alleged that the failure to record the confession violated defendant's right to due process. See R. 363, 256.

IV. Whether the trial court erred in denying Mr. Perea's motion to suppress his confession for a *Miranda* violation.

a. Standard of Review. This Court reviews the trial court's decision to grant a motion to suppress under a clearly erroneous standard. *State v. Brown*, 853 P.2d 851, 854 (Utah 1992). This court reviews the factual findings in a light most favorable to the trial court's decision but reviews questions of law under a correctness standard, according no deference to the trial court. *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994); *State v. Ramirez*, 817 P.2d 774, 781-82 (Utah 1991).

b. Preservation of the Argument. The defendant filed a motion to suppress the confession. See R. 363, 256.

V. Whether the trial court erroneously failed to allow critical defense witnesses to testify anonymously in order to protect them from gang retaliation.

a. Standard of Review. The trial court's decision as to whether witnesses deserved to testify anonymously or *in camera* constitutes a mixed question.

State v. Pena, 869 P.2d 932 (Utah 1994). Additionally, since this issue affected the defendant's right to due process and to present exculpatory evidence, the mixed standard also applies. *State v. Hales*, 2007 UT 14, ¶ 35, 152 P.3d 321.

b. Preservation of the Argument. The defendant formally moved that the trial court allow defense witnesses to testify anonymously. R. 733.

VI. Whether an imposition of life without parole, for a nineteen-year-old with an IQ of 77 violates the United States and Utah Constitutional prohibition on cruel and unusual punishment, and whether Utah's life without parole statute violates guarantees of equal protection and due process.

a. Standard of Review. A constitutional interpretation is a question of law that this Court reviews for correctness, affording no deference to the trial court. *See, e.g., State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519; *Ford v. State*, 2008 UT 66, ¶¶ 6, 18, 199 P.3d 892. However, underlying factual determinations are reviewed under a clearly erroneous standard. *State v. Pena*, 869 P.2d 932 (Utah 1994); *State v. Hales*, 2007 UT 14, ¶ 35, 152 P.3d 321.

b. Preservation of the Argument. Defense counsel filed a motion challenging the constitutionality of the life without parole statute as applied to Mr. Perea. R. 1480, 1500, 1550.

VII. Whether the combination of the above errors and other unraised errors constitutes cumulative error.

a. Standard of Review. A cumulative error claim requires the court to apply "the standard of review applicable to each underlying claim of error." *Radman v. Flanders Corp.*, 2007 UT App 351, ¶ 4, 172 P.3d 668. "Under the cumulative error doctrine, we will reverse only if 'the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had.'" *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (citation omitted).

b. Preservation of the Argument. The defendant also filed a motion to arrest judgment and a motion for new trial, which in both, he asserted several violations. R. 1478, 1563, 1570.

CONSTITUTIONAL OR STATUTORY PROVISIONS

This appeal is governed by U.S. Const. Amend. IV, VI and XIV, Utah Const. Art. I §§ 9, 12, 14, 24, Utah R. Crim. Pro. 12, 22, 40; Utah Code Ann. § 76-3-207.7.

STATEMENT OF THE CASE

On August 16, 2007, the State charged the defendant by information with two counts of aggravated murder, two counts of attempted murder and a dangerous penalty enhancement. R. 5. On January 8, 2008, the State filed notice of its intent to seek the death penalty. R. 63. On March 9, 2010 through March 16, 2010, the case was tried to a jury and on March 16, 2010, the jury found the defendant guilty of all five counts of the information. R. 1375-84. On May 25, 2010, the defendant filed a motion to arrest judgment. R. 1478, 1563. On May 27, 2010, the defendant was sentenced to life without the possibility of parole. R. 1566. On June 2, 2010, the defendant filed a motion for new

trial. R. 1570. On October 7, 2010, the court orally denied the motion for new trial. R. 1872. On October 29, 2010, the defendant filed a notice of appeal. R. 1874.

STATEMENT OF THE FACTS

Because Mr. Perea raises several issues, the facts relevant to those issues will be summarized in their appropriate sections.

SUMMARY OF THE ARGUMENT

Point I: The trial court held, pretrial, that the defense expert would be allowed to present his theory, and that flaws in his testimony went to its weight. Mid-trial, in response to a last-minute State motion, the trial court abruptly, and erroneously, changed its decision and prohibited the defense's forensic scientist from presenting any demonstrative exhibits. The trial court's ruling unconstitutionally denied the defendant the most persuasive evidence of his innocence. Additionally, the court unconstitutionally prohibited the defense expert from contradicting the State's witnesses. Finally, the trial court allowed the State to rebut the defense expert with its own charts and to comment on the defense expert's testimony, effectively expressing a preference for the State's case and theory.

Point II: The trial court prohibited the defense from presenting expert testimony surrounding false confessions, particularly the strong possibility that Riqo falsely confessed to this offense. However, the scientific literature repeatedly supports the proposition that people falsely confess to crimes, that juries are not aware of the phenomenon, and that juries tend to overvalue confessions. Expert testimony has

repeatedly been held to be critical to help establish a claim of a false confession and the trial court erroneously deprived the defense of the opportunity to present this evidence.

Point III: This Court has previously ruled that the Constitution does not require police officers to record confessions, reasoning that confessions may be taken outside of a police station. However, in this case, officers took Riqo's confession in a room in which recording would have been as simple as pressing a button, but the officers deliberately and consciously chose not to press record. This Court should require the police to record confessions, particularly when they occur at police stations since it deprived this Court of critical evidence necessary to assess the voluntariness of Riqo's confession.

Point IV: The defendant clearly and unequivocally invoked his right to deal with the police in interrogation only with the assistance of counsel, although he was not in custody at the time of the invocation. A defendant can anticipatorily invoke his right to counsel and the police were duty bound to honor the defendant's request. Hence, the trial court erred in denying the defendant's motion to suppress the confession.

Point V: Witnesses approached defense counsel willing to testify that a person other than Riqo Perea did the shooting at issue in this case, but that they feared for their safety and wished to testify anonymously. The trial court failed to take necessary steps to protect these witnesses, and in fact ordered the defense to disclose their names so that law enforcement could conduct a full investigation. The trial court erroneously took steps that ensured these witnesses would not cooperate with the court or with defense counsel, ultimately resulting in the loss of critical defense testimony.

Point VI: The Utah and United States Constitutions prohibit sentencing a 19-year with an IQ of 77 and various mental illnesses to the punishment of life without parole, as it is cruel and unusual and in violation of unnecessary rigor. Additionally, Utah Code Ann. § 76-3-207.7 is unconstitutionally vague since it gives no discretion to the court and denies a defendant proper due process by removing the sentencing decision from the jury.

Point VII: The combination of errors in this case resulted in cumulative error, when taken together.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY EXCLUDED PART OF THE TESTIMONY OF JAMES GASKILL

The State moved pretrial to exclude the testimony of the defendant's expert, James Gaskill, a retired professor of criminal justice at Weber State University, who concluded that there were multiple shooters and that the forensic evidence did not justify many of the State's conclusions. R. 1039-41; 1917:28-32. Gaskill had extensive experience in forensics, having testified in over 2,000 trials in all but one of Utah's counties. R. 1926:158-59. The court denied the State's motion, reasoning that the professor's methods went to the weight of his testimony and not to its substance. R. 1917:38-39. The court also ruled that the professor's conclusions could contradict witness testimony, but that he could not openly comment on the credibility of a witness. R. 1690-91; 1917:39-40.

Ten minutes before the defendant began his case, the State gave both counsel and the court a motion again asking to exclude Gaskill's testimony. R. 1926:137, 150. The trial court complained that the State "literally dump[ed] this in my lap in the middle of

the trial" and that this put the court "in a box" of having to assess something that should have been done pretrial. R. 1926:139, 141, 145, 155.

Gaskill testified that he went to the scene, took measurements and photographs, read police reports, and listened to witness testimony in reaching his conclusions. R. 1926:161-62. He also directed a computer specialist to prepare an animation depicting his testimony. R. 1926:163-66. He testified that the animation and photographs "accurately reflect what [he] intended them to reflect." R. 1926:176-77. After this testimony, the trial court changed its ruling and prohibited Gaskill from using the animation, reasoning that Gaskill could not lay a foundation for its admissibility since he did not prepare it himself. R. 1926:181-82. The court allowed Gaskill to testify to much of his theory—however, every time the professor's testimony contradicted that of another witness, the court sustained the State's objections on the grounds that it constituted commentary "on the credibility of witnesses ...." R. 1926:186-87; 191-95. Gaskill was able to testify that he believed there were multiple shooters (including one in the yard or carport), that the bullet casing pattern did not seem consistent with the State's version of events, that it would be difficult, if not impossible, for a shooter to hit these victims according to the State's theory. R. 1926:189-93, 200-01, 204-10; 223, 225. The court also prohibited Gaskill from putting individual locations on a demonstrative map because Gaskill lacked the knowledge to know "exactly where they were." R. 1926:218, 208-09. The animation, as proffered by defense counsel, would have demonstrated to the jury how two of the victims were shot by another individual in the yard or carport. R. 1927:153-54.

In rebuttal, the court allowed the State's expert to use a demonstrative exhibit, admittedly drawn not to scale, depicting bullet trajectories consistent with its theory. R. 1927:58, 1928:8. The defense objected, since the court would not allow its expert to use demonstrative exhibits, but the court overruled the objection. R. 1927:58. The State's expert, unlike Mr. Gaskill, had never been to the scene, nor taken any measurements. R. 1927:67.

The trial court's abrupt about-face effectively gutted the most effective pieces of the defendant's case.[1] The defense expert was erroneously prohibited from introducing any demonstrative exhibits and was unconstitutionally prohibited from presenting science that contradicted the State's witnesses' versions of the shooting.

Computer Generated Animation. Courts have frequently allowed the use of computer-generated reconstructions to assist expert testimony. *See State v. Phillips*, 98 P.3d 838, 843 (Wash. App. 2004) (holding that an expert's testimony should not be limited merely because he used a computer reconstruction; challenges to the software goes to its weight, not admissibility); *State v. Clark*, 655 N.E.2d 795, 812-13 (Ohio App. 1995) ("the fact that other jurisdictions ... allow for the admission of computer-generated simulations or reconstructions speaks for the reliability of such simulations within the relevant technical community").[2]

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[1] The court also denied defense motions regarding this evidence at the motion to arrest

[2] The number of cases to allow computer reconstructions to supplement expert testimony is voluminous at best. *See e.g., People v. McHugh,* 476 N.Y.S.2d 721 (N.Y. 1984) (proper to admit computer simulation of car crash in manslaughter prosecution); *United States v. Dioguardi*, 428 F.2d 1033, 1037 (2d Cir. 1972) (computer analysis used to

There are two categories of computer generated animations [CGA]: 1) demonstrative and 2) substantive; each has different standards of admissibility.

If an animation is used to illustrate a witness's testimony, it is purely demonstrative. One commentator called these "a graphic representation - a series of pictures 'drawn' by a computer operator with a computer - depicting a witness's testimony."[3] On the other hand, if "data is entered into a computer which is programmed to analyze the information and perform calculations by applying mathematical models, laws of physics and other scientific principles in order to draw conclusions and recreate an incident" then the animation is substantive evidence. *Commonwealth v. Serge*, 58 Pa. D. & C.4th 52, 68 (C.P. Ct. Lackawanna County 2001); Dean Morande, *A Class of Their Own: Model Procedural Rules and Evidentiary Evaluation of Computer Generated Animations*, 61 U. MIAMI L. REV. 1069, 1072 (2007). With a substantive animation, the computer acts as an expert itself, a silent witness, and as such, the computer simulation must pass the tests for the admissibility of scientific evidence, such as *Frye* or *Daubert*. Morande, 61 U. MIAMI L. REV. at 1073.

However, demonstrative animations do not have to comply with the rules for scientific admissibility. *See Gosser v. Commonwealth*, 31 S.W.3d 897, 901-03 (Ky. 2000) ("because a computer-generated diagram, like any diagram, is merely illustrative of a

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determine when defendant would have exhausted his inventory had he not concealed assets).

[3] Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J.L. & TECH. 161, 171-72 and 180-81 (2000).

witness's testimony, its admission normally does not depend on testimony as to how the diagram was prepared, e.g., how the data was gathered or inputted into the computer").[4] Typically, they must be authenticated—that the animation fairly and accurately depicts the proponent's version of the events; they must be relevant; and they must not be prejudicial. *See Commonwealth v. Serge*, 896 A.2d 1170, 1178 (Pa. 2006); *Harris v. Oklahoma*, 13 P.3d 489 (Ok. Crim. 2000).[5] The reasoning is that CGAs are more efficient and better tools, just like pen and paper have been, through which the expert can illustrate his testimony. Galves, 13 HARV. J.L. & TECH. at 181-83 & 189-90.

A. The Court Unfairly Suppressed the Videotape By Allowing the State to Raise the Issue Mid-Trial.

The first problem lies in the "surprise" motion filed by the State. Motions to suppress evidence "shall be raised at least five days prior to the trial." Utah R. Crim. Pro. 12(c)(1)(B). The State waived this issue because it did not raise it pretrial. *Cf. Id.* R. 12(f) (defendant's failure to raise a motion to suppress constitutes a waiver of the issue).

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[4] *Cleveland v. Bryant*, 512 S.E.2d 360, 362 (Ga. App. 1999) (computer-generated animation, which merely illustrates the witness's testimony, is admissible if it is a fair and accurate representation of the scene sought to be depicted); *See also* Morande, 61 U. MIAMI L. REV. 1069; Dean M. Harts, *Reel to Real: Should You Believe What You See*, 66 DEF. COUNS. J. 514, October 1999; Timothy W. Cerniglia, *Computer-Generated Exhibits-Demonstrative, Substantive or Pedagogical-Their Place in Evidence*, 18 AM. J. TRIAL ADVOC. 1, 1994 at 4-5.

[5] *See also* A. Albrecht, *Laying a Proper Foundation for Computer-Generated Demonstrative Evidence*, 90 ILL. B.J. 261 (2002); Mary Elizabeth McGinnis Hadley, *Access to CGAs and Justice: The Impact of the Use of Computer Generated Animations on Indigent Criminal Defendants' Constitutional Rights*, 22 GEO. J. LEGAL ETHICS 877, 884 (Summer 2009).

"Procedural due process requires, at a minimum, timely and adequate notice and an opportunity to be heard in a meaningful way." *McBride v. Utah State Bar*, 2010 UT 60, ¶ 16, 242 P.3d 769 (internal quotation marks omitted); *Osburn v. Bott*, 2011 UT App 138, ¶ 7, 681 Utah Adv. Rep. 7. "In our judicial system … all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision." *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990).

While defense counsel had a few perfunctory responses, the court gave virtually no time to the defense to respond. The State asked the court if it would like time to read through the motion, noting that "it's a bit lengthy." R. 1926:137. Even the court complained that the State's motion was dropped on its lap in the middle of trial. R. 1926:141. The defendant protested that he, too, had not read it. R. 1926:152. The court decided to see if Gaskill could lay adequate foundation. R. 1926:155. The State questioned the professor, the defense moved to admit the evidence and the court changed its pretrial ruling and prohibited the testimony. R. 1926:163-81.

The problem in this procedure is the uncertainty engendered by the State's motion. This issue had been previously decided and ruled on by the court well before trial. Based on that ruling, the defense proceeded assuming Gaskill would be able to present his theory. The State's improperly filed motion, and the court's reversal of decision without giving the defense a meaningful opportunity to respond to the State's motion and memorandum, constitutes the kind of surprise that violates due process.

Several policy reasons support resolving suppression issues pretrial.[6] It allows all parties the comfort of knowing what evidence they have to work with during trial. It allows parties to prepare their cases and theories knowing full well what evidence the court has admitted or excluded. Because suppressed evidence may carry extraordinary weight, it may entirely affect a party's ability to present a case. For example, if the court excludes the evidence of the crime, the State may not be able to go forward. For the defense, an exclusion of evidence may completely eradicate his challenge to the case. Additionally, it allows each party and full and complete opportunity to brief the court.

Additionally, parties must adhere to pretrial decisions. *State v. Willard*, 801 P.2d 189, 191 n.1 (Utah Ct. App. 1990) ("Generally, a pretrial ruling on a suppression motion becomes the law of the case to be adhered to by the trial judge") (citing *United States v. Montos*, 421 F.2d 215, 220 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); *State v. Pope*, 224 N.W.2d 521 (1974); *cf. State v. Lesley*, 672 P.2d 79, 83 (Utah 1983) (Howe, J.,

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[6] *See e.g., Jones v. United States*, 362 U.S. 257, 264 (1960), overruled on other grounds, *United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980) (the requirement that motions to suppress be filed pretrial "is designed to eliminate from the trial disputes ... not immediately relevant to the question of guilt" and that the rule "carr[ies] out an important social policy and not a narrow, finicky procedural requirement."); *Segurola v. United States*, 275 U.S. 106, 111-112 (1927) (courts should not permit collateral matters to be raised mid-trial "except where there has been no opportunity to present the matter in advance of trial"); *United States v. Gomez*, 770 F.2d 251 (1st Cir. 1985) (raising suppression issues at trial "impedes the momentum of the main proceeding and breaks the continuity of the jury's attention."); Utah R. Civ. Pro. 16(a) (purpose behind pretrial hearings are to 1) expedite disposition; 2) establish "early and continuing control so that the case will not be protracted for lack of management"; 3) discourage wasteful pretrial activities; 4) improve the quality of trial preparation; 5) facilitate case settlement and 6) consider matters to help the disposition of the case).

concurring in result) (suggesting that all pretrial suppression rulings should be binding at trial)).

The State's surprise motion effectively asked the court to redecide an issue it had already ruled on and not only caught the defense by surprise, but prevented the defense from effectively and meaningfully addressing and rebutting the State's arguments.[7]

B. The Trial Court Erroneously Excluded the Animation and Photographs.

The trial court also unfairly limited the professor's testimony when it ruled that he lacked the foundation to introduce animations and photographs.

The Defense Presented Adequate Foundation to Admit the Exhibits. The trial court incorrectly reasoned that the animation and photographs were inadmissible for foundational reasons because demonstrative exhibits do not have this requirement. *See Serge*, 896 A.2d at 1178 n.4 ("CGA evidence has been admitted in most states that have considered the matter, including in the criminal context.") *see also* Galves, 13 HARV. J.L. & TECH. at 226-27 (noting that the only foundational requirement would be that sufficient evidence to authenticate the exhibit under Rule 901 of the Rules of Evidence). An expert should not be prohibited from testifying about the CGA merely because he does not know the process by which the CGA was created.[8]

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[7] In the federal courts, a trial court may not repudiate its ruling on a pretrial suppression motion if it results in prejudice or surprise to a party. *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1210 (10th Cir. 2002); *McRae v United States*, 420 F.2d 1283 (D.C. App. 1969).

