Brigham Young University Law School
BYU Law Digital Commons

Utah Court of Appeals Briefs (2007–)

2016

Riqo M Perea, Plaintiff/Appellee, vs State of Utah, Defendant/Appellant.

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation
Brief of Appellant, *Perea v. Utah*, No. 20150144 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3361

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

RIQO M PEREA, :

Plaintiff/Appellee, :

vs. :

STATE OF UTAH, :

Defendant/Appellant. :

Appellate Court No. 20150144-CA

BRIEF OF APPELLANT

Post Conviction Relief 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.

Plaintiff/Appellee is currently incarcerated at the Utah State Prison Draper

Sean Reyes (7969)
Erin Riley (8375)
Attorney General
State of Utah
350 North State Street Suite 230
Salt Lake City Utah 84114-2320

Counsel for Defendant/Appellant

Randall W. Richards (4503)
Richards & Brown P.C.
938 University Park Blvd.
Suite 140
Clearfield, UT 84015

Counsel for Plaintiff-Appellee

FILED
UTAH APPELLATE COURTS

FEB 05 2016

IN THE UTAH COURT OF APPEALS

RIQO M PEREA, :

Plaintiff/Appellee, :

vs. :

STATE OF UTAH, :

Defendant/Appellant. :

Appellate Court No. 201501445-CA

BRIEF OF APPELLANT

Post Conviction Relief 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.
Plaintiff/Appellee is currently incarcerated at the Utah State Prison Draper

Sean Reyes (7969)
Erin Riley (8375)
Attorney General
State of Utah
350 North State Street Suite 230
Salt Lake City Utah 84114-2320

Counsel for Defendant/Appellant

Randall W. Richards (4503)
Richards & Brown P.C.
938 University Park Blvd.
Suite 140
Clearfield, UT 84015

Counsel for Plaintiff-Appellee

TABLE OF CONTENTS

Table of Authorities ii

JURISDICTION AND NATURE OF PROCEEDINGS 1

ISSUE ON APPEAL AND STANDARD OF REVIEW 1

POINT I 1

DID THE TRIAL COURT ERR IN DENYING THE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6) OF THE UTAH RULES OF CIVIL PROCEDURE AND THEREBY VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS? 2

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES 3

United States Constitution 3

Utah Constitution 3

Utah Code Annotated 4

Rule 60(b) of the Utah Rules of Civil Procedure 5

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 6

SUMMARY OF ARGUMENTS 10

ARGUMENT 12

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6) OF THE UTAH RULES OF CIVIL PROCEDURE, AND THEREBY VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS. 12

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 27

CERTIFICATE OF SERVICE 27

Table of Authorities

Cases

Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) 25
Berger v. United States, 295 U.S. 78, 88 (1935)) 22
Bish's Sheet Metal Co. v. Luras, 11 Utah 2d 357, 359, 359 P.2d 21, 22 (1961) 20
Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197 22
Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1168 (9th Cir.2002) 18
Colonna, 766 P.2d at 1066 23
County of Sacramento v. Lewis, 523 U.S. 833, 836, 118 S.Ct. 1708, 1711 (1998) 23
Evans v. Virginia, 471 U.S. 1025, 1027-28 (1985) 25
Gardner v. Galetka, 2007 UT 3, ¶ 20, 151 P.3d 968, 972-73 27
Giglio v. United States, 405 U.S. 150, 153 (1972) 25
Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) 21
Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971) 23
Hurst v. Cook, 777 P.2d 1029, 1036 n.6 (Utah 1989) 24
Kell v. State, 2012 UT 25, ¶ 14, 285 P.3d 1133, 1137 18
Laub v. S. Cent. Utah Tel. Ass'n., 657 P.2d 1304, 1306–07 (Utah 1982) 18
Laub, 657 P.2d at 1307–08 (internal quotation marks omitted) 18
Lund v. Brown, 2000 UT 75, ¶ 9, 11 P.3d 277 7
Lund, 2000 UT 75, ¶ 11, 11 P.3d 277 8
Lund, 2000 UT 75, ¶ 9, 11 P.3d 277 7
Menzies v. Galetka, ... 19
Menzies v. Galetka, 2006 UT 81, ¶ 54, 150 P.3d 480 7
Menzies v. Galetka, 2006 UT 81, ¶ 71, 150 P.3d 480 18
Miller v. Pate, 386 U.S. 1, 7 (1967) 25
Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935) 21
Musselman, 667 P.2d at 1055–56 7
Napue 25
Napue v. Illinois, 360 U.S. 264 (1959) 25
Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), ... 21
Napue, supra, at 269, 79 S.Ct., at 1177 22
Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) 18
Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942) 21
R. 1375-84 in appellate case no. 20100891 11
R. 1566 in appellate case no. 20100891 11
Rochin v. California, 342 U.S. 165, 172-74 (1952) 24
rule 60(b)(6 18
Russell v. Martell, 681 P.2d 1193, 1194 (Utah 1984) 7

Russell, 681 P.2d at 1194 7
Russell, 681 P.2d at 1195 18
See Russell, 681 P.2d at 1195 18
Servs. v. Musselman, 667 P.2d 1053, 1055 (Utah 1983) 7
State v. Colonna, 766 P.2d 1062, 1065 (Utah 1988) 23
State v. Emmett, 839 P.2d 781, 785–86 (Utah 1992)) 22
State v. Genovesi, 909 P.2d 916, 922 (Utah App. 1995) 25
State v. Hewitt, 689 P.2d 22, 24 and nn. 1-2 (Utah 1984). 25
State v. Perea, 2013 UT, 322 P.3d 624 12
State v. Perea, 2013 UT, 322 P.3d 624) 16
State v. Pinder, 2005 UT 15, ¶ 66, 114 P.3d 551 28
State v. Saunders, 1999 UT 59, ¶ 31, 992 P.2d 951 22
State v. Williams, 2012 UT App 119, ¶ 4, 276 P.3d 1265 . . . . . 27, 30
State v. Williams, 656 P.2d 450, 454 (Utah 1982) 24
Tani, 282 F.3d at 1168 & n. 8 18
Tani, 282 F.3d at 1168 (same) 18
Torres v. Mullin, 317 F.3d 1145, 1160 (10th Cir. 2003); 25
United States v. Buchanan, 891 F.2d 1436, 1441 (10th Cir. 1989) 25
United States v. Payner, 447 U.S. 727, 737 n.9 (1980) 23
United States v. Russell, 411 U.S. 423, 431-32 (1973) 23
Loose, 2000 UT 11, ¶ 18, 994 P.2d 1237 28
Walker v. State, 624 P.2d 687, 691 (Utah 1981) 24

Statutes

§76-5-202 9
§78A-4-103(2)(j) 9
UCA §76-5-202 10
Utah Code Ann. §78A-4-103(2)(j) 6

Rules

60(b) motion 7
Rule (b)(6) 18
rule 60(b) 18, 19
Rule 60(b) 20, 27, 31
Rule 60(b) motion 13
Rule 60(b) of the Utah Rules of Civil Procedure 10
Rule 60(b)([6]) 20
rule 60(b)(6) 18, 19
Rule 60(b)(6) . . . . . passim
RULE 60(b)(6) 17
~~rule 60(b)(6) of the Federal Rules of Civil Procedure . . . . . 18~~
rule 60(b)(6), ... 19
Rule 60(b)(7) of the 1961 Rules of Civil Procedure 20
Rule 60(b). 19
Utah R. Civ. P. 60(b)(6) 18

Constitutional Provisions

Article I, Section 12 8
Article I, Section 7 8
Article VIII Section 3 of the Utah Constitution 30
Constitution of Utah, Article VIII, § 16 22
Fourteenth Amendment 8, 24
Sixth Amendment 8
Utah Const. Art. I, § 7; U.S. Const Amend. XIV 25
Utah Constitution 8

IN THE UTAH COURT OF APPEALS

RIQO M PEREA,	:	
Plaintiff/Appellee,	:	
vs.	:	
STATE OF UTAH,	:	
Defendant/Appellant.	:	Appellate Court No. 201501445-CA

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an Order of Summary Dismissal on the Petitioner's Petition for Relief under the Post-Conviction Remedies Act filed November 11, 2014 as well as the Order on Petitioner's Motion for Relief from Judgment entered on October 16, 2015. Jurisdiction of This Court is conferred by Utah Code Ann. §78A-4-103(2)(j).

ISSUE ON APPEAL AND STANDARD OF REVIEW

POINT I

DID THE TRIAL COURT ERR IN DENYING THE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6) OF THE UTAH RULES OF CIVIL PROCEDURE AND THEREBY VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS?

PRESERVATION OF THE ISSUE: The issue was preserved by the filing of the Rule 60(b)(6) motion with the court.

STANDARD OF REVIEW: The Utah Court of Appeals review of a District Court's denial of a 60(b) motion is under an abuse of discretion standard of review. There are limits to the discretion of the District Court however as set forth in the case of *Menzies v. Galetka*, 2006 UT 81, ¶ 54, 150 P.3d 480, where the court held:

> The majority of Menzies' arguments on appeal deal with the district court's 60(b) ruling. A district court has broad discretion to rule on a motion to set aside a default judgment under rule 60(b) of the Utah Rules of Civil Procedure. *See Lund v. Brown*, 2000 UT 75, ¶ 9, 11 P.3d 277; *Russell v. Martell*, 681 P.2d 1193, 1194 (Utah 1984); *State Dep't of Soc. Servs. v. Musselman*, 667 P.2d 1053, 1055 (Utah 1983). Thus, we review a district court's denial of a 60(b) motion *502 under an abuse of discretion standard of review. *Russell*, 681 P.2d at 1194. However, we have emphasized that "the [district] court's discretion is not unlimited." *Lund*, 2000 UT 75, ¶ 9, 11 P.3d 277. It is well established that 60(b) motions should be liberally granted because of the equitable nature of the rule. *Id.* ¶ 10. Therefore, a district court should exercise its discretion in favor of granting relief so that controversies can be decided on the merits rather than on technicalities. *See id.; Musselman*, 667 P.2d at 1055–56. Accordingly, it is an abuse of discretion for a district court to deny a 60(b) motion to set aside a default judgment if there is a reasonable justification for the moving party's failure and the party requested 60(b) relief in a timely fashion. *Lund*, 2000 UT 75, ¶ 11, 11 P.3d 277

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution

Sixth Amendment - Rights of Accused in Criminal Prosecutions

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

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy

public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Code Annotated

***§76-5-202* Aggravated Murder (in relevant part)**

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;

§78A-4-103(2)(j)

The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: cases transferred to the Court of Appeals from the Supreme Court.

Rule 60(b) of the Utah Rules of Civil Procedure

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

The Defendant was charged by Information with two counts of Aggravated Murder, a Capital felony in violation of UCA §76-5-202 together with three other felony charges. 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 in appellate case no. 20100891). On May 27, 2010, the defendant was sentenced to life without the possibility of parole. R. 1566 in appellate case no. 20100891).

A Petition for Relief under the Post-Conviction Remedies Act was filed by Petitioner on November 12, 2014, and was summarily dismissed on January 12, 2015. An appeal was filed on February 11, 2015 and a motion for relief from judgment was filed on July 23, 2015. After remand to the trial court, the trial court issued a ruling denying the motion on October 16, 2015.

STATEMENT OF THE FACTS

1. In 2007 the Petitioner Riqo Perea was charged with two counts of Aggravated Murder, a Capital Felony, together with two counts of Attempted Aggravated Murder, a first-degree felony.

2. This case went to trial beginning March 9, 2010 and concluding with a guilty verdict to all charges rendered by the jury on March 16, 2010.

3. The matter was appealed to the Utah Supreme Court and although the court found numerous errors, the judgment was affirmed

based upon the Utah Supreme Court's finding that the errors were harmless due to the overwhelming evidence of guilt. This overwhelming evidence of guilt was founded on the testimony of Sarah Valencia, who testified that she witnessed Riqo Perea shooting the fatal and wounding shots. (See *State v. Perea*, 2013 UT, 322 P.3d 624, a copy of that decision is attached as Addendum A to this brief)

4. On November 12, 2014, the petitioner filed the current petition under the Post-Conviction Remedies Act, and that petition was denied by this court on October 16, 2015. (See copy of Ruling and Order attached as Addendum B to this brief).

5. The judgment on that matter was then appealed to the Utah Supreme Court on February 11, 2015. (See notice of appeal attached as Addendum C to this brief).

6. On July 2, 2015 Sarah Valencia came into the office of Randall W. Richards and declared that she wanted to sign an affidavit recanting the testimony that she had given the trial due to the fact that it was incorrect, and she had been pressured to testify falsely due to threats by the police. (A copy of that affidavit is attached as Addendum D to this brief).

7. A review of that affidavit would clearly indicate that her testimony given at the trial of petitioner Riqo Perea, was false, and in large part resulted in his conviction and life sentence, which was thereafter affirmed by the Supreme Court of Utah.

8. There were only three other witnesses that potentially put the gun in the hand of Riqo Perea. Two of those witnesses, Angelo Gallegos, and Elias Garcia were both potential suspects and both testified against Riqo Perea and as a result were not charged. (The relevant portions of those witnesses testimony are attached as Addendum E to this brief).

9. The other witness, Dominique Duran, gave a very contradictory testimony, with claims that she did not remember what happened that night. The only evidence that implicated Riqo Perea was actually read to the witness and she simply gave her affirmation. On page 26 of the trial transcript of her testimony she makes the following response to the question:

Q. Do you remember during the course of this statement Detective John Thomas, who's seated right here in the courtroom, coming to you and emphasizing that it was important for you to tell the truth?

A. Yes. He threatened me a lot, yes.

10. Since the testimony of Sarah Valencia is absolutely essential for the court to make a reasoned decision on this Rule 60(b) motion, the

relevant portions of that testimony are included with the trial transcript pages as follows:

Pg. 85--86 (Direct)
(After arguing begins in the street) "That's when me and Sabrina went in to get Anthony, because it was his house, thinking maybe that he could maybe stop the argument from going on. All I remember is being inside, and Ashley Gill ran in and said there was a shot in the air. And we went back outside, and that's when I seen the SUV pulling off, and I seen Riqo over the top, shooting."
Pg. 92--95 (Direct)
Q. When you gave that first statement did you tell the police that Riqo was the shooter?
A. No.
Q. Why not?
A. I was scared.
Q. Why were you scared?
A. Because I was getting threatened.
Q. How were you being threatened?
A. Phone calls.
Q. Do you know who was making the phone calls?
A. I don't.
Q. This is the middle of the night, correct? 1, 2, 3 am?
A. Uh--huh
Q. Did you the following day, on the morning of the 5th, Sunday, I believe, did you in fact go to the Ogden City Police Department and provide another statement, a detailed statement, question and answer statement to a detective?
A. Yes
Q. What time did that take place?
A. Maybe 9, 10.
Q. It was daylight out; is that right?
A. Yes
Q. And what did you do between the time you were at the hospital and the time you went down to the police station? A. Nothing really.
Q. Were you able to go home and go to sleep?
A. No.
Q. You did in fact at that time provide another detailed written statement; is that right?

A. Yes
Q. Did you describe the facts for that detective as you have described them today?
A. Yes.
Q. Did you have Riqo as the person over the front of the car, shooting?
A. On my second statement?
Q. Yes.
A. No.
Q. Why not?
A. Because I was scared.
Q. Again, why were you scared?
A. I was still getting threatening phone calls.
Q. Did you have Riqo in that statement as one of two people who was shooting?
A. Yes.
Q. And did you have Riqo in the front passenger seat?
A. Yes
Q. (Approximately a week later) Did Detective Gent come down and ask you to give another statement?
A. Yes
Q. In that written statement did you identify Riqo as the person doing the shooting?
A. Yes
Q. Did Detective Gent ask you why you hadn't identified Riqo in the first two?
A. Yes
Q. What did you tell him?
A. That I was scared and I was being threatened
Q. Did you in fact see this defendant come over the top of that red SUV and fire a gun many times?
A. Yes
Pg. 107 (Cross)
Q. And from there you see people get into the car, and then you could see the people shooting?
A. I seen Riqo shooting.

SUMMARY OF ARGUMENTS

This appeal arises out of a Petition for Relief under the Post-

Conviction Remedies Act was filed by Petitioner on November 12, 2014, which was summarily dismissed on January 12, 2015. After the appeal was filed, a Rule 60(b)(6) motion for relief from judgment was filed on July 23, 2015 and the request for remand was granted. After remand to the trial court, the trial court issued a ruling denying the motion.

The Rule 60(b)(6) motion was premised entirely upon a recantation of the main witness at trial, Sarah Valencia, who identified Riqo Perea as the shooter. This recantation, when juxtaposed with the Supreme Court of Utah's finding on direct appeal of numerous errors in the trial, but denying reversal based upon overwhelming evidence, suggests that the relief from judgment should be granted in the interest of justice.

An analysis of the Court's decision on direct appeal (*State v. Perea*, 2013 UT, 322 P.3d 624) suggests that the "overwhelming evidence of guilt" is premised primarily upon the eyewitness testimony of Sarah Valencia. While two other individuals testified that Riqo Perea was the shooter, those two individuals were original suspects in the case, and both were never charged but testified, thereby calling the question their bias and reliability. Even more troubling is the fact that several witnesses, including Sarah Valencia in her recantation affidavit, claim that police officers threatened and coerced false testimony during the course of the original trial. This

coercion, if it in fact occurred, would instigate the application of the Due Process Clause of the State and Federal Constitutions.

Given all of these facts, and the tenuous nature of the testimony relied on by the Supreme Court of Utah in making a finding of overwhelming evidence of guilt, the interest of justice request under Rule 60(b)(6) should have been granted by the trial court. It is for these reasons that the petitioner is requesting this Court reverse the trial court and grant the judgment requested.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6) OF THE UTAH RULES OF CIVIL PROCEDURE, AND THEREBY VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS.

Rule 60(b)(6) of the Utah Rules of Civil Procedure, provides relief from judgment based upon "any other reason justifying relief from the operation of the judgment." In the case before this Court, significant and unambiguous evidence that the main witness for the prosecution during the trial of Mr. Perea testified falsely. This recantation of testimony, combined with the Supreme Court of Utah's ruling on the direct appeal of the

conviction certainly would qualify as "other reason for justifying relief from the operation of the judgment." Rule 60(b)(6) is included to prevent a manifest injustice.

In the case of *Menzies v. Galetka*, 2006 UT 81, ¶ 71, 150 P.3d 480, the Supreme Court of Utah ruled that the trial court's denial of a Rule 60(b)(6) motion was improper due to both the nature of the case (a capital conviction and sentence) as well as the overwhelming indications of injustice. In that case the court held:

> Rule 60(b)(6) is the "catch-all" provision of rule 60(b). It provides that a party may be relieved from a judgment for "any *other* reason justifying relief from the operation of the judgment." Utah R. Civ. P. 60(b)(6) (emphasis added). Because rule 60(b)(6) is meant to operate as a residuary clause, it may not be relied upon if the asserted grounds for relief fall within any other subsection of rule 60(b). *See Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir.2002); *Russell*, 681 P.2d at 1195; *Laub v. S. Cent. Utah Tel. Ass'n.*, 657 P.2d 1304, 1306–07 (Utah 1982). In other words, the grounds for relief under 60(b)(6) are exclusive of the grounds for relief allowed under other subsections. *See Russell*, 681 P.2d at 1195; *Tani*, 282 F.3d at 1168 & n. 8. Furthermore, relief under rule 60(b)(6) is meant to be the exception rather than the rule; we have previously held that it should be "sparingly invoked" and used "only in unusual and exceptional circumstances." *Laub*, 657 P.2d at 1307–08 (internal quotation marks omitted); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (remarking that under rule 60(b)(6) of the Federal Rules of Civil Procedure, a party must show "extraordinary circumstances"); *Tani*, 282 F.3d at 1168 (same).

