

2017

**State of Utah, Plaintiff/Petitioner, v. James Christopher McCallie,
Defendan Tjresponden T.**

Utah Supreme Court

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IN THE
UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff and Appellant,

v.

SCOTT RICHARD STEWART,

Defendant and Appellee.

BRIEF OF APPELLEE

Appellate Court No. 20160484-SC

This is Appellee/Defendant, Mr. Stewart's response to the State of Utah's appeal brief, filed in support of its interlocutory appeal from an order excluding evidence by the Third Judicial District Court, Salt Lake County, District Court Case No. 131911542.

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

The Court of Appeals granted interlocutory review, then certified the appeal to this Court, which has jurisdiction pursuant to Utah Code. Ann. § 78A-3-102(3)(b).

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

1. The State of Utah details only one issue in its appeal. *See* Appellant's Brief, at 3. Namely, "Did the trial court err by excluding evidence of predicate acts that were part of the alleged pattern of unlawful activity?" *Id.* However, this general question, leaves open too much room. As explained below, it does not get directly to the legal issue that the Court must decide here. A more accurate and direct explanation of the issue presented is, "Can the allegation of an otherwise time-barred offense, be used by the Government in a criminal prosecution, to satisfy the definition of "unlawful activity" at Utah Code Ann. § 76-10-1602(4)?" The significance of this question is plain, under U.C.A. § 76-10-1602(2) the government must prove "at least three episodes of unlawful activity" in order to establish a "pattern" of conduct criminalized by § 76-10-1603 *et seq.* If the answer to the above question is no, then the district court was well within its authority and discretion to exclude the evidence at issue, as it explained, one statute of limitations grounds, because it was irrelevant and prejudicial under Rules 401, 402 and 403 of the Utah Rules of Evidence. On the other hand, if the answer to the above question is yes, then the district court was in error on the grounds cited, and should reconsider the other alternative grounds advocated by Mr. Stewart. Narrowing the specific question is important, because, 1) it focuses on the core legal determination

requested of this Court, and 2) respectfully, it renders the large majority of the State's argument on appeal, irrelevant.

2. Further, while the issue presented deals directly with the exclusion of irrelevant and prejudicial evidence, the legal standard of review cited by the State applies to the "applicability of a statute of limitations" as a legal question, and that is "reviewed for correctness." *Id.* But, as demonstrated below, there is no legal dispute in this case about the relevant period of limitations, nor the correctness of the statute of limitations as applied to the relevant "predicate" acts at issue, the otherwise time-barred offenses outlined in the State's proposed jury instruction. *Id.* at 15. Both parties and the district court agree that the alleged "offenses" at issue here, pertaining to the Nichols, Grandy, Conner, Mills, Goff, Wilkins, Rawlins, Stanger, Crosby-Burns, Manzanares, and Robinson are individually time-barred. However, this Court is being asked to review a different legal question, as derived from the application of these facts, and as such, the appropriate legal standard involves two considerations. First, "[t]he factual findings underlying a trial court's decision" to exclude or suppress evidence is "reviewed under the deferential clearly-erroneous standard" and then secondarily, "the legal conclusions" of the trial court involved in that exclusion, "are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts." *State v. Moreno*, 910 P.2d 1245, 1247 (Utah Ct. App. 1996).

SUMMARY OF ARGUMENT

The one question presented by the instant appeal is not nearly as complicated, nor tortured, as the State's appeal might make it seem. There is no order, nor any dispute presented that interprets or enforces the relevant statute of limitations. The State presents no argument – directly or by implication – challenging the district court's conclusion that “the predicate acts relied on by the State regarding Nichols, Grandy, Conner, Mills, Goff, Wilkins, Rawlins, Stanger, and Crosby-Burns are outside the statute of limitations” R892. Similarly, despite the lengthy treatment of this issue by the State, there is no order, nor any dispute, regarding whether the four separate criminal acts defined by Utah's Pattern of Unlawful Activity Act at § 76-10-1603 *et seq.*, are “continuing offenses” under the law. Finally, there is no dispute, nor any order of the district court that even questions whether the one Pattern of Unlawful count included in the Amended Information at issue in this case, is by itself, barred by the relevant statute of limitations. It is not.