[8] "If an animation is used demonstratively, then the underlying technology or science used to create that animation is irrelevant to the case. Consider an analogy: Suppose an expert witness medical doctor is testifying about her expert opinion regarding a plaintiff's

The court reasoned that the photographs were inadmissible because they did not accurately reflect the scene that night. R. 1926:181-82. If the trial court's reasoning were correct, no exhibit could ever be authenticated if it were created after a crime. However, that is not the requirement of Rule 901. In order to authenticate a photograph, "the proponent must show that the photograph 'is what its proponent claims.'" *State v. Horton*, 848 P.2d 708, 714 (Utah Ct. App. 1993) (quoting Utah R. Evid. 901(a)). "In general, if a competent witness with personal knowledge of the facts represented by a photograph testifies that the photograph accurately reflects those facts, it is admissible." *State v. Purcell*, 711 P.2d 243, 245 (Utah 1985) (citing E. Cleary, McCormick on Evidence § 214, at 671 (3d ed. 1984)). Any discrepancies in the photos, such as the time and place taken, can be explained by the witnesses and do not go to the adequacy of the foundation. *Id.*

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alleged neck injuries and is using a wax human skeleton model as a demonstrative exhibit to help clarify her testimony about how neck vertebrae can be injured in an automobile accident. It would be illogical to exclude that expert's medical opinion testimony simply because the expert physician witness did not know how such wax models are manufactured. The wax model is not evidence itself, and the expert is using it only to clarify her testimony. The technology used to make the wax model would not be the underlying science involved in the case. Similarly, the technology used to create a computer animation is not the underlying science at issue in the case either. Thus, it should not matter how the wax skeleton used by the expert was made, no matter how life-like and helpful it may be in understanding the wax skeleton model.

"Similarly then, a computer animation that merely clarifies an expert's opinion testimony is a demonstrative exhibit and therefore the expert should not be charged with knowing all the intricacies of how the animation was created and how exactly it generated the images that help the expert explain her testimony." Fred Galves, *The Admissibility of 3-D Computer Animations Under the Federal Rules of Evidence and the California Evidence Code*, 36 SW. U. L. REV. 723, 735-36 (2008).

In this case, Gaskill repeatedly testified that both the animation and the photographs accurately reflected his opinion and the facts gathered by him. R. 1926:162, 174, 176-177. That is the sole requirement of Rule 901. *Purcell*, 711 P.2d at 245. While there may have been defects in the photographs, those matters could be pointed out in cross-examination and were not proper bases to attack the foundation of his exhibits.

The Lack of Ability to Present the Testimony Unconstitutionally Limited Mr. Perea's Defense. The court's decision drastically limited Mr. Perea's defense. The State must provide an indigent defendant with the assistance of expert testimony—one of the "basic tools of an adequate defense"—if needed. *Ake v. Oklahoma*, 470 U.S. 68, 76-77, 82-83 (1985) ("when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."); U.S. Const. Amend. VI; Utah Const. Art. I, § 12.

Several commentators have noted that denying a defendant the ability to present a CGA to the jury "severely compromises the quality of the defense" and "denies criminal defendants their constitutional right to an adequate defense."[9] In fact, "[n]o matter how

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[9] McGinnis Hadley, *Access to CGAs,* 22 GEO. J. LEGAL ETHICS at 879 (citing Robert Aronson and Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence By Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1486 ("[T]he use of high-tech evidence is often expensive . . . [and] may make it impossible for opposing counsel to counter effectively the animation or closing argument, and this may unfairly favor the prosecution because it often has more resources to finance this kind of evidentiary presentation") (citing Jennifer Robinson Boyle, *State v. Pierce: Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?*, 19 NOVA L. REV. 371, 383 (1994); Carlo D'Angelo, *The Snoop Doggy Dogg Trial: A Look at How Computer Animation Will Impact Litigation in the Next Century*, 32 U.S.F. L. REV. 561, 562-63 (1998).

effective or desirable a computer-generated exhibit might be to a prosecutor, the defendant's ability to respond meaningfully is a matter of fundamental fairness."[10]

Courts have frequently allowed defendants to present computer animations and upheld the use of computer animations as an illustration of an expert's testimony. *See People v. McHugh*, 476 N.Y.S.2d 721, 722 (N.Y. Sup. Ct. 1984) (court allowed use of a computer-animated re-enactment showing defendant's version of an accident).[11] In many

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[10] Aronson & McMurtrie, supra n. 9, at 1486.

[11] *See, e.g., Hinkle v. City of Clarksburg*, 81 F.3d 416, 424 (4th Cir. 1996); *People v. Cauley*, 32 P.3d 602, 607 (Colo. Ct. App. 2001); *Bryant*, 512 S.E.2d at 361; *State v. Sayles*, 662 N.W.2d 1, 7 (Iowa 2003); *State v. Tollardo*, 77 P.3d 1023, 1029 (N.M. App. 2003) (opining that, "when the [CGA] is used to illustrate an opinion that an expert has arrived at without using the computer, the fact that the visual aid was generated by a computer ... does not matter because the witness can be questioned and cross-examined .... In that situation, the computer is no more or less than a drafting device"); *Serge*, 896 A.2d at 1178 (Pa. 2006) ("Presently, had the Commonwealth's experts, a crime scene reconstructionist and a pathologist, used traditional methods, they may have drawn chalk diagrams or sketches on a blackboard to help explain the basis for their opinions. Instead, they used a CGA to more concisely and more clearly present their opinion. The difference is one of mode, not meaning. The law does not, and should not, prohibit proficient professional employment of new technology in the courtroom. This is, after all, the twenty-first century").

Juries will not overvalue animations. *Datskow v. Teledyne Cont'l Motors Aircraft Prods.*, 826 F. Supp. 677, 685 (W.D.N.Y. 1993) ("The mere fact that this was an animated video ... does not mean that the jury would ... give it more weight than it would otherwise have deserved. ... Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight.'") (quoting 1 Jack. B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* P 403[5], at 403-88 (1992))); R. Bennett, Jr., J. Leibman, R. Fetter, *Seeing is Believing; or is it? An Empirical Study of Computer Simulations as Evidence*, 34 WAKE FOREST L. REV. 257, 285 (1999) (finding empirically "unwarranted" the claim that juries will find computer animations more persuasive).

ways, the use of a visual aide, like a CGA, helps jurors better understand and comprehend the expert's testimony.[12]

In the high profile murder trial of Snoop Doggy Dogg, the defense created a "brief 3-D computer animated video" summarizing evidence that normally would have required "numerous expert witnesses and hours of testimony" on the defense's version of the shooting. *The Snoop Doggy Dogg Trial: A Look at How Computer Animation Will Impact Litigation in the Next Century*, 32 U.S.F. L. REV. 561, 565 (Spring, 1998). The video showed an overhead view, with bullet trajectories, allowing "the jury to see, from all possible angles, the exact entry and exit points of both wounds sustained by the victim." *Id.* at 565-66. The defense's "masterful trial work [and] sophisticated computer technology" won an acquittal. *Id.* at 567.

Like in Snoop Dogg's case, the brief animation and photographs would have had an incalculable effect on the jury's ability to understand and visualize the professor's testimony. This denial effectively deprived Mr. Perea of the right to present a constitutionally adequate defense and deprived him of due process of law.

Experts Have Wide Latitude to Interpret Facts. An expert may base his opinion on facts that are not admissible in evidence. Utah R. Evid. 703. Experts may base their opinions on facts or data that they perceive or on facts made known to them before

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[12] David W. White-Lief, *Effective Demonstrative Evidence: It's Your Most Persuasive Tool*, Mass. L. Wkly., Jan. 17, 1994, at B37 (noting that "[o]ne study reported that jurors who received combined visual and oral presentations retained 650 percent more information compared to jurors who received only oral presentations").

or during the hearing. *Id.* Experts may even give opinions to the ultimate issues to be decided. Utah R. Evid. 704; *Gaw v. State*, 798 P.2d 1130, 1134 (Utah Ct. App. 1990).

Expert testimony does not have to be free from controversy and experts must only make a "threshold showing" of admissibility. *Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶ 12, 242 P.3d 59; *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974); *see also Smith v. Grand Canyon*, 2003 UT 57, ¶ 25, 84 P.3d 1154 ("disputes over the merits of competing opinions in non-novel scientific, technical, or specialized fields are properly left to the trier of fact to resolve").

In *Eskelson*, like this case, the trial court excluded the testimony of an expert because he lacked methodology, "chose to believe only facts in the record that supported his argument," and failed to apply scientific principles. *Id.* at ¶ 13. This Court said that the physician, under Rule 702, did not have to articulate a specific methodology. *Id.* at ¶ 15. This Court also held that the court erred in excluding the expert's opinion because the expert relied on selective testimony:

> Although an expert cannot give opinion testimony that "flies in the face of uncontroverted physical facts also in evidence," an expert can rely on his own interpretation of facts that have a foundation in the evidence, even if those facts are in dispute. Indeed, we allow experts latitude to interpret the facts before them.

Id. at ¶ 16.[13] Additionally, the trial court in *Eskelson* disallowed the expert's testimony because the expert's testimony implied witnesses' truthfulness. *Id.* at ¶ 17. This Court

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[13] Citing *Yowell v. Occidental Life Ins. Co.*, 100 Utah 120, 110 P.2d 566, 569 (Utah 1941), also citing *State v. Schreuder*, 726 P.2d 1215, 1223 (Utah 1986) (experts may rely on inadmissible facts); *Micro Chem, Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) (the trial court should not evaluate the correctness of conflicting facts relied upon

disagreed, holding that relying on the testimony of one witness does not "constitute the expression of an opinion as to the credibility of that witness." *Id.*

Once an expert witness is qualified as such, he may base his opinion on inadmissible evidence. *State v. Clayton*, 646 P.2d 723, 725 (Utah 1982). Any faults in the bases for the expert's opinion go to its weight and not to its admissibility and may be challenged on cross-examination. *Id.*[14]

In this case, Gaskill based his testimony on his own observations and measurements conducted at the scene of the crime. R. 1926:161-62. He also based his conclusions on witness testimony and other scientific principles. *Id.* The mere fact that Gaskill's recitation of the facts differed from the State's, or from some of the witnesses, does not mean that his theory lacks foundation or should be inadmissible. By that reasoning, no expert could testify if her conclusions contradict the statements of witnesses. *Poltrock v. Chicago and Northwestern Transportation Company*, 502 N.E.2d 1200, 1203 (Ill. App. 1986) ("The fact that expert testimony may conflict with eyewitness testimony does not make it inadmissible where the court finds it to be of assistance to a jury in understanding complex issues").[15] Gaskill's conclusions were supported by his

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by experts); *Atkinson Warehousing & Distrib., Inc. v. Ecolab, Inc.*, 99 F. Supp. 2d 665, 670 (D. Md. 2000) ("[A]n opinion based upon a disputed fact may not be excluded simply because it pertains to an issue to be decided by the jury").

[14] *Id.* ("The opposing party may challenge the suitability or reliability of such materials on cross-examination, but such challenge goes to the weight to be given the testimony, not to its admissibility.")

[15] Thousands of courts have allowed expert testimony, even when it contradicts lay testimony. *See e.g., Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 789; 178 L. Ed. 2d 624, 644 (2011) (expert's hypothesized testimony could have suggested that the

own observations and understanding of the facts in evidence and should not have been limited. As this Court said in *Eskelson*, "When ... the parties' experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate the correctness of facts underlying one expert's testimony." *Eskelson*, 2010 UT 15, ¶ 16. The trial court essentially gutted the professor's testimony when it repeatedly prohibited him from testifying about any facts if they contradicted witness testimony. R. 1926:186-87, 191-95. In short, the court unfairly limited the professor to testimony consistent with the State's version of events.

C. The Court Unfairly Allowed the State to Rebut Gaskill's Testimony With Its Own Demonstrative Evidence.

The third problem lies in allowing the State to rebut the professor's testimony with its own demonstrative evidence, albeit non-CGA evidence. The State's expert proffered a not-to-scale drawing of the scene on which he drew bullet trajectories with a ruler. R. 1927:58. Gaskill's animation was no different, except that it was done on a computer, as opposed to a piece of paper. Mr. Wakefield did not visit the crime scene, did not take measurements, and used a not-to-scale drawing made by the State's CSI witness. R. 1928:8; 1927:46, 69. Gaskill visited the scene, took pictures, took measurements and

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defendant's version of events was true and that victim's was not; however testimony might have implicated defendant as well); *Allen v. State*, 521 S.E.2d 190, 192 (Ga. 1999); *Palmer v. Mississippi*, 34 So.3d 1207, 1212 (Miss. App. 2010) (expert testimony contradicted defendant's version of events); *Wildman v. Johnson*, 261 F.3d 832, 835 (9th Cir. 2001); *People v. Villareal*, 559 N.E.2d 77, 82 (Ill. App. 1990) (newly discovered firearms expert's testimony so contradicted officer's events that defendant was entitled to a new trial); *Commonwealth v. Metzger*, 450 A.2d 981, 984 (Pa. 1982) (lay witness's testimony contradicted by expert testimony and that jury could evaluate difference).

created an animation depicting his testimony. R. 1926:161-62. The court prohibited Gaskill's demonstrative exhibits but allowed Wakefield to use his.[16]

The court allowed the State to rebut the defense's case with the exact type of evidence it ruled inadmissible in the defendant's case. The decision placed greater emphasis on the credibility of the State's expert and sent an impermissible message to the jury that the trial court agreed with the prosecution's case.

II. THE TRIAL COURT ERRONEOUSLY EXCLUDED DEFENSE EVIDENCE OF FALSE CONFESSIONS

Perhaps the State's most potent weapon in this case involves Mr. Perea's confession. One scholar commented that "the introduction of a confession makes the other aspects of a trial in court superfluous"[17]; *see also Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (explaining that a confession is "the most compelling possible evidence of guilt") (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting). The trial court's denial of the defense's attempts to present evidence of false confessions was erroneous and deprived the defendant of due process of law.

In the interrogation room, the officers repeatedly "confronted" Riqo with their opinion that he was lying. R. 1909:212, 242, 243; 1926:20.[18] Riqo then engaged in a

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[16] Additionally, the defense did not have notice that Wakefield would be testifying as an expert in bullet trajectories, a violation of Utah Code Ann. § 77-17-13. *See State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292. R. 1927:26-27.

[17] McCormick, C.T. (1972), p. 316. Handbook of the Law of Evidence (2nd ed.). St. Paul, MH: West.

[18] Detective Thomas admitted to being trained in interrogation "techniques" such as building rapport, sympathy, minimizing involvement, lying to suspects, telling suspects

"slumped demeanor." R. 1909:242. They suggested that Riqo might have fired the shots to protect Duran's children, who were in the vehicle, and his "demeanor started to change rapidly." R. 1909:212, 214, 243; 1926:20. Riqo "started to become nervous, a little scared"; his "chest started beating faster," he leaned forward in the chair, put his head down and began "tearing up." R. 1909:214, 216, 243: R. 1926:21, 94. Riqo said he cared for the children and wanted to protect them. R. 1909:214; R. 1926:92. He claimed he had blacked out. R. 1909:217; 1926:96. "He started to cry harder. Tears were running down his face." R. 1926:21.[19]

At this point, the officers decided to give Riqo "an out" or a way to "minimize [his] involvement" or to "lower [his] consequences"—and that was by confessing to the crime. R. 1909:230-31. The officer asked Riqo if he had a gun, and Riqo said that he did. R. 1926:21. Then Riqo said, "I just did it" and admitted to having a .22 caliber gun. R. 1909:217; 1926:97. He also said that he stood on the floorboard while his car door was open and fired the shots over the SUV. R. 1909:218; 1926:22, 23-24, 98. Riqo said that he "killed his own cousin." R. 1909:218; 1926:98. He also said that he was the only one in the SUV with a gun. R. 1926:99.

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that they've been ratted out, fear, playing off emotions, trying to have suspects get burdens off their chests. R. 1926:32-33.

[19] Detective Thomas admitted Riqo's emotions could have resulted from a fear of retaliation, considering that one individual, Paul Ashton, had been shot and that Riqo's grandmother's house had been shot at. R. 1926:53. However, Riqo never expressly told the officers that he was afraid. R. 1926:58. The detectives insisted that they never threatened or coerced Riqo. R. 1926:55-58, 100.

Riqo testified that he felt coerced and "disrespected" "because they asked me about the calling the first time and I stated it wasn't me, that I was innocent. And I kept pleading my innocence, and they continued to go on with the conversation, on with the interrogation." R. 1910:33, 37. He also testified that the reason he felt afraid was because "[m]y brother called me and explained to me that they wanted to either get my sister or get my wife because they wanted me to feel the pain that they felt for Sabrina." R. 1910:35, 37. He said the officers were "aggressive" and although they didn't yell or swear, they threatened him. R. 1910:38. According to Riqo, Detective Thomas told him during the interrogation, "that if I did want to protect my family that I can do this, which was take the blame and get me off the streets because he said to me that that's what they wanted. Either they were to get me off the streets or they would take care of it themselves." R. 1910:36. Riqo said that "I believe I was coerced into saying what they wanted me to because, like I said, they came aggressively." R. 1910:39. Riqo was not afraid of the officers, but he felt the officers threatened that his family would be harmed if he did not confess. R. 1910:40.

A. The Trial Court Erroneously Prohibited the Defense from Presenting Expert Testimony on False Confessions

The trial court reasoned that the jury was capable, by itself, to determine the existence of a false confession without the assistance of an expert. R. 1918:72. It also reasoned that the jury would overvalue expert testimony and that the science was not reliable. R. 1918:71-72. The trial court did not conduct a *Rimmasch* hearing or in any

way assess the reliability of the science—it merely gave an opinion. However, this conclusion contradicts a large body of scientific evidence.

1. Juries Do Not Understand the Phenomenon of False Confessions and Frequently Disregard It Entirely

Confessions exert such strong persuasive pull over juries because most people believe that "one who is innocent will not imperil his safety or prejudice his interests by an untrue statement." *Hopt v. Utah*, 110 U.S. 574, 585 (1884); *see also* Lisa E. Hasel and Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?,* 20 PSYCHOL. SCI. 122, 122 (Jan. 2009) (noting that "people reflexively trust confessions").

This notion has largely been exposed as a myth.[20] *Corley v. United States*, 129 S. Ct. 1558 (2009) ("there is mounting empirical evidence that [custodial police interrogation and its inherent] pressures can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 906-907 (2004)).[21] To date, 271 people have been exonerated through DNA testing—and 25% of them falsely

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[20] There exists an enormous body of scientific literature on false confessions. One of the best summaries of the literature was done by Saul M. Kassin, et al, *Police-Induced Confessions: Risk Factors and Recommendations,* LAW AND HUMAN BEHAVIOR, 34, 3-38 (attached in full as Addendum D).

[21] *See e.g.,* Gisli H. Gudjonnson, *The Psychology of Interrogations and Confessions: A Handbook* 631-662 (2003) (citing nearly 800 articles relating to false confessions and police interrogations); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 58 (1987) (finding 14.3% of wrongful convictions for potentially capital crimes based on false confessions).

confessed to their crimes.[22] This Court stated that, "[i]t is beyond dispute that some people falsely confess to committing a crime that was never committed or was committed by someone else." *State v. Mauchley*, 2003 UT 10, ¶ 21, 67 P.3d 477 (citing Professor Ofshe). As the United States Supreme Court said in *Escobedo v. Illinois*, 378 U.S. 478 (1964):

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Id. at 488-489 (footnotes omitted).