In the case of *Kell v. State*, 2012 UT 25, ¶ 14, 285 P.3d 1133, 1137 that

while relief under Rule (b)(6) is to be sparingly invoked by the court only in unusual and exceptional circumstances, the Court held:

> ¶ 14 Mr. Kell did not specify which of rule 60(b)'s subsections he relied upon, but his sole argument was that his postconviction attorneys were grossly negligent in representing him and provided him ineffective assistance. This claim does not fall within any of the five specified subsections of rule 60(b). In *Menzies v. Galetka,* we determined that Mr. Menzies' ineffective assistance of counsel claim fell under the province of subsection (b)(6).[11] Following that precedent, we treat Mr. Kell's motion as one for relief under subsection (b)(6). Rule 60(b)(6) imposes a temporal restriction, albeit an imprecise one, requiring that the motion be brought within a "reasonable time."

In the case at bar, there can be little dispute that the fact that the State's main witness committed perjury does not fit within the (b)(1) mistake, (b)(2) newly discovered evidence, or (b)(3) fraud by opposing party reasons of Rule 60(b). Here we have a witness under threat from the police, who testifies falsely. Furthermore, there can be little dispute that the motion and memorandum, filed a mere 21 days later was "filed within a reasonable time" of the discovery of said perjury. The trial court acknowledged the timeliness of the filing in finding,

> However, to the extent Petitioner's motion is more properly submitted under rule 60(b)(6), the court concludes the motion is timely.' A motion under rule 60(b)(6) must be filed within a "reasonable time." Petitioner filed the motion only three weeks after learning of Ms. Valencia's allegations, which is a reasonable time under the rule. (See Ruling and Order on Petitioner's motion for Relief from Judgment entered on October 16, 2015)

In the case of *Bish's Sheet Metal Co. v. Luras*, 11 Utah 2d 357, 359, 359 P.2d 21, 22 (1961) the Supreme Court of Utah recognized a due process component to Rule 60(b)([6])[1] language of "any other reason justifying relief from the operation of the judgment." In that case, the court held:

> The aggrieved party under such a showing would be entitled to relief from the judgment of the district court under subdivision (7) of Rule 60(b) Utah Rules of Civil Procedure even after the expiration of three months because relief from a judgment on account of a lack of due process of law is not expressly provided for by such rule.

One of the most troubling portions of the recantation statement by Sarah Valencia's the fact that the investigating officers, and apparently the prosecution's investigator were told multiple times that Sarah could not see the shooter, and yet were told to testify falsely at the trial. The relevant portion of Sarah Valencia's statement is as follows:

8. I told the detectives that I could not see the occupants of the car that I couldn't see their faces, but the officer insisted that it was Riqo and Bubba (Marquis Lucero). I informed the police that he couldn't have been Bubba because I didn't see him there that night.

9. Approximately a month or so after the shooting, I was again questioned by the police and I overheard the officers talked about the

---

1 Rule 60(b)(7) of the 1961 Rules of Civil Procedure is identical to the current Rule 60(b)(6).

fact that Sabrina was running toward the garage and was shot in the chest and therefore there may have been a shooter in the garage area. I asked the officers about this fact, and they told me that although the CSI and found some bullets there, that they didn't believe that happened. I was confused and scared, and therefore I went along with what the officers told me to say.

10. I also recall that prior to the trial occurring I was asked to meet at the prosecutor's office on 24th and Washington and they showed me maps and again told me what to say in trial. Again I was scared and worried about my child and therefore went along with what they told me to testify about.

In *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972) the Supreme Court of the United States held that a prosecutor who allows false testimony be introduced at trial even with regards to credibility has violated the due process rights of a criminal defendant. In that case the court held

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '(t)he same result obtains when the State, although not

> soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American *154 Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. *Napue*, supra, at 269, 79 S.Ct., at 1177.

Under our unique state constitution, public prosecutors fall under the judicial branch of government. (See Constitution of Utah, Article VIII, § 16). This placement of prosecutors in the judicial branch is appropriate, as our law recognizes that prosecutors are ministers of justice who must steadfastly "eschew all improper tactics." *State v. Saunders*, 1999 UT 59, ¶ 31, 992 P.2d 951.

> [A prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (quoting *State v. Emmett*, 839 P.2d 781, 785–86 (Utah 1992))
> *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

While the petitioner recognizes that there is no direct evidence the prosecutor knew the testimony of Sarah Valencia was both coerced and false, the fact that the police officers and the prosecutor's investigator allowed her to testify as she did triggers the same due process concerns.

The Supreme Court of Utah and the Supreme Court of the United States have both recognized that outrageous governmental misconduct may so offend due process of law that the government is "'absolutely barred from invoking judicial processes to obtain a conviction.'" *State v. Colonna,* 766 P.2d 1062, 1065 (Utah 1988), quoting *United States v. Russell,* 411 U.S. 423, 431-32 (1973). The *Colonna* court tacitly recognized that extreme governmental misconduct that shocks the conscience or is "'repugnant to the American criminal justice system'" may violate the Due Process Clauses of the Utah and Federal Constitutions. *Colonna*, 766 P.2d at 1066, *quoting Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971). The United States Supreme Court recognized that Due Process Clause of the Fifth Amendment might be violated by outrageous government misconduct that violates "fundamental 'canons of decency and fairness.'" *United States v. Payner*, 447 U.S. 727, 737 n.9 (1980). In *County of Sacramento v. Lewis,* 523 U.S. 833, 836, 118 S.Ct. 1708, 1711 (1998), the Court held, "In a due process challenge to executive action, the threshold question is whether the

behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Rochin v. California*, 342 U.S. 165, 172-74 (1952), exemplifies when that standard may be met. The *Rochin* Court recognized that police conduct in seeking to retrieve drugs swallowed by a suspect by squeezing and reaching down his throat, and then taking him to a hospital where a tube was forced down his throat to deliver an emetic inducing him to vomit the drugs he had swallowed, shocked the conscience and violated the Fourteenth Amendment.

Any lawyer's presentation or failure to correct false evidence is accurately viewed as a fraud upon the court. *See, e.g., Hurst v. Cook*, 777 P.2d 1029, 1036 n.6 (Utah 1989). The prosecution (which would include the prosecutor's investigator and by extension the investigating officers) clearly may not present evidence or advance arguments known to be untrue or likely to leave false impressions. *See, e.g., State v. Williams*, 656 P.2d 450, 454 (Utah 1982) (State duty-bound by law and professional ethics to treat defendant fairly and may not assert arguments known to be inaccurate); *Walker v. State*, 624 P.2d 687, 691 (Utah 1981) (State's reliance on false impressions created by testimony constituted prosecutorial misconduct analogous to use of false testimony). Indeed, the

knowing use of misleading or false testimony by the prosecution, or the failure to correct such testimony, violates a defendant's federal and state rights to due process. *Accord Evans v. Virginia*, 471 U.S. 1025, 1027-28 (1985); *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957). Constitutional errors normally cast upon the prosecution the duty to prove them harmless beyond a reasonable doubt. *See State v. Genovesi*, 909 P.2d 916, 922 (Utah App. 1995); *Torres v. Mullin*, 317 F.3d 1145, 1160 (10th Cir. 2003); *United States v. Buchanan*, 891 F.2d 1436, 1441 (10th Cir. 1989). A conviction obtained by the knowing use of false or misleading evidence is fundamentally unfair and must be set aside if there is any reasonable likelihood that the evidence could have affected the judgment of the jury. E.g. *Napue*.

When a prosecution obtains a criminal conviction through a knowing presentation or failure to correct false evidence, both the State and Federal constitutions are violated. *See* Utah Const. Art. I, § 7; U.S. Const Amend. XIV; *State v. Hewitt*, 689 P.2d 22, 24 and nn. 1-2 (Utah 1984). Due process simply "cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate*, 386 U.S. 1, 7 (1967). The Utah Supreme Court has aptly explained:

> It is an accepted premise in American jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with "rudimentary demands of justice." The proposition is firmly established that a conviction obtained through the use of false evidence known to be such by representatives of the State, must fall under the due process clause of the Fourteenth Amendment and Article I, Section 7, of the Utah State Constitution, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. This standard derives from both the prosecutorial misconduct and more importantly the fact that the use of false evidence involves a corruption of the truth seeking function of the trial process.

In the present case we have situation wherein there is evidence that the police threatened one of the Prosecution's main witnesses with the taking of her child if she did not testify in accordance with their wishes. According to the affidavit of Sarah Valencia, in a meeting with the prosecutor's investigator and the police several weeks prior to trial she was informed of the same. Actions by the police of this nature would certainly invoke the protections of the due process clause of the 14th amendment. The failure the prosecution to rein in such actions by the police would invoke similar constitutional violations.

The Supreme Court of Utah has recognized not only the due process implications of the police threatening a witness but also recognize the Utah

constitutional protections under Article VIII Section 3 which would allow due process type actions to be under the prerogative of the Supreme Court of Utah. In the case of *Gardner v. Galetka*, 2007 UT 3, ¶ 20, 151 P.3d 968, 972-73 the Court ruled it would be appropriate for the court under the Utah constitutional provisions to allow a Rule 60(b) motion to be addressed even if it could be potentially barred under some statute of limitation. In that case the Court held:

> We noted that "the power to review post-conviction petitions 'quintessentially ... belongs to the judicial branch of government' pursuant to article VIII of the Utah Constitution."[38] As such, "the legislature may not impose restrictions which limit [post-conviction relief] as a judicial rule of procedure, except as provided in the constitution."[39] We concluded, "Our state constitution is designed to prevent the unlawful, improper incarceration or execution of innocent individuals, and for that reason, we uphold the viability of the *Hurst* 'good cause' exceptions."[40] As a result, it is possible for a successive post-conviction claim to be procedurally barred under the PCRA and yet receive substantive review on its merits under our independent "good cause" common law exceptions.

In *State v. Williams*, 2012 UT App 119, ¶ 4, 276 P.3d 1265, the Utah Court of Appeals did apply limitations to posttrial recantation evidence, ruling;

> The granting of a new trial based on posttrial recantation evidence is appropriate only upon a determination that "the substance of the proffered [recantation] testimony" and the "testimony's probable weight" would "make a different result probable on retrial." *See State v. Loose*, 2000 UT 11, ¶ 18, 994

> P.2d 1237 (internal quotation marks omitted). The credibility of the recantation evidence is "an essential component" of this determination. *See State v. Pinder*, 2005 UT 15, ¶ 66, 114 P.3d 551;

In the case at bar, we have an unusually exceptional circumstance which justifies the application of Rule 60(b)(6) and the granting of a new trial. Here, we have a case in which a 19-year-old individual has been sentenced to prison for two consecutive life terms without the possibility of parole. Furthermore, this is a case in which there is a high probability that the defendant was improperly convicted. On direct appeal, the Supreme Court of Utah ruled that there were several errors made by the trial court including an improper exclusion of expert testimony that would suggest that due to lighting conditions an individual would not be able to see from the location of Sarah Valencia any facial features or distinguishing appearance of an individual shooting from a vehicle on the roadway. The expert generated animations, and the accompanying testimony suggested an alternate theory of the shooting. The improper exclusion of expert testimony regarding false confessions, and the improper exclusion of other testimony and documents presented by the defendant all support of the defendants theory that he was not the shooter. The Court concluded that these errors were harmless due to the overwhelming evidence of guilt. In

relying upon this harmless error theory, the court weighed heavily the testimony of Sarah Valencia, who was the only independent eye-witness in the case to put the gun in the hand of Riqo Perea. The other witnesses, Angelo Gallegos and Christopher Garcia were both potential defendants were never charged as a result of their testimony, and therefore as such had some inherent reliability issues. The only other eyewitness put a gun in the hand of Riqo Perea was Dominique Duran, but her testimony was likewise inherently unreliable based upon the fact that she testified she didn't remember much, and that questioning prosecutor's recitation of one of her prior three contradictory statements was qualified by a statement as follows.

> Q. Do you remember during the course of this statement Detective John Thomas, who's seated right here in the courtroom, coming to you and emphasizing that it was important for you to tell the truth?
>
> A. Yes. He threatened me a lot, yes.

Thus, we have a situation wherein the overwhelming evidence relied upon by the Supreme Court of Utah is significantly undermined by the recantation by Sarah Valencia for trial testimony. It is the testimony of Sarah Valencia that constituted the overwhelming evidence relied upon by the Utah Supreme Court in denying a new trial. Utilizing the requirement

that "[t]he credibility of the recantation evidence is 'an essential component' of this determination"[2], an analysis of that recantation would suggest reliability of the recantation. Here, we see that Ms. Valencia originally told the police three times that she could not recognize the shooter, and only after coercion did she change that story. Her original statements would be supported by the defense expert who said that due to lighting conditions one would not be able to see sufficiently to recognize an individual in the shooter's position.

Given all of the above, there is a significant likelihood that the outcome of the trial would be different if the original trial testimony of Sarah Valencia is shown to be false. This likelihood would increase even more if the original trial court errors excluding significant defense evidence were rectified at the new trial.

Article VIII Section 3 of the Utah Constitution provides the Supreme Court authority to issue writs and orders to ensure that an individual is not unjustly incarcerated. Given the information contained in Sarah Valencia's affidavit in which she recants the entirety of her eyewitness identification, the conviction of Riqo Perea is seriously called into question. A granting of the petitioner's request for new trial would ensure that justice is

---

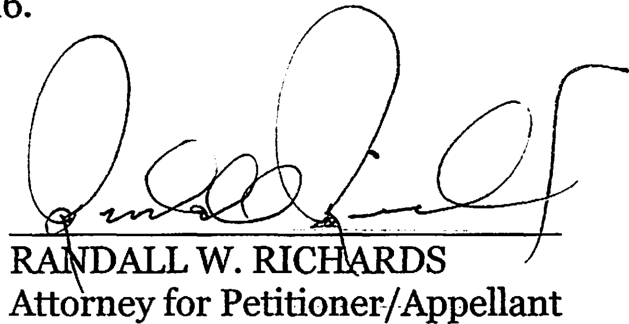
2 *State v. Williams,* 2012 UT App 119, ¶ 4, 276 P.3d 1265

accomplished, and that Mr. Perea's constitutional rights are adequately protected.

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests this court to grant relief from judgment in the Post-Conviction Remedies Act Petition. In the alternative, the petitioner respectfully requests that the case be remanded for an evidentiary hearing on the Rule 60(b) motion.

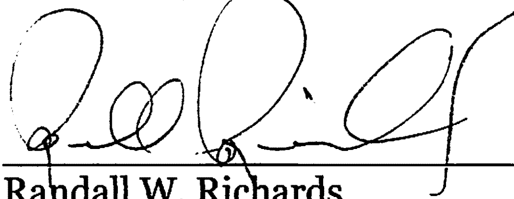
DATED this 4th day of February 2016.



RANDALL W. RICHARDS
Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that I reviewed the brief submitted in this case, and relying on the word count program of the Microsoft Word program used in preparing this brief, the total word count is 7446 words



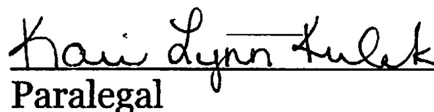
Randall W. Richards
Attorney for Petitioner/Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Brief of the Appellee* was mailed; postage prepaid this 4th day of February 2016 to:

Sean Reyes
Erin Riley
Attorney General
State of Utah
350 North State Street Suite 230
Salt Lake City Utah 84114-2320

Utah Court of Appeals
Scott M. Matheson Courthouse
450 S. State,
PO Box 140230
Salt Lake City, UT 84114



Paralegal

ADDENDUM A

Decision to State V. Perea, 2013 UT, 322 P.3d 624

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

2013 UT 68
322 P.3d 624

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Appellee,

v.

RIQO MARIANO PEREA,
Defendant and Appellant.

No. 20100891
Filed November 15, 2013

Second District, Ogden Dep't
The Honorable Ernest T. Jones
No. 071901847

Attorneys:

John E. Swallow, Att'y Gen., Christopher D. Ballard, Asst. Att'y Gen., Salt Lake City, for appellee

Samuel P. Newton, Kalispell, MT, for appellant

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

JUSTICE DURHAM filed a concurring opinion, in which ASSOCIATE CHIEF JUSTICE NEHRING joined.

JUSTICE LEE filed a concurring opinion, in which CHIEF JUSTICE DURRANT joined.

JUSTICE PARRISH, opinion of the Court:

INTRODUCTION

¶1 Riqo Perea appeals from a conviction for two counts of aggravated murder in violation of Utah Code section 76-5-202 and two counts of attempted murder in violation of Utah Code section 76-5-203. Mr. Perea was sentenced to life without parole (LWOP) for each aggravated murder conviction and three years to life for each attempted murder conviction.

¶2 Mr. Perea raises numerous issues. He contends that the district court erred by limiting and excluding the testimony of defense experts, precluding the testimony of potentially exculpatory defense witnesses, and denying Mr. Perea's motion to suppress his confession. Mr. Perea further contends that the combination of errors constitutes cumulative error and requires reversal. Mr. Perea also argues that Utah Code section 76-3-207.7, which provides the sentencing scheme for first degree felony aggravated murder, is unconstitutional. He finally argues that we should require recording of confessions occurring at police stations.

¶3 We hold that the district court erred when it excluded the testimony of the defense's expert witnesses. But we conclude that the error was harmless and does not undermine our confidence in the verdict when viewed against the backdrop of Mr. Perea's overwhelming guilt. We also hold that section 76-3-207.7 is constitutional on its face and was constitutionally applied to Mr. Perea. We therefore affirm.

BACKGROUND

¶4 On the evening of August 4, 2007, Mr. Perea, then nineteen years old, was spending time with friends. Mr. Perea and many of those with him belonged to the Ogden Trece gang. That night, Dominique Duran drove the group to the home of Christina Rivera in her maroon GMC Yukon (SUV). When the group arrived at Ms.Rivera's residence, Sarah Valencia, who had been left in charge of the residence, told the group they were not welcome.

¶5 When the group entered Ms. Rivera's house over Ms. Valencia's objections, she and a friend walked across the street to Anthony Nava's house. Mr. Nava was hosting a wedding party that included some members of the Norteños, a rival gang to the Ogden Trece. Before Ms. Valencia and her friend made it to Mr. Nava's house, Mr. Perea and the others followed them and an argument erupted. The argument led to an exchange of gang insults between Mr. Perea's group and some partygoers at Mr. Nava's, at which point an unknown person fired a shot in the air.

¶6 When the shot was fired, Mr. Perea and his group returned to Ms. Duran's SUV. Mr. Perea was seated in the front passenger seat. Ms. Valencia, who was standing near the street, testified that as the SUV pulled away, "I seen Riqo over the top, shooting." Similarly, Angelo Gallegos and Elias Garcia, passengers in the SUV, testified that Mr. Perea fired shots from the SUV as it pulled away from the party.

¶7 Ms. Valencia and her friend, Sabrina Prieto, were standing on a walkway between the front door and the carport of Mr. Nava's house when the shots rang out from the SUV. Ms. Valencia ran east along the front of the home toward the carport, and as she sought cover in a side door, she turned and saw Ms. Prieto fall on the doorstep. Ms. Prieto had been fatally shot through the right side of her chest.

¶8 Richard Esquivel, like many of the other witnesses, was facing the road when the shots from the SUV were fired. Mr. Esquivel testified that he saw someone from the passenger side of the SUV lean over the roof and fire towards Mr. Nava's house. After the first shot was fired, Mr. Esquivel got down but was hit in the back part of his shoulder and hip. Rocendo Nevarez, who was standing slightly closer to the road, was fatally shot in the lower left part of his back.

¶9 Keri Garcia was standing in Mr. Nava's driveway when the shots from the SUV were fired. She ran south along the side of the house, but was shot in the lower back as she sought cover. Ms. Garcia testified that the shots came only from the direction of the road.

¶10 Lacey Randall was standing beside her car, which was parked in Mr. Nava's driveway. As did the other witnesses, Ms. Randall testified that she saw the shooter sitting on the passenger side windowsill of the SUV. Ms. Randall was pulled to the ground just before a bullet struck the car window above her.

