PUBLIC

No. 20170436-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

DAVID BRUCE BUTTARS,
Defendant/Appellant.

BRIEF OF APPELLANT

An appeal from a judgment of conviction for four counts of securities fraud, second and third degree felonies; and one count of pattern of unlawful activity, a second degree felony, in the Third District Court, Salt Lake County, Utah, the Honorable Vernice Trease presiding.

Appellant is not incarcerated

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INTRODUCTION

A jury found Buttars guilty of four counts of securities fraud and one count of pattern of unlawful activity. The State secured these convictions through a combination of inadmissible bank record evidence, erroneous instructions, and improper expert testimony and prosecutorial argument. Individually and cumulatively, these errors undermine confidence in the fairness of Buttars's trial.

ISSUES, STANDARDS, PRESERVATION

Issue I: Whether the court erred in admitting the bank record evidence. Specifically:

A. Whether the court erred in denying Buttars's motion to suppress unconstitutionally seized bank records.

Standard/Preservation: This Court applies a clearly-erroneous standard to factual findings and reviews the trial court's legal conclusions for correctness. *State v. Yount*, 2008 UT App 102,¶10. This issue is preserved. R.766-48, 886-907, 962-1055 (briefing); R.3061-96 (argument); R.1085-90, 3098-3104 (rulings).

B. Whether the court erred in admitting the bank records under the residual exception to the hearsay rule.

Standard/Preservation: "Whether evidence is admissible is a question of law, which [this Court] review[s] for correctness, incorporating a 'clearly erroneous' standard… for []factual determinations.'" *Radman v. Flanders*, 2007 UT App 351,¶4. This issue is preserved. R.734-36, 862-85, 910-61,1058-1063 (briefing); R.3104-39 (argument); R.1148-1155, 3180-3212 (ruling).

C. Whether counsel was ineffective for failing to object to the bank record summaries (Exhibits 26-32) as inadmissible under rule 1006 where they did not prove the content of the underlying bank records.

Standard/Preservation: This issue is unpreserved. But it can be reached under the doctrine of ineffective assistance, which is an exception to the preservation rule and is reviewed as a matter of law. *State v. Kozlov*, 2012 UT App 114,¶28.

Issue II: Whether counsel rendered ineffective assistance by allowing incorrect instructions on the definition of "willfulness."

Standard/Preservation: This Court will review jury instructions for correctness. *State v. Bryant*, 965 P.2d 539, 544 (Utah Ct. App. 1998). This issue is unpreserved and may be reviewed for ineffective assistance or exceptional circumstances. *Kozlov*, 2012 UT App 114,¶28.

Issue III: Whether this Court should reverse where expert testimony, prosecutorial argument, and a jury instruction misstated the law surrounding a defendant's disclosure obligations under the securities fraud statute.

Standard/Preservation: "'Questions of law are reviewed for correctness.'" *State v. Goodrich*, 2016 UT App 72,¶6. This issue is partially preserved. R.4124-26. To the extent the issue is unpreserved, it may be reviewed for ineffective assistance. *Kozlov*, 2012 UT App 114,¶28; *supra* §III.B.

Issue IV: Whether this Court should grant Buttars a new trial on all counts where the State's experts gave testimony that violated rules 702, 704, and 403.

Standard/Preservation: The Court reviews the admission of expert testimony for an abuse of discretion. *State v. Stringham*, 957 P.2d 602, 607 (Utah Ct. App. 1998). This issue is preserved. R.5210-29 (Curtis's testimony); R.4827-38, 5225-26 (Lloyd's testimony).

Issue V: Whether cumulative error requires reversal.

Standard/Preservation: A claim of cumulative error "requires [this Court] to apply the standard of review applicable to each underlying claim." *Radman,* 2007 UT App 351,¶4. Preservation is inapplicable.

STATEMENT OF THE CASE/FACTS

The charges stemmed from Buttars's involvement in the startup companies, Ellipse Technology and MOVIEblitz North America. R.1-58, 534-39. Buttars became a suspect after the State's investigator, Agent Nesbit, spent several years pursuing Buttars's ex-girlfriend's allegation that Buttars stalked her. R.650, 685-87, 689-90; *see* 570-711. Buttars successfully defended those allegations both civilly and criminally, obtaining an acquittal in the criminal case and prevailing and obtaining attorney fees in the civil matter. R.679, 614-41. But the ex-girlfriend, an investor in Ellipse, further complained

that Ellipse was a "lousy company." R.631. Nesbit investigated Ellipse and MOVIEblitz and subpoenaed Buttars's bank records.

As a result of Nesbit's investigation, Buttars was charged with four counts of securities fraud, second/third degree felonies; four counts of theft, second/third degree felonies; and one count of pattern of unlawful activity, a second degree felony. R.1-58, 394-98, 534-39. Specifically, the State alleged that in 2009-2010, Buttars—with his co-defendant Mark LaCount—misused investor funds and omitted and misrepresented material facts to investors, in violation of Utah Code §§61-1-1(2)-(3), 61-1-21. *Id.* The magistrate expressed "misgivings" about the State's case, but bound it over. R.2794-95. After extensive litigation regarding the admissibility of Buttars's bank records, the court ruled the records admissible. *Infra* pp.13-16.

The case proceeded to a jury trial held on September 26-28, 2016. R.1363-75. The court gave two instructions, discussed in detail below (*infra* pp.51-52, 62), that Buttars now challenges on appeal. Addendum B (instructions). The jury acquitted on all four counts of theft, but found Buttars guilty on the pattern count and on all four counts of securities fraud. R.1432-33. The court sentenced Buttars to three 0-5 year prison terms (securities fraud counts) and two 1-15 year prison terms (securities fraud and pattern counts), running them all concurrently. R.1491-93; Addendum A (Sentence, Judgment, Commitment). Buttars appealed. R.2587-88.

Trial Evidence

Background.

Ellipse Technology was a startup company incorporated in 2005. R.4856; St.Ex.36. Ellipse sought to create movie kiosks where customers could load movies onto personalized flash drives. R.4856; St.Ex.1. Then, customers could take the flash drives home and watch the movies on their home devices. *Id.* Buttars, a trained engineer, was the "brains" behind the project. R.4856, 4886, 4944, 4972, 5032.

Buttars ultimately became the CEO of Ellipse and another man, Vince Romney, became the president. R.4895, 4910, 4954, 5028-29. The two owned the company "50/50," R.4940, though several others also became involved, including Steven Gerritsen. R.4907-10, 4953-54, 5025, 5030. For some time, Romney and Buttars worked for the company full time and drew a salary. R.4863, 4889-91, 4947.

Ellipse was headquartered at Buttars's Park City home—which was equipped with a basement conference room, servers, and a phone system. R.4891-93, 4958. Weekly meetings were held there, R.4891, 4911-12, 4944, 4958, 5028, and it was common for Ellipse-related travelers to stay at Buttars's home when visiting on business. R.4892. Ellipse also obtained investors, went on business trips, and sought the advice of attorneys. R.4888, 4960, 5027-28, 5065-66; St.Ex.32. By 2009, Ellipse was about 75-85 percent on the way toward having a working prototype. R.4930-31.

At some point, Ellipse's attorneys advised Buttars and the company to stop raising money from friends and family and to target institutional investors. R.4864-65, 4912-13, 5039-40. The State presented evidence that Ellipse received several offers from

institutional investors in 2007-2008, but Buttars rejected them. R.4865-66, 4919-22, 5034-36. This upset some of those involved in the company. R.4919-21.

In the latter part of 2008, Buttars involved LaCount in Ellipse. R.4940, 5030, 5040-41. LaCount traveled to Europe to promote the company in Switzerland, R.4922-30, 4868-69, 4890, but when he returned, the company was in need of money. R.4869-70. And at a certain point, Romney allegedly "found out… that there had been fundraising [through friends and family] at a micro level again." *Id.* One witness testified that during this timeframe Buttars fired him for failing to secure fundraising and stated "how do you expect me to support two families on what you've brought in?" R.4965-68. The State also presented testimony that Ellipse money went toward paying LaCount's mortgage, R.4924-30, 4937-41, and another witness testified that he suspected Buttars was misusing funds. R.5047-49.

Romney testified that in early 2009, in response to allegations of Buttars's misuse of funds and improper fundraising, he and several others retained independent counsel. R.4870-71, 4874-4877, 4881-82, 5047-49. After some correspondence, Buttars allegedly resigned as CEO but would not relinquish his shares. R.5069-70. Moreover, Romney testified that both he and Buttars's names were on the pending patents needed to advance the technology. R.4901-02, 5484-87. According to the State's witnesses, these were "road blocks" that impeded Ellipse from proceeding without Buttars. R.5069-70.

Buttars and LaCount went forward with the technology under the company name, MOVIEblitz. St.Ex.37. The existence of a licensing agreement between Ellipse and MOVIEblitz sounded "vaguely familiar" to the State's investigator. R.5534-35.

Moreover, the State did not pull the applicable patents or introduce the patents into evidence. R.5537, 5486.

The Investors.

Of 50-70 investors, only 4 investors—Mother, Neighbor, Neighbor's boyfriend, and Neighbor's ex-husband—testified. R.5073-5167, 5504-06, 5520-21, 5557-58.

Mother's investment. Mother heard about Ellipse and MOVIEblitz from her son, Gerritsen, R.5025. Mother testified that she spoke with Buttars on "a couple occasions is all" (R.5074); she thought Gerritsen provided most of the information about the investment. R.5081. On one occasion, Mother "th[ought] [she] might've had a phone call" with Buttars in which Buttars said that her investment would be "used for the technology and to bring it to market… more quickly." R.5078-79; *see also* R.5041-42, 5067 (Gerritsen testifying to a phone call in which Buttars communicated to Mother that the company was "close to getting a product developed" and was raising money to develop prototypes). Mother had previously indicated that she spoke with Buttars only once at a concert. R.5532-33.

On March 10-11, 2009, Mother invested $5000. R.5028; St.Exs.3, 26.[1] She signed a subscription agreement for stock in Ellipse, acknowledging, among other things, that "acquisition of the [s]ubscribed [s]hares represent[s] a speculative investment involving a

[1] Mother previously invested $10,000 in 2007. R.5028; St.Exs.3, 26.

high degree of risk." R.5077-78, 5081-82; St.Ex.4.[2] Mother said she never received anything evidencing stock ownership. R.5078-79.

The investments of LaCount's neighbors/friends. Neighbor learned about MOVIEblitz after she was approached by LaCount—a friend who lived in her neighborhood. R.5089, 5105, 5123. Neighbor hosted approximately three meetings at her home to discuss MOVIEblitz and invited her boyfriend and ex-husband to attend. R.5105, 5112-13, 5118-27, 514.

The first two meetings took place around May 2009 with LaCount, Neighbor, and Neighbor's boyfriend present. R.5090-91, 5118-19, 5136, 5141-42. Neighbor and her boyfriend testified inconsistently as to whether Buttars was present at this first meeting, *id.*, but agreed that at one of the meetings, Buttars gave a "presentation about what MOVIEblitz was." R.5090-96, 5106,5112, 5118-20, 5130-31, 5136, 5145; St.Exs.8,13. According to Neighbor, Buttars explained the "technical aspects," including showing them the "patents he had gotten" and describing the technology. R.5090-91, 5102,5106, 5112, 5136. They were also presented with the MOVIEblitz business plan. R.5095-96; St.Ex.8. This plan included a sample subscription agreement that discussed the risks of investing as well as pro forma financials that contemplated the payment of salaries. St.Ex.8.

[2] "Subscription agreements… contain the obligations of the parties with respect to the [securities] transaction and define what's being sold, and what's being paid, in exchange for that particular security." R.5467-68, 5490.

At one of the meetings, "it was stated" that investment money would be used to incorporate in Nevada and develop a media key and a kiosk. R.5098-99, 5112,5133.[3] Moreover, Neighbor's boyfriend previously indicated in a State-provided questionnaire that it was "LaCount [who] told us how great the company was, and our money... was going to be used to register the company in Nevada." R.5139. Neighbor's boyfriend mentioned Buttars little in the questionnaire "because [LaCount] was initially the one that did all this stuff." R.5141-42.

Neighbor hosted a third meeting in late 2009-early 2010 at which Buttars allegedly gave a similar presentation. R.5113, 5124-25, 5148. Neighbor, Neighbor's boyfriend, Neighbor's ex-husband, LaCount, and Buttars were present. *Id.* Neighbor's ex-husband recalled Buttars saying that the technology was "unique," but did not "recall a whole lot about the conversation." R.5148-49.

In late May 2009, Neighbor and her boyfriend each invested $2000 in exchange for stock in MOVIEblitz. R.5092-94, 5107, 5120-21. St.Ex.5-6, 9-10. They testified that upon Buttars'sand LaCount's request, they wrote their checks out to Buttars. R.5091-93, 5120-21; *see also* R5139. Portions of their investments were ultimately deposited in Buttars's personal account. St.Ex.26. After investing, both Neighbor and her boyfriend signed subscription agreements similar to the one signed by Mother. R.5995, 5099-5102, 5107, 5112,5129-30; St.Ex.7,14; Def.Ex.28.

[3] The State stipulated that MOVIEblitz was indeed registered in Nevada. R.5522.

On January 11, 2010, Neighbor's boyfriend invested another $7000 in MOVIEblitz in exchange for 70,000 shares. R.5126-27; St.Exs.11-12, 15. Neighbor's ex-husband also invested, writing checks for $10,000 on February 1-2, 2010, in exchange for a stock. R.5149-51; St.Exs.16-19. After investing, Neighbor's ex-husband signed a subscription agreement. R.5153; St.Ex.20. Neighbor's ex-husband understood it as an "investment opportunity to get[] Movie Blitz off the ground" and understood that his investment would be used to develop a media key and kiosks. R.5148-49, 5154-55.

According to the investors, Buttars did not mention: that there were risks involved in the business; that MOVIEblitz was undercapitalized and had outstanding debt; that a failed company called Ellipse predated MOVIEblitz and was dedicated to developing a similar product; that other individuals had a claim to the intellectual property; and that their investments would be for another purpose, like paying Buttars's personal expenses. R.5080, 5096-99, 5111-13, 5119-20, 5133-34, 5148-49, 5154-56, 5162.