Despite these phenomena, the public at large, and juries particularly, do not understand why an innocent person would confess to a crime he did not commit.[23] The psychological research can help explain this phenomenon. Once the defendant is alone with police, they begin to use what is called the Reid Technique, whereby police use psychological tricks and subtle forms of coercion to get a suspect to confess. *See* Fred E. Inbau, et al, *Criminal Interrogation and Confessions* (4th ed. 2004). The Supreme Court said that police interrogation "by its very nature, isolates and pressures the individual." *Corley v. United States*, 129 S. Ct. at 1570.

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[22] See The Innocence Project, http://www.innocenceproject.org/understand/False-Confessions.php, last checked (May 25, 2011). See also Richard A. Leo, *Police Interrogation and American Justice* 243 (2008). Law enforcement officers surveyed in 2007 estimated that 10% of their interrogations resulted in false confessions. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility,* 25 Behav. Sci. & L. 757, 770 (2007).

[23] *See, e.g.,* Danielle E. Chojnacki et al, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L. J. 1, 40 (2008).

Police using the Reid Technique separate the young person from his family or friends and put him in an interrogation room, which is designed to isolate him and make him feel helpless and trapped. *See* Kassin et al., *Police-Induced Confessions.* In the first stage, investigators try to shake a suspect from claims of innocence by repeatedly accusing the person of lying, refusing to listen to him, and by expressing confidence in his guilt. *See* Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979, 990 (1997). Once shaken, investigators offer the person a way out through confession. *Id.* Officers will minimize the defendant's involvement or engage in other tactics to make a confession seem like an easy way out of the situation. Kassin et al, *Police-Induced Confessions* (technique includes "suggesting to the suspect that the murder was … provoked … or accidental); Drizin & Leo, 82 N.C. L. REV. at 916.

One study showed that 51% of defendants falsely confessed based on police pressure and 48% confessed to protect another person.[24] The majority of false confessions occur in murder cases with persons under age 25 and among those with mental illnesses. Drizin & Leo, 82 N.C.L. REV. at 891-1007. One comprehensive study of false confessions found that age and mental disabilities were strong indicators of false confessions. Samuel R. Gross et al, *Exonerations in the United States 1989 Through*

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[24] Sigurdsson, J.F., & Gudjonsson, G.H. (1996). *Psychological Characteristics of "False Confessors": A Study Among Icelandic Prison Inmates and Juvenile Offenders.* PERSONALITY AND INDIVIDUAL DIFFERENCES, 20, 321-29.

2003, 95 J. CRIM. L. & CRIMINOLOGY 523-53 (2005).[25] Nearly two-thirds of wrongful convictions involve, at least in part, a false confession. *See* Welsh S. White, *Confessions in Capital Cases,* 2003 U. ILL. L. REV. 979, 984 (2003).

The Reid tactics can be particularly troubling for young people. *In re Gault*, 387 U.S. 1, 52 (1967) ("Authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children").[26] One study found that in a laboratory scenario, 78% of juveniles age 12-13, 75% of juveniles age 15-16, and 59% of young adults age 18-26 falsely confessed to an act they did not commit.[27] Another study found the Reid Technique's "psychologically manipulative tactics … eventually overwhelm many suspects and cause them to confess, whether guilty or not." Joshua A. Tepfer, et al, *Righting the Wronged: Causes, Effects, and Remedies of Juvenile Wrongful Conviction*, 62 RUTGERS L. REV. 887, 906-07 (2010).[28] Additionally, those with low IQs and the mentally retarded are significantly more likely to give suggested answers and to falsely confess. Kassin & Gudjonsson at 53.

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[25] It found that 44% of exonerees under age 18 falsely confessed compared to 13% of older exonerees. *Id.* 69% of exonerees with mental retardation falsely confessed. *Id.* "Overall, 55% of all the false confessions we found were from defendants who were under eighteen, or mentally disabled, or both." *Id*

[26] Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues,* Psychological Science in the Public Interest, Vol. 5, No. 2 (Nov. 2004), 52.

[27] Redlich & Goodman, *Taking Responsibility for an Act not Committed: The Influence of Age and Suggestibility*. LAW AND HUMAN BEHAVIOR, 27, 141-56 (2003).

[28] As a result of the "deeply troubling fact" of juvenile false confessions, the authors recommend electronic recording of all interrogations and "developmentally appropriate interrogation and interview practices," such as the presence of an attorney, the elimination of suggested, leading, or confrontational questions and the elimination of the use of false evidence. *Id.* at 891, 916-18.

Juveniles are particularly susceptible because they lack psychological development and act impulsively based on short-term gain, rather than long-term consequences. *See Roper v. Simmons*, 543 U.S. 551 (2005) (unconstitutional to execute juveniles because they are "categorically" different from adults); Kassin et al., *Police-Induced Confessions*. Juveniles' short-term decision-making often leads them to falsely confess on a misguided assumption that it will end the pressures of interrogation. *Id.*[29] Even the proponents of the Reid Technique acknowledge that minors are at a significant risk to falsely confess and that investigators must "exercise extreme caution" when interrogating a juvenile or a mentally ill person.[30]

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[29] Even though innocent, a suspect may reasonably determine that "continued resistance is futile because the police have evidence that will convict him despite his innocence." Welsh S. White, *What is an Involuntary Confession Now?,* 50 RUTGERS L. REV. 2001, 2053 (1998).

[30] *See Investigator Tips*, John E. Reid & Associates, Inc., http://www.reid.com/educational_info/r_tips.html?serial=1080839438473936 (last checked May 28, 2011). The Reid Technique proponents assert that "[e]very interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile or a person who is mentally or psychologically impaired. Certainly these individuals can and do commit very serious crimes. But when a juvenile or person who is mentally or psychologically impaired confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration. In these situations it is imperative that interrogators do not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity." *Id. See also* Allison D. Redlich, *Righting the Wronged: Causes, Effects, and Remedies of Juvenile Wrongful Conviction*, 62 RUTGERS L. REV. 943, 952-53 (2010) ("American interrogation techniques are not developmentally informed or appropriate. When these inappropriate techniques are employed on juveniles, who are at varying stages of immature development cognitively, socially, emotionally, and neurologically, and who are misjudged to be guilty, the risk of false confession increases"). *See also*, Steven A. Drizin & Beth Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce*

As the Reid Technique's proponents acknowledge, juveniles who are mentally ill are at grave risk to falsely confess. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (noting that the mentally retarded are more likely to falsely confess). Very generally, the mentally ill overly rely on authority, feign competence, have short attention spans and memory gaps, lack impulse control and accept blame for negative outcomes. *See* R. Perske, *Understanding Persons With Intellectual Disabilities in the Criminal Justice System: Indicators of Progress?,* 42 MENTAL RETARDATION 484 (2004). Specifically, people with ADHD have been found to falsely confess at significantly higher rates than normal. Kassin et al, *Police-Induced Confessions.*[31]

Jurors are completely unaware of these phenomena. In one particular study, researchers presented mock jurors with one of these types of evidence: circumstantial evidence, eyewitness testimony, and a confession.[32] Jurors who heard the confessions were significantly more likely to find guilt than jurors who did not. *Id.* A confession can outweigh for jurors significant amounts of exculpatory evidence, such as conflicting physical evidence, contradictory witness testimony, and alibis. *See* Hasel and Kassin, infra at 122.

Coerced and False Confessions From Juvenile Suspects in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127-62, 135 (G.D. Lassiter ed. 2004).

[31] Citing Gudjonnson et al, *Interrogative Suggestibility, Compliance and False Confessions Among Prison Inmates and their Relationship with Attention Deficit Hyperactivity Disorder (ADHD) Symptoms*, PSYCHOLOGICAL MEDICINE (in press).

[32] Gerald R. Miller and F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research,* in Bruce Dennis Sales (ed.), *Psychology in the Legal Process*, 19, 20-21 (1977).

> When the false confessors pled not guilty and proceeded to trial, the jury conviction rates ranged from 73% (Leo & Ofshe, 1998) to 81% (Drizin & Leo, 2004). These figures led Drizin and Leo (2004) to describe confession evidence as inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt."

Kassin & Gudjonsson, *The Psychology of Confessions* at 56.

Psychological research has shown that juries trust confessions, even when they were elicited through high-pressure methods of interrogation. *Id.* Ordinary people continue to assume that when a person confesses, he must mean it. *Id.* Mock jurors have been shown to vote guilty, even when they believe officers coerced the confession. *Id.* at 57.[33]

However, contrary to popular belief, false confessions have been found to be extremely difficult to detect. Testing has shown that students were no better than chance at detecting true or false confessions. *Id.* One study found that potential jurors could identify coercive practices by the police interrogations, but that they did not "believe that psychological interrogation techniques were likely to elicit false confessions." Leo & Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?,* University of San Francisco Law Research Paper No. 2009-17 (attached as Addendum E).

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[33] Kassin and Gudjonsson posit that jurors tend to believe confessions because they take people's words at face value, that most believe that people would not engage in self-destructive behaviors, and that most people are not proficient at detecting deception. Kassin & Gudjonnson, *The Psychology of Confessions* at 57.

Not only do jurors have difficulty with these concepts, but law enforcement officers have been found to be *less* likely to detect a false confession than introduction to psychology students or even pure chance. Saul M. Kassin et al., *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 L. & HUM. BEHAV. 211, 214 (2005). Despite the fact that police investigators were the least likely group to identify a false confession, they exhibited a higher confidence in their abilities than any other group. *Id.* at 218-19.

2. The Jury in This Case Needed Expert Assistance to Understand the Potential that Riqo Falsely Confessed to the Crime

Kassin and Gudjonsson assert that exclusion of expert testimony on false confessions is "wholly without merit" and that these rulings "contradict[] a broad range of research findings." Kassin & Gudjonsson, *The Psychology of Confessions* at 59.

> [I]t is now clear that such testimony is amply supported not only by anecdotes and case studies of wrongful convictions, but also by a long history of basic psychology and an extensive forensic science literature, as summarized not only in this monograph but also in several recently published books.

Id.

This Court's decision in *State v. Clopten*, 2009 UT 84, 223 P.3d 1103 is particularly instructive as to this issue. In *Clopten*, the defendant sought to introduce expert testimony on the flaws in eyewitness identification. *Id.* at ¶ 3. This Court reversed the trial court's decision to disallow the testimony. *Id.* at ¶ 49. This Court opined that jurors generally are unaware of the limitations of eyewitness identifications. *Id.* at ¶ 8 (citing *State v. Long*, 721 P.2d 483, 490 (Utah 1986). However, this Court concluded that

the scientific literature supported major issues with mistaken identification, and that jurors not only were "unaware of these deficiencies in human perception and memory" but that they tended to give such identifications significant weight. *Id.* at ¶ 15.

This Court reasoned that expert testimony carried significant advantages over other methods, such as cross-examination or jury instructions. *Id.* at ¶ 18. "When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision." *Id.* at ¶ 20. Additionally, cross-examination and jury instructions were shown to do "little to help a jury spot a mistaken identification." *Id.* at ¶ 21-24. Jury instructions, in particular, come too late, are too buried, and only generally touch the empirical evidence so much so that they lack effectiveness with a jury. *Id.* at ¶ 24.

As to future admissibility, this Court held that in cases of stranger identification, expert testimony on misidentifications will meet Rule 702's requirement that the evidence "assist the jury." *Id.* at ¶ 32-33. The Court also held that expert testimony on mistaken identification is the product of reliable principles and methodology. *Id.* at ¶ 35. Nor should expert testimony be excluded merely because it intrudes on the province of the jury. *Id.* at ¶ 36. In fact, this Court concluded that "eyewitness expert testimony should therefore be routinely admitted, regardless of whether the trial judge decides to issue a cautionary instruction." *Id.* at ¶ 49.

The issue in this case is no different that than in *Clopten*. The phenomenon of false confessions is supported by a massive body of empirical evidence. *See United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997) (finding "that the science of social psychology,

and specifically the field involving the use of coercion in interrogations, is sufficiently developed in its methods to constitute a reliable body of specialized knowledge under Rule 702"). The literature also supports the assertion that jurors are completely unaware of this phenomenon. Expert testimony, also, would dramatically assist jurors in understanding false confessions, and as reasoned in *Clopten*, should be presumptively admissible.

This Court's decision in *State v. Rettenberger*, 1999 UT 80, 984 P.2d 1009 is also relevant to this issue. In *Rettenberger*, the defendant, age 18, moved to suppress his confession to murder on the grounds that it was involuntary. *Id.* at ¶ 1. This Court said that courts must consider a person's age, mental health, education and mental deficiency in evaluating whether the person voluntarily confessed to a crime. *Id.* at ¶ 15. This Court remanded the case and after considering most of the research at issue here—police representations, false friend techniques, threats and promises, the length and time of the interrogation, and the defendant's subjective characteristics, such as his below-average IQ, ADD, brain development at age 15 and other mental illnesses—found that his confession was involuntary. *Id.* at ¶¶ 20-40, 45.

Perhaps most troublesome is that Riqo Perea fits into both suspect categories. Riqo was 19 years old on the date of the offense and has been diagnosed with an IQ of 77 and with a variety of mental illnesses, including ADHD and bipolar disorder. In fact, Riqo's performance on the Wechsler Adult Intelligence Test put his brain development at age 15 on one part and at age 10 or 11 on the other. Riqo testified that he admitted to the

shooting, but it was because of the officers threatened him that if he did not admit guilt, his family would be harmed. R. 1910:36-40. Riqo is exactly the type of individual whom the literature claims is highly susceptible to police coercion and who is most likely to falsely confess to a crime. In fact, in most ways Riqo is no different from *Rettenberger.* His IQ is in the bottom 4%, his brain development puts him under age 18, and his ADHD and other mental illnesses would make him extremely susceptible to police pressure.

The defendant proffered to have one of the nation's premier experts, Dr. Richard Ofshe, testify. According to counsel, Dr. Ofshe could have both opined that Riqo's confession contained classic hallmarks of a false confession and also, he could have educated the jury about false confessions generally. R. 1928:9. The court prohibited both types of testimony. R. 1918:73; 1608-14.

Courts have frequently allowed expert testimony on false confessions.[34] Dr. Ofshe, in particular, has testified repeatedly in courts around the United States. *See* Addendum F. By defendant's count, Dr. Ofshe has been referenced in eighty-five appellate opinions. *Id.* In 54% of them, Dr. Ofshe actually testified about false confessions or was allowed to

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[34] *See also United States v. Shay*, 57 F.3d 126 (1st Cir. 1995) (trial court erroneously excluded expert testimony on defendant's false confession); *United States v. Raposo*, 1998 U.S. Dist. LEXIS 19551, 1998 WL 879723 (S.D.N.Y. 1998) (allowing expert testimony on false confessions); *Hall*, 974 F. Supp. 1198; *State v. Buechler*, 572 N.W.2d 65, 72-74 (Neb. 1998) (trial court erred in refusing to admit expert testimony on false confessions); *Callis v. State*, 684 N.E.2d 233, 239 (Ind. App. 1997) (affirming trial court's decision to admit, on limited grounds, expert witness testimony regarding police interrogation tactics); *State v. Baldwin*, 125 N.C. App. 530, 482 S.E.2d 1, 5 (N.C. App. 1997) (holding that the trial court erred in excluding expert witness testimony that police interrogation tactics made defendant susceptible to giving a false confession).

testify. *Id.* In 22% of the reported opinions, Dr. Ofshe was cited as persuasive authority.[35] This Court has cited Dr. Ofshe as authority on false confessions. *Mauchley,* 2003 UT 10 at ¶¶ 21, 27 n. 3, 53, 54, 56; *State v. Rettenberger*, 1999 UT 80, ¶¶ 22, 23, 31, 984 P.2d 1009. In *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), the trial court excluded Dr. Ofshe's testimony, reasoning that jurors could comprehend false confessions without expert assistance. The 7th Circuit disagreed:

> This ruling overlooked the utility of valid social science. Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony … would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried. …
>
> It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision. It would have been up to the jury, of course, to decide how much weight to attach to Dr. Ofshe's theory, and to decide whether they believed his explanation of Hall's behavior or the more commonplace explanation that the confession was true.

Id. at 1345; *see also Scott v. Chicago*, 2010 U.S. Dist. LEXIS 79534 (N.D. Ill. 2010) (finding that "Ofshe has been held to meet the Daubert-Kumho standards by a wide margin on numerous occasions").

Unfortunately, this case provides virtually no record, other than the officers' testimony, about the form and methods of the interrogation. In *Rettenberger*, this Court was able to review the recording of the confession itself, assess the techniques used by

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[35] In other words, Dr. Ofhse had either testified or been cited favorably in 76% of the reported opinions. In twenty cases (or 24%) Dr. Ofshe was not allowed to testify. However, in several of the opinions, the voluntariness of the confession was not at issue or there was little to no evidence of police coercion. See Addendum F.

the police and the behavior of the defendant and determine, using the exact science at issue in this case, much of it authored by the defense's expert in this case, to determine the voluntariness of the confession. Mr. Perea has extreme difficulty in rebutting any presumption that his confession was voluntarily given because the record is entirely devoid of what methods the officers used.

However, officers acknowledged using specific ploys: they acknowledged using the false friend technique and they also acknowledged repeatedly confronting Riqo with their conclusion that he was lying. R. 1909:212, 242, 243; 1926:20. They also acknowledged using minimization techniques: telling Riqo that he probably shot to "protect the kids" and that he probably meant to shoot high. R. 1909:212, 214, 230-31, 243; 1926:20. Riqo claims the officers lied and threatened him, however, the officers denied these assertions. R. 1910:36-40; 1926:55-58, 100.

The relevant test under Rule 702 of the Rules of Evidence is whether the proffered testimony would assist the jury. Utah R. Evid. 702(a). Courts should not exclude expert testimony merely because it covers matters that jurors can understand. See *Weinstein's Evidence*, P. 702[02] at 702-20 to 702-21 (1996); Michael H. Graham, *Federal Practice and Procedure--Evidence*, § 6644 at 265-66 (Interim edition 1992).

As demonstrated, juries have little comprehension of the realities of false confessions. Ronald Houston testified that Riqo Perea's IQ was 77 and that he suffered from a variety of mental illnesses—these same mental illnesses and Riqo's age make it much more likely that he would be susceptible to a false confession. The trial court

erroneously excluded this valuable testimony from the jury's consideration and left them with a false impression of the potential reliability of Riqo's confession.

III. TO ADDRESS THE PROBLEM OF FALSE CONFESSIONS, THIS COURT SHOULD REQUIRE POLICE TO RECORD CONFESSIONS THAT OCCUR AT THE POLICE STATION

Riqo was taken to the police station, where officers put him in an interrogation room which was equipped with a closed-circuit television. R. 1909:208; 1926:86. One officer watched on television in another room that was capable of recording the entire conversation. R. 1909:226; 1926:35. Even though the equipment was not difficult to operate, Detective Gent said that in ten years he had never recorded an interrogation because it was a department policy and that he "chose not to" record because his report and notes were more accurate than a video recording. R. 1909:226-228; 1926:37. However, the detective acknowledged recording phone calls previously and using his small desk tape recorder to record a conversation with Dominque Duran in this case. R. 1926:40, 122. He admitted he could have used the small tape recorder to record Riqo's interrogation. R. 1926:122.

