The Story of *Territory v. Duran*

By Joel Jacobsen, Esq.

On the Saturday evening of Feb. 4, 1883, 8-year-old Luther Carey ran into his family's restaurant and saloon in Central, near Silver City. Luther shouted, "Mam! Mam!"[1] That was unusual, for Luther was deaf and generally did not speak at all. There was no school for the deaf in New Mexico in 1883, and the closest such schools were in Colorado Springs, Colo., and Austin, Texas.[2] Luther had not been trained in any standard form of sign language.

As soon as he got his mother's attention, Luther began a frantic pantomime. Grabbing an old broom handle he pretended to hit his head, to shoot, to slice his own throat. He then pointed to the Carey's neighbor, a young man named Abel Durán, who had entered the saloon about the same time as Luther. The boy's mother said, "Duran, what have you been doing? The boy is trying to tell something on you." Durán said, "I did nothing." Luther persisted, but his mother allowed the matter to drop.

The following morning Mrs. Carey finally understood her son's pantomime when she learned that three Chinese men had been murdered near Fort Bayard, a few miles from the town of Central. Luther became the star witness at the morning's inquest, a kind of combined autopsy/grand jury that was literally held "over the bod[ies] of the deceased," as specified in the statute.[3] Durán was arrested for the murders, along with his friends Aurelio Lara and Carlos Chaves.[4] Lara didn't help his case when he showed up at the inquest with blood spatters on his vest, pants and boots.

On Aug. 6, 1883, District Judge Warren Bristol (who also presided over Billy the Kid's trial) severed Chaves' trial from that of the other two. Chaves' trial got underway the same day. When Luther took the stand, with his mother beside him as interpreter, the first order of business was to swear him in. Bristol asked Luther whether "he knew the penalty he would incur if he told a falsehood" and he replied "that he would be burned up."[5] Under abundant contemporary authority, that counted as an oath, given Luther's youth.[6] The boy then told how he had been out riding with the three men. He held their horses while they went inside the Chinese men's tiny cabin, shot them and chopped them with a meat cleaver. His description was corroborated by examination of the bodies, which showed both bullet wounds and deep cuts, and by the discovery of a discarded cleaver along the killers' trail from the cabin. A jury found Chaves guilty of first-degree murder on Aug. 9, 1883.

The trial of Durán and Lara began the following Monday. This time, though, when Bristol asked Luther the questions about the eternal penalty for telling a falsehood, Mrs. Carey couldn't get him to answer. She explained, "I can not make him understand me; he is telling how the murder was committed, and what he saw; he thinks he is wanted to tell what took place at the Chinaman's house that night." After a hearing outside the presence of the jury, Bristol nonetheless found the boy to be a competent witness, in effect waiving the requirement of an oath. He reasoned that the oath's importance lay not in its form but in the guarantee it gave of truthfulness. Luther had pantomimed the manner in which the Chinese men had been killed at a time when only those who had been present even knew they were dead. Besides, given the difficulty of communicating anything but concrete facts to Luther, it seemed obvious that no one had told him the grisly details of the murders in the short time that elapsed between the killings and the moment he burst into the family saloon.[7] These circumstances, Bristol concluded, provided an equivalent – indeed, a better – guarantee of truthfulness than an oath. Therefore, Bristol ruled, the purpose of the oath was satisfied.[8] Once again Luther told his story, with his mother serving as translator, and Lara and Durán also were convicted. All three defendants were sentenced to death by hanging.

But six months later the Territorial Supreme Court reversed Durán's and Lara's convictions on a 2-1 vote. Justice Joseph Bell's opinion in *Territory v. Duran* is noteworthy in a couple respects. One is that it cites no legal authority at all, save only a bromidic quotation from a treatise about the importance of fair trials.[9] Second, the opinion never quite identifies the reason for its result. Rather, it gives two different reasons without explaining which was decisive or if they were decisive only in combination.

First, on the question of the oath, Justice Bell dealt with Bristol's reasoning by the tried-and-true judicial maneuver of pretending to misunderstand it and then responding to a different, easier argument. Bell wrote, "In other words, the presiding judge was of the opinion that the boy could not tell a lie, for the reason that he could only tell of such events as he had actually seen transpire."[10] The majority contended instead that deaf and dumb people are perfectly capable of imagining things, and even "have been successful writers of fiction"[11]

[1] Except where otherwise specifically noted, all quotations and factual statements in this article are drawn from the transcripts in *Territory v. Duran and Lora*, N.M. Supr. Ct. nos. 185 and 281, and *Territory v. Chaves*, N.M. Supr. Ct. no. 189, housed in the New Mexico Records Center and Archives as Collection no. 1983-041, United States Territorial and New Mexico Supreme Court Records, 1846-1978. The three appellate records are intermixed and appear to be incomplete.