While these topics are tangentially related to the issues at hand, and while the State's brief is largely consumed with a discussion of these issues, there is no dispute about them and most of the discussion is, respectfully, irrelevant. The actual question raised by the State's appeal has to do with the meaning and application of the statutory phrase “Unlawful Activity” at § 76-10-1602(4), and it is on this issue that Mr. Stewart's argument will focus.

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ARGUMENT

I. An Episode of Unlawful Activity Under Utah's Pattern of Unlawful Activity Act, Must Separately Constitute An Offense Under the Law.

There are four distinct crimes defined by Utah's Pattern of Unlawful Activity Act ("UPUA"), and these are defined at § 76-10-1603. An undisputed essential element of each of the four crimes requires the State to allege and prove, beyond a reasonable doubt, that "a pattern of unlawful activity" exists. *Id.* But, while this is a necessary element, it is not sufficient proof for the State to end there. Separately, and in addition, the statute requires the State to secondarily prove that "any person" charged under this statute, has also committed any one of four specific acts; being generally, 1) having "received" or "derived" "any proceeds" from the *pattern of unlawful activity*¹; 2) having "acquire[d]" or "maintain[e]d" "any interest in or control of any enterprise" through a *pattern of unlawful activity*; 3) having been "employed by or associated" with "any enterprise" to have "conduct[ed] or participate[d]" in that enterprise's affairs through a *pattern of unlawful activity*; or 4) to have "conspire[d] to violate" any of the above three provisions. Thus, the one common legal factor, no matter how the statute is analyzed or applied, and no matter which of the four crimes specified is charged, the crime itself – will always require proof that a "pattern of unlawful activity" has been alleged and proven.

For the reasons illustrated above, when applying the UPUA, a court's first and central determination, and the only specific question raised by this appeal, has to do with

¹ Not at issue in this appeal, the statute also requires that the State allege and prove that the person charged with receiving or deriving such proceeds, also participated in the pattern of unlawful activity "as a principal" and then with those proceeds, "invest[ed] directly or indirectly" in the "acquisition of any interest in, or the establishment or operation of, any enterprise." § 1603(1).

the definition of what constitutes a “pattern of unlawful activity” under the statute. The phrase “pattern of unlawful activity” is defined by the UPUA at § 76-10-1602(2).

The definition is rather involved, but the beginning point is the use of the word “pattern”, and under the UPUA, a “pattern” of unlawful activity exists when the person charged has “engag[ed] in conduct which constitutes the commission of at least three episodes of unlawful activity” *Id.* With the term “pattern” defined as “three episodes”, the definition goes on to define, modify and amend the characteristics that must also exist – in order for any particular “episode” to qualify as part of the pattern. But, for the purposes at issue here – the refinements of the term “episode” are all secondary concerns. The next and most important determination in applying the statute, and the most relevant determination here, has to do with how conduct qualifies as “unlawful activity” and therefore, the basis for one of the three episodes required to establish a pattern.

Or, to put it more simply, the central inquiry at this point, is how the UPUA defines a single episode of “unlawful activity” as the basic starting point, or building block of any charge under the UPUA. Answering this question requires careful attention to detail, especially because of the repeated and interrelated use of the words “act”, “activity”, “unlawful” throughout the UPUA. As the State admits, Appellant’s Br. at 12, with any question of statutory interpretation, this Court’s primary goal “is to effectuate the intent of the Legislature...[and] [t]he best evidence of the Legislature’s intent is the statute’s plain language.” *State v. Kay*, 2015 UT 43, ¶ 15, 349 P.3d 690, 693, reh’g denied (May 21, 2015). Here, any particular episode of “unlawful activity”, (i.e. any “predicate offense”) under the UPUA, is limited to a very specific statutory construction provided

by the Utah Legislature. In fact, the term “unlawful activity”, like the phrases referenced above, has been expressly defined in the UPUA statute.

“Unlawful activity” means “to directly engage in **conduct...which would constitute any offense** described by the following crimes or categories of crimes, or to attempt or conspire to engage in **an act which would constitute any of those offenses**, regardless of whether the act is in fact charged or indicted by any authority” § 76-10-1602. (Emphasis added.) The definition goes on to list a broad range of “crimes” and “categories of crimes” that fall within the scope of the term “unlawful activity” and what conduct can constitute an episode of the same.