This interview took a total of an hour and forty minutes, which Detective Thomas condensed down to a one-page report that he insisted "covered all the information that was gathered in the interview." R. 1909:222; 1926:38-39.[36] Over the next hour or so, Officers and Riqo sat at a computer while Detective Gent typed Riqo's confession, allegedly as Riqo spoke it. R. 1909:219-223; 1926:101, 105-07. Detective Gent

[36] Officers also testified that the interview took 45 minutes or an hour. R. 1926:36, 102.

acknowledged he made several typos. R. 1926:124. Riqo read the statement and signed it. R. 1909:223; 1926:106-07.

This Court has previously held that under the Utah Constitution, officers are not required to record confessions. *State v. Villarreal*, 889 P.2d 419 (Utah 1995). However, this Court expressed reservations about officers who violate these policies:

> When a formal confession is given in a police station, it could, and should, be recorded. But confessions, and admissions short of a confession, can be made anywhere at unexpected times and places where formal recording is impossible. Barring all such evidence would deprive the courts of much evidence that is generally reliable. Thus, we hold that contemporaneous recording of a confession is not mandated by the Utah Constitution.
>
> Although, in accord with other courts, we refrain from requiring recording of interrogations under the Utah Constitution, we note several policy reasons for recording interrogations. These include avoiding unwarranted claims of coercion and avoiding actual coercive tactics by police. In addition, recording an interrogation may show the "voluntariness of the confession, the context in which a particular statement was made, and . . . the actual content of the statement."

Id. at 427 (citing *Williams v. State*, 522 So. 2d 201, 208 (Miss. 1988)).

In a case similar to this one, this Court held that a defendant's confession, written down by the officer, and signed by the defendant, did not violate his rights. *State v. Carter*, 776 P.2d 886, 891 (Utah 1989). However, this Court indicated that "we do not sanction the particular manner in which [the confession] was recorded in this case." *Id.* The Court emphasized the importance of recording confessions verbatim:

> This process not only helped insure that the defendant's confession was not coerced, but also provided both the trial court and appellate court with the correct tools for effectively and efficiently reviewing the defendant's contentions, as well as the totality of the circumstances of his confession. Such a process guarantees that constitutional rights are protected and justice is effected. Nevertheless, while the dictation process that occurred in this case *could conceivably amount, in other*

instances, to deprivation of a defendant's constitutional rights, that was not the case here.

Id. (citing *State v. Bishop*, 753 P.2d 439 (Utah 1998) (emphasis added).

This Court has yet to promulgate a remedy in situations in which officers are at the police station, have the capacity to record an interrogation, and yet consciously choose not to do so. In fact, *Villarreal* seems to stand for the proposition that officers taking a confession in a police station must record the confession. Mr. Perea asserts that this case presents a unique opportunity for this Court to address police officers' continued disregard of this Court's patient calls for reform.[37]

A. Police Have Continued to Violate This Court's Suggestion

This Court has held that if a confession is given at a police station, "it could, *and should*, be recorded." *Id.* (emphasis added). It also previously stated it did not sanction the non-recording of interrogations. *Carter*, 776 P.2d at 891. In this case officers consciously chose not to record an interrogation at the police station in which recording technology was actually being used to monitor the conversation. "When a police officer intentionally violates what he knows to be a constitutional command, exclusion is essential to conform police behavior to the law. Such a 'flagrant' violation is in marked

[37] In *State v. James*, 858 P.2d 1012, 1018 (Utah Ct. App. 1993), the Utah Court of Appeals also encouraged recording interrogations, while declining to mandate them, stating that recordings help avoid "unwarranted claims of coercion and avoiding actual coercive tactics by police. In addition, recording an interrogation may show the 'voluntariness of the confession, the context in which a particular statement was made, and . . . the actual content of the statement'" (internal citation omitted).

contrast to a violation that is the product of a good-faith misunderstanding of the relevant constitutional requirements." *New York v. Harris*, 495 U.S. 14, 23-24 (1990).

This is not a case in which the police officers acted in ignorance or on a good faith reliance on the law. This Court expressly and repeatedly has asked police officers to record confessions in police stations. These officers chose not to and defended their disregard of this Court's suggestion by stating that their notes were "more accurate" than an actual recording of the interrogation. R. 1909:227.

B. Recordings of Interrogations are Vital to Ascertaining Truth and Their Existence Cannot Depend on a Police Officer's Whim.

Utah courts have recorded their official proceedings for over twenty years.[38] Yet judges, juries and lawyers frequently have to reconstruct the precise details of an interrogation—upon which hangs a person's liberty—without a record of it if the police, the party with the only incentive not to record this evidence, chooses not to preserve it.[39] Such reasoning defies logic and should defy Utah law.

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[38] *See* Utah R. Jud. Admin. 4-201(1)(A) ("A video or audio recording system shall maintain the verbatim record of all court proceedings"); Utah Code Ann. § 78A-2-405 ("The Judicial Council shall by rule provide for the means of maintaining the record of proceedings in the courts of record by official court reporters or by electronic recording devices.") (enacted 1988); 78A-5-108 (enacted 1989).

[39] The Supreme Court likened police interrogation to "testimony" demanding the same protections of confrontation. *Crawford v. Washington*, 541 U.S. 36, 52 (2004) ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard"). Thus, police interrogations clearly would require the same protections of all judicial testimony—a contemporaneous recording.

Courts, and even civil litigants, expect contemporaneous recording of their work.[40] The Massachusetts Supreme Court reasoned

> We believe that the electronic recording of interrogations would, in many cases, be a helpful tool in evaluating the voluntariness of confessions. Defendants, prosecutors, and courts spend an enormous amount of time and effort trying to determine precisely what transpires during custodial interrogations, and all would be benefited in some way by a complete electronic recording.

Commonwealth v. Fryar, 610 N.E.2d 903, 910, n.8 (Mass. 1993).

Unfortunately, the police have ignored this Court's repeatedly patient calls for a uniform system of recording. It appears that the Ogden Police Department prefers to risk a confession being ruled involuntary than to let courts and juries know exactly how it was obtained. *See* R. 1926:37 (Ogden detective policy was not to record confessions). This Court has not hesitated to impose duties on law enforcement in the interrogation context. *State v. Hunt*, 607 P.2d 297, 302 (Utah 1980) ("Police interrogation must, of course, *always* be reasonable, and police *must conduct* such interviews in a responsible manner") (emphasis added).

Currently, five states statutorily require recording confessions.[41] Additionally, several state courts have also required recording confessions.[42] Recording would not be unduly burdensome or difficult for law enforcement to implement.

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[40] Contemporaneous recording of a trial is required in criminal appeals, UTAH R. APP. PRO. 12(a)(1), and a transcript is essential for appellate review. *Lewis Bros. Stages, Inc. v. Public Serv. Comm'n,* 452 P.2d 287 (Utah 1969); Rule 4-201, Utah Rules of Judicial Administration. Civil practice in the analogous pretrial "investigative" context is premised upon availability of a contemporaneous verbatim record. *See* UTAH R. CIV. PRO. 30(b)(2) (depositions shall be recorded "by sound, sound-and-visual, or stenographic means").

> The cost of the equipment and its operation is minimal. The machinery is not difficult to use. A recording speaks for itself literally on questions concerning what was said and in what manner. Recording would tend to eliminate certain challenges to the admissibility of defendants' statements and to make easier the resolution of many challenges that are made.

Commonwealth v. Diaz, 661 N.E.2d 1326, 1328-29 (Mass. 1996). Like this Court, courts nationwide have strongly recommended recording.[43] In fact, as one court candidly

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[41] Texas, Illinois, Maine, New Mexico, and the District of Columbia. *See* Joshua M. Snavely, *The Electronic Recording of Custodial Interrogations: Who Gets to Hold the Remote? A Separation of Powers Battle*, 35 OKLA. CITY U.L. REV. 193, 195 (2010).

[42] *See e.g., In re Jerrell*, C.J., 283 Wis. 2d 145, 166-73 (Wis. 2005) (confessions of juveniles are not admissible if police fail to record the confession); *State v. Cook*, 179 N.J. 533, 562 (N.J. 2004) (appointing a committee to investigate the recording requirement); *Stephan v. State*, 711 P.2d 1156, 1158-59 (Alaska 1985) (failure to electronically record custodial interrogation conducted in a place of detention violates due process); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (all custodial interrogation must be electronically recorded when occurring at a place of detention to ensure the fair administration of justice).

[43] *See State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001) ("There can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation. As a result, the judiciary would be relieved of much of the burden of resolving these disputes. In light of the slight inconvenience and expense associated with electronically recording custodial interrogations, sound policy considerations support its adoption as a law enforcement practice."); *People v. Raibon*, 843 P.2d 46, 49 (Colo. Ct. App. 1992) ("[T]he recording of an interview with either a suspect or a witness, either by audiotape or otherwise, may remove some questions that may later arise with respect to the contents of that interview. For that reason, it may well be better investigative practice to make such a precise record of any interview as the circumstances may permit"); *State v. Kekona*, 886 P.2d 740, 745-46 (Hawaii 1994) ("[H]aving an electronic recording of all custodial interrogations would undoubtedly assist the trier of fact in ascertaining the truth.... A recording would be helpful to both the suspect and the police by obviating the 'swearing contest' which too often arises when an accused maintains that she asserted her constitutional right to remain silent or requested an attorney and the police testify to the contrary. A recording would also 'help to demonstrate the voluntariness of the confession, the context in which a particular statement was made and of course, the actual content of the statement.'"). A cogent summary of recording's benefits was provided in *Stoker v. State*, 692 N.E.2d 1386, 1390 (Ind. App. Ct. 1998):

admitted, "to the best of our knowledge, no court in any jurisdiction has ever concluded that the tape recording of custodial interrogations in places of detention would be detrimental ...." *Stoker v. State*, 692 N.E.2d 1386, 1390, n.10 (Ind. App. Ct. 1998).

Recordings are ubiquitous. Failing to record confessions does more than influence the accuracy of determinations at trial. It creates an inference that the police have something to hide and it corrodes the legitimacy and credibility of the process. This is because most all of us encounter the ubiquity of recording transactions outside of the interrogation room. We record 911 calls,[44] millions of customer service phone calls for "quality-assurance purposes,"[45] and thousands of surveillance cameras record transactions in banks and convenience stores and the actions of ordinary people

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> Nevertheless, although we impose no legal obligation, we discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget. In turn, the judiciary would be relieved of much of the burden of resolving disputes involving differing recollections of events which occurred.
>
> Moreover, the recording would serve to protect police officers against false allegations that a confession was not obtained voluntarily. Therefore, in light of the slight inconvenience and expense associated with the recording of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure.

[44] *State v. Roybal*, 2010 UT 34, ¶ 3, 232 P.3d 1016 (district court concluded that victim sounded intoxicated after listening to the 911 call); *State v. CDL*, 2011 UT App 55, 250 P.3d 69 (911 call reviewed extensively for admissibility); *Salt Lake City v. Williams*, 2005 UT App 493, ¶ 8, 128 P.3d 47 (trial court properly admitted 911 recording).

[45] Chuck Salter, *This Call is Being Recorded . . . for More than you Think*, 78 FAST COMPANY 34 (January 2004) ("[Call recording firm NICE Systems] claims to provide call-recording software to 67 of the *Fortune* 100 companies and says its customer-service centers capture about *40 million* calls a day.") (Italics in original).

throughout the country.[46] Yet the statement responsible for Riqo Perea's incarceration for life without parole may—or may not—be recorded at the sole, unfettered discretion of a police investigator.

Federal magistrates must produce a "verbatim record" of telephonic warrants and the Utah Rules of Criminal Procedure require the testimony and content of a warrant to be recorded. FED. R. CRIM. PRO. 41(d)(3)(B)(ii); UTAH R. CRIM. PRO. R. 40 (l)(2). Governmental meetings which are open to the public must be recorded. *See e.g.,* Utah Code Ann. § 52-4-203 (2009). In Utah, child sexual abuse interviews have been recorded for decades.[47] We even record conversations in the jail. *State v. Greuber*, 2007 UT 50, 165 P.3d 1185 (not ineffective assistance for defense counsel to fail to listen to jail recordings). In this case, Riqo's own jail recordings were used against him. R. 1928:52.

Commentators have been calling for recording of custodial interrogations for over four decades.[48] They have noted the anomaly of not recording custodial interrogations.

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[46] Jeremy Brown, *Pan, Tilt, Zoom: Regulating the Use of Video Surveillance of Public Places*, 23 BERKELEY TECH. L.J. 755 (2008) ("So many cities across the country have installed or upgraded [video surveillance] systems that research analysts estimate that the video surveillance market will almost double between 2006 and 2011, growing from $ 6.6 billion to $ 11.9 billion").

[47] *See e.g., State v. Lamper*, 779 P.2d 1125 (Utah 1989) (videotape of police interview with a child fit trustworthiness standards and was properly admitted); Utah Code Ann. § 62A-4a-414(1)(a)(i) (interviews of children in sex abuse cases "shall be recorded visually and aurally on film, videotape, or by other electronic means").

[48] See, e.g., James P. Barber & Philip R. Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017, 1020-26, 1040 (1974); Yale Kamisar, *Foreword: Brewer v. Williams--A Hard Look at a Discomfiting Record,* 66 GEO. L.J. 209, 238-43 (1977); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1, 45 (1970); Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 678 (1966); Saul M. Kassin et

> With this truism [that civil depositions must be recorded to be admissible], it is stunning that we do not require verbatim transcripts of criminal interrogations, where the stakes are so much higher, access to information about psychological pressures so much more important, and legal representation (of either party) so much less likely.

Christopher Slobogin, *Toward Taping*, 1 OHIO STATE J. CRIM.L. 309, 316-17 (2003).[49]

Video recording is widely available to law enforcement and helps them do their job better. Paul Cassell, one of the most persistent critics of the *Miranda* regime, has also concluded that recording interrogations has immense benefits:

> Recording confessions also promises to be effective in preventing not only physical coercion but also in detecting, if not preventing, other fine points of coercion as well. In this regard, it is interesting that some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which

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al, *Police Induced Confessions* at 23 ("Without an electronic recording of the entire interrogation process, courts are thus left to decide a swearing contest between the suspect and the detective over the source of the details contained within the confession"); Saul M. Kassin, *Wrongful Convictions: Understanding and Addressing Criminal Injustice*, 73 ALB. L. REV. 1227 (2010); Jennifer J. Ratcliff and Victoria M. Jager, *The Hidden Consequences of Racial Salience in Videotaped Interrogations and Confessions*, 16 PSYCH. PUB. POL. & L. 200 (2010) (recommending equal-focused videotaped confessions to avoid camera perspective bias).

[49] *See also*, Daniel Donovan & John Rhodes, *Comes A Time: The Case For Recording Interrogations*, 61 MONTANA LAW REVIEW 223 (2000); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1118 (2010) ("Increasing numbers of local police departments and states have adopted one crucial reform: videotaping entire interrogations. Contaminated false confessions can be inexpensively discouraged by requiring recording of entire interrogations.").

FBI Agent Julie Renee Linkins summarizes the argument well: "The time has come ... to embrace electronic recording of custodial investigative interviews .... It matters little how the mandate comes about; legislation, policy, and court requirements all can do the job. What matters is that recordings can enhance lawful investigations, safeguard individuals' rights, guard against false accusations, and conserve court resources. The collective interests of justice demand nothing less." Julie Renee Linkins, *Satisfy The Demands Of Justice: Embrace Electronic Recording Of Custodial Investigative Interviews Through Legislation, Agency Policy, Or Court Mandate*, 44 AM. CRIM. L. REV. 141, 173 (2007).

> permitted judges to parse implicit promises and threats made to obtain an admission. Recording also allows a review of police overbearing that might not be revealed in dry testimony. Taping is thus the only means of eliminating "swearing contests" about what went on in the interrogation room.
>
> Videotaping also promises to offer more effective protection against ... false confessions induced by noncoercive police questioning. A complete record of the proceedings promises to be the most effective means of identifying such cases.[50]

There is no excuse for the failure to record an interrogation conducted in a detention or law enforcement facility. For over a half a century Utah law enforcement has had the capability to record interviews.[51] Videotaping equipment is apparently sufficiently available for the State's law enforcement agencies to use it to record booking procedures. *State v. Jiminez*, 761 P.2d 577, 578 (Utah Ct. App. 1988).

Beyond the State of Utah, law enforcement agencies around the country routinely use video recording. 80% of American law enforcement agencies use some sort of recording device. Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and The Right To Anonymity*, 72 MISS. L. J. 213, 221 (2002). Police agencies typically become more satisfied once they record confessions, because they gain hard evidence of the confession. *See* Thomas P. Sullivan, *Police Experiences with Recording*

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[50] Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment,* 90 N.W. UNIV.L.REV. 387, 488 (1996).

[51] *See State v. Garcia,* 355 P.2d 57 (Utah 1960) (defendant's 1958 interview with police was tape recorded and used against him); *State v. Williams,* 656 P.2d 450, 451 (Utah 1982) (defendant's 1979 interview with police was recorded and admitted against him); *State v. Carter,* 888 P.2d 629, 636 (Utah 1994) (confession recorded in 1985); *State v. Bishop,* 753 P.2d 439, 464-65 (Utah 1988) (court finds after reviewing recording of 1983 confession that while some police interrogation tactics were threatening, defendant's confession remained voluntary); *Tillman v. Utah*, 2005 UT 56, ¶¶ 5, 24-25, 128 P.3d 1123 (Tillman's post-conviction petition was not procedurally barred because prosecution failed to disclose 1982/1983 recorded interviews of the defendant).

Custodial Interrogations (Summer 2004).[52] The recordings also prevented the vast majority of defense motions to suppress. *Id.*

Jurisdictions adopting a recording requirement recognize that in certain circumstances recording may not be feasible, and that despite the best efforts of responsible law enforcement officers, events beyond their control sometimes intervene. In Minnesota, the failure to record a custodial interrogation results in exclusion of the statement if the violation is "substantial." Substantiality is determined on a case-by-case basis. *See Scales*, 518 N.W.2d at 592.

Video recording helps judges determine voluntariness. For 125 years, in order to ensure the reliability of confessions, this Court has steadfastly recognized and discharged its obligation to ensure that statements produced by custodial interrogation are voluntary.[53] Recording will assist both trial and appellate judges in making these determinations. *See State v. Bozung*, 2011 UT 2, ¶ 3, 245 P.3d 739 (the district court and the appellate court reviewed the entire video and audio recording of defendant's interrogation and made findings regarding suppression); *State v. McClellan*, 2009 UT 50, ¶¶ 30-32, 216 P.3d 956 (no error to admit video recorded interrogation).

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[52] Available online at http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf (last accessed May 28, 2011) (attached as Addendum G)

[53] *Mauchley*, 2003 UT 10; *State v. Rettenberger*, 1999 UT 80, 984 P.2d 1009; *State v. Mabe*, 864 P.2d 890 (Utah 1993); *State v. Allen*, 505 P.2d 302 (Utah 1973); *State v. Strohm*, 456 P.2d 170 (Utah 1969); *State v. Gardner*, 230 P.2d 559 (Utah 1951); *State v. Crank*, 142 P.2d 178 (Utah 1943); *State v. Wells*, 100 P. 681 (Utah 1909); *United States v. Kirkwood*, 13 P. 234 (Utah 1886).

