

Case No. 20180870-SC

IN THE
UTAH SUPREME COURT

BENJAMIN ARRIAGA,
Petitioner,

v.

STATE OF UTAH,
Respondent.

Brief of Respondent

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

Armed with a gun, Petitioner Benjamin Arriaga angrily confronted Benacio Herrera about claims that Herrera had slept with Arriaga's estranged wife. The confrontation ended when Arriaga shot Herrera five times. Arriaga pleaded guilty to murder in exchange for the dismissal of two second-degree felonies.

At the change-of-plea hearing, Arriaga stated that he and his attorney discussed the content of the plea affidavit. He represented that he understood everything they talked about. Arriaga also acknowledged that he understood the rights he was waiving by pleading guilty, the nature and elements of the crime of murder, and the consequences of his plea. When asked if he had any

questions, Arriaga responded that he did not.

But when trial counsel provided a factual basis for the murder charge, Arriaga stated that he defended himself and that he never intended to hurt the Herrera. Trial counsel then interjected that he explained to Arriaga the concept of imperfect self-defense in relation to the facts of Arriaga's case. In addition, the trial court asked Arriaga if he knew pulling the trigger on the gun would cause Herrera's death. Arriaga acknowledged that he did. The court accepted Arriaga's guilty plea and sentenced him to fifteen years to life in prison.

In a post-conviction petition filed months later, Arriaga alleged generally that his plea was invalid because he did not understand the nature of the murder charge and the consequences of his plea. He also claimed that he received ineffective representation because his trial attorney did not have a Spanish-language interpreter present for their out-of-court discussions, which allegedly caused Arriaga to misunderstand his counsel's plea advice. The State moved for summary judgment.

The district court—and, ultimately, the Utah Court of Appeals—rejected Arriaga's claims. And for good reason. Most of Arriaga's allegations were contradicted by the acknowledgements he made at the change-of-plea hearing. The court of appeals correctly held that Arriaga was bound by those

representations absent a valid reason why they should not be believed, which Arriaga never provided. In addition, while Arriaga belatedly alleged that he was never told what the implications of a defense of imperfect self-defense would be at a trial, or that the absence of such a defense was an essential element of the murder charge, his attorney explained that they had discussed this issue. The court of appeals correctly held that the trial court was entitled to rely on counsel's explanation in finding Arriaga's guilty plea knowing and voluntary.

STATEMENT OF THE ISSUES

This Court granted Arriaga's petition for a writ of certiorari to review the following question:

"Whether the court of appeals erred in affirming the post-conviction court's denial of Petitioner's petition for post-conviction relief."

Standard of Review. On certiorari, this Court reviews for correctness the decision of the court of appeals. *See State v. Levin*, 2006 UT 50, ¶15, 144 P.3d 1096. Because the court of appeals affirmed the district court's decision granting the State's summary judgment motion, the correctness of the court of appeals' decision turns, in part, on whether the court of appeals accurately reviewed the district court's ruling under the standard of review applicable to motions for summary judgment. *Id.* Under rule 56, Utah Rule of Civil

Procedure, the facts and any reasonable inferences must be viewed “in the light most favorable to the nonmoving party.” *Orvis v. Johnson*, 2008 UT 2, ¶6, 177 P.3d 600 (citations omitted). Correctness “also turns on whether [the court of appeals] correctly assessed preservation of the issues before it.” *Baumann v. Kroger Co.*, 2017 UT 80, ¶15, 416 P.3d 512.

STATEMENT OF THE CASE

A. Summary of relevant facts.¹

After repeatedly lying to police that he had any involvement in the death of Benacio Herrera, R631, 638-40, 642, 662-66, 668-74, 676, Petitioner Benjamin Arriaga eventually admitted that, armed with a handgun, he angrily confronted Herrera in an open field about claims that Herrera had slept with Arriaga’s estranged wife. R605, 632-33, 665, 670, 675, 680-82. Herrera denied the affair, which made Arriaga even angrier. R633, 681, 685. Arriaga told Herrera to tell the truth or he would kill him.² R694-95. Arriaga pulled the gun from his waistband to get Herrera to admit to the affair. R633, 643, 682, 695. Herrera begged for forgiveness, but Arriaga said it was not the kind of thing that could be forgiven. R694. According to Arriaga, Herrera

¹The facts are taken from the preliminary hearing transcript, attached as Addendum B, and the transcript of Arriaga’s police interview, attached as Addendum C.

²Arriaga also told the police that he “was not going to do it.” R695.

then lunged at him and a struggle ensued. R633, 643, 682, 685, 694. Arriaga shot Herrera five times, once in the abdomen, once in the leg, twice in the small of the back, and once in the back of the head. R607.

After the murder, Arriaga disposed of the gun by selling it to a man on the street. R633, 686-87. Someone walking through the field found the body and reported it to police. R614. No weapons were found on Herrera. R616.

B. Summary of proceedings.

The State charged Arriaga with murder, a first-degree felony. R237-38. He was also charged with possession or use of a firearm by a restricted person, and obstructing justice, both second-degree felonies. *Id.*

*Change-of-Plea Proceedings*³

Arriaga pleaded guilty to murder and the other charges were dismissed. R80, 85, 410. At the change-of-plea hearing, the trial court explained through an interpreter that Arriaga had the right to the presumption of innocence, the right against self-incrimination, the right to a speedy and public trial before an impartial jury, the right to call and cross-examine witnesses, the right to a unanimous verdict on all the elements of the crimes beyond a

³ The Sentence, Judgment, and Commitment Transcript (change-of-plea hearing) is attached as Addendum D. The Statement of Defendant in Support of Guilty Plea (plea affidavit) is attached as Addendum E.

reasonable doubt, and the right to appeal. R408-20. Arriaga acknowledged that he understood he would be waiving these rights by pleading guilty. R411. The court also explained the maximum and minimum penalty for murder, which Arriaga acknowledged he understood. R412.

The court asked defense counsel whether he believed Arriaga was competent to plead and understood his rights. R412. Counsel responded affirmatively and explained that he and Arriaga had been working together on the case for over a year – including the preliminary hearing and a motion to suppress Arriaga’s statements to the police. *Id.* Arriaga acknowledged that he was satisfied with counsel’s assistance and that he fully understood everything counsel talked to him about. *Id.*

Arriaga also acknowledged that he and his attorney had been through the plea affidavit together. R412-13. In the affidavit, Arriaga certified that he read the plea affidavit, understood its contents, understood the nature and elements of the crime of murder, the consequences of his guilty plea, and the rights he would be waiving. R82-84, 86. He also certified that he was satisfied with the advice and assistance of his attorney. R86.

When the trial court asked for a factual basis, trial counsel stated that Arriaga “confronted a man who had been sleeping with his wife. An argument and subsequent fight took place at which time he pulled out a

firearm and he shot the man killing him.” R413. Through the interpreter, the court asked Arriaga if that was what happened and Arriaga said, “I defended myself. It was not my intention. I never thought about hurting him.” *Id.* The court asked if Arriaga’s response changed the plea. *Id.* Counsel explained, “Your Honor, we had—we had discussed the imperfect self-defense concept and that he did pull out a gun to get the man to confess to his sleeping with his wife. And that the man charged at him but he was unarmed. So that is why he used a gun.” *Id.*

When the court accepted the factual basis, Arriaga said, “He was drugged and drunk and I didn’t know if he had a weapon, a knife and that’s why I....” *Id.* At this point, the prosecutor stated that the plea would be valid only if Arriaga admitted that he intentionally—or knowingly—caused Herrera’s death. R414. Trial counsel interjected that Arriaga “is prepared to say, your Honor, he’s asked that I say it, that by pulling the trigger he knew that it would cause the death of the man.” *Id.* The trial court then directly asked Arriaga, “do you understand that by pulling the trigger you knew you could cause the death of the gentleman?” *Id.* Arriaga responded, “Yes.” *Id.*

After ensuring that Arriaga had not been forced or coerced into pleading guilty, the court told him, “If you feel like you understand what you’re doing and you want to do this today, I will have you go ahead and sign that

plea form.” R415. Arriaga signed the plea affidavit and the court accepted his guilty plea to murder. R87, 415.

*Post-Conviction Proceedings*⁴

Arriaga timely filed a pro se post-conviction petition. R1. He asserted that his attorney was ineffective, his plea was invalid, and that Herrera’s death was an accident and therefore unintentional. R13-17. After counsel was appointed, he filed an amended petition alleging that he received ineffective representation and that his plea was invalid. R65-75. He argued that counsel was ineffective for not having a Spanish-language interpreter present during their out-of-court discussions about the case, which he alleged resulted in him not understanding the rights he was waiving. R70-71. In particular, he argued that he did not understand that he could take his case to trial and assert a defense that he did not have the requisite intent for murder. R71. Arriaga argued that this made his plea unknowing and involuntary. R70-71. The State filed a response to Arriaga’s amended petition, arguing that relief should be denied because he had failed to prove his claims. R105-05, 111-27.

After appointed counsel moved to withdraw from the case, Arriaga filed a pro se reply to the State’s response. R306-313. There he stated that trial

⁴ The district court’s Findings of Fact and Conclusions of Law is attached as Addendum F.

counsel's ineffectiveness denied him the chance to present evidence of "his lack of intent to commit murder." R307. He argued that there was a fight, he pulled his gun out to scare Herrera but Herrera charged him, "and he instinctively pulled the trigger but not intending to kill the victim." R307-08; *see also* R311 ("Petitioner is not sure exactly how the gun was discharged, but he is certain he did not intend to kill the victim."). According to Arriaga, it was his lack of the requisite mental state that he was trying to convey to the court when he stated during the plea colloquy that he was defending himself and never thought about hurting Herrera. R311-13.

The district court eventually appointed new counsel and convened an evidentiary hearing. R325, 443-44. But when the State objected to post-conviction counsel's questioning of trial counsel on issues not raised in the amended petition, the court ended the hearing and allowed Arriaga to file another amended petition to raise additional claims. R534-550. In the second amended petition, Arriaga raised three claims. First, he argued that he received ineffective representation when counsel allegedly did not properly communicate with him, did not investigate the case, and did not pursue available defenses. R446-50, 1114-19. Second, without specificity, he alleged that his "conviction was obtained by a plea of guilty that was unlawfully induced or not made voluntarily with understanding of the nature of the

charge and the consequences of the plea.” R450. Last, he asserted that he was denied his right to appeal. R450.

The State moved for summary judgment, arguing that Arriaga’s proffer failed as a matter of law to establish his claims. R819-62. Arriaga opposed the motion. R1095-1121. For the first time, he alleged that his plea was invalid on the theory that he did not understand the interplay between the essential elements of a first-degree murder charge and a second-degree manslaughter charge based on imperfect self-defense. R1108-09, 1111. After hearing oral argument from the parties, the district court granted the State’s summary judgment motion. R1219-21.

The district court ruled that Arriaga failed to show that his attorney was ineffective. R1269. The court concluded that Arriaga had not established that he should not be bound by the representations he made at the change-of-plea hearing. *Id.* Because Arriaga acknowledged that he understood everything his attorney told him and the consequences of pleading guilty, he had not shown that his counsel performed deficiently for not having a Spanish-language interpreter present during their private conversations about the plea. *Id.* And even if counsel had performed unreasonably, Arriaga failed to show that he was prejudiced. *Id.* The court also ruled that because all of the constitutional prerequisites for a knowing and voluntary plea were satisfied,

the plea was valid. R1269-70. But nowhere did the court address or rule on Arriaga's theory that the guilty plea was invalid because he had an incomplete understanding of the murder charge, or was never informed of the implications of a defense of imperfect self-defense at trial. The district court therefore denied Arriaga's post-conviction petition. R1270.

Proceedings on Appeal

Arriaga timely appealed. R1289-90. He argued that his guilty plea was invalid because it was not knowingly and voluntarily entered. *See Arriaga v. State*, 2018 UT App 160, ¶7, 436 P.3d 222. He asserted that the self-defense statements he made during the plea colloquy "negated an essential element of the murder charge." *Id.* at ¶13. His statements, Arriaga argued, were objective evidence that he misunderstood the elements of the crime he was pleading guilty to and showed that he lacked an understanding of the proceedings. *Id.* at ¶¶12-13. He also argued that his plea was not knowing because he allegedly did not understand English and never read the plea affidavit. *Id.* at ¶15. The court of appeals rejected Arriaga's arguments. *Id.* at ¶¶12-13, 15.

The court held that any potential misunderstanding was inconsequential in light of Arriaga's acknowledgements at the change-of-plea hearing. *Id.* at ¶12. In the plea affidavit—which was written in English and Spanish—the elements of the murder charge were explained and a factual

basis provided. *Id.* Arriaga assured the trial court that he had reviewed the plea affidavit and understood its contents. *Id.* Thus, there was “no doubt that [Arriaga] understood the elements of the murder charge at the time of his guilty plea.” *Id.*

In addition, when Arriaga made his self-defense statements, trial counsel assured the trial court that he had explained to Arriaga the concept of imperfect self-defense in relation to the facts of the case. *Id.* at ¶13. And because Arriaga had already told the trial court that he understood everything counsel explained to him, the court of appeals held that it was reasonable for the trial court to rely on counsel’s assurances that Arriaga understood how imperfect self-defense applied in his case. *Id.* (citing *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005)). Nevertheless, the court of appeals recognized that when Arriaga made his self-defense statements and said it was not his intention to harm Herrera, the trial court had a duty to “to address the conflict between this statement and the plea affidavit.” *Id.* at ¶14. The majority determined that the trial court fulfilled its responsibility by asking Arriaga whether he knew his action in pulling the trigger of the gun would cause Herrera’s death, to which Arriaga said he did. *Id.*

Arriaga also argued that his plea was invalid because he could not understand English and he never read the plea affidavit. *Id.* at ¶15. But the

court of appeals pointed out that these claims contradicted the representations Arriaga made to the trial court at the change-of-plea hearing that he did read the plea affidavit and understood everything his trial attorney told him. *Id.* The court of appeals held that Arriaga was bound by his representations absent a valid reason why they should not be believed, which Arriaga never provided. *Id.* (citing *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977)).

Finally, Arriaga argued that he received ineffective representation because trial counsel did not have an interpreter present during their private conversations about the case. *Id.* at ¶16. But again, the court of appeals noted that Arriaga acknowledged during the plea colloquy – when an interpreter was present – that he understood everything that counsel had explained to him. *Id.* at ¶18. “Had there been an insurmountable language barrier, [Arriaga] had the opportunity to raise this with the court,” but never did. *Id.*

In any event, the court of appeals held that Arriaga had failed to show prejudice. *Id.* at ¶19. Based on the factual circumstances surrounding the plea – including Arriaga’s confession, the denial of his motion to suppress the confession, the fact that the victim was shot five times, including twice in the back and once in the back of the head, and the questionable applicability of a defense of imperfect self-defense – the court of appeals held that it was rational for Arriaga to accept the State’s plea offer. *Id.* at ¶20.

In a concurring opinion, Judge Pohlman agreed with the lead opinion with a single exception. *Id.* at ¶22. In her view, it was “questionable whether the [trial] court’s attempts to resolve the conflict” between Arriaga’s self-defense claims and his acknowledgements in the plea affidavit “were successful.” *Id.* Nevertheless, she concurred in the result because she agreed that Arriaga failed to show prejudice. *Id.* at ¶25.

SUMMARY OF ARGUMENT

Arriaga challenges the court of appeals’ decision affirming the district court’s grant of summary judgment in favor of the State and dismissing his post-conviction petition.

Point I. Arriaga initially alleged—without particularity—that his guilty plea was not knowingly and voluntarily entered. But after the State filed its summary judgment motion, Arriaga claimed in his opposition memorandum that his plea was invalid because he was never informed that the absence of imperfect self-defense is an essential element of murder. But it is well-established that a party may not add new claims in a memorandum opposing summary judgment. Because Arriaga waited until his opposition to summary judgment to raise this specific invalid guilty plea argument, he never properly presented it to the district court for consideration. And the district court neither considered nor ruled on that version of Arriaga’s invalid

guilty plea claim. It was therefore never properly preserved for appellate review.

Point II. In any event, Arriaga's guilty plea was knowing and voluntary. The record of the change-of-plea hearing shows that all of the constitutional prerequisites for a knowing and voluntary plea were satisfied. And Arriaga has not affirmatively shown that his plea was unknowing or involuntary. He argues that because he stated he defended himself, but no one explained to him the implications of an imperfect self-defense claim, that he did not have a meaningful understanding of the murder charge. But the absence of imperfect self-defense is not an element of murder at the plea-taking stage.

In addition, trial counsel assured the trial court that he discussed imperfect self-defense with Arriaga, and Arriaga never objected to counsel's assurance. The presumption is that counsel provided Arriaga with an adequate explanation of imperfect self-defense. The trial court was entitled to rely on counsel's assurance. Arriaga also claims that his plea is invalid because he did not read the plea affidavit and did not understand what his attorney told him. But these allegations are contradicted by Arriaga's acknowledgements at the change-of-plea hearing. Arriaga is bound by those acknowledgements.

Point III. Arriaga argues that his attorney was ineffective for not having a Spanish-language interpreter present during their private conversations. He alleges that he therefore misunderstood counsel's advice about the guilty plea. But the record contradicts Arriaga's claim. When the trial court asked him through an interpreter if he understood everything trial counsel talked to him about, Arriaga said he did. Arriaga is bound by his statement.

In any event, counsel met with Arriaga in private on multiple occasions and Arriaga never complained that he was unable to understand what counsel said. He told the trial court that he understood everything counsel told him. The strong presumption is that counsel made a reasonable decision that Arriaga's command of the English language was sufficient for him to adequately comprehend the substance of their discussions without the aid of an interpreter.

And even if counsel was deficient in this respect, Arriaga cannot show prejudice. First, on the facts of his case, Arriaga has not shown that, but for counsel's alleged deficiency, it would have been rational for him to insist on going to trial instead of pleading guilty. Second, he alleges that he believed counsel told him that he had already been found guilty, that if he won at trial, he would still go to prison, and that he had no choice but to plead guilty. But

all of these alleged misunderstandings were cured at the change-of-plea hearing. Yet, Arriaga still pleaded guilty. In other words, any deficiency on trial counsel's part did not affect Arriaga's decision to plead guilty.

ARGUMENT

I.

Arriaga's claim that his self-defense statements negated an element of his guilty plea to murder is unpreserved because it was raised for the first time in his opposition to the State's summary judgment motion and was never considered by the district court.

In "order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶14, 48 P.3d 968. "Additionally, a party that makes an objection based on one ground does not preserve any alternative grounds for objection for appeal." *Oseguera v. State*, 2014 UT 31, ¶10, 332 P.3d 963.

In his second amended petition, Arriaga never raised the claim that his plea was invalid because his self-defense statements negated an essential element of the murder charge or that no one explained to him the implications of a defense of imperfect self-defense at trial. R446-50, 1108-12; *see also* Pet's Brief at 13-18. Rather, he argued that his plea was not knowing and voluntary because he did not understand that he was innocent until proven

guilty, “that he did not have to plead guilty,” and that “winning at trial would mean no prison time.” R448. The closest he came to alleging the invalid guilty plea claim he now raises on appeal was when he stated that his self-defense claim shows he did not agree that he committed murder. R448. But Arriaga never predicated his claim on the theory that no one ensured that he understood that, as an element of the crime of murder, the State would have to disprove the existence of imperfect self-defense beyond a reasonable doubt, or that a successful imperfect self-defense claim at trial would defeat the murder charge and result in a manslaughter conviction.

Arriaga first raised this theory in his opposition to the State’s summary judgment motion. R1108-12. But it is well-settled that a “plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah’s pleading requirements.” *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶31, 48 P.3d 895; *see also Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶20 n.19, 243 P.3d 1275 (same). In other words, a specific claim for relief raised for the first time in an opposition memorandum is procedurally improper and, by definition, is an argument not raised in a manner that allows a court to consider it. Appellate courts will decline to address such an issue “as it was never properly raised below.” *Id.*

Because Arriaga waited until his opposition to summary judgment to raise his alternative invalid guilty plea argument, he never properly presented it to the district court for consideration. And, in fact, the district court neither considered nor ruled on it. R1262-70. The court only ruled on the invalid guilty plea claim Arriaga pleaded in his second amended petition. R1269-70. Thus, Arriaga never properly preserved his invalid guilty plea claim predicated on the trial court's alleged failure to ensure that he understood the implications of his self-defense claim or that the absence of imperfect self-defense was an element of the murder charge. *See Gowe v. Intermountain Healthcare, Inc.*, 2015 UT App 105, ¶9 n.2, 356 P.3d 683 ("Presentation of one argument or theory to the district court does not preserve for appeal any alternative arguments, even regarding the same issue.").

II.

The court of appeals correctly affirmed the district court's grant of summary judgment on Arriaga's invalid guilty plea claim because all the constitutional prerequisites for a knowing and voluntary plea were met and Arriaga has not shown otherwise.

In any event, the court of appeals correctly determined that Arriaga failed to show that his guilty plea was invalid. To show that his plea was invalid, Arriaga must establish that it was entered in violation of either the

state or federal constitutions. *See* Utah Code Ann. § 78B-9-104(1)(a); *see also* *Salazar v. Warden, Utah State Prison*, 852 P.2d 988, 991 n.6 (Utah 1993) (on “collateral attack of a conviction, the petitioner must show a constitutional violation to obtain relief”). That is, he must demonstrate that his guilty plea was not entered knowingly and voluntarily. “A plea is not knowing and voluntary when the defendant ‘does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.’” *State v. Alexander*, 2012 UT 27, ¶29, 279 P.3d 371 (quoting *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976)).

And to obtain post-conviction relief, Arriaga must also show prejudice. Utah Code Ann. § 78B-9-104(2) (“The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.”). To do so, Arriaga “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial and that such a decision would have been rational under the circumstances.” *Ramirez-Gil v. State*, 2014 UT App 122, ¶8, 327 P.3d 1228 (citations and internal quotation

marks omitted); *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

A. All the constitutional prerequisites for a valid guilty plea were satisfied.

A constitutionally valid guilty plea is “one that has a factual basis for the plea and ensures that the defendant understands and waives his constitutional right against self-incrimination, the right to a jury trial, and the right to confront witnesses.” *Nicholls v. State*, 2009 UT 12, ¶20, 203 P.3d 976; *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) (“A defendant who enters ... a [guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.”). “To have a complete understanding of the charge ... a defendant must possess ‘an understanding of the law in relation to the facts.’” *Alexander*, 2012 UT 27 at ¶29 (citations omitted); *see also Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (“[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”). “In determining whether a defendant understands the law in relation to the facts, courts review whether the defendant understood the ‘critical’ or ‘essential’ elements of the crime to which he pled guilty.” *Id.* at ¶30.

Here, all the constitutional prerequisites for a valid guilty plea were met. Among others, Arriaga's rights against self-incrimination, to a speedy and public trial before an impartial jury, and to confront witness were explained to him in the plea affidavit. R81-84. Arriaga acknowledged that he understood these rights and that he would be waiving them by pleading guilty. R84. In addition, the trial court explained these rights to Arriaga and informed him that he would be giving them up if he pleaded guilty. R411. Arriaga acknowledged that he understood this. R411.

Arriaga also had an understanding of the law in relation to the facts. First, the plea affidavit explained—and Arriaga acknowledged that he understood—that the elements of murder were that he intentionally or knowingly caused the death of another. R81, 86. Although Arriaga stated that he defended himself and did not intend to harm Herrera, he agreed that he knew that pulling the trigger of the gun would cause Herrera's death. R413-14. He therefore acknowledged that he knowingly killed Herrera.

Second, a factual basis for the plea was set forth in the plea affidavit. R81. In addition, trial counsel explained at the change-of-plea hearing that on April 4, 2010, Arriaga confronted Herrera, who had been sleeping with Arriaga's wife, that an argument and fight ensued, and that Arriaga pulled out a gun and shot Herrera, killing him. R413. The plea affidavit's and the

trial court's explanations of the elements of the crime and the factual basis counsel provided gave Arriaga an understanding of the law in relation to the facts by informing him that he was guilty of murder because (1) he knowingly (2) caused the death of another. *See* Utah Code Ann. § 76-5-203(2)(a) ("Criminal homicide constitutes murder if ... the actor intentionally or knowingly causes the death of another."). Accordingly, all the requirements for a constitutionally valid guilty plea were met in Arriaga's case.

B. The court of appeals correctly determined that Arriaga failed to show that his guilty plea was unknowing or involuntary.

Arriaga nevertheless argues that his guilty plea was not valid. *See* Pet's Brief at 12-33. As explained, for a guilty plea to be knowing and voluntary, a defendant must have an adequate understanding of the essential elements of the crime he is pleading guilty to. *See Alexander*, 2012 UT 27, ¶30. Arriaga argues that, because he asserted that he defended himself, the State's burden to disprove his self-defense claim became an essential element of the murder charge. *See* Pet's Brief at 13, 16-18. But, he contends, no one ever informed him that the absence of imperfect self-defense was an element of the murder charge, that the State would have to disprove imperfect self-defense if the case went to trial, or that a successful imperfect self-defense claim would defeat the murder charge at trial and result in a manslaughter conviction. *Id.* This failure, Arriaga argues, shows that he did not have an adequate

understanding of the essential elements of the murder charge. *Id.* at 13, 18. He therefore contends that his guilty plea was not knowing and voluntary. *Id.* at 18. Arriaga is mistaken.