¶11 Mr. Gallegos, a passenger in the SUV, testified that when Mr. Perea climbed back into the vehicle after the shootings, Mr. Perea told them that "[i]f [they] said anything, there would be a bullet with [their] name on it." In contrast, Mr. Garcia, another passenger, testified that Mr. Perea "was confused," but "never threatened to put a bullet in anybody." Ms. Duran, who was driving, testified that Mr. Perea said, "[D]rive right and let's not get pulled over."

¶12 A short time later, Ms. Duran dropped off the group near a church in North Ogden. Mr. Garcia testified that later that morning, Mr. Perea dumped the gun in an alley. The gun was never recovered.

¶13 The bullets recovered from Ms. Prieto's and Mr. Navarez's bodies were .22 caliber and appeared to have been fired from the same gun. Police recovered ten expended .22 caliber shell casings in

the street in front of Mr. Nava's house. No other shell casings were found at the crime scene. While the State's ballistic expert determined that all of the casings were expended from the same gun, the expert was not able to determine if the gun that fired the bullets was the same gun that expended the casings.

¶14 While investigating the case, Detective John Thomas called Mr. Perea's cell phone. Detective Thomas explained that he needed Mr. Perea "to come into the police station, talk to [him]," and give the detective "[Mr. Perea's] version of what happened that night." Mr. Perea denied any involvement in the crime and then disconnected the call. When Detective Thomas called back, Mr. Perea stated that "he wasn't coming in yet, that he needed to speak with his lawyer first before he came in," and that "he got screwed the last time he spoke with cops and he was innocent."

¶15 Two days later, officers arrested Mr. Perea in Layton. They transported Mr. Perea back to Ogden and placed him in an interview room. Mr. Perea was allowed to use the bathroom, and when he returned, Detective Thomas read Mr. Perea his *Miranda* rights. Detective Thomas joked that Mr. Perea "had his rights read to him so many times that he could probably read them back to [him], and [Mr. Perea] kind of laughed and said, 'Yeah, probably.'" Officer Gent, who was standing outside the interview room, monitored the conversation via a closed-circuit television. Despite the fact that the closed-circuit television was equipped to do so, Officer Gent did not record the interview because it was the Ogden Police Department's policy not to record interrogations.

¶16 After providing Mr. Perea with some water, Detective Thomas and Officer Gent began their questioning. Mr. Perea agreed to speak with the investigators and told them his version of the events the night of the shootings. Though the investigators told Mr. Perea that his story did not match that of other witnesses, the conversation remained calm and civil.

¶17 During the questioning, the investigators suggested that perhaps Mr. Perea fired the shots from the SUV because he was trying to protect Ms. Duran's children, who were in the back seat of the SUV. And in an attempt "to minimize the consequences of what [Mr. Perea] was looking at," Officer Gent suggested to Mr. Perea that he intentionally shot low or high, not intending to kill anyone. During this part of the questioning, Mr. Perea began to cry and though "he was tearing up and his eyes were welling up," Officer Gent testified that "it wasn't like [Mr. Perea] was full grown dis-

traught." When further questioned about whether he shot to protect the children, Mr. Perea stated that "as they drove off [in the SUV] he blacked out and he couldn't remember what happened."

¶18 The investigators told Mr. Perea that "it doesn't usually work out well" when people say they blacked out, and they encouraged Mr. Perea to tell the truth. Mr. Perea thereafter admitted to shooting from the SUV. When asked what kind of gun he fired, Mr. Perea stated that it was a .22 caliber, a fact the investigators had not previously disclosed.

¶19 After admitting to the shooting, Mr. Perea agreed to sign a typewritten confession. Officer Gent once again gave Mr. Perea a *Miranda* warning, and Mr. Perea again agreed to speak with the officers. Officer Gent then asked Mr. Perea open-ended questions about the shooting, to which Mr. Perea gave answers that "seemed appropriate for the question." Officer Gent testified that he transcribed Mr. Perea's statements "verbatim."

¶20 After Officer Gent completed the transcription, he printed the document and handed it to Mr. Perea for review. When Officer Gent asked Mr. Perea if he could read, "[Mr. Perea] laughed at [the officer] and said he could." Mr. Perea read the statement and signed where appropriate, including an acknowledgment that he voluntarily waived his *Miranda* rights. Officer Gent testified that he "[n]ever saw any indication that [Mr. Perea] was not understanding what [the investigators] were saying" and that Mr. Perea was attentive and responsive throughout the process. Officer Gent further testified that he never made any promises to Mr. Perea in exchange for his cooperation with the investigators.

¶21 The State charged Mr. Perea with two counts of aggravated murder and two counts of attempted murder. The State initially filed, and then withdrew, a notice of intent to seek the death penalty. Prior to trial, the district court made three substantive evidentiary rulings relevant to the issues raised on appeal.

¶22 First, the district court denied the State's motion to exclude the testimony of James Gaskill, the defense's crime scene reconstruction expert, who intended to testify that there were multiple shooters and that the State's conclusion that Mr. Perea fired all of the shots was not supported by the forensic evidence. The State argued that Mr. Gaskill's theories were not supported by the facts and that his anticipated testimony constituted an improper expression of opinion on the credibility of other witnesses. The district court held that Mr .Gaskill could testify regarding his conclusions about the

sequence of events on the night of the crime. And while the district court ruled that Mr. Gaskill could not comment on the credibility of other witnesses, it allowed him to "testify that based on his examination[,] he [did not] agree with what some of the witnesses testified to."

¶23 Minutes before the defense presented its case, the State renewed its motion to exclude Mr. Gaskill's testimony. Citing foundational concerns, the State objected to the admission of two computer animations and a number of photographs Mr. Gaskill intended to use in support of his testimony. After hearing testimony from Mr. Gaskill in support of the evidentiary foundation, the court excluded both animations and the photographic evidence. It ruled that the photographs did not accurately depict the crime scene and it excluded the animation because "[Mr.] Gaskill can't lay any kind of a foundation for the animation here. He didn't prepare it. We don't know what went into it. We don't know who was involved in [its creation]." Although the court allowed Mr. Gaskill to testify at trial regarding his theories, it sustained the majority of the State's multiple objections when Mr. Gaskill's testimony commented directly on the credibility of other witnesses.

¶24 The district court's second relevant pretrial ruling involved the testimony of Dr. Richard Ofshe, a defense expert who intended to testify about the phenomena of false confessions and opine that Mr. Perea had falsely confessed. The State argued that under rule 608 of the Utah Rules of Evidence, Dr. Ofshe could not testify "that [Mr. Perea's] confession was coerced" because "[t]hat is a legal conclusion . . . [a]nd that is for the [district court] to determine." The State also argued that under rule 702, Dr. Ofshe's "research is sharply contested . . . [and] is not research that is generally accepted within the scientific community in which he operates." Finally, the State argued that under rule 403, Dr. Ofshe's testimony would be more prejudicial than probative.

¶25 The defense responded by noting that the parties were not before the court "on a *Rimmasch* hearing" and argued that the district court had "appointed [Dr. Ofshe] as an expert." The defense continued, stating that "[w]e're asking that [Dr. Ofshe] be able to testify as an expert and ask for some sort of *Rimmasch* [hearing] that could show that he's not reliable," otherwise, "I think that it would be incumbent upon the Court to allow his testimony." The defense argued that Dr. Ofshe had testified in over one hundred cases nationwide, that this court had cited to Dr. Ofshe's work in two

opinions,[1] and that his expert testimony would assist the jury and should therefore be admitted.

¶26 The district court reasoned that a jury of lay people could determine a confession's voluntariness. It also expressed concern that it

> ha[d] previously ruled that Defendant's confession was voluntary. Dr. Ofshe's proposed testimony that Defendant's [confession] was coerced is a legal conclusion previously rejected by the Court and invades the fact finding function of the jury. . . . [Further,] Dr. Ofshe's conclusions do not meet the *Rimmasch* standard because they are based upon principles not generally accepted within the scientific community.

The district court did not "allow Dr. Ofshe to testify either in generalities about coerced confessions or about the confession in this particular case." The district court noted, however, that "the defense [could] develop their theory of whether it was a coerced confession in the[ir] argument," and it agreed to give a jury instruction regarding coerced confessions.

¶27 The district court's third relevant pretrial ruling involved its decision to bar potential defense witnesses unless the defense disclosed their names. The defense argued that anonymity was critical because these potentially exculpatory witnesses would not come forward, or would change their stories, if their names were revealed outside of the courtroom. The State argued that such a prohibition would prevent proper investigation of the witnesses' stories. The district court ruled that "if these [witnesses] are not willing to give their identity to the prosecutors and the law enforcement [to] follow up on what they are going to say, then they are not going to testify." After the court's ruling, the defense chose not to disclose the names of the potential witnesses and did not call them at trial.

¶28 The jury found Mr. Perea guilty as charged. At the sentencing hearing, the district court identified several aggravating and mitigating circumstances, and found that "the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt." It sentenced Mr. Perea to LWOP for each

---

[1] *See State v. Rettenberger*, 1999 UT 80, ¶¶ 22–23, 31, 984 P.2d 1009; *State v. Mauchley*, 2003 UT 10, ¶¶ 21, 27 n.3, 53–54, 56, 67 P.3d 477.

aggravated murder count and three years to life for each attempted murder count. Mr. Perea timely appealed.

¶29 We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(i).

STANDARD OF REVIEW

¶30 We review the district court's decision to exclude expert witness testimony for an abuse of discretion. *Eskelson ex rel. 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. The district court has "wide discretion in determining the admissibility of expert testimony." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (internal quotation marks omitted). Therefore, "we disturb the district court's decision to strike expert testimony only when it exceeds the limits of reasonability." *Eskelson*, 2010 UT 59, ¶ 5 (internal quotation marks omitted). But if the district court errs in its interpretation of the law or the application of the law to the facts, "it [does] not act within the limits of reasonability, and we will not defer to the evidentiary decision." *Id.*

¶31 Similarly, we give the district court "broad discretion to admit or exclude evidence," including lay witness testimony, "and will disturb its ruling only for abuse of discretion." *Daines v. Vincent*, 2008 UT 51, ¶ 21, 190 P.3d 1269; *see also Taylor v. Illinois*, 484 U.S. 400, 415 (1988) (affirming the trial court's preclusion of witness testimony as a sanction for a discovery violation).

¶32 A district court's "ruling on a motion to suppress is reviewed for correctness, including its application of the law to the facts." *State v. Tripp*, 2010 UT 9, ¶ 23, 227 P.3d 1251. We review the district court's factual findings for clear error. *Save Our Schools v. Bd. of Educ.*, 2005 UT 55, ¶ 9, 122 P.3d 611. We will only find clear error if the court's factual findings "are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." *Id.* (internal quotation marks omitted).

¶33 Mr. Perea's cumulative error claim requires that we first 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. After assessing Mr. Perea's underlying claims, we will reverse "under the cumulative error doctrine only if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had." *State v. Killpack*, 2008 UT 49, ¶ 54, 191 P.3d 17 (internal

quotation marks omitted). But, if Mr. Perea's claims do not constitute error, or if the cumulative effect of any errors does not undermine our confidence in the verdict, we will not apply the doctrine. *See id.*

¶34 Mr. Perea's challenge to his sentence of LWOP involves statutory and constitutional interpretation. We therefore review the district court's decision "for correctness, and we provide no deference to the district court's legal conclusions." *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519.

ANALYSIS

¶35 Mr. Perea argues that the district court erred in: (1) limiting the testimony of the defense's crime scene reconstruction expert, (2) excluding the testimony of the defense's false confession expert, (3) precluding the testimony of potentially exculpatory witnesses, and (4) denying the defense's motion to suppress Mr. Perea's confession. Mr. Perea argues that, taken together, these errors constituted cumulative error and "effectively den[ied] Mr. Perea a fair trial." Mr. Perea further argues that his sentence of LWOP is unconstitutional. Finally, Mr. Perea urges us to judicially require the recording of all station house confessions.

¶36 We first address each of Mr. Perea's asserted errors and then turn to his cumulative error argument. We next discuss Mr .Perea's argument that his sentence of LWOP is unconstitutional. Finally, we turn to Mr. Perea's argument that we should judicially mandate the recording of station house confessions.

I. THE DISTRICT COURT ERRED IN LIMITING THE TESTIMONY OF JAMES GASKILL

¶37 Mr. Perea argues that the district court erroneously excluded the testimony of James Gaskill, the defense expert on crime scene reconstruction. Mr. Gaskill visited the scene, took measurements, and determined that there "were multiple shooters[,] . . . that the bullet casing pattern did not seem consistent with the State's version of events, [and] that it would be difficult, if not impossible, for [Mr. Perea] to hit the[] victims according to the State's theory." While the district court allowed Mr. Gaskill to testify to his investigation and theory, it did not allow him to directly comment on the credibility of the State's witnesses, or utilize photographic and animated evidence in support of his testimony.

¶38 We hold that the district court did not err when it prevented Mr. Gaskill from commenting on the veracity of other

witnesses and when it refused to admit his proffered photographs. But the district court did abuse its discretion when it refused to admit the computer animations in support of Mr. Gaskill's testimony.

A. The District Court Did not Err when It Precluded Mr. Gaskill From Directly Commenting on the Credibility of the State's Witnesses

¶39 "[W]e allow experts latitude to interpret the facts before them," even when that interpretation contradicts that of another witness. *Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶ 16, 242 P.3d 762. But we do not allow "an expert's testimony as to the truthfulness of a witness on a particular occasion." *State v. Rimmasch*, 775 P.2d 388, 392 (Utah 1989) (citing rule 608 of the Utah Rules of Evidence for the proposition that witnesses may not normally testify regarding "specific instances of [another] witness's conduct in order to attack or support the witness's character for truthfulness"). Because "the resolution of credibility [is] for the fact finder [alone]," it is not a proper subject on which an expert witness may opine. *State v. Hoyt*, 806 P.2d 204, 211 (Utah Ct. App. 1991).

¶40 While our rules of evidence allow Mr. Gaskill to present theories that contradicted the testimony of other witnesses, our rules do not allow him to comment directly on the veracity of those witnesses. *See Eskelson*, 2010 UT 59, ¶ 17. We therefore hold that the district court did not err when it prohibited Mr. Gaskill from testifying as to the truthfulness of the State's witnesses.

B. The District Court Did not Err when It Excluded Mr. Gaskill's Crime Scene Photographs

¶41 Before evidence may be admitted, its proponent is required to establish a proper foundation. Rule 402 of the Utah Rules of Evidence requires that evidence must be relevant to be admitted. Rule 901(a) requires that an exhibit must be authenticated and that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Where an exhibit is not representative of what its proponent claims it represents, a court does not abuse its discretion when it refuses to admit the exhibit. *See State v. Horton*, 848 P.2d 708, 714 (Utah Ct. App. 1993). And even if an exhibit is both relevant and authenticated, rule 403 allows the district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

¶42 Here, the defense sought to introduce photographs taken by Mr. Gaskill that he claimed represented the crime scene. The State objected, arguing that the photographs did not accurately represent the scene on the night of the shooting. Though the photographs were based on actual crime scene photographs, Mr. Gaskill admitted that there were many differences between his photographs and the scene on the night of the shooting. He admitted that the photos purporting to show Mr. Perea's view from the SUV could not be accurate because the appropriate make and model SUV was not used. He further admitted that a pickup truck in one of the photographs was not the same make or model as the truck parked there on the night of the shooting. Finally, Mr. Gaskill admitted that he was not certain if a car in one of the photographs was in the same location as it had been on the night of the shooting.

¶43 Mr. Gaskill's admissions create significant doubt as to the accuracy and relevance of the photographs. Particularly where the defense's theory was contingent on the location and size of the vehicles involved, the inaccurate use of substitute vehicles had the potential to unfairly prejudice or mislead the jury or to confuse the issues. *See* UTAH R. EVID. 403. Therefore, the district court did not abuse its discretion when it refused to admit the inaccurate and potentially misleading photographs.

C. The District Court Erred when It Excluded Mr. Gaskill's Computer-Generated Animations

¶44 The defense attempted to introduce two computer-generated animations to visually represent Mr. Gaskill's testimony. Mr. Gaskill testified that although he did not personally create the animations, they "g[a]ve an indication of what [he] believe[d] may have happened" and would make it easier for the jury to understand his testimony. The State objected and the district court refused to admit the animations, finding that "there [was] no foundation for the animation[s]" because Mr. Gaskill did not know "who created [them]," "the background of the people who created [them]," "how [they were] created," or "what [the animators] relied upon in creating [them]." We hold that the district court applied an erroneous legal standard in refusing to admit the animations.

¶45 Broadly speaking, all evidence can be categorized as either substantive or demonstrative. *See* Steven C. Marks, *The Admissibility and Use of Demonstrative Aids*, 32 A.B.A. THE BRIEF 24, 25 (2003). Demonstrative evidence is evidence that is meant only to illustrate a witness's testimony. *Id.* It carries no independent probative value

in and of itself, but aids a jury in understanding difficult factual issues. *Id.* Common examples of demonstrative evidence include models, charts, and timelines.

¶46 On the other hand, substantive evidence is "offered to help establish a fact in issue." BLACK'S LAW DICTIONARY 640 (9th ed. 2009). In other words, relevant "[substantive] evidence directly affects the perceived likelihood that a fact of consequence has occurred" whereas the "effect of demonstrative evidence is to help clarify and make more understandable a piece of substantive proof." Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 967 (1992). Common examples of substantive evidence include eyewitness testimony, ballistic reports, and security camera footage.

¶47 Because rule 901(a) of the Utah Rules of Evidence requires that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is," the distinction between substantive and demonstrative evidence is critical to understanding the foundational burden imposed on the evidence's proponent. If the evidence is merely demonstrative, then the proponent claims only that the proffered demonstrative evidence accurately illustrates the testimony given and rule 901 is satisfied so long as there is sufficient evidence to support the claim that it accurately depicts a witness's testimony as well as any uncontested relevant facts.[2] Alternatively, in the case of substantive evidence, there must be some showing that the evidence itself supports the proffered conclusion.[3]

¶48 Computer-generated evidence is simply a subset of general evidence and the categories of computer-generated evidence correspond with the two general categories of evidence. A "com-

---

[2] Prior cases have held that demonstrations and reenactments require substantially similar conditions. *See, e.g., Whitehead v. Am. Motors Sales Corp.*, 801 P.2d 920, 923 (Utah 1990). This substantial similarity requirement is properly applied to the *undisputed facts* and proponent's own testimony. We have never held that such evidence must be substantially similar to the opponent's version of *disputed facts*.

[3] The type of support required will vary depending on the nature of the substantive evidence. *See* R. COLLIN MANGRUM & DEE BENSON, MANGRUM & BENSON ON UTAH EVIDENCE, 802–23 (2012).

puter animation" demonstrates a witness's testimony and is therefore a subset of demonstrative evidence. *See* Kurtis A. Kemper, Annotation, *Admissibility of Computer-Generated Animation*, 111 A.L.R. 5th 529 § 2b (2003). As such, the witness does not use the computer animation to arrive at his or her conclusions. Rather, the animation is wholly illustrative of the witness's own conclusions drawn from the underlying substantive evidence.

¶49 In contrast, a "computer simulation" is substantive evidence used by the witness in drawing his conclusions.

> [C]omputer-generated simulations are typically recreations of events or experiments based on scientific principles and data; in a simulation, data is entered into a computer, which is programmed to analyze and draw conclusions from the data. Computer simulations are [therefore a type of] substantive evidence offered to support a fact in issue and have independent evidentiary value.

Id. (footnotes omitted). Computer simulations do not just illustrate an expert's conclusions but are submitted as substantive evidence with independent probative value. As a subset of substantive evidence, computer simulations must therefore meet a higher threshold showing than that required for demonstrative evidence.

¶50 Because computer animations are merely a subset of demonstrative evidence, it is not necessary that the testifying witness know how the animation was created in order to satisfy rule 901's authenticity requirement. Rather, it is sufficient that the animation accurately reflects the witness's testimony. *See, e.g., Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000) ("[B]ecause a computer-generated diagram, like any diagram, is merely illustrative of a 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."), *abrogated on other grounds by Elery v. Commonwealth*, 368 S.W.3d 78 (Ky. 2012). For instance, an expert witness using a plastic model of a human organ is not required to know how the model was created. It is sufficient for the expert to confirm that the model accurately represents the organ about which he is testifying.[4]

---

[4] We recognize, however, that because the "animation represents only a re-creation of the proponent's version of the event," it "should (continued...)