The investors described the communications surrounding Ellipse and MOVIEblitz using descriptors such as "positive," "no risks involved," and painting a "pretty picture" about a product that "nothing… [could] compete with." R.5067, 5080, 5090-91, 5096-97, 5112, 5118-20, 5124-25, 5130-31, 5145, 5156, 5161. Moreover, the investors testified that they never received returns on their investments. R.5078-79, 5101-03, 5110, 5133, 5152, 5155. The summaries reveal a payment to Neighbor's ex-husband for $6,500. St.Ex.26 at 12.

Bank record summaries and Curtis's expert testimony

To try to demonstrate that Buttars misused investor money for personal expenses, the State admitted "summaries" of Buttars personal and business bank records through its forensic accounting expert, John Curtis. R.5168-69, 5175-5209; St.Exs.26-32. The summaries, marked as Exhibits 26-32, are attached at Addendum C. Moreover, the record suggests that all exhibits, including Exhibits 26-32, were available to jurors during deliberations. R.5668. The underlying bank records themselves were not admitted.

Exhibits 26-32 purport to document the flow of incoming and outgoing funds relating to the accounts of Ellipse, MOVIEblitz, and Buttars's personal account. St.Exs.26-32. The summaries do not account for nearly $80,000 worth of checks that Buttars gave to Ellipse from his personal account from September, 2007-January, 2009. Def.Exs.11-22.

The summaries also label certain transactions as "investor money" and opine that funds were "comingled." *Id.* In addition, Exhibits 26-31 categorize certain payments as "questionable," and "potentially legitimate." St.Exs.26-31. Among the "questionable" payments were payments to Buttars, LaCount, "Steve Groves (private investigator)," "Reynalda Juarez (Housekeeping)," "Kay Burmingham (Lawyer and [Buttars's] Ex-wife)," and "BAC Home Loans," as well as payments to restaurants, utility companies, grocery stores, and a talent management group. *Id.* The State attempted to support its conclusion that these payments were questionable by eliciting testimony that Ellipse had no need to pay for a talent agency, a private investigator, or the housekeeper (who

testified that she cleaned Buttars's whole home). R.4867-88, 4917-18, 4961-62, 5042-46, 5456-57.

On direct, Curtis went through payments and observations that raised "red flags" and "st[oo]d out." *E.g.*, R.5199, 5204, 5207, 5180-82,5185, 5195, 5199-5200. Moreover, over Buttars's objections, Curtis identified various characteristics of "fraud, deceit, or theft," and opined that these characteristics were present in Buttars's case. R.5210-29.[4] According to Curtis, documents relating to the foreclosure of Buttars's home and his missed credit card payments further supported Curtis's opinions; the documents demonstrated that Buttars's was in "financial distress"—which, Curtis said, "would be a significant disclosure to investors." R.5423-39; St.Exs.39-40

On cross-examination, defense counsel went through the various transactions and payments in detail, eliciting evidence that many of the payments could be proper business expenses associated with bringing the product to market. R.5248-5268, 5295-5307,5313-18; *see, e.g.*, R.5521, 5295-96, Def.Exs.1,24. Curtis also acknowledged that a person can account for any misplaced payments in their end-of-the-year taxes. R.5233, 5306-07, 5233, 5317-18. Even though the State procured Buttars's tax documents, it did not present them at trial, and it did not provide them to Curtis. R.5307-08, 5521.

Moreover, Curtis acknowledged that if Buttars paid himself a salary, payments from the business accounts to Buttars's personal account would not be "questionable," provided the salary "was disclosed and authorized." R.5258-59, 5315-18. The State tried

[4] Curtis's testimony is set forth in detail at pp.69-70 and Addendum D.

to rebut the defense's suggestion that Buttars was paying himself a salary by introducing a document in which Buttars stated that he was unemployed during the relevant time frame. *See* St.Ex.40—attachment B. Curtis never spoke with LaCount and thus, could not testify to the purpose behind the payments to him. R.5315-16.

Lloyd's expert testimony

Brian Lloyd, the State's securities expert, made various statements about the disclosure obligations of securities salespeople, R.4826-38, 4843-44, 5468-69; and—over Buttars's objections—the meaning of material. R.4827-39; Addendum E (Lloyd's testimony). In closing, the prosecutor also made statements about the legal obligations of disclosure. Addendum F (prosecutor's argument). The statements of Lloyd and the prosecutor are discussed in detail below. *Infra* p.61.

Moreover, Lloyd testified that "[b]ased on [his] experience in the securities industry" it would be "important" to disclose whether patents are encumbered and whether a predecessor company existed. R.5471-5475.

Bank Records

The State applied to obtain Buttars's bank records through the Subpoena Powers Act ("SPA"). R.785-801, 805-42, 859, 1085-86; Def.Ex. A-L (9/14/2015 Hr'g); St.Ex.8 (9/14/2015 Hr'g).

Prior to issuing the subpoenas, the State filed a statement of good cause, R.786-92, 806-12, 825-33; Def.Ex.A-B, G-H, and a magistrate "[a]pprov[ed]… an [i]nvestigation" based on "good cause appearing." R.793-95, 814-16, 822-24. Def.Ex.C, I, K. The

magistrate then reviewed each subpoena to "determin[e] whether the subpoenas were reasonably related to the [court-authorized] criminal investigation." R.1087.

The State then served the subpoenas on Buttars's banks, JP Morgan Chase and Frontier Bank.[5] R.797-99, 818-20, 834-36, 839-42, 1086-87; Def.Ex.D, J. The subpoenas contained references to an irrelevant provision of the Utah Code and ordered the recipients "not to disclose to any person the existence or service of the subpoena." *See id.* The State did not obtain a secrecy order, as required by Utah Code §77-22-2, to keep the investigation or the subpoenaed materials secret. R.1087. Rather, the inclusion of this language "was an error." R.1086. The State never notified Buttars that it had issued subpoenas to his banks. R.1087, 2972-73.

Producing the Frontier records took some time because Frontier had closed its Utah branch and "most everything [wa]s jumbled in storage." R.2963-64; Def.Ex O (9/14/2015 Hr'g). Frontier ultimately produced the records in 3-4 productions, but only two productions were accompanied with custodian certificates. R.1150, 3197-98. It was unclear which certificate went to which production. R.3197-98.

Curtis compiled summaries of the records, St.Exs.26-32, and the State moved for a pretrial ruling on the summaries' admissibility. R.734-36, 862-85. It argued that the underlying bank records were admissible under rules 803(6) and 703. R.734-36, 862-85.

[5] In 2012, Frontier Bank was acquired by a successor bank and moved its entire administration to California. R.844-46, 4050-51.

The State further argued that the summaries were admissible under rule 1006 because they distilled voluminous records. *See id.*

The defense objected to the admission of the bank records/summaries on two primary grounds. First, Buttars argued that the State obtained the bank records in secrecy and without notice, in violation of his rights under the Utah Constitution and Fourth Amendment. R.766-87, 962-1055, 3067-86, 3093-3096. Second, Buttars argued that the bank records/summaries were inadmissible because the missing custodian certificates precluded admissibility under rule 803(6)'s business records exception to the hearsay rule. R.910-61.

The court held an evidentiary hearing on the admissibility of the bank records/summaries. R.855-56, 2933-3048. There, the State introduced the summaries, but did not introduce the underlying bank records. Curtis and Nesbit testified that the records appeared to be complete and "were what they purported to be." R.1150, 1217-18. The State, however, did not call a records custodian.

After briefing and argument on the admissibility of the bank records/summaries, the court issued two rulings. *See* R.766-87 886-907, 962-1055 (suppression briefing); R.3061-96 (suppression argument); R.1085-90, 3098-3104 (suppression ruling); R.734-36, 862-85, 910-61, 1058-1063 (initial hearsay briefing); R.3104-39 (initial hearsay argument); R.1148-1155, 3180-3212 (initial hearsay ruling).

First, the court denied Buttars's motion to suppress the bank records. R.1085-90, 3098-3104; Addendum G (order). It determined (1) that the State is not required to notify defendants when it issues subpoenas for their bank records; (2) that the erroneous secrecy

language did not render the subpoenas unlawful; (3) and in any event, the good faith exception to the exclusionary rule applied. R.1085-90.

Second, the court denied, without prejudice, the State's motion to admit the bank records. R.1148-1155, 3180-3212; Addendum H (order). It reasoned that "while… the State met its burden of proving [] authenticity," the missing custodian certificates precluded the State from meeting its burden under rule 803(6). R.1148-1155. Thus, the records were inadmissible hearsay. *Id.* The court also determined that Curtis could rely on the bank records to form an opinion under rule 703. *Id.* But it did not rule on the admissibility of the records under rule 703 because the parties did not brief the second prong of rule 703—whether the records' "'probative value in helping the jury evaluate [Curtis's] opinion substantially outweigh[ed] their prejudicial effect.'" R.1153-54.

The State then filed a supplemental brief, arguing that the bank records were admissible under rule 703's second prong. R.1137-1145; 1177-1185. Alternatively, the State asserted that the evidence was admissible under rule 807's residual exception to the hearsay rule. *Id.*

After considering the additional briefing and argument, the court ruled that the bank records were admissible under the residual exception to the hearsay rule. R.1137-45, 1158-1174, 1177-85 (briefing); R.3216-42 (argument); R.1216-23, 3274-93 (ruling); Addendum H (applicable order). The court "d[id] not address whether the records or summaries [we]re also admissible under Rule 703" because they were "admissible for their substance under Rule 807." R.1219.

SUMMARY OF ARGUMENT

I. This Court should grant Buttars a new trial on all counts because the trial court erred in admitting prejudicial bank record evidence. The bank record evidence was inadmissible for three reasons.

First, the court should have suppressed the bank record evidence because the State unconstitutionally obtained the evidence using secret and unlawful subpoenas. Second, the summaries (Exhibits 26-32) were inadmissible under rule 1006 because the underlying bank records constituted inadmissible hearsay that did not qualify under the residual exception. And third, the summaries were inadmissible under rule 1006 because they contained State-drawn conclusions and extra-bank record information; counsel performed ineffectively by failing to object to the summaries on the grounds that they did not prove the content of the underlying bank records.

II. Counsel rendered ineffective assistance by allowing an incorrect instruction defining "willfulness." The instruction incorrectly incorporated conscious avoidance/willful blindness principles and misarticulated the conduct that must be the object of a defendant's willfulness. Allowing this instruction constituted deficient performance that prejudiced Buttars. Alternatively, this Court may reverse under the exceptional circumstances doctrine.

III. This Court should reverse because the State presented prejudicial expert testimony, argument, and jury instructions that misstated the law and expanded the conduct criminalized by the securities fraud statute. Specifically, the misstatements incorrectly suggested that the law imposed an affirmative duty to disclose material

information—a violation of which rendered a defendant's genuine beliefs in his statements "not[] a defense." To the extent counsel failed to adequately preserve the issue, that failure constituted ineffective assistance.

IV. The trial court erred by admitting expert testimony that violated rules 702, 704, and 403. The expert testimony of Curtis and/or Lloyd did not help the trier of fact, was unduly prejudicial, and improperly stated legal conclusions. This Court should reverse because the improper testimony undermines confidence in the verdict.

V. Cumulative error requires reversal.

ARGUMENT

I. The bank record evidence was inadmissible.

The bank record evidence was inadmissible because the State obtained Buttars's bank records in violation of his rights under Article I, §14 of the Utah Constitution and the Fourth Amendment. *Infra* §I.A. Even if the records were lawfully obtained, the summaries were inadmissible because the underlying bank records were hearsay. *Infra* §I.B. Alternatively, counsel was ineffective for failing to object to the summaries on the grounds that they did not accurately reflect the contents of the underlying bank records. *Infra* §I.C.

A. The court erred in failing to suppress the bank record evidence.

The State violated Buttars's rights under Article I, §14 and Fourth Amendment by using secret SPA subpoenas to obtain his protected bank records. This Court should reverse because the State unlawfully seized Buttars's bank records, *infra* §I.A.1; the good

faith exception does not apply, *infra* §I.A.2; and the bank record evidence prejudiced Buttars. *Infra* §I.A.3.

1. The State unlawfully seized Buttars' bank records.

Article I, §14 and the Fourth Amendment grant defendants the right "to be secure in their… papers... against unreasonable searches and seizures." Utah Const. art. I, §14; U.S.Const. amend. IV; Addendum I (provisions). In *State v. Thompson*, our supreme court interpreted Article I, §14 to grant defendants a privacy interest in their bank records and a right to be free from seizures of those records by way of unlawful subpoenas. 810 P.2d 415, 416-18 (Utah 1991).

In *Thompson*, the State began an investigation of the defendants' financial activities and issued subpoenas duces tecum to banks for the defendants' financial records. *Id*. at 415-16. The defendants argued that the subpoenas were illegal. *Id.* at 416. They also sought suppression of the records because attaining the evidence through invalid subpoenas constituted an unreasonable search and seizure. *See id.*

The Utah Supreme Court held "that under [A]rticle I, [§]14 of the Utah Constitution, [the] defendants... had a right to be secure against unreasonable searches and seizures of their bank [records] 'and all papers which they supplied to the bank... upon the reasonable assumption that the information would remain confidential.'" *Id.* at 418. The court determined that the defendants had a "right to privacy" in the content of their bank records. *Id.* It then acknowledged that the subpoenas were unlawful/invalid. *Id.* at 420. The supreme court determined that the search and seizure of the bank records by

way of unlawful subpoenas was therefore unreasonable under Article I, §14. *Id.* at 418-19.

The question in this case, then, is what makes a subpoena lawful? *Id.* And relatedly, were the SPA subpoenas lawful here? *Id.*

***

The SPA gives the State broad powers to subpoena information and seemingly applies to privileged and constitutionally-protected information—including bank records. Utah Code §77-22-2; Addendum I. When the act faces constitutional problems, our supreme court has been willing read in procedural protections so as to save it from unconstitutionality. *See In re Criminal Investigation*, 754 P.2d 633 (Utah 1988) (superseded by statute).

The SPA provides that "upon application and approval of the district court and for good cause shown, [the prosecutor may] conduct a criminal investigation." Utah Code §77-22-2(2)(a). Upon such a showing, the prosecutor may then "subpoena witnesses" and "require the production of… documents." *Id.* §77-22-2(3)(a). The prosecutor, however, "shall… apply to the district court for each subpoena[]" and "show that the requested information is reasonably related to the criminal investigation authorized by the court." *Id.* §77-22-2(3)(b).