First, Arriaga’s central premise is incorrect. The elements of murder – which Arriaga acknowledged he understood – are that he intentionally or knowingly caused the death of another. R81, 414; *see also* Utah Code Ann. § 76-5-203(2)(a) (“Criminal homicide constitutes murder if ... the actor intentionally or knowingly causes the death of another.”). “Absence of self-defense is not an element of a homicide offense. As a matter of statutory construction, § 76-5-201 does not make absence of self-defense a *prima facie* element of a homicide crime. Rather, self-defense is a *justification* for a killing and a ‘defense to prosecution.’” *State v. Knoll*, 712 P.2d 211, 214 (Utah 1985) (citing Utah Code Ann. §§ 76-2-401 and -402) (emphasis in original); *but see State v. Low*, 2008 UT 58, ¶45, 192 P.3d 867 (in trial context a “necessary element of a murder conviction is the absence of affirmative defenses”). Thus, merely because the trial court did not ask Arriaga “if he understood the implications of his self-defense assertions,” Pet’s Brief at 17, does not mean that he did not have an adequate understanding of the elements of the murder charge. And by specifically admitting that when he pulled the trigger on the gun he knew he would cause Herrera’s death, Arriaga did understand

the elements of the murder charge. R414.

Second, even assuming that the absence of self-defense is an element of the murder charge, Arriaga's guilty plea was still knowing and voluntary. When Arriaga asserted, "I defended myself. It was not my intention. I never thought about hurting him," counsel immediately assured the trial court—without objection from Arriaga—that he had discussed imperfect self-defense with him. R413. The presumption is that counsel provided an adequate explanation of imperfect self-defense, including that the State bore the burden of proving the absence of self-defense at a trial, and that if an imperfect self-defense claim were successfully asserted, a murder conviction would be reduced to a manslaughter conviction. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating a "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."); *see also Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) ("When collaterally attacked, the judgment of a court carries with it a presumption of regularity."), overruled on other grounds by *Edwards v. Arizona*, 451 U.S. 477 (1981)); *Lucero v. Kennard*, 2005 UT 79, ¶24, 125 P.3d 917 ("In a proceeding where a defendant seeks to collaterally attack a court's judgment, we presume the regularity of the proceedings below."); *Price v. Turner*, 502 P.2d 121, 122 (Utah 1972) ("After one has been convicted of [a] crime the

presumption of innocence and other protections afforded an accused no longer obtain. The presumptions then are in favor of the propriety of the proceedings....”).

In finding that Arriaga’s guilty plea was knowing and voluntary, the trial court was entitled to rely on counsel’s assurances that imperfect self-defense was explained to Arriaga. The United States Supreme Court has held that, while the “court taking a defendant’s plea is responsible for ensuring ‘a record adequate for any review that may be later sought,’ we have never held that the judge must himself explain the elements of each charge to the defendant on the record.” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (*quoting Boykin v. Alabama*, 395 U.S. 238, 244 (1969)). “Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.” *Id.*

Where a “defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.” *Id.* (emphasis added); *see also Henderson v. Morgan*, 426 U.S. 637, 647 (1976) (“Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that

the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.”); *Salazar*, 852 P.2d at 992 (court considering challenge to guilty plea “is not limited to the record of the plea hearing but may look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea”).

Thus, because Arriaga acknowledged that he understood everything counsel talked to him about and that he was satisfied with his attorney’s assistance, R86, 412, the trial court was entitled to rely on counsel’s assurances that he explained imperfect self-defense to Arriaga. Arriaga has therefore not shown that the trial court failed to ensure that he understood the implications of his self-defense claim, or that the district court erred in concluding that Arriaga’s plea was knowing and voluntary.

Arriaga also asserts that the circumstances surrounding his guilty plea show that it was not knowing and voluntary. *See* Pet’s Brief at 18-20. Specifically, he argues that because he did not speak English, his trial counsel did not speak Spanish, and no Spanish-language interpreter was present during their private conversations, he did not fully understand counsel’s advice. *Id.*

at 19. He alleges, for example, that he believed counsel told him he had already been found guilty, there was no need for a trial, if he won at trial he would still go to prison, and he had no choice but to plead guilty. *Id.* He also asserts that he did not understand that he was innocent until proven guilty. *Id.* And he alleges that his misunderstandings were compounded by the fact that he did not read the plea affidavit and at the change-of-plea hearing he was still operating under what he understood from trial counsel. *Id.* at 20. Because he “completely misunderstood the nature of his guilty plea” the district court erred in ruling that it was knowingly and voluntarily entered. *Id.* Again, Arriaga is mistaken.

The court of appeals correctly concluded that Arriaga’s guilty plea was knowing and voluntary because any misunderstandings were cured at the change-of-plea hearing. First, while Arriaga states that he never read the plea affidavit, *id.*, his claim is directly contradicted by the signed plea affidavit itself. There Arriaga specifically acknowledged that he either read the plea affidavit or had it read to him by his attorney, he and his attorney fully discussed its contents, he understood everything they talked about, and he understood—and adopted as his own—all the statements in the plea affidavit. R82, 86, 412-13.

It is well-settled that “[s]olemn declarations in open court carry a

strong presumption of verity” that create a “formidable barrier in any subsequent collateral proceedings.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see also United States v. Scalzo*, 764 F.3d 739, 746 (7th Cir. 2014) (“But having admitted the facts in the Information through his plea agreement and through his answers to the court during his change-of-plea colloquy, [defendant] may not now deny them.”); *Burket v. Angelone*, 208 F.3d 172, 191 (4th Cir. 2000) (absent clear and convincing evidence to the contrary, defendants are bound their representation when pleading guilty); *Ramos v. Rogers*, 170 F.3d 560, 566 (6th Cir. 1999) (a “defendant must be bound to the answers he provides during a plea colloquy. Allowing petitioner to withdraw his plea would essentially put this court in the position of ... condoning the practice by defendants of providing untruthful responses to questions during plea colloquies. This we simply will not do.”); *Sanchez v. United States*, 50 F.3d 1448, 1455 (9th Cir. 1995) (defendant is bound by his answers during the plea colloquy); *Commonwealth v. Brown*, 48 A.3d 1275, 1277 (Pa. 2012) (“A defendant is bound by the statements made during the plea colloquy, and a defendant may not later offer reasons for withdrawing the plea that contradict statements made when he pled.”).

Other than his bare assertion, nothing in the record suggests that the representations in Arriaga’s plea affidavit and his answers to questions asked

by the trial court during the plea colloquy were anything other than truthful and voluntary. *See Burket*, 208 F.3d at 191 (defendant bound by representations where he “presented no evidence of sufficient evidentiary force, e.g., evidence that he was forced, coerced, threatened, or improperly induced into pleading guilty to demonstrate that his representations were untruthful or involuntary.”). “But when a party takes a clear position in a [statement], ... he may not thereafter raise an issue of fact by his own affidavit which contradicts his [statement], unless he can provide an explanation of the discrepancy.” *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983); *see also Brinton v. IHC Hosps., Inc.*, 973 P.2d 956, 973 (Utah 1998) (“An affidavit, as a matter of law, cannot contradict [a] prior sworn statement ... which was clear and unequivocal, [unless] the affidavit [] state[s] an adequate reason for the contradiction.”). “A contrary rule would undermine the utility of summary judgment as a means for screening out sham issues of fact.” *Id.* at 1173.

Thus, Arriaga’s affidavit contradicting the acknowledgements he made when he pleaded guilty is insufficient to create a genuine factual dispute. R486-87. Indeed, if all it took to collaterally challenge a guilty plea is to simply contradict what the record firmly establishes—particularly a petitioner’s own statements—then virtually all guilty pleas would be subject to collateral attack when a petitioner avers that he did not mean what he said

at the change-of-plea hearing. *See United States v. Lemaster*, 403 F.3d 216, 221-11 (4th Cir. 2005) (affirming summary dismissal of collateral attack on guilty plea where defendant's allegations merely contradicted his sworn statements during his plea colloquy). Accordingly, Arriaga is bound by his plea affidavit and change-of-plea hearing representations absent "an adequate reason for the contradiction," which he has not provided. *Brinton*, 973 P.2d at 973.

Second, regardless of whether Arriaga misunderstood his counsel's advice, the trial court's plea colloquy and the plea affidavit remedied any misunderstandings Arriaga may have had about the consequences of his plea. *See Ramirez-Gil*, 2014 UT App 122, ¶10 (holding correct statements in plea affidavit adequately substituted for any insufficient explanations by counsel); *Rhinehart v. State*, 2012 UT App 322, ¶8, 290 P.3d 921 (misunderstanding from counsel's advice "was cured at the plea hearing when Rhinehart repeatedly acknowledged under oath that she understood the consequences of her plea."); *Ramos v. Rogers*, 170 F.3d 560, 565 (6th Cir. 1999) ("[T]he state trial court's proper colloquy can be said to have cured any misunderstanding [defendant] may have had about the consequences of his plea."). Arriaga acknowledged that he understood that he was "presumed innocent until the State prove[d] that [he was] guilty of the charged crime." R83, 411. He understood that he did not have to plead guilty if that was not

what he wanted to do. He specifically acknowledged in the plea affidavit, "If I choose to fight the charges against me, I need only plead 'not guilty,' and my case will be set for a trial." R83. In addition, Arriaga acknowledged that no one was forcing him or threatening him to plead guilty. R86, 414. Thus, Arriaga knew that he did not have to plead guilty if that was not what he wanted to do.

Arriaga also knew that winning at trial meant no prison time. The plea affidavit informed him that a guilty verdict involved a finding that he committed a crime, a not guilty verdict meant he did not commit a crime, and punishment resulted from being found guilty, not from being found not guilty. R83-84. In addition, at the time Arriaga pleaded guilty he was not a novice to the criminal justice system and had been through the plea process before. R1047-60. In 2003 he was charged with several class A and class B misdemeanors. R1047-48. He ultimately pleaded guilty to simple assault, a class B misdemeanor, and the rest of the charges were dismissed. R1047-48, 1053. Arriaga knew when he was sentenced that he was being punished only for the crime for which he was guilty and not the offenses that were dismissed. R1053. Then in 2004, he was charged with several third-degree felonies and a class A misdemeanor. R1056. Based on a plea agreement with the State, he pleaded guilty to three third-degree felonies. R1056, 1059-60.

Again, Arriaga was aware at that time that he was only sentenced for the crimes he was guilty of and not the offenses that were dismissed.

Having been charged with criminal offenses on two prior occasions and punished only for the offenses he pleaded guilty to, Arriaga was necessarily aware that if he were found not guilty at a trial he would not be punished. Thus, based on his acknowledgements in the plea affidavit and his prior experience in the criminal justice system, Arriaga understood when he pleaded guilty that winning at trial would mean no prison time.

* * * * *

In sum, all of the prerequisites for a constitutionally valid guilty plea were satisfied in Arriaga's case and he has not shown otherwise. The trial court was entitled to rely on counsel's assurance that he discussed imperfect self-defense with Arriaga. And regardless of whether Arriaga misunderstood his counsel's advice, any misunderstanding was cured by the trial court and the plea affidavit. Accordingly, the court of appeals correctly determined that Arriaga's guilty plea was knowing and voluntary.

III.

The court of appeals correctly held that Arriaga's trial counsel was not ineffective during the plea process.

Arriaga argues that the district court erred when it denied his claim that trial counsel was ineffective for not having a Spanish-language inter-

preter present when they discussed the guilty plea. *See* Pet's Brief at 34-35. He asserts that because no interpreter was present, he believed his trial counsel told him that there was no need for a trial because he had already been found guilty; that even if he prevailed at a trial, he would still go to prison; and that he had to plead guilty that day. *Id.* at 36. He also alleges that he did not understand that he did not have to plead guilty and that he was innocent until proven guilty. *Id.* According to Arriaga, but for counsel's errors, he would have rejected the state's plea offer and insisted on going to trial. *Id.* at 32-33, 41.

A petitioner who pleads guilty has an especially high burden in establishing ineffective assistance of counsel. The "plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases ... where witnesses and evidence were not presented in the first place." *Premo v. Moore*, 562 U.S. 115, 132 (2011). Thus, as a petitioner claiming counsel ineffectiveness in the context of a guilty plea, Arriaga has a "substantial burden ... to avoid the plea." *Id.* To succeed, Arriaga must "show that counsel's performance was deficient" and that the "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either Strickland element defeats Arriaga's claim. *See id.* at 687, 697. Here, the court

of appeals correctly determined that Arriaga failed to establish either deficient performance or prejudice. *Arriaga*, 2018 UT App 160, ¶¶18-20.

A. Arriaga has not shown that trial counsel’s decision not to have a Spanish-language interpreter present during their private discussions was unreasonable.

To prove deficient performance Arriaga must show that counsel’s actions “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Because of the “difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689; *see also id.* at 687 (counsel “is strongly presumed to have ... made all significant decisions in the exercise of reasonable professional judgment.”). This standard is appropriately deferential, recognizing that “[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011). And deference to counsel’s decisions is “all the more essential when reviewing the choices an attorney made at the plea bargain stage.” *Premo*, 562 U.S. at 125. Here, Arriaga has not shown that counsel performed deficiently.

Arriaga’s claim that he could not understand what his attorney told him during their private discussions is contradicted by the record. R1265-66.

Arriaga acknowledged that he met with counsel for a few minutes at each of the fourteen hearings in his case. R13, 722-31. They also met together “for approximately an hour at the jail prior to trial.” R13. And, as trial counsel explained to the trial court at the change-of-plea hearing, he and Arriaga had been working together for over a year and Arriaga had assisted him in preparing for the preliminary hearing and filing a motion to suppress. R412.

With respect to all of these private meetings, Arriaga never complained to counsel or the trial court that he could not adequately understand what was being discussed. Indeed, it is difficult to imagine that trial counsel and Arriaga could discuss the case at the jail for an hour if Arriaga was truly unable to adequately communicate. This “failure to complain earlier about a problem that would have been obvious to [Arriaga]—an almost complete inability to communicate with his lawyer—calls into question whether such a problem really existed.” *Gallo-Vasquez v. United States*, 402 F.3d 793, 799 n.1 (7th Cir. 2005). Moreover, the reasonableness of “[c]ounsel’s actions are usually based, quite properly, on ... information supplied by the defendant.” *Strickland*, 466 U.S. at 691. In light of the strong presumption that counsel “made all significant decisions in the exercise of reasonable professional judgment,” without any indication from Arriaga that he was not adequately understanding what counsel was saying, trial counsel could reasonably

conclude that a Spanish-language interpreter was not necessary during their private conversations. *See Strickland*, 466 U.S. at 687, 689.

In addition, as explained, the contents of the plea affidavit and the trial court's questioning during the plea colloquy also contradict Arriaga's claims that he misunderstood counsel's advice on the presumption of innocence, whether he would still be punished if he were acquitted, and whether he could insist on going to trial. Arriaga acknowledged that he read the plea affidavit or had it read to him. R86. He acknowledged that he and his attorney fully discussed the contents of the plea affidavit, his rights, and the consequences of his guilty plea. R82, 412-13. This included a discussion of the presumption of innocence, that if Arriaga wanted to go to trial, all he had to do was plead "not guilty," and that he would be punished only if he pleaded guilty. R82-83. Arriaga further acknowledged that he understood everything in the plea affidavit, he understood everything his trial counsel talked with him about, and he was satisfied with his counsel's advice and assistance. R86, 412. Arriaga's record acknowledgements establish that he was capable of adequately communicating – and in fact did adequately communicate – with trial counsel during their private meetings.

Arriaga suggests, however, that he should not be held to his acknowledgements because he never actually read the plea affidavit and at

the time he pleaded guilty was operating under what he understood from his discussions with counsel. *See* Pet's Brief at 36. But again, as explained, it is well-settled that "[s]olemn declarations in open court carry a strong presumption of verity" that create a "formidable barrier in any subsequent collateral proceedings." *Blackledge*, 431 U.S. at 74. Other than his bare assertion otherwise, R487, Arriaga has never proffered any evidence showing that the representations he made in his signed plea affidavit and his answers to questions asked by the trial court were anything other than truthful and voluntary. Accordingly, his contradictory statements are insufficient to create a genuine factual dispute. Arriaga's acknowledgements establish that he adequately understood counsel during their private discussions. The court of appeals therefore correctly held that Arriaga failed to show "that trial counsel acted unreasonably in failing to secure an interpreter for his out-of-court consultations" with Arriaga. *Arriaga*, 2018 UT App 160, ¶18.

B. Arriaga fails to show prejudice because he has not established the rationality of rejecting the State's plea offer and insisting on going to trial, and because he pleaded guilty even after receiving full and accurate information from the trial court.

Even assuming that trial counsel performed deficiently for not having a Spanish-language interpreter present during their private discussions, Arriaga cannot show that he was prejudiced. To satisfy *Strickland*'s prejudice element in the context of a guilty plea challenge, Arriaga "must show that

there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial and that such a decision would have been rational under the circumstances." *Ramirez-Gil*, 2014 UT App 122, ¶8 (citations and internal quotation marks omitted); *see also Padilla*, 559 U.S. at 372; *Hill*, 474 U.S. at 59. In "evaluating the likelihood and rationality of a decision to reject a plea bargain and go to trial," courts "'look to the factual circumstances surrounding the plea.'" *Rippey v. State*, 2014 UT App 240, ¶14, 337 P.3d 1071 (quoting *Ramirez-Gil*, 2014 UT App 122 at ¶8).

Because this is an objective standard, a petitioner's "mere allegation that he would have insisted on trial but for his counsel's errors ... is ultimately insufficient to entitle him to relief." *United States v. Clingman*, 288 F.3d 1183, 1186 (10th Cir. 2002) (citation and internal quotation marks omitted); *see also Collazo-Collazo v. State*, 2015 UT App 111, ¶10, 349 P.3d 776 (same). Rather, Arriaga "must come forward with objective evidence that he would not have pled guilty." *Hutchings v. United States*, 618 F.3d 693, 697 (7th Cir. 2010); *see also Hill*, 474 U.S. at 60 (petitioner alleged no "special circumstances" to support contention that he placed particular emphasis on counsel's incorrect advice); *Segura v. State*, 749 N.E. 2d 496, 507 (Ind. 2001) ("[S]pecific facts, in addition to the petitioner's conclusory allegation, must establish an objective reasonable probability that competent representation would have caused the

petitioner not to enter a plea.”).

Arriaga argues that his post-conviction affidavit and his self-defense statements establish a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Pet’s Brief at 32. According to Arriaga, Herrera lunged at him before he shot the gun and therefore he had an imperfect self-defense claim. *Id.* at 41. But the facts of the case show that it was Herrera—not Arriaga—who was trying to defend himself when he allegedly lunged at Arriaga. Arriaga therefore did not have a viable imperfect self-defense claim that he could raise at trial.

s explained, in his statements to police, Arriaga repeatedly lied about having any involvement in Herrera’s death. R631, 638-40, 642, 662-66, 668-74, 676. He ultimately admitted, however, that, armed with a gun, he angrily confronted Herrera in an open field about claims that Herrera had slept with Arriaga’s estranged wife. R605, 632-33, 665, 670, 675, 680-82. Herrera denied the affair, which made Arriaga even angrier. R633, 681, 685. Arriaga told Herrera to tell the truth or he would kill him. R694-95. Arriaga pulled the gun from his waistband to get Herrera to admit to the affair. R633, 643, 682, 695. At this point, Herrera begged for forgiveness, but Arriaga said it was not the kind of thing that could be forgiven. R694. Herrera then lunged at Arriaga. R633, 643, 682, 685, 694. Arriaga shot Herrera five times, once in the abdomen,

once in the leg, twice in the small of the back, and once in the back of the head. R607. After the murder, Arriaga disposed of the gun by selling it to a man on the street. R633, 686-87. Someone walking through the field found the body and reported it to police. R614. No weapons were found on Herrera. R616.

These facts do not support an imperfect self-defense claim. Arriaga was angry, was armed with a gun, confronted an unarmed Herrera, brandished the gun, said he would kill Herrera, and told Herrera there was no forgiveness for what he had done. Only at that point did Herrera allegedly lunge at Arriaga—arguably to defend himself from being shot by Arriaga. Arriaga shot Herrera five times, including twice in the back and once in the back of the head. He then sought to cover up his actions by disposing of the weapon. No reasonable juror would believe that these “circumstances provided a legal justification or excuse” for killing Herrera. Utah Code Ann. § 76-5-203(4). That Herrera tried to defend himself by lunging at Arriaga did not undermine the fact that Arriaga had total control over the circumstances or that he shot Herrera in the back of the head. Arriaga did not defend himself; he executed Herrera.

Contrary to Arriaga’s argument, he had no viable imperfect self-defense claim that would have made rational a choice to reject the State’s plea

offer and insist on going to trial. He almost certainly would have been convicted, and going to trial would have forfeited the substantial consideration Arriaga received by pleading guilty. The court of appeals therefore correctly held that Arriaga had failed to show prejudice. *See Arriaga*, 2018 UT App 160, ¶¶19-20.

Arriaga now contends, however, that the court of appeals' prejudice holding was erroneous because the court ignored recent United States Supreme Court precedent that, he alleges, changed the prejudice analysis. *See* Pet's Brief at 39. He argues that under *Lee v. United States*, 137 S. Ct. 1958 (2017), the Supreme Court altered the counsel-ineffectiveness prejudice standard in the plea-taking context by rejecting "a per se rule that a defendant with no viable defense cannot show prejudice." Pet's Brief at 30. "*Lee* held that for attorney error that effects [*sic*] the defendant's understanding of the consequences of his plea—not attorney error that effects [*sic*] the defendant's prospects of success at trial—a defendant does not have to prove that he would have a viable defense at trial." *Id.* at 39. Consequently, because trial counsel's error in Arriaga's case went to his understanding about the plea, he has to show only that "whatever he misunderstood was important and determinative to him." *Id.* at 40. Arriaga is mistaken.

In *Lee*, the Supreme Court reiterated the difficulty in surmounting

Strickland's high bar and that "the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas.'" *Lee*, 137 S. Ct. at 1967 (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). The Court recognized that a "defendant without any viable defense will be highly likely to lose at trial." *Lee*, 137 S. Ct. at 1966. And where "a defendant has no plausible chance of acquittal at trial, it is highly likely that he will accept a plea if the Government offers one." *Id.*

Nevertheless, for some defendants—in particular *noncitizen* defendants concerned about deportation—there is often "more to consider than simply the likelihood of success at trial." *Id.* For these defendants, the "decision to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.* For *Lee*, a noncitizen, the determinative issue was deportation, not the length of incarceration he might face if he went to trial and lost. *Id.* at 1968. Because avoiding deportation was of paramount importance, losing at trial and spending significantly longer in prison than he would spend by accepting the Government's plea offer was rational for *Lee*. *Id.*

Here, however, Arriaga has not demonstrated that there was more to

consider for him—such as deportation—than the length of time he would spend in prison for his crimes. Nor has he articulated “the respective consequences of a conviction after trial and by plea” that he faced that would have changed his decision to plead guilty. He suggests that the “plea was not a significantly better deal” because only two second-degree felonies were dropped and the first-degree felony—with a fifteen years to life sentence—remained. Pet’s Brief at 41. Presumably, his argument is that he had nothing to lose by going to trial because the sentencing outcome if he lost was not much different than the sentencing outcome of his plea.

But as the Supreme Court made clear in *Lee*, courts “should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” *Lee*, 137 S. Ct. at 1967. Arriaga points to no “contemporaneous evidence” suggesting that anything other than reducing his time in prison was *the* important consideration for Arriaga. And that is precisely what he achieved by pleading guilty. While his “*post hoc* assertions” are that the plea deal did not significantly reduce the prison time he faced, the facts show otherwise. Without the dismissal of the two second-degree felonies, Arriaga would run the risk that the trial court would run his sentences consecutively.

If so, Arriaga could have potentially served up to fifteen years on each of second-degree felony convictions before he even started serving his sentence on the murder conviction. Thus, even under *Lee*, Arriaga has not shown that he suffered any prejudice as a result of his trial counsel's alleged deficiencies.

In any event, Arriaga cannot show prejudice for an additional reason. Even assuming trial counsel's alleged deficiencies caused Arriaga to misunderstand counsel's advice, any misunderstanding was cured at the change-of-plea hearing – and yet Arriaga still chose to plead guilty. Arriaga asserts that because no interpreter was present during their out-of-court conversations about the guilty plea, he incorrectly believed his trial counsel told him that there was no need for a trial because he had already been found guilty; that even if he prevailed at a trial, he would still go to prison; and that he had to plead guilty that day. *See* Pet's Brief at 36. He also alleges that he did not understand that he did not have to plead guilty and that he was innocent until proven guilty. *Id.*

But Arriaga acknowledged at the change-of-plea hearing that he understood that he was “presumed innocent until the State prove[d] that [he was] guilty of the charged crime.” R83, 411. His acknowledgements also show that he knew that winning at trial would mean no prison time. The plea affidavit informed Arriaga that a guilty verdict involved a finding that he

committed a crime, that a not guilty verdict meant he did not commit a crime, and that punishment resulted from being found guilty, not from being found not guilty. R83-84. Because Arriaga acknowledged that he understood the contents of the plea affidavit, R82, 86, 412-13, he necessarily understood that punishment would result only if he were found guilty at trial, not if he were found not guilty.

In addition, as shown, Arriaga's prior extensive experience with the criminal justice system suggests that he knew that winning at trial would mean no prison time. As explained, in his other criminal matters where he pleaded guilty, Arriaga was aware that he was only sentenced for the crimes he pleaded guilty to, not the crimes that were dismissed as part of the plea agreement. R1047-48, 1053, 1056, 1059-60. Based on his prior experience in the criminal justice system and his acknowledgements in the plea affidavit, Arriaga understood that winning at trial would mean no prison time.

Arriaga also knew that he had not yet been found guilty and that he did not have to plead guilty if that was not what he wanted to do. Arriaga acknowledged in the plea affidavit, "I know that if I do not plead guilty ..., I am presumed innocent until the State proves that I am guilty of the charged crime. If I choose to fight the charges against me, I need only plead 'not guilty,' and my case will be set for a trial." R83. In addition, the trial court

asked Arriaga to sign the plea affidavit, but only if that was what he wanted to do. R415. Thus, Arriaga was aware that if he did not want to plead guilty, he did not have to. In other words, any alleged misunderstandings as a result of counsel's alleged deficiencies made no difference to the outcome of the proceeding. Accordingly, Arriaga suffered no prejudice.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Utah Court of Appeals.