¶51 Because the animations offered to illustrate Mr. Gaskill's testimony were only visual representations of his opinions, the evidence was demonstrative in nature. It is uncontested that Mr. Gaskill did not know the exact computer processes through which the animations were created. But the court had already found that Mr. Gaskill's testimony about the events depicted in the animations was relevant under rule 401 and it did not exclude the testimony or animations based on prejudice under rule 403.

¶52 The State argues that the animations do not accurately represent the facts because, under the State's theory, there was only one shooter. But this argument misapprehends the burden for admissibility of demonstrative evidence under rule 901. Rule 901 does not require that the demonstrative evidence be uncontroversial, but only that it accurately represents what its proponent claims. Mr. Gaskill confirmed that the animations accurately represented his expert interpretation of the facts. Therefore, the district court erred when it did not admit the animations.

II. THE DISTRICT COURT ERRED IN BARRING THE TESTIMONY OF DR. OFSHE

¶53 Mr. Perea argues that the district court also erroneously excluded the testimony of Dr. Richard Ofshe, a defense expert who intended to testify regarding false confessions. The district court ruled first that Dr. Ofshe could not testify as to the truthfulness of Mr. Perea's confession. It next questioned whether or not an expert was needed to testify to the phenomena of false confessions and concluded that "a jury of lay people can decide the question as to whether or not a confession is reliable, involuntary, or coerced without having an expert testify on that issue."[5] Finally, the court

---

[4](...continued)
in no way be viewed as the absolute truth." *Clark v. Cantrell*, 529 S.E.2d 528, 537 (S.C. 2000). And we echo the Supreme Court of South Carolina in "encourag[ing] the [district] court to give a cautionary instruction" to the jury that it is not the absolute truth "and, like all evidence, it may be accepted or rejected in whole or in part." *Id.*

[5] We pause to note the distinction between false and coerced confessions. Whether a confession is coerced is a question of law that hinges on the manner in which the confession was obtained. In contrast, whether a confession is false is a question of fact that hinges
(continued...)

found that Dr. Ofshe's methods were not "science" and refused to allow any of his proffered testimony.

¶54 Because we find that any error was harmless, we decline to consider whether the district court erred when it prohibited Dr. Ofshe from directly testifying as to the veracity of Mr. Perea's confession. However, we find the district court did err when it barred Dr. Ofshe from testifying as to the phenomenon of false confessions generally.

A. Because Any Error Was Harmless, We Decline to Consider Whether the District Court Erred in Prohibiting Dr. Ofshe from Testifying as to the Veracity of Mr. Perea's Confession

¶ 55 Mr. Perea first argues that the district court erred when it ruled that Dr. Ofshe could not opine on the truthfulness of Mr. Perea's confession. The State disagrees. In arguing as to the propriety of Dr. Ofshe's proffered testimony on this point, both parties frame their arguments around rule 608 of the Utah Rules of Evidence, which prohibits testimony as to a witness's truthfulness on a particular occasion. *See State v. Rimmasch*, 775 P.2d 388, 391 (Utah 1989). However, by its plain language, rule 608 applies only to a *witness's* character for truthfulness. UTAH R. EVID. 608(a) ("A *witness's credibility* may be attacked or supported by testimony about the *witness's* reputation for having a character for truthfulness or untruthfulness . . . ." (emphasis added)). Because Mr. Perea never testified, he was not a witness in this case. Rule 608 is therefore not controlling.

¶56 Although rule 608 is not controlling here, it may be that the policy behind rule 608 is equally applicable to situations like this where a witness offers to testify as to the truthfulness of a non-testifying defendant's out-of-court statement. Indeed, in *Rimmasch*, we relied on rule 608 to disallow expert testimony as to the veracity of a testifying witness's specific out-of-court statement, recognizing the important public policy goal of preventing "trials from being turned into contests between what would amount to modern oath-helpers who would largely usurp the fact-finding function of judge or jury." 775 P.2d at 392. This same public policy goal appears to be implicated in the case of a defendant's out-of-court confession

---

[5](...continued)
on the veracity of the confession. It is both possible to have a coerced, but true, confession, or a false confession that was not coerced.

when the defendant declines to testify. Thus, it may well be that rule 608' s prohibitions should be extended to apply to the out-of-court statements of nontestifying witnesses. However, because the parties to this appeal did not brief this issue, and because we conclude that any error in refusing to admit Dr. Ofshe's testimony is ultimately harmless, *see infra* Section V.A.2, we decline to resolve the issue here.

¶57 Thus, we do not reach the question of whether the district court erred when it prohibited Dr. Ofshe from testifying about the veracity of Mr. Perea's confession.

B. The District Court Abused Its Discretion when It Refused to Allow Dr. Ofshe to Testify About False Confessions Generally

¶58 Mr. Perea argues that juries do not understand the phenomenon of false confessions and frequently disregard the possibility of a false confession. He also argues that juries do not understand the prevalence of false confessions, the aggressive and persuasive techniques employed by police to elicit confessions from suspects, or other factors that contribute to false confessions. He accordingly argues that expert testimony was necessary to assist the jury in evaluating the truthfulness of his confession. The State responds that the district court was well within its discretion to exclude the proposed expert testimony under rules 608(a) and 702(a) of the Utah Rules of Evidence because such testimony constituted a comment on Mr. Perea's credibility, and because the scientific methodology on which Dr. Ofshe relied is unreliable.

¶59 Issues relating to the admissibility of expert testimony regarding the reliability of confessions are similar to those relating to the admissibility of expert testimony regarding the reliability of eyewitness identification testimony that we recently examined in *State v. Clopten*, 2009 UT 84, 223 P.3d 1103. We therefore begin by reviewing our analysis in that case.

1. Our Holding in *Clopten* Made Clear that Cautionary Instructions and Cross-Examination Are No Substitute For Expert Testimony

¶60 In February 2006, Deon Clopten was convicted of first-degree murder for the shooting of Tony Fuailemaa outside of a nightclub in Salt Lake City. *Clopten*, 2009 UT 84, ¶ 2. While Mr. Clopten claimed that a man named Freddie White was responsible for the shooting, several eyewitnesses testified that Mr. Clopten was the shooter. *Id.* Without strong physical or forensic evidence, the State relied in large part on the eyewitness testimony to convict Mr. Clopten. *Id.*

¶61 At trial, Mr. Clopten sought to introduce an expert in eyewitness identification, Dr. David Dodd, to testify regarding various factors that affect the accuracy of eyewitness testimony. *Id.* ¶ 3. These factors included "cross-racial identification, the impact of violence and stress during an event, the tendency to focus on a weapon" and the "suggestive nature of certain identification procedures used by police." *Id.* The district court refused to admit the expert testimony, reasoning that it was unnecessary because "potential problems with eyewitness identification could be explained using a jury instruction." *Id.* ¶ 4. The court of appeals deferred to the district court's judgment and upheld Mr. Clopten's conviction. *Id.* ¶ 5. We granted certiorari to review the question of "whether expert testimony regarding the reliability of eyewitness identification should be presumed admissible when timely requested." *Id.* ¶ 6.

¶62 Our analysis in *Clopten* began with a review of *State v. Long*, in which we concluded that "[a]lthough research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems." 721 P.2d 483, 490 (Utah 1986). In *Long*, we therefore "abandon[ed] our discretionary approach to cautionary jury instructions and direct[ed] that . . . [district] courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." *Id.* at 492.

¶63 Although it was not our intention in *Long* to preclude the admission of expert testimony regarding the infirmities of eyewitness identifications, that was what frequently occurred in practice. Many district courts took the position that a cautionary jury instruction entirely resolved the question of the reliability of eyewitness identifications, and therefore precluded expert testimony on that issue. *Clopten*, 2009 UT 84, ¶ 13. We recognized in *Clopten* that "[t]his trend . . . is troubling in light of strong empirical research suggesting that cautionary instructions are a poor substitute for expert testimony." *Id.* ¶ 14. We then noted that the more recent empirical evidence had conclusively established that the accuracy of eyewitness identification depends upon certain factors. *Id.* ¶ 15. Such factors included the race of the accused and the witness, the amount of time the accused was in view, lighting conditions, distinctiveness of appearance, the use of a disguise, and the presence of weapons or other distracting objects. *Id.* Unfortunately, "juries are generally unaware of these deficiencies . . . and thus give great

weight to eyewitness identifications" even when they are potentially unreliable. *Id.*

¶64 Without expert testimony, a defendant is left with only cross-examination and a cautionary jury instruction to convey the potential shortcomings of an eyewitness identification. We concluded, however, that "[b]oth of these tools suffer from serious shortcomings." *Id.* ¶ 16. We noted that cautionary instructions were only given when requested by the defense and were considered ineffective at educating a jury because they are "given at the end of what might be a long and fatiguing trial . . . buried in an overall charge by the court" and "instructions may come too late to alter the jury's opinion of a witness whose testimony might have been heard days before." *Id.* ¶ 24 (internal quotation marks omitted). And we reasoned that cross-examination, while often able to expose lies or half-truths, is far less effective when witnesses are mistaken but believe that what they say is true. Even if cross-examination could expose the mistake, "[w]ithout the assistance of expert testimony, a jury may have difficulty assessing the import of those factors in gauging the reliability of the identification." *Id.* ¶ 22.

¶65 On the other hand, we concluded that expert testimony "substantially enhance[s] the ability of juries to recognize potential problems with eyewitness testimony." *Id.* ¶ 25. And although the actual number of wrongful convictions from mistaken eyewitness identifications is unknown, the possibility of such a wrongful conviction provided sufficient justification for us to review the implications of our decision in *Long*. *Id.* ¶ 16 n.7.

¶66 Because we found that the empirical research regarding the limitations of eyewitness identification had matured since our decision in *Long*, we held in *Clopten* that expert testimony regarding eyewitness identifications should be admitted as long as it met the standards set out in rule 702 of the Utah Rules of Evidence. *Id.* ¶ 32. Our expectation was that the "application of rule 702 will result in the liberal and routine admission of eyewitness expert testimony." *Id.* ¶ 30. Although we cautioned that the admission of eyewitness testimony is not mandatory, we warned that "the testimony of an eyewitness expert should not be considered cumulative or duplicative of cautionary instructions to the jury." *Id.* ¶¶ 33–34.

¶67 We then applied our holding to the facts in *Clopten*. We noted that the witnesses "saw the shooter for no more than a few seconds, from some distance away, at night, and while in extreme fear for their own lives"; the shooter's face was disguised; the

shooter was a different race than the witnesses; and the weapon used in the murder may have distracted the witnesses. *Id.* ¶ 46. We concluded that "the circumstances found in the *Clopten* trial are exactly those under which the testimony of an eyewitness expert is most helpful to a jury." *Id.* ¶ 47. We overruled the court of appeals, vacated the verdict, and remanded for a new trial because there was a "reasonable likelihood that, if allowed to hear Dr. Dodd's testimony, the jury would have questioned the accuracy of the eyewitnesses more rigorously and would not have convicted Clopten." *Id.* ¶ 48.

2. Our Reasoning in *Clopten* Is Directly Applicable to the Use of Expert Testimony with Regard to the Phenomenon of False Confessions

¶68 This case presents issues closely paralleling those we decided in *Clopton*. A confession, much like an eyewitness identification, is more or less reliable based on a number of factors. Unfortunately, however, research has shown that the potential infirmities of confessions are largely unknown to jurors.[6]

¶69 False confessions are an unsettling and unfortunate reality of our criminal justice system. Just as the criminal law is "rife with instances of mistaken identification," *Long*, 721 P.2d at 491 (internal quotation marks omitted), "[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. And like expert testimony regarding eyewitness identification, expert testimony about factors leading to a false confession assists a "trier of fact to understand the evidence or to determine a fact in issue." UTAH R. EVID. 702(a).

¶70 Recent laboratory-based studies have identified several factors that increase the likelihood of false confessions.[7] Among the factors identified are sleep deprivation, the presentation of false

---

[6] Our analogy to *Clopton* is limited to a recognition that fact finders can benefit from expert testimony relating to counterintuitive phenomena that are dependent on numerous inter-related factors. We make no judgment as to the relative merits of the studies relating to eyewitness identification versus those related to the prevalence of false confessions.

[7] These studies are discussed in greater detail below. *See infra* Section II.B.3.

evidence and use of minimization techniques by questioners, the subject's age and intelligence level, and certain personality traits. Though expert testimony regarding the phenomenon of false confessions would not be appropriate in every case, when such indicia are present, a defendant should be allowed to present expert testimony on the subject.

¶71 Importantly, the shortcomings in the use of cautionary instructions and cross-examination in lieu of expert testimony are even more acute when dealing with potentially false confessions than when dealing with potentially mistaken identifications. Cross-examination of eyewitnesses is routine in all cases. Conversely, the ability to examine the defendant is only possible if he waives his Fifth Amendment protections and testifies in his own case—a situation that is far from routine. To require a defendant to testify regarding the factors that contributed to his alleged false confession, rather than allow the use of an expert witness, opens the defendant up to cross-examination and impinges on his constitutionally guaranteed right against self-incrimination. For these reasons, expert testimony regarding the phenomenon of false confessions should be admitted so long as it meets the standards set out in rule 702 of the Utah Rules of Evidence and it is relevant to the facts of the specific case.

3. Dr. Ofshe's Testimony Satisfied the Requirements for Admissibility Under Rule 702

¶72 The two-part analysis articulated by rule 702 of the Utah Rules of Evidence governs the admissibility of expert witness testimony. "First, the trial judge must find that the expert testimony will 'assist the trier of fact.'" *Clopten*, 2009 UT 84, ¶ 31 (quoting UTAH R. EVID. 702(a)). Second, the party wishing to rely on the expert's testimony must make a threshold showing that "the principles or methods that are underlying in the testimony (1) are reliable, (2) are based upon sufficient facts or data, and (3) have been reliably applied to the facts." UTAH R. EVID. 702(b). We therefore analyze Dr. Ofshe's proffered testimony under these requirements.

a. Dr. Ofshe's proposed testimony would have enabled the jury to evaluate Mr. Perea's claim that he falsely confessed

¶73 Under rule 702(a), proposed expert testimony must "assist the trier of fact." UTAH R. EVID. 702(a). Here, there is no question that Dr. Ofshe's proposed testimony would have assisted the jury in evaluating the reliability of Mr. Perea's confession. Testimony regarding the factors that can lead to false confessions is exactly the

type of evidence that would have helped the jury assess Mr. Perea's claim that he falsely confessed. Such testimony aids a jury in reaching a just verdict because it puts a jury on guard to protect against giving disproportionate weight to confessions where multiple indicia of false confessions are present. In other instances, however, such expert testimony may embolden juries to give more weight to confessions where no such factors are present.

b. The science underlying Dr. Ofshe's proffered testimony is sufficiently developed to satisfy rule 702

¶74 Rule 702 next requires that proposed expert testimony be supported by reliable scientific study and methodology. UTAH R. EVID. 702(b). Rule 702 "assigns to trial judges a 'gatekeeper' responsibility to screen out unreliable expert testimony" and cautions that "trial judges should confront proposed expert testimony with rational skepticism." UTAH R. EVID. 702 advisory committee's note. But this "threshold showing" requires "only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct." *Id.*

¶75 Although a science in its infancy may not meet the reliability standards of rule 702, as it matures, the science may become sufficiently reliable to meet the "basic foundational showing of indicia of reliability for the testimony to be admissible." *Id.* And that is what has happened to the science relating to false confessions. In the 1990s, little research had been conducted on the phenomenon of false confessions and many of the theories relating to it were not sufficiently supported. But more contemporary, laboratory-based studies have since been performed and demonstrate that the science surrounding false confessions now meets the reliability standards of rule 702.

¶76 The State argues that Dr. Ofshe has no reliable scientific evidence to support his conclusions about the factors that influence the rate of false confessions.[8] It argues that Dr. Ofshe's "work is

---

[8] The State additionally argues that "[s]ince Dr. Ofshe and his allies have not been able to determine the rate at which false confessions occur, *a fortiori*, they have not been able to determine the rate at which any particular feature they identify as a component of a false confession is associated with a false confession." The State's logic is mathematically flawed, however, because it is entirely possible to know that a factor increases, decreases, or has no effect

(continued...)

predicated upon individual case studies of alleged false confession[s]" rather than empirical evidence or laboratory research. The State therefore contends that the defense cannot show that Dr. Ofshe's "principles or methods" were "based upon sufficient facts or data."

¶77 In support of its argument, the State principally relies on Professor Paul Cassell's article, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999). The district court agreed with the State, concluding Dr. Ofshe's proposed testimony did not satisfy rule 702(b) because the false confession cases relied upon by Dr. Ofshe "are not uniformly accepted within the scientific community as being valid false confession cases,"and "[t]here is no empirical data or credible research that supports Dr. Ofshe's opinions regarding false confessions." The district court also explicitly stated that Professor Cassell was "more reliable" than Dr. Ofshe.[9]

¶78 Professor Cassell's article criticizes the lack of empirical evidence in Dr. Ofshe's two original articles. But it does not speak to the wealth of studies generated in the intervening years that the

---

[8](...continued)
on the underlying rate of false confessions without knowing the underlying rate itself. A common sense example is that it is possible to know that a car speeds up when the driver steps on the accelerator even if the exact starting or ending speeds are unknown. Therefore it is mathematically incorrect to say that nothing can be known about the way factors influence the likelihood of a false confession without knowing the underlying rate of false confessions.

[9] The district court went beyond the mandate of its gatekeeping role when it engaged in such weighing of competing expert testimony. A district court does not abuse its discretion when it concludes that expert testimony does not have sufficient foundational support under rule 702—and this conclusion may be based, in part, on a lack of consensus in the field. But a court exceeds its role when it bars expert testimony because it prefers one theory or researcher over another. An expert either meets or fails the standards under the rules of evidence. So-called "dueling experts" are a standard feature of trials in which expert testimony is presented. Rule 702 does not prohibit the admission of two reliable experts who draw opposite conclusions based on the underlying evidence.

defense presented to the district court. Dr. Ofshe's report states that his testimony not only relies on his original two articles, but also on several more recent articles which, in turn, cite to numerous studies performed by many other researchers.[10] These studies are based on empirical data and laboratory research indicating that such factors as sleep deprivation, presentation of false evidence, minimization techniques, age, intelligence level, and personality traits all affect the rate of false confessions.[11] This development of the science of false confessions is substantially similar to the development of the science of eyewitness identifications we considered in *Clopten*.

¶79 While a comprehensive review of the relevant studies is beyond the scope of this opinion, a few of the most important studies will be set forth here. For example, controlled laboratory experiments have proven that sleep deprivation, which may be present in prolonged interrogations, can increase susceptibility to influence and has been shown to increase the rate of false confessions. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 16 (2010). "[S]leep deprivation markedly impairs the ability to sustain attention, flexibility of thinking, and suggestibility in response to leading questions." *Id.; see also*, Mark Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 48 (1996); Yvonne Harrison & James A. Horn, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 236 (2000).

¶80 Presentation of false evidence is another factor that has been shown to increase the rate of false confessions. Numerous

---

[10] Specifically, his report states: "There are several more recent literature reviews which report research on which I also rely. These reviews include *The Psychology of Interrogation and Confessions* - Gudjonsson, John Wiley, New York 2003; *The Psychology of Confessions - Kassin and Gudjonsson in Psychological Science in the Public Interest*, 5, 2004, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, D. Davis and W O'Donahue in O'Donahue and Hollin (eds.), *Handbook of Forensic Psychology*, New York, Basic Books, 2004."

