

No. _____

18-8590

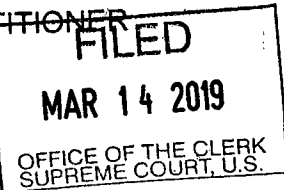
IN THE

SUPREME COURT OF THE UNITED STATES

Harlin Angelio RAMOS — PETITIONER
(Your Name)

vs.

State of UTAH, et.al. — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

The Utah Court of Appeals opined, The
Utah Supreme Court denied certiorari
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Harlin Angelio RAMOS, # 225770
(Your Name)

P.O. Box 0550
(Address)

Gunnison, Utah 84634-0550
(City, State, Zip Code)

No phone - Petitioner is incarcerated in a
(Phone Number) state facility / CUCF.

QUESTION(S) PRESENTED

- I Did the Utah appellate Court err in holding that the erroneous jury instruction, which impermissibly shifted the burden of proof onto Petitioner/Defendant Ramos to prove imperfect self-defense beyond a reasonable doubt, was not prejudicial?

- II Did the Utah appellate court err in holding that trial counsel was not ineffective for failing to object to improperly elicited testimony that was irrelevant and prejudicial?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

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

1. State of Utah

2. Sean D. Reyes, Utah Attorney General, ut. Bar No. 7969

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	14
CONCLUSION.....	25

INDEX TO APPENDICES

APPENDIX A , Order, from Utah Supreme Court denying Certiorari

APPENDIX B , Opinion, of the Utah Court of Appeals

APPENDIX C , statutes, Rules, Jury Instructions.

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

Federal

Strickland v. Washington, 466 U.S. 668 (1984) 18

State

People v. Washington, 201 N.E. 2d 25 (Ill. App. Ct. 1964) 24

State v. Akok, 2015 UT App 89, 348 P.3d 377 24

State v. Campos, 2013 UT App 213, 309 P.3d 1160 14, 15, 16, 17, 20, 21, 22, 23, 25

State v. Crippen, 2016 UT App 152, 380 P.3d 18 24

State v. Drej, 2010 UT App 35, 233 P.3d 476 14, 17

State v. Dunn, 850 P.2d 1201 (Utah 1993) 24

State v. Eyre, 2008 UT 16, 179 P.3d 792 17

State v. Garcia, 2017 UT 53, 424 P.3d 171 20

State v. Green, 78 Utah 580, 6 P.2d 177 (1931) 17

State v. Harmon, 956 P.2d 202 (Utah 1998) 22

State v. Low, 2008 UT 58, 192 P.3d 867 15, 17

State v. Martinez, 2000 UT App 320, 14 P.3d 114 14

State v. Mitchell, 779 P.2d 1116 (Utah 1989) 17

State v. Ramos, 2018 UT App 103 12, 13, 15, 17

State v. Saunders, 1999 UT 59, 992 P.2d 951 23

State v. Tillman, 750 P.2d 546 (Utah 1987) 24

State v. Torres, 619 P.2d 694 (Utah 1980) 16

State v. Tray, 688 P.2d 483 (Utah 1984) 22, 23

State v. Valdez, 513 P.2d 422 (Utah 1973) 23

Statutes

Utah Code, Section 76-1-501 14

Utah Code, Section 76-1-502 14

Utah Code, Section 76-1-504 14

Utah Code, Section 76-2-402

Utah Code, Section 76-5-203 14, 16, 17, 20

Rules

Utah R. Evid. 401

22

Utah R. Evid. 402

22

Other

Law Journal

42 GEO. L.J. ANN. REV. CRIM. PROC. (2013)

18

Constitutional provisions

passim

Jury Instruction

4, 5, 6, 16, 17, 20, 21

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from **state courts**:

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

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

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

☒ reported at 2018 UT App 103; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

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

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

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

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

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was JAN. 21st, 2019.
A copy of that decision appears at Appendix A.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V.

No person shall be held ... nor be deprived of life, liberty, or property, without due process of law...

Amendment VI

In all criminal prosecutions, the accused shall enjoy the ... [Effective] Assistance of Counsel for his defence.

Amendment XIV, Section 1.

... No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE AND NATURE OF PROCEEDINGS

a. Procedural Background. Petitioner/Defendant Harlin Argelio Ramos (hereafter Ramos) was charged with one count of murder, a first degree, in the death of Joaquin Gonzalez (hereafter Quino). R: 1-3. Ramos asserted the affirmative defense of perfect and imperfect self-defense manslaughter. R: 1582-586. The jury was instructed on both murder and manslaughter involving a dangerous weapon. R: 720-22; Addendum D. (Jury Instructions 32-34, 48).