Respectfully submitted on April 10, 2019.

SEAN D. REYES
Utah Attorney General

/s/ Mark C. Field

MARK C. FIELD
Assistant Solicitor General
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 10,709 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☒ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Mark C. Field

MARK C. FIELD
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 10, 2019, the Brief of Respondent was served upon counsel of record for Petitioner by ☐ mail ☒ email ☐ hand-delivery at:

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

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

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

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

/s/ Melissa Walkingstick Fryer

ADDENDA

ADDENDUM A

Arriaga v. State,
2018 UT App 160, 436 P.3d 222

THE UTAH COURT OF APPEALS

BENJAMIN ARRIAGA,
Appellant,
v.
STATE OF UTAH,
Appellee.

Opinion
No. 20150911-CA
Filed August 23, 2018

Third District Court, West Jordan Department
The Honorable Charlene Barlow
No. 120404690

Emily Adams, Attorney for Appellant¹
Sean D. Reyes and Mark C. Field, Attorneys
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which
JUDGE MICHELE M. CHRISTIANSEN FORSTER concurred. JUDGE JILL
M. POHLMAN concurred in part and concurred in the result in
part, with opinion.

1. Postconviction proceedings are civil in nature, and defendants who bring such petitions do not have the right to appointed counsel. *See Hutchings v. State*, 2003 UT 52, ¶ 20, 84 P.3d 1150. But when Appellant filed his postconviction petition pro se, he requested that counsel be appointed, and the district court granted this request. If a petition is not summarily dismissed, the court may appoint counsel “on a pro bono basis” to represent the defendant. *See Utah Code Ann. § 78B-9-109(1)* (LexisNexis 2012). We appreciate the district court’s decision to appoint counsel in this case because it has helped us better understand Appellant’s claims and arguments. And we appreciate the willingness of appellate counsel, as well as that of James D. Gilson, who represented Appellant below, to accept these appointments.

ORME, Judge:

¶1 Appellant Benjamin Arriaga (Defendant) appeals the district court's order granting the State's summary judgment motion and denying his petition for postconviction relief. Defendant pled guilty to murder, a first degree felony, and was sentenced to prison in 2011. He now challenges his guilty plea on the grounds that it was not knowing or voluntary and that he received ineffective assistance of counsel. We affirm the summary judgment denying his petition for postconviction relief.

BACKGROUND

¶2 Defendant admitted to police that, on April 4, 2010, he shot and killed the man (Victim) who was having an affair with his wife. He explained that, having discovered the affair, he angrily confronted Victim in a park. Defendant then pointed a gun at Victim, intending to scare him into admitting to the affair. When Victim admitted to sleeping with Defendant's wife, Defendant replied that "this kind of thing is not forgiven." Defendant said that Victim then lunged for the gun, and a struggle ensued. Defendant told police that the gun discharged several times in the course of the struggle, and Victim was shot once in the abdomen, once in the leg, twice in the back, and once in the back of the head.

¶3 The State charged Defendant with murder, a first degree felony, *see* Utah Code Ann. § 76-5-203(3)(a) (LexisNexis 2017); the purchase, transfer, possession, or use of a firearm by a restricted person, a second degree felony, *see id.* § 76-10-503(2)(a); and obstruction of justice, a second degree felony, *see id.* § 76-8-

306(3)(a).² Defendant entered into a plea bargain, agreeing to plead guilty to murder if the other charges were dismissed. At the plea hearing, Defendant acknowledged he knew that by pleading guilty he was waiving his constitutional rights, including the right to the presumption of innocence and the right to a jury trial.³ Defendant further acknowledged that he understood everything that his counsel had discussed with him, including the plea affidavit. The court then inquired whether Defendant had any questions about the plea affidavit, to which Defendant replied that he did not.

¶4 After trial counsel described the factual basis for Defendant's murder charge, Defendant made statements implying that he acted in self-defense:

[TRIAL COUNSEL]: Your Honor, on April 4th 2010 in Salt Lake County [Defendant] confronted a man who had been sleeping with his wife. An argument and subsequent fight took place at which time he pulled out a firearm and he shot the man killing him.

THE COURT: Is that what happened, [Defendant]?

2. Because the statutory provisions in effect at the relevant time do not differ in any material way from those now in effect, we cite the current version of the Utah Code for convenience.

3. Defendant's primary language at the time of the plea hearing was Spanish. To ensure Defendant understood the court proceedings, interpreters were present and the plea affidavit was written in both English and Spanish. However, an interpreter was not present during out-of-court discussions between Defendant and his trial counsel.

THE DEFENDANT: I defended myself. It was not my intention. I never thought about hurting him.

....

[TRIAL COUNSEL]: Your Honor, we had—discussed the imperfect self-defense concept and that he did pull out a gun to get the man to confess to sleeping with his wife. And that the man charged at him but he was unarmed. So that is why he used a gun.

THE COURT: I will find that that is a sufficient factual basis.

THE DEFENDANT: He was drugged and drunk and I didn't know if he had a weapon, a knife and that's why I—

After Defendant made these statements, the district court clarified with Defendant that he intentionally killed Victim by asking Defendant whether he knew that by pulling the trigger he would cause Victim's death. Defendant acknowledged that he did. After entering his guilty plea, Defendant asked to be sentenced immediately and waived the right to withdraw his plea.

¶5 After a few months in prison, Defendant filed a petition under the Post-Conviction Remedies Act, *see* Utah Code Ann. §§ 78B-9-101 to -405 (LexisNexis 2012), arguing that his plea was involuntary because his attorney explained his plea to him without the assistance of an interpreter. He also raised an ineffective-assistance-of-counsel claim on that same basis, specifically arguing that counsel's failure to use an interpreter resulted in Defendant not knowing that he had a valid self-defense argument and could have taken his case to trial. The State filed a response to his petition, asserting that Defendant

had not carried his burden of establishing by a preponderance of the evidence that his trial counsel's performance was deficient and prejudicial. The State also contended that the nature of Defendant's plea was both voluntary and knowing because any misunderstandings regarding his plea that arose out of his communications with his attorney were cured by his plea affidavit and plea colloquy, both of which had been translated into Spanish.

¶6 An evidentiary hearing was held, but suspended, and in the meantime, the State moved for summary judgment. Granting the State's motion, the district court concluded that Defendant had failed to show that trial counsel's performance was deficient and that all constitutional prerequisites for a valid guilty plea had been satisfied in Defendant's case. Defendant appeals.

ISSUES AND STANDARDS OF REVIEW

¶7 Defendant contends that the district court erred in granting the State's motion for summary judgment for two reasons. First, he argues that his plea was not knowing or voluntary, asserting he did not understand the essential elements of his murder charge at the time of his plea. Second, he argues that his trial counsel's performance was deficient for failure to use an interpreter during their out-of-court discussions.

¶8 "We review an appeal from an order dismissing or denying a petition for postconviction relief for correctness without deference to the lower court's conclusions of law." *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115 (citation and internal quotation marks omitted). "Similarly, we review a grant of summary judgment for correctness, granting no deference to the lower court." *Ross v. State*, 2012 UT 93, ¶ 18, 293 P.3d 345 (brackets, citation, and internal quotation marks omitted).

ANALYSIS

I. Defendant's Plea

¶9 Defendant contends that his self-defense statements and the circumstances surrounding his guilty plea demonstrate that he did not understand the elements of the murder charge against him, which rendered his plea unknowing and involuntary.⁴ For a guilty plea to be valid under the Due Process Clause of the Fourteenth Amendment, it must be made “voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (citation and internal quotation marks omitted). For that reason, “[i]t is the responsibility of the district court to ensure that defendants enter pleas knowingly and voluntarily.” *State v. Candland*, 2013 UT 55, ¶ 14, 309 P.3d 230. And rule 11 of the Utah Rules of Criminal Procedure provides courts with a “roadmap for ensuring that defendants receive adequate notice of their rights and for examining defendants’ subjective understanding and intent.” *Id.*

¶10 Rule 11 states that a district court may not accept a guilty plea until it has found that the defendant understands his constitutional rights, including his right to the presumption of innocence and his right to a jury trial. Utah R. Crim. P. 11(e)(3). Additionally, the court must ensure that the defendant knows

4. The State argues that Defendant’s involuntary plea claim is procedurally barred as Defendant did not raise it in a motion to withdraw his plea before being sentenced. *See* Utah Code Ann. § 78B-9-106(1)(c) (LexisNexis Supp. 2017) (stating that a person is ineligible for postconviction relief on any ground that “could have been but was not raised at trial or on appeal”). Defendant’s argument is unsuccessful in this appeal, so we do not dwell on whether it is also procedurally barred.

“the nature and elements of the offense to which the plea is entered.” *Id.* R. 11(e)(4)(A). It is not enough for the district court to give notice to the defendant; the court must also find that “the defendant *actually* understood the charges, the constitutional rights, and the likely consequences of the plea and voluntarily chose to plead guilty.” *Candland*, 2013 UT 55, ¶ 16 (emphasis added).

¶11 Defendant asserts that he lacked a meaningful understanding of the murder charge, and he points to his self-defense statements during the plea colloquy to demonstrate this lack of understanding. But the transcript of the plea colloquy shows that any misunderstanding Defendant may have had was inconsequential given his acknowledgements during the plea colloquy that he understood the contents of his plea affidavit and that he understood everything counsel had explained to him.

¶12 Within the plea affidavit, prepared in both English and Spanish, Defendant stated that the elements of the crime for which he was pleading guilty were that “[Defendant] did knowingly and intentionally cause[] the death of another.” He also stated that the facts providing a basis for these elements were that on April 4, 2010, he “confront[ed] a man who slept [with his] wife” and “fought with the man and subsequently shot him, killing him.” Based on Defendant’s assurances in the plea colloquy that he had reviewed and understood his plea affidavit, there is no doubt that Defendant understood the elements of the murder charge at the time of his guilty plea.

¶13 Defendant also argues that his self-defense claims “negated an essential element of the murder charge and provided objective evidence that he did not understand the proceedings.” When a defendant puts an affirmative defense at issue during trial, “the State carries the burden of proving beyond a reasonable doubt each element of an offense, including

the absence of an affirmative defense[.]” *State v. Low*, 2008 UT 58, ¶ 45, 192 P.3d 867 (citation and internal quotation marks omitted). Accordingly, a “necessary element of a murder conviction is the absence of affirmative defenses.” *Id.* When Defendant made his statements indicating that he acted in self-defense, his trial counsel explained to the court that the concept of imperfect self-defense had been explained to Defendant, specifically in relation to the facts of his case, including counsel’s assessment that it was not a viable defense.⁵ And “[w]here a defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.” *Bradshaw v. Stumpf*, 545

5. Imperfect self-defense “is an affirmative defense to a charge of murder” in cases where “the defendant caused the death of another . . . under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.” Utah Code Ann. § 76-5-203(4)(a) (LexisNexis 2017). And so the “difference between perfect self-defense and imperfect self-defense is the determination of whether the defendant’s conduct was, in fact, legally justifiable or excusable under the existing circumstances.” *State v. Low*, 2008 UT 58, ¶ 32, 192 P.3d 867 (citation and internal quotation marks omitted). *Cf.* Utah Code Ann. § 76-2-402(1)(b) (LexisNexis 2017) (providing that, in cases of perfect self-defense, lethal force is justified “only if the person reasonably believes that force is necessary to prevent death or serious bodily injury . . . as a result of another person’s imminent use of unlawful force”). But the use of lethal force is not justified when the defendant “initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant” or when the defendant “was the aggressor” and did not withdraw from the encounter. *Id.* § 76-2-402(2)(a)(i), (iii).

U.S. 175, 183 (2005). Trial counsel assured the district court that the concept of imperfect self-defense had been explained to Defendant, and where Defendant had previously told the court he understood everything counsel had explained to him, it was reasonable for the court to conclude that Defendant understood how the imperfect self-defense theory applied in his case. Furthermore, with the benefit of an interpreter during the plea colloquy, Defendant made no objection to trial counsel's assurance that Defendant understood.

¶14 We do, however, recognize that Defendant's statements suggesting possible self-defense did raise a question of whether he intended to kill Victim because he stated, "It was not my intention. I never thought about hurting him." It was therefore necessary for the court to address the conflict between this statement and his plea affidavit. *See State v. Maguire*, 830 P.2d 216, 217 (Utah 1991) ("Any omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy.") (quoting *State v. Smith*, 812 P.2d 470, 477 (Utah Ct. App. 1991)). And the court did address this conflict by asking Defendant whether he knew that his actions, specifically pulling the trigger of the gun, would cause Victim's death. Defendant acknowledged that he did.

¶15 Defendant further contends that he did not understand his guilty plea because he "speaks Spanish, has a fifth-grade education, and did not speak English except a few random words at the time he pleaded guilty," while "[h]is trial counsel did not speak Spanish." He additionally claims not to have read the plea affidavit before signing it. But these claims contradict Defendant's statements to the district court during his plea hearing. Defendant is bound by his statements because "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any

subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977). “Accordingly, the truth and accuracy of a defendant’s statements during the [plea colloquy] should be regarded as conclusive in the absence of a believable, valid reason justifying a departure from the apparent truth of his [plea colloquy] statements.” *United States v. Weeks*, 653 F.3d 1188, 1205 (10th Cir. 2011) (citation and internal quotation marks omitted). Here, there is no valid reason to doubt the truthfulness of Defendant’s statements to the district court during his plea colloquy because an interpreter was present and Defendant professed to understand everything discussed with counsel and the contents of his plea affidavit. Because there is nothing in the record that suggests Defendant lacked an understanding of the elements of the murder charge against him or anything but his own later assertions that he did not actually understand the essence of imperfect self-defense, the district court did not err in concluding on summary judgment that his plea was voluntarily and knowingly made.

II. Assistance of Counsel

¶16 Defendant contends that his trial counsel’s performance was deficient because no interpreter was present during their out-of-court discussions prior to his plea hearing. To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) “counsel’s performance was deficient in that it ‘fell below an objective standard of reasonableness’” and (2) “counsel’s performance was prejudicial in that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Menzies v. Galetka*, 2006 UT 81, ¶ 87, 150 P.3d 480 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

¶17 Defendant must first show that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*,

466 U.S. at 688. Defendant asserts that the language barrier with his trial counsel prevented him from becoming aware of his right to the presumption of innocence and his right to plead not guilty. He claims that his counsel's conduct fell below the standard of reasonableness when he did not secure an interpreter to better communicate these rights to Defendant. Nevertheless, any "[j]udicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. And whether counsel's conduct was reasonable "may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691.

¶18 Here, Defendant claims that he only knew a few words of English at the time of his plea hearing and that trial counsel did not speak Spanish. But with an interpreter present, Defendant never advised the court that there was any issue in communicating with his counsel. He specifically acknowledged in the plea colloquy, during which an interpreter was present, that he understood everything counsel had explained to him. Had there been an insurmountable language barrier, Defendant had the opportunity to raise this issue with the court in the plea hearing on several occasions when asked by the court whether he understood everything his counsel had discussed with him and whether he had questions about the plea affidavit. We therefore are not persuaded that trial counsel acted unreasonably in failing to secure an interpreter for his out-of-court consultations with Defendant.

¶19 We do appreciate the importance of interpreters, but any suggestion that we should err on the side of requiring an interpreter in this case is dispelled by the other basis on which Defendant's ineffective assistance claim can be rejected. Defendant does nothing to establish that counsel's failure to secure an interpreter was prejudicial. To contest his guilty plea

on the ground of ineffective assistance of counsel, Defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial *and* that such a decision would have been rational under the circumstances.” *Rippey v. State*, 2014 UT App 240, ¶ 14, 337 P.3d 1071 (emphasis in original) (citation and internal quotation marks omitted). Defendant must do more than allege that he would not have pled guilty had his counsel secured an interpreter for their out-of-court discussions. Rather, we “look to the factual circumstances surrounding the plea” and whether it would have been rational for Defendant to reject the plea and insist on a trial. *Id.* (citation and internal quotation marks omitted).

¶20 At the time of the State’s plea offer, Defendant had already confessed to killing Victim, and a motion to suppress that confession had been denied by the district court. Defendant asserts that, had trial counsel better explained the elements of murder to Defendant, he would have known he had a valid claim for imperfect self-defense based on his statement to officers that Victim lunged at him during the confrontation. But the imperfect-self-defense theory is substantially undermined by the fact that, in what Defendant characterized as a tussle over the gun that he brought only to scare Victim, Victim was shot five times, including twice in the back and once in the back of the head. Based on these circumstances, there is nothing to suggest that it would have been rational for Defendant to reject the State’s offer to dismiss the other two felony charges against him in exchange for his guilty plea to the murder charge.

CONCLUSION

¶21 Defendant’s statements and actions do not demonstrate that his guilty plea was unknowing or involuntary or that his counsel performed deficiently by not having an interpreter

present during their out-of-court discussions. Additionally, he fails to establish any prejudice as a result of this decision by counsel. We thus presume Defendant's counsel rendered constitutionally adequate assistance, exercising reasonable professional judgment, and the district court did not err in granting summary judgment to the State. Accordingly, we affirm.

POHLMAN, Judge (concurring in part and concurring in the result in part):

¶22 I concur with the lead opinion except as to Part I, in which I concur in the result. I am troubled by my colleagues' conclusion that the district court adequately remedied the conflict between the statements in Defendant's plea affidavit and his self-defense assertions during the plea colloquy. *See supra* ¶ 14. Defendant interjected statements that created a conflict about the nature of his plea. In my view, it is questionable whether the court's attempts to resolve the conflict were successful.

¶23 The court apparently recognized the significance of Defendant's initial assertion that he "defended [him]self," and it attempted to resolve the apparent conflict between his plea affidavit and that assertion by asking defense counsel if it changed the plea. But although counsel explained that he had "discussed the imperfect self-defense concept" with Defendant, he did not explain what Defendant understood. Thus, counsel's representation did not resolve the conflict or demonstrate that Defendant understood he was waiving any potential defenses in pleading guilty to first degree murder.

¶24 Defendant further added to the confusion when he interjected that he shot Victim because "[Victim] was drugged and drunk and [Defendant] didn't know if [Victim] had a

weapon.” The court again tried to resolve the conflict, this time asking Defendant whether he knew that his actions would cause Victim’s death. Defendant acknowledged that he knew “by pulling the trigger” of the gun he could cause Victim’s death, but that acknowledgement did not speak to the conflict created by his assertions: whether he understood that in pleading guilty to first degree murder he was conceding that the concept of imperfect self-defense did not apply.

¶25 Thus, I question whether the ambiguities introduced in the plea hearing regarding the nature of Defendant’s plea were resolved by the court’s colloquy. *See State v. Lehi*, 2003 UT App 212, ¶ 16, 73 P.3d 985 (recognizing the district court’s obligation to clarify discrepancies during the plea colloquy). However, I concur in the result and would affirm the district court’s decision based on Defendant’s failure to demonstrate prejudice.

¶26 Under the Post-Conviction Remedies Act, “[t]he court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.” Utah Code Ann. § 78B-9-104(2) (LexisNexis 2012); *see also Gardner v. State*, 2010 UT 46, ¶ 62, 234 P.3d 1115. A petitioner must satisfy the same standard to obtain relief based on a claim of ineffective assistance of counsel. *Landry v. State*, 2016 UT App 164, ¶ 23 n.6, 380 P.3d 25.

¶27 On appeal, Defendant relies on the same arguments to satisfy this standard for his claims based on the voluntariness of his plea and his claims based on ineffective assistance of counsel. In addressing Defendant’s challenge based on ineffective assistance of counsel, we conclude that he failed to demonstrate that, absent the claimed errors, he would have rejected the State’s plea offer and that it would have been rational under the

circumstances to do so. *See supra* ¶¶ 19–20; *see also Rippey v. State*, 2014 UT App 240, ¶ 14, 337 P.3d 1071 (requiring a petitioner challenging the voluntariness of his plea based on ineffective assistance of counsel to “show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial *and* that such a decision would have been rational under the circumstances” (quotation simplified)). I believe this deficiency is equally fatal to Defendant’s challenge based on the voluntary nature of his plea. For the same reasons he fails to demonstrate prejudice arising out of his ineffective assistance of counsel claim, he has failed to demonstrate prejudice arising out of his claim based on the voluntariness of his plea. *See supra* ¶¶ 19–20. On this basis, I would affirm the district court’s decision granting summary judgment to the State on Defendant’s postconviction challenge to the voluntariness of his plea.

ADDENDUM B

Preliminary Hearing Transcript

0132

A P P E A R A N C E S

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I N D E X

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E X H I B I T S

State's Exhibit No. 111
State's Exhibit No. 249

July 21, 2010

P R O C E E D I N G S

* * *

THE COURT: Okay. Let's get on the record in the matter of the State of Utah vs. Benjamin Arriaga-Luna. I think I am saying that right. 101400853. Let the record reflect that the defendant is present. I think we have an interpreter. Is that correct?

INTERPRETER: We have more than one.

THE COURT: Okay. Let's have both of you be sworn, please, or three of you, two of you, how many of you there are. Now, would you state your names for the record.

MR. SILVEIRA: Yes. Pablo Silveira, S-i-l-v-e-i-r-a.

MR. HARRINGTON: Randall Harrington.

THE COURT: Let's have you both be sworn.

(Whereupon the two interpreters were sworn.)

THE COURT: All right. Can I have the attorneys state their names for the record, please?

MR. BAUTISTA: Your Honor, Rudy Bautista and Michael Howell for the defendant.

MR. HILL: Joseph Hill and Mark Mathis for the State.

THE COURT: Is that okay? Do you need anything else? And Senior Judge Dennis Fuchs presiding.

Will you waive formal reading of the information?

MR. BAUTISTA: We do, your Honor.

1 THE COURT: Okay. Thank you. How many witnesses
2 does the State have?

3 MR. HILL: The State has two witnesses, Judge.

4 THE COURT: Okay. Let's have them come forward and
5 let's have them be sworn and excluded from the courtroom,
6 please.

7 MR. BAUTISTA: Your Honor, because they are both
8 detectives, there's no --

9 THE COURT: Oh, you are fine?

10 MR. HILL: Yes.

11 THE COURT: Okay. They can both stay. I'm assuming
12 that there's some stipulations you want to put on the record.
13 I mean, I'm assuming there's a stipulation in regards to the
14 medical examiner, death being ruled a homicide. How is that
15 coming in?

16 MR. HILL: Your Honor, we have the M.E.'s report.

17 THE COURT: Okay. So you are going to be putting in
18 the report?

19 MR. HILL: Yes.

20 THE COURT: All right. Then maybe there aren't any
21 stipulations. Okay. Everybody ready to proceed?

22 MR. HILL: Yes, your Honor.

23 THE COURT: All right. The State may call its first
24 witness.

25 MR. HILL: The State calls James Bigelow to the

1 stand.

2 THE COURT: Please come forward and be sworn, please.

3 (The witness is duly sworn.)

4 * * *

5 JAMES BIGELOW,

6 Called by the State, having been duly

7 Sworn, is examined and testifies as follows:

8 * * *

9 THE COURT: And again, I've instructed the court
10 reporter if at any time any of us start mumbling or talking
11 over each other so she can't record what is said, remember we
12 do have a court reporter, so she can only take down one
13 conversation at a time. This isn't being recorded on multiple
14 tracks. So she will interrupt. You will pay attention to her.
15 And if she says hold it up for a minute, you will. Okay?

16 All right. You may proceed.

17 DIRECT EXAMINATION

18 BY MR. HILL:

19 Q. Thank you, Judge.

20 Sir, can you please state your name and spell your
21 last name?

22 A. James Bigelow, B-i-g-e-l-o-w.

23 Q. Mr. Bigelow, how are you employed?

24 A. I work for the city of West Jordan Police Department.

25 Q. And what are your duties there at the West Jordan

1 Police Department?

2 A. I'm currently assigned to the major crimes division.

3 Q. Are you a detective?

4 A. I am.

5 Q. How long have you been employed in that capacity at
6 West Jordan? Well, I'm sorry, just as a police officer at West
7 Jordan.

8 A. I've been at West Jordan for nine years.

9 Q. Do you have any law enforcement experience prior to
10 that time?

11 A. I do. I worked a year in the Salt Lake County Jail
12 and four years as a military police officer in the marines.

13 Q. And I assume you are Post certified?

14 A. I am as well.

15 Q. Mr. Bigelow, were you involved with the investigation
16 of a homicide in April of this year?

17 A. I was.

18 Q. And approximately what date did that investigation
19 commence?

20 A. April 4th, 2010, which I believe is Easter, was
21 Easter that day.

22 Q. I see. And what began that investigation?

23 A. I was called by my sergeant, Sergeant Reese, to
24 respond to a death investigation.

25 Q. And where did you respond to?

1 A. Approximately 7400 South 6400 West. It's an open
2 field out in the west side of West Jordan.

3 Q. And is that location in Salt Lake County?

4 A. It is.

5 Q. Approximately what time of day did you go to that
6 location?

7 A. I want to say between 3:30, 4:00 o'clock.

8 Q. And what did you observe when you arrived there?

9 A. I observed what appeared to be a male individual face
10 down in the field, which was extremely muddy. So his body was
11 kind of halfway submerged in the mud.

12 Q. Anything else, just first impression, as you arrived
13 there? Any other people in the area? Any --

14 A. Not -- there's -- there's nothing really in that
15 area. There's some houses, but you can see them, but they are
16 not in, you know, close proximity.

17 Q. I see. Any signs of trauma to this person that was
18 laying in the mud?

19 A. Yes. Once we called for a fire truck from the fire
20 department, due to the mud and everything, we didn't want to
21 walk out there. So the fire truck laid its ladder horizontally
22 over the body, and I walked out there, and I could observe some
23 blood spatter. And I noticed one shell casing, silver shell
24 casing to the north which was in close proximity to the head of
25 the individual and then another shell casing to the south which

1 was near a coke can.