In *State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106, the defendant alleged that the police took advantage of his mental impairments to obtain a *Miranda* waiver. *Id.* at ¶ 14. This Court, "having reviewed the transcript and video of the interrogation" disagreed: the officers did not use the false friend technique or half-truth tactics, nor did they threaten or make promises to the defendant. *Id.* at ¶ 18. Justice Wilkins extensively analyzed the "critical portion" of the videotape in his assessment of the confession. *Id.* ¶¶ 58-62. In short, videotapes allow this Court, and other courts, to engage in a meaningful analysis of the issues raised. In *Rettenberger*, discussed *infra* section II.A.2., this Court extensively reviewed the two videotaped interrogations (the district court reviewed them four times) to determine that officers engaged in tactics that overwhelmed the particular defendant and affected the voluntariness of his confession. *See*, *Rettenberger*, 1999 UT 80 at ¶¶ 3, 8 n.2, 35, 39 ("the interview videotapes demonstrate" or "[t]he videotapes of the interviews support this assessment …"); *see also State v. Galli*, 967 P.2d 930, 933-37 (Utah 1998) (after reviewing the recordings of defendant's confession this Court concluded that his confession was not obtained in violation of *Miranda* nor coerced). Nuanced (and accurate) review was possible because the interrogations were taped.

Lessons learned from other jurisdictions. The experience of jurisdictions that have chosen to require electronic recordings demonstrate that: 1) recording will not happen through persuasion; 2) recording must be adopted in a uniform, comprehensive fashion; 3) recording would be comparatively easy to implement; and strongly suggest

that 4) once implemented, recording of custodial interrogations will benefit judges, jurors, prosecutors, defendants and police.

In 1985, Alaska became the first U.S. jurisdiction to implement a recording requirement for custodial interrogations. It did so after five years of attempting to persuade law enforcement to adopt the practice voluntarily. The Alaska Supreme Court had first "advise[d] law enforcement agencies that as part of their duty to preserve evidence, . . . it is incumbent upon them to tape record, where feasible, any questioning and particularly that which occurs in a place of detention." *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980) (citations omitted). Nevertheless, this advice went unheeded.[54]

After five years of having its clear recommendations ignored, the Alaska Supreme Court held that "recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible." *Stephan v. State*, at 711 P.2d 1156, 1158-59 (Alaska 1985).[55] The Alaska rule states that if a custodial interrogation conducted at a detention facility is not fully recorded, then the state must convince the

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[54] *See McMahan v. State*, 617 P.2d 494, 499 n.11 (Alaska 1980), *cert. denied*, 454 U.S. 839 (1981) ("Again we advise law enforcement agencies that, as part of their duty to preserve evidence, it is incumbent upon them to tape record, where feasible, any questioning and particularly that which occurs in a place of detention."); *In re S.B. v. State*, 614 P.2d 786, 790 n.9 (Alaska 1980) ("It will be a great aid to the trial court's determinations and our own review of the record if an electronic record of the police interview with a defendant is available from which the circumstances of a confession or other waiver of *Miranda* rights may be ascertained.")

[55] The Alaska Supreme Court also found that a failure to record implicated other provisions beyond due process. "[R]ecording … is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial." *Stephan*, 711 P.2d at 1159-60.

court by a preponderance of the evidence that recording was not feasible under the circumstances, and in such cases the "failure to record should be viewed with distrust." *Id.* at 1162-63. The remedy for the failure to record is exclusion.

Minnesota's Supreme Court implemented a recording requirement in 1994. *See State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). The Minnesota Supreme Court, as has this Court, first tried recommending to law enforcement that interrogations be recorded as a means of enabling judicial review. *See State v. Robinson*, 427 N.W.2d 217, 224 (Minn. 1988); *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). These recommendations were ignored for six years. Then the Minnesota Supreme Court recognized, as had the Alaska Supreme Court, that a recording requirement would

> provid[e] a more accurate record of a defendant's interrogation and thus will reduce the number of disputes over the validity of *Miranda* warnings and the voluntariness of purported waivers. In addition, an accurate record makes it possible for a defendant to challenge misleading or false testimony and, at the same time, protects the state against meritless claims. ... A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.

Scales, 518 N.W.2d at 591 (Minn. 1994) (citations omitted).

The National Institute of Justice found "a striking 97 percent of all departments that have ever videotaped suspects' statements continue to find such videotaping, on balance, to be useful." NIJ, *Videotaping Interrogations*.

While this Court has previously decided that recordings are not constitutionally mandated because of the need for confessions to be taken in the field, Riqo Perea's case demonstrates that this Court must do something more to address the problem of the non-

recording of custodial police interrogations. Mr. Perea contends that this Court ought to require police to record any interrogation that occurs at a police station.

C. The Absence of a Recording Makes it Extremely Difficult to Assess the Voluntariness of the Defendant's Confession.

Perhaps most troublingly, the absence of a record of the interrogation leads to serious defects in attempting to assess the voluntariness of Mr. Perea's confession. As alleged in the trial court, Mr. Perea contended that because of his relative youth and mental illnesses coupled with interrogation tactics used by the police, he did not give a voluntary confession. He had an expert prepared to testify to that effect. He contended that the facts of his case nearly mirrored those of *State v. Rettenberger*, 1999 UT 80, 984 P.2d 1009, in which this Court, after painstakingly examining the videotaped interrogations, held that the defendant, who while 18, had the maturity of a 15-year old, a below-average IQ and ADD, coupled with police use of misrepresentations, false friend techniques and threats and promises, did not voluntarily confess. Riqo's subjective characteristics mirror exactly those of *Rettenberger*. In fact, the officers in this case admitted to using most of the Reid Techniques, including minimization, threats and false friend techniques. Like *Rettenberger*, this Court also could easily find that Riqo did not voluntarily confess to this offense. For the reasons herein stated, Mr. Perea reasserts that the trial court erroneously determined the voluntariness of his confession, especially given the trial court's refusal to hear expert testimony on the issue.

However, the difficulty lies in the fact that unlike *Rettenberger*, this Court lacks an objective record of the proceedings of the interrogation, which only increases the difficulty of making a finding that Riqo's confession was involuntary. This underscores the critical need to require recording of police-station interrogations.

One analogy is appropriate at this stage. In this case, the officer engaged in a phone conversation with the defendant that the defendant recorded. R. 1909:29. The officer acknowledged the recording's accuracy and admitted it contained several statements that he did not put in his police report, including one in which the officer expressed his opinion that Riqo was not the shooter. R. 1910:11-26; 1926:40-41, 46-47. In fact, the officer disregarded all of the statements he made to Riqo as not "pertinent" or "important" enough to merit inclusion in his report. R. 1926:47, 49. Riqo's interrogation lasted over ninety minutes which the officer summarized into a page and a half report. There is no way the police report contains all of the statements made during an hour and a half interrogation. Despite the officer's confidence, like the phone call, the report lacks information. This Court must recognize the critical need for law enforcement to preserve evidence of confessions.

IV. THE DEFENDANT'S CONFESSION SHOULD HAVE BEEN SUPPRESSED FOR A *MIRANDA* VIOLATION

Detective Thomas called Riqo Perea on the telephone while investigating the case. R. 1909:236, 228; 1926:11. Riqo told the detective that he would not come in and "that he needed to speak with a lawyer first before he came in. … He told me he got screwed the

last time he spoke with cops and he was innocent." R. 1909:247-48, 236, 1910:23, 25, 36; 1926:12. Riqo was subsequently *Mirandized*, according to officers, during the interrogation in which he waived his rights. R. 1909:208; 1926:86. Riqo clearly invoked his right to counsel prior to the interrogation and prior to being in custody.

A. A Defendant Can Anticipatorily Invoke His Right to Counsel

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court said:

> If the individual indicates in any manner, ***at any time prior to*** or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Id. at 473-74 (emphasis added). The Supreme Court has reasoned that these prophylactic rules are necessary to limit the compulsion in interrogations. *Davis v. United States*, 512 U.S. 452, 457 (1994) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court emphasized a "bright-line" rule in *Miranda* invocations:

> [A]n accused ... *having expressed his desire to deal with the police only through counsel*, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85 (emphasis added).

This bright line rule "provid[es] 'clear and unequivocal' guidelines to the law enforcement profession." *Arizona v. Roberson*, 486 U.S. 675, 682 (1988). It is also "designed to prevent police from badgering a defendant into waiving his previously

asserted *Miranda* rights." *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (emphasis added) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). If an accused has "expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Roberson,* 486 U.S. at 681 (quoting *Michigan v. Mosley*, 423 U.S. 96, 110, n. 2 (1975) (White, J. concurring)). "This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation. . . ." *Id.* at 684. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Id.* at 686.

Most courts acknowledge that the United States Supreme Court has not decided the issue of whether a defendant can anticipatorily invoke his Fifth Amendment rights pre-custodial interrogation. *See, e.g., Alston v. Redman*, 34 F.3d 1237, 1245 (3d Cir. 1994), cert. denied, 513 U.S. 1160, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995); *People v. Villalobos*, 737 N.E. 2d 639, 642 (Ill. 2000); *Russell v. State*, 215 S.W.3d 531, 536 (Tex. App. 2007). However, many courts cite dicta from a footnote in *McNeil* for the proposition that defendants may not invoke their rights outside of the custodial setting. See, e.g., *Redman*, 34 F.3d at 1248. The footnote says:

> The dissent predicts that the result in this case will routinely be circumvented when, "in future preliminary hearings, competent counsel ... make sure that they, or their clients, make a statement on the record' invoking the *Miranda* right to counsel. We have in fact never held that a person can invoke his *Miranda* rights

> anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve. If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed no objection to being questioned would be unapproachable.

McNeil, 501 U.S. at 182 n.3 (internal citations omitted).

McNeil does not stand for the proposition that one cannot anticipatorily invoke constitutional rights. McNeil appeared in court, with counsel, at a bail hearing. Id. at 174. Later that evening, police interrogated him on a different charge which he confessed to after *Miranda* warnings. *Id.* McNeil argued that his appearance with counsel constituted an invocation of the right to counsel on any other offense. *Id.* at 174-75. The Supreme Court disagreed, holding that the invocation of the Fifth Amendment right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction." *Id.* at 178 (emphasis in original). The Supreme Court in *McNeil* never focused its analysis on the time or the place in which a defendant asserted his right to counsel. Rather, the only issue of importance was that *McNeil* never actually expressly asserted a right to counsel.

The footnote seems to imply that one cannot invoke the right to counsel prior to custodial interrogation. However, this reasoning is misplaced. First, the footnote is clearly *dicta*, since the Court's analysis weighed entirely on McNeil's lack of invocation of his right to counsel. In fact, most courts acknowledge the footnote as *dicta*. *See, e.g.*, *United States v. Wright*, 962 F.2d 953, 954-55 (9th Cir. 1992); *United States v. Barnett*, 814 F. Supp. 1449, 1453 (D. Alaska 1992); *Sauerheber v. Indiana*, 698 N.E.2d 796, 802 (Ind. 1998). Second, the footnote does not stand for the proposition that a defendant cannot affirmatively invoke his right to counsel prior to interrogation—it only acknowledges the existence of an issue yet to be decided. Third, in *McNeil*, the dissent argued that McNeil did, in fact, invoke his right to counsel. *Id.* at 184 (Stevens, J., dissenting, joined by Marshall and Blackmun, JJ). The footnote constitutes a response to the dissent's argument that lawyers would circumvent the Court's ruling by expressly invoking the right to counsel at preliminary hearings. In response, the Court says that these invocations would likely be ineffective since they are not made in "the context" of custodial interrogations. However, the Court's response does not address the situation in which a defendant happens to invoke his rights in "the context" of interrogations, like the case at hand, rather than at a preliminary hearing. In other words, the Court's footnote has little to do with the specific issue in this case: whether a defendant, acting alone and without counsel, can invoke his right to counsel when specifically asked by the police to come in for an interrogation.

McNeil itself, in the majority opinion, supports the proposition that a person could expressly invoke the right to counsel prior to interrogation: the *Edwards* rule "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *Id.* at 178 (emphasis in original). *McNeil* supports an argument that if a person indicates, at any time, that he wants an attorney's help in dealing with custodial interrogation, then the *Edwards* rule would apply. In fact, the Court said that the purpose of the *Edwards* rule, and a suspect's invocation of it, is to express the suspect's "desire to deal with the police only through counsel." *Id.*

Additionally, the footnote contradicts much of the Court's prior jurisprudence on this issue. In *Miranda*, the Supreme Court said that "a pre-interrogation request for a lawyer ... affirmatively secures his right to [an attorney] ...." *Miranda*, 384 U.S. at 470. Additionally, the Court said that if a defendant requests counsel "in any manner and at any stage of the process" then "there can be no questioning." *Id.* at 444-45. The Court has rejected as "plainly wrong" the position "that the authorities need not stop their questions if an accused requests counsel prior to or during the *Miranda* warnings," reasoning that "[a] request for counsel coming at *any* stage of the process requires that questioning cease until counsel has been provided." *Smith v. Illinois*, 469 U.S. 91, 97 n.6, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984) (quotation marks and citations omitted) (emphasis in original). The Court stated that "[w]hat matters for *Miranda* and *Edwards* is what happens *when the defendant is approached for interrogation*, and (if he consents) what happens during the

interrogation ..." *Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079, 2091, 173 L. Ed. 2d 955, 970 (2009) (emphasis added).

Some courts have held that defendants may invoke the Fifth Amendment right to counsel pre-interrogation, so long as the interrogation was "imminent."[56] For example, in *United States v. Kelsey*, 951 F.2d 1196 (10th Cir. 1991), the police searched the defendant's home. *Id.* at 1197-98. He repeatedly asked for counsel and was subsequently taken into custody, given *Miranda* and interrogated. *Id.* at 1198. The fact that Kelsey invoked his right to counsel before the police were required to *Mirandize* him was "irrelevant," the Court said, since the *Edwards* rule is triggered by "some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *Id.* at 1199 (quoting *McNeil*, 501 U.S. at 178). Since Kelsey expressly asked for counsel in dealing upcoming police interrogation, he successfully met that requirement.

A person who asks for counsel to help him in interrogation "considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Id.* (quoting *Roberson*, 486 U.S. at 683); c*f. North Carolina v. Torres*, 412 S.E.2d 20, 25

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[56] *See United States v. LaGrone*, 43 F.3d 332, 339 (7th Cir. 1994) ("in order for a defendant to invoke his *Miranda* rights the authorities must be conducting interrogation, or interrogation must be imminent"); *People v. Nguyen*, 132 Cal. App. 4th 350, 33 Cal. Rptr. 3d 390, 395 (Cal. Ct. App. 2005) ("[A] suspect may invoke *Miranda's* protections if custodial interrogation is impending or imminent"); *United States v. Grimes*, 142 F.3d 1342, 1348 (11th Cir. 1998) ("*Miranda* rights may be invoked only during custodial interrogation or when interrogation is imminent"); *Villalobos*, 737 N.E.2d at 646 ("[T]he suspect must invoke the right to counsel during custodial interrogation or when custodial interrogation was imminent").

(N.C. 1992) ("Thus, although an individual cannot *waive* her right to counsel prior to receiving *Miranda* warnings, a suspect in custody can certainly *assert* her right to have counsel present during her impending interrogation prior to *Miranda* warnings and the actual onset of questioning") (emphasis in original); *Nguyen*, 132 Cal. App. 4th at 394-95 ("We do not suggest defendant must await a police officer's formal recitation of the *Miranda* admonition before invoking the right to counsel"); *State v. Kramer*, 720 N.W.2d 459, 464 (Wis. App. 2006) ("there might be situations where a request for counsel at the conclusion of a standoff situation is so intertwined with imminent interrogation that the invocation should be honored"). *See also United States v. Goodson*, 22 M.J. 22, 23 (C.M.A. 1986) (holding that a defendant's repeated requests for an attorney pre-interrogation had the "effect" of bringing Edwards "into play"); *Pecina v. Texas*, 326 N.W.3d 249, 265 (Tex. App. 2010) ("To protect the Fifth Amendment privilege against self-incrimination, the police still may not initiate custodial interrogation of a suspect who has previously requested assistance of counsel").

Several policy reasons justify allowing defendants facing custodial interrogation to anticipatorily invoke their right to counsel. Without such a rule, the police could freely interrogate a person, who as they arrest him, asserts that he wants a lawyer—so long as the police merely interrogate him later. Unfortunately, ordinary people are not as sophisticated as lawyers, and a person, who when confronted by the police after invoking their rights, would only assume that the police are ignoring or denying them that right. The Supreme Court explicitly supported this reasoning:

> "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. . . . The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly."

Michigan v. Jackson, 475 U.S. 625, 633 n. 7 (1986) (citations omitted) (overruled on Sixth Amendment grounds, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009)).

Additionally, *Miranda* attempted to "give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Roberson*, 486 U.S. at 680 (quoting *Miranda*, 384 U.S. at 441-42). The rule is simple: if a defendant asks to deal with custodial interrogation only through a lawyer, then the police may not do so—even if such a request comes before the defendant is actually taken into custody.

In this case, there is no question that Riqo expressly invoked his right to counsel. Critically, Riqo invoked this right in the context of an anticipated interrogation. The officer asked him to come in and talk with him—an interrogation. Riqo indicated that the last time he was interrogated, he was screwed. The conversation revolved entirely around an anticipated interrogation and Riqo expressly indicated that it was his desire to "deal with the police only through counsel." *Edwards*, 451 U.S. at 485. In such a scenario, the defendant certainly can indicate to the police that it is his desire to have an attorney present during any questioning and the police must honor this request.

Hence, the trial court erred in denying Mr. Perea's motion to suppress the confession for a *Miranda* violation.

V. THE TRIAL COURT ERRONEOUSLY LIMITED MR. PEREA'S ABILITY TO PRESENT A DEFENSE BY FAILING TO PROHIBIT OFFICERS FROM DISCLOSING THE IDENTITIES OF ANONYMOUS WITNESSES

Prior to trial, several witnesses approached defense counsel indicating they would testify that Riqo was not the shooter and that another person had confessed to the shooting, so long as they could testify anonymously because of fears for their safety. R. 1915:15-16. Their fears were not unfounded: one man, Paul Ashton, was kidnapped, taken to a parking lot and shot in retaliation for the shooting. R. 1915:14. Riqo's grandmother's house was shot at two times. *Id.* The day of the preliminary hearing, Riqo's mother and sister were attacked and "severely beaten" in the courthouse elevator. *Id.* One other person was charged with aggravated assault against a member of Riqo's family. R. 1914:15; 1915:20. The State admitted that retaliation and gang violence was a "very real issue in this case." R. 1914:19.

Defense counsel proposed closing the courtroom to the public for their testimony, which the court said seemed drastic. R. 1915:18-20. He also proposed turning their names over to the State and to law enforcement, but with the proviso that law enforcement not disclose their names to others, reasoning that if that happened, witnesses would either change their stories or be harmed. R. 1915:65-66. The court refused to "put that kind of limit on" their investigation, reasoning that law enforcement had "to have some latitude … to talk to these witnesses and follow up on the information … they get …." R. 1915:60. The court said it was "blown away" that these witnesses lacked "moral courage" and had "no backbone, no spine …" to talk with the police about what they saw. R.