Jury Instruction 33, instructed that to convict on the offense of murder the jury had to find beyond a reasonable doubt each of the following elements:

(1) that Ramos;

(2) Did one of the following:

(a) Intentionally or knowingly caused the death of

[Quino]; or

(b) Intending to cause serious bodily injury to another, he committed an act clearly dangerous to human life that cause the death of [Quino]; or

(c) Acting under the circumstances evidencing a depraved indifference to human life, he knowingly engaged in conduct which created a grave risk of death to another and thereby caused the death of [Quino]; and

(3) The defendant did not act with any legal justification.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has ^{been} proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that one or more of these elements has been

proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY. R:721; Addendum D.

Jury Instruction 34, instructed the jury on the affirmative defense of imperfect self-defense of manslaughter involving a dangerous weapon as follows:

You may consider the lesser included offense of "Murder Involving a Dangerous Weapon." To do so you must find from all ^{of} the evidence and beyond a reasonable doubt each and every one of the following elements of that offense. That... (1) Ramos;

(2) Either:

(a) Recklessly caused the death of [Quino]; or.

(b) Caused the death of [Quino] under circumstances where the defendant reasonably believed the circumstances provide a legal justification or excuse for his conduct, although the conduct was not legally justifiable or excusable under the existing circumstances; and

(3) A dangerous weapon was used...

After you **carefully** consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY of Manslaughter Involving a Dangerous Weapon. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY of Manslaughter Involving a Dangerous Weapon. R:722; Addendum D; see also State v. Ramos, 2018 UT App 16, at 18.

Jury Instruct 48 defined imperfect self-defense and the burden of proof.

Imperfect self-defense is a partial defense to the charge of Murder. It applies when the defendant caused the death of another while incorrectly, but reasonably, believing that his conduct was legally justified or excused. The effect of the defense is to reduce the crime of Murder to Manslaughter Involving a Dangerous Weapon.

The defendant is not required to prove that the defense applies. Rather, the State must prove beyond a reasonable doubt that the defense does not apply. The State has the burden of proof at all times. If the State has not carried the burden, the defendant may only be convicted of Manslaughter Involving a Dangerous Weapon. R: 736; Addendum D; see also State v. Ramos, 2018 UT App. 161 at 33.

b. State's Evidence. Sometime after midnight on April 19, 2014, Quino walked with his friend, Megan, to her car after seeing a movie at the Gateway Mall Theater. R: 1588-598. Megan's white Toyota Corolla was parked two blocks away from Quino's vehicle. R: 1598-1602, 1706-707, 1999, 2104. Because of the late hour, Megan drove Quino to his vehicle but the two continued to sit in Megan's car to talk. R: 1598-603, 2106. Megan noticed two males, Ramos and another male, look toward her vehicle as they passed by in front. R: 1602-603, 1622-26. Megan felt "creeped out" because "the energy was very uncomfortable." R: 1604, 1649. It was just after 1:00 AM

when the couple leaned toward each other to hug goodbye.
R: 1604-1606, 1648.

Quino's back was toward the passenger door

when Ramos opened it and reached inside. R: 1604, 1627, 1647. Quino whipped around toward Ramos and shoved him away from the car and said "what the hell are you doing?"

R: 1607, 1648. As Quino got out of the car he shoved Ramos and the two began wrestling or fistfighting. R: 1607, 1823.

Megan could not see whether the other man with Ramos earlier

was also outside her car. R: 1607, 1645-1646. Megan looked her car doors and began honking the horn and screaming for help.

R: 1607-1608, 1649-50, 1821-822. Megan lost sight of Quino

and Ramos when she leaned down to retrieve her phone. R: 1607-1608. when she got out to look for the men she heard Quino yelling,

"Please don't kill me. I have kids. Please don't kill me." R: 1608-

1609, 1651-1652. Megan grabbed her Taser and ran around the

front of her car to find Ramos straddling Quino's hips and, given Ramos' arm movements, saw what ~~he~~ appeared to be

Ramos punching Quino. R: 1610-1611, 1637-1640, 2105.