This is the critical portion of the definition, the statute, and the present appeal. While Mr. Stewart agrees with the State that the definition includes “a long list of predicate offenses – 90 of them – a number of which encompass multiple crimes”, Appellant’s Br. at 16, under the plain language of the statute, there is no “unlawful activity” and therefore no “episode” of unlawful activity, *if* the person charged under the UPUA is accused of alleged activity that does *not* constitute any of the listed offenses, or which *could not* constitute “any” of those offenses.

Moreover, “[u]nambiguous language in the statute may not be interpreted to contradict its plain meaning.” *Bonham v. Morgan*, 788 P.2d 497, 500 (Utah 1989) (per curiam). The law requires that, “when reviewing a statute” the Court must “assume[] that each term in the statute was used advisedly” and “thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.” *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1020 (Utah 1995). And, this

is the crux of this appeal. The key dispute that was litigated before the district court, and the key question asked here – has to do with the specific language and the precise terms used in the UPUA, that plainly limits the meaning of the term “unlawful activity” to: **“conduct...which would constitute any offense** described by the [statutory list of qualifying] crimes or categories of crimes, or to attempt or conspire to engage in **an act which would constitute any of those offenses.”** § 76-10-1602(4). Where the State’s appeal fails – is on this point, squarely.

In fact, in its analysis, the State’s treatment of the “plain meaning” of the UPUA on this definition, actually *omits all of the key language*. See Appellant’s Br. at 13.² This is not to attribute any ill motive, just to respectfully, yet poignantly illustrate State blindness to the importance of the one critical issue upon which the district court heard over an hour of oral argument, and upon which the appealed order directly relied.

II. An Otherwise Time-Barred Offense, Is No Offense Under the Law.

The district court order currently on appeal prevents the government from using evidence of otherwise time-barred offenses as evidence to prove a pattern of unlawful activity. Nowhere, before the district court or on appeal, does the government argue that it sought to introduce the evidence at issue, as proof relating to any other count, nor for any other purpose. Its sole purpose relates to proving alleged episodes of “unlawful activity” as part of the Pattern of Unlawful Activity charge. Thus, on appeal, the

² The State’s brief includes the definition of the term “Unlawful activity” from the UPUA statute, but in place of the relevant language, uses the phrase “among other things” to describe the statute’s additional limits on the term. The point here is that these “other things” are the “things” upon which the present legal question turns, in support of Mr. Stewart and the district court.

propriety and validity of the district court's order excluding this evidence turns entirely³ on the answer to the question presented – can an otherwise time-barred offense⁴ constitute proof of “unlawful activity” under the UPUA.

A. Charged or Uncharged, There is Still No Offense.

The State repeatedly emphasizes that the UPUA includes within its definition a broad scope of conduct, “whether the act is in fact charged or indicted” as a separate offense. Appellant's Br. at 13. But, there is no quarrel on this point, neither was there before the district court. The legal issues here is not whether the conduct was charged or uncharged, indicted or unindicted, that detail is of no matter. The legal issue raised before the district court, as now re-raised here, is that *previously dismissed time-barred claims are not, and cannot be, “unlawful activity”* under the plain language of the UPUA, because such conduct only qualifies as “unlawful activity” if it “would constitute” a relevant offense at the time at the time a defendant is charged with one of the four violations outlined at § 76-10-1603, and because of the expired statute of limitations period here, such conduct could not and did not, constitute an such offense.

Not only does the government fail to directly address this point on appeal, it provides no legal authority to support the position that conduct which clearly falls outside the relevant statute of limitations period could or would somehow “constitute” any

³ The practical irrelevance of the argument raised by the State, regarding the relationship (or the claimed lack thereof) between the statute of limitations and the rules of evidence pertaining to admissibility, is addressed separately below.

⁴ There is no dispute that the alleged unlawful activity (predicate episodes) at issue are “previously dismissed claims”, independently time-barred by the statute of limitations. R891-92.