[11] For a list of the independent studies corroborating the existence of these factors see Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 14–22 (2010).

studies have demonstrated that the presentation of false evidence renders individuals more vulnerable to manipulation. Kassin et al., *Police-Induced Confessions*, *supra*, at 14. These studies reveal that the presentation of false information through confederates, witnesses, counterfeit test results, and false physiological feedback can alter the test subjects' visual judgments,[12] beliefs,[13] perceptions of other people,[14] behaviors towards other people,[15] emotional states,[16] self-assessments,[17] and memories for observed and experienced events.[18] Additionally, laboratory experiments have confirmed that the presentation of false evidence can increase the probability that an innocent person confesses.

¶81 In one study, college students were falsely accused of pressing a key on a computer, causing it to crash, after they were instructed to avoid the key. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance,*

---

[12] *E.g.*, Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN & APPLIED 1 (1956); MUZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS (1936).

[13] Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980).

[14] Henri Tajfel et al., *Social Categorization and Intergroup Behaviour*, 1 EURO. J. SOC. PSYCHOL. 149 (1971).

[15] ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS' INTELLECTUAL DEVELOPMENT (1968).

[16] Stanley Schachter & Jerome E. Singer, *Cognitive, Social, and Physiological Determinants of Emotional State*, 69 PSYCHOL. REV. 379 (1962).

[17] Jennifer Crocker et al., *Social Stigma: The Affective Consequences of Attributional Ambiguity*, 60 J. PERSONALITY & SOC. PSYCHOL. 218 (1991).

[18] Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361(2005).

Internalization, and Confabulation, 7 PSYCHOL. SCI. 125 (1996).

> Despite their innocence and initial denials, subjects were asked to sign a confession. In some sessions but not others, a confederate said she witnessed the subject hit the forbidden key. This false evidence nearly doubled the number of students who signed a written confession, from 48% to 94%.

Kassin et al., *Police-Induced Confessions*, *supra*, at 17. Similar studies have replicated this experiment and found similar results even when the subject's confession led to detrimental financial or other consequences. *See, e.g.*, Robert Horselenberg et al., *Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel*, 9 PSYCHOL., CRIME & L. 1 (2003); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141 (2003). The false confession rate in similar experiments was particularly acute among children and juveniles. *See, e.g.*, Ingrid Candel et al., *"I Hit the Shift-Key and Then the Computer Crashed": Children and False Admissions*, 38 PERSONALITY & INDIVIDUAL DIFFERENCES 1381 (2005).

¶82 Minimization techniques used by police officers have also been shown to increase the rate of false confessions. Using the results from the experiment described above, it was found that remarks that minimized the subjects' culpability significantly increased the false confession rate. Jessica R. Klaver et al., *Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 71 (2008). In another study, the test subjects were paired with a confederate and given problem solving tasks. Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481 (2005). They were instructed to work together on some problems and alone on others. *Id.* By design, some of the confederates sought help on a problem that was supposed to be solved alone while others did not. *Id.* at 483. The experimenter would then claim to find similarities in their answers and accuse the subject of cheating. *Id.* When the accusation was accompanied by minimization techniques, the rate of false confessions tripled. *Id.*

¶83 Paradoxically, anecdotal evidence suggests that a defendant's actual innocence may actually increase an individual's susceptibility to manipulation. Kassin et al., *Police-Induced Confessions*, *supra*, at 22–23. The innocent are often more likely to waive

their rights, believing that since they did nothing wrong, they have nothing to hide. *Id.* at 23. This comports with the commonplace, but naive, notion that only the guilty are accused of crimes and only the guilty need attorneys. *Id.*

¶84 We detail these studies not to endorse a particular position on the false confessions literature, but rather to emphasize the proper role of courts as gatekeepers under the rules of evidence. The aforementioned factors and studies are but a portion of the scientifically reliable information on risk factors of false confessions. And the defense presented this information to the district court, either directly through Dr. Ofshe's proposed testimony or through the various articles on which Dr. Ofshe based his intended testimony. Rule 702(b)(2) requires that the district court consider all the relevant indicia of reliability in determining whether a threshold showing has been made. UTAH R. EVID. 702 advisory committee note. Therefore, even if Dr. Ofshe's original two articles lacked the requisite foundation of "sufficient facts or data," the district court could only properly exclude Dr. Ofshe's testimony if it concluded that all the other studies on which the testimony is based also lacked "sufficient facts or data." UTAH. R. EVID. 702(b)(2). At a minimum, the science behind these studies of false confessions is sufficiently developed to meet the threshold of admissibility.

¶85 The district court abused its discretion when it evaluated only the reliability of Dr. Ofshe's two articles and failed to consider the dozens of other studies on which his testimony relied. Just as the science regarding eyewitness identifications has sufficiently matured to allow its routine introduction after *Clopten*, so too has the science regarding false confessions.

III. THE DISTRICT COURT DID NOT ERR WHEN IT REFUSED TO ALLOW POTENTIAL DEFENSE WITNESSES TO TESTIFY

¶86 Prior to trial, the district court ruled that if the defense was unwilling to provide the State with the names of potentially exculpatory witnesses, the court would not allow those witnesses to testify. Mr. Perea argues that the district court's decision "deprived [him] of an opportunity to present crucial evidence in his defense." The State counters that because "the prosecution, the [district] court, and the public have a vital interest in the integrity of the trial process," the court's decision to make the testimony conditional on the disclosure of the witnesses' names was within the discretion granted to the district court.

¶87 Mr. Perea argues that the Compulsory Process Clause of the Sixth Amendment grants defendants the right to call favorable witnesses, particularly when those witnesses are "material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). While a defendant's right to call favorable witnesses is a "fundamental element of due process of law," *Washington v. Texas*, 388 U.S. 14, 19 (1967), "[t]he right to present defense witnesses . . . is not absolute," *United States v. Russell*, 109 F.3d 1503, 1509 (10th Cir. 1997). For instance, in *Taylor v. Illinois*, the U.S. Supreme Court affirmed a district court's exclusion of a potentially exculpatory defense witness based on the defense's discovery violation. 484 U.S. 400, 418 (1988). The Court began by stating that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* at 410. The Court continued, stating:

> The defendant's right to compulsory process is itself designed to . . . [ensure that] judgments [are not] founded on a partial or speculative presentation of the facts. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose . . . [and] minimize[] the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.

Id. at 411–12 (internal quotation marks omitted). The Court's ruling makes clear that a district court's decision to "[e]xclud[e] witnesses for failure to comply with discovery orders, if not an abuse of discretion, does not violate a defendant's Sixth Amendment right to compulsory process." *Russell*, 109 F.3d at 1509.

¶88 Under rule 16(c) of the Utah Rules of Criminal Procedure, "[e]xcept as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information . . . [or] item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case." Because district courts must manage discovery in such a way as to prevent unfair prejudice to either party, they do not abuse their discretion when they exclude witnesses based on a party's failure or refusal to disclose a witness's identity. For instance, in *State v. Maestas* our court of appeals held that the district court did not abuse its discretion when it excluded an alibi witness because the defense had failed to timely notify the prosecution of the witness. 815 P.2d 1319, 1325 (Utah Ct. App. 1991). The court

reasoned that disclosure "prevents last minute surprises and enables the prosecution to make a full and thorough investigation of the merits of the defense." *Id.*

¶89 Here, the district court acknowledged concerns regarding potential retaliation against the defense witnesses, and it left open the possibility that it would allow the witnesses to testify under an assumed name or undertake similar protective measures. But, emphasizing its duty "to [ensure] a fair trial," and concluding that the potential witnesses were both relevant and material to Mr. Perea's defense, the district court determined that fairness afforded the State an opportunity to fully investigate the witnesses' stories. Such a decision is not an abuse of discretion when it "prevents last minute surprises and enables the prosecution to make a full and thorough investigation of the merits of the defense." *Id.* We therefore hold that the district court did not err when it excluded the potential defense witnesses.

IV. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED MR. PEREA'S MOTION TO SUPPRESS HIS CONFESSION

¶90 Mr. Perea next argues that his confession should have been suppressed for a *Miranda* violation. Specifically, Mr. Perea argues that his statement "that he needed to speak with a lawyer first before he came in" was sufficient to anticipatorily invoke his right to counsel. The State argues first that a defendant cannot anticipatorily invoke his right to counsel prior to a custodial interrogation. It next argues that even if an anticipatory invocation of the right is proper, Mr. Perea's statements do not constitute a proper invocation of that right. We agree with the State and therefore hold that the district court did not err when it denied Mr. Perea's motion to suppress his confession.

¶91 The U.S. Supreme Court's landmark decision in *Miranda v. Arizona* prevents the use of incriminating statements "stemming from custodial interrogation of [a] defendant" unless certain procedural safeguards are met. 384 U.S. 436, 444 (1966). Therefore, "[p]rior to any questioning, the person must be warned that he has . . . a right to the presence of an attorney, either retained or appointed . . . [and if] he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444–45. In *Edwards v. Arizona*, the Court expanded the scope of *Miranda* and held that once a custodial suspect has "expressed his desire to deal with the police only through counsel," he cannot be "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." 451 U.S. 477, 484–85 (1981).

¶92 Although the Court has not ruled directly on the issue before us, a footnote in *McNeil v. Wisconsin* suggests that the Court would not allow a defendant to anticipatorily invoke his right to counsel. 501 U.S. 171 (1991). The Court stated that while it has

> never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation" . . . [t]he 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.

Id. at 182 n.3 (citations omitted). Moreover, the Court has repeatedly clarified that a suspect's *Miranda* rights are contingent on his being subject to a custodial interrogation. *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 297 (1990) (stating that *Miranda* is premised on "the interaction of custody and official interrogation"); *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980) ("The concern of the Court in *Miranda* was that the interrogation environment created by the interplay of interrogation and custody would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination." (internal quotation marks omitted)); *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977) ("Our decision in *Miranda* set forth rules of police procedure applicable to custodial interrogation." (internal quotation marks omitted)).

¶93 Similarly, this court has stated that the procedural safeguards of *Miranda* apply only when a defendant is in custody. In *State v. Shuman*, we stated that "*Miranda* warnings are required only where a person has been taken into custody or otherwise deprived of his freedom in a significant way." 639 P.2d 155, 157 (Utah 1981). And in *State v. Cruz*, we stated that "the Fifth Amendment right to counsel attaches during custodial interrogation, or questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 2005 UT 45, ¶ 43, 122 P.3d 543 (internal quotation marks omitted).

¶94 Here, Mr. Perea's statement "that he needed to speak with a lawyer first before he came in" occurred two days before Mr. Perea was arrested. When he was arrested, police read Mr. Perea his *Miranda* rights, which he then waived. Prior to his interrogation, he was again advised of his *Miranda* rights, and he once again waived those rights. Mr. Perea was once again advised of his *Miranda* rights when he signed the confession and he acknowledged in writing that he was aware of the waiver of his rights.

¶95 Assuming, without deciding, that Mr. Perea's statement two days before his arrest constitutes a request for a lawyer's assistance, such a prospective request would still be subject to waiver. Had Mr. Perea made the same statement at any point during his custodial interrogation, our decision may be different. But that was not the case. And once he was taken into custody, Mr. Perea waived his rights to the assistance of counsel when he consented to the investigators' questioning and confessed to the shootings.

¶96 Because Mr. Perea was advised of and subsequently waived his *Miranda* rights, the district court did not err when it denied Mr. Perea's motion to suppress his confession.

V. BASED ON THE OVERWHELMING EVIDENCE OF MR. PEREA'S GUILT, WE HOLD THAT THE DISTRICT COURT'S ERRORS WERE HARMLESS AND THAT THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY

¶97 Even if the district court did err, we will not reverse if that error was harmless. *See State v. Vargas*, 2001 UT 5, ¶ 48, 20 P.3d 271. "In order to show that the error is harmful, [Mr. Perea] must demonstrate that absent the error, there is a reasonable likelihood of a more favorable outcome for [him], or phrased differently, our confidence in the verdict is undermined." *State v. Medina-Juarez*, 2001 UT 79, ¶ 18, 34 P.3d 187 (internal quotation marks omitted). Similarly, the doctrine of cumulative error is applicable "only if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had." *State v. Gallegos*, 2009 UT 42, ¶ 39, 220 P.3d 136. It is a doctrine used when a single error may not constitute grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of a trial.

A. Individually, the District Court's Errors Are Harmless

¶98 We have concluded that the district court erred when it limited the testimony of Mr. Gaskill and chose not to admit the

proposed testimony of Dr. Ofshe. But the potential harm of each error must be viewed against the backdrop of the entire body of evidence. And when so viewed, the errors were harmless.

¶99 There was significant testimony from witnesses both inside and outside of the SUV stating that Mr. Perea was the individual who fired shots into the crowd at Mr. Nava's house. Angelo Gallegos and Elias Garcia, both passengers in the SUV and friends of Mr. Perea, testified that Mr. Perea fired shots from the SUV as it pulled away from the party. Similarly, Ms. Valencia, who was standing near the street and knew Mr. Perea, testified that as the SUV pulled away, "I seen [him] over the top, shooting." Two other party guests, Richard Esquivel and Lacey Randall, testified that they saw someone from the passenger side of the SUV lean over the roof and fire towards Mr. Nava's house. And Keri Garcia, who was standing in Mr. Nava's driveway when the shots from the SUV were fired, testified that the shots came only from the direction of the road.

¶100 Additionally, during questioning, Mr. Perea volunteered that the gun he had used was .22 caliber, a fact that the police had not shared with the public. Although the murder weapon was not recovered, police investigators recovered ten expended .22 caliber shell casings in the street in front of Mr. Nava's house, all fired from the same weapon. Likewise, the bullets from Ms. Prieto's and Mr. Navarez's bodies were .22 caliber. No other shell casings were found at the crime scene.

1. The District Court's Exclusion of Mr. Gaskill's Animations Was Harmless

¶101 While the district court excluded Mr. Gaskill's computer-generated animations, it did not exclude his expert testimony on which the animations were based. It allowed him to opine as to his theory that there were multiple shooters and that the location of some of the injuries made it unlikely that Mr. Perea could have made the shots. He was allowed to refer to diagrams depicting the scene and demonstrate the bullet trajectories that gave him concern. And although Mr. Gaskill's theories conflicted with the State's theory and the testimony of many of the State's witnesses, the district court appropriately allowed him to present his theory to the jury.

¶102 After having reviewed both the testimony provided by Mr. Gaskill and his proffered animations, we hold that the exclusion of the animations does not create the "reasonable likelihood of a more favorable outcome for the appellant." *Medina-Juarez*, 2001 UT

79, ¶ 18 (internal quotation marks omitted). The animations were short, provided nothing that Mr. Gaskill did not make clear in his testimony, and used a perspective that was unhelpful in putting Mr. Gaskill's testimony in context. Because Mr. Gaskill was allowed to fully testify as to his multiple-shooter theory and cast doubt on the State's single-shooter theory, the exclusion of the animations does not undermine our confidence in the verdict.

2. The District Court's Exclusion of Dr. Ofshe's Testimony Was Harmless

¶103 We next evaluate any prejudice arising from the erroneous exclusion of Dr. Ofshe's testimony. We begin by noting that the district court did not err in admitting Mr. Perea's confession. Even had the district court allowed Dr. Ofshe to testify, the jury would have been entitled to consider Mr. Perea's confession. Nor did it err in ruling that Dr. Ofshe could not testify as to the veracity of Mr. Perea's confession. Rather, its only error consisted in barring Dr. Ofshe's proffered testimony about the factors that may contribute to false confessions. We find this error to be harmless because of the overwhelming evidence of Mr. Perea's guilt.

¶104 Multiple individuals who knew Mr. Perea testified that he shot into the crowd. Indeed, the defense's theory was not based on Mr. Perea's exclusion from the crime but on a multiple-shooter theory. Thus, the exclusion of testimony that would have merely cast doubt on Mr. Perea's confession does not undermine our confidence in the verdict. Had this been a case like *Clopten*, in which the evidence of guilt was circumstantial and there were significant issues with eyewitness identification, the exclusion of Dr. Ofshe's testimony would be more concerning. In that case, the admission of an unrebutted confession would have the potential to overwhelm any other evidence of innocence. But here, where there was substantial, independent evidence of Mr. Perea's guilt and his primary defense did not necessarily absolve him of the crime, the admission of Dr. Ofshe's proposed testimony was unlikely to change the outcome of the trial.

B. The District Court's Errors Do not Constitute Cumulative Error

¶105 Having concluded that the district court's errors were harmless individually, we now evaluate their cumulative effect on our confidence in the verdict. Cumulative error is applicable in those instances where the district court's collective errors rise to a level that undermine our confidence in the fairness of the proceed-

ings. But that analysis cannot be conducted in a vacuum, ignorant of the other evidence demonstrating guilt.

¶106 The body of evidence established that Mr. Perea was at the crime scene that evening. It left no doubt that he was in the vehicle from which a number of witnesses testified the shots came. Those witnesses, two of whom were present in the vehicle, testified that it was Mr. Perea who fired shots into the crowd at Mr. Nava's house. The two witnesses who were in the SUV, and at least one of whom witnessed the shooting from Mr. Nava's front yard, were personally familiar with Mr. Perea—he was not a nameless, faceless defendant to them. And, Mr. Perea's knowledge of the type of weapon used in the shooting and the physical evidence at the crime scene provides further evidence that the jury could consider in evaluating his guilt. Finally, Mr. Perea's confession was evidence that the jury was entitled to consider.

¶107 When viewed against the eyewitness testimony, the physical evidence, and Mr. Perea's confession, we cannot say that the district court's individual errors rise to the level of cumulative error. Where there is overwhelming evidence that Mr. Perea shot into the crowd, the exclusion of the expert testimony at issue does not undermine our confidence in the overall fairness of the proceedings or the jury's verdict.

VI. MR. PEREA'S SENTENCE OF LWOP IS CONSTITUTIONAL

¶108 Utah Code section 76-3-207.7 provides that "[a] person who has pled guilty to or been convicted of first degree felony aggravated murder . . . shall be sentenced by the court . . . [to] life in prison without parole or an indeterminate prison term of not less than 25 years and which may be for life."

¶109 Mr. Perea argues that section 76-3-207.7 violates the Utah Constitution and the U.S. Constitution in a number of ways. First, he argues that the statute is unconstitutionally vague because it authorizes arbitrary and discriminatory enforcement. He next argues that the statute violates the Due Process and Equal Protection Clauses of the Utah Constitution and the federal Constitution and that it runs afoul of the uniform operation of laws provisions of the Utah Constitution. Finally, he argues that his sentence violates the unnecessary rigor provision of the Utah Constitution and the Cruel and Unusual Punishment Clause of the federal Constitution. We find these arguments unavailing and conclude that section 76-3-207.7 is constitutional on its face and as applied to Mr. Perea.

A. Utah Code Section 76-3-207.7 Is not Unconstitutionally Vague

¶110 Because Utah Code section 76-3-207.7 does not list the factors a sentencing court must consider when deciding whether to impose a sentence of 25 years to life or LWOP, Mr. Perea argues that it is unconstitutionally vague. Unconstitutionally vague laws violate the due process prohibition 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) (internal quotation marks omitted). Similarly, a statute may be unconstitutionally vague if written in a way that "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

¶111 In arguing that section 76-3-207.7 is unconstitutionally vague, Mr. Perea cites primarily to cases where courts have overturned statutes that did not adequately explain the criminal act. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (holding that a city's loitering statute was unconstitutionally vague because it gave officers unfettered discretion to criminalize otherwise lawful behavior). Although it is well settled that statutes must clearly articulate the behavior that they proscribe, there are far fewer cases in which vague sentencing guidelines have been overturned. Even so, the U. S. Supreme Court has made clear that "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.

¶112 We conclude that section 76-3-207.7 does not suffer from such an infirmity. It states clearly that a defendant convicted of non-capital first-degree felony aggravated murder may be incarcerated for a term up to and including the rest of his life. While it also holds out the possibility of a more lenient sentence of 25 years to life, the fact that the sentencing court may choose to impose the more lenient sentence does not render the statute unconstitutional. Sentencing courts have long been afforded broad discretion in sentencing. And when section 76-3-207.7 is read in the context of Utah's sentencing scheme as a whole, we conclude that it provides sufficient guidance to withstand Mr. Perea's facial vagueness challenge. We further conclude that it was not unconstitutionally applied to Mr. Perea.