Moreover, "[u]pon an additional showing by a prosecutor that publicly releasing information… may 'pose a threat of harm to a person or otherwise impede the investigation,' a court may order, among other things, that the 'occurrence of... the subpoenaing of evidence... be kept secret.'" *Yount*, 2008 UT App 102,¶19.

The SPA—and of course the state and federal constitutions—dictate the lawfulness of subpoenas issued under the act. *See Criminal Investigation*, 754 P.2d 633. Moreover, the *Thompson* court looked to *Criminal Investigation* for the "the test of whether a subpoena issued under the [SPA] is lawful." *Thompson*, 810 P.2d at 418.

Buttars recognizes, as the trial court did, that *Criminal Investigation* and *Thompson* concerned subpoenas that were issued under a previous version of the SPA—a version of the act that did not require the prosecution to apply to a court for individual subpoenas. R.1088-89. The *Criminal Investigation* court, however, did not find the SPA's lack of judicial oversight to be fatal. Instead, the court was concerned with, among other things, the subpoenaed party's ability to mount a meaningful pre-compliance challenge to the subpoena. 754 P.2d at 656, 658-59.

The *Criminal Investigation* court stated, that "a subpoenaed person must have a meaningful opportunity to challenge the lawfulness of a subpoena." *Id.* at 656. Moreover, while our supreme court determined that the SPA was facially constitutional, it held that the SPA was unconstitutionally applied where the "secrecy provisions… were applied too broadly." *Id.* at 659. And to the extent that the broadly-applied secrecy provisions "impeded the challenge of subpoenas…, it operated to deny rights against unreasonable search and seizure." *Id.* More recently, our supreme court relied on *Criminal Investigation* to similarly hold that "[t]he Fourth Amendment is satisfied if the subpoenaed party is allowed 'to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections… in [the] district court.'" *Burns v. Boyden*, 2006 UT 14,¶31.

The pre-compliance opportunity to challenge the subpoena would be of little value without notice. *State v. Gonzales*, 2005 UT 72,¶32. Indeed, "'[t]he fundamental requisite of due process… is the opportunity to be heard, a right which has little reality or worth unless one is informed that the matter is pending and one can choose for himself whether to contest.'" *Id.*

Due process and other constitutional concerns dictate that in certain situations, a defendant is entitled to notice of the issuance of a subpoena. *Yount*, 2008 UT App 102. This Court recognized these principles in *Yount*, which held that the "the State's failure to notify Defendant of the subpoenas for his medical records was a violation of his rights and rendered the subpoenas invalid." *Id.*¶16.

In *Yount*, this Court explained "that due process concerns arise where no notice is given to the party whose confidential or privileged records are subpoenaed." *Id.*¶13. "When a party's confidential records are reviewed before he even knows they are subpoenaed, he cannot choose to protect them." *Id.* (cleaned up). Thus, "'[t]he only way to prevent this is to ensure that the party receives notification that a subpoena has been issued.'" *Id.* And where the *Yount* defendant did not receive notice, he "was denied an opportunity to assert his potential privilege or to otherwise pursue procedural safeguards in court to avoid unnecessary disclosure." *Id.*¶16.

Here, the trial court was wrong to conclude that "[t]he State is [n]ot [r]equired to [g]ive [n]otice to a [s]uspect in a [c]riminal [i]nvestigation [w]hen the State [i]ssues [s]ubpoenas to [b]anks for a [s]uspect's [b]ank [r]ecords." R.1088. While the SPA contains no express notice requirement, the act does not override basic constitutional

requirements. Case law suggests that to be lawful and constitutional, interested parties must be afforded a meaningful opportunity to object to subpoenas. *Criminal Investigation*, 754 P.2d at 656, 658-59; *Burns*, 2006 UT 14,¶31; *Yount*, 2008 UT App 102,¶¶13-16. Moreover, notice is critical in providing a defendant a pre-compliance opportunity to object. *Gonzales*, 2005 UT 72,¶32; *Yount*, 2008 UT App 102,¶¶13-16. And where protected/privileged documents are the subject of the subpoena, notice is necessary to avoid due process and other constitutional problems. *Yount*, 2008 UT App 102,¶¶13-16.

The State in this case used a subpoena to obtain Buttars's protected bank records. Like the privileged medical records in *Yount*, 2008 UT App 102,¶¶13-16, Buttars's bank records were constitutionally protected under Article I, §14. *Thompson*, 810 P.2d at 416-18. Thus, as in *Yount,* Buttars was entitled to notice to allow him to object to the subpoena and "pursue procedural safeguards in court to avoid unnecessary disclosure." *Id.*¶16. Without notice, the subpoenas were unlawful. *Id.*

The erroneously included secrecy provision further worked to deprive Buttars of notice and the opportunity to object. R.797-99, 818-20, 834-36, 839-42, 1086-87; Def.Ex.D, J. The secrecy provisions directed the banks "not to disclose to any person the existence or service of the subpoena." *Id.* These secrecy provisions were indisputably included in "error." R.1086.

In rejecting the import of the secrecy provision, the trial court reasoned that the State had otherwise "met all the requirements of obtaining a lawful subpoena" and that the erroneous grant of a secrecy order "is not a basis for attacking" the subpoena's

validity. R.1088-89. But when the erroneous inclusion of a secrecy order serves to preclude a defendant from challenging a subpoena for constitutionally-protected documents, the subpoena is invalid. *Criminal Investigation*, 754 P.2d at 656, 658-59; *Burns*, 2006 UT 14,¶31; *Yount*, 2008 UT App 102,¶¶13-16. Indeed, as discussed, case law shows that interested parties must be afforded a pre-compliance opportunity to challenge subpoenas for protected documents. *Id.*

Here, the erroneous secrecy provision further deprived Buttars of notice and a pre-compliance opportunity to object. For instance, California law, which governed the conduct of the Frontier Bank records custodian, prohibits disclosure of bank records absent "serv[ice of] a copy of the subpoena… on the customer" and the allowance of 10 days for the customer to seek quashal of the subpoena. Cal. Gov't Code §§7470(a) & (a)(2); 7474(a) & (a)(1)-(3). Any notice that Buttars might have received from his bank was further precluded by the secrecy provision.

The court was also wrong to focus on whether Buttars "would have successfully moved to quash" the subpoenas. R.1088-90. Buttars was entitled to a pre-compliance opportunity to object regardless of whether he would ultimately succeed in quashing them. To draw a comparison, Utah courts have determined that even if communications may fall under a privilege exception, "'the patient has the right to be notified of the potential disclosure of confidential [medical] records.'" *Yount*, 2008 UT App 102,¶15. "This notification is required to provide the patient with an 'opportunity to assert [the] privilege' and to… 'pursue the appropriate procedural safeguards in court to avoid unnecessary disclosure.'" *Id*.

Just as a defendant need not show that privilege will bar the release of medical records, Buttars did not need to prove that the release of his bank records would be barred and the State's subpoena would be quashed. What is important is that Buttars be given an opportunity to "'pursue procedural safeguards in court to avoid unnecessary disclosure.'" *Id*.[6]

In short, to be lawful, Buttars needed notice and a meaningful pre-compliance opportunity to challenge the subpoenas. The subpoenas issued to Buttars's banks lacked these necessary procedural protections and were therefore unlawful. The seizure of Buttars's bank records pursuant to unlawful subpoenas constituted an unreasonable search that violated Buttars's State and federal constitutional rights. *Thompson*, 810 P.2d at 418.

2. The violation requires suppression.

The bank record evidence must be excluded pursuant to the Fourth Amendment, Article I, §14, *Thompson*, and *Yount*. In *Thompson*, our supreme court considered whether the unlawfully seized bank records should be suppressed. 810 P.2d at 419. At the outset, the court noted that "'[e]xclusion of illegally obtained evidence is a necessary consequence of police violations of [A]rticle I, [§]14.'" *Id.* "The supreme court accepted the defendants' analogy between a[n] officer's erroneous action in a warrantless search and an attorney's 'unconstitutional application of the [SPA].'" *Yount*, 2008 UT App

[6] For instance, Buttars could have contended that due to the protected status of the records, the State needed to make a higher showing than that required by the SPA, which only required that the bank records be "reasonably related to the criminal investigation" for which there was "good cause." Utah Code §77-22-2(3)(b).

102,¶15. "Based on the general rule and this analogy, the supreme court concluded that '[a]ll bank records obtained as a result of illegal subpoenas must... be suppressed unless [the] good faith exception'" applied. *Id.* The good faith exception did not apply, however, because the "illegal subpoenas [were] issued… by the attorney general, who [wa]s chargeable for the illegality." *Thompson*, 810 P.2d at 419-20.

Relying on *Thompson*, this Court in *Yount* likewise suppressed "medical records[] obtained through subpoenas that were illegal due to the State's failure to notify Defendant of their issuance." *Yount*, 2008 UT App 102,¶24. Moreover, the *Yount* court determined that the good faith exception did not apply "because the trial court merely authorized the prosecutor to prepare" the subpoenas. *Id.*¶26 n.3. The court, however, "did not authorize the prosecutor to issue the subpoenas in secret or to otherwise issue them without notice to Defendant." *Id.*

Here, the trial court erred in declining to suppress the bank record evidence. As in *Thompson* and *Yount*, Buttars had a privacy interest in the bank records. *Thompson*, 810 P.2d 415 at 418-20; *Yount*, 2008 UT App 102,¶24. Moreover, as explained above, the State obtained Buttars's bank records through subpoenas that were illegal. *Supra* §I.A. "Thus, under Article I, [§]14…, the evidence obtained through the State's illegal subpoenas… must be suppressed unless an exception to the exclusionary rule applies." *Yount*, 2008 UT App 102,¶24.

The trial court determined that the good faith exception applied because the State obtained judicial review and "reasonably relied on the Court's approval of the

subpoenas." R.1089-90. But the circumstances did not warrant the application of the good faith exception.

Similar to *Yount*, a court in this case initially approved the issuance of subpoenas to Buttars's banks. R.797-99, 818-20, 834-36, 839-42, 1086-87; Def.Ex.D, J; *Yount*, 2008 UT App 102, *Id.*¶¶5, 26 n.3. The subpoenas then directed *the banks* to keep the subpoenas secret. *Id.* But the subpoenas did not spell out the procedure by which *the prosecutor* should issue the subpoenas. *Id.* Nor did the court "authorize the prosecutor to issue the subpoenas… without notice to [the] Defendant." *Id.* In other words, the court-approved secrecy provision authorized secrecy on the part of the banks—not the State. Moreover, the State's failure to provide notice was chargeable solely to the State and its attorneys. Thus, the trial court erred in applying the good faith exception "because the error that rendered the subpoenas illegal was due to the attorney's conduct and the attorney's errors were not excused by any sort of reasonable reliance on the court's authorization." *Yount*, 2008 UT App 102,¶23.

In short, the Fourth Amendment, Article I, §14, *Thompson*, and *Yount* required suppression of the bank records and all derivative testimony. *Murray v. U.S.*, 487 U.S. 533, 536-37 (1988) (the exclusionary rule "prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence").

3. Prejudice.

When an error is constitutional in nature, the State bears the burden of demonstrating that the error was harmless beyond a reasonable doubt. *Chapman v.*

California, 386 U.S. 18, 24 (1967)); *State v. Lujan*, 2015 UT App 199,¶16 n.2, *cert. granted*, (applying the *Chapman* standard to state constitutional error).

Here, admission of the bank record evidence violated Buttars's state and federal constitutional rights. Accordingly, the State must prove that admission of the bank record evidence was harmless beyond a reasonable doubt. The State cannot meet this burden.

The bank record evidence was "crucial" evidence that went to all counts. R.1222. To convict Buttars of securities fraud, the jury had to find that Buttars (1) misstated a material fact, omitted a material fact necessary to complete a misleading predicate statement, or engaged in an act that operated as a fraud/deceit, and (2) acted willfully. *See* Utah Code §§61-1-1(2)-(3), 61-1-21. The State relied on the bank records to prove securities fraud, using them to try to demonstrate that Buttars: misstated facts by knowingly using investment money differently than what he represented to investors, R.5610, 5656-67, 5659-60; omitted to tell investors how he used the investments of previous investors, R.5654; and engaged in an act that operated as a fraud/deceit. R.5227-28. Moreover, the instructions told jurors that securities fraud constituted "unlawful activity" upon which the pattern count could rest. R.1411, 1425-26. Thus, the bank records impacted the pattern count too.

Additionally, much of the State's evidence centered on the bank records. The summaries depended on the bank records. *See* R.5175; St.Exs.26-32. Likewise, Curtis's testimony derived almost exclusively from his analysis of the bank records. R.5168-5334, 5442-5455.

Without the bank record evidence, the State's case rested predominantly on the testimony of the investors, to whom—the State argued—Buttars failed to disclose certain information. For instance, the State argued that Buttars was guilty of securities fraud because he omitted to tell investors about Ellipse, R.5614, 5617; the existence of prior allegations that Buttars misused Ellipse funds, R.5614-17, 5653; the potentially encumbered patents, R.5616, 5653; and the payment of salaries. R.5613. But this evidence was not overwhelming, and there was evidence upon which the jury could doubt these claims.

Buttars had no "'affirmative duty to disclose in the absence of a prior [, misleading] statement.'" *State v. Moore*, 2015 UT App 112,¶10. And the evidence was vague and inconsistent as to what, if anything, Buttars said to the investors. R.5081 (Mother testifying that Gerritsen provided most of the information about the investment); R.5078-79 (Mother testifying that she "th[ought] [she] might've had a phone call" with Buttars in which Buttars told her how her investment would be used); R.5532-33 (evidence that Mother spoke with Buttars only once at a concert); R.5119 (Neighbor's boyfriend testifying that Buttars gave a "presentation about what MovieBlitz was."); R.5090-91, 5102, 5106, 5112 (Neighbor testifying that Buttars explained the "technical aspects," including showing her the "patents he had gotten" and describing the technology); R.5098-99, 5133 ("it was stated" the money would be used in a particular way); R.5139 (it was "'Mark LaCount [who] told us how great the company was'" and how "'our money… was going to be used'"); R.5141-42 ("[LaCount] was initially the one that did all this stuff").

Moreover, there was evidence that Buttars did not attend all the investor meetings. R.5118-19. In fact, evidence showed that it was Gerritsen and LaCount who primarily interacted with investors —investors who were Gerritsen and LaCount's neighbors, friends, and relatives. R.5089, 5105, 5123, 5136,5139, 5141-42. By contrast, Buttars was the "brains" who lacked a personal connection with the investors. R.5106, 5136. Given the evidence, a jury could acquit upon a finding that Buttars did not utter any misleading predicate statements; he did not act willfully as he was not privy to any conversation during which the predicate statements were made; and/or he did not act willfully because he believed that LaCount and Gerritsen had already informed investors of all the necessary information.