1915:34-35. The court ruled that defendant could only call these witnesses if he allowed law enforcement to investigate their claims: "if these people are not willing to give their identity to the prosecutors and [let] law enforcement follow up on what they are going to say, then they are not going to testify." R. 1915:62. Defense counsel reiterated that "we are there" if law enforcement would not leak the names on the street, but the court refused to give that order. R. 1915:66.

The State then moved to disqualify defense counsel, "conceding to a Sixth Amendment ineffective assistance of counsel issue," because in its opinion, defense counsel treated exculpatory witnesses identities as deserving of greater protection than his client's right to a defense. R. 1112; 1916:13. Defense counsel indicated he would not call the witnesses because they would change their stories once he turned their information over to law enforcement. R. 1916:17-18, 1918:40; 1916:20. Riqo subsequently waived the conflict and never called the witnesses at trial. R. 1916:65-66; 1918:1-20, 26-32, 36-40.

Ultimately, the trial court erroneously failed to take critical steps necessary to protect these individuals and its failure to do so deprived the defendant of an opportunity to present crucial evidence in his defense.

Criminal defendants must be "afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The Sixth Amendment's Compulsory Process Clause grants criminal defendants the right to call "witnesses in his favor" and applies to the States through the 14th Amendment. U.S.

Const. Amend. VI; *Rock v. Arkansas,* 483 U.S. 44, 52 (1987). A defendant must be allowed an opportunity to call witnesses in his favor, as a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Courts may not interfere with a defendant's constitutional right to call witnesses who are "material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *Washington*, 388 U.S. at 19, 23 (finding violation of the right to present a defense because trial court excluded "testimony … relevant and material to the defense").

A. Witness Intimidation Requires Judicial Remedies

Witness intimidation severely affects the authority of the criminal justice system. *See* Judge Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After Alvarado*, 39 SAN DIEGO L. REV. 1165, 1194-1204 (2002). Because of intimidation, witnesses may not come forward or refuse to testify, witnesses may be physically harmed or killed, and may be prevented from cooperating with the police. *Id.* at 1194-95. One court noted "the serious nature and magnitude of the problem of witness intimidation." *Alvarado v. Superior Court*, 5 P.3d 203, 222 (Cal. 2000). Gangs, in particular, may use methods such as "public humiliation, assault, or even execution of victims or witnesses, or members of their families, as well as public acts of extreme brutality that are meant to terrify potential witnesses." Comparet-Cassani, *Balancing the Anonymity* at 1195; *see also* Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?,* 46 AM. J. COMP. L. 641, 644 (Supp. 1998) (noting gang cases particularly

involve witness intimidation). Other methods include "threats of physical violence against a witness's mother, children, or spouse. Threats may be communicated by drive-by shootings into the witness's home, fire bombings of cars, house burnings, or any other form of violent activity." Comparet-Cassani, *Balancing the Anonymity* at 1198.

Gang members also have intimidated witnesses in the courtroom. *Id.* at 1198-99 citing Peter Finn & Kerry Murphy Healey, U.S. Dep't of Justice, *Preventing Gang-and Drug-Related Witness Intimidation* 1, 7 (1996). In a U.S. Department of Justice Survey, 74% of prosecutor's offices reported declining to pursue cases to trial because of witness intimidation. *Id.* at 1204 (citing Carol J. DeFrances et al., U.S. Dep't of Justice, *Prosecutors in State Courts*, 1994, at 1 (1996)). 92% of prosecutor's offices had to dismiss cases because of fear of retribution or actual threats to witnesses. *Id.* "Prosecutors estimated intimidation in 75% to 100% of cases that involved violent crimes in gang areas." *Id.* Gang members, in particular, enforce a strong code of silence, which frightens many witnesses to such a degree that they refuse to come forward. Laura Perry, *What's in a Name?*, 46 AM. CRIM. L. REV. 1563, 1579-82 (2009); *see also Alvarado*, 5 P.3d at 222, n. 15 ("The use of violence and intimidation by criminal gangs to immunize themselves from the criminal justice system is by no means a recent phenomenon").

In this case, the witnesses had legitimate concerns. Witnesses had been kidnapped, shot, shot at, and actually attacked in the courtroom. The threat of violence in this case was very real and it demanded the court take extraordinary measures. The trial court had a simple obligation: to protect the witnesses. The solution would have been easy. The

State and law enforcement would have had these individuals' names with which they could run criminal histories and do limited investigation in order to prepare for cross-examination. The court, then, could have 1) held an *in camera* hearing in which it could have assessed the legitimacy of the witnesses' concerns and the necessity for anonymous testimony;[57] 2) closed the relevant testimony to the public;[58] 3) granted the witnesses a degree of anonymity;[59] 4) or even limited the State's ability to cross-examine.[60]

The court had several options for limiting witness disclosure at its disposal. For example, one appellate court held that the complete anonymity of certain witnesses violated a defendant's right to confrontation, however, the State could refuse to disclose their identities until the moment they took the stand. *People v. Wheaton*, 40 Cal. App. 4th 1348, 1356-57, 47 Cal. Rptr. 2d 418, 423-24 (Cal. App. 4th 1995). In another case, because of threats to a victim, the court properly allowed her to be questioned outside the presence of the defendant, his counsel or the prosecutor. *People v. Perkins*, 691 N.Y.S.2d

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[57] *State v. Keeton*, 573 N.W.2d 378, 381-82 (Minn. App. 1997) (not erroneous for the trial court to hold an *in cam*era hearing without the defendant, his counsel or the prosecutor, to assess the intimidation against a witness claiming anonymity).

[58] Demleitner, *Witness Protection*, 46 AM. J. COMP. L. at 655-60; *Alvarado,* 5 P.3d at 222 (finding that closing court to the public would help prevent witness intimidation).

[59] *Alvarado v. Burge*, 2006 U.S. Dist. LEXIS 46708, 2006 WL 1840020 at 2 (S.D.N.Y. 2006) ("Testifying by giving an identifying number rather than a name does not necessarily curtail any trial rights. The cross-examiner can question the witness' activities in the buy-and-bust operation without regard to the witness' name, and similarly has an opportunity to see and hear that which he testifies about"); *Harbison v. Little*, 511 F. Supp. 2d 872, 887 n.11 (M.D. Tenn. 2007) (witnesses testified anonymously behind a screen).

[60] *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about ... harassment [or] ... the witness' safety").

273, 275 (Sup. Ct. 1999). In *Perkins,* defense counsel had to submit written questions for the witness, which were posed to her by the court, transcribed, sealed and were deemed to be admissible at a subsequent trial against the defendant. *Id.* at 275, 277. The court could also have prevented the witnesses from being seen. *See Maryland v. Craig*, 497 U.S. 836, 844 (1990) ("We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.")

Closing the courtroom constitutes a relatively simple and non-invasive tactic that not only protects witnesses from intimidation but also would not have violated the defendant's rights.[61] First, Mr. Perea was willing to absent himself during the witnesses' testimony, thus waiving any objection he had to a public trial. R. 1915:18. Second, closure can be a critical remedy if it impacts a defendant's ability to present his defense. For example, in *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956), the defendant sought to present evidence that her husband had forced her to commit abnormally shocking sexual acts. *Id.* at 165. Because this testimony would have affected her "physically and emotionally," the trial court properly closed her testimony to the public. *Id.* at 169. In *State v. Poindexter*, 92 So.2d 390 (La. 1956), similar to Mr. Perea's case, the Louisiana Supreme Court reversed a conviction because the judge

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[61] A public trial "is necessarily for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions ..." *Moore v. State*, 108 S.E. 47, 50 (Ga. 1921). Closing the courtroom arguably only impacts the defendant's rights—a right he was willing to waive in this case to ensure he could present his defense. R. 1915:18.

opined that he lacked the discretion to close the courtroom in order to protect a witness who felt he could not testify freely if prison personnel were present. The court disagreed:

> It is well settled in the jurisprudence of the United States that a trial judge may, in his discretion, exclude spectators from the courtroom while the testimony of a witness in a criminal case is being taken if such a step appears reasonably necessary to prevent the embarrassment or emotional disturbance of the witness or to enable the witness to testify to facts material to the case.

Id. at 391-92.[62] In *Commonwealth v. Principatti*, 104 A. 53 (Pa. 1918), the defendant sought to introduce a witness who would testify that the victim had threatened to kill the defendant previously. *Id.* at 57-58. However, this man would not testify if other Italians were in the courtroom, because he feared retaliation for his testimony. *Id.* The judge denied the request, reasoning that he had no power to close the courtroom. *Id.* The appellate court disagreed, reasoning that the court should have closed the courtroom to protect the witness. *Id.*; *see also Hogan v. State*, 86 S.W.2d 931, 932 (Ark. 1935) (trial court did not err in closing the courtroom to protect witness who was "greatly embarrassed and emotionally disturbed" during her testimony). Closure has frequently been used as a remedy to protect fearful or intimidated witnesses.[63]

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[62] *See also People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (N.Y. 1954) ("It has uniformly been held to be subject to the inherent power of the court [to close the courtroom] ... to protect the rights of parties and witnesses, and generally to further the administration of justice" (citing Bowers, Judicial Discretion of Trial Courts [1931], § 262, pp. 296-297; 6 Wigmore, op. cit., p. 338; 1 Bentham, op. cit., p. 541 et seq.); *Moore*, 108 S.E. 47; *State v. Hinton*, 286 N.E.2d 265, 266 (N.Y. 1972) ("a trial court has [well-settled and] inherent power to exclude the public from the courtroom in a criminal case ... [if] a witness would be unnecessarily embarrassed ...").

[63] *United States ex rel. Bruno v. Herold*, 408 F.2d 125, 126-28 (2d Cir. 1969), cert. denied, 397 U.S. 957, 90 S. Ct. 947, 25 L. Ed. 2d 141 (1970) (court did not err in clearing courtroom for one day to protect witness from intimidation from spectators); *Harris v.*

A defendant is not denied a public trial if a courtroom is closed to protect a witness. *People v. Hagan*, 248 N.E.2d 588, cert. denied, 396 U.S. 886, 90 S. Ct. 173, 24 L. Ed. 2d 161 (1969). In *Hagan* the defendants allegedly assassinated Malcolm X. The court excluded spectators from the courtroom during the testimony of one witness who claimed that he had been threatened and that he "believed his life was in danger if he testified publicly and would refuse to testify on this ground." *Id.* at 589. According to the court, because the "witness feared for his life, and threats had been made against him, and he was not going to testify," the exclusion of spectators from the courtroom during his testimony, which was a "small segment of the trial," did not deprive defendants of their right to a 'public trial'" *Id.* at 589, 590.

However, in this case the trial court chose none of these actions. Instead it chose to require the defendant to turn over the names of these people and to allow law enforcement to investigate their claims—thereby exposing these witnesses to extreme danger. It did all of this without assessing the serious potential for harm to these

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Stephens, 361 F.2d 888, 891 (8th Cir. 1966), cert. denied, 386 U.S. 964, 87 S. Ct. 1040, 18 L. Ed. 2d 113 (1967) (defendant's claim that courtroom was improperly closed to protect rape victim was "spurious"); *United States ex rel. Smallwood v. LaValle*, 377 F. Supp. 1148, 1153 (E.D.N.Y. 1974), aff'd, 508 F.2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920, 95 S. Ct. 1586, 43 L. Ed. 2d 788 (1975) ("the health and safety of the witness and the rights of the defendant seem much better served by careful inquiry to determine the need for the witness's testimony and the witness's inability to testify in public, followed by an exclusion order that is limited in time to the witness's testimony only and otherwise operates, where possible, to minimize the impact on the defendant's rights"); *Hogan v. State*, 86 S.W.2d 931, 932 (Ark. 1935) (court properly closed courtroom for ten minutes for "terribly frightened and embarrassed" witness to testify); *Lowe v. State*, 233 S.E.2d 807, 808-09 (Ga. App. 1977) (no abuse of discretion for court to exclude spectators "for the next few minutes" while rape victim, who "feared possible bodily harm" from spectators in the courtroom, testified).

individuals. As defense counsel pointed out, this approach eviscerated his ability to call the witnesses, because once their identities were known, they would not be likely to testify for Mr. Perea. R. 1915:62; 1916:20. The potential for devastation to Mr. Perea's case was enormous. Several witnesses were willing to testify that Riqo was not the shooter. The court's ruling, in essence, deprived him of this critical testimony.

Courts have repeatedly allowed witnesses to not divulge their identities out of fear of retaliation from the defendant—and these situations deal with a potential violation of the defendant's right to confrontation.[64] For example, in *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969) the court held that the defendant did not have a right to witnesses' names and addresses if a genuine threat to their safety existed.

Commentators have frequently advocated the use of anonymous testimony to protect witnesses.[65] In *People v. Pryor*, 668 N.E.2d 1090 (Ill. App. 1996), witnesses'

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[64] *See, e.g., United States v. Cherry*, 217 F.3d 811, 813-15 (10th Cir. 2000); *United States v. Johnson*, 219 F.3d 349, 352 (4th Cir. 2000); *United States v. Emery*, 186 F.3d 921, 924-26 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 911 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1278-79 (1st Cir. 1996); *United States v. Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977) (witness's safety justified denying defendant witness's address); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976) (allowing nondisclosure of a government informant to protect the witness's cover); *United States v. Jordan*, 466 F.2d 99, 101-02 (4th Cir. 1972) (upholding the nondisclosure of the names of two witnesses to a knife attack in jail); *United States v. Ellis*, 468 F.2d 638, 639 (9th Cir. 1972) (allowing the nondisclosure of a government agent's identity because "[t]he incriminating transaction was observed by police officers, and the relevance of the personal history of the undercover agent was questionable"). *But see State v. Bonza*, 269 P. 480 (Utah 1928), in which this Court held that a defendant's right to confrontation was violated by closing the courtroom during a witness's testimony. *Bonza* is inapplicable to the case at hand, since it was the defendant in this case who sought closure.

[65] Demleitner, *Witness Protection*, 46 AM. J. COMP. L. at 660-64; Comparet-Cassani, 39 SAN DIEGO L. REV. at 1239-43; Laura Perry, 46 AM. CRIM. L. REV. at 1587-89 (calling

anonymous testimony did not violate the defendant's right to confrontation, specifically when he waived his presence during their testimony. *Id.* at 1093-94. Nor is a witness's identity always critical for cross-examination. *Nelson v. Crowley*, 2009 U.S. Dist. LEXIS 18291, 2009 WL 498909, at 5 (S.D.N.Y. 2009) ("No clearly established law interpreting the Confrontation Clause required that Petitioner be provided with the Undercover's name in order to facilitate cross-examination bearing on his general credibility"). Merely having the witness's true name may be enough of a basis to allow for adequate cross-examination. *Marshall v. Florida*, 604 So.2d 799, 802-03 (Fla. 1992) (not erroneous for court to allow witness to testify anonymously since defendant knew witness's true name).

In one federal case, the United States used anonymous witness testimony to establish that the defendants murdered another individual. *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997). Witnesses had been threatened, assaulted, and even murdered—much like the case at hand. *Id.* at 913. The defendants wanted disclosure of the witness's identities "to conduct independent investigations on their credibility and call either the witnesses or the defense investigators." *Id.* at 914. The defendants, at a minimum, wanted the witness's identities disclosed after jury *voir dire*. The court disagreed: "identification of the murder witnesses at any time before their trial testimony would have ... seriously increased the risks to the witnesses." *Id.* at 915. Disclosure of

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for a four-pronged "sliding scale" in which a witness's identity could be hidden at various levels, depending on the level of threat); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 3 WASH. U. L.Q. 279, 292-295 (1963) ("In the rare case, the denial of all discovery may be compelled to protect the safety of witnesses or prevent apparent perversion of the judicial process").

their identities, prior to trial, the court reasoned, "would have [made the witnesses] open to threats and other tactics designed to obtain their silence." *Id.*

B. Policy Reasons Favor Protecting Witnesses from Intimidation

Several policy reasons justify protecting witnesses' identity when there are serious concerns about violence. First, we need an effective criminal justice system in which citizens have confidence in its reliability. Witness intimidation undermines the system's integrity and produces a vicious cycle in which people lack the confidence to speak with the police or the courts. Comparet-Cassani, *Balancing the Anonymity* at 1227.

> Second, we want to encourage citizens to report criminal activity to the police.
>
> If law enforcement fails to protect those who come forward with information about criminal activity even after they are attacked and threatened, other citizens will be discouraged from reporting future criminal activity. Requiring disclosure of a threatened witness's identity will weaken other citizens' resolve to perform their civic and moral duty to report crime. This result is contrary to the important policy goal of encouraging citizens to report crime.

Id. In fact, citizens have a Constitutional right to report wrongdoing. *In Re Quarles*, 158 U.S. 532, 536-37 (1895) ("The necessary conclusion is, that it is the right of every private citizen of the United States to inform a marshal ... of a violation of the ... laws of the United States; that this right is secured to the citizen by the Constitution of the United States ... "). Any governmental interference on a witness's ability to report a crime arguably affects that citizen's constitutional duty to inform the police of unlawful behavior. "[I]t would be unconscionable for government to impose duties and obligations on its citizenry, exposing them to the possibility of harm or danger, and then fail to assist

them." Comparet-Cassani, *Balancing the Anonymity* at 1236; *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) ("it is the duty of that government to see that [a citizen] may exercise [his] right freely, and to protect him from violence while so doing, or on account of so doing"). Witnesses who face intimidation have three choices:

> They can testify truthfully, risking retaliation. They can refuse to testify, thereby risking being in contempt of court, or they can commit perjury by exonerating the defendants. The latter choice is becoming more common as witness intimidation increases.

Tara C. Kowalski, *Alvarado v. Superior Court: A Death Sentence for Government Witnesses*, 35 U.C. DAVIS L. REV. 207, 223 (2001).

A third policy concern involves the safety of the witnesses at hand. If courts do little to guarantee witness safety, we expose them to potentially violent consequences. *Id.* Justice O'Connor opined that "most people would think that witnesses to a gang-related murder likely would be unwilling to speak to the [FBI] except on the condition of confidentiality." *Dep't of Justice v. Landano*, 508 U.S. 165, 179 (1993). Even prisoners have a right to be protected against violence and government has a duty to protect them from it. *Logan v. United States*, 144 U.S. 263, 284 (1892).[66] If prisoners have a Constitutional right to governmental protection from violence, then witnesses clearly have an equal, if not superior, right. As one court said:

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[66] "The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution ... ." *Id.*

> Society reaps enormous benefits when a witness's testimony succeeds in getting a criminal off the street and placed behind bars. Society must be willing to pay for that benefit by affording necessary protection to both the witness and his family, for the threat of violence against a witness's family will often silence the witness. Without a continuing and visible public commitment to such protection, it is unrealistic to expect citizens to come forward and provide information so critical to the successful operation of the criminal justice system. To the extent that government fails to meet this essential responsibility, it cedes control of our cities to the criminals.

Wallace v. City of Los Angeles, 16 Cal. Rptr. 2d 113, 127 (Ct. App. 1983).