¶113 District courts have historically been afforded broad discretion when it comes to sentencing. The U.S. Supreme Court has stated:

> [Although t]ribunals passing on the guilt of a defen-

> dant always have been hedged in by strict evidentiary procedural limitations . . . both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams v. New York, 337 U.S. 241, 246 (1949).[19]

¶114 So long as a statute clearly specifies the maximum allowable penalty, it is not unconstitutional for sentencing judges to exercise their discretion in offering leniency. *See State v. Shelby*, 728 P.2d 987, 988 (Utah 1986) (stating that this court will overturn a sentence that is within the statutorily prescribed range only for an abuse of discretion). For example, sentencing judges may choose to suspend all or part of a sentence. *See* UTAH CODE § 77-18-1(2)(a); *Williams v. Harris*, 149 P.2d 640, 642 (Utah 1944) (noting that "[t]he right to suspend imposition of sentence . . . is a discretionary right"). Even under Utah's indeterminate sentencing scheme, where the actual time served by any particular defendant is determined by the Board of Pardons, sentencing judges are given discretion to sentence a defendant as if he had been convicted of the next lower degree of offense. UTAH CODE § 76-3-402(1).[20] And we can find no authority

---

[19] *See also State v. Shuler*, 780 P.2d 1067, 1069 (Ariz. Ct. App. 1989) (holding that a sentencing court may consider a defendant's "criminal character and history" despite the absence of prior convictions); *State v. Huey*, 505 A.2d 1242, 1245–46 (Conn. 1986) (finding that a sentencing court may consider prior indictments, uncharged allegations, dismissed counts, and acquittals); *Smith v. State*, 517 A.2d 1081, 1083 (Md. 1986) (holding that a sentencing judge may consider "the facts and circumstances of the crime itself and the background of the individual convicted of committing the crime").

[20] Utah Code section 76-3-402(1) provides that if

> the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant . . . concludes it would be unduly harsh to record the conviction as being for that degree of

(continued...)

to support the notion that a sentencing judge's statutory authority to grant leniency renders a sentencing statute unconstitutional.

¶115 Mr. Perea argues that section 76-3-207.7 is impermissibly vague because it does not specify the particular items the sentencing court must consider in deciding which of the two possible sentences to impose. We are unpersuaded. Section 76-3-207.7 must be read in the context of Utah's sentencing scheme as a whole. To give full effect to the Legislature's intent, we construe statutes in harmony "with other statutes under the same and related chapters." *Lyon v. Burton*, 2000 UT 19, ¶ 17, 5 P.3d 616. And, when read in context, the statutory scheme provides adequate guidance to sentencing courts. Utah Code section 76-1-104 provides that "[t]he provisions of [the criminal] code shall be construed . . . [to p]revent arbitrary or oppressive treatment . . . [and to p]rescribe penalties which are proportionate to the seriousness of offenses and which permit recognition o[f] differences in rehabilitation possibilities among individual offenders." Section 76-1-106 reinforces section 76-1-104 by providing that "[a]ll provisions of this code and offenses defined by the laws of this state shall be construed . . . to effect the objects of the law and general purposes of [s]ection 76-1-104." When read in harmony, these provisions make clear that a sentencing court is to consider all the evidence before it—the totality of the circumstances—in imposing a sentence that is proportionate to the crime and the culpability of the defendant.

¶ 116 The notion that a sentencing court should consider the totality of the circumstances in determining a proportionate sentence is also supported by our evidentiary rules. Rule 1101(c) of the Utah Rules of Evidence provides that our evidentiary rules do not apply during sentencing, opening the door to the court's evaluation of a variety of factors. *See also State v. Sanwick*, 713 P.2d 707, 708 (Utah 1986) (A sentencing court "must be permitted to consider any and all information that reasonably may bear on the proper sentence for the particular defendant, given the crime committed." (quoting *Wasman v. United States*, 468 U.S. 559, 563 (1984)). Because our rules do not constrain the introduction of any evidence tending to inform the

---

[20](...continued)

offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

court's determination, it is not incumbent upon the statute to enumerate the factors the sentencing judge may or must consider.

¶117 Indeed, it has only been in capital cases that we have required an explicit weighing of aggravating and mitigating factors. *See, e.g., State v. Lafferty*, 2001 UT 19, ¶ 130, 20 P.3d 342 (reiterating the district court's obligation to weigh the mitigating and aggravating circumstances in a capital case); *State v. Holland*, 777 P.2d 1019, 1027 (Utah 1989) (stating that the "first step" in a capital sentencing evaluation is "to determine whether the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt"); *State v. Wood*, 648 P.2d 71, 83 (Utah 1982) (holding that the capital sentencing standards "require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors"). Absent statutorily articulated aggravating and mitigating circumstances in noncapital cases, courts have historically based their sentencing decisions on the totality of the circumstances. *See, e.g., State v. Killpack*, 2008 UT 49, ¶ 59, 191 P.3d 17 (stating that "courts must consider all legally relevant factors in making a sentencing decision"); *State v. McClendon*, 611 P.2d 728, 729 (Utah 1980) ("A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system.").

¶118 And that is exactly what the district court did here. Specifically, the district court found that Mr. Perea's relative youth, his poor educational background, and his borderline IQ/learning disability constituted mitigating factors. But the district court found that there were a wealth of aggravating factors to offset these considerations, including the multiple young victims, the fact that Mr. Perea fired ten shots into a large group of partygoers, and Mr. Perea's lengthy prior criminal record.

¶119 Because district courts are "in the best position to ensure that justice is done and to determine whether any '[o]ne factor in mitigation or aggravation [should] weigh more than several factors on the opposite scale,'" they are "allowed a great deal of discretion in determining the relative weight of competing aggravating and mitigating circumstances." *State v. Moreno*, 2005 UT App 200, ¶ 9, 113 P.3d 992 (alteration in original) (quoting *State v. Russell*, 791 P.2d 188, 192 (Utah 1990)). And as here, where the district court considered the totality of the circumstances and explicitly weighed the mitigating and aggravating factors, we are not persuaded that it

abused its discretion or applied the statute in an unconstitutional fashion.

B. Mr. Perea's Argument that Utah Code Section 76-3-207.7 Violates the Due Process Protections of the Utah and U.S. Constitutions Is Inadequately Briefed

¶120 Mr. Perea next argues that section 76-3-207.7 violates the due process protections contained within the Utah and U.S. Constitutions. While he cites to relevant constitutional provisions, he provides absolutely no analysis as to how those provisions render his sentence unconstitutional. Because an issue is inadequately briefed "when it merely contains bald citation[s] to authority [without] development of that authority and reasoned analysis based on that authority," *Smith v. Four Corners Mental Health Ctr, Inc.*, 2003 UT 23, ¶ 46, 70 P.3d 904 (alteration in original) (internal quotation marks omitted), we decline to address Mr. Perea's assertion that section 76-3-207.7 violates his due process rights.

C. Utah Code Section 76-3-207.7 Does not Violate the Uniform Operation of Laws Provision

¶121 Mr. Perea argues that section 76-3-207.7 violates the uniform operation of laws provision of the Utah Constitution. Article 1, section 24 of the Utah Constitution requires that "[a]ll laws of a general nature shall have uniform operation." Under the uniform operation of laws provision, a statute must be "uniform on its face." *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995). Further, it "is critical that the *operation* of the [statute] be uniform," such that similarly situated people are treated similarly under the statute. *Id.* (emphasis in original).

¶122 Our analysis under the uniform operation of laws provision requires that we first "determine what classifications, if any, are created by the statute." *Id.* We must then analyze "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." *Id.* Mr. Perea asserts that section 76-3-207.7 divides the general class made up of those found guilty of aggravated murder into two subclasses based on the sentence imposed by the district court. He then asserts that the disparate treatment between those sentenced to 25 years to life and those sentenced to LWOP is not justified because the statute fails to provide guidance to the district court.

¶123 We disagree. Not all those found guilty of aggravated murder are similarly situated. While all are found guilty of the same crime, each case and each defendant presents a different set of facts and a different combination of aggravating and mitigating factors. The discretion afforded to district courts furthers the legitimate legislative purpose of sentencing offenders based on the totality of the unique circumstances present in each case. District courts are authorized and empowered by the Legislature to review the totality of the circumstances before imposing a sentence. Therefore, because the discretion given to district courts furthers the legitimate legislative purpose of sentencing offenders based on the severity of their particular circumstances, we hold that section 76-3-207.7 does not violate our uniform operation of laws provision.

D. Mr. Perea's Sentence Does not Violate the Unnecessary Rigor Provision of the Utah Constitution

¶124 Mr. Perea argues that his sentence of LWOP violates the Utah Constitution's unnecessary rigor provision because it fails to take into account his "age, mental disabilities and IQ." But Mr. Perea misapprehends the application of the unnecessary rigor provision. That provision protects prisoners from "the imposition of circumstances . . . 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. It therefore applies only to the conditions of one's confinement and does not speak to the proportionality of the particular sentence imposed. The unnecessary rigor provision is therefore not implicated by the imposition of his sentence of LWOP.

E. Mr. Perea's Sentence Does not Constitute Cruel and Unusual Punishment Under the U.S. Constitution

¶125 Finally, Mr. Perea argues that his sentence violates the Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishments. He argues that his relatively young age, coupled with his low IQ, militates against a sentence of LWOP. In support of his argument, Mr. Perea cites to the Supreme Court's holdings in *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (holding that juveniles, those persons under eighteen years of age, cannot be sentenced to death); *Graham v. Florida*, 560 U.S. 48, 75 (2010) (holding that the Eighth Amendment prohibits a sentence of LWOP for juvenile non-homicide offenders); and *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding that persons with an IQ below 70 cannot be executed because such individuals are too mentally impaired to

"understand and process information, to communicate . . . to engage in logical reasoning, [and] to control impulses").

¶126 But the holdings of these cases are inapplicable to the present case. *Roper* does not control because Mr. Perea was neither sentenced to death[21] nor a juvenile offender at the time of the shootings. It is uncontested that Mr. Perea was nineteen years old at the time of the shootings and he was sentenced only to LWOP. Similarly, the Court's holding in *Graham* is inapplicable because Mr. Perea was not found guilty of a non-homicide crime, but was found guilty of aggravated murder arising from the death of two individuals. Finally, it is uncontested that although Mr. Perea has been diagnosed with a low IQ, his score of 77 puts him above the line drawn by the Supreme Court in *Atkins*.

¶127 In spite of the differences between Mr. Perea and the defendants sentenced in *Roper*, *Graham*, and *Atkins*, the district court was authorized to evaluate the totality of the circumstances and could have chosen to impose a less severe sentence. It did not, however, based on its weighing of the aggravating and mitigating circumstances present in this case. And in the absence of a statutory mandate or compelling factual circumstances indicating the district court erred, we will not second-guess the district court, which is "in the best position to ensure that justice is done." *Moreno*, 2005 UT App 200, ¶ 9. We therefore hold that Mr. Perea's sentence is not unconstitutional under the Cruel and Unusual Punishment Clause of the federal Constitution.

VII. MR. PEREA'S CLAIM THAT ALL STATION-HOUSE CONFESSIONS SHOULD BE RECORDED DOES NOT CONSTITUTE GROUNDS FOR REVERSAL

¶128 Finally, we turn to Mr. Perea's argument that we should require the police to record all confessions given at police stations. Mr. Perea argues that recording station-house confessions aids the fact finder in ascertaining the truth and that the absence of a recording makes it difficult to assess the voluntariness of a confession. The State concedes that "an electronic recording requirement

---

[21] *See Solem v. Helm*, 463 U.S. 277, 289–90 (1983) ("It is true that the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. As a result, our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment in a noncapital case." (alteration in original) (internal quotation marks omitted)).

would have benefits," but argues the determination of this issue is better left to a legislative body. While we have concerns about the Ogden Police Department's policy of not recording interrogations or confessions, this appeal is not the appropriate context for addressing those concerns.

¶129 Although Mr. Perea goes on at great length about the necessity of recording a suspect's confession, he concedes that such recordings are not required by the Utah Constitution or our case law.[22] Nor does Mr. Perea explain how a ruling in his favor on this issue would change the outcome of his appeal. Rather, Mr. Perea argues that this court "*should* require" the recording of station-house confessions—a prospective ruling that would not impact the investigators' decision not to record the confession in this case.

¶130 Because there was no constitutional, statutory, or common law obligation for the investigators to record Mr. Perea's confession, and because any ruling that law enforcement should record interrogations in the future would have no effect on the case before us, we decline Mr. Perea's invitation to judicially pronounce a requirement that investigators record station-house confessions. Nevertheless, the benefits of recording station-house confessions are worth considering,[23] especially when viewed in light of current

---

[22] *See State v. Villarreal*, 889 P.2d 419, 427 (Utah 1995) (concluding that the recording of confessions is not required by the Utah Constitution).

[23] Such benefits include "avoiding unwarranted claims of coercion," preventing the use of "actual coercive tactics by police," and demonstrating "the voluntariness of the confession, the context in which a particular statement was made, and . . . the actual content of the statement." *State v. James*, 858 P.2d 1012, 1018 (Utah Ct. App. 1993) (internal quotation marks omitted). The recording of confessions provides clear evidence of coercion or a lack of coercion and assists the fact finder in determining a confession's voluntariness. Furthermore, such recordings protect police officers and departments from false claims of coercion and misconduct. In the past, there were serious technical and cost barriers to recording confessions. But such concerns have been largely ameliorated by technology. The necessary equipment is not cost prohibitive and is standard equipment on almost every cell phone. When police officers refuse to record interrogations and confessions despite the
(continued...)

technological advances and the Attorney General's recommendations in favor of recording.[24] These potential benefits, along with possible arguments against recording station-house confessions, are most appropriately addressed in the first instance by our Advisory Committee on the Rules of Evidence, within which the relative merits of mandating a recording requirement can be fully debated.

CONCLUSION

¶131 The district court did not err when it denied Mr. Perea's motion to suppress his confession because, even if his ambiguous statement made two days before he was taken into custody was sufficient to constitute an invocation of his right to counsel under the Sixth Amendment, Mr. Perea thereafter voluntarily waived his right to counsel. Similarly, the district court did not err when it barred the testimony of potentially exculpatory witnesses whom the defense would not identify.

¶132 Although the district court did err when it limited and excluded the testimony of the defense's expert witnesses, we conclude these errors were harmless. Similarly, the combined result of these errors does not undermine our confidence in the verdict. We also find that section 76-3-207.7 is not unconstitutional and thus affirm Mr. Perea's sentence. Finally, the arguments for and against a requirement to record station-house confessions are more appropriately addressed through the administrative process.

---

[23](...continued)
presence of recording equipment, the State runs the risk that the fact finder will draw the natural inference that the officers have attempted to hide some aspect of the interrogation, even when there are no ill intentions.

[24] In 2008, the Utah Attorney General's Office, in cooperation with statewide law enforcement organizations, drafted a statement for law enforcement that recommends electronic recording of custodial interviews and gives guidelines for doing so. Contrary to those recommendations, Ogden Police Department policy dictates that officers are not to electronically record interrogations or confessions. Despite the fact that the room in which Mr. Perea was questioned was equipped to record (and an officer actually watched a live feed), no effort was made to record his interrogation and subsequent confession.

JUSTICE DURHAM, concurring:

¶133 I concur fully in the reasoning and the result of the majority opinion. I only write separately to express my views regarding the Ogden Police Department's policy not to record station-house interrogations or confessions—despite having the means to do so. At the present time, I am persuaded that recording confessions can only further the interests of justice by enhancing a court's ability both to safeguard important Sixth Amendment protections and to detect false claims of improper police coercion. *See supra* ¶ 132 n.23. Due to these benefits, I believe that we should adopt an evidentiary rule requiring station-house interrogations to be recorded. I do not object to the referral of the question to our rules advisory committee for study and recommendations, but note that on the present state of the evidence and policy considerations regarding this question, the arguments for a rule appear strong.

JUSTICE LEE, concurring:

¶134 I agree with and concur in the court's opinion and disposition of this case, including its determination not to opine on the "advisability" of issuing a rule regarding station-house interrogations. *Supra* ¶ 132. As the majority opinion explains, we are in no position to weigh in on this matter, as there is no law currently requiring recording of such interrogations and "a prospective ruling . . . would not impact the investigators' decision not to record the confession in this case." *Supra* ¶ 131.

¶135 In my view that should be the end of the matter. If we are to leave it to our Advisory Committee on the Rules of Evidence to address this question "in the first instance," *supra* ¶ 132, we should not get ahead of the committee by weighing in through our opinions in this case. Thus, I would not express the view "that recording confessions can only further the interests of justice," or endorse the position "that we should adopt an evidentiary rule requiring station-house interrogations to be recorded." *Supra* ¶ 135 (Durham, J., concurring).

¶136 First, we have no authority to adopt a rule, of evidence or otherwise, "requiring station-house interrogations to be recorded." *Supra* ¶ 135. Our supervisory rulemaking authority extends only to matters of evidence and procedure. *See* UTAH CONST. art. VIII, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the

appellate process."). It does not encompass the power to direct the operations of law enforcement.

¶137 Second, although we conceivably could adopt a rule deeming unrecorded stationhouse confessions inadmissible under the law of evidence, I do not think we have sufficient perspective on the matter to opine on the wisdom of such a rule at this juncture. Certainly there would be upsides to a rule foreclosing the admissibility of unrecorded confessions, as acknowledged above. *See supra* ¶ 132. But I have no idea whether the benefits of such a rule are "strong," *supra* ¶ 135, much less whether they might outweigh any of the various costs or downsides of that approach (none of which have been presented to us on this appeal, but surely will be considered by our advisory committee in due course).

¶138 Finally, the devil is undoubtedly in the details here. The decision whether to adopt a rule of evidence should of course be informed by the nature and content of any proposed rule. Such a rule, moreover, would almost certainly have to be subject to exceptions set forth in any proposed rule. And unless and until we have the proposed text in front of us, I see no basis for an advisory thumb on the scale in its favor. I would accordingly await the results of our advisory committee process instead of weighing in in advance.

ADDENDUM B

Ruling on Post Conviction Relief Rule 60 b

FILED
OCT 16 2015
SECOND DISTRICT COURT

**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH**

RIQO PEREA, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING AND ORDER ON PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT** Trial Court Case No. 140907173 Appellate Court Case No. 20150144 Judge Ernie W. Jones

THE MATTER IS BEFORE THE COURT on Petitioner's Motion for Relief from Judgment filed on July 23, 2015. The State filed an opposition on September 21, 2015. Petitioner did not file a reply, and the time for filing a reply is now past. *See* Utah R. Civ. Pro. Rule 7(c)(1). Although neither party has filed a request to submit for decision, the Court of Appeals has ordered this court to enter a ruling on Petitioner's motion within 60 days after remand. Therefore, the court now enters its ruling DENYING Petitioner's motion as follows.

Petitioner filed his petition for post-conviction relief on November 12, 2014. The court reviewed the petition pursuant to rule 65C(h)(1) and entered an order dismissing the petition on January 12, 2015, because all of Petitioner's claims had already been fully adjudicated by the Utah Supreme Court in *State v. Perea*, 2013 UT 68.

Petitioner now asks this court to set aside its order of summary dismissal pursuant to rule 60(b)(6). Petitioner alleges that on July 2, 2015—seven months after this court dismissed the petition—Sarah Valencia informed Petitioner's counsel that she had been pressured to testify falsely during Petitioner's criminal trial. Ms. Valencia signed an affidavit recanting her trial testimony, and Petitioner attached a copy of her affidavit to his motion. According to Petitioner,

because the Supreme Court heavily weighed Sarah Valencia's testimony in determining that any errors at Petitioner's criminal trial were harmless, the court should grant Petitioner relief from judgment based upon her affidavit.