There was also evidence upon which a jury could find that Buttars believed all that he said (assuming he said anything). Indeed, evidence showed that Buttars was pursuing a legitimate technology, he believed in the company, and he "was trying to do things right." R.4887-88, 4944-45, 4972, 5057,5232-35, 5295-96, 5632; St.Ex.26; Def.Ex.2,4,6. He believed in the technology enough to devote nearly $80,000 of his own money. Def.Ex.11-22. He had retained lawyers and applied for patents, and there was evidence of a licensing agreement between Ellipse and MovieBlitz. R.4866, 4888, 5534-35. Moreover, evidence showed that Buttars had done his research, compiling a detailed business plan with financial projections (contemplating salaries) and a sample subscription agreement that discussed the risks of investing. St.Ex.8. This was not a case involving some sham product. Buttars had a viable technology, but like many startups,

his company did not ultimately prevail. Given this evidence, a jury could find that Buttars believed everything he told investors and could acquit because he did not act willfully.

Additionally, the jury's acquittals on the theft counts indicate that jurors were conflicted about the State's evidence and its theory of the case. *State v. Richardson*, 2013 UT 50,¶44. Under these circumstances, the State cannot demonstrate that the admission of the bank record evidence was harmless beyond a reasonable doubt.

B. The court erred in admitting Exhibits 26-32 because the underlying bank records constituted inadmissible hearsay.

The Frontier bank records were inadmissible hearsay. While the State did not introduce the underlying bank records, it admitted summaries of the records (Exhibits 26-32) pursuant to rule 1006. These summaries relied either solely or mostly on the Frontier records. R.916-17; St.Exs. 26-32. Where the underlying bank records were inadmissible hearsay, rule 1006 precluded the summaries' admission.

Hearsay is a "statement that [] the declarant does not make while testifying at the current trial" and "a party offers in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c), 802; Addendum I. Hearsay is inadmissible unless it falls under an exception. *Id.* Admissible out-of-court statements may be the subject of a rule 1006 summary. *Sunridge Dev. Corp. v. RB&G Eng'g, Inc.*, 2013 UT App 146,¶¶19-20. Rule 1006 provides that a "proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Utah R. Evid.1006; Addendum I.

But Utah courts agree that rule 1006 summaries "'cannot be used as a cover for bringing [in] inadmissible hearsay.'" *Sunridge,* 2013 UT App 146,¶20. "Thus, the proponent of a summary must also show that the underlying records are admissible, which typically requires a showing that the records qualify under the business records exception to the hearsay rule." *Id*. Stated differently, rule 1006 summaries must be excluded if the underlying records do not qualify under a hearsay exception. *Id.*

Here, the underlying bank records constituted inadmissible hearsay. The court correctly determined that the records did not qualify under the business records exception. But it incorrectly determined that they were admissible under the hearsay rule's residual exception. *Infra* §I.B.1. Moreover, admission of the hearsay summaries prejudiced Buttars. *Infra* §I.B.2.

1. The residual exception did not apply; thus, the bank records constituted inadmissible hearsay.

"[T]he residual exception is a catchall provision that may be applied when a hearsay statement 'is not specifically covered by a hearsay exception in Rule 803 or 804.'" *State v. Clopten*, 2015 UT 82,¶23. The rule states:

> **(a) In General.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

> **(b) Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Utah R. Evid. 807; Addendum I.

"This exception… was intended for use in those rare cases where, although the out-of-court statement does not fit into a recognized exception, its admission is justified by the inherent reliability of the statement and the need for its admission." *State v. Nelson*, 777 P.2d 479, 482 (Utah 1989). The residual hearsay exception is to be used "rarely," "construed strictly," and employed only in "exceptional circumstances" where "the high requirements" of the rule are met. *Workman,* 2005 UT 66,¶12; *State v. Webster*, 2001 UT App 238,¶26.

This case was not one of those rare and exceptionable cases. Specifically, the State did not meet rule 807's requirements of notice, trustworthiness, reasonable efforts, or interests of justice.

Notice. "[T]he purpose of the notice provision [is]… to afford the adverse party an opportunity to attack the statement's trustworthiness." *Webster*, 2001 UT App 238,¶21. Without adequate notice of the proponent's intent to rely on the residual exception, the opposing party need "only be prepared to contest whether the statement fits under one of the other specific, narrow exceptions." *Id.* Accordingly, rule 807 requires reasonable notice not only of the proponent's intent to rely on the hearsay statement, but also "requires notice of the proponent's intent to rely on th[e] [residual] exception." *Id.*¶22.

Here, the court erred in determining that the State had provided proper notice. R.1220. The State initially proceeded on various theories for the bank records' admissibility, none of which involved the residual hearsay exception. R.734-36, 862-85, 910-61, 1058-1063. The evidentiary hearing addressing the bank records' admissibility revolved around the State's initial theories. R.855-56, 2933-3048. Only after the evidentiary hearing and several months of briefing, did the State raise the residual exception. R.1137-1145; 1177-1185.

The court determined Buttars "had a fair opportunity to respond" to the State's residual exception arguments. R.1220. But Buttars's opportunity to attack the bank records' trustworthiness was limited by the facts that came out at the evidentiary hearing—facts that were developed to challenge the admissibility of the bank records under "other specific, narrow exceptions." *Webster*, 2001 UT App 238,¶21. Had the State provided notice prior to the evidentiary hearing, Buttars could have tailored his cross-examination to address trustworthiness and introduced evidence relating to the trustworthiness issue. Absent an opportunity to develop the evidence toward this purpose, Buttars lacked a fair "opportunity to attack the statement's trustworthiness." *Id.*

Trustworthiness. The court erred in determining that the bank records had equivalent circumstantial guarantees of trustworthiness. Our supreme court's decision in *Clopten* is instructive on this point.

The *Clopten* court held that statements were inadmissible under the residual exception because they did not meet trustworthiness requirement. 2015 UT 82,¶¶24-26. There, the supreme court considered the residual exception after first deeming the

statements inadmissible under the statement-against-interest exception. *Id.* The proponent asserted that the statements satisfied the residual exception's trustworthiness requirement based on (1) "corroborat[ing] [] extrinsic evidence" and (2) their tendency to subject the declarant to potential harm. *Id.* The *Clopten* court rejected both contentions. *Id.*

On the first point, the *Clopten* court stated that the "trustworthiness requirement is not satisfied by extrinsic corroborating evidence." *Id.*¶25. "Instead, courts look to either the circumstances in which the hearsay statement was made or the content of the statement itself." *Id.* To satisfy the trustworthiness element, "'hearsay evidence... must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.'" *Id.*

The supreme court likewise rejected the proponent's contention that the statements had *inherent* circumstantial guarantees of trustworthiness. *Id.*¶26. That contention could be dismissed "for the same reasons that the statement-against-interest exception d[id] not apply." *Id*. Thus, the *Clopten* court held that the statements were inadmissible where the proponent failed to show "that the statements ha[d] 'equivalent circumstantial guarantees of trustworthiness' that [we]re *different from other recognized exceptions* to the hearsay rule." *Id.*¶24 (emphasis added).

Under *Clopten*, then, guarantees of trustworthiness must be both inherent and different from the recognized exceptions. *Id.*¶¶24-26. Indeed, the text of the rule suggests that the residual exception does not allow statements that have indicia of trustworthiness that are the same as—but fall short of—those contemplated under the recognized exceptions. Utah R. Evid.807. Rule 807 contemplates that the residual exception may be

applied when a hearsay statement "is not *specifically covered* by a hearsay exception in Rule 803 or 804." *Id.* If the statement offered under rule 807 has indicia of reliability that is the *same* as a recognized exception (for instance, the statement subjects the declarant to harm), then it is likely of a type that is "specifically covered" by a recognized exception. Admissibility is therefore governed by the recognized exception—not the residual exception. *Keller v. Martinez*, 2014 UT App 2,¶9 ("statutes that address specific circumstances 'control over more general ones'").

Moreover, if the statement does not satisfy the recognized exception, then it lacks circumstantial indicia of trustworthiness and fails under the residual exception for the "same reasons" it fails under the recognized exception. *Clopten*, 2015 UT 82,¶26. Indeed, the text of the rule requires "equivalent circumstantial guarantees of trustworthiness." Utah. R. Evid.807. A statement that does not comport with the requirements of the applicable recognized exception cannot have "equivalent" guarantees of trustworthiness. *Id.* Otherwise the recognized exception would have allowed it.

The residual exception "is not a basis to admit hearsay when the proponent of the evidence has failed to comply with the foundation requirements of other [hearsay] exceptions… under which the proffered statement might have been admitted, had the conditions precedent for their application been observed." *Clifton v. Gusto Records, Inc.*, 852 F.2d 1287 (6th Cir. 1988) (unpublished decision). Instead, the residual exception is reserved for "exceptional" cases, *Workman,* 2005 UT 66,¶12; *Webster*, 2001 UT App 238,¶26, where the recognized exceptions do not apply due to the unique character of the

evidence and the "different" indicia of trustworthiness that it brings. *Clopten*, 2015 UT 82,¶24. That was not the case here.

In this case, the court made two fundamental errors in its application of the law. First, the court expressly relied on extrinsic corroborating evidence to support the admissibility of the bank records—specifically, the testimony of Nesbit and Curtis. R.1221. But *Clopten* held that trustworthiness must be inherent; the "trustworthiness requirement is not satisfied by extrinsic corroborating evidence." *Clopten*, 2015 UT 82,¶25. Thus, the court was wrong to rely on "extrinsic evidence to support" trustworthiness. R.1221.

Second, the inherent indicators of trustworthiness the court relied upon—for instance, that the records were kept in the usual course of business—were not "different from other recognized exceptions to the hearsay rule." *Clopten*, 2015 UT 82,¶24. In other words, the court merely looked to the circumstantial guarantees of trustworthiness required by the business records exception—an exception for which the court found the proper foundation lacking. R.1153. Records that did not meet the requirements of the business records exception lacked "equivalent" guarantees of trustworthiness. If the guarantees were truly equivalent, then the business records exception would have allowed them. Utah. R. Evid. 803(6), 807; Addendum I.

Even without considering the court's misapplication of the law, the record reveals that the State (the hearsay's proponent) did not meet its burden of establishing trustworthiness. For instance, the State failed to introduce the underlying bank records themselves, producing only the summaries instead. This deprived the court of the

opportunity to properly examine the trustworthiness of the Frontier records. *U.S. v. Turner*, 718 F.3d 226, 233 (3d Cir. 2013) (the trustworthiness analysis "is a highly fact-specific inquiry"). Moreover, the hearsay's trustworthiness was belied by record evidence showing that the Frontier records had been "jumbled in storage." R.2963-64; Def.Ex O (9/14/2015 Hr'g).

In short, the State did not meet its trustworthiness burden and the court misapplied the law. Thus, the court erred in determining that the bank records satisfied rule 807's trustworthiness requirement.

Reasonable efforts to obtain more probative evidence. Although Rule 807 does not contain an explicit unavailability requirement, "it still requires the proponent… to undertake reasonable efforts to get better evidence, and Rule 807(a) only applies if another exception does not." *U.S. v. Turner*, 561 F. App'x 312, 321 (5th Cir. 2014); *accord N.D. v. A.B.*, 2003 UT App 215,¶18.

Here, the bank records/summaries—as proffered by the State—were not the most probative evidence of Buttars's expenditures. R.1222. Of greater probative value were records that a custodian showed to be accurate and trustworthy–that is, regular entries of Buttars' expenditures made near the time of the transaction and kept in the ordinary course of business. Utah R. Evid. 803(6).

Calling the custodian to testify was one way the State could have ensured that the most probative evidence of Buttars's expenditures went to the jury. But the record reveals no attempt on the part of the State to call a custodian. *See* R.2919, 3117, 3136, 3244. Nor did the court identify any reasonable efforts to do so. R.1222. On the contrary, the State

took the position that it "d[id] not have to bring in a records custodian from these banks." R.3136. This position contradicts both the letter and spirit of rule 807, which is reserved for truly exceptional circumstances involving a showing of "need." *Nelson*, 777 P.2d at 482; *Workman,* 2005 UT 66,¶12; *Webster*, 2001 UT App 238,¶26; *Turner*, 561 F. App'x at 321. Accordingly, the court erred in determining that the State satisfied this prong. *N.D.*, 2003 UT App 215,¶18.

Interests of justice. For many of the reasons already discussed, admitting the bank records under the residual exception did not serve the purposes of the rules and the interests of justice. Rule 102 states that "[t]he[] rules should be construed so as to… promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." Utah R. Evid.102. The record does not reveal how admitting the bank records through the residual exception—without the custodian certifications that would otherwise be required under the business records exception—best serves the end of ascertaining the truth. *N.D.*, 2003 UT App 215,¶20.

The firmly rooted exceptions to our hearsay rules serve the interests of justice by ensuring the trustworthiness of out-of-court statements. *State v. Cude*, 784 P.2d 1197, 1199 (Utah 1989). Where, as here, rule 807 is used to do an end-run around the established exceptions and their trustworthiness requirements, neither the purposes of the rules nor the interests of justice are served. Indeed, the business records exception would be of little use if courts could bypass it in favor of the residual exception whenever the requisite foundation was lacking. Such a prospect is even more troubling when the record reveals that the State did not even take reasonable efforts to establish the requisite

foundation. *See* R.3136; *N.D.,* 2003 UT App 215,¶20. The court did not weigh these important considerations.

In short, the court erred in determining that the Frontier records qualified under rule 807. The records were thus inadmissible hearsay. And because the underlying bank records were inadmissible, the Exhibit 26-32 summaries were inadmissible to the extent that they relied on the Frontier records.

2. Prejudice.

An error is prejudicial when "there [i]s 'a reasonable likelihood of a more favorable result for the defendant'" "without the error." *State v. Fontana*, 680 P.2d 1042, 1048 (Utah 1984).

Here, Buttars was prejudiced by the admission of Exhibits 26-32. As discussed, the bank records went to all securities fraud counts as well as the pattern count. *Supra* p.28 And the State relied upon the bank records to prove its case. *Id.* Exhibits 26-32 relied either solely or mostly on the inadmissible Frontier records. R.916-17; St.Exs.26-32. Without the Frontier records, jurors were left with a comparatively small number of transactions from a time that predated the investments of the testifying investors as well as a list of investments (mostly from 2007). *Id.* The summaries, in other words, rose and fell with the Frontier records.