Fourth, allowing witness anonymity helps foster for effective law enforcement. For example, the State frequently uses informants, and refuses to disclose their identities, on the grounds that disclosure will limit their ability to use that witness in the future, and that it may lead to future harm. Comparet-Cassani, *Balancing the Anonymity* at 1227.[67] Lastly, it is the defendant whose rights might be violated by non-disclosure of a witness's identification since it would arguably affect his Constitutional right to confront the witnesses against him. However, the State does not possess a concurrent right to confrontation.

Government has a duty to protect its citizens from the malfeasance of those who would intimidate witnesses and corrupt the judicial process:

> To hold that the liberty of [individuals] ... must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. The freedom to leave one's house and move about at will, and to have a measure of personal security is "implicit in "the concept of ordered liberty'"

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[67] Citing *Landano*, 508 U.S. at 179-81; *Lewis v. United States*, 385 U.S. 206, 208-10 (1966); *United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993); *United States v. Toombs*, 497 F.2d 88, 94 (5th Cir. 1974); *United States v. Twomey*, 460 F.2d 400, 401-03 (7th Cir. 1972); *Ellis*, 468 F.2d at 639; *Palermo*, 410 F.2d at 472-73.

> enshrined in the history and basic constitutional documents of English-speaking people. Preserving the peace is the first duty of government, and it is for the protection of the community from predations of the idle, the contentious and the brutal that government was invented.

People ex rel. Gallo v. Acuna, 928 P.2d 596, 618 (Cal. 1997) (citing *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)).

Accordingly, Mr. Perea contends that the trial court erroneously compromised the safety of the witnesses by requiring the defense to turn over their names for law enforcement investigation, thereby exposing them to great personal risk. Because of that order, Mr. Perea chose not to turn over the names and not to present perhaps the most critical aspect of his defense. He chose this because, as his counsel pointed out to the court, the witnesses would conveniently forget their testimony or would act to preserve themselves if their anonymity was not guaranteed by the court. R. 1915:62; 1916:20.

The threat of violence against these witnesses was extremely real. The trial court took no steps to assess the reality of the problem, nor did it take any steps necessary to protect the witnesses. In fact, the court repeatedly commented on the witnesses' lack of courage to come forward, impugning their bravery. R. 1915:34-35, 62. The court's ruling deprived Mr. Perea of a meaningful opportunity to present a defense.

VI. UTAH CODE ANN. § 76-3-207.7 UNCONSTITUTIONALLY ALLOWS FOR THE IMPOSITION OF LIFE WITHOUT PAROLE FOR A NINETEEN-YEAR-OLD WITH AN IQ OF 77 IN VIOLATION OF THE UNITED STATES AND UTAH CONSTITUTIONAL PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT, UNNECESSARY RIGOR AND GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS

Riqo Perea's Background. By all accounts, Riqo Perea was a troubled kid. According to Dr. Ronald Houston, a clinical psychologist, Riqo was born into a gang and raised by his gang-member mother. R. 1909:60. Riqo's mother used alcohol and drugs during pregnancy. R. 1909:31, 38, 148. She fed Riqo alcohol in a bottle and gave him marijuana at age three. R. 1909:55. He drank alcohol prior to age six and frequently witnessed his mother engaging in sexual acts with various boyfriends. R. 1909:55-56. As a child, Riqo was hyperactive and uncontrollable. R. 1909:31. In kindergarten, Riqo manifested speech and language problems. R. 1909:31. Because of "chaotic parenting," Riqo was forced largely to raise himself. R. 1909:148, 37. He moved from school to school and place to place, always in high-crime, high poverty areas. R. 1909:43-51, 57. In school, Riqo was placed in courses for low-functioning children. R. 1909:32. Dr. Stephen Golding characterized this as an "extremely traumatic and neglectful childhood." R. 1909:148.

The dominant male figures in Riqo's life were gang members. R. 1909:60, 97. When he was in the fourth grade, Riqo joined his mother's gang, Central City Local Ogden Trece. R. 1909:124, 152. As a peewee member of the gang, Riqo participated in thefts, selling and using drugs, and some shooting. R. 1909:125. The gang became Riqo's

"surrogate family," and pressured him to live up to the gang's standards. R. 1909:116, 119. Riqo indicated he was "down in the hood 113 percent." R. 1909:128.

When Riqo underwent residential treatment, he stopped using drugs and alcohol and was involved in athletics and his education. R. 1909:91, 153. But when Riqo left these programs, returned to gang life. R. 1909:97. "Membership [in a gang] … afforded [Riqo] a level of social status that he has not been able to otherwise obtain through intellectual, academic and or athletic accomplishment." R. 1909:99.

According to Dr. Houston, Riqo's intellectual functioning was barely above that of mental retardation. R. 1909:104. His IQ tested at 77 and he manifested clear "organic disfunction." R. 1909:33. 94% of people who take an IQ test have a higher result than Riqo. R. 1909:34. Riqo also showed clear signs of ADHD. R. 1909:35-36. "It's sufficient to say at gross level that there is a level of immaturity that's characteristic of an adolescent … compared to a normal adolescent or a normal adult." R. 1909:43.
Dr. Houston testified that although Riqo was physically 19 years old, in terms of brain development, he "clearly" was under the age of 18, but not as low as 14. R. 1909:43. Riqo's age equivalent on the Wechsler Adult Intelligence Test was age 15 on one part and age 10 or 11 on the other. R. 1909:58. Because Riqo had difficulty with organic brain sampling, Dr. Houston opined that Riqo would have "an inability or difficulty deficit" to comply with rule-governed behavior—he would be much more likely to be impulsive. R. 1909:69, 84-87.

Dr. Stephen Golding, a forensic psychologist, disagreed with some of Dr. Houston's findings, but admitted he never tested Riqo. R. 1909:152, 154-65, 175-76. However, Dr. Golding agreed that his diagnoses would increase Riqo's impulsivity, and that Riqo's performance on the standardized testing was "in the toilet." R. 1909:181-82; 190-91.

A. Utah Code Ann. § 76-3-207.7 Violates Guarantees of Equal Protection and Due Process

The Utah Legislature recently changed the murder sentencing statute. The statute states the following:

> (1) A person who has pled guilty to or been convicted of first degree felony aggravated murder under Section 76-5-202 shall be sentenced by the court.
> (2) The sentence under this section shall be life in prison without parole or an indeterminate prison term of not less than 25 years and which may be for life.

Utah Code Ann. § 76-3-207.7 (2009). The statute is unconstitutionally vague, since it gives no guidance to the trial court about which situations would merit a sentence of life without parole and which would merit 25 years to life.

Legislative History. The legislature passed this statute in order to simplify aggravated murder prosecutions in which the death penalty was not specifically sought.[68] According to the bill's sponsor, seeking life without parole as opposed to death would

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[68] S.B. 114, 2007 Gen. Sess. (Utah 2007); *Aggravated Murder Amendments: Hearing on S.B. 116 Before the H. Jud. Comm.*, 2007 Leg., 2007 Gen. Sess. (Utah 2007); *Aggravated Murder Amendments: Hearing on S.B. 116 Before the S. Jud., L. Enf., and Crim. J. Comm.*., 2007 Leg., 2007 Gen. Sess. (Utah 2007); *Aggravated Murder Amendments, Floor Debates*, S.B. 116, 2007 Gen. Sess. (Utah 2007), http://le.utah.gov/jsp/jdisplay/billaudio.jsp?sess=2007GS&bill=sb0114&Headers=true.

The prior statute required life without parole to be decided by the jury. Utah Code Ann. § 76-3-207(5)(c) (2003).

save counties enormous costs by not having to have twelve-person juries, hire Rule 8 qualified counsel, hire mitigation specialists and the like.[69] Without death on the table, the bill's sponsor opined that there was no longer a need for a "higher standard" in which the State has to "jump through quite the hurdles."[70] The State was "being too careful when [it] didn't need to be," he said.[71]

One Senator thought that life without parole seemed to be fundamentally different.[72] Paul Boyden, head of the Statewide Association of Prosecutors, said that the statute was a "trade-off," but that "it makes it so much easier if you handle [life without parole the same] as every other felony."[73] According to the bill's sponsor, "everyone knows" that the defendant will receive life without parole and "and we're just required by caselaw and statute to do it this certain way. It does not make sense."[74]

The legislature eliminated the requirement that a jury find the existence of a sentence of life without parole through a series of carefully crafted factors (or, as the

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[69] *Aggravated Murder Amendments: Hearing on S.B. 116 Before the H. Jud. Comm.*, 2007 Leg., 2007 Gen. Sess. (Utah 2007) (statement of Sen. Gregory Bell). The head of the Statewide Association of Prosecutors, Paul Boyden, said that the primary motivation behind the bill was to "save expenses" since death penalty procedures can "break a small county." *Id.* (statement of Paul Boyden).

[70] *Aggravated Murder Amendments*, *Senate: Second Reading*, S.B. 116, 2007 Gen. Sess. (Utah 2007) (statement of Sen. Gregory Bell).

[71] *Aggravated Murder Amendments*, *Senate: Third Reading*, S.B. 116, 2007 Gen. Sess. (Utah 2007) (statement of Sen. Gregory Bell).

[72] *Aggravated Murder Amendments: Hearing on S.B. 116 Before the S. Jud., L. Enf., and Crim. J. Comm..*, 2007 Leg., 2007 Gen. Sess. (Utah 2007) (statement of Sen. Ross Romero).

[73] *Id.* (statement of Paul Boyden).

[74] *Aggravated Murder Amendments: Hearing on S.B. 116 Before the H. Jud. Comm.*, 2007 Leg., 2007 Gen. Sess. (Utah 2007) (statement of Sen. Gregory Bell).

bill's sponsor called them: "drawn-out" "extraordinary steps"[75]) and instead decided to shorten and shortcut the process to merely require the judge to sentence someone to life or twenty-five years to life. The lack of legislative guidance violates state and federal guarantees of due process, equal protection and prohibitions against cruel and unusual punishments.

1. Section 76-3-207.7 is Unconstitutionally Vague Because it Authorizes Arbitrary and Discriminatory Enforcement

"It is a fundamental tenet of due process that 'no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). A statute may be unconstitutionally vague if it is written in a way that "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *State v. Honie*, 2002 UT 4, ¶ 31, 57 P.3d 977; *see also Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 54, 225 P.3d 153 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)).

The vagueness doctrine requires the legislature to define criminal standards in order to minimize the discretion of executive and judicial branch actors to pursue their "personal predilections" in the enforcement and application of the law. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Statutes are not vague, so long as they "mark boundaries sufficiently distinct for judges and juries fairly to administer the law." *State v. Ramsey*, 782 P.2d 480, 486 (Utah 1989) (quoting 21 Am. Jur. Criminal Law § 17, at 130

[75] *Id.*

(1981)). As such, laws must be defined "with sufficient precision to permit *uniform interpretation and application* by those charged with enforcing them." *State v. Fontana*, 680 P.2d 1042, 1050 (Utah 1984) (emphasis added). In fact, "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *Batchelder*, 442 U.S. at 123.

Utah Code Ann. § 76-3-207.7 clearly punishes two classes of aggravated murderers: some will merit life without parole and others will merit twenty-five years to life. However, the statute contains no list of aggravating and mitigating factors to assist in determining which individuals deserve parole and which do not—which would be an easy way to avoid a vagueness problem.[76] The statute fails to identify a standard of proof. It gives no guidance to the court to enable it to determine when a particular sentence

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[76] Sentencing schemes must not be vague, and they avoid these problems when they require courts to balance aggravating and mitigating factors:

> As to sentencing decisions, 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.

Tuilaepa v. California, 512 U.S. 967, 972 (1994); *see also Honie*, 2002 UT 4 at ¶ 55-58 (applying this analysis to a rape statute). *See also Bell*, 754 P.2d at 57-59 (holding that minimum mandatory sentence was not void for vagueness because the statute required the court to consider several aggravating and mitigating factors); *see also State v. Egbert*, 748 P.2d 558, 559 (Utah 1987) (finding minimum mandatory sentence on an aggravated sexual assault conviction not void for vagueness because "[i]t is … plain from that statute that imposition of the sentence of highest severity is dependent upon a determination of the existence of aggravating circumstances, while imposition of the sentence of lowest severity is dependent upon a determination of the existence of mitigating circumstances.").

would be appropriate. A defendant convicted of aggravated murder would have no idea whether he would be sentenced to life without parole, or under which situations he would merit the possibility of parole. This statute carries significant danger that judges would fail to uniformly apply a consistent standard—because none exists. The danger is that the statute allows judges to arbitrarily sentence people to the second-most severe sentence—a sentence to die in prison—without any objective standard.

2. Section 76-3-207.7 Violates Due Process, Equal Protection and the Uniform Operation of Laws

Article I, § 7 of the Utah Constitution and the Fourteenth Amendment guarantee due process of law. "The sentencing phase of a criminal trial is a critical stage of a criminal proceeding, and a defendant is entitled to procedural protections to prevent any unfairness." *State v. Bell*, 754 P.2d 55, 58 (Utah 1988) (citing *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Casarez*, 656 P.2d 1005, 1007 (Utah 1982); *State v. Lipsky*, 608 P.2d 1241 (Utah 1980)). The Fourteenth Amendment guarantees all citizens equal protection of the law. U.S. Const. amend. XIV, § 1. Article I § 24 of the Utah Constitution requires "that the *operation* of the law be uniform." *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995) (emphasis in original) (quoting *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984)). According to this Court, Utah's uniform operation of laws provision, a law must not only be "uniform on its face," but it "is critical is that the *operation* of the law be uniform." *Id.*

This Court assesses equal protection challenges under the uniform laws provision with a three-prong test.

> First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. Therefore, we must first determine what classifications, if any, are created by the statute. Second, we must determine whether different classes or subclasses are treated disparately. Finally, if any disparate treatment exists between classes or subclasses, we must determine whether the legislature had any reasonable objective that warrants the disparity.

Mohi, 901 P.2d at 997 (internal quotations and citations omitted).

Section 76-3-207.7 fails two prongs of this test because classes are treated differently and the legislature failed to define a reasonable objective with which to differentiate the classes.

Section 76-3-207.7 creates two subclasses. In this case, the general class includes those found guilty of aggravated murder. The statute then creates two subclasses: (1) persons sentenced to the presumptive life without parole; and (2) persons sentenced to the lighter sentence of twenty-five years to life. Utah Code Ann. § 76-3-207.7(2).

Section 76-3-207.7 treats the subclasses disparately. In this case, as in *Mohi*, all offenders are convicted of an offense that is "statutorily indistinguishable." *Mohi*, 901 P.2d at 998. Each offender sentenced under 76-3-207.7 will be convicted of aggravated murder, yet despite this common conviction, some in the class receive life without parole while others receive twenty-five years to life. Utah Code Ann. § 76-3-207.7(2).

Section 76-3-207.7 lacks a reasonable objective to warrant disparate treatment. In *Mohi*, this Court recognized that in some situations there is a need to treat

subclasses differently, such as "trying certain violent juveniles as adults." *Mohi*, 901 P.2d at 999. In *Mohi*, however, as in this case, "the legislature has failed to identify *which* violent [offenders] require such treatment, instead delegating that discretion [without] ... guidelines as to how it is to be exercised." *Id.* (emphasis in original). In *Mohi,* the statute had "*no* standards" to guide decision making—its standards were "totally absent" and the statute was "wholly without standards to guide or instruct" the use of discretion. *Id.* (emphasis in original). "Legitimacy of a goal cannot justify an arbitrary means ... [and] cannot make up for a deficiency in its design." *Id.*

Section 76-3-207.7 increases the likelihood of disparate treatment. It does not require a balance of aggravating and mitigating factors. It gives no guidelines to when twenty-five years to life might be the appropriate sentence. Because the statute fails to distinguish those who merit the harsher or lighter sentence, it violates equal protection, due process, and the uniform laws provision.

The Statute Removes the Burden from the Jury. Additionally, the statute violates due process since it removes the question of deciding aggravating and mitigating factors from the jury and makes it a judicial question. *Ring v. Arizona*, 536 U.S. 584 (2002) (jury must find the existence of aggravating factors necessary for death sentence); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (any factor that enhances a person's potential sentence must be proven to the jury beyond a reasonable doubt). Defendant argues the statute violates his right to have this punishment decided by the jury, since the sentence of life without parole constitutes an aggravating factor in sentencing.

B. The Cruel and Unusual Punishment Clause and Utah's Unnecessary Rigor Provision Prohibit Sentencing a 19-year old Offender with an IQ of 77 to Life Without Parole

1. Sentencing a 19-year old With an IQ of 77 to Life Without Parole Violates Utah's Unnecessary Rigor Provision

Unnecessary rigor provisions existed in state constitutions as early as 1796.[77] Utah's provision was adopted in 1896, about the time four other states adopted similar provisions.[78] Unnecessary rigor provisions "came out of the Prison Reform Movement of the 1800s, whereby people sought to make prisons more humane."[79] "[M]any states thought a commitment to humanizing penal laws and the treatment of offenders to rank with other principles of constitutional magnitude ..." *Sterling v. Cupp*, 625 P.2d 123, 128 (Ore. 1981). "Unnecessary rigor" does not focus on the "conditions of punishment," nor does it limit itself to shackles, balls and chains—the provision "protects persons charged with crime from ill or unjust treatment at all times." *Id.* at 129 (citing *Bonahoon v. State*, 178 N.E. 570, 571 (Ind. 1931)).

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[77] *Sterling v. Cupp*, 625 P.2d 123, 128 n. 11 (Ore. 1981) (citing Tenn Const 1796, art XI, § 13 in volume 9 at 148 (1979)). *See* Richard S. Frase, *Cruel and Unusual Punishment: Litigating Under the Eighth Amendment: Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. Pa. J. Const. L. 39, 65 (2008).

[78] "Persons arrested or imprisoned shall not be treated with unnecessary rigor." Utah Const. art I, § 9. The other four states use slightly different language: "No person arrested, or confined in jail, shall be treated with unnecessary rigor." Ind. Const. art. I, § 15; Or. Const. art. I, § 13; Tenn. Const. art. I, § 13; Wyo. Const. Art. I, § 16. *See* Scott C. Sandberg, *Developing Jurisprudence on the Unnecessary Rigor Provision of the Utah Constitution*, 1996 UTAH L. REV. 751, 752-53 (1996).

[79] Symposium, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 56 (2002). Unnecessary rigor provisions "reflect a widespread interest in penal reform in the states during the post-Revolutionary decades." *Sterling*, 625 P.2d at 128. Tennessee has interpreted the clause to require prisoners to be guaranteed safety and humane treatment. *Raedle v. Townsend*, 1987 WL 7721 at *3 (Tenn. Ct. App. 1987) (Franks, J., concurring).

In Utah, the unnecessary rigor provision came at a time in which most Utahns exhibited vast frustrations with excessive criminal sentencing.[80] Congress criminalized polygamy, resulting in the incarceration of thousands of Mormon men, many of whom saw the criminalization and resulting penalties as particularly onerous.[81] The federal government's "zealous enforcement" of polygamy prosecutions "led to allegations of disproportionate sentences for Mormon polygamists in comparison to criminals convicted of other crimes." James G. McLaren, *The Meaning of the "Unnecessary Rigor" Provision in the Utah Constitution*, 10 B.Y.U. J. Pub. L. 27, 34-35 (1996). Mormons' recent recollection of polygamy-based incarcerations "undoubtedly ... contributed to the early protections afforded convicts in Utah." *Id.*

> The memory of past injustices, real and perceived, may have influenced the Mormon delegates attending the constitutional convention to approve the inclusion of the unnecessary rigor clause.