“offense.” In fact, there is direct authority in Utah law, that such conduct *does not*, and *cannot* constitute “any” offense under the law.⁵

B. State v. Crank

In *State v. Crank*, 105 Utah 332, 142 P.2d 178 (1943) this court was presented with a situation where the statute of limitations had run on the charge of manslaughter, but not on charges of murder in the first and second degrees, and a related challenge to an instructions submitted to the jury on these charges. The issue submitted required the court to explain the contours and effect of criminal statutes of limitation. In declaring the law on this point, the court explained, in relevant part:

The state is not permitted to prosecute a man, put him on, and to the expense of, his defense, nor have a verdict adjudging one a felon when the statute of limitations has run. The statute runs against the filing of such complaint or information; against the attempt to prosecute. It says in effect, that **as far as such offense is concerned, a man may not in law be considered as having committed it; he may not, within the spirit of the law be properly accused thereof or charged therewith.**

Id. at 193–94 (Emphasis added.) This principle in the law has not been disturbed since *Crank*. When the statute of limitations would otherwise bar a conviction on a particular offense, the additional legal consequence ensures and requires still more, specifically, that “a man may not...be considered as having committed it” and “he may not...be properly accused” let alone charged. While *Crank* has been scrutinized on the topic of

⁵ Further, and very respectfully, the question is not whether previously dismissed time-barred charges should constitute an offense going forward, but whether such conduct could constitute an offense at time he was charged. *See e.g. Salt Lake Cty. v. Holliday Water Co.*, 2010 UT 45, ¶ 41, 234 P.3d 1105, 1113; *Gressman v. State*, 2013 UT 63, ¶ 17, 323 P.3d 998, 1003.

whether a statute of limitations defense is a subject matter jurisdictional issue⁶ or an affirmative defense that can be waived, it has not been overturned, and the holding cited above, has been re-affirmed. Further, if a statute of limitations is an “affirmative defense” then in this case, it was raised, in the sense that Mr. Stewart affirmatively raised the issue, and because the alleged conduct is time-barred by the statute of limitations, he has made a successful pre-emptive defense against the allegation that such conduct “could” constitute an offense in this case.

The same conclusion promulgated so clearly by *Crank*, also remains at the core of the Tenth Circuit’s application of the same principle. Recognizing that many courts have concluded that a criminal statute of limitations does not limit the court’s subject matter jurisdiction, the Tenth Circuit has made it a point to continually point out that there is, nevertheless, no dispute that a statute of limitations does limit the executive branches authority to bring charges.

If the statute of limitations is to have any meaning in the administration of criminal justice, [it] must be held ... to operate as a jurisdictional limitation upon the power to prosecute and punish...It is plainly a limitation upon the power to prosecute or to punish. Allowing the government to do so...would be to change the statute of limitations from a law into a mere suggestion.

United States v. Cooper, 956 F.2d 960, 962 (10th Cir. 1992) citing *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964) (“Unlike the statute of limitations in civil

⁶ See e.g. *State v. Jackson*, 2011 UT App 318, 263 P.3d 540, 547 (Holding as a “matter of first impression” that a statute of limitations defense “can be waived” and is not in that sense “jurisdictional” but still acknowledging that it is an “affirmative defense” and a “bar to prosecution” if timely raised.); *James v. Galetka*, 965 P.2d 567, 573 (Utah Ct. App. 1998)(Specifically acknowledging the holding in *Crank*, as cited herein, and further recognizing that, “[s]tatutes of limitations are invoked to protect the rights of the defendant” and while they do not limit the court’s jurisdiction, they provide an “affirmative defense” and if timely invoked, “are a bar to prosecution.”)

cases, it is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused.)

C. State v. McGrath

The relevance of *State v. McGrath*, 749 P.2d 631, 635 (Utah 1988) was argued before the district court, and is raised by the State in its appeal. *See* Appellant's Br. at 13, 15 and 18. McGrath does not support the State's position. While it is true, that McGrath makes clear that predicate acts of racketeering conduct "do not need to be charged or indicted", *id.*, at 636, as pointed out above, that is rather irrelevant here. But, *McGrath* does provide support to Mr. Stewart's position and that taken by the district court. In *McGrath* this court was confronted with several issues related to Utah's prior racketeering statute, including a challenge by the defendant in that case that "the State failed to convict him on at least two of the eight indictments which charged him with distribution of a controlled substance" and therefore, according to that defendant, it "failed to prove that he engaged in a "pattern of racketeering activity." *Id.* at 634. That is the context from which the State derives its quote regarding its uncontested point that predicate acts of racketeering can be either charged or uncharged. But, and this is significant, while *McGrath* does not deal with challenges to predicate acts based upon the relevant statute of limitations – as does this case with Mr. Stewart, it squarely acknowledges the valid legal principle that predicate acts – whether they are charged or uncharged - are nevertheless subject to legal scrutiny, on the grounds of legal validity. Simply, in *McGrath*, this court distinguished federal cases cited by the defendant there, by pointing out that unlike those cases, in his case (McGrath's), "none of the predicate

acts which support the racketeering charge have been invalidated.” *McGrath*, 749 P.2d at 635. While subtle, the point is important. A predicate act, that is not legally valid or (in the words of this court), that has been “invalidated” by a subsequent legal challenge raised by the defendant, legitimately changes the analysis as to its effect in supporting a racketeering charge.