2 Q. Were there any other shell casings besides those two
3 recovered at the scene?

4 A. There were.

5 Q. Do you know how many were recovered?

6 A. Five.

7 Q. What happened next in the investigation?

8 A. At that point we waited till the medical examiner
9 arrived, Cal Ostler. We moved the body and determined it
10 wasn't a suicide. At that point he had multiple gunshots. So
11 kind of stopped everything right there, and he was transported
12 to the Medical Examiner's Office. And it was getting dark at
13 that time, so we called off the -- till tomorrow morning. We
14 stopped till the following morning.

15 Q. Was the scene secured at that time?

16 A. Yes.

17 Q. Did you observe the autopsy of this individual?

18 A. I did.

19 Q. And do you recall approximately when that occurred?

20 A. It was the next morning, Monday morning, April 5th,
21 at 8:00 a.m.

22 Q. Was this person identified?

23 A. Not till later.

24 Q. Not till later. So eventually he was identified?

25 A. Yes.

1 Q. And do you know how he was identified?

2 A. Yes. He was identified through -- the medical
3 examiner took a template card of his fingerprints and took it
4 down to BCI, called me about an hour later, said they had a
5 name of Benacio Herrera. And then I took the fingerprint card
6 and the information that I received from the medical examiner
7 and went to ICE, Immigration Custom Enforcement. And I talked
8 to their supervisor, Raoul Penragon (phonetic), and we ran that
9 name through their database. And the picture I had of Benacio
10 matched. And they came up with the same name. So I positively
11 identified him as Benacio. I think they had him as Benacio
12 Hernandez Herrera, but Benacio Herrera.

13 Q. I see. Now going back to the autopsy, did you
14 observe -- so I don't want to walk you through all of that, but
15 when they processed the body, did they discover wounds to the
16 body?

17 A. Yes.

18 Q. And can you describe those?

19 A. There's five bullet holes. One was in the abdomen,
20 one entered through the left leg, went through the left leg
21 into the scrotum and then lodged into the right leg. He had
22 one in the small of his back near the center, one on the right
23 side of his back, and then he had one almost center in the back
24 of his head right here, neck, back of the head and neck right
25 there.

1 Q. I see. Have you seen the Medical Examiner's report
2 in this case?

3 A. Just the one I have from when I was up there. I
4 haven't seen the official, their official report yet.

5 Q. I see.

6 Your Honor, at this time I would present for entrance
7 into evidence State's Exhibit 1. It's a multiple page document
8 from the office of medical examiner's report.

9 THE COURT: That's fine.

10 MR. HILL: I ask for the admission at this time.

11 THE COURT: Any objection?

12 MR. BAUTISTA: No, your Honor.

13 THE COURT: It will be admitted.

14 (State's Exhibit No. 1

15 Was received into evidence.)

16 Q. (BY MR. HILL) After -- or what steps did you take?
17 So after the autopsy is completed, what steps did you take in
18 your investigation at that point?

19 A. I notified Sergeant Reese that we had five, five
20 wounds to Benacio. And they recovered the rest of the shell
21 casings at the scene there. And then, like I said, I went back
22 to the office and that's when I received the call from the
23 medical examiner with his name. I ran to ICE.

24 And later that night, I want to say around
25 7:00 o'clock, I received a call from Sergeant Reese saying that

1 Salt Lake City had a homicide and that they believed the two
2 were related.

3 Q. And what steps did you take from that point after you
4 received that phone call?

5 A. I responded to Salt Lake City and met with their
6 investigators.

7 Q. Were there any search warrants issued and executed in
8 relation to that second homicide investigation?

9 A. Yes.

10 Q. And were you involved in any of those?

11 A. In one of them. 263 East Burrell Avenue.

12 Q. And whose residence was that believed to be? If you
13 know.

14 A. I was told by Rosalinda that that was her residence
15 and her and Delfino lived there.

16 Q. Who is Rosalinda?

17 A. Rosalinda is the wife, girlfriend of Delfino Arriaga.

18 Q. And -- okay. Who's Delfino?

19 A. Delfino is the brother to Benjamin.

20 Q. I see. And at this residence that the search warrant
21 was served, was there any, anything of evidentiary value found
22 there?

23 A. Yes. I, I recovered some muddy boots that were under
24 the kitchen sink, a pair of muddy pants that were kind of
25 halfway in the kitchen, halfway in the laundry room, a muddy

1 belt that was in one of the bedrooms, and then four cases of
2 Modelo beer.

3 Q. Why was the Modelo beer significant?

4 A. When I was at the crime scene on Easter, I noticed a
5 single can of Modelo beer, an empty can that was sitting near a
6 a wood pile. And it was just -- it was new. You could tell it
7 was fresh. It hadn't been weathered. So that struck me as odd
8 the beer can at the scene.

9 Q. And was there any connection between that beer can
10 found at the scene and the cases of beer found in this home
11 where the search warrant was served?

12 A. Yes. Later on Detective Jenkins ran the lot numbers
13 and case numbers, and the beer can that was at the scene in
14 West Jordan matched one of the cases of beer that was at the
15 residence on Burrell Avenue.

16 Q. Now when you say it matched, how did it match?

17 A. The lot numbers were the same.

18 Q. Okay. Now you described these muddy clothing. Is
19 this just there's a little bit of mud on them, or can you
20 describe what you mean by muddy?

21 A. No. To describe the scene a little more, I mean,
22 this wasn't just like a little sprinkle of rain mud. This was
23 deep, thick mud. It was very wet, very heavy. And these boots
24 that were under the sink were still wet and very muddy. The
25 thick mud -- it appeared just from my point of view, it was, it

1 was the same type of mud, dirt that was, you know, the grayish
2 type mud that was at the scene.

3 Q. So did the colors match between from what you saw at
4 the scene, the color of the mud there and the color of the mud
5 on these -- this clothing?

6 A. Yeah. I can't say for sure, but it appeared it was,
7 it was the same.

8 Q. I see.

9 A. It would make sense for how much mud was on the boots
10 and how much mud was at the scene that it was consistent.

11 Q. I see. And from that evidence that was discovered
12 there, did that lead to any investigation of any suspects in
13 this case?

14 A. Yes.

15 Q. And who, who did you determine to be suspects based
16 on that evidence?

17 A. With everything that I learned and Salt Lake City's
18 investigation, Delfino and Benjamin Arriaga.

19 Q. I see. Did police officers ever speak with Benjamin
20 Arriaga in relation to this case?

21 A. Yes, they did.

22 Q. And do you know how that happened?

23 A. So --

24 Q. As far as did you go out and find him or how did that
25 --

1 A. I was notified by Detective Jenkins that Benjamin
2 Arriaga and Alvaro Arriaga were at the Salt Lake City Police
3 station.

4 Q. And who is Alvaro Arriaga?

5 A. Alvaro is the younger brother to Delfino and
6 Benjamin.

7 Q. I see. And just for the record, is Benjamin Arriaga
8 in the courtroom today?

9 A. He is.

10 Q. Can you identify where he is sitting and what he is
11 wearing?

12 A. He's sitting to the right of me, orange shoes, brown
13 jail jumpsuit.

14 MR. HILL: I'd ask the record to reflect the
15 identification of the defendant.

16 THE COURT: Any objection?

17 MR. BAUTISTA: No, your Honor.

18 THE COURT: The record will so reflect.

19 MR. HILL: If I may have one moment, Judge.

20 THE COURT: You may. While you're doing that, let's
21 put on the record that I was handed a copy of the medical
22 examiner's report. That in the report it determines that the
23 immediate cause of death were gunshot wounds of the neck, torso
24 and leg and that the manner of death was determined to be a
25 homicide. Okay.

1 MR. HILL: Thank you, Judge. Nothing further for
2 this witness at this time.

3 THE COURT: Okay. Cross-examination?

4 CROSS-EXAMINATION

5 BY MR. BAUTISTA:

6 Q. Detective Bigelow, let's talk about the crime scene
7 itself.

8 A. Yes, sir.

9 Q. You indicated that there was a good amount of mud
10 there, correct?

11 A. Yes, sir.

12 Q. And it was a grayish clay-like mud?

13 A. Yeah.

14 Q. And, in fact, where you discovered the body, would it
15 be fair to say that the mud was about 6-inches deep, at least?

16 A. I don't -- I can't give you an actual depth. It was
17 thick mud.

18 Q. Okay. The body itself was partially covered in mud?

19 A. Yes. It was -- it was faced down in the mud.

20 Q. And the mud itself, did the mud look like it had come
21 down off a hill like a mud slide from the rains?

22 A. No.

23 Q. Was it the type of mud that just became saturated and
24 that's how it became mud, or did it look like it had flown
25 down, had been like a flow of mud from a higher elevation?

1 A. No. There was a berm, but it didn't appear to come
2 down from the berm.

3 Q. And in regards to you said blood splatter?

4 A. Spatter?

5 Q. Yes. You indicated there was some around the head?

6 A. There was some around the body in -- that you could
7 see on the mud.

8 Q. And did it appear that that blood had come out from
9 being the gunshot wound or had flown out of the body as he
10 died?

11 A. I --

12 Q. Can't tell?

13 A. Yeah. I mean, there's just blood spatter around the
14 body.

15 Q. And do you know how many -- it was reported that the
16 body was found by a civilian, correct?

17 A. Yes.

18 Q. And that was reported to a law enforcement or to
19 another agency first?

20 A. I think if I remember correctly he, he walked down to
21 the fire station that's just directly south of that, that
22 field.

23 Q. So is it your understanding that before any law
24 enforcement officers from West Jordan showed up, or the Salt
25 Lake County Sheriff's, that the fire department, Unified Police

1 Department were the first on the scene?

2 A. From what I understand, the fire department did not
3 go up there till the police arrived, and they went up there
4 together.

5 Q. So the first, first authorities on scene were law
6 enforcement?

7 A. Yes, to my knowledge.

8 Q. And they were with the West Jordan Police Department?

9 A. West Jordan Police, West Jordan Fire, yes.

10 Q. So they would have been trained and instructed on how
11 to quarantine the crime scene to make sure that stays intact?

12 A. Yes, sir. They had the road blocked off on both
13 directions, from Uintah and from 6400 West.

14 Q. And you indicated that you used a fire truck to look
15 from an elevated view of the body?

16 A. Yes, sir.

17 Q. Was that because you didn't want to obstruct the mud?

18 A. Didn't want to disturb the crime scene.

19 Q. Were you able to discover any footprints in the mud
20 near the vicinity of the body?

21 A. Yes, there was some footprints.

22 Q. And with the nature of the mud being so thick and
23 clay-like were you able to recover pictures of footprints or
24 just that you could tell that they had been walked through?

25 A. You know, I don't know what the crime scene or crime

1 scene individuals actually were able to get. I know it was
2 impossible to pull the footprint, because once you stepped in
3 that, it just, you know, dispersed. It was a really wet, thick
4 heavy mud.

5 Q. So it had a pretty heavy water content, so it folded
6 in on itself or caved in on itself?

7 A. Correct.

8 Q. And you indicated that you discovered five slugs,
9 shell casings?

10 A. Yes.

11 Q. And were they buried in the mud or were they on top
12 of the mud?

13 A. The two that I observed were on top of the mud, and I
14 believe one other one was on top of the mud. And the other two
15 I believe were recovered from under the mud with a metal
16 detector.

17 Q. And on the deceased were you able to find any
18 identification on that person?

19 A. He had no identification.

20 Q. Did you find anything of evidentiary value on him?

21 A. He had some business cards, 2-dollar bill and two
22 crystals that were later identified as crystal meth.
23 Methamphetamine.

24 Q. And the crystal meth, that was discovered in a sock?

25 A. Yes.

1 Q. Now did you discover anything of other value that
2 could lead to possibility that he was a drug user, such as a
3 pipe, needle, anything of that nature?

4 A. No. He had, he had two passport photos also. You
5 know, the photos you get for your passport, he also had those.
6 But as far as identification, there's nothing, nothing else.

7 Q. And a toxicology test was done at the coroner's
8 office. Is that correct?

9 A. I, I assume so. I haven't seen the final report, so
10 I couldn't tell you.

11 Q. You're not privy to know that. Okay. Regarding that
12 person, initially you didn't have any information about him
13 other than discovering through BCI and then ICE about his
14 identity?

15 A. Yes, sir.

16 Q. So until you got a phone call from Salt Lake PD, you
17 are kind of coming up short with any information?

18 A. I had, I had nothing.

19 Q. And you had received information from at least three
20 civilians that were in the area of the body, but whether they
21 didn't see it or they found it, anything of that nature, but
22 none of them are a suspect?

23 A. No, they weren't.

24 Q. And what did you do once you discovered the identity?
25 Did you track down any witnesses or in the area to put a

1 bulletin board out or anything to see if anyone saw anything,
2 or were you kind of just cold?

3 A. No. That -- on Easter we had detectives go out and
4 talk to each one of those individual houses that are in that
5 area? And they canvassed that area that day, that night.

6 Q. Anything of evidentiary value gained?

7 A. No. I think maybe there was one, one gentleman who
8 saw three Hispanic males arguing, and he described the vehicle
9 as a truck or something of that sort. But he came down and
10 talked to us, Sergeant Reese. He was showed a photo lineup,
11 and the only way he could identify anybody is from what he had
12 seen on the news. So he was of no value.

13 Q. And you indicated that you'd received a phone call
14 from Salt Lake PD the next day?

15 A. I received a phone call from my sergeant, Sergeant
16 Reese, who had contacted, who had been contacted by Salt Lake
17 City.

18 Q. And that's why you put in your report that you didn't
19 really know why there was a connection because you weren't
20 privy to the conversation with Salt Lake PD?

21 A. No. He just said they'd had a homicide and that Salt
22 Lake City believed that they are possibly related and asked if
23 I would go out there.

24 Q. And when you arrived at the Salt Lake Police
25 Department, who was the first person you interviewed?

1 A. Rosalinda.

2 Q. And Rosalinda indicated to you that she lives with
3 Delfino?

4 A. Yes.

5 Q. And she explained to you that Delfino is Benjamin's
6 brother?

7 A. Yes.

8 Q. And the addresses that -- she gave you four addresses
9 where you could find information?

10 A. Four addresses?

11 Q. Yes. Did you subsequently search four different
12 residences?

13 A. I went to 263 Burrell. Salt Lake City PD went to the
14 other addresses.

15 Q. And were you part of the process of writing up the
16 search warrants for those addresses?

17 A. No. Detective Mike Hamideh was taking care of that.

18 Q. And he's with Salt Lake PD?

19 A. Yes.

20 Q. And to the best of your knowledge that was reviewed
21 by a deputy district attorney?

22 A. Yes, Sandi Johnson.

23 Q. And Rosalinda also informed you that she knew who
24 Benny was, correct?

25 A. Correct.

1 Q. And he's the decedent. Did you show her a picture of
2 Benny? Was that how she was able to identify him?

3 A. Yes.

4 Q. And she told you that Benny had been running drugs
5 for Delfino?

6 A. She said in the past he had, yes. She didn't know
7 what he was currently doing or when the last time Delfino or
8 Benjamin had any contact with him. But in the past he had run
9 drugs for them, yes.

10 Q. And she in essence told you that she didn't get
11 involved in Delfino's business, so she knew Benny but she
12 didn't know him well and what their activities were?

13 A. Yeah, she knew Benny, but she didn't know what the
14 activities between the three of them were.

15 Q. And regarding the residence that you searched, that
16 was Delfino's residence?

17 A. According to Rosalinda, yes, that's where her and
18 Delfino resided.

19 Q. And Benjamin did not live with them?

20 A. I don't recall. I don't remember what she told me.

21 Q. At this time do you have any information to believe
22 that he lived with Delfino?

23 A. I know Rosalinda stated that that day Delfino and
24 Benjamin came to the house with muddy clothes on and left their
25 clothes there. Whether or not Benjamin lived there or not, I

1 couldn't tell you right now.

2 Q. And you indicated that you discovered a Modelo beer
3 can at the crime scene, and that was empty?

4 A. Yes.

5 Q. And you also discovered four cases of beer at the
6 Delfino residence?

7 A. Yes.

8 Q. And were these cases 24 cans each or were they 12
9 packs?

10 A. You know, I can't recall right now. I want to say --
11 I want -- they were cans. I want to say 24-pack, but I
12 couldn't give you a for sure answer, sir.

13 Q. Were those retained and put into evidence?

14 A. Yes.

15 Q. And photographed?

16 A. Yes, they were photographed.

17 Q. And the lot numbers on those were photographed as
18 well?

19 A. I don't know if they are photographed at that time,
20 but they -- they were written down at least.

21 Q. And did you contact the manufacturer of these beers
22 and determine how many cans are in a lot?

23 A. Did I personally? No, that was Detective Jenkins.

24 Q. And do you know what the results of his findings
25 were?

1 A. I couldn't, I couldn't tell you what his conversation
2 was with -- if he contacted them or what his conversation was
3 with Modelo.

4 Q. So the best of your knowledge that information wasn't
5 relayed back to you?

6 A. No. He -- the information that was relayed back to
7 me was that the lot numbers matched. The can at the scene and
8 the lot numbers of the -- the beer cans at the house matched.

9 Q. And you're the case manager in this case?

10 A. (Nodding.)

11 Q. And Detective Jenkins -- I'm sorry. Is that
12 affirmative?

13 THE WITNESS: Yes. I'm sorry.

14 THE COURT: You have to answer out loud. She can't
15 record a nod.

16 THE WITNESS: Yes.

17 Q. (BY MR. BAUTISTA) And Detective Jenkins, he's with
18 Salt Lake Police Department?

19 A. He's with West Jordan.

20 Q. He's with West Jordan. And so you asked him to do
21 some follow up for you?

22 A. Yes, because I was out of town. I went out of town
23 shortly after this.

24 Q. And you also discovered a Coca Cola can at the crime
25 scene?

1 A. Yes.

2 Q. And were there any Coca Cola cans discovered in the
3 Delfino residence?

4 A. No, not that I -- not that I recall. And the Coca
5 Cola can that was at the scene appeared to have been weathered
6 and had been there. It wasn't fresh like the Modelo can.

7 Q. Okay. So it may have just been there from someone
8 else working in the area?

9 A. I couldn't tell you how it got there. It was there,
10 but it looked like it had been there for a longer period of
11 time than the Modelo beer can.

12 Q. This area that we are talking about, is it vacant,
13 unused land, or is it land that's being developed?

14 A. Right now it's vacant. It's used by recreation
15 vehicles, four wheelers, that type of stuff.

16 Q. So there is some traffic that goes through that area,
17 maybe not heavy traffic, but on a weekly basis there are some
18 civilians that use the area?

19 A. Yes.

20 Q. And so nothing to lead you to believe that the Coca
21 Cola can was related to this crime?

22 A. No.

23 Q. In regard to the can that was found at the scene,
24 that was preserved as well?

25 A. It was.

1 Q. And what did you do to preserve it?

2 A. You talking about that night?

3 Q. Yes.

4 A. It was left in place until our crime scene
5 individuals picked it up and got it. We just left everything
6 in place.

7 Q. So you, you had the experts then preserving evidence,
8 the crime scene investigators handle the collection and the
9 preservation of evidence?

10 A. Yes. They are crime scene technicians; they are not
11 investigators.

12 Q. And they've obviously been trained on how to preserve
13 it to make sure it's not corrupted by outside sources?

14 A. Yes.

15 Q. And in regards to that night after, did you go search
16 the Delfino residence before you interviewed the rest of the
17 individuals, or did you do that after the interviews?

18 A. You are going to have to tell me which night. We
19 talking about Easter or talking about Monday?

20 Q. Monday, when Salt Lake PD told you they had suspects.

21 A. Okay. What was the question, sir?

22 Q. You had searched the Delfino residence that Rosalinda
23 gave you. Was that done before or after you then subsequently
24 interviewed Delfino and made --

25 A. That was prior to my interview with Delfino.

1 Q. Is there a reason why you did that before
2 interviewing them?

3 A. Because Salt Lake City was interviewing him.

4 Q. And did you receive information that Benjamin and his
5 younger brother were picked up by Salt Lake Police Department
6 or that they had voluntarily reported to the police station?

7 A. Yes, I received that information.

8 Q. That they voluntarily reported?

9 A. I, I can't recall what Detective Jenkins told me. I
10 want to say Benjamin had turned himself in, and then Benjamin
11 told Salt Lake City where Alvaro was, and they went and picked
12 him up at work.

13 Q. And you were part of -- after Salt Lake Police
14 Department interviewed people, did they convey to you what they
15 discovered during their interviews, or were you required to
16 interview them from scratch?

17 A. They gave me little bits and pieces. You got to
18 understand they were busy trying to focus on their crime scene,
19 and we were trying to figure out our crime. So we, we were
20 talking back forth, but I didn't take anything they told me --
21 we went and did our own interviews.

22 Q. To help the court, I'm not sure if it's aware, but
23 they were -- Salt Lake Police Department was investigating a
24 different murder than the one that you were investigating,
25 correct?

1 A. Correct.

2 Q. And it was their -- your understanding they had
3 believed that Delfino was a suspect in that murder?

4 A. They had -- when I first arrived there Monday night,
5 they gave me the names of Delfino and Benjamin.

6 Q. As possible suspects?

7 A. Correct.

8 Q. In regard to the deceased, you indicated that you
9 were able to discover -- you were able to identify him by
10 fingerprints. Did you look up to see if he had any criminal
11 history?

12 A. Yes.

13 Q. And did he?

14 A. He did.

15 Q. What was his criminal history like? Was it
16 consistent with being a drug dealer or drug user?

17 A. I want to say it was just minor stuff, alcohol
18 possession, public intox.

19 Q. Kind of more --

20 A. He had a couple, I think, misdemeanor warrants also.
21 Nothing, nothing real major.

22 Q. And when you first started investigating this because
23 it was just a dead body, kind of cold, when you found the crack
24 cocaine -- or I'm sorry, the methamphetamine on him, were you
25 thinking it was possibly drug related?

1 A. That's always a possibility when you find narcotics
2 on a deceased individual, yeah.

3 MR. BAUTISTA: I have nothing further. Thank you.

4 THE COURT: Thanks. Anything on redirect?

5 MR. HILL: No, Judge.

6 THE COURT: Okay. You may step down.

7 THE WITNESS: Thanks, your Honor.

8 THE COURT: May the witness be excused if he chooses
9 to go? I don't know whether they rode together, came together,
10 walked over together.

11 MR. HILL: He may be excused, Judge, but I'm assuming
12 he's probably going to stay.

13 The State would next call Brandon Turner to the
14 stand.

15 THE COURT: Detective, come forward and be sworn,
16 please.

17 (The witness is duly sworn.)

18 * * *

19 BRANDON TURNER,

20 Called by the State, having been duly

21 Sworn, is examined and testifies as follows:

22 * * *

23 DIRECT EXAMINATION

24 BY MR. HILL:

25 Q. Sir, could you please state your name and spell your

1 last name?

2 A. Brandon Turner. T-u-r-n-e-r.

3 Q. Mr. Turner, how are you employed?

4 A. I'm with the city of West Jordan as a police
5 detective.

6 Q. How long have you been working with the West Jordan
7 Police Department?

8 A. Six years.

9 Q. Do you have any law enforcement experience prior to
10 that time?

11 A. No.

12 Q. And are you -- you say you are currently a detective
13 with West Jordan?

14 A. Yes.

15 Q. Were you involved in the investigation of a homicide
16 that we've been discussing today?

17 A. Yes.

18 Q. And did you interview Benjamin Arriaga in relation to
19 this investigation?

20 A. Yes.

21 Q. And what language was that interview done in?

22 A. Spanish.

23 Q. Do you speak Spanish?

24 A. I do.

25 Q. And how long have you been able, or how long have you

1 been conversing in Spanish?

2 A. Conversing about six -- probably about 10 years and a
3 total experience about 13 years learning Spanish.

4 Q. And what kind of training do you have in the Spanish
5 language?

6 A. I served an LDS mission in Comayagua, Honduras. And
7 before that just schooling.

8 Q. And have you kept -- how long ago did you serve that
9 mission?

10 A. From 2001 to 2003.

11 Q. And from 2003 to present day, how have you maintained
12 your language skills?

13 A. Through the police department translating in
14 different situations and instances.

15 Q. - And you stated, did you not, that you spoke with
16 Benjamin Arriaga in Spanish?

17 A. Yes.

18 Q. Was anybody else present during that interview?

19 A. Just Detective Bigelow.

20 Q. And was that interview audioed and video recorded?

21 A. Yes.

22 Q. Which one? Or both.

23 A. Both. I'm sorry.

24 Q. Did you read Mr. Arriaga his Miranda rights?

25 A. Yes, I did.

1 Q. And I just want to walk through fairly slowly with
2 you from the first time you met with him to the end of that
3 interview when you initially spoke with him, you read him his
4 Miranda rights, what did you ask him?

5 A. Basically I asked him -- I told him he had the
6 right -- do you want me just to say what I told him or?

7 Q. I don't think we need to go into the Miranda warnings
8 and things like that, but, yeah, just where did the interview
9 begin?

10 A. Basically it just began -- to back up a little bit, I
11 was actually on maternity leave at the time, so I wasn't
12 involved with the initial investigation. And I got my call
13 from my sergeant, Sergeant Reese, who'd asked me to go down to
14 the Salt Lake City Police station where they had a possible
15 suspect. He told me to get with Detective Bigelow who told me
16 about what they had so far. Due to the fact I didn't know a
17 whole lot about the investigation, Bigelow and I decided he
18 would initially ask a question, I would just translate until I
19 got a little bit better knowledge of the incident.