Id. at 39-40.

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[80] Thomas Alexander, *Mormonism in Transition: A History of the Latter-day Saints, 1890*-1930 (University of Illinois Press, 1986) at 6-15. Mormons were told in seeking statehood that "you are a mere handful of people; 150,000 against 50 or 60 millions, and those millions have made up their minds that polygamy shall be exterminated." *Id.* at 129. *See generally*, Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 222 (University of North Carolina Press. 2002); Edward Leo Lyman, *Political Deliverance: The Mormon Quest for Utah Statehood* (University of Illinois Press 1986); Gustive O. Larson, *The Americanization of Utah for Statehood* (Huntington Library 1971).

[81] *See* James B. Hill, *History of Utah State Prison 1850-1952*, at 92 (1952) (unpublished M.S. thesis, Brigham Young University; Mormon Polygamy: A History. By Richard S. Van Wagoner. (Salt Lake City: Signature Books. Pp. 255. 1989.) at 115-23. Mormons remained defiant against anti-polygamy efforts: "Mormonism will never be destroyed until it is destroyed by the guns of the United States Government ... with cannons of the biggest bore, thunder into them the seventh commandment" *Id.* at 116.

In interpreting Utah constitutional provisions, this Court has said that it looks first to the plain language of the constitutional text. *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235. Beyond the language, the court should consider "historical evidence of the framers' intent" in "our state's particular traditions, and the intent of our constitution's drafters." *Id.* at ¶¶ 11-12 (quoting *West v. Thomson Newspapers*, 872 P.2d 999, 1013 (Utah 1994)). According to this Court, the unnecessary rigor provision "on its face" is "broader than" the Eighth Amendment and provides greater protections to defendants. *Bishop*, 717 P.2d at 267; *State v. Lafferty*, 2001 UT 19, ¶ 73, 20 P.3d 342. Prisoners are protected against "unnecessary abuse" or "treatment that is clearly excessive or deficient and unjustified ...." *Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996); *see also State v. M.L.C.*, 933 P.2d 380, 385 (Utah 1997) ("the clause applies to abusive treatment of prisoners or arrestees.").

"The unnecessary rigor clause of the Utah Constitution protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is entitled to require." *Dexter v. Bosko*, 2008 UT 29, ¶ 17, 184 P.3d 592. The applicability of Utah's unnecessary rigor clause is determined on a case-by-case basis. *Id.* at ¶ 17; *State v. Russell*, 791 P.2d 188, 190 (Utah 1990). The provision is "self-executing," meaning that it "prohibits specific evils that may be defined and remedied without implementing legislation." *Bott*, 922 P.2d at 737.

Utah's unnecessary rigor provision should be read to prohibit sending a young person of Mr. Perea's age, mental disabilities and IQ to prison for life. Mr. Perea makes this argument based on the scientific literature.

Scientific Literature on Adolescence.[82] The literature is replete with the fact that young people, even over age 18, are less likely to make mature judgments, are more vulnerable to negative influences, and are more likely to engage in risky or criminal behavior.[83] Young people impulsively focus on short-term benefits,[84] without much self-control or focus on the long-term effects or consequences of their actions.[85]

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[82] *See State v. Ninham*, 797 N.W.2d 451 (Wi. 2011) (amicus brief of the Wisconsin Psychiatric Association and the Wisconsin Psychological Association citing much of the research in this section).

[83] See, e.g., Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1015 (2003); Margo Gardner & Laurence Stienberg, *Peer Influence on Risk taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 632 (2005); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64–66 (2004); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16 Ann. Rev. Clinical Psychol. 47, 57-61 (2009) [hereinafter *Adolescent Development*]; see also Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193, 194 (2010).

[84] *Adolescent Development*, supra note 83, at 57-58; Cauffman et al., supra note 83, at 194; B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 65 (2008).

[85] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 748-49, 754 & tbl. 4 (2000) [hereinafter (Im)maturity of Judgment]; Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764, 1774-76 (2008).

Perhaps most significantly, a nineteen-year old's brain has not completely developed.[86] Research has showed that a child's brain develops logical reasoning well before advanced emotional maturity, which occurs much later.[87] The brain's frontal lobes, particularly its prefrontal cortex, enable higher-order cognitive functions[88], such as information processing, decision-making, risk assessment, evaluation of consequences for actions, impulse control[89], and moral judgments.[90] However, the prefrontal cortex has been found to be one of the last areas of brain to fully mature.[91] This development extends beyond adolescence and well into early adulthood.[92] In other words, nineteen-

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[86] Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216-18 (2009); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCE. NAT'L ACAD. SCI. 8174, 8177 (2004); B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000).

[87] Laurence Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583, 592 (2009).

[88] Johnson et al., supra note 86, at 217; Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 DEVELOPMENTAL SCI. 55, 56 (2009); Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301, 301 (2002).

[89] Laurence Steinberg, *Age Differences in Future Orientation and Delay Discounting, 80 Child Development* 28, 40 (2009); Elkhonon Goldberg, *The New Executive Brain: Frontal Lobes in a Complex World* 175 (Oxford Univ. Press 2009).

[90] Johnson et al., supra note 86, at 217; Antoine Bechara et al., *Characterization of the Decision Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198–2200 (2000); Judge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROSIQUIATR 657, 661-63 (2001).

[91] Gogtay et al., supra note 86, at 8177.

[92] Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGICA 1270, 1270 (2007); Elizabeth R. Sowell et al., *In Vivo Evidence*

year olds, categorically, have not completely developed those areas of the brain responsible for higher-level decision-making and impulse control.

Not only has the brain not completely developed, but nineteen-year olds' personality traits have not yet stabilized.[93] Emotional stability increases through adolescence, and conscientiousness continues to develop through college age young people.[94]

However, Riqo was not a typical nineteen-year old. According to Dr. Houston, after administering the Wechsler Adult Intelligence Test, Riqo's age equivalent was age 15 on one part and age 10 or 11 on the other. R. 1909:58. In fact, while Riqo is in an adult body, his brain has not developed beyond that of an eighteen-year old and he remains age 10-11 or age 15 in mind. "For instance, a person said to have the mental age of a five year-old scored roughly the same as the average five year-old who took the IQ test."[95]

Scientific Literature on IQs, ADHD and Potential Mental Retardation. "It is commonly agreed among criminologists that low IQ is a robust predictor of delinquency

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for Post Adolescent Brain Maturation in Frontal and Striatal Regions, 2 NATURE NEUROSCIENCE 859, 859-60 (1999).

[93] Theo A. Klimstra et al., *Maturation of Personality in Adolescence*, 96 J. PERSONALITY & SOCIAL PSYCHOL. 898, 906-08 (2009); Steinberg & Scott, supra note 83, at 1015; Robert R. McCrae, et al., *Nature Over Nurture: Temperament, Personality and Life Span Development*, 78 J. PERSONALITY & SOC. PSYCHOL. 173, 177-84 (2000).

[94] Steinberg & Scott, supra note 83, at 1015; Daniel M. Blonigen, *Explaining the Relationship Between Age and Crime: Contributions from the Developmental Literature on Personality*, 30 CLINICAL PSYCHOL. REV. 89, 91-94 (2010).

[95] Joseph A. Nese, Jr., *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 375 (2002).

and criminality."[96] There is a "remarkable" correlation between low IQ and violent behavior.[97] However, a person with a low IQ, in a proper environment, can minimize or eliminate delinquent behavior.[98] Low IQ evidence inherently mitigates criminal culpability: "we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence." *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). The mentally retarded or impaired lack impulse control and have difficulty correcting improper behavior.[99] An innumerable body of scientific literature shows that the mentally retarded have a "reduced ability" to function.[100]

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[96] J.C. Oleson, *The Insanity of Genius: Criminal Culpability and Right-Tail Psychometrics*, 16 GEO. MASON L. REV. 587, 602 (2009); Geoffrey R. McKee, *Competency to Stand Trial in Low-IQ Juveniles*, 19 AM. J. FORENSIC PSYCHIATRY 3 (1998); Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 13 (2007) (low IQs can "make unfortunate outcomes [such as delinquency] more likely.").

[97] David P. Farrington, *Predictors, Causes, and Correlates of Male Youth Violence*, 24 CRIME & JUST. 421, 444-45 (1998).

[98] Edward, Mulvey et al., *Prevention of Juvenile Delinquency: A Review of the Research*, 4:2 THE PREVENTION RESEARCHER 1- 4, 2 (1997).

[99] *See, e.g.,* Jonathan L. Bing, *Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 80-81 (1996); Jamie Marie Billotte, *Is it Justified?--The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333, 366-67 (1994).

[100] *See, e.g.,* AAMR, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 1999); Manual of Diagnosis and Professional Practice in Mental Retardation (John W. Jacobson & James A. Mulick eds., 1996); Robert M. Hodapp, Jacob A. Burack, & Edward Zigler, *Developmental Approaches to Mental Retardation: A Short Introduction*, in Handbook of Mental Retardation and Development 3 (Jacob A. Burack, et al. eds., 1998); Thomas L. Whitman, *Self-Regulation and Mental Retardation*, 94 A.J.M.R. 347 (1990) (impulse control); L.W. Heal & C.L. Sigelman, *Response Biases in Interviews of Individuals with Limited Mental Ability*, 39 INTELL. DISABILITY RESEARCH 331 (1995) (acquiescence); Edward Zigler & Robert M. Hodapp, *Behavioral Functioning in Individuals with Mental Retardation*, 42 ANN. REV. PSYCHOL. 29, 43 (1991) (outer-directedness); Harvey N. Switzky, *Mental Retardation and the Neglected*

However, an IQ below 70 is not the only predictor of mental retardation because of problems in diagnosis, coupled with the standard error of measurement.[101] The DSM-IV-TR states that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."[102]

Courts have found mentally retarded individuals among those with IQs above 70. *Commonwealth v. Gibson*, 925 A.2d 167, 170 (Pa. 2007) (Defendant had an IQ of 74 and "both parties agree that it is possible for a person with an IQ ranging from 70 to 75 to suffer from mental retardation, depending upon the degree of adaptive deficits," which in

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Construct of Motivation, 32 EDUC. AND TRAINING IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITY 194 (1997) (extrinsic versus intrinsic motivation and relationship to social deprivation); Josephine C. Jenkinson, *Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities*, 104 A.J.M.R. 320 (1999) (learned helplessness); Judith Cockram, Robert Jackson & Rod Underwood, *People with an Intellectual and Developmental Disability and the Criminal Justice System: The Family Perspective*, 23 J. INTELL. & DEVELOPMENTAL DISABILITY 41 (1998) (propensity to hide disability).

[101] AAIDD, User's Guide: Mental Retardation Definition, Classification and Systems of Supports 12 (10th ed. 2007) at 24 (stating that "IQ scores alone cannot precisely identify an individual's functioning in the upper boundary of mental retardation" suggesting an upper range of 75); accord Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. FORENSIC PSYCHOL. PRAC. 1, 21 (2006) ("Limiting the determination of mental retardation to a specific IQ score is unacceptable due to multiple factors such as measurement error and cultural bias."). *See also* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 836 (2007) ("[T]he SEM must always be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests.").

[102] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000) (DSM-IV-TR) at 41-42 ("It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75).").

this case included "severe deficits" in academic and work skills, self-direction, coupled with an age equivalent of nine-years old); *People v. Tulare County Superior Court*, 155 P.3d 259, 260-61 (Cal. 2007) (trial court did not err in giving less weight to defendant's IQ of 84-92 and greater weight to other evidence of impaired intellectual functioning in finding mental retardation). In fact, because of the standard error of measurement "[i]n order to be highly confident that a person is not mentally retarded, therefore, an IQ score of at least 79 might be required, whereas a score of 76 might be required to rule out mental retardation if a somewhat lower level of confidence ('reasonable confidence') were acceptable."[103]

Because Riqo Has the Potential to Reform and Change, a Sentence of Life Without Parole Violates Unnecessary Rigor. Character traits in teens are not stable predictors of their future behavior.[104] In fact, the traits most associated with violent behavior have been shown to be extremely susceptible to positive changes as the teen matures. "[T]he vast majority of adolescents who engage in criminal or delinquent

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[103] Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 835 (2007). Bonnie & Gustafson also criticized the Supreme Court of Virginia for holding that because a particular defendant had IQ scores of 75 and 78, that he could not be mentally retarded, noting that without further study, this individual could meet the diagnostic criteria. *Id.* at 844-45. This standard can be even higher: the American Association of Mental Retardation says that an IQ of 70 indicates a range of 62 to 78. Am. Ass'n of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 57 (10th ed. 2002). In other words, given the standard error of measurement, Riqo Perea's IQ would fall anywhere between 69 to 85.

[104] Daniel M. Blonigen, supra note 94, at 91.

behavior desist from crime as they mature"[105] and expert psychologists lack the capabilities to concretely determine which juveniles will continue to engage in criminal behavior and which will not.[106] As the Supreme Court said in *Roper v. Simmons*, 543 U.S. 551 (2005), "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. at 573.

Perhaps the most problematic is the tendency to use a juvenile's crime as an indicator of an entrenched character and an impossibility for reform. However, the scientific literature almost completely rebuts such a claim: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570.

A sentence of life without parole is a death sentence for any offender—the young person will die in prison. This sentence is significantly graver for a young, rather than an older offender. "[P]unishment of life imprisonment without the possibility of parole is itself a severe sanction, *in particular for a young person.*" *Id.* at 571 (emphasis added). A sentence of life without parole guarantees society's lack of investment in the person. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010). "The State does not execute the

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[105] Steinberg & Scott, supra note 83, at 1015; see also Terrie E. Moffitt, *Adolescence-Limited and LifeCourse-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-86 (1993).
[106] Grisso, supra note 83, at 64–66.

offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable." *Id.*

Utah's unnecessary rigor provision prohibits just such a scenario. While Riqo's chronological age was 19 at the time of the crime, his IQ puts him in the mental range of either a 15-year old or a 10 or 11 year-old. Additionally, given the standard error rate in IQ testing, Riqo could well suffer from actual mental retardation given his difficulties functioning in life. He has been diagnosed with ADHD, which untreated, can lead toward greater criminality. Riqo is a young offender—and one with mental illnesses—which minimizes his culpability over those of other offenders.

Dr. Houston testified that Riqo could "be rehabilitated given proper program and sufficient length of time." R. 1928:96; 98. He testified using the scientific literature referenced here, that Riqo specifically could be rehabilitated. R. 1928:103-04. While a homicide may merit a life sentence without parole, Utah's unnecessary rigor provision would prohibit sentencing a young, mentally-ill offender to a lifetime of incarceration, especially given that there are substantial possibilities that at some point in his lifetime, Riqo may completely reform and no longer be a danger to society.

2. Sentencing a 19-year old with an IQ of 77 to Life in Prison Violates the Federal Constitution

In *Graham v. Florida*, 130 S. Ct. 2011 (2010) the Supreme Court said that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031.

In addition, "the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits vague statutes … ." *State v. Ross*, 2007 UT 89, ¶ 22, 174 P.3d 628.

In *Roper v. Simmons*, the United States Supreme Court held that the Eighth Amendment prohibits sentencing a juvenile offender to death. 543 U.S. 551 (2005). In *Graham*, the Court held that the Eighth Amendment also prohibits sentencing a juvenile to life without parole for a non-homicide crime. 130 S. Ct. 2011 (2010). Both *Roper* and *Graham* relied on the scientific literature about young people's capacities. *Roper*, 543 U.S. at 569-75; *Graham*, 130 S. Ct. at 2026-27. The Court emphasized that juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility," that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and that "the character of a juvenile is not as well formed." *Roper*, 543 U.S. at 569-70; *see also Graham*, 130 S. Ct. at 2026.

Recognizing the fundamental differences between adults and juveniles, the Court held that juveniles are less culpable and less deserving of the most severe punishments. *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2026. The Court also acknowledged that "'a greater possibility exists that a minor's character deficiencies will be reformed.'" *Graham*, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at 570). Additionally, the Supreme Court held in *Atkins v. Virginia* that States could not execute those who have IQs of 70 or less because they

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than

> others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Atkins v. Virginia, 536 U.S. 304, 318 (2002). Executing the mentally retarded would also not deter crime, since these offenders have a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320.

For the reasons stated in the section on unnecessary rigor, the Eighth Amendment also prohibits cruel and unusual punishments. Sentencing a young offender, with a potential IQ in the mental retardation range, to life in prison constitutes cruel and unusual punishment. A mentally-challenged 19-year old's immaturity, vulnerability, impetuosity, and undeveloped character make him less culpable than an adult with a fully developed brain and values system. These deficits undermine every penological basis for imposing the most severe sentencing option currently available for juveniles: life without parole does not deter, facilitate retribution, or promote public safety any more than would an indeterminate sentence of life with parole. Especially troublesome about sentencing a juvenile to die in prison is the hopelessness exacerbated by the juvenile's lessened culpability, and lack of life experience to make sense of it all – in addition to the stark reality that a juvenile's life sentence is likely to be longer than an adult's.

VII. A COMBINATION OF THE ABOVE ERRORS CONSTITUTES CUMULATIVE ERROR

Cumulative error warrants reversal where "the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had.'" *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (quoting *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993)); *Gallegos*, 2009 UT 42, ¶ 39, 220 P.3d 136 (requiring reversal for cumulative error where "the cumulative effect of the several errors undermines confidence that a fair trial was had"). "In assessing a cumulative error claim, 'we consider all the identified errors, as well as any other errors we assume may have occurred.'" *Kohl* at ¶ 25 (quoting *Dunn* at 1229). It may be reached because the defendant faces a long term of imprisonment. *Cobo*, 60 P.2d 952, 958 (Utah 1936).

The errors in this case were numerous and substantial, effectively denying Mr. Perea a fair trial. Mr. Perea was prevented from presenting two key aspects of his defense: computer animations and key forensic testimony establishing the existence of a second shooter and testimony in support of false confessions. Mr. Perea was also prohibited from presenting critical testimony from witnesses who, fearing for their safety, wished to testify anonymously that Riqo was not the shooter.

CONCLUSION

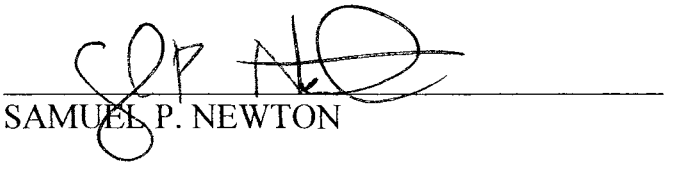
Based on the foregoing, Mr. Perea asks this Court to reverse his conviction and to remand for a new trial.

RESPECTFULLY SUBMITTED this 15 day of September, 11.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be deposited in the United States mail ten copies of the foregoing and an electronic CD of the foregoing to the Utah Supreme Court, 450 South State Street, P.O. Box 140210, Salt Lake City, Utah 84114-0210, and two copies and an electronic CD to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15 day of September, 11.



SAMUEL P. NEWTON

MAILED a true and correct copy of the foregoing and an electronic CD containing the foregoing to the Utah Supreme Court and the Utah Attorney General's Office as indicated above this 15 day of September, 11.