Megan tried to use her Taser on the back of Ramos'

calf, over his jeans, but it had no effect on him. R: 1611, 1653.

She then put the Taser directly to the skin on the back of

Ramos' neck which caused him to scream and throw his arm

back as if trying to elbow her. R: 1612-1613, 1654-1655. Megan

ran back to her car, locked herself inside, and honked the horn

while she screamed for help. R: 1613-1614, 1656-1657. Ramos and

1. Megan believed Ramos was reaching for her keys to steal her car.
R: 1606.

another male took off running away from the scene. R: 1672-678, 1696-677, 1831-832. Megan saw Quino lean against her hood before falling backwards, landing next to the driver side door. R: 1614-615, 1679-80. Megan knelt next to Quino and continued to yell for help. R: 1615. An off-duty paramedic arrived and offered aid. R: 1615, 1620, 1665-693. The paramedic observed that Quino had what appeared to be "four sharp-force-trauma injuries" - two in the thoracic area and two in the abdominal area. R: 1617, 1631, 1683-684, 1793-795, 1832-833, 1885. The injuries appeared to have been caused by a sharp blade, such as a knife. R: 1686. After police officers and paramedics arrived on the scene, Quino was declared dead. R: 1619-621, 1687, 1701-708, 1840-841, 1995-997.

An investigating officer noticed personal belongings were scattered in front and next to Quino's car, and the gravel was disturbed and had ruts in it at the front of Quino's car. R: 1871-883, 2005-007, 2049-053. The officer testified that it appeared that there was some type of struggle either on the ground or that someone's feet had been digging into the gravel for traction. R: 2005-007, 2050-051. Officers searched the area but did not locate a knife or any other weapon. R: 1708, 1841-849. But two backpacks were located. R: 1706-707, 1717, 1846, 1877-878, 1906, 1999, 2001-009, 2151-152, 2329-330. Inside one of the backpacks officers found clothing, a receipt from a nearby Maverik [convenience store], a Cricket phone bill with Ramos' name and address, and his Honduran identification card. R: 2009-010, 2152-153, 2329-334. Two cell phones - a Kyocera and an iPhone were also

found. R: 1871-881, 2001-005, 2049-053. The Kyocera phone belonged to Ramos. R: 1879, 2032-2033. The iPhone belonged to Ramos' brother-in-law, Guillermo. R: 2034-035. Officers were unable to contact Guillermo. R: 2342.

Ramos was arrested at the Overniter Motel- approximately a mile away from the scene of the incident. R: 2011-016, 2153-155, 2334-337. Ramos told officers that he did not speak English so his interview was conducted in Spanish. R: 2157. Ramos admitted to being involved and defending himself by using a knife he carried in his pocket. R: 2159-60. An officer testified that Ramos had given different versions of what occurred that night. R: 2157, 2377-383. Ramos had said that he was waiting for a taxi from someone who had a white sedan and mistook Megan's car for his ride. R: 2158-166. And that before he could open the door, Quino got out of the car and attacked him. R: 2158-166. Ramos believed that when Quino attacked that Quino was associated with Mara-a gang in Mexico-and Ramos had feared that they had come to harm him. R: 2167, 2172-173, 2211.

Ramos also told officers that he approached the car because he thought they wanted to buy drugs, and he and Guillermo were selling drugs in the area. R: 2176-177. And when Ramos opened the door to sell the drugs, Quino got out and attacked him by hitting and choking him, making Ramos spit out the drugs he had in his mouth.² R: 2177-178, 2187, 2337. Ramos feared that Quino was trying to rob him. R: 2197. Ramos did not remember where the knife he used went but thought he might have dropped it as he ran away or

2. No drugs were found at the scene or in Ramos' possession. R: 2216-217.

threw it away with his clothes. R: 2186, 2196, 2340. Ramos suffered minor injuries; an abrasion on his forehead, a scratch on his temple, abrasions on his right forearm, and scratch marks on the front of his neck, on the sides of his neck above his clavicle, and on the back of his neck. R: 2053-059, 2182-185, 2203, 2217-218, 2338-340. Officers said they did not observe Ramos having a sore throat or difficulty speaking. R: 2337-338, 2343.