20 Q. I see. So I guess without, you know, saying, what
21 did you ask or what did Detective Bigelow ask him --

22 A. Right.

23 Q. -- what was initially asked of Mr. Arriaga that
24 night?

25 A. Basically what was asked is what he did on, I believe

1 it was the Friday before, well, the Friday of the incident, we
2 just asked him what he did that day.

3 Q. And what was his response?

4 A. His response basically was, without going word for
5 word, he'd hung out at Delfino's house fixing up a truck. Then
6 I believe later that day they went to an Easter egg hunt and
7 watched movies.

8 Q. Well, maybe we can fast forward. Did you ever ask
9 him if he knew Benacio Herrera?

10 A. Yes.

11 Q. And what was his response?

12 A. Initially it was no, he didn't.

13 Q. Did he ever admit to knowing Benacio?

14 A. Yes.

15 Q. What did he say?

16 A. He said that I think Benacio was a friend and that he
17 used to live with, I believe it was him and Delfino.

18 Q. And did he admit to being with Benacio on the 4th of
19 April?

20 A. Not initially, no.

21 Q. At some point did he admit that?

22 A. Yes.

23 Q. What did he say?

24 A. He said that he had got him, Delfino and Alvaro went
25 to a park and found Benny. And they basically gave him a ride

1 and drove around.

2 Q. Did he say where they ended up?

3 A. He said he ended up in -- the words he used is "where
4 we found Benny or Benacio."

5 Q. Did he admit to having any problems with Benacio, any
6 animosity towards him?

7 A. Yes.

8 Q. What did he say?

9 A. He -- we talked about an affair that Benacio had with
10 his wife Laufa (phonetic), and that was -- that made him feel
11 really bad and gave him a lot of -- the word he used was
12 caraje, which is I think ugly or shame.

13 Q. I see. Did he display any emotion when you were
14 speaking with him about that affair?

15 A. Other than his words, he didn't explain any emotion
16 about.

17 Q. Did he explain to you how he came to know about that
18 affair?

19 A. He told me that -- I believe he told me that people
20 had told him about the affair and he didn't believe them until
21 his mechanic, Jose, told him about it. And Jose was a friend
22 of Benacio. And at that point he came to the realization that
23 the affair really happened.

24 Q. I see. So the day he stated they picked up Benacio
25 and drove him to where police officers found him, did he

1 describe any sort of altercation occurring that day?

2 A. Yeah, he did.

3 Q. What did he say?

4 A. He said that he went out there. He wanted to
5 confront him about the affair. Benny, he referred to him as
6 Benny, denied it, continued to deny it and that made him more
7 angry. And they exchanged punches. At one point he mentioned
8 that he pulled a gun out of his waistband and just wanted to
9 scare Benny with the gun. I asked him if Benny had run away at
10 that point. He said he'd actually lunged towards him, and the
11 gun had gone off.

12 Q. Did he describe how many times the gun went off?

13 A. Yeah. I believe he said four times the gun went off.

14 Q. Did you ask him about that gun; where you could find
15 the gun?

16 A. I did.

17 Q. I'm sorry. Did you ask him where you could find that
18 gun?

19 A. Yes, I did.

20 Q. What did he say?

21 A. He did. He told me that he had sold it to a man on
22 the street who he described as a Chicano in his twenties.

23 Q. Did you ask him about the muddy clothing that was
24 recovered --

25 A. I did, yes.

1 Q. -- on the search warrant? What did he say about
2 those?

3 A. He said the clothes were probably his.

4 Q. Did you ask him about the specific gunshot wounds
5 that Benacio sustained?

6 A. I don't recall if I asked about the specific wounds
7 or not. I do recall that I asked him when they'd left if Benny
8 was alive or not. Initially he told me he thought he was
9 alive. And then I did ask him, I believe, about the gunshot to
10 the back of the head. And that's when he told me that Benny
11 was dead when they'd left.

12 Q. Did you ask him what position Benny was in when they
13 left him?

14 A. I believe I did. He said face down.

15 Q. Did he give you any more detail about when the gun
16 was sold or where in relation to when the homicide occurred?

17 A. You mind if I check my notes? I don't recall if I
18 asked a specific day or not.

19 Q. If that would help to refresh your memory, please do
20 so.

21 A. Yes, it would.

22 I just asked him to describe the gun. And he had
23 told me he bought the gun five, four months before.

24 Q. But -- okay. And I don't know that it's in your
25 report about when he actually sold the gun. I was just

1 wondering --

2 A. I don't believe I did. I just asked him about who he
3 sold it to and how he sold it. I didn't ask him when.

4 Q. I see. Could I have one moment, Judge?

5 I have nothing further at this time, Judge.

6 THE COURT: Thank you. Cross-examination?

7 CROSS-EXAMINATION

8 BY MR. HOWELL:

9 Q. Thank you, your Honor.

10 Good morning, Detective. Thank you for being here.

11 I believe you testified you've been with the West Jordan Police
12 Department for six years. Is that correct?

13 A. Yes, sir.

14 Q. And how long have you been a detective with West
15 Jordan Police Department?

16 A. For two years.

17 Q. Two years?

18 A. Yes.

19 Q. Okay. And I believe you said you started learning
20 Spanish approximately 13 years ago?

21 A. Yes, sir.

22 Q. And 10 years ago you served an LDS mission in
23 Honduras?

24 A. Yes, sir.

25 Q. So the three years before you went on your mission,

1 where did you receive your Spanish training?

2 A. Just in the different levels of Spanish classes in
3 Murray High School.

4 Q. Okay. So you grew up here in Utah?

5 A. Yes, sir.

6 Q. And isn't it true that in different countries even if
7 they speak Spanish in those countries, there can be different
8 dialects of the Spanish language?

9 A. Different dialects and slang, yeah.

10 Q. So it's possible because you learned Spanish in high
11 school and Honduras that you may not know some of the dialects
12 or slangs in other Spanish speaking countries?

13 A. It's possible.

14 Q. And you know -- well, Benjamin is from Mexico. Is
15 that correct?

16 A. Uh-huh.

17 Q. And so it's possible that he may have been speaking
18 in a Spanish language or using dialects that were different
19 than what you are familiar with in Honduras?

20 A. I believe with the Spanish -- if you don't mind me
21 explaining. There's pretty much a base language kind of like
22 we do in English. Different countries speak English, but they
23 have different slang words. It's the same with Spanish.
24 There's a baseline to where we can understand pretty much the
25 same Spanish with using different slangs and dialects.

1 Q. Okay. But it is possible there's differences between
2 Honduras and Mexico?

3 A. Uh-huh. Yes, sir.

4 Q. And you and Detective Bigelow interviewed Benjamin
5 several times. Is that correct?

6 A. Yes.

7 Q. And whenever you first got involved -- I just want to
8 clarify, you said you didn't know very much about the case.
9 How did you get your knowledge about this case when you were
10 first asked to interview Benjamin?

11 A. Before me and Detective Bigelow went in to speak with
12 Benjamin, he had talked with me about the case.

13 Q. Detective Bigelow did?

14 A. Yes.

15 Q. And what did he tell you about the case?

16 A. From what I can remember, I can't recall everything
17 that he said, but what he testified to before, that he'd gotten
18 the call from Salt Lake City Police Department. That they had
19 a possible -- they had a homicide as well and they had a
20 possible suspect in our homicide. That he had spoken with
21 Delfino and Rosalinda and needed help in translating for
22 Benjamin just due to the fact he didn't speak English.

23 Q. Okay. So this, this first interview that you had
24 with Benjamin, that occurred in Salt Lake City. Is that
25 correct?

1 A. Yes, sir.

2 Q. All right. And I believe you testified earlier that
3 you asked Benjamin what he did on the Friday, Saturday, and
4 Sunday of that weekend when the incident occurred. Is that
5 right?

6 A. Yes.

7 Q. And on Friday what did Benjamin tell you that he did?

8 A. You mind if I look at my notes?

9 Q. That's fine.

10 A. Yes, sir. Mentioned what he told me is he -- if you
11 want me to go through it all, or do you want just to kind of
12 summarize it?

13 Q. Well, the notes I'm looking at here, he went to
14 work --

15 A. Went to work till 3:30.

16 Q. Right. And then he went practicing with his band?

17 A. Yes, sir.

18 Q. And that evening he went to sleep?

19 A. Yes, sir.

20 Q. And then Saturday morning he was trying to work on
21 his vehicle with his friend, Jose. Is that correct?

22 A. Yes.

23 Q. And it took a little while to locate Jose, and so he
24 went to Delfino's house and worked on his truck with Jose?

25 A. With Jose, yes.

1 Q. And on Sunday he told you that he woke up and watched
2 hunting shows?

3 A. Uh-huh.

4 Q. And then --

5 THE COURT: Is that yes?

6 THE WITNESS: Yes, I'm sorry.

7 Q. (BY MR. HOWELL) Thank you. I'm sorry.

8 Then he went to Delfino's house again -- or I'm
9 sorry. Delfino and Rosalinda came to his house and watched
10 movies --

11 A. Yes.

12 Q. -- and they went to Liberty Park and had an Easter
13 egg hunt?

14 A. Yes.

15 Q. And at that point, you, or Detective Bigelow showed
16 Benjamin a picture of Benny, the decedent, in this case,
17 correct?

18 A. Yes.

19 Q. And Benjamin testified, or Benjamin informed you that
20 he did not know Benny or didn't recognize him, correct?

21 A. At that time, yes.

22 Q. But then he clarified later and said it had been a
23 long time since he had seen Benny and didn't really know him?

24 A. Yes.

25 Q. Isn't it true that Benjamin in his first interview

1 told you that he didn't really do anything with Delfino on
2 Saturday and he just worked on his truck with Jose?

3 A. Yes. He said Delfino was in the house initially
4 while they were working on the truck and he didn't really see
5 him that day.

6 Q. Okay. And before this interview occurred, this first
7 interview, you reviewed with Benjamin his Miranda rights. Is
8 that correct?

9 A. Yes, I did.

10 Q. And that was in Spanish?

11 A. Yes, it was.

12 Q. Okay. Did you rehearse those from memory, or did you
13 read them from a card?

14 A. I rehearsed them from memory.

15 Q. Okay. And he seemed to understand his rights at that
16 time?

17 A. He told me he did, yes.

18 Q. So after this first interview, you and Detective
19 Bigelow left, and you went and interviewed his younger brother,
20 Alvaro?

21 A. Alvaro, yes.

22 Q. And based on your interview with Alvaro, that
23 prompted you to go back and interview Benjamin a second time?

24 A. Yes.

25 Q. So when you and Detective Bigelow reinterviewed

1 Benjamin, the second interview, did you remind him of his
2 Miranda rights?

3 A. I reminded him of them, yes.

4 Q. And he asked you what would happen if he wanted a
5 lawyer, correct?

6 A. Yes.

7 Q. And he told you that he would like a lawyer because
8 he told you the truth. Is that correct?

9 A. He had -- the exact wording he used was "I would like
10 to occupy a lawyer because I've told you the truth."

11 Q. So this is before you started interviewing the second
12 time. This is at the very beginning of that interview?

13 A. Yes.

14 Q. So after he told you that he wanted a lawyer, you
15 didn't provide him a lawyer, though, correct?

16 A. No. What I did is stood up and advised Detective
17 Bigelow due to the fact that he didn't speak Spanish, he would
18 like to have a lawyer, occupy a lawyer. Detective Bigelow said
19 okay. I advised Benjamin that we'd just spoken and wanted to
20 speak with him further. At that point he said, "Okay. Let's
21 talk."

22 Q. Okay. So you continued questioning after he advised
23 you he wanted a lawyer?

24 A. Yes.

25 Q. So you informed Benjamin that you had information

1 that his wife was having an affair with the decedent. Is that
2 correct?

3 A. Yes.

4 Q. And he testified that he felt very bad, or I believe
5 you said shameful about this?

6 A. Shameful and ugly, yes.

7 Q. And he seemed, at least by his language, he seemed
8 somewhat distraught about this. He was repeating it several
9 times?

10 A. Yes.

11 Q. And you asked, at this time you asked Benjamin if he
12 killed Benny, and he told you that he did not --

13 A. Yes.

14 Q. -- correct? And as the questioning continued,
15 Benjamin asked what the charge was for adultery because he was
16 separated from his wife at the time and had been having a
17 relationship with another woman, correct?

18 A. Yes.

19 Q. So he was concerned about the adultery charge, but you
20 told him there is no, no charge for that?

21 A. Yeah, they really don't charge you with adultery,
22 yeah.

23 Q. Right. Okay. So, so after this discussion, you
24 continued to, tried to converse with Benjamin and just advise
25 him that you were there to listen, and that was all, correct?

1 A. Yes.

2 Q. And it was at that time that Benjamin explained that
3 Jose, the mechanic he was working on his vehicle with, informed
4 him that his wife had been having an affair with the decedent?

5 A. Yes.

6 Q. And I want to make sure I'm understanding. I believe
7 earlier you testified that Benjamin -- there was some punches
8 exchanged between Benjamin and the decedent?

9 A. Yes.

10 Q. And he took the gun out only to scare the decedent --

11 A. Yes.

12 Q. -- and try to convince or help the decedent admit
13 that the affair took place?

14 A. Yes.

15 Q. Okay. And it was at that time that the decedent
16 lunged forward towards Benjamin and tried to grab the gun,
17 correct?

18 A. That's what Benjamin said, yes.

19 Q. And it was at that time that the gun discharged and
20 struck Benny?

21 A. Yes.

22 Q. Earlier you talked about his testimony or his
23 statements regarding disposing of the gun. You were involved
24 with this investigation subsequent to the interview, correct?

25 A. No. I -- until the interview I was never involved in

1 it.

2 Q. But after the interview --

3 A. After the interview.

4 Q. -- you continued to be involved in the investigation?

5 A. No, actually -- like I explained, I was actually on
6 maternity leave. So what I'd done, due to the seriousness of
7 the case, I was asked by Sergeant Reese to type up my interview
8 and basically just continue with my maternity leave.

9 MR. HOWELL: All right. Could I have just a moment,
10 please?

11 THE COURT: You may.

12 Q. (BY MR. HOWELL) This time period in which Salt Lake
13 City Police Department was involved and West Jordan Police were
14 involved interviewing Delfino and Benjamin and Alvaro, that
15 interview process took approximately six hours. Is that
16 correct?

17 A. I can't give you a number. I don't recall.

18 Q. Was it longer than typical interviews that you do?

19 A. That I do, yeah, usually typical interviews, yes.

20 MR. HOWELL: Okay. Nothing further. Thank you.

21 THE COURT: Okay. Anything on redirect?

22 MR. HILL: Just briefly, Judge.

23 REDIRECT EXAMINATION

24 BY MR. HILL:

25 Q. Detective Turner, speaking or turning your attention

1 just to the second time you went back to interview Benjamin,
2 after you'd spoken to Alvaro regarding the Miranda warnings
3 that you gave to him, so you read the warnings again, correct?

4 A. I didn't read them word for word like I'd done the
5 first time, I just reminded him of -- that he did have the
6 right to have an attorney and he could choose not to speak with
7 me at any time, yes.

8 Q. And then he says that he would like an attorney
9 because he's told you the truth?

10 A. Yes.

11 Q. And then was that the only -- what statement did you
12 make to him after that?

13 A. Well, to back up a little bit like I was explaining
14 before, I told Detective Bigelow what he had told me. Then I
15 turned to Benjamin and just told him we had spoken with others
16 and we just wanted to speak with him further about this.

17 Q. So you didn't ask him another question; you just made
18 a statement to him?

19 A. Yes.

20 Q. And what was his response after that?

21 A. He said, "Okay. Let's talk." And I asked him if he
22 was sure he wanted to talk without an attorney and he said yes.

23 Q. Did you at any time tell him that it wasn't necessary
24 to have an attorney?

25 A. No, I did not.

1 MR. HILL: May I have one moment, Judge?
2 No further witnesses -- no further questions for this
3 witness, Judge.
4 THE COURT: Okay. You may step down. Thanks.
5 Any other witnesses from the State?
6 MR. HILL: No, your Honor. I do have one other
7 exhibit. I've marked it as State's Exhibit 2. It's a two-page
8 document under court seal. It's a prior conviction for -- I've
9 shown that to defense counsel.
10 THE COURT: Any objection?
11 MR. BAUTISTA: No, your Honor.
12 THE COURT: It will be admitted.
13 (State's Exhibit No. 2
14 Was received into evidence.)
15 THE COURT: Okay. Let the record reflect that it
16 shows a conviction for Benjamin Arriaga-Luna for third-degree
17 felony of possession of a controlled substance; third-degree
18 felony for endangerment of a child; a second third-degree
19 felony for endangerment of a child of an adult. So the
20 convictions of three third-degree felonies.
21 Okay? Anything else from the State?
22 MR. HILL: No, your Honor. The State rests.
23 THE COURT: All right.
24 MR. BAUTISTA: If I may have a moment, your Honor?
25 THE COURT: You may.

1 MR. BAUTISTA: Your Honor, the defendant has been
2 advised that he does have a right to testify at a preliminary
3 hearing. I've also advised him that I do not think it would be
4 a wise thing for him to do. He is following my advice and not
5 testifying. And at this time the defense is not presenting any
6 witnesses and we would rest as well. And we would submit it.

7 THE COURT: Thank you, Mr. Bautista. Both sides
8 submit it? Argument?

9 MR. HILL: We'll submit it, Judge.

10 THE COURT: Submit it?

11 MR. BAUTISTA: Yes.

12 THE COURT: All right. Let the record reflect that
13 this court finds that there's probable cause or reason to
14 believe that the crime of murder, a first-degree felony;
15 possession of a dangerous weapon by restricted person, a second
16 degree felony; and obstruction of justice, a second degree
17 felony were committed, and that the Defendant committed that
18 crime.

19 The basis for those findings are the fact that the
20 defendant has admitted to the detectives that he was the one
21 that caused the death of the victim in this particular case.
22 That the medical examiner has ruled it a homicide.

23 In regards to the possession of a dangerous weapon,
24 that he's been convicted of a felony prior to this and admitted
25 that he had a gun or a handgun in his possession.

1 In regards to the obstructing justice, this court
2 finds that one, that he -- well, I guess the main obstruction
3 of justice is the fact that he sold the weapon to a third-party
4 to try to get rid of, or at least the court would infer that he
5 was trying to get rid of it after the homicide took place.

6 Based on that, again the court finds there's reason
7 to believe that these crimes were committed and the Defendant
8 committed these crimes. He's bound over to the District Court.

9 Do I just follow the same thing? So it goes to Judge
10 Adkins. He's bound over to Judge Adkins and he will appear?

11 THE CLERK: He has a calendar next week or the week
12 after -- or two weeks, three weeks.

13 THE COURT: How quickly do you want him up for
14 arraignment?

15 MR. BAUTISTA: We need to get a copy of the
16 transcript.

17 THE COURT: So two weeks?

18 MR. BAUTISTA: I'm sure the court can anticipate
19 there's going to be a motion in this case. So I would ask for
20 August 16th at 1:30 which I believe would be Judge Adkins.

21 THE CLERK: He's not. He's on the 9th.

22 MR. BAUTISTA: Okay. I'm sorry. The 9th at 1:30,
23 please.

24 THE COURT: So it will be the 9th. And if you don't
25 have the transcript, if it's not ready, you can ask him to set

1 it over then. But arraignment will be on the 9th in front of
2 Judge Adkins at -- does he do it at 8:30 in the morning?

3 THE CLERK: Yes.

4 THE COURT: 8:30 in the morning.

5 MR. BAUTISTA: Actually, your Honor, he has a 1:30
6 calendar as well.

7 THE COURT: Oh, would you like the 1:30?

8 MR. BAUTISTA: Please.

9 THE COURT: Okay. It will be at 1:30 then.

10 MR. BAUTISTA: Thank you.

11 THE COURT: With that we stand adjourned.

12 Let the record reflect that the State has requested
13 the withdrawal of the two exhibits, being the medical
14 examiner's report and the record of conviction. The court is
15 going to grant that and give them back to the State to maintain
16 in their custody.

17 MR. HILL: Thanks, Judge.

18 (Whereupon the proceedings were concluded.)
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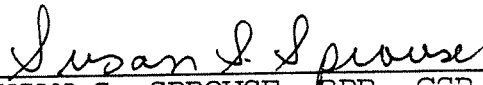
C E R T I F I C A T E

STATE OF UTAH)
)
COUNTY OF UTAH)

 This is to certify that the foregoing proceedings
were taken before me, Susan S. Sprouse, a certified shorthand
reporter in and for the State of Utah, residing in Salt Lake
County, Utah;

 That the proceedings were reported by me in
stenotype, and thereafter caused by me to be transcribed into
printed form, and that a true and correct transcription of said
testimony so taken and transcribed is set forth in the
foregoing pages, inclusive.

DATED this 1st day of AUGUST, 2010.


SUSAN S. SPROUSE, RPR, CSR
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ADDENDUM C

Police Interview Transcript

1 State V. Benjamin, Arriaga-Luna

2 Case no. 201058764

3
4 B = Benjamin Arriaga

5 DB = Detective Bigelow

6 DT = Detective Turner (Interpreter)

7
8
9 DT: I want to remind you that ...you remember your rights ok. Well then
10 do you totally understand these rights? You do not have to talk to us.
11 You have the right to bring an attorney here. If you do not have the
12 money to bring an attorney we can appoint one to represent you,
13 remember this. Do you understand these things right?

14
15 B: Mmm...hmm...

16
17 DT: Since you understand these things, you do understand right? Do you
18 want to talk to me some more?

19
20 B: And if I do not have the money for an attorney?

21
22 DT: We will appoint one.

23
24 B: Yes...yes, I will need to have one appointed.

25
26 DT: Ok...he wants a lawyer.

27
28 DB: What did he say?

29
30 DT: He won't talk... (Reply to DB).

31
32 DT: Are you sure? (question directed at Benjamin).

33
34 B: Yes, I would like to occupy a lawyer because I've told you the truth.

35
36 DT: Ok...Ahm, but like I said. We have talked to others ok, and that is
37 why we only want to talk to you a little more, but if you do not want
38 to, you do not want to. Ok.

39
40 B: Mmm....hmm.

1
2 DJ: Do you want to?
3
4 B: Why not, yes it's ok.
5
6 DJ: It's ok, you do not want an attorney here?
7
8 B: No.
9
10 DJ: Are you sure?
11
12 B: Yes.
13
14 DJ: Ok. (statement to DB) He's recanted back. I think I won't talk. (
15 Phone rings inaudible).
16
17 DJ: (statement directed to Benjamine) I have talked to other people that
18 are somewhat close to you.
19
20 B: Mmm....hmm.
21
22 DJ: We found out that the man was having sexual relations with your
23 wife.
24
25 B: Mmm..hmm.
26
27 DJ: Is it true?
28
29 B: No. I am not really sure.
30
31 DJ: These other persons say it is.
32
33 B: Mmm... hmm. Yes.
34
35 DJ: You found this out through a friend and you want to fight with this
36 man because of these relations, because he was having sex with your
37 wife.
38
39 B: I don't know I never, I knew a little but.
40 DJ: What did you know?

1
2 B: That this man was with my wife, but that was all.
3
4 DJ: These people also, the thing is that you wanted to fight each other.
5
6 B: I never.
7
8 DJ: You wanted to fight with him because he was having sexual relations
9 with your wife and you and your brothers drove with that man to a
10 field to fight.
11
12 B: No. I never wanted to fight with him.
13
14 DJ: These people say yes.
15
16 B: But No.
17
18 DJ: You are the only person saying no.
19
20 B: No... I only ...
21
22 DJ: Delfino is not the person we are talking about. We have not talked to
23 Delfino about this situation. Your wife's name is Laura right?
24
25 B: Yes. She is not my wife anymore I am no longer with her. The truth is
26 I am no longer with her, for many reasons.
27
28 DJ: Look Benjamin. I can not understand why you killed this man, ok.
29
30 B: I did not kill him.
31
32 DJ: but if he was having sexual relations with your wife, you need to be a
33 man right. Right?
34
35 B: Yes.
36
37 DJ: Right? You would have to put him a side. You had to wash away how
38 you felt about this person, right?
39
40 B: Yes.

1
2 DJ: You have kids with this woman right?
3
4 B: Yes.
5
6 DJ: And this man was having sexual relations with your wife.
7
8 B: It was my guess that he had...
9
10 DJ: No. no. I want to know.
11
12 B: I became aware of it, but I had guessed, that is what I guessed.
13
14 DJ: Ok. We know that Delfino drove the car, with you and your other
15 brother.
16
17 B: What I assumed was, what can I do it's my wife's fault.
18
19 DJ: Exactly, exactly, but you had to be a little mad, right.
20
21 B: Yes.
22
23 DJ: Like I said you have kids with this woman, and this man. Are you
24 married?
25
26 B: Yes.
27
28 DJ: If she is committing adultery with this man, you'd have to be a little
29 bit mad.
30
31 B: Yes.
32
33 DJ: You have to locate him to ask him why? Right? Right?
34
35 B: Yes.
36
37 DJ: And begin talking about these things and start fighting.
38
39 B: No, no I never fought with him.
40 DJ: It was normal, just with words?

1
2 B: Just normally. I did get angry but that was all you know. What I
3 assumed was that it was my wife's fault (inaudible).
4
5 DJ: No it is very painful because he did everything you loved her, I know.
6
7 B: Yes.
8
9 DJ: This is going to be your last chance, ok. We are not going to talk to
10 you anymore after we leave this room ok. I am going to ask you one
11 thing and then we are going to talk. Did you kill this man?
12
13 B: No.... No.... No. really that's the truth.
14
15 DJ: Benjamin.
16
17 B: No. Ok then, I was very angry but...
18
19 DJ: I have witnesses that say that they saw.
20
21 B: No.
22
23 DJ: That you killed this man.
24
25 B: They lied to you, because I never... On Saturday, these people that
26 told you on Saturday or Friday.
27
28 DJ: They told me Sunday.
29
30 B: No, on Sunday I was with my brother.
31
32 DJ: which one?
33
34 B: Alvaro. We were together and Delfino as well but we never picked
35 this person up. We never picked him up. Like I told you I got real
36 angry, it's been, this happened years ago. It has been about six years
37 now since this thing happened.
38
39 DJ: This thing with your wife?
40 B: With my wife?