The court's erroneous ruling allowed the State to use summaries as substantive evidence. R.1219.[7] The State did just that, making the summaries a "crucial" part of its

[7] As noted, the trial court declined to rule on whether the bank records/summaries were admissible under rule 703. R.1219. The court correctly noted, nevertheless, that had

case. R.1222. Not only did the State admit the summaries as exhibits, but it also elicited detailed testimony from Curtis highlighting various transactions and statements contained in the summaries. *E.g.*, R.5175-204.

Moreover, the summaries were not cumulative. This is true even assuming that Curtis could rely on the summaries to form his in-court conclusions. The summaries constituted the only evidence that purported to show the actual flow and source of funds. R.1222. Unlike the conclusion testimony of Curtis, the records were allegedly objective and unbiased. The State recognized as much, arguing that the bank records/summaries "don't have a motive. Their credibility's not at issue. [They] are cold, hard facts." R.5651. But without an opportunity to review the "hard facts" for themselves, jurors had reason to be skeptical of any bald conclusions about the bank records that Curtis might have given. Additionally, the record reveals that the summaries were available to the jurors during deliberations. R.5668. This allowed jurors to place particular emphasis on the summaries.

Meanwhile, the State's case was not otherwise overwhelming. As detailed above, the State's remaining evidence—chiefly, the investor testimony—did not provide a strong basis for the jury to convict. *Supra* pp.29-31. In fact, the jury acquitted on all theft counts, indicating that jurors were conflicted about the State's case. *Richardson*, 2013 UT 50,¶44.

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it admitted the evidence under rule 703, the evidence could "only [be used] for the purpose of assisting the jury in evaluating an expert's opinion." *Id.*

Moreover, absent the summaries, there was evidence upon which the jury could have acquitted. *Supra* pp.29-31. For instance, jurors could have doubted that Buttars acted willfully, finding that Buttars believed all that he said; was not privy to the utterance of any misleading predicate statements; and/or he believed that LaCount and Gerritsen had already informed investors of all the necessary information. *Id.* Thus, it is reasonably likely that but for the summaries' admission, Buttars would have enjoyed a more favorable result.

C. Exhibits 26-32 were inadmissible under rule 1006 because they did not prove the content of the underlying bank records.

The summaries did not prove the content of the underlying bank records; instead, they contained information outside of the bank records and were augmented with State-drawn conclusions. Moreover, counsel was ineffective for failing to object to the bank records on these grounds.

1. The summaries did not accurately prove the content of the underlying bank records.

Rule 1006 permits summaries that "*prove the content* of voluminous writings, recordings, or photographs." Utah R. Evid.1006 (emphasis added). If the summary does not accurately summarize the source materials, it does not "prove the content" of the underlying evidence. *Id.* Moreover, only "writings, recordings, or photographs" may be summarized; this means that a person's personal knowledge, opinions, or theories cannot be the subject of a rule 1006 summary. *Id.*; *see U.S. Bank Nat. Ass'n v. Scott*, 673 N.W.2d 646, 655 (S.D. 2003).

Rule 1006's plain language, then, places several limitations on the admissibility of summaries. To be admissible, a summary must "summarize[] the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner." *U.S. v. Bray*, 139 F.3d 1104, 1110 (6th Cir.1998). "Charts and summaries are… inadmissible if they contain information not present in the… material on which they are based." *U.S. v. Drougas*, 748 F.2d 8, 25 (1st Cir.1984), *modified on other grounds by U.S. v. Piper*, 35 F.3d 611 (1st Cir.1994).

Moreover, the summary must not be "embellished by or annotated with the conclusions of or inferences drawn by the proponent." *Bray*, 139 F.3d at 1110. "Care must be taken to insure that [rule 1006] summaries accurately reflect the contents of the underlying documents and do not function as pedagogical devices that unfairly emphasize part of the proponent's proof or create the impression that disputed facts have been conclusively established." *Drougas*, 748 F.2d at 25.

Here, the State's summaries did more than summarize the content of the underlying bank records. First, Curtis compiled the summaries based on sources extraneous to the bank record data. R.3245; *see* R.3015; R.6118. The court found that the summaries "were based in part on the bank records, but they also included evidence that []Curtis reviewed… [like] police reports and things like that, so he had additional information about the case.... Curtis also testified that he did some followup looking into individual transactions." R.3245; *see also* R.3015; R.6118. Moreover, the record suggests that in creating the summaries, Curtis relied on information provided by an unidentified Wells Fargo fraud investigator and another non-testifying witness. R.2677; *see* R.6125;

St.Ex. 26. Curtis, therefore, compiled the summaries using information "not present" in the underlying records. *Drougas*, 748 F.2d at 25.

Second, the record reveals that Exhibits 26-32 summarized information that did not qualify as "writings, recordings, or photographs." Utah R. Evid.1006. Curtis acknowledged, for example, that he compiled the "questionable payments" portion of the summaries based on his "involvement with the facts in the case, review of the file, interview of some of the witnesses, including alleged victims, and [his] general [investigation] experience." R.3017; *see* R.6118; R.6121-22. Thus, the summaries were partially based on testimonial evidence and Curtis's personal knowledge/experience—sources that were not the proper subject of a rule 1006 summary. Utah R. Evid.1006.

Third, the summaries were embellished with conclusions and inferences drawn by the State. *Bray*, 139 F.3d at 1110. The summaries did not merely list Buttars's various financial transactions, but went a step further by categorizing certain payments as "questionable" and "potential[ly] legitimate." St.Exs.26-32. These were State-drawn conclusions that did not prove the content of the underlying bank records. R.3017.

The summaries also concluded that Buttars "commingled" funds. St.Exs.27-31. And commingling, Curtis later testified, was something that is characteristic of "fraud" and "deceit." R.5227-28. The summaries also made assumptions about which payments constituted "investor money." *Compare* St.Ex. 26 at 1 (categorizing the payments of [redacted], and [redacted] as "investor money"), *with* St.Ex. 32 (revealing blank "memo" lines on the [redacted] and [redacted] payments; a memo line

marked [redacted]" on the [redacted] payment; and a memo line marked "Bnf: David Buttars" on the [redacted] payment).

In short, the summaries were based on extra-bank record information and were embellished with the gloss of the State. The Exhibit 26-32 summaries, therefore, were inadmissible under rule 1006.

2. Trial counsel was ineffective for failing to object to the summaries on the grounds that they did not accurately prove the content of the bank records.

"When analyzing a claim of ineffective assistance of counsel, [this Court] must make two distinct determinations: (1) whether counsel's performance was deficient in that it 'fell below an objective standard of reasonableness'; and (2) whether counsel's performance was prejudicial in that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. King*, 2010 UT App 396,¶30.

Counsel's performance falls below an objective standard of reasonableness when it "would not have been futile to object" and this Court can "perceive no tactical reason why such an objection was not made." *State v. Jordan*, 2018 UT App 187,¶51. Moreover, counsel performs deficiently when "there is only upside" to pursuing a legally viable action and "no reasonable lawyer would have found an advantage" in proceeding as counsel did. *State v. Barela*, 2015 UT 22,¶27.

In this case, counsel performed deficiently by failing to lodge an accuracy/content-based objection to Exhibits 26-32 on the grounds described above. *Supra* §I.C.1. As shown, the summaries did not accurately prove the content of the underlying bank

records, as required by rule 1006. *Id*. Thus, an objection in this regard "would not have been futile." *Jordan*, 2018 UT App 187,¶51.

Moreover, there is "no tactical reason why such an objection was not made." *Id.* Before trial, the defense attacked the admissibility of the bank record summaries on multiple grounds. E.g., R.766-87, 910-61. The record thus suggests that counsel's objective was to exclude the bank records. *Id.* Failing to object on accuracy/content grounds was inconsistent with counsel's exclusion objective. *Id.* This suggests that counsel's failure to object was not strategy, but an oversight. *Id.*

The misleading summaries also put before the jury damaging, State-drawn conclusions about disputed issues. St.Exs.26-32. An objection would have forced the State to remove all conclusions and extra-bank record information. And an objection would have provided jurors with an accurate understanding of the bank records' content and would have removed the impression that disputed evidence was conclusively proven in the records. Under these circumstances, "there [wa]s only upside" in lodging an accuracy/content-based objection and "no reasonable lawyer would have found an advantage" in proceeding as counsel did. *Barela*, 2015 UT 22,¶27.

Moreover, it is reasonably likely that but for counsel's failure to object, Buttars would have enjoyed a more favorable result. As detailed above, the summaries constituted "critical" evidence that went to all counts. *Supra* p.28. Furthermore, the State relied upon the summaries to try to prove its case. *Id.* And, as discussed, the jury had reason to doubt that the investors' testimony was enough to satisfy the elements of the offenses. *Supra* pp.29-31.

The conclusions drawn by the summaries also went to key disputed issues. For instance, the State argued that Buttars made illegitimate or "questionable" purchases and comingled funds. St.Ex.26-32. The defense disputed this, eliciting believable evidence that Buttars's expenditures were legitimate business transactions. R.5248-5268, 5295-5307,5313-18; *see, e.g.*, R.5521, 5295-96, Def.Exs.1,24. Yet, the summaries gave the State an advantage by creating the impression that these "disputed facts ha[d] been conclusively established." *Drougas*, 748 F.2d at 25. Moreover, categorizing certain payments as investor money was an assumption beneficial to the State. St.Ex.26, 32. Indeed, this assumption fit into the State's narrative that Buttars had a pattern of "misusing investor funds"; substantiated its claim that Buttars engaged in a course of conduct that operated as a fraud; and bolstered its contention that Buttars omitted to tell investors how he used the funds of past "investors." R.5226-29, 5610, 5654-67,5659-60.

Meanwhile, absent the summaries' conclusions, the jury had reason to believe that Buttars's expenditures were legitimate and associated, for instance, with bringing the product to market and registering the company in Nevada. Evidence showed that Buttars did, in fact, register the company in Nevada. R.5522. Moreover, the defense elicited testimony that bringing the product to market could involve a host of different expenditures. R.5239-40,5256-57.

Evidence also showed that any misplaced payments could be accounted for in tax paperwork (the State pulled Buttars's taxes, but did not introduce them at trial or provide them to Curtis). R.5233, 5306-08, 5317-18. And defense counsel elicited evidence that

Buttars "was trying to do things right," and if he made mistakes in his accounting, it was not willful. *E.g.*, R.5232-35, 5295-96, 5632; St.Ex.4,8,26; Def.Ex.2,4,6.

On cross-examination, defense counsel went through the various transactions in detail, eliciting testimony that many of the payments could be proper business expenses. R.5248-5268, 5295-5307,5313-18; *see, e.g.*, R.5521, 5295-96, Def.Exs.1,24. This testimony was believable too. For instance, the defense produced evidence that the payments to Buttars's "lawyer/ex-wife" was for relevant patent work. R.4866-67; Def.Ex.24. Moreover, the BAC Home Loans payment was made with a check that noted "corporate office rent" in the memo. Def.Ex.1. Indeed, evidence showed that Buttars conducted business out of his home and had hosted business travelers at his home in the past. R.4891-93, 4958. That Buttars paid himself a salary was also believable, given that he had previously drawn a salary and he had the technical background necessary to develop the product. R.4856, 4863, 4886, 4889-91, 4944, 4972, 5032. Thus, the jury could have doubted that Buttars's expenditures were "questionable."

Additionally, the record suggests the summaries were available to jurors during deliberations. R.5668. This created a danger that the State's conclusions/assumptions were unduly emphasized to jurors. *State v. Cruz*, 2016 UT App 234,¶¶35-41.

That the State did not introduce the underlying bank records made matters worse. The summaries were admitted as substantive evidence in lieu of the bank records themselves. This meant jurors had no way to separate argument/assumption from the underlying content of the bank records. For all the jury knew, the underlying records themselves—rather than the State's expert—could have flagged the transactions as

"questionable." St.Ex.26-31. The State gave argument supporting this belief; it claimed the records "don't have a motive. Their credibility's not at issue. [They] are cold, hard facts." R.6593-94. But the bank record summaries were more than just "hard facts." They represented the State's conclusions and arguments about key aspects of the case—conclusions that were disguised as substantive evidence and available to jurors throughout deliberations. Under these circumstances, it is reasonably likely that Buttars's would have enjoyed a more favorable result but for counsel's failure to object.

II. Trial counsel rendered ineffective assistance by proposing/allowing an incorrect instruction on the definition of "willfulness."

Instruction 42 incorrectly told jurors that Buttars acted willfully if he had the conscious desire to avoid facts. *Infra* §II.A. Proposing/allowing this instruction constituted deficient performance that prejudiced Buttars. *Infra* §§II.B-C.

A. The jury was incorrectly instructed on the definition of willfulness.

As charged, the securities fraud statute makes it unlawful for a person, "in connection with the offer, sale, or purchase of any security," to directly/indirectly:

> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Utah Code §61-1-1(2)-(3); Addendum I.

These sections "must be read in conjunction with section 61-1-21," which specifies "willfully" as the requisite mental state for a criminal violation. *State v. Larsen*, 865 P.2d 1355, 1358 (Utah 1993); Utah Code §§61-1-21(1)(a), 61-1-21(2); Addendum I.

Thus, to be guilty of a criminal violation of §61-1-1(2), the defendant must have "willfully omit[ted] or misstate[d] material facts." *Larsen*, 865 P.2d at 1360. To be guilty of a criminal violation of §61-1-1(3), the defendant must have "willfully engag[ed] in conduct 'which operates or would operate as a fraud or deceit upon any person.'" *Fibro Trust v. Brahman Financial*, 1999 UT 13,¶15.

Willfulness is a "highly culpable mental state"—the highest under Utah law *Larsen*, 865 P.2d at 1360; Utah Code §76-2-103. "A person engages in conduct… willfully… when it is his conscious objective or desire to engage in the conduct or cause the result." *Id.* §76-2-103(1). In the context of securities fraud, "'[t]o act willfully… means to act deliberately and purposefully, as distinguished from merely accidentally or inadvertently.'" *Fibro Trust*, 1999 UT 13,¶15.