In response, the State contends Petitioner's motion cannot be filed under rule 60(b)(6) because he is claiming newly-discovered evidence under rule 60(b)(2). As such, Petitioner had 90 days after the court dismissed the petition to file his motion. Because Petitioner filed his motion over seven months after the court entered its order, according to the State, the motion is untimely.

To the extent Petitioner's motion is more properly labeled as a motion under rule 60(b)(2), the court finds that it is untimely and dismisses it on that basis. However, to the extent Petitioner's motion is more properly submitted under rule 60(b)(6), the court concludes the motion is timely.[1] A motion under rule 60(b)(6) must be filed within a "reasonable time." Petitioner filed the motion only three weeks after learning of Ms. Valencia's allegations, which is a reasonable time under the rule.

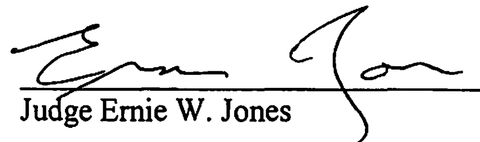
However, even if the motion is timely under rule 60(b)(6), the court concludes Petitioner has not raised a meritorious defense to justify setting aside the dismissal of the petition. *See Menzies v. Galetka*, 2006 UT 81, ¶ 108. Ms. Valencia's affidavit has no relation or relevance to the claims asserted in the petition, and Petitioner offers no basis upon which the court should set aside the dismissal of those claims. Rather, Petitioner presents an entirely new issue to the court without regard to the claims he has previously adjudicated and that have previously been dismissed. A motion for relief from judgment is, therefore, improper in this circumstance.

[1] Because Ms. Valencia's affidavit is not newly-discovered evidence that puts any of the claims in the petition in a new light, the claim, arguably, does not fall into the rule 60(b)(2) subsection.

Indeed, as suggested by the State, Petitioner's claim would more appropriately be brought in a new petition for post-conviction relief.

Accordingly, Petitioner's motion is denied. This ruling and order is the order of the court. No further order under rule 7(f)(2) is required.

Dated this 14 day of October, 2015.



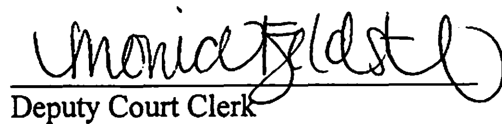
Judge Ernie W. Jones

CERTIFICATE OF MAILING

I hereby certify that on the 16 day of October, 2015, I sent a true and correct copy of the foregoing ruling to the following:

Erin Riley
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Randall W. Richards
Richards & Brown PC
Attorney for Petitioner
938 University Park Blvd Suite140
Clearfield, Utah 84015



Deputy Court Clerk

ADDENDUM C

Notice of Appeal

RANDALL W. RICHARDSW #4503 of
RICHARDS & BROWN P.C.
938 University Park Blvd., Suite 140
Clearfield, UT 84015
Telephone: (801) 773-2080
Facsimile: (801) 773-5078
lawyers@richardsbrownlaw.com

IN THE SECOND DISTRICT JUDICIAL COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

RIQO MARIANO PEREA PETITIONER	)	**NOTICE OF APPEAL**
	)	
Vs.		
STATE OF UTAH	)	Case No.140907173 Judge: JONES
	)	
RESPONDENT	)	

COMES NOW the above named Petitioner, Rico Perea, by and through his attorney, Randall W. Richards and hereby gives notice of intent to appeal the Order of Summary Dismissal on the Petitioner's Petition for Relief under the Post Conviction Remedies Act filed on November 11, 2014, that was entered hereon in the above-entitled case on or about the 12th day of January 2015 to the Supreme Court of Utah.

DATED this 11th day of February 2015.

_/s/: Randall W. Richards__
RANDALL W. RICHARDS
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of the foregoing Notice of Appeal.... this 11th day of February, 2015 to

Weber County Attorney
2380 Washington Blvd., Suite 140
Ogden, UT 84401

/s/Kari L. Kulak
Paralegal

ADDENDUM D

Affidavit of Sarah Valencia

AFFIDAVIT OF SARAH VALENCIA

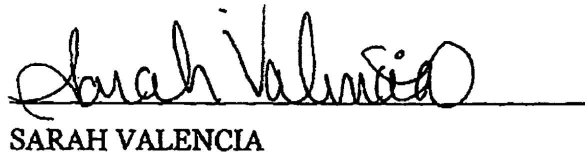
SARAH VALENCIA does hereby swear or affirm, upon information and belief that:

1. I was a witness in the case of State v. Riqo Perea, and testified at his murder trial.
2. At the time of the trial and before that, I was under the impression that the police were pressuring me to testify in a certain way at that trial.
3. I have had some time to think about the testimony that I gave and believe that I need to correct some of the statements that I made at trial which I believe are not accurate.
4. I was at the home during the shooting, and I did in fact see Riqo prior to the shooting, as he was a good friend of mine. To the best of my recollection he was also at least friendly with Sabrina Prieto, and to the best of my knowledge had nothing against her or me.
5. After the shooting occurred I was in shock having lost with my good friend Sabrina and the police immediately approached me once I arrived at the hospital and said that I had to talk to them.
6. During the conversation with the police, I felt threatened as far as the officers mentioned I may be losing custody of my son, and getting into trouble unless I was a witness for them. They informed me that I could either be a witness or I would be a suspect.
7. I was also very ill that night, and was not feeling good that evening, and therefore did not eat or drink much at the wedding party, and I was actually throwing up at the hospital due to my illness and nerves.
8. I told the detectives that I could not see the occupants of the car that I couldn't see their faces, but the officer insisted that it was Riqo and Bubba (Marquis Lucero). I informed the police that he couldn't have been Bubba because I didn't see him there that night.
9. Approximately a month or so after the shooting, I was again questioned by the police and I overheard the officers talked about the fact that Sabrina was running toward the garage and was shot in the chest and therefore there may have been a

shooter in the garage area. I asked the officers about this fact, and they told me that although the CSI and found some bullets there, that they didn't believe that happened. I was confused and scared, and therefore I went along with what the officers told me to say.

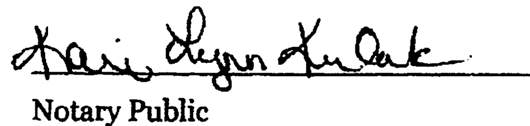
10. I also recall that prior to the trial occurring I was asked to meet at the prosecutor's office on 24th and Washington and they showed me maps and again told me what to say in trial. Again I was scared and worried about my child and therefore went along with what they told me to testify about.
11. I could not testify that I ever saw Riqo with the gun that evening, and I clearly did not see the face of the shooter in the vehicle, therefore any testimony that I gave contradicting those facts would not be accurate.

DATED this 2nd day of July 2015.

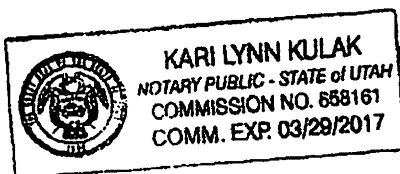


SARAH VALENCIA

SUBSCRIBED AND SWORN to before me this 2nd day of July 2015.



Notary Public



ADDENDUM E

Witness Statements

Angelo Gallegos and Elias Garcia

ANGELO GALLEGOS

ADDENDUM B

Petition for Post Conviction Relief

RANDALL W RICHARDS (#4503)
Attorney for Appellant
RICHARDS & BROWN PC
738 University Park Blvd. #140
Clearfield, Utah 84015
Telephone: (801) 773-2080
Facsimile: 1- 801-773-5078
Email: Randy@richardsbrownlaw.com

IN THE SECOND DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH

RIQO MARIANO PEREA, Petitioner, v. STATE OF UTAH, Respondent.	PETITION FOR POST-CONVICTION RELIEF Case No. 140907173 JUDGE:

Pursuant to the Utah Post-conviction Remedies Act and Utah R. Civ. P. 65C, RIQO PEREA hereby petitions the Court for post-conviction relief. He is currently incarcerated in the Utah State Prison in Draper, Utah.

I. NAME OF THE RESPONDENT: RIQO PEREA

X Conviction of a felony X State of Utah

II. IDENTIFICATION OF CURRENT AND RELATED CASES

1. (a) Name of Court that entered judgment below: Second District Court, Weber County, State of Utah, the Honorable Ernest Jones presiding.

(b) Location: Ogden, Utah.

(c) Case Number: 071901847

2. Date of judgment: May 27, 2010.

3. Sentence: Two counts Aggravated Murder, Life without parole. Two

Counts Attempted Murder .

4. Nature of Offenses involved: Two Counts Aggravated Murder

5. What was your plea? Not guilty.

6. Not guilty pled as to all counts.

7. Trial was before a jury.

8. Perea did not testify.

9. Perea appealed from the convictions.

10. Appellate information

(a) Name of Appellate Court: Supreme Court of Utah

(b) Case number: 20100891-SC

(c) Result: Convictions Affirmed.

(d) Date of opinion: November 15, 2013.

(e) Issues raised:

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

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

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

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.

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

III. Grounds for relief:

(a) Ground 1: Whether the trial court erroneously denied the defendant's ability to present his defense by limiting an expert's testimony on crime scene reconstruction.

Supporting facts for ground 1: 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. This significantly hampered defendant's ability to present a case which it had prepared for months prior to trial. The trial court's ruling literally five minutes before the beginning of the defense presentation of evidence required a complete change in trial strategy and presentation. 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.

(b) Ground 2: Whether the trial court erroneously excluded the testimony of defense expert Richard G. Ofshe, an expert in false confessions.

Supporting facts for ground 2: 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.

(c) Ground 3: Newly discovered evidence. Whether the trial court erred in denying Mr. Perea's motion to suppress his confession for a Miranda violation.

Supporting facts for ground 3: 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.

(d) Ground 4: Whether the trial court erroneously failed to allow critical defense witnesses to testify anonymously in order to protect them from gang retaliation.

Supporting facts for ground 4: 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.

(e) Ground 5: 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.

Supporting facts for ground 5: Riqo Perea presented evidence at the motion hearing that at the time of the offense he was 19 years old and had a full scale IQ of 77. 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.

REQUIRED ATTACHMENTS

1. The judgment and commitment being challenged – Attachment 1.

(b) Any decision issued by an appellate court from the direct appeal – Attachment 2.

(c) Any previously-filed petition for post-conviction relief, and any decision issued as a result. None

(d) Affidavits, records, or other documentary evidence that support your claim. Attachments 3.

(e) Memorandum of Points and Authorities. Attachment 4.

V. PETITIONER'S VERIFICATION UNDER OATH

PETITIONER'S VERIFICATION UNDER OATH

STATE OF UTAH

COUNTY OF Davis } SS.

I, the undersigned petitioner, declare under penalty of perjury that the information have provided in this petition is true and correct.

/s/: RIQO MARIANO PEREA
Signed by Randall W. Richards with Permission from Riqo Perea
SIGNATURE OF PETITIONER

Subscribed and sworn to before me on: 11/12/2014

_Kari Lynn Kulak________________________________
NOTARY PUBLIC

Residing in: __Davis County, UT___
My Commission Expires: __03/29/2017_________________

VI. CERTIFICATION OF ATTORNEY

I certify I am the attorney for petitioner, and that this petition complies with Rule 11, Utah Rules of Civil Procedure.

/s/: Randall W. Richards
SIGNATURE OF ATTORNEY

ADDENDUM C

Notice of Appeal

RANDALL W. RICHARDSW #4503 of
RICHARDS & BROWN P.C.
938 University Park Blvd., Suite 140
Clearfield, UT 84015
Telephone: (801) 773-2080
Facsimile: (801) 773-5078
lawyers@richardsbrownlaw.com

IN THE SECOND DISTRICT JUDICIAL COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

RIQO MARIANO PEREA PETITIONER	)	**NOTICE OF APPEAL**
	)	
Vs.		
	)	Case No.140907173
STATE OF UTAH		Judge: JONES
	)	
RESPONDENT		
	)	

COMES NOW the above named Petitioner, Rico Perea, by and through his attorney, Randall W. Richards and hereby gives notice of intent to appeal the Order of Summary Dismissal on the Petitioner's Petition for Relief under the Post Conviction Remedies Act filed on November 11, 2014, that was entered hereon in the above-entitled case on or about the 12th day of January 2015 to the Supreme Court of Utah.

DATED this 11th day of February 2015.

_/s/: Randall W. Richards__
RANDALL W. RICHARDS
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of the foregoing Notice of Appeal.... this 11th day of February, 2015 to

Weber County Attorney
2380 Washington Blvd., Suite 140
Ogden, UT 84401

/s/Kari L. Kulak
Paralegal

ADDENDUM D

Affidavit of Sarah Valencia

AFFIDAVIT OF SARAH VALENCIA

SARAH VALENCIA does hereby swear or affirm, upon information and belief that:

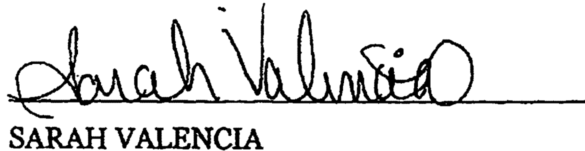
1. I was a witness in the case of State v. Riqo Perea, and testified at his murder trial.
2. At the time of the trial and before that, I was under the impression that the police were pressuring me to testify in a certain way at that trial.
3. I have had some time to think about the testimony that I gave and believe that I need to correct some of the statements that I made at trial which I believe are not accurate.
4. I was at the home during the shooting, and I did in fact see Riqo prior to the shooting, as he was a good friend of mine. To the best of my recollection he was also at least friendly with Sabrina Prieto, and to the best of my knowledge had nothing against her or me.
5. After the shooting occurred I was in shock having lost with my good friend Sabrina and the police immediately approached me once I arrived at the hospital and said that I had to talk to them.
6. During the conversation with the police, I felt threatened as far as the officers mentioned I may be losing custody of my son, and getting into trouble unless I was a witness for them. They informed me that I could either be a witness or I would be a suspect.
7. I was also very ill that night, and was not feeling good that evening, and therefore did not eat or drink much at the wedding party, and I was actually throwing up at the hospital due to my illness and nerves.
8. I told the detectives that I could not see the occupants of the car that I couldn't see their faces, but the officer insisted that it was Riqo and Bubba (Marquis Lucero). I informed the police that he couldn't have been Bubba because I didn't see him there that night.
9. Approximately a month or so after the shooting, I was again questioned by the police and I overheard the officers talked about the fact that Sabrina was running toward the garage and was shot in the chest and therefore there may have been a

____

shooter in the garage area. I asked the officers about this fact, and they told me that although the CSI and found some bullets there, that they didn't believe that happened. I was confused and scared, and therefore I went along with what the officers told me to say.

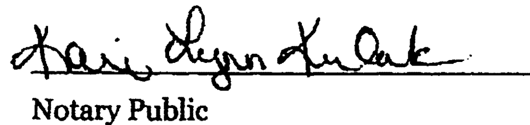
10. I also recall that prior to the trial occurring I was asked to meet at the prosecutor's office on 24th and Washington and they showed me maps and again told me what to say in trial. Again I was scared and worried about my child and therefore went along with what they told me to testify about.
11. I could not testify that I ever saw Riqo with the gun that evening, and I clearly did not see the face of the shooter in the vehicle, therefore any testimony that I gave contradicting those facts would not be accurate.

DATED this 2nd day of July 2015.

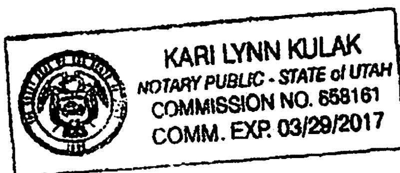


SARAH VALENCIA

SUBSCRIBED AND SWORN to before me this 2nd day of July 2015.



Notary Public



ADDENDUM E

Witness Statements

Angelo Gallegos and Elias Garcia

ANGELO GALLEGOS

1 the course of the 10 or so minutes that you were there?
2 A. Probably like when we were leaving, getting ready to
3 leave.
4 Q. Do you know who was involved in that argument?
5 A. Riqo.
6 Q. Who else? Anybody else?
7 A. I don't know.
8 Q. After that argument happened, what did you do?
9 A. Was entering the car, getting ready to enter the car
10 to leave.
11 Q. Okay. And did you then enter the car?
12 A. Yeah.
13 Q. Do you know what the defendant was doing?
14 A. He was already in the car.
15 Q. Okay. Where was he?
16 A. In the front passenger.
17 Q. Okay. As the car was leaving what happened?
18 A. I heard gunshots.
19 Q. Okay. Did you -- do you know how many?
20 A. I heard one or two, and then there were several
21 after.
22 Q. Okay. Do you know where those gunshots were coming
23 from?
24 A. Front passenger.
25 Q. And how do you know that?

1 A. Because I seen the lights from a gun getting shot off
2 right in front, the passenger.
3 Q. Okay. Could you tell where — could you see the
4 defendant's head, chest and body?
5 A. His upper body.
6 Q. Okay. Could you see his head?
7 A. No.
8 Q. Could you see his neck?
9 A. No.
10 Q. Okay. Did you see a gun in the defendant's hand as
11 shots were being fired?
12 A. No.
13 Q. Okay. What happened after the shots were fired?
14 A. We were driving toward Washington Boulevard.
15 Q. Okay. When you got to Washington Boulevard, do you
16 know which direction the vehicle turned?
17 A. Left.
18 Q. Okay. That would be south?
19 A. South.
20 Q. Okay. After it turned south where did the vehicle
21 go?
22 A. Seventh Street.
23 Q. All right. Now, when you got to Seventh Street, what
24 happened?
25 A. There was a threat made toward me and several others.

1 Q. And who made that threat?

2 A. Riqo.

3 Q. What did he say?

4 A. If we said anything, there would be a bullet with our

5 name on it.

6 Q. During the course of the travel from the crime scene

7 to the house near Seventh and Washington, did the Defendant say

8 anything else?

9 A. The same thing, there would be a bullet with our

10 name.

11 MR. SHAW: That's all.

12 THE COURT: Mr. Richards?

13 CROSS-EXAMINATION

14 BY MR. RICHARDS:

15 Q. Now, you are a member of a gang. Is that correct?

16 A. No.

17 Q. Were you at that time?

18 A. No, I was not.

19 Q. You were not a member of the Ogden Trece gang?

20 A. I am not. My brother is, but I am not.

21 Q. Okay. Let me show you an exhibit marked State's

22 Exhibit — Defense Exhibit No. 1 and ask you if you know this

23 individual?

24 A. Yes.

25 Q. And who's that?

1 A. They call him Dad. I don't know him. Elias?

2 Q. Was he there that night?

3 A. Yeah.

4 Q. And whose Dad is he of?

5 A. I don't know.

6 Q. Do you know a Christopher Garcia?

7 A. Christopher Garcia?

8 Q. Elias Christopher?

9 A. Elias. I know Elias. I know him by Elias.

10 Q. He's your age, isn't he?

11 A. Again, I suppose.

12 Q. Well, you grew up together, didn't you?

13 A. Well, I don't really know him. I never really hung

14 out with him, but I know I've seen him around.

15 Q. Was he in the car that night with you?

16 A. Yes, he was.

17 Q. But you didn't hang out with him?

18 A. Other than that night, no.

19 Q. That's the only time you've ever hung out with

20 Christopher?

21 A. Yep.

22 Q. And you know Riqo?

23 A. Yes, I do.

24 Q. And did you hang out with Riqo?

25 A. Yes, I hung out with Riqo.

1 Q. And did Christopher hang out with Riqo a lot?

2 A. Not when I was around.

3 Q. So where did you grow up at?

4 A. On thirty-second and Lincoln.

5 Q. And where did Riqo grow up at?

6 A. At Third below Grant. Right above Grant between

7 Grant and Washington Boulevard.

8 Q. And do you know where Christopher lived and grew up?

9 A. I do not.

10 Q. Now, this situation that happened on March 5th, that

11 night, why were you hanging out with Riqo and Christopher that

12 night?

13 A. We were going to go party, going to hang out, drink

14 beer.

15 Q. Okay. And that's the first time you've ever hung out

16 with Christopher?