[2] The New Mexico School for the Deaf was established as a private institution in 1885. www.nmsd.k12.nm.us/about/overview.html. For the establishment of the deaf schools in Colorado and Texas, *see* www.csdb.org/about/history.html; www.tsd.state.tx.us/overview/history.htm; Jack R. Gannon, *Deaf Heritage: A Narrative History of Deaf America* (Silver Springs, Md.: National Association of the Deaf, 1981), pp. 33, 42.

[3] 1884 Compiled Laws of New Mexico § 444. The statute was enacted in 1867.

[4] One co-defendant's name is spelled "Lora" in the published opinion of the case. Because Lara is a relatively common surname in New Mexico, and "Lora" a rare one, and because "Lora" could be a phonetic rendering of "Lara," I have used Lara in this article.

[5] *Territory v. Duran*, 3 N.M. 189, 198-199 (Gild.), 3 N.M. 134 (Johnson), 3 P. 53 (1884) (Bristol, J., dissenting).

[6] *See, e.g., State v. Levy*, 23 Minn. 104, 108 (Minn. 1876) (8-year-old could testify "if she understood that she was brought to court to tell the truth, that it is wrongful to tell a lie, and that she would be punished if she told a lie"); *Johnson v. State*, 1 Texas App. 609, 611 (Tex. Ct. App. 1877) (no error in admitting testimony of 10-year-old who "said she knew it was wrong to tell a lie"); *Blackwell v. State,* 11 Ind. 196, 198 (Ind. 1858) (9-year-old victim could testify upon showing that "she comprehends the obligations of an oath, and is satisfied that any deviation from the truth, while under oath, will be certainly followed by an appropriate punishment").

[7] The approximate time of the killings was established through the testimony of another Chinese man, Wy Mock, who had been outside the cabin and ran away at the sound of the first shot without being detected by the killers.

[8] *Territory v. Duran*, 3 N.M. at 200 (Bristol, J., dissenting).

[9] *Id.* at 195-196.

– thus entirely avoiding Bristol's point, which was precisely that Luther's account was not imaginary at all, and could not have been communicated to him by another.

After setting up and knocking down its straw man, the majority segued into a discussion of the practical difficulty the lawyers experienced while questioning the child, finding it "is entirely evident in this cause that the counsel for the accused, or the accused themselves, could not by any possibility have intelligently tested either the recollection or the truthfulness of this deaf and dumb child, by reason of the inability of anyone to either fully interpret their questions or his answers."[12]

There were three plausible interpretations of the Supreme Court's opinion. Interpretation number one: An unsworn witness may never testify, regardless of circumstantial guarantees of truthfulness. Interpretation number two: A deaf-mute witness may never testify, or may testify only if some easy and entirely reliable means of interpretation is available. Interpretation number three: Both of the above, but only in combination.

The precise holding was a matter of significance to everyone involved, and even more so to someone who *wasn't*: Carlos Chaves. If either interpretation number one or number three was correct, things looked grim for him, because in his case young Luther Carey took the functional equivalent of an oath. On the other hand, if interpretation number two was correct, Chaves, too, was entitled to a new trial. Furthermore, interpretation number two would presumably prevent Luther from testifying at any retrial, greatly increasing the odds of acquittal.[13] Thus two of three possible readings of *Territory v. Duran* meant likely death by hanging for Chaves, while the third meant likely freedom. It must have been a cruel moment for him when he realized the significance of the opinion's ambiguity. While Chaves waited for the Supreme Court to decide his separate appeal, Lara and Durán remained jailed pending retrial.

The ambiguity of the Supreme Court's opinion produced results that were probably more dramatic than the justices anticipated. Just 20 days after *Territory v. Duran* was decided, Chaves, who evidently accepted interpretation number one or number three and believed his goose was cooked, broke out of Silver City's jail. He was quickly shot and killed by a pursuing posse.[14] Lara and Durán were invited to join the break-out but declined. They "gave as their reason for not joining the jail breakers that there was no evidence against them, and they would come clear at their next trial."[15] Evidently they adhered to interpretation number 2.