1
2 DJ: Who told you?
3
4 B: Many people in the street. They were saying.
5
6 DJ: Give me some names.
7
8 B: Those people do not live there anymore. He knew all of them too. He
9 knew them all well.
10
11 DJ: How ~~did~~ you know that he was the one?
12
13 B: They would be talking about it but they never told me. I heard but
14 they never told me. They never said it to me, look that is him.
15
16 DJ: When did you become aware of this?
17
18 B: I became aware about three years back. I was in Mexico about three
19 years ago and when I was with my wife in Mexico I became aware
20 there. I then came back and my wife and I left each other but I became
21 aware of all this in Mexico, three to four months later I saw him here.
22 When I saw him I got very angry, I go very angry because I would
23 think about those things. I don't know how you would feel if
24 somebody...
25
26 DJ: I would have felt real mad
27
28 B: Had sexual relation with...
29
30 DJ: And detective Bigelow would be very mad if his wife was with a
31 different man.
32
33 B: Yes it's true because, when you are married and you have kids, you
34 feel awful. You feel real awful.
35
36 DJ: Real angry.
37
38 B: But like I have told you I did not kill him. The truth is I did not know
39 where he lived or what he does. I thought what do I do now, but and
40 then I thought not to. At best it is not his fault because they say it is

1 the women's fault. It is his fault too but I then thought if I do
2 something I am going to go to jail and she will continue on. Those
3 were my thoughts. That was it. was being told that she was with my
4 brother, and all that, and so I talked to Jessica and told her that I was
5 going to go talk to them (inaudible).
6

7 DJ: Jose says you are doing the same thing with Jessica.
8

9 B: Yes but I do not know, she is my girlfriend, but I am not....
10

11 DJ: But why is she not Bennies girlfriend?
12

13 B: What?
14

15 DJ: Because you are angry.
16

17 B: Because I was with him.
18

19 DJ: But you have been with another woman.
20

21 B: No... no
22

23 DJ: With Jessica?
24

25 B: No.
26

27 DJ: You have not been with Jessica?
28

29 B: Well now I am.
30

31 DJ: Well it's the same.
32

33 B: Because of this I am separated from my wife. I am now separated.
34

35 DJ: But how long have you been with Jessica?
36

37 B: One year. My wife and I have been separated for three years. That is
38 when I separated with her, it has been three years.
39

40 DJ: (to DB) He's talking about his wife cheating on him.

1
2 DB: Did you bring in Alvaro?
3
4 DJ: Hah?
5
6 DB: During the conversation? Make sure you talk to him and get that info
7 and take measurements.
8
9 DJ: You know what... I just finished talking with Alvaro. Alvaro told me
10 that you killed that man.
11
12 B: Ok. What he is saying is all wrong.
13
14 DJ: It's all wrong. He was there, he saw it. He saw what you did.
15
16 B: It's all wrong, he is telling lies.
17
18 DJ: No.
19
20 B: You don't think so?
21
22 DJ: No.
23
24 B: You think I killed him?
25
26 DJ: Mmm...hmm.
27
28 B: Why?
29
30 DJ: Because there is proof that indicates it was.
31
32 B: Yes. No I don't believe it. The truth is it had been a while since I last
33 saw him.
34
35 DJ: The games are over. We already know Bengamin. If you want to do
36 this man to man and tell me what happened. I know that you were
37 angry with this man ok. You had to do something. You wanted to
38 fight with this man but you gave him a few blows in the face, and you
39 probably thought you had to do what you did.
40 B: Yes. But I already told you already that.....

1
2 DJ: the games over, we are finished ok. We already know. We have one
3 person who says they saw you fire the shots at Bennie. We have one
4 person who says they saw you.
5
6 B: Alvaro?
7
8 DJ: Mmm..hmm..
9
10 B: Alvaro is telling lies.
11
12 DJ: No he is telling the truth.
13
14 B: I don't know why he would have told you that. I would not have the
15 courage to kill a human being.
16
17 DJ: You did not want to do it but.
18
19 B: I have thought all along that...
20
21 DJ: I do not understand because I have never had a girl that has gone out
22 with another man, but you have to do something.
23
24 B: Yes.
25
26 DJ: Yes. Tell me what you did. We have Alvaro, in a little while we will
27 also have the gun. It would be better if you tell us what happened.
28
29 B: I am telling you truth.
30
31 DJ: No.
32
33 B: You guys probably think I am lying but the truth. The truth it has been
34 some time since I have seen him.
35
36 DJ: No..no... we are no longer talking about that. When was the last time
37 you saw him? We are done with that. I am telling you what Alvaro
38 told me, because during the time you have been here I have been
39 talking to Alvaro and Alvaro has told me all these things.
40 B: He told you it was me?

1
2 DJ: Mmm...hmm..
3
4 B: He is lying to you.
5
6 DJ: He did not want to tell me, he wanted to protect you.
7
8 B: You think he is scared? Alvaro, he is nervous, I am nervous too... it is
9 scary... death is something... terrible thing you know... but I have
10 always thought... I was very angry but after all it was not totally his
11 fault but my wife's as well.
12
13 DJ: It is his fault that is why you had to do something.
14
15 B: If I did something with him I will go to jail and my wife will be with
16 others, and that is why I then thought a little more positive. Ask my
17 friend where I work he knows me and what I am like.
18
19 DJ: But Alvaro was there, he was not there with Alvaro and Delfino.
20
21 B: But he can tell you that I am a peaceful man, that I am not bad or
22 unreasonable. Do you understand? Yes I did get angry, who would not
23 get angry.
24
25 DJ: I am not saying that but we have to go past that. You were angry.
26
27 B: Yes.
28
29 DJ: You had to do something, you were real angry. The detective and I
30 would be very angry. You had to do something. You had to do
31 something.
32
33 B: He just told you that I killed him.
34
35 DJ: Mmm...hmm...
36
37 B: He is lying.
38
39 DJ: (speaking to DB) He's saying Alvaro is a liar.
40 DB: Why is Alvaro a liar?

1
2 DJ: What reason would Alvaro have to lie to us?
3
4 B: He would not have any.
5
6 DJ: Right! Exactly! Why would he lie to us if he did not have something
7 to hide, but like I said he did not want to tell us, he himself has his
8 own battles. He saw what happened but he is your brother, he wants to
9 protect you. He knows that it is his obligation to tell the truth. He had
10 to lie about what he knows because he feels a little guilt, because he
11 saw something real bad, and he saw that his brother did it freely.
12
13 DB: Listen to me, this isn't going away ok. Look Benacio, he's dead ok.
14 Let's just make this right for everybody. Why don't you tell us what
15 happened, cause were not going to leave. This whole thing is not
16 going away, so let's just make it right. Let's be men here and tell us
17 what happened. You know tell us your story.
18
19 B: I am telling you the same thing that I keep telling you, that I did not
20 kill him.
21
22 DJ: Same story that Alvaro lied.
23
24 DB: Think he did?
25
26 B: I do not know how I could have....
27
28 DJ: Delfino?
29
30 B: No, it was not either of us. No
31
32 DJ: Who did it then?
33
34 B: It's not true. Like I told you it had been months since I had seen him.
35
36 DJ: Like I told you we have finished with that. Like the detective told you,
37 this is always going to be on your conscious. His face is always going
38 to be there until you admit what happened, you will always see what
39 happened to this man. He had sexual relations with your wife, we
40 know that. You were angry. You got mad.

1
2 B: And that's called adultery you say?
3
4 DB: Yes, adultery.
5
6 B: Adultery, mm..hm...
7
8 DJ: We all want to hear the story about what happened with Benacio.
9
10 B: What did Alvaro tell you?
11
12 DJ: No. I want to know what happened from you.
13
14 B: I keep telling you... Nothing...
15
16 DJ: I want to hear it from you.
17
18 B: I am telling the truth is that I did not kill him.
19
20 DJ: I want to hear what happened from your mouth.
21
22 B: That he was involved with my wife?
23
24 DJ: No. What it was that happened to him?
25
26 B: I do not know.
27
28 DJ: Alvaro (inaudible)
29
30 DB: Do you speak enough English?
31
32 B: Not to much.
33
34 DB: You guys were just fighting?
35
36 B: No.
37
38 DB: Did the gun accidentally go off?
39 B: No we were fighting.
40

1 DB: I think the gun accidentally went off.
2
3 B: It did.
4
5 DJ: Are you saying it was accidental, that the gun accidentally
6 discharged?
7
8 B: I never shot at him. What am I going to shoot with if I don't have a
9 gun?
10
11 DJ: He says that he didn't have a gun.
12
13 B: I have never had one.
14
15 DB: (inaudible) Back stabbing because he doesn't have a gun.
16
17 B: You can ask my friends, I have never had a gun.
18
19 DJ: I have asked Alvaro, Alvaro said that you did have one.
20
21 B: That I had a gun?
22
23 DJ: Ya.
24
25 B: I have never had a gun.
26
27 DB: We know where it's at too.
28
29 DJ: We know where the gun is.
30
31 B: Mmm..hmm? Where is it? No I have never had a gun.
32
33 DJ: Yes.
34
35 B: No.
36
37 DB: Stop playing games. Stop playing the whole game, let's make this
38 right.
39 B: I am telling you the truth.
40

1 DB: Did the gun just accidentally go off in your hand when you were
2 fighting?
3
4 B: No... never fighting.
5
6 DB: Then how did the gun go off?
7
8 B: I was never... I did not see him this weekend. I did not see him this
9 weekend.
10
11 DJ: No he is saying how did the gun go off?
12
13 B: Who knows, I did not do anything to him. It....
14
15 DJ: You are not answering the question. He is asking how the gun went
16 off. Was it an accident or what?
17
18 B: Because I never shot at him.
19
20 DJ: Did you shoot at the floor?
21
22 B: My brother has one but I never have.
23
24 DJ: Your own brother says you do.
25
26 B: No, he is lying.
27
28 DJ: We are going to get the gun because we know where it's at and we
29 know your DNA will be there. We are not going to talk anymore.
30
31 B: No.
32
33 DJ: After this we are not going to talk. If you want to tell us something
34 say it to us, because after we leave this room we are not going to talk
35 with you anymore.
36
37 B: No
38
39 DJ: Nope.
40

1 B: No attorney or nothing?
2
3 DJ: You can talk with an attorney if you want but we are not going to talk
4 to you anymore.
5
6 B: Ok. No more?
7
8 DJ: That is why we want to do it man to man, so that you can be a man
9 and tell what happened.
10
11 B: And what type of charge does adultery carry?
12
13 DJ: Adultery?
14
15 B: Mmm...hmm...
16
17 DJ: Nothing
18
19 B: Nothing now?
20
21 DJ: No.
22
23 B: Mmm...hmm...But like I said I know he did cause me a lot of harm.
24
25 DJ: I know he did you lots of harm, but I also want to know what you did
26 to him.
27
28 B: Well you know, I got very angry but like I told you.
29
30 DJ: I know, and you also have kids with this girl. This man got between
31 you and your wife's relationship. I know what he did to you, but what
32 I want to know is what you did to him ok. Man to man Gabriel, man
33 to man. You and I are talking.
34
35 B: Yes. That he shouldn't be doing that (inaudible) because a death.
36
37 DJ: I know.
38
39 B: (inaudible)
40

1 DJ: I know, but tell me. You are going to feel fine or better then what you
2 are feeling now.
3
4 B: Mmm....hmm. For telling the truth... but if I say yes and it was not
5 me... sometimes put you to jail for twenty to thirty years, is that true?
6
7 DJ: At times yes but at times no.
8
9 B: Yes.
10
11 DJ: The whole story about him and your wife will be known. I know that
12 this man caused you a lot of harm, I know that but what I want to hear
13 from your mouth is what you did to him.
14
15 B: Yes. What did Alvaro tell you, that I killed him? What did Alvaro tell
16 you, that I killed him?
17
18 DJ: I am not going to say what Alvaro told me. I want to hear what
19 happened to this man. I am here to listen to you.
20
21 B: Well nothing. I told you I never fought with him.
22
23 DJ: No, no. I know this man caused you a lot of harm to. You got very
24 angry. I know that. That he had sexual relations with your wife a lot of
25 times.
26
27 B: I was aware of it for a long time and after I was aware of it I left to
28 Mexico. I was there for three or four months. On the fourth month I
29 then knew that she had been with him. I am still married to her.
30
31 DJ: Did you get married through the church or what?
32 B: Through the church and through the court.
33
34 DJ: At best this is going to cause you more harm, because this is through
35 the church not something civil, but because of the religion.
36
37 B: I have five kids.
38
39 DJ: Five kids. You told me that the oldest is six and the youngest is four.
40 How do your kids feel?

1
2 B: Bad.
3
4 DJ: I guess they would when they feel these things are happening but also
5 how are your kids going to feel when they know that their father is not
6 telling the whole truth? Think about that. I know this person did a lot
7 of harm to your family. This man here Benny did you a lot of harm.
8
9 B: To me. He did me a lot of harm.
10
11 DJ: A lot of harm I can feel that you feel real bad because of this person.
12
13 B: Up until now I feel traumatized. Like when there is something you
14 can not get off your mind.
15
16 DJ: Exactly, the thing is when something like what happened to this man
17 takes place it can also stay on your mind. A thing like this is the same.
18 It is going to stay on your mind, but at the same time I know that
19 when a person talks about these kind of things and they tell me the
20 things that happened they feel better.
21
22 B: Yes.
23
24 DJ: I know that because the experiences that I have had. I know that a
25 person feels better when they talk about the things they have done.
26
27 B: Yes one feels better? One feels better right?
28
29 DJ: They feel a little better. When they talk about the things, like what we
30 are talking about this thing, about your wife that you have told me,
31 you feel a little better if you are talking with another man about these
32 things and about how you feel. But also, when you talk about the
33 other things, like what happened with this man, you are going to feel
34 better.
35
36 B: You think so?
37
38 DJ: That's right! I am here to listen to you. But Like I said when I leave
39 here I am not going to talk to you anymore.
40

1 B: No.
2
3 DJ: If you want to feel better you will tell me everything that happened
4 with Benacio.
5
6 B: Did Alvaro tell you that I killed him?
7
8 DJ: No. I am not going to tell you what Alvaro said, or what Alvaro tol
9 me because I want to hear what happened from your mouth.
10
11 B: Do you know how much I will get?
12
13 DJ: I do not know, but I am also going to be there. I can talk about the
14 things that I know. About the harm but, it could be twenty or maybe
15 less it all depends on the situation.
16
17 B: The situation of what things took place?
18
19 DJ: How things took place, things with your wife.
20
21 B: All my life I have been a good person.
22
23 DJ: I know you are a good man that is why you are here.
24
25 B: Yes.
26
27 DJ: I want to see that you feel better. The things they did to you are
28 wrong.
29
30 B: But there is no punishment for that or is there. Are there any charges
31 for that?
32 DJ: We can check.
33
34 B: Didn't you say that is was called adultery here in the state of Utah?
35 There is not a charge for that I believe, but I do not know
36 (inaudible both talking).
37
38 DJ: We can not go now but I can look for him.
39
40 B: (Inaudible)? But I think that in this state it is not punishable.

1
2 DJ : What they did to you is a very bad thing, but while we have been
3 talking I can see that you feel a little better by talking to another man
4 about what has happened, but you need to also tell me about what
5 happened with the man. You will feel better.
6
7 B: You think so?
8
9 DJ: Like I said I have talked with people that have done things not similar
10 to this, but they have felt a lot better because the things have been on
11 their mind forever.
12
13 B: Will they give me a lot of years in jail?
14
15 DJ: I do not really know. They could do it but they can also make it less. It
16 all depends on the situation. That is why I want to know everything.
17 Right now we do not need to preoccupy ourselves with this, we need
18 to be preoccupied in what happened. Do you understand what I am
19 telling you? After we talk about what happened we can talk about the
20 other things. Because at best in this situation something happened and
21 that is why we also have to know what happened, about everything
22 and all that happened and all that took place so that we can make a
23 decision. Do you understand? Tell me what happened.
24
25 B: My mechanic he knows him.
26
27 DJ: He knows ah...
28
29 B: Him. He had known him for a long time. I became aware that he was
30 with my wife from many...
31
32 DJ: Your mechanic told you.
33
34 B: Yes but... they told me about three years ago and I did not believe
35 it... but I did not believe it because I loved my wife and I thought it
36 was not true.
37
38 DJ: The mother of your kids.
39

1 B: I know that they.... I am going to do everything to get back together
2 and be happy with her. But living together was not the same. I was not
3 the same anymore. The day that my mechanic was there he said it was
4 Bernardo. He told me... he said it was true. It is true. I told my
5 mechanic lies so that he would tell me the truth. Do you understand? I
6 told him that I had left my wife and that I was still separated from her.
7 I told him that it had been eight days since I had talked to her and I
8 that I was aware of everything.

9
10 DJ: What you were talking about with...ok...

11
12 B: That I was aware. We still had another girl and she never told me
13 anything. (inaudible) in my house and we had the girl and she never
14 told anything.

15
16 DJ: Is the girl?

17
18 B: My daughter is my daughter, but I never was aware that she was...

19
20 DJ: That she was with him?

21
22 B: Yes. Four or five months she never... If you had a woman like that it
23 is not worth it.

24
25 DJ: What do you mean?

26
27 B: A woman that, you feel awful. I hope you never have to feel
28 something. That is to say that a woman you love a lot gets involved
29 with another.

30
31 DJ: I understand.

32
33 B: When I found this out, after I found out I stopped living with her
34 because in reality I was not angry. The mechanic also knows, the
35 mechanic Jose, and when he called me he told me it was true, but I
36 lied to him. I told him I no longer lived with her, because of what
37 happened. When I would call her I'd locate her at the hotels...and the
38 crises....

39 DJ: What crises, what happened next?

40

1 B: I got real angry. I ran into him....
2
3 DJ: Where did you run into him?
4
5 B: At the park.
6
7 DJ: At Liberty?
8
9 B: No at another park that is there. Norwood. I ran into him and thought
10 he didn't do anything, but I felt like you explained, I felt bad and I am
11 a man too.
12
13 DJ: How were you?
14
15 B: I (inaudible)?
16
17 DJ: Who all was at the park? Who was with you?
18
19 B: My brother Berjin.
20
21 DJ: Not Alvaro or another person?
22
23 B: Alvaro too.
24
25 DJ: And Alvaro too.
26
27 B: But they had nothing to do with that...
28
29 DJ: After you ran into him at the park what was the next thing you all did?
30
31 B: We smoked with him.
32 DJ: Where?
33
34 B: (inaudible) that is where we ran into him.
35
36 DJ: Tell me everything that happened with Benacio.
37
38 B: I asked him if he had had sexual relations with my wife. We talked for
39 a little while and he told me no. I got very angry and I hit him.
40

1 DJ: What else?
2
3 B: But he blocked it.
4
5 DJ: Who you from him or him from you?
6
7 B: Him too... Him too... we hit each other.
8
9 DJ: After that what did he do?
10
11 B: When I hit him, he... I got him.... I hit him, but he swung at me too. I
12 pulled out the gun.
13
14 DJ: Where did you pull the gun from?
15
16 B: Form here. I was going to, my thought was just to scare him but he
17 came at me and the gun fired.
18
19 DJ: How did it discharge?
20
21 B: It appeared to have hit him because we rolled onto the ground. Do you
22 know what I mean? And then....
23
24 DJ: Mmm... hmm
25
26 B: My brothers did not do anything.
27
28 DJ: It was only you? Why?
29
30 B: Well because he was the one who hit me.
31
32 DJ: Where were your brothers when this happened?
33
34 B: They were waiting for me in the car.
35
36 DJ: What car were you all in?
37
38 B: A gray car.
39
40 DJ: What make?

1
2 B: It is a Hyundai, something like that.
3
4 DJ: Tell me where you got this car. Who was driving?
5
6 B: My brother Delfino.
7
8 DJ: Delfino. Who was in the passenger side?
9
10 B: Benny.
11
12 DJ: And in the back?
13
14 B: Me and my brother Alvaro.
15
16 DJ: And before, ok you are telling me that you ran into him at the park,
17 because you arrived at the park. What did you talk about when you
18 were all very angry?
19
20 B: We were talking about other things not relevant to this is what
21 happened. We were talking about, hey what have you been doing,
22 where do you live, where do you work.
23
24 DJ: Like friends.
25
26 B: Yes like friends so that he wouldn't say anything, but I was very
27 angry inside. Do you understand? You feel awful. It feels awful. If
28 you have never felt that feeling of when a woman you love a lot goes
29 with another.
30
31 DJ: It has never happened to me but I have talked with friends that have
32 been there.
33
34 B: It is awful and on top of it if you have kids, I have my daughter. I
35 have always been good. I have never done bad things, with something
36 like this can you imagine?
37
38 DJ: Where did you get the gun?
39
40 B: The gun? I have had it for a while. It had been a while.

1
2 DJ: I am going to talk in English with him for a while.
3
4 DB: Are those his things that were in Delfinos house?
5
6 DJ: The boots that we found in Delfinos house are they yours?
7
8 B: Yes.
9
10 DB: What about the pants?
11
12 DJ: The pants too?
13
14 B: Yes I was living with him.
15
16 DB: What about the belt?
17
18 DJ: And the belt?
19
20 B: Yes also. (inaudible) was my brothers.
21
22 DJ: This means you are a man. This signifies a man. You admit to the
23 things you did.
24
25 B: They did not do anything I was the one.
26
27 DJ: Thinks he's all better, better than any of the others as a witness?
28
29 DB: Where were they at?
30
31 DJ: They were out by the car.
32
33 B: I had already told them he was mine.
34
35 DJ: Wait.
36
37 DB: What is he saying? Did he fire?
38 DJ: (To DB) He just can't remember. This is what he said. He got out he
39 confronted him about that his wife being with him, he denied it so
40 they started fighting and punching each other, and he pulled the gun

1 out. He was going to scare him with it and then when he came at him
2 it fired. He is saying that about the gun.
3
4 DB: Did he...Did Benny run away?
5
6 DJ: Ah?
7
8 B: I did not want to harm him, because he also swung at me but he did
9 not hit me.
10
11 DJ: When you pulled the gun out did he run?
12
13 B: Him towards me and we fought. He came at me to take it from me and
14 we struggled over it, but my brothers, I told my brothers no then.
15
16 DJ: He says he pulled it out, and that he wondered towards him and
17 grabbed it and that is when it happened.
18
19 B: At best it was an accident, like two or three, about four attempting to
20 get the gun. I had a hold of it from here and he automatically grabbed
21 it. Do you understand me?
22
23 DJ: He said that he grabbed it and he already had, he left his finger on the
24 trigger, you know the reflex of an automatic, you know you start
25 pulling.
26
27 B: Yes.
28
29 DB: Where were they at were they by the car?
30
31 DJ: Were you close to the car?
32
33 B: No, Far away from the car.
34
35 DJ: (inaudible) They were in his brothers...
36
37 B: I took him over there and I talked with him. I told him I wanted to
38 know one thing. Is it true that you got involved with my wife? He told
39 me he had not. Don't lie to me, it's true, I have witnesses who have
40 told me that it is true. I already know everything, it is true.

1
2 DJ: And then his brothers, he was talking about something else there. One
3 of his brothers saw that he was fighting and they came down... told
4 them to stay by the car... that it was his deal...he was going to take
5 care of it.
6
7 DB: Know what day?
8
9 DJ: What day was it?
10
11 B: Sunday around...
12
13 DJ: What time?
14
15 B: Sunday... two or three in the afternoon.
16
17 DJ: In the afternoon?
18
19 B: Three in the afternoon.
20
21 DB: Two or three O'clock in the afternoon?
22
23 DJ: Where is the gun now?
24
25 B: I don't know.
26
27 DJ: You don't know? What did you do with the gun?
28
29 B: We were... that same Sunday I sold it on the street.
30
31 DJ: But to whom?
32
33 B: To Juan....he is not my friend.. Juan.
34
35 DJ: Was it a girl or?
36
37 B: No. it's a man. I do not know him. Do you understand me? He said
38 that he wanted a gun, and there in the street I told him that I
39

1 DJ: He said that he sold it to a man in the street the day before the got
2 there.
3
4 DB: Does he know the girl?
5
6 DJ: There was another girl that is already dead, did you shoot her too?
7
8 B: I do not know.
9
10 DB: Was he there?
11
12 DJ: Was he there?
13
14 B: No I was never there. That night my brother gave me a ride to the
15 house and he left and then came back to his house. I do not know if...
16
17 DJ: If it was not him?
18
19 B: (inaudible)
20
21 DJ: But your brother knew this girl?
22
23 B: He knew her.
24
25 DJ: Was she a girlfriend or what?
26
27 B: Yes when he would go over there he would go have sex. He left with
28 her.
29
30 DJ: At her house or what?
31
32 B: At her house. I did not know where she lived. I saw her a few times,
33 but I do not know if she is his mistress.
34
35 DB: Does he know where his brother left that night?
36
37 DJ: Like for two hours your brother left.
38 B: I noticed that we came from the house and he gave me a ride when
39 (inaudible).
40

1 DB: Ask him who was drinking beer out there?
2
3 DJ: Benacio who was drinking beer?
4
5 B: Me, Benito and Delfino.
6
7 DJ: Not Alvaro?
8
9 B: No.
10
11 DJ: Bennie and Delfino?
12
13 B: They were drinking Modelo.
14
15 DJ: Were you drinking too?
16
17 B: Yes.
18
19 DJ: He was also smoking. (inaudible).
20
21 DB: Does he need to use the bathroom or anything.
22
23 DJ: Do you need water or to use the bathroom?
24
25 B: Right now the bath room is all.
26
27 I: Water...
28
29 **They take about a 10 minute break**
30
31 DJ: I have some more questions. Describe the gun for me. What type was
32 it? Was it a revolver or a semiautomatic?
33
34 B: Automatic.
35
36 DJ: What brand was it?
37
38 B: Smith and Wesson.
39
40 DB: How does he know it is a Smith and Wesson?