Ramos' motel room was searched and clothing containing bloodstains was collected. R: 2021-024, 2233-243, 2260-63, 2275-290, 2319-324, 2340-342. Quino's DNA was on Ramos clothing. R: 2279-2289. Officers found a gray fleece with bloodstains in the motel dumpster. R: 2018-019. Ramos' fingerprints were found on the passenger door of Megan's white Toyota. R: 2130-135, 2145. And Ramos' phone showed a call at 1:08 a.m. on April 19th from a Nestor. R: 2048-057.

c. Defense. Ramos told officers that he and Guillermo were waiting for a ride from a taxi, specifically a white sedan, driven by Nestor. R: 2158-59, 2162, 2200-205, 2347-48, 2468-48e. Ramos said the taxi always picked him up in that location, and flashed its lights when arriving. R: 166e, 2476-77, 2159, 2205-211. So, when Megan's white sedan flashed its lights, Ramos approached the front passenger door thinking it was his ride. R: 166e, 2476-77, 2159, 2205-211.

As Ramos opened the passenger door, Quino got out and Ramos realized he had made a mistake and repeated "sorry, sorry, and no problem" to Quino in English. R: 2166, 2202-20e. But Quino attacked Ramos, repeatedly hitting him in the head and grabbing his neck, choking him. R: 1607, 2159, 2163-164, 220e-207, 2343, 2477-84. Ramos pleaded "help

me, help me, he is going to kill me." R: 2211. Ramos did not take out his knife until he became desperate as Quino continued to strangle him and caused him to suffer the effects of asphyxiation. R: 2198-199, 2207, 2346-348. Ramos also reported that while he was being attacked, Megan "electrocuted" him twice - once in the leg and on the neck. R: 1611-613, 2163, 2209, 2483. Ramos and Guillermo left the scene, leaving two backpacks and other belongings behind. R: 2032-33, 2050-52, 2152-53, 2165.

Nestor testified that Ramos was a regular taxi customer, R: 2486-87; Ramos called him to 500 West 100 South for a taxi ride, R: 2468-70; Nestor's vehicle was a white sedan, R: 2345-346, 2473; and he watched Ramos open the passenger door of another white vehicle. R: 2468-77. Nestor testified that he heard Ramos apologize in Spanish after Quino appeared angry when he exited the white Toyota Corolla. R: 2477-79. Nestor watched a struggle between the two, heard Ramos ask Guillermo for help, and said that Quino was choking and killing him. R: 2480-83. Nestor watched as Guillermo tried to separate the men by pulling Ramos' arm, but Ramos was unable to stand after being Tasered. R: 2483-484. Nestor testified that when Ramos got into his taxi, Ramos was shaking and had difficulty speaking. R: 2484-86. Nestor took Ramos to the Overniter motel and rented a room for him. R: 2494-497.

A defense expert testified that Ramos' injuries were consistent with strangulation. R: 2366-373, 2387-390, 2409-211, 2446. The expert also testified that it is common for strangulation victims to gain memories over time about

what occurred, causing their story to change. R:2413-414. The medical examiner testified that an individual could have their breathing cut off by force applied to their trachea and it would not cause petechiae, which is commonly associated with strangulation. R:1977-780. According to the examiner, the tissue in the trachea is resilient so "you can crush it, block it, and then if you take the pressure off" it would come back out restoring the ability to breathe. R:1985.

d. Verdict. After a four day trial, the jury found Ramos guilty of murder. R:689. Ramos was sentenced to fifteen years to life in the Utah State Prison. R:759-661.

e. Direct Appeal. Ramos filed a direct appeal through counsel. The Utah Supreme Court assigned the case to the Utah Court of Appeals. Case No. 20160075CA. The Utah Court of Appeals affirmed the conviction on August 23rd, 2018. Ramos' appellate counsel filed a Petition for Writ of Certiorari in the Utah Supreme Court on October 03rd, 2018. The Utah Supreme Court denied certiorari on January 21st, 2019.

f. Utah Court of Appeals' Opinion. On appeal, Ramos argued that his trial counsel was ineffective for failing to object to the erroneous jury instruction, which impermissibly shifted the burden of proof onto him to prove imperfect self-defense beyond a reasonable doubt. *State v. Ramos*, 2018 UT App 161 at 21. Alternatively, Ramos argued that the trial court erred by misinstructing the jury on the burden of proof for the affirmative

defense. Id. at 23 n.9. Ramos also argued that his trial counsel was ineffective for failing to object when the prosecutor improperly elicited irrelevant and prejudicial testimony about the young children left behind after the victim's death. Id. Ramos argued these errors, individually and cumulatively, were prejudicial and required a new trial. Id. at 22.