"[W]illfulness 'does not require an intent to violate the law or to injure another.'" *State v. Wallace*, 2005 UT App 434,¶13. But it is not enough to show that the defendant ought to have been aware of the risk. *See* Utah Code §76-2-103(4). Nor is it enough to show that he was aware of the risk but disregarded it. *See id.* §76-2-103(3). It is not even enough to show that he was "aware that his conduct [was] reasonably certain to cause the result." *Id.* §76-2-103(2); *see State v. Casey*, 2003 UT 55,¶36.

Rather, "the prosecution must prove beyond a reasonable doubt that the accused 'desired to engage in the conduct or cause the result.'" *Larsen*, 865 P.2d at 1360; *State v. Martinez*, 2000 UT App 320,¶12 n.5 (intent "require[s] actual knowledge… and thus turn[s] on the defendant's subjective mental state"), *aff'd*, 2002 UT 80; *Silver v. Auditing*

Div., 820 P.2d 912, 915 (Utah 1991) ("The usual meaning of the term 'intent' is that one must have a conscious objective… to accomplish the prohibited end.").

Thus, under §61-1-1, the State must prove that it was the defendant's "conscious objective or desire to" misstate a material fact, omit a material fact necessary to complete a misleading predicate statement, or engage in an act that operated as a fraud. Utah Code §§61-1-1(2)-(3), 76-2-103(1); *Fibro Trust*, 1999 UT 13,¶15; *Larsen*, 865 P.2d at 1358 n.3.

Here, the instructions defining willfulness were incorrect and/or misleading. The court provided three willfulness instructions. R.1424, 1412-13; Addendum B. First, the court gave Instruction 52, a stock instruction that included the statutory definition of willfulness: "A person engages in conduct… willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." R.1424.

Second, Instruction 41, repeated the statutory definition and provided additional State-favorable guidance:

> …
>
> A defendant acts willfully if it was his conscious objective or desire to engage in the conduct or cause the result—not that it was the defendant's conscious desire or objective to violate the law, nor that the defendant knew that he was committing fraud in the sale of the security.

R.1412.

Third, the court gave Instruction 42, an instruction drafted by defense counsel. R.1297,1413. The first two sentences offer a general definition, stating:

> To act willfully it must be a person's conscious objective or desire to engage in certain conduct or cause a certain result. A person acts willfully if he acts purposefully and not because of mistake or accident.

Id. Then, the remainder of the instruction provides a case-specific definition, which states:

> In the context of willful misstatements or omissions of material facts, willfully implies knowledge of the falsity of the misstatements and knowledge of the omitted facts and knowledge of the materiality of the misstatement(s). *That knowledge can be inferred if the defendant consciously avoided the existence of a fact or facts;* however, the defendant cannot be convicted if he was merely negligent, careless or foolish. *He must have acted with the conscious objective or desire to ignore a material fact or facts*.

R.1413 (emphasis added).

The italicized portion of Instruction 42 renders the definition of willfulness incorrect and/or misleading in two fundamental ways. First, Instruction 42 incorrectly imports conscious avoidance principles into the definition of willfulness. *E.g.*, R.1413 (knowledge may be inferred when a "*defendant consciously avoid[s] the existence of... facts*"). The conscious avoidance doctrine, a.k.a. "willful blindness," *U.S. v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002), holds that "knowledge of a fact... may be found when the jury is persuaded that the defendant consciously avoided learning [of a] fact while aware of a high probability of its existence." *U.S. v. Svoboda*, 347 F.3d 471, 477 (2d Cir. 2003). But in *Moore*, this Court held that Utah's securities fraud statutes do not "impose criminal liability for acts amounting to willful blindness or a violation of a duty to know." *Moore*, 2015 UT App 112,¶10.

It is worth noting that courts that *have* embraced this doctrine impose a far more stringent standard than that articulated by Instruction 42. Indeed, to "give willful blindness an appropriately limited scope that surpasses recklessness and negligence," the Supreme Court requires that a "defendant must subjectively believe that there is a *high probability* that a fact exists." *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (emphasis added); *see U.S. v. Kaiser*, 609 F.3d 556, 566-67 (2d Cir. 2010). Even the definition of recklessness contemplates awareness of a "substantial and unjustifiable" risk that a fact exists. Utah Code §76-2-103(3). In effect, Instruction 42 supported a belief that willfulness involved conduct that would not even amount to recklessness.

Second, the instruction misarticulated the conduct that must be the object of a defendant's objective/desire. R.1413. While initially stating that a defendant must act with the objective/desire "to engage in the conduct," Instruction 42 then went on to erroneously identify the pertinent "conduct" as the decision to ignore facts. *Id.* (the defendant *"*must have acted with the conscious… desire to ignore a material fact"). But the object of the defendant's "conscious objective or desire" is not ignorance of facts; it is the misstatement of a material fact, the omission of a material fact necessary to complete a misleading predicate statement, or an act that operates as a fraud. Utah Code §§61-1-1(2)-(3), 76-2-103(1); *Fibro Trust*, 1999 UT 13,¶15; *Larsen*, 865 P.2d at 1358 n.3.

Moreover, consciously ignoring the existence of material facts is not criminal. There is no duty to know and no duty to disclose in the absence of a prior misleading statement. *Moore*, 2015 UT App 112,¶10; *State v. Johnson,* 2009 UT App 382,¶42. There is a duty, however, to refrain from making misstatements and refrain from uttering half-

truths that mislead. Utah Code §§61-1-1(2)-(3), 61-1-21. It is the willful violation of these duties that is a crime. *Id.* Tethering a defendant's objective/desire to the ignorance of facts significantly distorted the mental state required for securities fraud.

In short, the combined effect of both of these errors was to incorrectly focus the jury's analysis on whether Buttars was purposeful in his ignorance. And as a result, the instructions allowed jurors to convict based on non-criminal conduct.

The remaining instructions did not cure these errors. The jury was given the abstract definition of willfulness. R.1413, 1424. But the challenged portion expounded upon the general definition with an erroneous case-specific definition. R.1413. And it was the erroneous case-specific definition that jurors would consider controlling. *State v. Reigelsperger*, 2017 UT App 101,¶96 ("juries can… conclude that a general mens rea requirement applies to all elements… *except where a specific mental state is expressly indicated*" (emphasis added)).

Telling jurors they could not convict based on negligence, accident, or carelessness did not help either. R.1413. This language had no curative value because Instruction 42 incorrectly shifted the analysis away from whether the defendant purposefully or accidently misstated facts, and placed the focus on whether the defendant was purposeful or accidental in his ignorance. *Id.* Thus, the accident/negligence language served only to remind jurors that a defendant cannot be guilty for accidentally or negligently ignoring facts. Moreover, any good that came from the portion requiring "knowledge" of the omitted facts/misstatements was immediately undone by the next

sentence, which instructed jurors that they could "infer[]" knowledge from conscious avoidance. *Id.*

Buttars recognizes that *Moore* appeared to approve of the language he challenges, stating: "*Larsen* requires that [the defendant's] convictions rest on facts indicating, for example, that he 'made a willful misstatement or omission of a material fact' by having 'consciously avoided the existence of a fact or facts' or, in other words, that [the defendant] 'acted with a conscious objective or desire to ignore a material fact or facts.'" *Moore*, 2015 UT App 112,¶17. But *Moore*'s language of approval may be regarded as nonbinding dicta, *Jones v. Barlow,* 2007 UT 20,¶28, as it was "not necessary to sustain the decision" of the *Moore* court. *E. Bench Irrigation Co. v. State*, 300 P.2d 603, 606 (Utah 1956).

If the language was not dicta, then Buttars asks this Court to overrule it. Before overruling precedent, this Court considers (1) the authority's "persuasiveness" and the "reasoning on which the precedent was originally based"; and (2) "how firmly the precedent has become established." *In Interest of B.T.B.*, 2018 UT App 157,¶39.

Here, both factors favor disavowal. First, *Moore*'s conscious avoidance language rests on tenuous legal grounds. *Larsen* did not—as the *Moore* court suggested—embrace the conscious avoidance language. *See Larsen*, 865 P.2d 1355. The conscious avoidance language appears to originate from *Chapman*, which merely quoted the language because it appeared in one of the instructions given at the defendant's trial. *State v. Chapman,* 2014 UT App 255,¶11. Indeed, *Chapman*, an insufficient evidence case, had nothing to say about the propriety of the conscious avoidance language. *Id.* The challenged

language, therefore, comes not from reasoned analysis, but from an instruction given in *Chapman*.

Second, *Moore*'s conscious avoidance language has not become firmly entrenched in Utah's jurisprudence. *Moore* was issued fairly recently. And the conscious avoidance language is inconsistent with other legal principles—including *Moore*'s own holding, which expressly rejects willful blindness principles. 2015 UT App 112,¶10. For this reason, it is also unlikely that many parties have relied on the language. Accordingly, this Court should overrule *Moore*'s conscious avoidance language because it incorrectly defines willfulness.

In short, the instructions in Buttars's case did not adequately instruct jurors on the mental state necessary to commit securities fraud.

B. Deficient performance.

Counsel performs deficiently when his "conduct f[alls] below an objective standard of reasonableness under prevailing professional norms." *State v. Ring*, 2018 UT 19,¶35 (quotation marks omitted). For instance, counsel performs deficiently by failing to object to instructions that understate the mens rea element. *Barela*, 2015 UT 22,¶¶26-27. Likewise, it is deficient performance to allow instructions that "reduce the State's burden of proof" and permit jurors to convict under "impermissible scenarios." *Grunwald*, 2018 UT App 46,¶42.

Here, counsel performed deficiently by proposing the conscious avoidance/ignorance language and allowing it to go to the jury. The defense argued that the "case boil[ed] down to" what Buttars's mental state was. R.5635-36, 5627, 5645-46.

Yet, the instructions "understat[ed]" the willfulness requirement by allowing jurors to convict based on conduct that would not even amount to recklessness. *Supra* pp.52-55. Moreover, the instructions allowed jurors to convict under "impermissible scenarios." *Grunwald*, 2018 UT App 46,¶42. That is, jurors could convict if they found that Buttars acted with an objective other than the desire to misstate a fact or omit a fact necessary to complete a misleading predicate statement. *Id*. Thus, the "error[] had the effect of reducing the State's burden of proof at trial." 2018 UT App 46,¶42. And no reasonable trial strategy would justify allowing an incorrect instruction that made it easier for jurors to convict. *See id.*

Moore's language of approval did not change this. 2015 UT App 112,¶17. Counsel's duties extend to investigating issues and performing tasks beyond the obvious. *See State v. Eyre*, 2008 UT 16,¶¶11-21, 179 P.3d 792; *State v. Ison*, 2006 UT 26,¶32, 135 P.3d 864. Thus, counsel had a duty to investigate the soundness of the conscious avoidance language in *Moore* and ensure that the incorrect language did not go to the jury. The failure to do so was deficient performance.

If this Court determines *Moore*'s conscious avoidance language precludes a showing of deficient performance, then Buttars asks this Court to reach this issue under the exceptional circumstances doctrine.

The exceptional circumstances concept serves as a "safety device," to assure that "manifest injustice does not result from the failure to consider an issue on appeal." *State v. Irwin*, 924 P.2d 5, 8 (Utah Ct. App. 1996). The Utah Supreme Court, for instance, has "employed the 'exceptional circumstances' rubric where… the settled interpretation of

law colored the failure to have raised an issue." *Irwin*, 924 P.2d at 10; *State v. Lopez,* 873 P.2d 1127 (Utah 1994).

Unique procedural circumstances exist here. This Court's "interpretation of law" in *Moore* was the basis for the erroneous instruction. *Id.*; *Moore*, 2015 UT App 112,¶17. Moreover, if this Court finds that *Moore* excused counsel's actions, the exceptional circumstances doctrine is Buttars's only "safety device" for obtaining review of the merits. *Irwin*, 924 P.2d at 8. As shown, the erroneous language significantly distorted the willfulness requirement. *Supra* pp.52-55. Moreover, as explained below, the error prejudiced Buttars. *Infra* §II.C. Failure to consider the merits of this issue would be an "injustice" to Buttars and to future defendants whose juries are instructed using the same erroneous language from *Moore*. Thus, this case is appropriate for exceptional circumstances review.

Be it through ineffective assistance or exceptional circumstances, Buttars asks the Court to reach the merits of this issue.

C. Prejudice.

There was a reasonable probability of a different result but for the challenged language in Instruction 42. *Supra* p.45 (setting forth prejudice test). If the jury had been properly instructed on the definition of "willfulness," there was evidence from which jurors could have acquitted Buttars of securities fraud. And where the instruction error impacts the securities fraud charges, this Court should reverse on the pattern count because it rests on the underlying securities charges. R.1411,1425-26; *supra* p.28.

Moreover, the court instructed jurors that the erroneous definition of willfulness applied to the pattern count. *Id.*

The defense argued that the "case boil[ed] down to… what [Buttars's] intent was." R.5635-36, 5627, 5645-46. And it asked jurors to acquit because Buttars did not act willfully. *Id.* There was evidence to support that claim.

The evidence was vague and inconsistent as to what, if anything, Buttars said to the investors. *Supra* p.29; *E.g.*, R.5078-81. And if he said anything, evidence showed (as argued above) that Buttars believed everything he said, *supra* pp.30-31, and used investor funds for legitimate purposes. *Supra* pp.47-48. Indeed, the jury acquitted on all theft counts despite the State's contention that Buttars was guilty of theft because he accepted investor funds knowing that he was going to use the money differently than what he represented to investors. R.5659-60. This suggests that jurors rejected the notion that Buttars willfully misrepresented how he intended to use investor funds.

Moreover, as discussed, there was evidence that Buttars did not attend all the meetings with investors. R.5118-19. And importantly, evidence showed that it was Gerritsen and LaCount who primarily interacted with investors—investors who were Gerritsen and LaCount's neighbors, friends, and relatives. R.5089, 5105,5123, 5136, 5139, 5141-42; *e.g.*, R.5139 (it was "Mark LaCount [who] told us how great the company was" and how "our money… was going to be used"); R.5532-33 (evidence that Mother spoke with Buttars only once at a concert).

Given this evidence, it is reasonably likely a jury could find that Buttars was not privy to the conversation during which the predicate statements were made. They could

also find that Buttars thought it was likely that LaCount and Gerritsen had already informed investors of any necessary information. Such a belief was reasonable given the relationships and dealings LaCount and Gerritsen shared with the investors. From this, a jury could reasonably doubt that Buttars acted willfully, finding that he was unaware of the utterance of any misstatements or misleading predicate statements.