D. State v. Kay

The State’s treatment of *State v. Kay* 2015 UT 43, 349 P.3d 690, reh’g denied (May 21, 2015), addresses virtually every possible angle of the case, as it applies to a statute of limitations argument, except for the most relevant issue here. To begin with, Mr. Stewart agrees that *Kay* “did not interpret the UPUA”, Appellant’s Br. at 22, and that “the essence” of *Kay* was that “neither the communications fraud statute” nor the “securities fraud statute” as they were then written, constituted continuing offenses. *Id.* at 24. But, here again, the State slips into the irrelevant. There is no dispute that a Pattern of Unlawful Activity charge, is by its nature, a charge involving a continuing “pattern” and that for *its* statute of limitations purposes, on a UPUA charge - itself, the limitations period does not begin to run until the last act in the relevant series of acts is completed. But, this misses the question as to the effect the statute of limitations has on invalidating the alleged predicate offenses as time-barred and therefore preventing the same from being “unlawful activity” under the statute. Neither Mr. Stewart nor the district court took issue with the limitations period as applied to the UPUA charge itself, nor has the count been dismissed on limitations grounds.

The issue, as explained above, is a legal determination – as to what constitutes “unlawful activity” under the UPUA. Here, *Kay* is definitively instructive. And while it did not interpret the statute, as outlined above, no interpretation is needed because the meaning of the terms are plain, and the consequence of the statute of limitations on whether charged or uncharged activity can legally “constitute” an offense, is established law in Utah, under *Crank*, *Jackson*, *Galetka*, and by implication, *McGrath*. Like the district court’s reliance, Mr. Stewart’s argument is that *Kay* clarifies the consequence of invalid predicate acts in a UPUA charge and is an example affirming this position, and further clarifying the position advanced here.

First, in *Kay*, this Court explained, “because the pattern of unlawful activity charge” in that case, “was predicated on the four charges of communication fraud, the district court correctly dismissed all of the charges in *Kay I*.” *Kay*, 349 P.3d at 695. The State argues that this doesn’t affect the case against Mr. Stewart, because “unlike in *Kay*, the pattern count here alleges at least one timely predicate act.” Appellant’s Br. at 2. But, there is a subtle contradiction in the State’s position.

The State also argues that the *Kay* decision does not interpret the UPUA statute. Thus, the conclusions reached in *Kay*, are not new, but an example of a clear application of the law. Thus, when *Kay* doesn’t even endeavor to explain why the predicate offenses are invalidated by being time-barred, it is unmistakable that no explanation was necessary. The contradiction in the State’s position is most easily seen by asking this question. Why would the dismissal of the time-barred, communication fraud charges mean that the district court correctly dismissed the UPUA count? *Kay* answers, because

the UPUA count was “predicated” upon these time-barred charges. But, the State argues that this is because all counts were “all” time-barred, and since in Mr. Stewart’s case, at least “one” predicate episode is not time-barred, the circumstances are different. But, that is reading more into *Kay* than is there, and it is ignoring both the definitional element of the statute (one predicate act is defined the same as any other) and the fact that *Kay* implicitly requires the conclusions that statute of limitations analysis on the “predicate” offenses is an appropriate manner of legal scrutiny, going to their “validity” (e.g. *McGrath*) of the predicate, meaning time-barred conduct is not legally able to qualify as “unlawful activity” under the UPUA statute because they cannot constitute an offense. Stated in its most simple form, *Kay* clearly demonstrates that the State’s fundamental theory on appeal is manifestly incorrect, i.e. “the statute of limitations for predicate acts had ‘no effect’ on their admissibility to prove pattern,” Appellant’s Br. at 3, and that “regardless of the statute of limitations for the older offenses, they are properly within the pattern statute.” *Id.*, at 18.