Addressing the erroneous jury instruction, the court of appeals presumed error and counsel's deficient performance but affirmed finding no prejudice. see Ramos, 2018 UT App 161 at 25. The Court held that "Ramos suffered no prejudice because there was no reasonable probability that but for his counsel's performance 'the result of the proceeding would have been different' such that the error 'undermine[s] [our] confidence in the outcome.'" Id. at 31. (citation omitted) (alterations in original). The court did not address whether the trial court erred, determining the invited error doctrine applied. Id. at 23 n.9.

The Utah Court of Appeals also held that trial counsel was not ineffective for failing to object to the testimony elicited regarding the victim's children because Ramos could "not rebut [...] the presumption that his trial counsel's performance was objectively reasonable." Id. at 39. Finally, the Court rejected Ramos' cumulative error argument. Id. at 41.

REASONS FOR GRANTING THE PETITION.

I. This Court should review the Utah Appellate Courts' affirmance, where trial counsel was ineffective for failing to object to the jury instruction that shifted the burden of proof onto Ramos to prove imperfect self-defense beyond a reasonable doubt, for the reason Petitioner Ramos has been denied his U.S. Constitutional Rights to Due Process and Effective Assistance of Counsel guaranteed to state prisoners through the Fourteenth Amendment.

Once some evidence is presented of an affirmative defense that negates an element of the charged offense, the state alone has the burden to disprove the affirmative defense beyond a reasonable doubt. See *State v. Campos*, 2015 UT App 213 at 42, 45; 301 P.3d 1160. ("when the defendant has reached the threshold to merit self-defense instructions, those instructions must clearly communicate to the jury what the burden of proof is and who carries the burden"); *State v. Martinez*, 2000 UT App 320, sect. 9; 11 P.3d 114. ("It is fundamental that the state carries the burden of proving beyond a reasonable doubt each element of an offense."); Utah Code, Section 76-1-501, 502 (requiring state to negate a defense "by proof when the defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense), - 504 (requiring Defendant to present evidence on an affirmative defense but not requiring Defendant to prove the defense). The defendant has no burden to prove an affirmative defense. See *State v. Dreij*, 2010 UT 35, at 15; 233 P.3d 476 (noting the state is required to "disprove the existence

of affirmative defenses beyond a reasonable doubt once the defendant has produced some evidence of the defense" (citation and quotations omitted)). If the State fails to meet its burden, then the jury must convict of only the lesser offense. See Utah Code, Section 76-5-203(4).

Imperfect self-defense is an affirmative defense to murder, and serves to reduce the charge to manslaughter. See *State v. Low*, 2008 UT 58, at 22-24; 192 P.3d 867 (recognizing under Utah law, "the assertion of a successful affirmative defense of ... imperfect self-defense reduces murder to manslaughter"). Imperfect self-defense is available when evidence is presented that the defendant "attempted to cause 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, Section 76-5-203(4) (imperfect self-defense is an affirmative defense that mitigates intentional murder.)

In this case, "[t]he State conceded that sufficient evidence existed in the record to support the trial court [I] giving ... a self-defense instruction" on the theory of imperfect self-defense. *Ramos*, 2018 UT App 161 at 24. Under this theory, *Ramos* was entitled to have the charge of murder against him reduced to manslaughter, unless the State disproved the affirmative defense beyond a reasonable doubt. See *Campos*, 2013 UT App 213 at 41. ("Once a defendant—or even the prosecution for that matter—has produced enough evidence to warrant the giving of an instruction on an affirmative defense, the defendant is entitled to acquittal or as in the case

of imperfect self-defense, reduction of the charge unless the prosecution carries its burden of disproving the defense (beyond a reasonable doubt."); see also Drej, 2010 UT 35 at 15; Utah Code, Section 76-5-203(4).