But then an event occurred that Lara and Durán could not have bargained for. The people of Grant County took up a public collection to pay for Luther Carey to be educated at the Texas Deaf and Dumb Asylum in Austin.[16] At the Asylum (since renamed the Texas School for the Deaf), Luther learned American Sign Language. After eight months he rode the train back to Silver City in the company of one of his teachers, A.E. Lester, to testify at the retrial of Durán and Lara. Lester was himself deaf. Questions were submitted to him in writing which he translated into sign for Luther. The Carey boy answered in sign, which Lester rendered into written English.[17] Judge Stephen F. Wilson, who had recently replaced Bristol on the Third Judicial District bench, observed during his instructions to the jury that "[a]ll the material evidence has been given in language not understood by the court or jury" until translated from the Spanish, Chinese or sign.[18] Once again the jury believed Luther, and Durán and Lara were once more convicted and sentenced to death.

The story doesn't end there, though. The condemned men again appealed to the Territorial Supreme Court, arguing that the use of Lester as a translator made the examination so cumbersome and unreliable that it amounted to a denial of the defendants' right to confront the witness. The correct interpretation of *Territory v. Durán*, they argued, was number two, and furthermore sign was not nearly reliable or convenient enough to satisfy the Constitution. If taken to its logical conclusion, that position would have the effect of preventing deaf victims of criminal violence from giving evidence of their victimization, the equivalent of declaring open season on them. For that reason among others, the position had been squarely rejected in every published opinion in both America and England – that is, in every published opinion other than *Territory v. Duran*, which had, however, not exactly accepted it, either.[19] (To this day *Duran* is regularly cited as the American case that comes closest to declaring deaf people per se incompetent witnesses.[20])

In its first opinion in the case, the Territorial Supreme Court tiptoed right up to the edge of withdrawing the protection of the law from the deaf. Was it prepared to go all the way in its second opinion? We'll never know. In 1887, after the appeal had already been pending for two years without a decision, Governor Edmund G. Ross commuted Durán's and Lara's sentences to seven years imprisonment, of which they had already served four. In exchange they withdrew their appeal. The commutation petition submitted by their lawyers reportedly reflected "the prevailing opinion that with the character of testimony no satisfactory conviction could ever be had."[21] Apparently, Ross concluded that Luther's testimony would never be as good a hearing person's. So even if Durán and Lara didn't win their second appeal, they seem to have won the argument.

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[10] *Id.* at 195.
[11] *Id.*
[12] *Id*. at 194.
[13] The evidence against Chaves was stronger than that against Durán and Lara, because Wy Mock (*see* note 7) testified he recognized Chaves's voice.
[14] "A Break for Liberty!" *Silver City Enterprise* (March 14, 1884), reprinted in *This Is Silver City* vol. I, 1884, p. 10.
[15] *Id*., p. 11.
[16] "An Eye For An Eye," *Silver City Enterprise* (Aug. 17, 1883), reprinted in *This Is Silver City* vol. I, 1883, p. 11; "Eight Prisoners," *Silver City Enterprise* (July 15, 1887), reprinted in *This Is Silver City* vol. II, 1887, p. 19.
[17] The procedure is detailed in a court reporter's note appended to the transcript.
[18] This was from the judge's charge to the jury. The charge was published in "Murder in the First Degree," *Silver City Enterprise* (Dec. 19, 1884), reprinted in *This Is Silver City* vol. I, 1884, p. 68.
[19] "None of the cases, so far as we have examined, require what is called expert testimony, but *all* of them recognize the doctrine that *any* person who is able to communicate with the deaf-mute by signs may be sworn as an interpreter." *State v. Weldon*, 17 S.E. 688, 689 (S.C. 1893) (italics added). The foundational precedent is *John Rushton's Case*, 1 Leach Crown Cases 408, 168 English Reports 306 (1786).
[20] For example, in 2 Charles E. Torcia, ed., *Wharton's Criminal Evidence* § 355 at 422 n. 91 (14th ed. 1986), and Lowell J. Myers, *The Law and the Deaf* 21-23 (Washington, D.C.: U.S. Dept. of Health, Education, and Welfare, Vocational Rehabilitation Administration, 1967).
[21] "Eight Prisoners," *Silver City Enterprise* (July 15, 1887), reprinted in *This Is Silver City*, vol. II, 1887, p. 19.