But the instructions told jurors that it did not matter if Buttars actually knew about the misstatements or misleading predicate statements. They could "infer[]" that knowledge if he "consciously avoided the existence of a fact or facts." R.1413. For instance, the instruction permitted jurors to infer knowledge if Buttars was aware of some possibility that LaCount made misleading omissions, but Buttars consciously chose not to investigate his suspicions. As another example: even if jurors found that Buttars believed that the patents were unencumbered (there was evidence of a licensing agreement between MOVIEblitz and Ellipse), the instructions permitted a finding of guilt if Buttars consciously ignored some remote risk that Romney might have a claim to them. R.5534-35, 5640. Indeed, Instruction 42 did not specify the level of risk that must be ignored before jurors could infer knowledge. R.1413; *supra* p.53. Thus, this Court should reverse on all counts because the erroneous instructions prejudiced Buttars.

III. This Court should grant Buttars a new trial on all counts because the State presented expert testimony, argument, and jury instructions that misstated the law surrounding a defendant's disclosure obligations under the securities fraud statute.

When given, expert testimony, prosecutorial argument, and jury instructions must accurately state the law. *See Jordan*, 2018 UT App 187,¶¶42-52; *Stringham*, 957 P.2d at

607-08; *State v. Bird*, 2015 UT 7,¶14. Here, the State presented expert testimony, argument, and jury instructions that misstated the law and expanded the conduct criminalized by the securities fraud statute. To the extent counsel failed to adequately preserve the issue, that failure constituted ineffective assistance.

A. The State presented expert testimony, argument, and jury instructions that misstated the law.

The securities fraud statute makes it "unlawful for any person, in connection with the []sale… of any security… to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." Utah Code §61-1-1(2). "'The plain language of section 61-1-1(2)... makes no mention of an affirmative duty to disclose in the absence of a prior[, misleading] statement.'" *Moore*, 2015 UT App 112,¶10. Rather, a defendant has a duty to disclose or "not omit" only when (1) a predicate statement was made, (2) the predicate statement was misleading, and (3) the omitted statement was material. *Id.*; Utah Code §61-1-1(2).

Here, erroneous expert testimony, prosecutorial argument, and jury instructions suggested that the law imposed an affirmative duty to disclose material information—even in the absence of a prior misleading statement. The misstatements began with Lloyd, the State's securities expert, who gave "legal conclusion[s]" that were "wrong." *Stringham*, 957 P.2d at 607. Lloyd testified, for instance, that "federal and state securities laws operate under the presumption that a seller of securities has an obligation to make disclosure[s] so that a purchaser can assess" her purchase. R.4826; Addendum E; *see also* R.5468-69 (Lloyd referencing "the fundamental obligations that are established under

law with respect to disclosure"); *accord* R.4827-38, 4843, 5468-69. Later in Lloyd's testimony, he discussed the "obligation not to omit material information… [and] engage in deceit. Those… are established by statute." R.4844.

Then in closing, the prosecutor made further misstatements, arguing that "the securities industry and the law, it all requires the seller to be up front, to make full disclosures about information that the average reasonable investor would want to know. And that's contained in the jury instructions." R.5611; Addendum F. Thus, Lloyd and the prosecutor incorrectly suggested that the law imposed an affirmative duty to disclose or "not[] omit" material information.

Further, the State-proposed Instruction 47 said that

> …Even if the Defendant(s) had an honest belief that an event would occur in the future or made a good faith effort to bring about the future event, he is still not permitted to make a willful misrepresentation or omission of a material fact.
>
> Therefore, to the extent that there exists any such belief that the plan will succeed, that belief does not constitute a defense to the crimes alleged if you find that the defendant has engage in willful material misstatements or omissions.

R.1419; Addendum B.

Like Lloyd and the prosecutor, Instruction 47 erroneously told jurors that a defendant is "not permitted to make[] willful… omission[s] of[] material fact." *Id.* The instruction then went further, incorrectly stating that a finding of "willful material… omissions" meant that it did not matter if Buttars believed what he said about future events—"that belief did not constitute a defense." *Id.* But such a "belief d[id] not constitute a defense" only if Buttars willfully violated the securities fraud statute by

misstating or omitting material facts *necessary to correct a misleading predicate statement*. Utah Code §61-1-1(2). Indeed, if Buttars genuinely believed in his forward-looking statements, that *could* be a defense to the crimes—specifically, to the allegation that Buttars uttered misstatements. *E.g.*, *SEC v. Ustian*, 229 F.Supp. 3d 739 (N.D Ill. 2017) ("future hopes are generally not actionable if they are based on a genuine belief"); *accord Greenberg v. Crossroads*, 364 F.3d 657, 670 (5th Cir. 2004). The instruction, therefore, misstated the law and effect of violating a duty to disclose.

In short, the legal misstatements of Lloyd, the prosecutor, and Instruction 47 suggested that the law imposed an affirmative duty to disclose material information—a violation of which rendered a defendant's genuine beliefs in his statements "not [] a defense." In turn, the misstatements expanded the conduct criminalized by the securities fraud statute, thereby reducing the State's burden of proof. Moreover, these misstatements prejudiced Buttars. *Infra* pp.65-66.

B. Trial counsel rendered ineffective assistance to the extent counsel did not adequately preserve this issue.

Counsel objected to Instruction 47, but did not object to the misstatements of Lloyd or the prosecutor. R.4124-26. The court ruled that the instruction was "appropriate" and gave it over defense counsel's objection. *Id.* Buttars preserved an objection to Instruction 47 because the trial court had the opportunity to rule—and did in fact rule—on the instruction's propriety. *See Fort Pierce Indus. Park v. Shakespeare,* 2016 UT 28,¶13; *Patterson v. Patterson*, 2011 UT 68,¶12.

This Court may review the misstatements of Lloyd and the prosecutor for ineffective assistance. *Supra* p.45 (setting forth ineffective assistance test). Likewise, if this Court believes that counsel's objection to Instruction 47 did not preserve the issue, the failure to properly preserve the issue constituted ineffective assistance. *State v. Larrabee*, 2013 UT 70,¶26 (performance deficient because, by failing to object, counsel "failed to preserve the issue").

First, counsel performed deficiently by failing to adequately object to the misstatements. As shown, Lloyd, the prosecutor, and Instruction 47 misstated the law, *supra* §III.A; thus, a proper objection to these misstatements would have been well-taken. *Moore*, 2015 UT App 112,¶10; *see Grunwald*, 2018 UT App 46,¶42. Moreover, there "was no conceivable tactical benefit" for counsel to allow expert testimony, argument, and instructions that departed from "the narrow way in which Utah courts have interpreted the applicable [securities] statute." *State v. Lewis*, 2014 UT App 241,¶13; *see Moore*, 2015 UT App 112,¶¶6-14; *Johnson,* 2009 UT App 382,¶42. Indeed, the misstatements suggested that the law prohibited conduct that was not criminal, thereby understating the State's burden of proof. *Supra* §III.A There is no conceivable tactical basis for suggesting to the jury that the State's burden was lower than it actually was. *Grunwald*, 2018 UT App 46,¶42.

Likewise, with respect to Instruction 47, the record suggests that counsel's goal was to preserve the issue for appeal and prevent the instruction from going to the jury. R.4124-26. Failing to lodge a specific objection on the record was inconsistent with these goals. *Id.* This suggests that counsel's failure to properly object was not strategy, but an

oversight. *Id*; *State v. Moritzsky*, 771 P.2d 688, 691-92 (Utah Ct.App. 1989) (counsel performed deficiently when he "overlooked" the statutory presumption by failing to check the pocket-part). Accordingly, counsel performed deficiently by failing to adequately object to the misstatements of Lloyd, the prosecutor, and Instruction 47.

Second, these misstatements prejudiced Buttars, both individually and cumulatively. The misstatements negatively impacted the elements of securities fraud, *supra* §III.A, which in turn, negatively impacted the pattern count as well. R.1411, 1425-26 (instructions telling jurors that the securities fraud counts were "unlawful" acts upon which the pattern count could rest). R.1411, 1425-26.

Absent the misstatements, there was evidence from which jurors could have concluded that Buttars was innocent because he believed all that he said, *supra* pp.30-31; was unaware of the utterance of any prior misleading predicate statements, *supra* pp.29-30; and/or he did not misuse investor funds. *Supra* pp.47-48. But the misstatements told jurors that none of this mattered if they found that Buttars willfully omitted material facts—facts that he allegedly had a statutory obligation to disclose. R.1419, 4844, 5611.

True, the elements instructions correctly stated the actus reus for securities fraud. *E.g.*, R.1409. But the jury was not given a way to reconcile the elements instructions with Instruction 47, which stated that Buttars was "not permitted to make a willful… omission[s] of[] material fact." R.1419; *Francis v. Franklin*, 471 U.S. 307, 322 (1985) ("contradict[ory]" language does not absolve an instructional infirmity); *accord State v. Campos*, 2013 UT App 213,¶43. Nor did the elements instruction cure Instruction 47's

assertion that Buttars's genuine beliefs did not matter if he made "willful… omission[s] of[] material fact." R.1419.

Moreover, the notion that Buttars had a duty to disclose was reinforced at all stages of the trial. It was reinforced by Lloyd's expert testimony, *e.g.*, R.4844; Curtis's expert testimony, *e.g.*, R.5227-28, 5423-39; the prosecutor's argument, R.5611; and in the jury instructions. R.1419. Standing alone, each misstatement caused prejudice, which was exacerbated—not cured—by additional misstatements. Thus, the misstatements individually and cumulatively undermine confidence in the fairness of Buttars's trial.

IV. This Court should grant Buttars a new trial on all counts because the State's experts gave testimony that violated rules 702, 704, and 403.

"In general, the admissibility and limits of expert testimony are governed by rules 701 through 704." *Larsen*, 865 P.2d at 1361. Rule 702 provides that "a witness who is qualified as an expert… may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Utah R. Evid. 702; Addendum I. "Under rule 702, the question that must be posed prior to the admission of any expert evidence is whether, 'on balance, the evidence will be helpful to the finder of fact.'" *Larsen*, 865 P.2d at 1361. "In determining 'helpfulness,' the []court must first decide whether the subject is within the knowledge or experience of the average individual." *Id.*

Another "integral element of a rule 702 determination to admit expert evidence is a balancing of the probativeness of the evidence against its potential for unfair prejudice."

Id. at 1363 n.12. "This balancing mimics that under rule 403 and is necessary to a determination of 'helpfulness.'" *Id.*; Utah R. Evid. 403.

Under rule 704, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Utah R. Evid. 704(a); Addendum I. But there "are limits on an expert's license to testify as to the legal meaning of a statute." *State v. Johnson*, 2009 UT App 382,¶37 n.14. Moreover, "opinions that '"tell the jury what result to reach"' or '"give legal conclusions"' [are] impermissible." *Davis*, 2007 UT App 13,¶15.

For instance, in *State v. Tenney*, it was plain error to allow the experts to testify "that the buy-back agreements were securities," "that certain information was material," and "that failure to disclose certain enumerated information would be a material omission." *Tenney*, 913 P.2d 750, 756 (Utah Ct. App. 1996). Similarly, in *Stringham*, it was improper for a prosecutor to present a hypothetical "consisting of the exact actions of which defendant was accused" and ask the expert to opine on "whether these actions were illegal." *Stringham*, 957 P.2d at 607, 607 n.15, 611. Conversely, in *Larsen*, the use of the term "material" was not "an inadmissible legal conclusion" because the expert did not use the term in its legal sense. *Larsen*, 865 P.2d at 1361-63. Nevertheless, an objection under rule 403—which allows for the exclusion of relevant evidence when "its probative value is substantially outweighed by a danger of… unfair prejudice," Utah R. Evid. 403; Addendum I—"might have merited serious consideration." *Larsen*, 865 P.2d at 1363 n.12.

Here, Lloyd's testimony violated Rules 702 and 704. *Infra* §III.A. Curtis also gave improper testimony that violated rules 702, 704, and 403. *Infra* §III.B. Moreover, admission of this testimony was prejudicial. *Infra* §III.C.

A. Lloyd's testimony violated rules 702 and 704.

In addition to erroneously telling jurors that defendants have a statutory "obligation not to omit material information," R.4844; *supra* §III.A, Lloyd violated rules 702 and 704 when he used the legal term "material" and provided case-specific examples of material information. *See* Addendum E (Lloyd's testimony).

Unlike in *Larsen*, Lloyd did not use the term "material" in its non-legal sense; rather, as in *Tenney*, he used it in its legal sense. *Compare Tenney*, 913 P.2d at 756; *with Larsen*, 865 P.2d at 1361-63. Specifically Lloyd testified that the definition of "material information would be [] information that's important to an investor making a decision." R.4838; *see also* R.4830. Thus, the testimony was inadmissible because it "state[d] legal conclusions." *Tenney*, 913 P.2d at 756.

Moreover, Lloyd's examples of material information mirrored the State's allegations. R.4838-39. Lloyd said that "material information" "would include" (1) "information about the management" including "who is running this enterprise, what's their background, what's their experience, have the ever been involved in… inappropriate activity." R.4838. He also listed that it could involve (2) "financial information about the enterprise" including whether the "financial assets are sufficient to conduct operations"; (3) "what are the risks of the business"; and (4) information about "the underlying assets of the business." R.4838-39. As in *Stringham*, Lloyd's examples mirrored the

information the State faulted Buttars for not disclosing. *Compare Stringham*, 957 P.2d at 607, 611.

The trial court appeared to determine that Lloyd could give a definition and examples of material information provided the testimony comported with *Moore*, 2015 UT App 112. R.4836-37. But as counsel pointed out, the portion of *Moore* discussing expert testimony was "not a majority" opinion. R.4837; *Moore*, 2015 UT App 112,¶27 & n.4. And even if it was, Lloyd's testimony ran afoul of *Moore* by offering certain examples that "explicitly mirror[ed] the State's allegations." 2015 UT App 112,¶27.

Moreover, this case is distinguishable from *Chapman*, where the expert merely gave "some examples" of information he believed was important "[f]or a purchaser… to make an intelligent investment decision." 2014 UT App 255,¶21. Here, by contrast, Lloyd gave a legal definition "material" that was immediately followed by a list of information that "*would*" and could be "material." R.4838-39.