Second, if the State’s theory is wrong, there is no merit to its individual arguments. The logical and unmistakable consequence of the government’s theory is that no statute of limitations analysis can invalidate any predicate offense under the UPUA. But, there is no escaping the logical and unmistakable consequence of *Kay*, that a predicate offense invalidated by the statute of limitations, does not constitute an offense. The State tries to carve out of these mutually exclusive views with an exception that says, in effect, if one predicate offense is timely, that is enough – but while that is the only consistent explanation to distinguish this case from *Kay*, it is a distinction without a

meaningful difference. The statute either defines “unlawful activity” as conduct that can “constitute” an offense, and the statute of limitations is relevant, or the definition of “unlawful activity” and “constitute[ing] an offense” is separate and apart from statute of limitations concerns. The statute does not offer a different definition for different predicate acts. This is the problem with confusing the issue of UPUA being a continuing offense generally, and ignoring the definition of unlawful activity for predicate episodes.⁷

III. There is No Merit to the State’s Other Arguments.

Once the plain language application of the UPUA is made, there is no basis to further “interpret” the Act. In addition, the application of existing law makes clear that the district court’s decision was valid. Nevertheless, Mr. Stewart here addresses the remaining arguments advanced by the State, none of which are availing.

A. The Nature of Limitations Statutes

The State argues that the district court and Mr. Stewart “misapprehend” the “nature” of limitations statutes. Respectfully, as argued above, the State misapprehends that when a statute of limitations is at issue, Mr. Stewart has the right not to be accused of the time-barred conduct – in any form, and such conduct cannot and does not constitute an offense under Utah law.

Secondarily, the authority cited by the State all deals with inapposite circumstances where defendants seek to exclude evidence from periods of time that fall

⁷ Further, this Court in *Kay* also referenced Utah R. Crim. P. 25(d) (“An order of dismissal ... based upon the statute of limitations [] shall be a bar to any other prosecution for the offense charged.”). This is consistent with Mr. Stewart’s argument, the district court’s application of *Kay*, and the *Kay* decisions implicit reliance upon statute of limitations law as consequently invalidating previously dismissed predicate charges.

outside limitations period, but that could be otherwise used to prove timely alleged elements of relevant charges. That is not the case here. The exclusion of evidence here took place because the evidence sought to be introduced was for an invalid legal purpose – i.e. to prove a predicate act, or to prove certain conduct was “unlawful activity” when it simply, could not be, as explained above. The State nowhere argues that there was any other purpose for the admission of the evidence – it was not going to prove any other count, and it was not going to prove any other element of the UPUA count.

Third, the “nature” of the statute of limitations is decidedly **about** excluding evidence. The State argument presents a scenario of two ships passing in the night – not ever contacting each other. *See e.g. Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989)(“In general, statutes of limitation are intended to...suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh.”); *Galetka*, 965 P.2d at 572 (Recognizing “the purpose of a criminal statutes of limitation is avoiding the filing of stale criminal charges...[and] ... to foreclose the potential for inaccuracy and fairness that stale evidence and dull memories may occasion an unduly delayed trial.”) (Internal quotes and citations omitted.)

Fourth, “[t]he factual findings underlying a trial court's decision” to exclude or suppress evidence is “reviewed under the deferential clearly-erroneous standard” and then secondarily, “the legal conclusions” of the trial court involved in that exclusion, “are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.” *State v. Moreno*, 910 P.2d 1245, 1247 (Utah Ct. App. 1996). The State makes no argument that excluding this evidence, under

the legal principle relied upon by the district court is, as applied to this circumstance, independently somehow, inappropriate.

B. The Application of Federal RICO Cases.

It is true that the general similarity between the federal racketeering statute and the UPUA has meant that Utah appellate courts “look to...federal case law for guidance on these issues.” *State v. Hutchings*, 950 P.2d 425, 430 (Utah App. 1997). But, by skipping the language of the UPUA that is at issue in this appeal, the State’s brief overstate’s the value of such federal law.