17 A. Yep. I've seen him in school often, but I never --

18 me and him never associated.

19 Q. And it's not true that you are both members of a

20 gang, you and Christopher?

21 A. I am not.

22 MR. SHAW: Asked and answered, your Honor.

23 THE COURT: Sustained.

24 THE WITNESS: I am not.

25 THE COURT: You answered that before. You don't need

1 to answer again.

2 Q. (BY MR. RICHARDS) So you were going to go party and

3 where were you going to go party at, go drinking at?

4 A. I don't know. I didn't know where we were going. I

5 just know we were going to go party.

6 Q. So you get into a car and did you know the driver of

7 the car?

8 A. No, I do not.

9 Q. It was a lady, wasn't it?

10 A. From what — yeah, from what I remember, yeah.

11 Q. Do you remember her name?

12 A. I do not.

13 Q. Okay. And who else was in the car with you?

14 A. There was me, that girl —

15 Q. The driver?

16 A. The driver. You said his name was Elias? Elias, two

17 kids and another girl.

18 Q. And the kids were how old?

19 A. I don't remember.

20 Q. Okay. How about the other girl, what was her name?

21 A. I don't know.

22 Q. Okay. And so you're in this car with people you

23 don't ever know other than Riqo?

24 A. Uh-huh.

25 Q. And you're going to go party and get drunk?

1 A. Yep.

2 Q. And you don't know where you are going?

3 A. Don't know. Our intention was just go party.

4 Q. Okay. And then you stop at a house, and you don't

5 know Christina?

6 A. Unh-unh.

7 Q. And do you know the Navas?

8 A. I knew Sabrina. That's the only person I knew there.

9 There — that —

10 Q. Did you see her there at the party?

11 A. Yeah.

12 Q. And you heard an argument going on. Is that right?

13 A. Yes, I did.

14 Q. And Riqo was arguing?

15 A. Yes.

16 Q. And who else was he arguing with?

17 A. I don't know.

18 Q. Were there many people there?

19 A. There was — at the party?

20 Q. Arguing.

21 A. Explain that again.

22 Q. Arguing.

23 MR. SHAW: Well, objection your Honor. He obviously

24 doesn't understand the question.

25 THE COURT: Maybe just rephrase the question then.

1 Q. (BY MR. RICHARDS) How many people were arguing with
2 Riqo?
3 A. Just one that I can recall of.
4 Q. And was it a male or female?
5 A. Before the incident happened, it was a female.
6 Q. So Riqo was arguing with the female?
7 A. Uh-huh.
8 Q. And was Elias?
9 A. No.
10 Q. He wasn't arguing?
11 A. No.
12 MR. SHAW: Well, which Elias?
13 MR. RICHARDS: Well, the one he knows, I guess.
14 THE WITNESS: Which — I don't — I don't know.
15 MR. SHAW: Let's find out which one.
16 THE COURT: Go ahead. Maybe you can just clarify
17 that.
18 Q. (BY MR. RICHARDS) Go ahead.
19 A. I don't know which Elias you are talking about.
20 Q. Okay. We have the son — well, I thought you didn't
21 know this one?
22 A. I have seen him.
23 Q. Do you know his name?
24 A. No.
25 Q. Well, then how come you are confused about which

1 Elias then?

2 A. Because that's what they both go by, is Elias.

3 Q. Well, I thought you said just a moment ago that you

4 didn't know what this guy's name was?

5 A. I don't know his name. They both go by Elias or Dad.

6 He goes by Dad.

7 Q. So if he goes by Dad --

8 A. And they goes -- both Elias or Dad. That's what he

9 went by.

10 Q. So -- so you do know him a little bit?

11 A. I've seen him, yeah, but I don't know of him.

12 Q. And he goes by Dad or Elias?

13 A. Yeah.

14 Q. Okay. We'll call him the father.

15 A. Okay.

16 Q. Okay. Or Dad. Let's call him Dad. So do you see

17 Dad arguing with anybody?

18 A. No, I did not.

19 Q. Did you see Elias arguing with anybody?

20 A. No, I did not.

21 Q. And so the only person you saw arguing was Riqo and a

22 girl?

23 A. Yes.

24 Q. And you don't know the girl's name?

25 A. (Nodding.)

1 Q. And there was only just two of them there arguing?
2 A. Yeah, just them two.
3 Q. And then did you see — you said you hear a shot?
4 A. Yeah.
5 Q. And did you see who fired that shot?
6 A. I do not.
7 Q. Do you know where it came from?
8 A. I do not.
9 Q. Okay. And once that shot was fired, then everybody
10 gets in the car?
11 A. No. There was — before we even entered the car,
12 there was already one or two shots being shot. There was one
13 or two shots before I entered the car.
14 Q. And you climbed clear into the back seat?
15 A. Yep.
16 Q. And you were by a little kid?
17 A. No. I was by the girl in the back.
18 Q. And how old was she?
19 A. I don't remember.
20 Q. Was she two or five or 10 or 15?
21 A. She was older than 10.
22 Q. All right. And who else gets into the car?
23 A. It was me, Elias, Riqo and the two kids, the driver.
24 That was it.
25 Q. Okay. And Elias was in the middle seat?

1 A. Yes.

2 Q. And so then the car starts driving?

3 A. Yes.

4 Q. And shots are being fired?

5 A. Yes.

6 Q. But you aren't able to see in which direction they

7 were being fired?

8 A. I do not.

9 Q. Okay. And you don't -- you didn't see them being

10 fired?

11 A. I looked up and I seen shots being fired from the

12 right passenger of the vehicle that I was in.

13 Q. You said you couldn't see them being fired, though,

14 could you?

15 A. Unh-unh. But I heard -- I heard them. You can only

16 hear from what a gunshot sounds like when you're four feet

17 away.

18 Q. I understand. And they were driving down -- if I may

19 approach -- so you get into the car here?

20 A. Yes.

21 Q. And then -- well, where's the argument?

22 A. In front of the car.

23 Q. So right here?

24 A. Right here.

25 Q. Okay. Also it's right here, right? That's where the

1 argument was?

2 A. That's where the car was parked. That's where the

3 argument was.

4 Q. And then you hear some shots?

5 A. Two. One or two shots.

6 Q. And you don't know where they came from?

7 A. Unh-unh.

8 Q. And then they get into the car and then what happens?

9 A. There wasn't even a chance for -- we were already in

10 the vehicle once I heard the shots.

11 Q. So you were in the vehicle --

12 A. Well, I wasn't in the vehicle at the time, but I was

13 -- I was entering -- I was entering the car when I heard the

14 shots.

15 Q. And was Riqo in the vehicle when --

16 A. Yes, he was.

17 Q. And so he's not the one that did the two shots then,

18 right?

19 A. I have no -- I don't know. But after I seen --

20 Q. Well, you heard -- according to your testimony, you

21 heard him shoot moments later, and you could tell it was him

22 shooting?

23 A. Yes.

24 Q. And so if you couldn't tell at that moment, then it

25 must have been somebody else that was firing these two shots.

1 Is that a fair statement?
2 A. Yes.
3 Q. Okay. And so then you get into the car, and does it
4 back up a little bit and then go out?
5 A. No, it accelerated forward.
6 Q. Was there a car parked right here in front of it?
7 A. Not that I can remember.
8 Q. If there was, it would have had to hit it, or she
9 would have?
10 A. I don't remember. I --
11 Q. Okay. So they accelerate forward driving down the
12 street, and several shots are fired as they drive down the
13 street?
14 A. Yes.
15 Q. How fast was the car going?
16 A. I don't know. I don't remember.
17 Q. Okay. Was Elias wearing a white shirt, or were you?
18 A. I don't remember.
19 Q. Do you remember what you were wearing?
20 A. I don't.
21 Q. Okay. Now, let me show you this Exhibit No. 2. Can
22 you identify that?
23 A. That's me.
24 Q. That's a picture of you?
25 A. Yeah.

1 Q. Okay. I'd move for Exhibit No. 2 to be admitted.

2 MR. SHAW: It's irrelevant, your Honor. It's a

3 photograph of the witness; completely irrelevant to this case.

4 And may we approach the bench?

5 THE COURT: All right.

6 *(Discussion held at the bench.)*

7 THE COURT: All right. I'll sustain the objection.

8 MR. RICHARDS: I think that's all the questions I

9 have. Just a moment.

10 Q. (BY MR. RICHARDS) Do you ever recall attending a

11 barbecue with Elias senior or Dad as you call him?

12 A. No, I do not.

13 Q. With your brother Jeremy?

14 A. No, I do not.

15 Q. Did you have a gun that night?

16 A. No.

17 Q. Were you dumping or unloading a weapon that night?

18 A. No, I was not.

19 MR. RICHARDS: That's all the questions I have.

20 THE COURT: Mr. Shaw any other questions?

21 REDIRECT EXAMINATION

22 BY MR. SHAW:

23 Q. Just so we are clear about who exited the Yukon, do

24 you recall whether the driver exited or did she stay in the

25 car?

ELIAS GARCIA

1 Q. That's what you and Riqo were, the younger ones.
2 Then you have -- after you're in the late twenties or something
3 like that you become a homey?
4 A. I don't know. I didn't get to that stage.
5 Q. I understand you didn't, but you know the process.
6 Is that right? And eventually you become an original gangster.
7 Correct me if I am not telling you right.
8 A. Yes.
9 Q. That's correct? All right. And you understand that
10 an original gangster has some authority over the pee wee
11 homeys, correct?
12 A. Yes.
13 Q. An original gangster can order a pee wee homey to
14 take the fall for another person. Is that right?
15 A. Could I ask what you are trying to ask me? Could you
16 just get to the point? Because you are confusing me with these
17 questions.
18 Q. Well, I'm trying to be as clear as I can. Does the
19 -- the original gangster has the ability to give orders to pee
20 wee homeys, correct? Which you were.
21 A. Well, we make our own decisions.
22 Q. Okay. But you're influenced by what the OG says?
23 A. No.
24 Q. Okay. It's true, is it not, that the original
25 gangster occasionally tells a pee wee to take the fall for

1 another crime, somebody else's crime, isn't it?
2 A. I don't think anybody in their right mind would take
3 the fall for somebody else's crime.
4 Q. No, except that if you don't do what the original
5 gangster says, then you may be hurt, your family may be hurt,
6 correct?
7 A. Correct. You may --
8 Q. So if you don't want to get hurt or you don't want
9 your family to get hurt, you do what the original gangster
10 tells you to do?
11 A. Not, not all the time.
12 Q. Okay. Usually?
13 A. No. There's nobody -- I ain't never ever listened to
14 any of my -- over a gangster, the original gangsters. If they
15 told me to go do something, if I didn't want to do it, I
16 wouldn't act upon it because they told me to go do it.
17 Q. If there's -- if you don't do something that the
18 original gangster tells you to do, they have ways of scaring
19 you into doing that, don't they?
20 A. Um, I don't see how.
21 Q. Well, a drive-by shooting of a home, for instance.
22 You are aware that those occur, aren't you?
23 A. Yes.
24 Q. Yes? And if someone were to drive by Riqo's home or
25 his grandma's home where he would stay and shoot it up, that

1 would be a warning situation, wouldn't it?

2 A. But from the side. What are you talking about?

3 Q. Well, are you aware —

4 A. Because there's two gangs — two gangs involved in

5 this, not just one.

6 Q. I understand.

7 A. So what side, what side you talking about?

8 Q. Either side.

9 A. No. I couldn't tell you. I --

10 Q. You're aware that Riqo's grandma's house has been

11 shot at least twice since this incident occurred —

12 A. It's been shot at multiple times before this occurred

13 too.

14 Q. Okay.

15 A. It's been bombed.

16 Q. All right. A Molotov cocktail, right? That's a

17 cannister full of gasoline that gets thrown onto that house.

18 And those are sometimes done as warnings, aren't they, that you

19 better do what the OG says or you are going to have trouble,

20 correct?

21 A. (Nodding.)

22 Q. All right. And since this has happened, at least

23 twice Riqo's house to the best of your knowledge has been

24 drive-by shot or molotoved?

25 A. I haven't known it's been shot or been drive-by. I

1 haven't had any affiliation to do with Riqo or anything towards
2 that nature of the gang life or anything. I've been trying to
3 move on with my life. And then I get threats from Ogden
4 Trece's. I get shot at from Ogden Trece's. I get chased by
5 from Ogden Trece's for doing what I am doing today from what I
6 did.
7 Q. You go to Iowa, didn't you?
8 A. Yes.
9 Q. And you were afraid of the Nortenos at that point,
10 weren't you? Is that why you went to Iowa?
11 A. No. I went to Iowa because even before that
12 happened, I was trying to change my life.
13 Q. But you went to Iowa because a fellow by the name of
14 Paul Ashfield (phonetic) was shot in retaliation by Nortenos
15 for this incident. Is that correct?
16 A. I didn't go to Iowa because of that.
17 Q. You went immediately after that, didn't you, within a
18 day?
19 A. I already had my ticket.
20 Q. Okay. Do you remember talking to an officer Gent in
21 Iowa?
22 A. Do I remember talking to him?
23 Q. Yes.
24 A. When he came out?
25 Q. Do you remember an Officer Gent?

1 A. Yes, I got in contact with him.

2 Q. And did you tell him that when he asked you it's

3 tough, at least you were smart enough to get out of there and

4 asked you who Paul was. Do you recall him asking you that?

5 A. Um, I really don't recall him asking me that.

6 Q. You don't recall that? And you said, "Who hit Paul?"

7 Do you recall telling that to Officer Gent?

8 A. No. I —

9 Q. All right. You don't recall that?

10 A. I remember talking to Officer Gent, but I don't — I

11 don't recall. I don't — it's not coming back to me that I

12 talked to him about that. I probably did. I'm not saying I

13 didn't, but I don't remember.

14 Q. A long time ago?

15 A. Yeah.

16 Q. Over two and a half years ago?

17 A. Yes.

18 Q. And you — I want to go a little bit to what your

19 rendition is of what happened that night of August 5th at this

20 location here on the map. You said that Riqo was in the front

21 passenger seat?

22 A. That's right.

23 Q. And you saw him shoot the gun?

24 A. That's right.

25 Q. And how did — how would you see him shoot the gun?

1 A. Because he was hanging out the -- he was hanging out
2 the car when he did it. I was right behind him.
3 Q. You were behind him?
4 A. Right behind him.
5 Q. And so he's hanging out so you can see him through
6 the windshield or where?
7 A. I'd have to be in the front to see him through the
8 windshield. I was in the back seat.
9 Q. So you see him hanging out. Where is he hanging out
10 is my question?
11 A. The driver -- the passenger front seat.
12 Q. He's hanging out the passenger front seat window?
13 Door?
14 A. Door.
15 Q. So the door is open? Or do you remember?
16 A. I just know that he was hanging out, holding onto the
17 thing that he climbed into the SUV with firing a gun.
18 Q. There's a handle right there?
19 A. Yes.
20 Q. Kind of part way down in the front of the window. So
21 he's hanging out holding that? Is that right. Is that what
22 you are saying?
23 A. Yes.
24 Q. Okay. And so you are seeing him shoot through the
25 front windshield, or how are you seeing him?

1 A. He's shooting over a car back towards the people
2 because we was driving off. So he was shooting over the car
3 back towards the group.
4 Q. All right. And so you didn't actually see him fire
5 the gun; you just heard it?
6 A. Well, I heard the gun go off, and then I seen the gun
7 when he came back in with it.
8 Q. Did you have a gun that night?
9 A. Did I have a gun that night?
10 Q. Yes.
11 A. Yes, I did.
12 Q. Did you fire it?
13 A. No, I didn't.
14 Q. Now, after you drove away -- well, let me ask this.
15 Do you know Angelo --
16 A. Yes.
17 Q. -- Gallegos?
18 A. Yes, I do.
19 Q. How long have you known Angelo?
20 A. For a little, for a little while. For probably about
21 the same time, if not longer as much as I've known Riqo.
22 Q. So you've known him almost as long as you've known
23 Riqo?
24 A. About as long. About as long.
25 Q. Did you hang out with Angelo?

1 A. Not really that much.
2 Q. But he knew who you were?
3 A. Yeah.
4 Q. Did you go to barbecues with him?
5 A. Yes. We were — I went to a barbecue at his house at
6 one point.
7 Q. A barbecue at his brother Jeremy's place?
8 A. Yes.
9 Q. And you hung out with him? So he would know who you
10 are, wouldn't he?
11 A. Yes.
12 Q. Did he know your name?
13 A. Yes.
14 Q. So if he denied knowing you, he's lying?
15 A. I guess.
16 Q. I want to talk about after you left the scene. Did
17 — you never heard Riqo threaten anybody, did you?
18 A. No. I heard him be confused.
19 Q. Okay. He was confused, but he never threatened to
20 put a bullet in anybody?
21 A. No.
22 Q. Now, you talked to Detective Gent because you were
23 worried that you were going to get charged with this crime,
24 weren't you?
25 A. I called Detective Gent because my cousin Sarah got

1 ahold of me.

2 Q. And that's Sarah Valencia?

3 A. Yes.

4 Q. Okay.

5 A. And me and her had a good talk. And --

6 Q. And you were afraid that you were going to get turned

7 in and charged with this crime, were you not?

8 MR. HEWARD: Judge, I would object. The witness is

9 in the middle of trying to answer a question. Counsel didn't

10 give him a chance to finish and went on to the next one.

11 THE COURT: Are you done with your answer, or do you

12 need a second?

13 Q. (BY MR. RICHARDS) Yeah, please answer.

14 A. I got ahold of my cousin Sarah. My cousin Sarah got

15 ahold of me.

16 Q. Okay.

17 A. And we talked. And she knew it wasn't me that did

18 it. She knew who did it. And she didn't want to see me -- she

19 didn't want to see me -- see it be framed on me for the one

20 that did it.

21 Q. Okay. So you decided to talk to Detective Gent

22 because of that?

23 A. (Nodding.) I decided to talk to Detective Gent

24 because not only because of that, because I found out it was

25 right for me to be honest and for --

1 Q. And — and for what?

2 A. -- and for people that involved with this to know the

3 truth.

4 Q. Okay. And you haven't been very honest in a lot of

5 things, have you?

6 A. Been honest about what? You got to be specific about

7 your question. I don't know exactly what you are saying when

8 you say that.

9 Q. Let me ask another question. Shortly after you were

10 dropped off, you went — you got picked up and went in another

11 car driven by Brian Moore or a Tara Sweet. Is that correct?

12 A. A who?

13 Q. A Brian Moore and Tara Sweet. Do you recall that?

14 A. No.

15 Q. Do you recall telling Brian Moore —

16 MR. HEWARD: I'll object, Judge. He said he didn't

17 recall.

18 MR. RICHARDS: Well, I think I can ask him —

19 THE COURT: I'll give you a little latitude, but his

20 answer is he doesn't know who this fellow is.

21 Q. (BY MR. RICHARDS) You don't recall getting in a

22 car —

23 A. No.

24 Q. -- with a fellow?

25 A. We didn't get into a car with no guy named Brian.

1 Q. And do you recall talking or telling Brian that you
2 may have seen me on the news; I'm the one that shot the two
3 people?
4 A. No. I don't even know who this Brian guy is. I
5 don't even know nobody by the name of Brian.
6 Q. You don't know Brian --
7 A. No.
8 Q. -- Moore or a Tara Sweet?
9 A. No.
10 Q. Okay. I think that's all I have.
11 MR. HEWARD: I just have one follow up.
12 REDIRECT EXAMINATION
13 BY MR. HEWARD:
14 Q. Chris, what caliber gun did you have that night?
15 A. I had a 25.
16 Q. Was that gun even functioning?
17 A. It had no firing pin.
18 MR. HEWARD: That's all.
19 THE COURT: Any questions?
20 RECROSS-EXAMINATION
21 BY MR. RICHARDS:
22 Q. It seems a little odd to me in that --
23 MR. HEWARD: I'll object, your Honor, to it seems a
24 little odd to me. That's not a question.
25 THE COURT: Yeah. Reword the question if you would.