Jury Instruction 34 instructed that Imperfect self-defense manslaughter "require[d] the affirmative defense to be established beyond a reasonable doubt." Campos, 2013 UT App 213 at 41; see R:772; Instr. 34 (instructing jury to consider the affirmative defense of imperfect self-defense of murder involving a dangerous weapon it "must find ... beyond a reasonable doubt each and every one of the elements of that offense"). However, the instruction failed to clearly and properly instruct the jury that the state had the burden to disprove beyond a reasonable doubt that the evidence provided Ramos with "a legal justification or excuse" for his conduct. *Id.* And, the instruction failed to instruct the jury that it was the state's burden to disprove that there was a reasonable basis to convict under the affirmative defense of imperfect self-defense manslaughter, rather than murder. *Id.*; Campos, 2013 UT App 213 at 40 (disagreeing with state's argument that verdict "form was not erroneous, because it did not state or imply that the defendant bore the burden to prove that imperfect self-defense applied"); see also *State v. Torres*, 619 P.2d 674, 675 (UTAH 1980) ("The ultimate burden of proving the defendant's guilt beyond a reasonable doubt remains on the state, whether defendant offers any evidence in an effort to prove affirmative defenses or not."). Instruction 34 effectively instructed the jury that it could consider a conviction of manslaughter only if Ramos proved imperfect self-defense applied beyond a

reasonable doubt. R: 722. Instruction 34 conflicted with the more accurate instruction given in Instruction 48. See R: 736; Instr. 48 (instruction that "the State must prove beyond a reasonable doubt that the defense does not apply").

On appeal, Ramos argued that his trial counsel was ineffective for failing to fulfill his "duty to ensure that the jury was clearly and properly instructed on the burden of proof relevant to imperfect self-defense." Campos, 2013 UT App 213 at 45; see Utah Code, Section 76-5-203(4). Specifically, Ramos contended that the jury was misled when it was given a fundamentally flawed instruction, which effectively shifted onto Ramos the burden of proving beyond a reasonable doubt the affirmative defense theory of imperfect self-defense manslaughter. See Prej, 2010 UT 35 at 15.

The State conceded that Jury Instruction 34 erroneously shifted the burden of proof onto Ramos. See Ramos, 2018 UT App. 161 at 18 and at n7, 19. "Where instructions are in irreconcilable conflict, or so conflicting as to confuse or mislead the jury, the rule requiring instructions to be read together has no application." State v. Green, 78 Utah 580, 6P.2d 177, 183-84 (1931) (citation and internal quotations omitted). Such "that the giving of inconsistent instructions is error and sufficient ground for reversal of the judgment, because, after a verdict, it cannot be told which instruction was followed by the jury, or what influence the erroneous instruction had on their deliberations." Id.

Therefore, Ramos argued that trial counsel's performance was deficient in failing to object to

the instruction and absent the error there is a reasonable likelihood that the jury would have convicted Ramos of manslaughter with a dangerous weapon instead of murder, entitling Ramos to a new trial. see *State v. Eyre*, 2008 UT 16 at 19; 179 P.3d 392 ("counsel's failure to object to a jury instruction that did not alert the jury to every element of the crime... charged amounted to a deficient performance"); *State v. Lew*, 2008 UT 58 at 22; 192 P.3d 867 (noting imperfect self-defense was removed from the manslaughter statute and placed in the murder statute as an affirmative defense); *State v. Mitchell*, 779 P.2d 1116, 1121-22 (Utah 1989) (prejudice analysis considers whether there is a reasonable likelihood of a more favorable outcome, "i.e. being convicted of an offense other than... murder").

The Utah Court of Appeals addressed Ramos' ineffectiveness claim under the prejudice prong of the ineffective assistance of counsel doctrine - "but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *Ramos*, 2018 UT App 11 at 23; accord 42 GEO. L.J. ANN. REV. CRIM. PROC. page 553 (2013) (The burden is met by showing a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors.) citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984). But, the Utah appellate court rejected Ramos' claim, determining he could not "carry the heavy burden of demonstrating that the erroneous instruction prejudiced him." *Ramos* at 25. The Utah Court of Appeals decision was erroneous and requires review.