First, the federal statute does not use the “constitute an offense” language discussed here. Instead, it uses the terms “chargeable” and “indictable.” While there is some overlap, clearly the district court here used the term “chargeable” as an examination for what *could* constitute an offense – this Court has to “assume[] that each term in the statute was used advisedly” and “thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.” *Salt Lake Child & Family Therapy Clinic, Inc.*, 890 P.2d at 1020. As explained above, the use of the phrase “constitute an offense” in the Utah statute, is a marked distinction with direct consequence on the application of the term “unlawful activity” (Utah 1995). Further, federal courts have recognized the “anomalous results” in federal law with the use of “chargeable” and “indictable” as opposed the language used by the Utah statute. *See e.g. Spinelli, Kehiayan-Berkman, S.A. v. Imas Gruner, A.I.A., & Assocs.*, 602 F. Supp. 372, 377 (D. Md. 1985). Other federal courts continue to recognize that the legal “validity” of “predicate offenses” in a racketeering charge is a legitimate attack, as discussed with

regard to *McGrath*, *supra*. See e.g. *United States v. Vastola*, 989 F.2d 1318, 1329 (3d Cir. 1993)(Emphasis added.)

Finally, the line of federal cases that reject the application of statute of limitations arguments to predicate offenses, and further rejects the argument regarding whether a “chargeable” or “indictable” offense is determined at the time of the alleged act or at the time of the alleged charge, rests primarily on principles of federalism, not allowing state limitations periods to overrule the federal legislature’s prerogative. See e.g. *United States v. Mazzio*, 501 F. Supp. 340, 343 (E.D. Pa. 1980), *aff’d*, 681 F.2d 810 (3d Cir. 1982).

That is clearly not the situation here. And, as argued above, the federal law is interpreting different language, and the Court must presume that Utah changed its language and used different terms, advisedly. Consider, the United States Supreme Court recently explained that, “RICO defines as racketeering activity only acts that are “indictable” (or, what amounts to the same thing, “chargeable” or “punishable”), and clarifies that even under federal law if the “conduct” is not “indictable” it “cannot qualify as a predicate under RICO’s plain terms.” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102, 195 L. Ed. 2d 476 (2016). In Utah, based upon the *Crank* and related authority above, by Utah’s use of the phrase “constitute an offense” rather than “indictable” or “chargeable” the consequent analysis is that time-barred offenses “cannot qualify as a predicate” under the plain terms of the UPUA.

Thus, where there is Utah law on point, and where prior decisions of the Utah Supreme Court support Mr. Stewart and the district court’s reading of the statute – these authorities are not binding or helpful.

C. The Supposed Meaninglessness Implied by the Court's Decision

The State argues that the consequence of the district court's application of statute of limitation restrictions on predicate offenses under the UPUA renders the other provisions of the act, "meaningless." Appellant's Br. at 16-18. But, the opposite is true.

First, the State cites no legal authority directly on point.

Second, the State cites no authority for its argument that the July 31, 1981 lookback period takes the place of statute of limitation analysis for what could constitute an offense under the "unlawful activity" definition.

Third, the State's argument is that regardless of how long back it stretches a series of predicate acts, as long as one predicate act is within the limitations period for that act (why this would be relevant or implied from the text of the statute, the State never argues or explains), and so long as the "second-to-last" predicate offense occurs within the five year proximity requirement at § 76-10-1602(2), regardless of the other "statute of limitations for the older offenses, they are properly within the pattern statute."


Appellant's Br. at 18. The State also argues that the "penultimate" predicate act also must occur within "five years of the last act." There is no textual reference or explanation for this last interpretation either. But, the consequence of this interpretation is both unexplainable and impermissible. Under the State's reading, not only would the Court be required to abandon the clear consequence of untimely predicate offenses referenced in *Kay*, but the State would be permitted to chain together an unlimited line of predicate acts – back 36 years to 1981. There is absolutely no support for such a result – in the relevant caselaw, nor is this, for any reason, a better reading of the plain language

of the statute. Instead, it requires the court to add terms not contemplated by the legislature, and ignore the meaning of “constitute an offense” and the related, and established legal doctrines related to the statute of limitations protecting defendants from stale charges, stale evidence, and even the allegations of time-barred conduct.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on May 22, 2017.

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CERTIFICATE OF COMPLIANCE

This brief, pursuant to Rule 24(f)(1) of the Utah Rules of Appellate Procedure, complies with the type-volume limitation. The word processing system used to prepare this brief states that it contains 5,737 words in thirteen (13) point Times New Roman, which is a proportionally spaced font.

CERTIFICATE OF SERVICE

I CERTIFY that on **MAY 22, 2017** two copies of the foregoing brief was served, and the original filed, via U.S. First Class Mail and as set forth below:

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