1
2 DJ: How do you know it is a...
3
4 B: It says it on it.
5
6 DJ: Where does it say?
7
8 B: Mine, in the front.
9
10 DJ: In the front of it.
11
12 DB: Is it your gun?
13
14 DJ: Is it your gun? How long have you had it? Did you have it?
15
16 B: Four or five months.
17
18 DJ: He said he had it four or five months.
19
20 DB: Did he buy it off the street or where did he buy it?
21
22 DJ: Did you buy it on the street or?
23
24 B: Yes. When it was sold to me it was brand new then.
25
26 DJ: Where did you buy it?
27
28 B: In the street.
29
30 DJ: But what street, where was more or less?
31 B: I do not recall.
32
33 DJ: Why? When you ran into...is Benito is name?
34
35 B: I do not really know, I just know him as Benny.
36
37 DJ: Benny is his name. Ah...?
38 B: Benito.
39
40 DJ: Benny. Why was he taken to (inaudible)?

1 B: To get him out...to get him out of the city limits .
2
3 DJ: Where there wouldn't be anybody?
4
5 B: Yes.
6
7 DJ: Did you know that this field was there, or?
8
9 B: No. I was just looking for a street.
10
11 DB: Did they smoke out there or work out there? How did they know that
12 was out there?
13
14 I: (inaudible).
15
16 DB: Oh...
17
18 DJ: Did you know that this ?..was there right?
19
20 B: No.
21
22 DJ: You did not know the field was there?
23
24 B: No. I don't know was there (inaudible).
25
26 DJ: He said that they were driving to visit... driving in a circle for about
27 an hour and they came across that. And your shirt where is it?
28
29 B: My shirt?
30
31 DJ: Mmm...hmm...
32
33 B: (inaudible) it's dirty, I don't remember which one was.
34
35 DJ: Where is it?
36
37 B: Over at my brothers house.
38 DJ: At Delfinos?
39
40 B: Yes.

1
2 DJ: Is it washed?
3
4 B: I don't think so.
5
6 DJ: Describe it?
7
8 B: I do not recall now what I had on.
9
10 DJ: His shirt is still at Delfinos house...his cloths... he can't remember
11 what shirt he was wearing.
12
13 DB: Where was the first place they went after this happened?
14
15 DJ: After everything happened what was the first place you all went too?
16
17 B: To the house.
18
19 DJ: Which one?
20
21 B: To Delfinos house.
22
23 DB: Delfinos house?
24
25 DJ: And what did you do at Delfinos house?
26
27 DB: And what happened at Delfinos house?
28 B: Nothing.
29
30 DJ: What did you all do?
31
32 B: We were watching television.
33
34 DJ: What movie?
35
36 B: The movies that were sent to my brother from Mexico.
37
38 DJ: He talked about it before...the videos from Mexico that were down in
39 the basement.
40

1 DB: Did he change clothes?
2
3 DJ: Did you change clothes?
4
5 B: Mmmm... hmmm.
6
7 DJ: Ya he did.
8
9 DB: What did he do with the clothes that he wore?
10
11 DJ: What did you do with the cloth you were wearing?
12
13 B: It is there.
14
15 DJ: Says he dropped it at Delfinos house... all of it.
16
17 DB: What time did he get back to Delfinos house?
18
19 DJ: What time did you arrive at Delfinos house?
20
21 B: Around 3:30 or 4:00, sometime around then.
22
23 DJ: 3:30 or 4:00.
24
25 B: After we arrived there we took the girls to the park to
26
27 DJ: To Easter hunt.
28
29 B: Yes.
30
31 DB: (inaudible) ok.
32
33 DJ: Then later after they got back they went the park to get (inaudible).
34
35 DB: (inaudible) Ok.
36
37 DJ: Anything more?
38 B: That's all.
39

1 DJ: Ok. Do you have questions? (directed at DB) I just asked him if he
2 had any more questions for us.
3
4 B: How much do you think I'll get?
5
6 DJ: I do not know. The thing is that we are going to give it to the district
7 and they are going to have this case. We are going to give them all the
8 information... but like I said... man to man... we are talking about
9 man things. They will look into the situation that you have and then
10 they will talk with you. From there the judge will decide what will
11 happen.
12
13 B: Mmm... hmm.... The thing is I still have to keep supporting my
14 family.
15
16 DJ: I believe so.
17
18 B: My wife does not earn much money.
19
20 DJ: Doesn't what?
21
22 B: She does not earn too much money in Mexico.
23
24 DJ: Oh, she works there?
25 B: Yes.
26
27 DJ: she works there?
28
29 B: Cutting (inaudible) but she does not earn much.
30
31 DJ: What part of Mexico?
32
33 B: Michoacan.
34
35 DJ: Where is that at?
36
37 B: In the center of the country. She is from Michoacan and I am from
38 Guanajuato. It is another state, Guanajuato close to ... and like you
39 say... when you commit a crime your family also suffers.. it's true...
40

1 DJ: But then again on top of that the family sees if you tell the truth or if
2 you do not tell the truth. If something good does come out of this is
3 that your family and kids know that you told the whole truth. You did
4 not lie or anything like that and you told the whole truth. They know
5 this.
6
7 B: When it is an accident it is less years, right?
8
9 DB: Was he aiming the gun at him when it discharged?
10
11 DJ: When the gun fell were you lying up against him?
12
13 B: Yes. I just wanted to get the truth out of him. I told him... tell me the
14 truth or I am going to (inaudible both talking).
15
16 DJ: You said that?
17
18 B: I told... but it was not...
19
20 DJ: Tell me exactly what you told him.
21
22 B: He asked that I forgive him.
23
24 DJ: Mmmm....hmmm.
25 B: He kept saying, forgive me. He called me Father and he said he was
26 sorry.
27
28 DJ: Mmm...hmm..
29
30 B: And I told him this kind of thing is not forgiven and that is when he
31 began grabbing at me.
32
33 DJ: You had the gun...
34
35 B: I had my finger here when he shoved me...grabbed me...he grabbed
36 me and the gun fired but I did not intend to fire it.
37 DJ: Ok.
38
39 B: All I wanted was to get the truth out of him. Where you with my wife?
40

1 DJ: You mentioned that before you took out the gun you told him... tell
2 me the truth or I am going to kill you.
3
4 B: Yes.
5
6 DJ: Ok.
7
8 B: But I was not going to do it..
9
10 DJ: Ya...
11
12 B: I told him that I just wanted to know the truth. If you tell me the truth
13 now.. Like you say... like a man... I told him tell me the truth and then
14 we will go papy.
15
16 DJ: (statement directed at DB) When he took out the pistol he really
17 wasn't going to shoot him but he says... tell me the truth and I'll get
18 my wife (inaudible)... and then he said he started saying ... forgive
19 me ... forgive me...and all that other stuff...lunged for him and
20 grabbed the outside of his hand...that's when the gun went off.
21
22 B: Before I took it out I hit him. I hit him ... but he hit me.
23
24 DJ: You were both hitting one another?
25
26 B: Yes.
27
28 DB: This is important!
29
30 DJ: He pulled out the gun ...started punching each other.
31
32 B: Mmmm....hmmm... and then I took it out and told him...tell me the
33 truth.
34
35 DB: Did he know he was dead when he stood up?
36
37 DJ: When you all left did you know he had been dead?
38
39 B: What do you mean?
40

1 DJ: Did you all know.....when you all left there... did you know that he
2 had already died?
3
4 B: No.
5
6 DJ: No. How?
7
8 B: No. I did not know.
9
10 DJ: He didn't know he was dead.
11
12 DB: Did he think he was still alive?
13
14 DJ: Did you think he was still alive then?
15
16 B: I think he was.
17
18 DJ: (inaudible) Auro?
19
20 DB: Their in the car?
21
22 DJ: Mmmm...hmmm. Who is Mida Auro?
23
24 B: Alvaro?
25
26 DJ: Mida Auro... look Mida.
27
28 B: Mida Auro?
29
30 DJ: He doesn't know.
31
32 DB: Ok. Ah... you got the Car?
33
34 DJ: Is this your car a kind of gray 1993 Infinity? Is that the car you were
35 all in?
36
37 B: Yes.
38
39 DJ: Yes?
40

1 B: Yes.
2
3 DJ: Are you sure?
4
5 B: Yes...yes..
6
7 DJ: Ya that's it.
8
9 DB: Does he know who owns the car:
10
11 DJ: But you do not know who the owner of the car is?
12
13 B: No.
14
15 DJ: But this is the car you were all in?
16
17 B: Yes..
18
19 DJ: He ought to know he's registered through 1999.
20
21 DB: How does that fit the pack?
22
23 DJ: How did Delfino get this car?
24
25 B: I think a friend loan it to him.
26
27 DJ: He says a friend loan it to him.
28
29 DB: Who's car is it?
30
31 B: I do not know.
32
33 DJ: He always lends this car to Delfino?
34
35 B: No.
36
37 DJ: Just for this day? Ok. But the whole story is that you all thought
38 although he was down he was still alive?
39
40 B: Yes.

1
2 DJ: What position was he in when you all left?
3
4 B: Face down.
5
6 DJ: Face down, and in the mud?
7
8 B: Yes.
9
10 DJ: Why did you think he was still alive?
11
12 B: Well I thought...
13
14 DJ: You just thought?
15
16 B: Mmm...hmm.
17
18 DJ: Why did you leave?
19
20 B: Why did we leave?
21
22 DJ: Yes.
23
24 B: I don't know.
25
26 DJ: Why didn't you help him? To help him?
27
28 B: It was....
29
30 DJ: The only reason I am asking you this is because you are telling me
31 that this was an accident.
32
33 B: Yes... yes
34
35 DJ: Well then, if it was an accident, you would have done everything
36 possible to help him.
37 B: Yes.. yes but you know, in the accident it was a bullet to the head
38
39 DJ: Who at him? Did it go into his head then?
40

1 B: Yes.
2
3 DJ: Not only to the stomach?
4
5 B: No. In the head.
6
7 DJ: In the head too? Well it didn't, either way he died. Did you know that
8 he died?
9
10 B: That what? How was I going to help him..
11
12 DJ: Ok...
13
14 B: I knew he died... Benny?
15
16 DJ: Mmm...hmm ok. What color is the gun?
17
18 B: Black.
19
20 DJ: There is no other color just black? Wait for me here a while ok.
21
22 **They take a break for a couple of minutes**
23
24 DJ: Benjamin where did you get the ammunition?
25
26 B: The ammunition...
27
28 DJ: The bullets.
29
30 B: From the same person I sold it too.
31
32 DJ: What type of bullets were they?
33
34 B: They were ...they were... I do not know. Remington? I don't know.
35
36 DJ: Describe them. What color were they?
37 B: White with yellow.
38
39 DJ: What was the shape? Describe it here?
40 What was it shaped like? Do you understand?

1
2 B: I do not remember. It was like that and it had something here. I do not
3 know if they were (inaudible) or not.
4
5 DJ: Ok.
6
7 B: I do not know what type they were.
8
9 DJ: Ok.
10
11 **They take a break for about 13 minutes**
12
13 DJ: Ok. To help us a little more I need to know exactly where the gun is.
14
15 B: I sold it.
16
17 DJ: To Gabby?
18
19 B: No.
20
21 DJ: Because the people we have talked to said that Gabby has the gun.
22
23 B: Gabby has the gun?
24
25 DJ: Mmm...hmm.. Is it true?
26
27 B: No.
28
29 DJ: You know Gabby right?
30
31 B: Yes.
32
33 DJ: Because they say that Gabby has.... Are you sure that it is black and
34 Smith and Wesson?
35
36 B: Mmm...hmm.. I beleive it's 12 guage.
37 DJ: Ha?
38
39 B: 12 or 13.
40

1 DJ: No
2
3 B: Maybe, I don't know.
4
5 DJ: Because it says here that you gave the gun to Gabby yesterday. It says
6 it right here.
7
8 B: Yes.
9
10 DJ: Ya..
11
12 B: I sold it in the streets last night.
13
14 DJ: To whom?
15
16 B: It might have been a friend of Gaby's, or someone who knows Gabby
17 and (inaudible). Yes.
18
19 DJ: Because we located some fire arms yesterday at Gaby's house.
20
21 B: At Gaby's house?
22
23 DJ: Mmm...hmm.
24
25 B: Was the fourty there?
26
27 DJ: They did not locate it.
28
29 B: Mmm...hmm..I believe he sold it.
30
31 DJ: Mmm?
32
33 B: She probably sold it.
34
35 DJ: She sells fire arms or what?
36
37 B: No. I am just saying.
38
39 DJ: But you sold it to her.
40

1 B: No. no
2
3 DJ: Are you sure. Gaby's friends are in jail right now.
4
5 B: His friends? Did he tell you that I sold it to him?
6
7 DJ: I do not know that is why. Like I said when we were talking man to
8 man, I want to hear from you about what happened, where the fire
9 arm is, the gun, not from them I want to hear it from you.
10
11 B: Mmm...hmm... I tell you these comrades are not my friend. No.
12
13 DJ: Who is he?
14
15 B: I do not know who he is ...I never....(inaudible both talking)
16
17 DJ: Look in order for me to believe you, that out in the street you sold the
18 gun.
19
20 B: Yes. (Tape stops)
21
22
23 Translation by Paul Espinoza SLLDA for Rudy Bautista 10-27-10

ADDENDUM D

Sentence, Judgment, and Commitment Transcript

THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,)	
)	
Plaintiff,)	
)	
VS.)	Case No. 101400853
)	
BENJAMIN ARRIAGA-LUNA,)	
)	
Defendant.)	SENTENCE, JUDGMENT & COMMITMENT
)	

BEFORE THE HONORABLE CHARLENE BARLOW

WEST JORDAN COURTHOUSE
8080 Redwood Road
West Jordan, Utah 84088

APRIL 19, 2011

A P P E A R A N C E S

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1 APRIL 19, 2011

2 * * *

3 **THE COURT:** This is Case Number 101400853,
4 Mr. Bautista is here. Who is here for the state?

5 **MR. MATHIS:** Mark Mathis, Rob Neill for the state.

6 **THE COURT:** Okay. Mr. Mathis and Mr. Neill for the
7 state.

8 And Mr. Arriaga-Luna has joined us. What are we
9 going to do today?

10 **MR. BAUTISTA:** Your Honor, we're going to resolve
11 this matter. What's anticipated is Benjamin will be entering a
12 guilty plea to count one, murder, a first degree felony. In
13 exchange, the remaining counts will be dismissed.

14 **THE COURT:** Is that the State's understanding?

15 **MR. MATHIS:** It is, Your Honor.

16 **THE COURT:** Okay. Mr. Arriaga-Luna, will you please
17 state your full name?

18 **THE DEFENDANT:** Arriaga-Luna.

19 **THE COURT:** First name?

20 **THE DEFENDANT:** Benjamin Arriaga-Luna.

21 **THE COURT:** Okay. Thank you. How old are you?

22 **THE DEFENDANT:** I'm 38.

23 **THE COURT:** Okay. Do you have any physical or mental
24 problem that interferes with your ability to understand what
25 you're doing today?

1 **THE DEFENDANT:** No.

2 **THE COURT:** Have you taken any medication, drugs or
3 alcohol today that would impact your ability to understand?

4 **THE DEFENDANT:** No.

5 **THE COURT:** Okay. You are giving up certain rights.
6 Was there a preliminary hearing held in this?

7 **MR. BAUTISTA:** There was, Your Honor.

8 **THE COURT:** Okay. You are giving up certain trial
9 rights by pleading guilty today. You have the right to be
10 presumed to be innocent. You have the right not to testify
11 against yourself.

12 You have the right to a speedy and public trial in
13 front of an impartial jury. You have the right to cross
14 examine the state's witness and call your own witnesses. You
15 have the right to an unanimous verdict on all elements beyond a
16 reasonable doubt. You have certain appeal rights if you go to
17 trial.

18 You are giving up these rights by pleading guilty
19 today, do you understand that?

20 **THE DEFENDANT:** Yes.

21 **THE COURT:** Okay. There are certain immigration
22 consequences by pleading guilty, too. And you -- you address
23 or you know that you have these consequences, you might be
24 deported by pleading guilty, do you understand that?

25 **THE DEFENDANT:** Yes.

1 **THE COURT:** Okay. Thank you. The change that you're
2 looking at is a first degree felony.

3 Is there a minimum?

4 **MR. BAUTISTA:** It's 15 years to life.

5 **THE COURT:** Fifteen to life. Thank you.

6 The potential punishment is 15 years to life in the
7 Utah State Prison and a \$10,000 fine. That's the potential
8 punishment, do you understand that?

9 **THE DEFENDANT:** Yes.

10 **THE COURT:** Okay. Counsel, do you believe that he's
11 competent to enter this plea?

12 **MR. BAUTISTA:** I do.

13 **THE COURT:** Do you believe he understands the rights
14 that he's giving up?

15 **MR. BAUTISTA:** I do. We've been working together for
16 over a year. We did the preliminary hearing, as well as, the
17 motion to suppress which was denied.

18 **THE COURT:** Okay. Mr. Arriaga-Luna, are you
19 satisfied with the help that your attorney has given you?

20 **THE DEFENDANT:** Yes.

21 **THE COURT:** Do you fully understand everything that
22 he's talked to you about?

23 **THE DEFENDANT:** Yes. I understand.

24 **THE COURT:** Okay. Have you been through a plea form
25 with your attorney?

1 **THE DEFENDANT:** Yes.

2 **THE COURT:** Do you have anymore questions about
3 what's in that form?

4 **THE DEFENDANT:** No. None.

5 **THE COURT:** Okay. Counsel, can you give me a factual
6 basis?

7 **MR. BAUTISTA:** Your Honor, on April 4th 2010 in Salt
8 Lake County Mr. Arriaga-Luna confronted a man who had been
9 sleeping with his wife. An argument and subsequent fight took
10 place at which time he pulled out a firearm and he shot the man
11 killing him.

12 **THE COURT:** Is that what happened, Mr. Arriaga-Luna?

13 **THE DEFENDANT:** I defended myself. It was not my
14 intention. I never thought about hurting him.

15 **THE COURT:** Okay. Does that change the plea at all,
16 counsel?

17 **MR. BAUTISTA:** Your Honor, we had -- we had discussed
18 the imperfect self-defense concept and that he did pull out a
19 gun to get the man to confess to his sleeping with his wife.
20 And that the man charged at him but he was unarmed. So that is
21 why he used a gun.

22 **THE COURT:** I will find that that is a sufficient
23 factual basis.

24 **THE DEFENDANT:** He was drugged and drunk and I didn't
25 know if he had a weapon, a knife and that's why I...

1 **THE COURT:** Okay. Mr. Mathis?

2 **MR. MATHIS:** Your Honor, I think for the colloquy to
3 be valid that the defendant will have to state that he did
4 intentionally take the life of Benacio Hernandez-Herrera. He
5 had stated earlier that he did not intend for that to happen.
6 I think, for it to be a valid plea, he would need to state to
7 this court that he did intend to take his life.

8 **MR. BAUTISTA:** Or knowingly, Your Honor.

9 **THE COURT:** Or knowingly. Yes.

10 **MR. MATHIS:** Intentionally or knowingly.

11 **THE COURT:** Yeah.

12 **MR. BAUTISTA:** He is prepared to say, Your Honor,
13 he's asked that I say it, that by pulling the trigger he knew
14 that it would cause the death of the man.

15 **THE COURT:** Mr. Arriaga-Luna, do you understand that
16 by pulling the trigger you knew you could cause the death of
17 the gentleman?

18 **THE DEFENDANT:** Yes.

19 **THE COURT:** Okay. Thank you. I will accept that
20 factual basis. Has anyone threatened you or forced you to
21 enter this plea today?

22 **THE DEFENDANT:** No.

23 **THE COURT:** Has anyone made any promises to you?

24 **THE DEFENDANT:** No, not [inaudible].

25 **THE COURT:** Thank you. If you feel like you

1 understand what you're doing and you want to do this today, I
2 will have you go ahead and sign that plea form.

3 Thank you. Mr. Arriaga-Luna, then to the charge of
4 murder, a first degree felony, how do you plead, guilty or not
5 guilty?

6 **THE DEFENDANT:** Guilty.

7 **THE COURT:** Okay. Thank you. I find that
8 Mr. Arriaga-Luna is competent to enter this plea, that he
9 understands the rights that he's giving up, he's had the
10 advantage of counsel, that it's a knowingly and voluntarily
11 plea. I will accept the plea and sign the plea form.

12 You have the right to be sentenced in no fewer than
13 two, nor more than 45 days from today. You have the right up
14 until the time of sentencing to request to withdraw this plea.
15 But the request has to be in writing and you would have to have
16 good cause. You would have to have a good reason not just that
17 you changed your mind.

18 What's anticipated with sentencing?

19 **MR. BAUTISTA:** Your Honor, we had discussed his
20 options. He would ask the court to sentence him today. He
21 understands that he is going to the Utah State Prison. He's
22 asking to start his time there. He also understands that by
23 being sentenced today he will be waiving an opportunity to file
24 a motion, withdraw his plea and understands so and is willing
25 to do so.

1 **THE COURT:** Is that is correct, Mr. Arriaga-Luna?

2 **THE DEFENDANT:** Yes.

3 **THE COURT:** Okay. Thank you.

4 Does the state have any input?

5 **MR. MATHIS:** No, the state would go along with that
6 recommendation, Your Honor. This case has involved the murder
7 of an individual who was an illegal alien. To our knowledge in
8 speaking with the ME's office and law enforcement, there is no
9 known family members that are here. I believe that they are
10 still all in Mexico. And so as far as, like, representing to
11 the court anything from their side, I think that the crime
12 speaks for itself.

13 **THE COURT:** Okay. Anything further, Mr. Bautista?

14 **MR. BAUTISTA:** None, Your Honor. We would submit.
15 Anything else you want to tell me, Mr. Arriaga-Luna?

16 **THE DEFENDANT:** No, that's all.

17 **THE COURT:** Okay. Thank you.

18 It is the order of the court then that you serve a
19 prison term of 15 years to life at the Utah State Prison and I
20 will have you taken there forthwith.

21 **MR. BAUTISTA:** Your Honor, that's my only matter, may
22 I be excused?

23 **THE COURT:** Yes, thank you.

24 (End of Hearing.)

25

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C E R T I F I C A T E

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

I, KATIE HARMON, a Certified Shorthand Reporter in
and for the State of Utah, do hereby certify that I received
the audio recording in this matter, and that I transcribed it
into typewriting and that a full, true and correct
transcription of said audio recording so recorded and
transcribed is set forth in the foregoing pages, inclusive
except where it is indicated that the recording was inaudible.

DATED this 13th day of March, 2014.

KATIE HARMON, RPR, CSR

\$10,000 [1] 5/7	BARLOW [1] 1/13	End [1] 9/24
1	basis [3]	enforcement [1] 9/8
101400853 [2] 1/6 3/3	Bautista [3]	enter [3]
111 [1] 2/5	be [11]	entering [1] 3/11
13th [1] 10/20	been [3]	Esq [3]
15 [3]	BEFORE [1] 1/13	everything [1] 5/21
1700 [1] 2/10	being [1] 8/23	examine [1] 4/14
19 [2] 1/19 3/1	believe [3]	except [1] 10/16
2	Benacio [1] 7/4	exchange [1] 3/13
2010 [1] 6/7	BENJAMIN [3]	excused [1] 9/22
2011 [2] 1/19 3/1	beyond [1] 4/15	F
2014 [1] 10/20	Broadway [2] 2/5 2/9	factual [3]
2035 [1] 2/10	C	family [1] 9/9
3	call [1] 4/14	far [1] 9/10
38 [1] 3/22	can [1] 6/5	feel [1] 7/25
4	case [3]	felony [3]
400 [1] 2/5	cause [3]	fewer [1] 8/12
45 [1] 8/13	certain [4]	Fifteen [1] 5/5
4th [1] 6/7	Certified [1] 10/10	fight [1] 6/9
5	certify [1] 10/11	file [1] 8/23
50 [1] 2/9	change [2] 5/1 6/15	find [2] 6/22 8/7
7	changed [1] 8/17	fine [1] 5/7
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8	charged [1] 6/20	first [4]
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inaudible [2] 7/24 10/16	never [1] 6/14	sentencing [2] 8/14 8/18
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K	place [1] 6/10	Suite [1] 2/5
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ADDENDUM E

**Statement of Defendant
in Support of Guilty Plea**

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

EN EL TRIBUNAL JUDICIAL DEL TERCER DISTRITO
CONDADO DE SALT LAKE, ESTADO DE UTAH

STATE OF UTAH
ESTADO DE UTAH

VS Plaintiff,
 Demandante

Benjamin Arriaga-Luna
Defendant
Acusado.

: STATEMENT OF DEFENDANT
: IN SUPPORT OF GUILTY PLEA
: AND CERTIFICATE OF
: COUNSEL

: AFIRMACIÓN DEL ACUSADO
: EN APOYO A SU DECLARACIÓN
: DE CULPABILIDAD Y CERTIFICADO
: DEL ASESOR LEGAL

: Case No. 101400853

No. de caso. _____

I, B. Arriaga-Luna hereby acknowledge and certify that I have been
advised of and that I understand the following facts and rights:

Yo, _____, por medio de la siguiente reconozco y certifico que
he sido asesorado y que entiendo los siguientes hechos y derechos:

Notification of Charges
Notificación de Cargos

I am pleading guilty (or no contest) to the following crimes:
Me declaro culpable (o sin argumento) de los siguientes delitos:

Crime & Statutory Provision		Degree	Punishment Min/Max and / or Minimum Mandatory
Delito y provisiones estatutarias		Grado	Pena Min/Max y/o Mínimo Mandatorio
A.	Murder	1 ^o	15 years to Life prison and/or up to = \$10000 fine + 85% surcharge
B.			
C.			
D.			