The jury heard evidence supporting Ramos defense. R: 2158-59, 2347-48, 2468-86 (testimony that Quino hit Ramos after he mistook the white Toyota Corolla for Nestor's white taxi); R: 2053-059, 2182-185, 2203, 2217-218, 2338-340 (testimony that Ramos sustained minor injuries to his head and neck); R: 1953-56, 1977-85, 2053-55, 2059, 2163-64, 2371-72, 2414, 2484-486 (testimony that Quino applied strangulation pressure to Ramos' neck, which resulted in scratches on his neck and difficulty breathing, that because a trachea is made-up of resilient tissue, it can be crushed during manual strangulation and still pop back out, restoring breathing, once the pressure is relieved. And that manual strangulation can occur and there would be no external signs present such as petechia, bruising, or scratching); R: 2468-79, 2484-87 (Ramos was a regular taxi customer for Nestor; Ramos called Nestor to pick him up from the area; Nestor drives a white sedan; Nestor watched Ramos start to enter a different park white vehicle; Ramos apologized in Spanish after Quino appeared angry upon exiting the white Toyota Corolla; Ramos asked for help, saying that Quino was choking and killing him; Ramos had difficulty speaking); R: 1925-43, 1961-64 (the directionalities and locations of Quino's wounds indicated that Ramos and Quino were moving around relative to each other during the wound inflictions. And defense counsel's closing argument that the orientation and directionality evidence was consistent with a struggle between the parties rather than a one-sided attack of Quino by Ramos); R: 2009-10 (Ramos dropped his backpack and left it at the scene, which is inconsistent with a planned and intentional attack).

2

The aforementioned evidence supports imperfect self-defense manslaughter — that Ramos erroneously but reasonably believed he was legally justified to use deadly force — because the evidence provided an interpretation that Ramos was entitled to defend himself against Quino's attack but not necessarily entitled to use deadly force to do so. See Utah Code, Section 76-5-203(4). "Because there was a reasonable basis for the jury to conclude that imperfect self-defense applied, there is necessarily a reasonable probability ... that, but for counsel's error, the result would have been different." State v. Garcia, 2017 UT 53 at 34; 424 P.3d 171 (citation omitted).

Ramos was entitled to have the jury clearly and correctly instructed that it was the state's burden to disprove beyond a reasonable doubt his affirmative defense. Because the imperfect self-defense manslaughter with a deadly weapon instruction directly conflicts with Instruction 48 (defining imperfect self-defense and the burden of proof), trial counsel's failure to object to it constitutes deficient performance, prejudicing Ramos. See Campos, 2013 UT App 213 at 64 ("given the direct conflict between the imperfect self-defense instruction and the verdict form in the case, we cannot say that the jury was fairly instructed on the applicable law, even in light of the numerous more general statements in the instructions about burdens of proof"). The jury could have concluded that there was a legitimate issue as to whether Ramos was entitled to use deadly force against Quino, where there was conflicting evidence that Quino either hit Ramos repeatedly or strangled him. See Supra.

Finally, while Instruction 48 more accurately stated the law of imperfect self-defense, it was insufficient to make plain that Ramos had no particular burden of proof. *Id.* The instructions failed to "clearly communicate to the jury what the burden of proof is and who carries the burden." *Id.* at 42. (internal citation and quotations omitted.). It is impossible for the Utah appellate court to be sure whether the jury carefully read Instruction 48 defining imperfect self-defense, and bore in mind its injunction requiring the state to prove the defense. *Id.* at 65. ("When it cannot be told which instruction was followed by the jury, or what influence the erroneous instruction had on their deliberations, 'the giving of inconsistent instructions is error and sufficient ground for a reversal of the judgment.'" (citation omitted)). This is especially true where Instruction 48 was one of the last few instructions given to the jury and fourteen instructions after Instruction 34 which provided the jury with conflicting language. Compare R:736 (Instruction 48), with R:722 (Instruction 34).

II This Court should grant the Petition to review whether the Utah appellate court deviated from this court's precedent by erring in determining Ramos' trial counsel was not ineffective for failing to object to the irrelevant and prejudicial testimony regarding Quimo's young children.

During Megan's direct examination, testimony was elicited regarding the home screen image on Quimo's

phone — a picture of his two young sons. R: 1624. Trial counsel did not object to this prejudicial line of questioning, ask for a bench conference, or request a curative instruction. Yet, the elicited testimony was not relevant to any issue before the jury. See Utah R. Evid. 401, 402 (evidence must be relevant to be admissible).

Ramos "must show not only that his trial counsel performed deficiently, but also that he was prejudiced by his trial counsel's deficient performance." Campos, 2013 UT App 213 at 46 (citation omitted). Ramos argued that by failing to object to the irrelevant and prejudicial testimony about Quino's two young children, and counsel's failure to request a curative instruction, Ramos was prejudiced because improper testimony was heard by the jury. See *State v. Harmon*, 956 P.2d 262, 269-71 (Utah 1998) (concluding that the trial court's "forceful, explicit instruction to the jury to disregard the 'totally and absolutely inappropriate' comment" effectively cured error of improper testimony).