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty (or no contest).

He recibido una copia (reformada) del Documento acusatorio en mi contra. Lo he leído, o me lo han leído y entiendo la naturaleza y los elementos del(os) delito(s) por el (los) cual(es) me declaro culpable (o sin argumento).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:
Los elementos del (los) delito(s) por el (los) cual(es) me declaro culpable (o sin
argumento) son:

Def. did knowingly and intentionally
cause the death of mother.

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

Entiendo que al declararme culpable estaré admitiendo que cometí el delito (los delitos) mencionado(s) anteriormente. (O, si me declaro sin argumento, no disputaré que cometí los delitos que anteceden). Yo estipulo y estoy de acuerdo (o si me declaro sin argumento, no disputo ni refuto) que los siguientes hechos describen mi conducta y la conducta de otras personas por las cuales soy responsable legalmente. Estos hechos proveen las bases para que el tribunal acepte mi declaración de culpabilidad (o sin argumento) y compruebe los elementos del delito (los delitos) por el cual (los cuales) me estoy declarando culpable (o sin argumento):

On 4/4/10, in SL Co, I, while
confronting a man who slept w/ my wife
fought with the man and subsequently shot
him, killing him.

Waiver of Constitutional Rights Renuncia de los derechos constitucionales

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

Doy esta declaración voluntariamente. Entiendo que tengo los siguientes derechos bajo la constitución de Utah y de los Estados Unidos. También entiendo que si me declaro culpable (o sin argumento) renunciaré a los siguientes derechos

Counsel: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

Asesoramiento: Se que tengo el derecho de ser representado por un abogado y que si no puedo costear uno, se me asignará un abogado por parte del tribunal sin costo alguno para mí. Entiendo que posteriormente, si el juez determinara que soy solvente se me requerirá pagar por los servicios del abogado que me fue asignado.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

He (no he) renunciado a mi derecho de asesoria legal. Si he renunciado a mi derecho de asesoramiento legal, lo he hecho a sabiendas, inteligente y voluntariamente por las siguientes razones:

If I have waived my rights to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

Si yo he renunciado a mi derecho de asesoramiento legal, certifico que he leído esta afirmación y que entiendo la naturaleza y los elementos de los cargos y delitos por los cuales me declaro culpable (o sin argumento). También entiendo mis derechos en este caso y otros casos y las consecuencias de mi(s) declaración(es) de culpabilidad

If I have not waived my right to counsel, my attorney is Ray B. Abbott. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

Si no he renunciado a mi derecho de asesoria legal, mi abogado es Ray B. Abbott. Mi abogado y yo hemos platicado a fondo de esta afirmación, mis derechos y las consecuencias de mi(s) declaración(es) de culpabilidad (o sin argumento)

Jury Trial: I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

Juicio por jurado. Sé que tengo el derecho a un juicio público y sin demora ante un jurado imparcial (sin prejuicio) y que estaré renunciando a ese derecho al declararme culpable (o sin argumento).

Confrontation and cross-examination of witnesses: I know that if I were to have a trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

Careo y contra interrogatorio de los testigos. Sé que si tuviera un juicio, a) Tendría el derecho de ver y observar a los testigos que testifiquen en mi contra y b) mi abogado, o yo si renunciara a mi derecho de abogado, tendrían la oportunidad de contra interrogar a todos los testigos que testifiquen en mi contra.

Right to compel witnesses: I know that if I were to have a trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Derecho de obligar a testigos. Sé que si tuviera un juicio, podría elegir llamar a testigos, y podría obtener comparendos requiriendo la asistencia y testimonio de esos testigos. Si no pudiera costear el pago de los testigos, el Estado cubriría las costas.

Right to testify and privilege against self-incrimination: I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

Derecho a testificar y el privilegio en contra de la auto-incriminación. Sé que si tuviera un juicio, yo tendría el derecho de dar testimonio a mi favor. También sé que si no deseara testificar, nadie podría obligarme a dar testimonio o presentar pruebas en contra de mí mismo. También sé que si yo eligiera no dar testimonio, al jurado se le indicaría que no podrían usar mi decisión en mi contra.

Presumption of innocence and burden of proof: I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charges(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

Presunción de inocencia y responsabilidad de prueba. Sé que si no me declaro culpable (o sin argumento), se me presume ser inocente hasta que la fiscalía compruebe que soy culpable del (los) delito(s) imputado(s). Si elijo pelear los cargos en mi contra, solo necesito declararme "no culpable," y mi caso será fijado para juicio. En el juicio, la fiscalía tendría la responsabilidad de comprobar cada uno de los elementos del (los) cargo(s) más allá de una duda razonable. Si el juicio fuera ante un jurado, el veredicto deberá ser unánime, quiere decir que cada miembro del jurado tendrá que encontrarme culpable.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Entiendo que si me declaro culpable (o sin argumento), renuncio a la presunción de inocencia y admitiré que cometí el (los) delito(s) previamente mencionado(s).

Appeal: I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest). I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

Apelación. Sé que bajo la Constitución de Utah, si fuera condenado por un jurado o juez, tendría el derecho de apelar mi condena y sentencia. Si no pudiera costear las costas de la apelación, el Estado cubriría esas costas. Entiendo que al declararme culpable (o sin argumento) renuncio a mi derecho de apelar mi condena. Entiendo que si deseo apelar mi sentencia debo presentar notificación de mi apelación dentro de treinta días después de asentada mi sentencia

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

Sé y entiendo que al declararme culpable, renuncio y cedo todos mis derechos estatutarios y constitucionales previamente explicados.

Consequences of Entering a Guilty (or No Contest) Plea
Consecuencias de dar una declaración de culpabilidad (o sin argumento)

Potential penalties: I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

Penas potenciales. Sé la pena máxima que se podría imponer por cada delito del cual me estoy declarando culpable (o sin argumento). Sé que al declararme culpable (o sin argumento) de un delito que lleve consigo una pena obligatoria, me estaré sujetando a servir la pena obligatoria por ese delito. Sé que mi sentencia puede incluir un término en la prisión, una multa o ambos

I know that in addition to a fine, an ninety percent (90%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Se que aunado a una multa, se impondrá un noventa por ciento (90%) en recargos. También se que se me podría ordenar reintegrar a cualquier víctima de mis delitos, incluyendo reintegro que se deba por cargos que sean desestimados como parte del trato declaratorio.

Consecutive/concurrent prison terms: I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

Términos de prisión consecutivos/simultáneos. Sé que si hubiera más de un delito involucrado, las penas podrían ser impuestas una después de la otra (consecutivamente), o podrían ser servidas al mismo tiempo, (simultáneamente). Sé que se me podría cobrar una multa adicional por cada delito por el cual haya dado mi declaración. También sé que si estoy bajo libertad provisional o preparatoria, ó si estoy esperando recibir sentencia por algún otro delito por el cual haya sido condenado o me haya declarado culpable (o sin argumento), mi(s) declaración(es) de culpabilidad (o sin argumento) que doy ahora podrían resultar en la imposición de sentencias consecutivas. Si el delito por el cual me estoy declarando culpable sucedió cuando me encontraba preso o bajo libertad preparatoria, sé que la ley requiere que el tribunal imponga sentencias consecutivas a menos que el tribunal falle y haga constar en el acta que las sentencias consecutivas serían inapropiadas.

Plea agreement: My guilty (or no contest) plea(s) (is/are) (is/are not) the result of a plea agreement between myself and the prosecuting attorney. All the promises, duties and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

Trato declaratorio. Mi(s) declaración(es) de culpabilidad (o sin argumento) es (son) el resultado de un trato declaratorio que he hecho con el abogado fiscal. Todas las promesas, deberes y provisiones de este trato declaratorio, si hubiera alguno, se encuentran en su totalidad en esta afirmación, incluyendo aquellas explicadas a continuación:

Trial judge not bound: I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

El juez de primera instancia no está obligado. Sé que cualquier cargo, o concesión de sentencia o recomendación de libertad condicional, o sentencia suspendida, incluyendo una reducción de los cargos para el dictado de la sentencia, que haya sido hecho o solicitado ya sea por el abogado de defensa o el fiscal no son obligatorias para el juez. También se que cualquier idea expresada ante mí concerniente a lo que se piensa que el juez pueda hacer no son obligatorias para el juez.

Immigration/Deportation: I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under United States immigration laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

Inmigración/Deportación: Entiendo que si no soy ciudadano de los Estado Unidos, mi(s) declaración(es) del día de hoy podría, o ciertamente me sujetará a deportación bajo las leyes y reglamentos de inmigración de los Estado Unidos, o de otra manera afectarán negativamente mi estado migratorio, que podría incluir el impedir mi reingreso a los Estados Unidos. Entiendo que si tengo preguntas acerca del efecto que tendrá mi declaración de culpabilidad en mi estado migratorio, debo consultar con un abogado de emigración.

Defendant's Certification of Voluntariness **Certificación de voluntariedad del acusado**

I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

Estoy dando esta declaración por mi propia y libre voluntad. No se han utilizado fuerza ni amenazas o coacción de ningún tipo para convencerme de declararme culpable (o sin argumento). No se me ha hecho ninguna promesa con excepción de aquellas que se encuentran en esta afirmación.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

He leído esta afirmación, o me la ha leído mi abogado, entiendo sus contenidos y adopto cada afirmación aquí contenida como mía propia. Sé que soy libre de cambiar o borrar cualquier afirmación contenida en este documento pero no deseo hacer ningún cambio porque todas las afirmaciones en este son correctas.

I am satisfied with advice and assistance of my attorney.
Estoy satisfecho(a) con el asesoramiento y servicio de mi abogado(a).

I am 38 years of age. I have attended school through the 5th grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

Tengo años de edad. He asistido hasta el grado escolar. Puedo leer y entender el idioma inglés. Si no entiendo el inglés, se me ha proporcionado un intérprete. No me encontraba bajo la influencia de ningún estupefaciente, medicina, o embriagante que pudiera impedir mi sano juicio cuando decidí declararme culpable. En este momento no me encuentro bajo la influencia de ningún estupefaciente, medicina, o embriagante que pueda impedir mi sano juicio.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

Me considero de mente sana, capaz de discernir y entender este procedimiento y las consecuencias de mi declaración. Estoy libre de cualquier enfermedad mental, defecto o impedimento que me evite entender lo que estoy haciendo o que evite que dé mi declaración a sabiendas, inteligente y voluntariamente.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Entiendo que si quisiera retirar mi(s) declaración(es) de culpabilidad (o sin argumento), debo presentar una petición escrita para retirar mi(s) declaración(es) antes que se pronuncie la sentencia. Entiendo que para una Declaración en suspenso, la petición para retirarme del trato declaratorio debe ser hecha dentro de treinta días de mi declaración de culpabilidad o sin argumento. Solamente se me permitirá retirar mi declaración de culpabilidad si demuestro que no fue dada a sabiendas y voluntariamente. Entiendo que para disputar mi(s) declaración(es) de culpabilidad después de recibida la sentencia deberé hacerlo bajo la Ley de Remedios Post-condenatorios Título 78, Capítulo 35a, y la Regla 65C del las Reglas del Procedimiento Penal de Utah.

Dated this 19 day of April, 2011.

Fechado este día de del 20 .

Benjamin Arriaga Luna
DEFENDANT'S SIGNATURE
FIRMA DEL ACUSADO

Certificate of Defense Attorney
Certificado del abogado defensor

I certify that I am the attorney for B. Arriaga-Luna, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

Certifico que soy el abogado de _____, el acusado previamente mencionado, y que se que él/ella ha leído la afirmación o que yo se la he leído a él/ella; He hablado con él/ella de esta afirmación y me parece que él /ella entiende completamente el significado de su contenido y es competente física y mentalmente. A mi leal saber y entender, después de una investigación apropiada, los elementos del(los) delito(s) y la sinopsis de los hechos de la conducta penada del acusado son correctos; Esto, junto con los otros comentarios y aseveraciones hechos por el acusado en el affidavit previo son correctos y verdaderos.



ATTORNEY FOR DEFENDANT

Bar No. _____

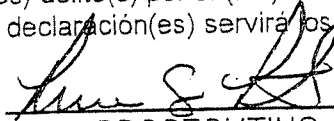
ABOGADO DEL ACUSADO

No. del colegio de abogados _____

Certificate of Prosecuting Attorney
Certificado del abogado fiscal

I certify that I am the attorney for the State of Utah in the case against B. Arriaga-Luna defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered to defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

Certifico que soy el abogado representando al Estado de Utah en el caso en contra del acusado _____. He repasado esta Afirmación del acusado y encuentro que los hechos en los que se basa la conducta penal del acusado constituyen el delito y son verdaderos y correctos. No se ha ofrecido al acusado ningún incentivo, amenaza o intimidación para alentar su declaración. Las negociaciones para la declaración se encuentran en su totalidad en esta afirmación y en el Trato declaratorio adjunto, se han suplementado en el acta ante el tribunal. Hay causas razonables para creer que la evidencia respaldará la condena del acusado por el (los) delito(s) por el (los) cual (cuales) da su(s) declaración(es) y que la aceptación de la(s) declaración(es) servirá los intereses del público.



PROSECUTING ATTORNEY

Bar No. 11248

ABOGADO FISCAL

No. del colegio de abogados _____

Order

Orden

Based on the facts set forth in the foregoing Statement and the certifications of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds the defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

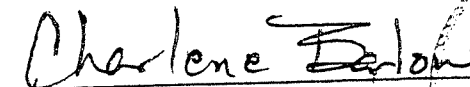
Basado en los hechos previamente presentados y en la certificación del(a) acusado(a) y su asesor jurídico, y basado en las afirmaciones dadas ante el tribunal, el juez como testigo de las firmas falla que la(s) declaración(es) de culpabilidad (o sin argumento) del acusado ha (han) sido dada(s) libre, a sabiendas y voluntariamente

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

POR LO TANTO SE ORDENA que la(s) declaración(es) de culpabilidad (o sin argumento) del acusado presentada en esta Afirmación, sea aceptada y asentada.

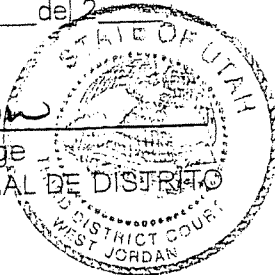
Dated this 19th day of April, 2011.

Fechado este día _____ de _____ del 2



District Court Judge

JUEZ DEL TRIBUNAL DE DISTRITO



10/10 felony plea/cd

ADDENDUM F

Findings of Fact and Conclusions of Law

The Order of Court is stated below:

Dated: November 02, 2015 /s/ Charlene Barlow
10:58:40 AM District Court Judge



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**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

BENJAMIN ARRIAGA, Petitioner, vs. STATE OF UTAH, Respondent.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER Case No. 120404690 Judge Charlene Barlow
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THIS MATTER COMES BEFORE THE COURT on the State's Motion for Summary Judgment filed on November 19, 2014. Petitioner Benjamin Arriaga filed his opposition memorandum on May 4, 2015. The State's reply memorandum was filed on June 8, 2015. Oral argument on the State's motion was heard on September 4, 2015. Mr. Arriaga was present and represented by his attorney, James D. Gilson. The State was represented by Mark Field, Assistant Attorney General. The Court has reviewed the parties' memoranda, the relevant case law, all applicable rules and statutory provisions, and considered the oral arguments presented by

counsel. Now being fully advised, the Court enters the following findings of fact and conclusions of law and order GRANTING the State's motion for summary judgment.

Background

On April 4, 2010, Mr. Arriaga confronted Benacio Herrera in an open field in West Jordan about claims that Mr. Herrera had slept with Mr. Arriaga's wife. At some point during the confrontation, Mr. Arriaga pulled a gun out of his waistband. A struggle ensued and the gun discharged several times. During his interview with police, Mr. Arriaga admitted that he asked Mr. Herrera whether he had sexual relations with his (Mr. Arriaga's) wife, that Mr. Herrera said "no," that this made Mr. Arriaga angry and they fought, and that he shot Mr. Herrera, but he only meant to scare him.

The State charged Mr. Arriaga with several offenses, including murder, a first-degree felony. Trial counsel, Rudy Bautista filed a motion to suppress Mr. Arriaga's incriminating statements to police, which the Court denied. Mr. Arriaga then accepted a plea offer from the prosecutor and agreed to plead guilty to the murder charge in exchange for the other charges being dismissed. After pleading guilty, he was immediately sentenced to the mandatory term of 15 years to life in prison. He did not pursue a direct appeal.

Mr. Arriaga timely filed a petition for post-conviction relief, an amended petition, and then a second amended petition. He raised several arguments that his conviction should be vacated. First, he challenged the effectiveness of his attorney's representation. Mr. Arriaga argued that he spoke little English and because his attorney did not have a Spanish interpreter present during their private conversations, he misunderstood counsel's advice concerning his

guilty plea. He also claimed that counsel did not seek discretionary review of the Court's denial of the motion to suppress, did not use the potentially appealable ruling as a basis for negotiating a better plea agreement with the prosecutor, did not seek concessions of the prosecutor in exchange for the guilty plea, did not advise him to go to trial where the defenses of self-defense, extreme emotional distress, lack of the required mental state, and lack of proof beyond a reasonable doubt as to all the elements of the murder charge could have been pursued, and did not investigate the facts of the case, hire experts, and interview witnesses.

Second, Mr. Arriaga argued that his guilty plea was not knowingly and voluntarily entered. He asserted that because of his limited ability to speak English and trial counsel's failure to have a Spanish interpreter present during their private discussions, he did not understand that he was innocent until proven guilty, that he did not have to plead guilty, and that winning at trial would mean no prison time. Third, Mr. Arriaga asserted that because of the misunderstanding that resulted from his limited ability to speak English and trial counsel's failure to have a Spanish interpreter present during their private discussions prior to the change-of-plea hearing, he did not understand his right to appeal his conviction, nor did he understand the time limit for filing an appeal.

The State responded to the second amended petition with a motion for summary judgment, arguing that relief was not warranted because Mr. Arriaga's post-conviction proffer failed as a matter of law to establish that he received ineffective representation, that his guilty plea was invalid, or that he was denied his right to appeal. Mr. Arriaga opposed the State's motion.

Findings of Fact

1. Mr. Arriaga was charged on April 14, 2010 with murder, a first-degree felony, purchase, transfer, or possession, or use of a firearm by a restricted person, a second-degree felony, and obstructing justice, also a second-degree felony.
2. The medical examiner's report established that Mr. Herrera was shot five times, once in the abdomen, once in the leg, twice in the back, and once in the back of the head.
3. A Spanish interpreter was not present when Mr. Arriaga's appointed attorney, Rudy Bautista, met with him for approximately an hour at the jail and several times when Mr. Arriaga was transported to the courthouse for a hearing in the case.
4. Trial counsel filed a motion to suppress Mr. Arriaga's incriminating statements to the police, which the Court denied.
5. Counsel did not seek interlocutory review of the Court's order denying the motion.
6. The prosecutor offered to dismiss the obstructing justice and possession of a firearm by a restricted person charges in exchange for Mr. Arriaga's guilty plea to the murder charge.
7. Mr. Arriaga accepted this offer.
8. A Spanish interpreter was present at the change-of-plea hearing for the benefit of Mr. Arriaga and the Court.
9. Mr. Arriaga acknowledged that he was not suffering from any physical or mental impairment that would affect his ability to understand the proceedings.
10. Mr. Arriaga acknowledged that he and his attorney fully discussed the contents of the Statement of Defendant in Support of Guilty Plea ("Plea Statement"), as well as his rights and

the consequences of pleading guilty.

11. The Plea Statement was written in both English and Spanish,

12. Mr. Arriaga acknowledged that he understood the contents of the Plea Statement and that he adopted each statement in it as his own, that he was satisfied with his attorney's advice and assistance, and that he understood everything that his attorney had discussed with him.

13. Mr. Arriaga told the Court that he had no questions about anything in the Plea Statement.

14. Mr. Arriaga acknowledged in the Plea Statement and during the plea colloquy that he understood his right against self-incrimination, the right to a jury trial, and the right to confront witnesses.

15. Mr. Arriaga acknowledged that he understood his right to the presumption of innocence, and that if he wanted to fight the charges against him and go to trial, all he had to do was plead not guilty and his case would be set for a trial.

16. Mr. Arriaga acknowledged that the elements of the crime of murder to which he was pleading guilty were that he intentionally or knowingly caused the death of another.

17. After trial counsel provided the factual basis for the offense, Mr. Arriaga told the Court that the victim was on drugs and drunk, that he was unsure whether the victim had a weapon, that he defended himself against the victim, and that it was not his intention to hurt the victim.

18. Trial counsel explained that he and Mr. Arriaga previously discussed the possibility of raising a defense of imperfect self-defense because the victim charged at Mr. Arriaga and that

is why he used the gun.

19. The prosecutor explained that in order for the guilty plea to be valid, Mr. Arriaga would need to state that he either intentionally caused the death or knowingly caused the death of the victim.

20. Without objection from Mr. Arriaga, trial counsel stated that Mr. Arriaga had authorized him to tell the Court that by pulling the trigger he knew that it would cause the victim's death.

21. Mr. Arriaga specifically acknowledged that he understood that by pulling the trigger of the gun he knew he could cause the death of the victim.

22. Mr. Arriaga acknowledged that he understood he would be pleading guilty to a first-degree felony and that the minimum and maximum punishment was a prison term of 15 years to life at the Utah State Prison.

23. Mr. Arriaga also acknowledged that he understood that by pleading guilty he would be waiving his right to appeal his conviction and that if he wanted to appeal his sentence, he would need to file a notice of appeal within 30 days after his sentence was entered.

24. Mr. Arriaga pleaded guilty to the charge of murder and requested the Court to immediately sentence him to the mandatory term of 15 years to life in prison.

25. Mr. Arriaga did not pursue a direct appeal.

Conclusions of Law

1. Mr. Arriaga bears the burden of pleading and proving the facts necessary to entitle him to post-conviction relief. *See* Utah Code Ann. § 78B-9-105(1).

2. As the moving party on summary judgment, the State satisfies its burden “by showing, by reference to ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ that there is no genuine issue of material fact.” *Orvis v. Johnson*, 2008 UT 2, ¶18, 177 P.3d 600 (quoting Utah R. Civ. P. 56(c)).

3. Although Mr. Arriaga is entitled to the benefit of having the Court consider the facts and inferences in a light most favorable to him, to survive summary judgment he must show that he “could, if given a trial [or evidentiary hearing], produce evidence which would reasonably sustain a judgment in his favor.” *Archuleta v. Galetka*, 2011 UT 73, ¶43, 267 P.3d 232.

4. To succeed on his ineffective assistance of counsel claims, Mr. Arriaga must “show that counsel’s performance was deficient” and that the “deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

5. While Mr. Arriaga must show that counsel’s actions “fell below an objective standard of reasonableness,” *id.* at 688, to prove deficient performance, the Court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689.

6. To satisfy the prejudice element of the *Strickland* standard in the context of a guilty plea challenge based on counsel ineffectiveness, Mr. Arriaga “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial and that such a decision would have been rational under the circumstances.” *Ramirez–Gil v. State*, 2014 UT App 122, ¶8, 327 P.3d 1228 (citations and internal quotation marks omitted). *See also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *Hill*

v. Lockhart, 474 U.S. 52, 59 (1985).

7. Mr. Arriaga has not shown that he should not be bound by the representations he made during the change-of-plea hearing. *See Burket v. Angelone*, 208 F.3d 172, 191 (4th Cir. 2000). *Cf. Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983)

8. Mr. Arriaga has not shown that he could not adequately understand his counsel's advice about the guilty plea, even though a Spanish interpreter was not present, and therefore has not shown that counsel performed deficiently for not having a Spanish interpreter present during their private discussions.

9. Mr. Arriaga has not shown that his attorney performed deficiently for not seeking interlocutory review of the Court's order denying the motion to suppress, not seeking a better plea agreement, not advising Mr. Arriaga go to trial and raise defenses of self-defense, extreme emotional distress, lack of the required mental state, and lack of proof beyond a reasonable doubt as to all the elements of the murder charge could have been pursued, and not investigating the facts of the case, hiring experts, and interviewing witnesses.

10. Mr. Arriaga also has not shown prejudice because he provides no facts or argument establishing a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial and that such a decision would have been rational under the circumstances.

11. As a matter of law, Mr. Arriaga has not shown that his trial attorney was ineffective.

12. A valid plea is "one that has a factual basis for the plea and ensures that the defendant understands and waives his constitutional right against self-incrimination, the right to

a jury trial, and the right to confront witnesses.” *Nicholls v. State*, 2009 UT 12, ¶20, 203 P.3d 976.

13. All the constitutional prerequisites for a valid guilty plea were satisfied in Mr. Arriaga’s case.

14. Even if Mr. Arriaga misunderstood his counsel’s advice in relation to the guilty plea, any misunderstanding was cured by the Court’s plea colloquy and the Plea Statement.

15. As a matter of law, Mr. Arriaga has not shown that his guilty plea was not knowing and voluntary.

16. Because Mr. Arriaga was fully informed at the change-of-plea hearing of his right to appeal and that the notice of appeal had to be filed within 30 days after his sentence was entered, as a matter of law he has not shown that he did not understand his right to appeal.

ORDER

IT IS HEREBY ORDERED that the State’s Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that Petitioner Benjamin Arriaga’s petition for post-conviction relief is DENIED.

This is the final order of the Court. No further action is necessary to effectuate the Court’s order.

In accordance with rule 10(e), Utah Rules of Civil Procedure, the Judge’s electronic signature appears at the top of the first page of this Order. END OF DOCUMENT