Because the pivotal issue before the jury was whether Ramos reasonably believed he needed to defend himself against deadly force from Quino, and conflicting evidence supported opposite conclusions, the jury would have been looking for guidance in whom to believe. See *State v. Troy*, 688 P.2d 483, 486 (Utah 1984) (noting that where the jury had to weigh conflicting evidence, "the jurors may be searching for guidance in weighing and interpreting the evidence"). Jurors were likely influenced by the prejudicial comments the prosecutor elicited

where jurors had to weigh conflicting testimony and other evidence. Here, the state's use of prejudicial testimony implicating that Qumo's death resulted in two young children being fatherless was "a direct appeal to the passions of the jury [, and] suggested to the jury that it should find [Ramos] guilty out of vengeance or sympathy for the victim rather than based on what the facts and the law required." Campos, 2013 UT App 213 at 52. In that regard, Ramos right to a fair trial and his right to have the jury reach a unanimous verdict on the essential elements of the offense was affected. See State v. Saunders, 1999 UT 59 at 52; 992 P.2d 951.

In determining whether inappropriate testimony prejudiced the defendant, appellate courts consider whether, "under the circumstances of the particular case," the jury was "probably influenced by those remarks." State v. Valdez, 513 P.2d 422, 424 (Utah 1973). "If proof of [Ramos'] guilt is strong, the challenged conduct or remark will not be presumed prejudicial." State v. Atok, 2015 UT App 89 at 20; 348 P.3d 377. "If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel." Id. (quoting Troy, 688 P.2d at 486 (citation and internal quotations omitted)); Campos, 2013 UT App 213 at 67 ("In cases where the jury had to weigh conflicting evidence or evidence susceptible of differing interpretations, [jurors] may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.").

Here, Ramos was prejudice by the testimony elicited.

Viewing the evidence as a whole, there was not overwhelming proof that Ramos should have been found guilty of murder rather than imperfect self-defense manslaughter. The testimony elicited from Megan implied that because Quino was a father of two young boys who cared enough to keep their photo on his cell phone, he was more likely to have acted in a responsible and protective manner during the encounter. The state compounded the error of the testimony by using Quino's statement "please don't kill me, I have kids" repeatedly in closing, and emphasizing the evidence that Quino was a father to argue that Ramos was unreasonable to fear that Quino was violent or in a gang. See R: 2603, 2620 (state's argument: "No evidence that [I] Quino was a member of a gang. He was the father of two out on a date"); see also *People v. Washington*, 204 N.E.2d 25, 28-30 (Ill. App. Ct. 1964) (holding that defendant did not receive a fair trial where prosecutor elicited testimony that murder victim left wife and four children, and prosecutor used the information in opening and closing). This line of questioning and argument "invited the jury to tip the credibility balance" toward Quino and the testimony that favored his justification and disfavored Ramos' reasonable belief that self-defense was required. *Akkk*, 2015 UT App. 89 at 21.

The remarks had a direct bearing on the facts of Ramos' self-defense theory — that Quino was a parent, and by implication, would not have been an aggressor. see *State v. Crippen*, 2016 UT App 152 at 22; 380 P.3d 18. Moreover, trial counsel did not request a curative instruction to mitigate the prejudicial effect of the testimony, and none was given. see *Id.* (factoring in the trial court's curative instruction in conclusion

that defendant was not prejudiced by improper testimony). where "there is a reasonable likelihood that in [the] absence [of the improper testimony], there would have been a more favorable result," Ramos ask this Court to review the State of Utah appellate Courts' affirmance of his conviction. State v. Tillman 750 P.2d 546, 555 (UTAH 1987).

III. This Court should review the Utah appellate Courts' holding that the cumulative effect doctrine is appltizable for the reason stated above.

The Utah Court of Appeals held that the cumulative error doctrine was inapplicable. See Ramos, 2018 UT App 161 a 10-41. But the Utah court's analysis of the errors was erroneous. See Supra. This Court should review the cumulative effect of the errors cited above. See Campos, 2013 UT App 213 at 72; State v. Dunn, 850 P.2d 1201, 1229 (UTAH 1993).

The Utah Supreme Court denied certiorari.

CONCLUSION

For the reasons stated above, Ramos respectfully request the Petition for a writ of certiorari should be granted.

Submitted this 13th day of March 2018.



Harlin Angelito Ramos
Petitioner Pro Se