Nor did the court adequately consider whether the opinion testimony helped jurors. As counsel argued, the materiality question was "squarely within the layman's understanding." R.4827. It is well within the experience of jurors to know the type of information that would likely influence a reasonable investor. *Chapman*, 2014 UT App 255,¶32 (Pearce, concurring). This is particularly true in Buttars's case, which involved a start-up company with investments made by lay-individuals much like the jurors themselves. Lloyd's testimony evidences the lack of complexity. *Id.* Indeed, Lloyd "simply listed categories of information," failing "to explain why such information would be important to an investor." *Id.*; R.4838-39. Lloyd may not have explained his

conclusions "because they needed no explanation." *Id.*¶33. Under these circumstances, Lloyd's opinion testimony was not helpful to the jury.

Thus, the testimony was inadmissible under rules 702 and 704 because it "state[d] legal conclusions," *Tenney*, 913 P.2d at 756; it gave "an opinion as to whether [actions like Buttars's] actions were illegal," *Stringham*, 957 P.2d at 607-08; and it did not help jurors. *Chapman*, 2014 UT App 255,¶33 (Pearce, concurring).

B. Curtis's testimony violated rules 702, 704, and 403.

Curtis gave unhelpful and prejudicial testimony that stated legal conclusions and opined on the legality of Buttars's conduct. *Tenney*, 913 P.2d at 756; *Stringham*, 957 P.2d at 607-08. Specifically, Curtis testified:

> **Prosecutor**: You indicated that you have particular experience investigating and analyzing records of companies or individuals alleged to have engaged in fraud, deceit, or theft? Is that correct?
>
> **Curtis:** Yes. That's right.
>
> **Prosecutor**: In your experience, and based on your practice, are there certain characteristics that you look for in analyzing a business or an individual to determine fraud, deceit, or theft?
>
> **Curtis:** Yes.
>
> **Prosecutor**: Can you briefly explain what those characteristics are in general?
>
> **Curtis:**…As it relates to investment fraud, there would be things like… financial statement misrepresentations, or misrepresentations of how the money's being used, or failure to disclose material information, or that could be omissions. So, if the party has knowledge of material information and does not disclose that to investors, that's important. Disregard for corporate formalities. That's where corporations--business and personal could be commingled and confused…. A business being dependent on investor money. Investor money not being used for the stated purpose that's stated to investors, it's used for other purposes or unauthorized purposes….

> **Prosecutor**: After reviewing the financial records associated with this case, and after listening to the testimony of this trial, based on generally accepted accounting practices, do you… see any of these characteristics present in this case?
>
> **Curtis:** Yes.
>
> **Prosecutor**: And which ones, in your opinion?
>
> **Curtis:** Right. I see characteristics of misrepresentations and omissions, of investor money not being used for the stated purpose, of inadequate capitalization or lack of capital to operate the business. Those are the main ones that come to mind. And dependence on investor money, obviously**.**

R.5227-28; Addendum D.

This testimony was improper. First, Curtis incorporated the legal terms "fraud, deceit, or theft" into his conclusion testimony. Utah Code §§61-1-1(2)-(3). The prosecutor framed his question in terms of those "*alleged to have engaged* in fraud, deceit, or theft." R.5227-28 (emphasis added). From this, it is evident that the terms "fraud, deceit, or theft" were being used in reference to the statutory crimes that Buttars was "alleged to have engaged in." *Id.* Thus, as in *Tenney*, the terms were used in their legal sense. *Compare Tenney*, 913 P.2d at 756; *with Larsen*, 865 P.2d at 1361-63.

Curtis further offered his legal interpretation of these terms by providing case-specific examples of "characteristics" used "to determine" fraud, deceit, or theft. R.5227-28. Most—if not all—of the examples closely mirrored the allegations. *E.g.*, R.5227-28 ("misrepresentations of how… money's being used"). Curtis then opined that these "characteristics" were present in Buttars's case. *Id.* In effect, the testimony told jurors that there were characteristics of legal fraud, deceit, and theft in Buttars's case. While the testimony fell short of opining that Buttars was guilty of fraud, saying that there are "characteristics" of fraud implies the presence of at least some of the legal elements of

fraud. *Id.* Indeed, "characteristic" is a synonym of "element."[8] And Curtis testified he observed "omissions" and "misrepresentations"—both of which constitute elements of securities fraud. *Id.* Utah Code §61-1-1(2).

The court reasoned the testimony was appropriate provided Curtis did not testify to the requirements of "Utah law." R.5223-24; Addendum D. But jurors would have known that Curtis was drawing conclusions about legal fraud/deceit even if without an explicit reference to "Utah law." As explained, the terms "fraud, deceit, and theft" were used in reference to the statutory crimes Buttars was "alleged to have engaged in." R.5227-28. Moreover, Curtis offered no explanation regarding an alternative meaning of the terms. *Id.* Even *Larsen*, which the prosecution used to support its arguments, frowned upon testimony drawing upon statutory language. *Larsen*, 865 P.2d at 1361-63 & n.3. The court, therefore, was incorrect.

But even if testimony passes muster provided no reference to "Utah law" is made, the court did not fully consider the testimony's helpfulness or admissibility under rule 403. The testimony's probative value was minimal. Indeed, Curtis had already testified about troubling charges and "red flags" in Buttars's financials. R.5199, 5204, 5207, 5180-82, 5185, 5195, 5199-5200. There was little need for further conclusion testimony—particularly opinion testimony that drew upon the statutory language of securities fraud.

[8] https://en.oxforddictionaries.com/thesaurus/characteristic.

deceit. The sequencing of the prosecutor's questions and the use of statutory terms supported this belief. R.5227-28. Moreover, Curtis's testimony tended to "'blur the separate and distinct responsibilities of the judge, jury, and witness,'" and created a danger that the jurors might "'turn to [Curtis] rather than the judge for guidance on the… law.'" *Id.*; *Johnson*, 2009 UT App 382,¶37 n.14. Thus, this Court should reverse because Curtis's testimony would not help the trier of fact, as required by rule 702; was unduly prejudicial under rule 403; and stated legal conclusions in violation of rules 702 and 704.

C. Prejudice.

An appellate court must "'overturn a jury verdict for the admission of improper evidence'" whenever the evidence reasonably affected "'the likelihood of a different verdict.'" *State v. Johnson*, 2007 UT App 184,¶34. In this case, there was a reasonable probability of a different result but for Lloyd and/or Curtis's improper expert testimony.

Considered individually and cumulatively, Lloyd and/or Curtis's testimony negatively impacted the elements of securities fraud. *See* Utah Code §§61-1-1(2)-(3), 61-1-21. Because the testimony affected the securities fraud charges, this Court should reverse on the pattern count as well. R.1411, 1425-26; *supra* p.28.

Lloyd and Curtis told jurors what result to reach, used statutory terms that constituted elements of the offense, and opined that those elements or "characteristics" were present in Buttars's case. *Supra* §IV.A-B. Given the complexity of securities law, Lloyd and Curtis's conclusions would have been especially persuasive. *See Larsen*, 865 P.2d at 1361. "[T]here is a danger" that jurors relied on the experts' expertise rather than studying the instructions and reaching their own conclusions. *Davis*, 2007 UT App

13,¶15. There is also a danger that jurors deferred to Lloyd and Curtis's expertise even if they were inclined to believe differently. *See Larsen*, 865 P.2d at 1361.

Absent Lloyd and/or Curtis's testimony, the jury had reason to doubt that Buttars was guilty of securities fraud. There was evidence from which the jury could have concluded that Buttars was innocent because: (1) no misleading predicate statements were uttered, or if they were uttered, Buttars was unaware of them, *see supra* pp.29-30; (2) Buttars believed all that he said, *see supra* pp.30-31; and (3) Buttars did not engage in a pattern of misusing investor funds. *See supra* pp.47-48. Absent Lloyd's testimony, a jury could also doubt the materiality of Lloyd's list of allegedly material information. For instance, a jury could doubt the importance of management's prior, "inappropriate activity" where the activity had no bearing on the success of the company. R.4848.

Moreover, Curtis and/or Lloyd's testimony "could easily have misled the jury" into convicting based on non-criminal conduct. *Stringham*, 957 P.2d at 607-08. Through their use of statutory terminology, Curtis and Lloyd erroneously led jurors to believe that—notwithstanding the utterance of a prior misleading statement—the fraud statute condemned the "failure to disclose" the broad list of "material" information identified by Lloyd. R.4838-39, 5227-28; *see* R.5227-28 (Curtis identifying the "failure to disclose material information, or… omissions" as a characteristic of "fraud" and identifying "omissions" as one of the characteristics of "fraud" that he observed in Buttars's case).

From this, the jury could have believed, for instance, that Buttars was guilty simply because he did not disclose otherwise doubtfully relevant/material information about late payments on his personal credit card. R.4838-39 (Lloyd defining material to

broadly include "information about the management" of the company). Curtis's testimony further supported such a belief, stating that Buttars's personal state of financial distress "would be a significant disclosure to investors." R.5423-39; St.Exs.39-40. Moreover, as explained, the instructions reinforced rather than corrected this erroneous impression. *Supra* pp.65-66.

Considered individually and cumulatively, it is reasonably likely that Buttars would have enjoyed a more favorable result but for the improper expert testimony.

V. Cumulative error requires reversal.

Considering "'all the identified errors'" addressed above, "'as well as any other errors [this Court] assume[s] may have occurred,'" this Court should reverse because ""'the cumulative effect of the several errors undermines [] confidence… that a fair trial was had.'"" *State v. Kohl*, 2000 UT 35,¶25.

Here, the improper expert testimony, prosecutorial argument, and instructions worked to increase the likelihood that the jury convicted based on non-criminal conduct. *Supra* §§II-IV. Curtis and Lloyd's expert testimony, Instruction 47, and the prosecutor's argument allowed jurors to convict Buttars for violating an affirmative duty to disclose—a duty that does not exist under the securities fraud statute. *Supra* §III-IV. Meanwhile, Instruction 42 provided an incorrect definition of willfulness that expanded the conduct criminalized by the securities fraud statute. *Supra* §II. And Instruction 47 similarly impacted the mental state requirement by incorrectly describing a scenario where Buttars's genuine beliefs did not matter. *Supra* §III.A.

Additionally, the erroneously admitted bank record evidence allowed the State to try to bolster its case for conviction. Using the inadmissible bank records, the State exacerbated the error by augmenting the bank record summaries with conclusions favorable to the State. *Supra* §I.C. And again, the State exacerbated the error by introducing the testimony of Curtis, who used the bank record/summaries to improperly testify that he saw characteristics of fraud and deceit in Buttars's case. *Supra* §IV; *also compare* R.5227-28 (Curtis identifying "coming[ling]" as a characteristic of fraud/deceit), *with* St.Exs.27-31 ("summaries" telling jurors that Buttars had "commingled" funds). Thus, the cumulative effect of the all the errors undermines confidence that Buttars had a fair trial.

CONCLUSION

Buttars asks this Court to reverse and remand for a new trial on all counts.

SUBMITTED this 14th of January 2019.

Alexandra S. McCallum
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 18,981 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

ALEXANDRA S. McCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, hereby certify that I have caused to be hand-delivered an original and five copies of the private and one copy of the public brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and delivered two copies of the private and public brief to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 14th day of January 2019. A searchable pdf of the private and public brief will be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.

ALEXANDRA S. McCALLUM

DELIVERED this _____ day of January 2019.

ADDENDUM A

The Order of the Court is stated below:
Dated: January 26, 2017 09:59:00 AM
At the direction of:
/s/ Vernice Trease
District Court Judge
by
/s/ REBECCA FAATAU
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH ATTORNEY GENERAL, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 131901512 FS
DAVID BRUCE BUTTARS, Defendant.	:	Judge: VERNICE TREASE Date: January 26, 2017

PRESENT
Clerk: rebeccaf
Prosecutor: MICHAEL D PALUMBO
JACOB S TAYLOR
Defendant
Defendant's Attorney(s): ROBERT B CUMMINGS
CARA M TANGARO

DEFENDANT INFORMATION
Date of birth: June 29, 1960
Sheriff Office#: 344819
Audio
Tape Number: W45 Tape Count: 9.05-9.53

CHARGES
1. SECURITIES FRAUD - 3rd Degree Felony
- Disposition: 09/28/2016 Guilty
3. SECURITIES FRAUD - 3rd Degree Felony
- Disposition: 09/28/2016 Guilty
5. SECURITIES FRAUD (amended) - 3rd Degree Felony
- Disposition: 09/28/2016 Guilty
7. SECURITIES FRAUD (amended) - 2nd Degree Felony
- Disposition: 09/28/2016 Guilty
9. PATTERN OF UNLAW ACTIVITY (amended) - 2nd Degree Felony
- Disposition: 09/28/2016 Guilty

HEARING

Ms. Tangaro enters objections and arguments for objections of PSR into the record.

Mr. Taylor enters arguments in favor of PSR recommendations into the record.

The Court enters sentence.

The Court orders the defendant to pay full restitution on all counts. The State will file an order of restitution with the Court.

SENTENCE PRISON
Based on the defendant's conviction of SECURITIES FRAUD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of PATTERN OF UNLAW ACTIVITY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
Commitment and charges to run concurrent to any other commitment.

SENTENCE RECOMMENDATION NOTE
Defendant is taken forthwith to begin serving commitment. Any and all restitution amounts to be paid through the Board of Pardons.

End Of Order - Signature at the Top of the First Page

ADDENDUM B

INSTRUCTION NO. 41

The State of Utah must prove that the defendant, DAVID BUTTARS, acted willfully in committing the offenses set forth in Counts 1, 3, 5 and 7.

A defendant acts willfully if it was his conscious objective or desire to engage in the conduct or cause the result--not that it was the defendant's conscious desire or objective to violate the law, nor that the defendant knew that he was committing fraud in the sale of the security.

Instruction No. 42

WILLFULLY

To act willfully it must be a person's conscious objective or desire to engage in certain conduct or cause a certain result. A person acts willfully if he acts purposefully and not because of mistake or accident. In the context of willful misstatements or omissions of material facts, willfully implies knowledge of the falsity of the misstatements and knowledge of the omitted facts and knowledge of the materiality of the misstatement(s). That knowledge can be inferred if the defendant consciously avoided the existence of a fact or facts; however, the defendant cannot be convicted if he was merely negligent, careless or foolish. He must have acted with a conscious objective or desire to ignore a material fact or facts.

INSTRUCTION NO. 52

You are instructed that the following words have the following meanings:

Count 9, Pattern of Unlawful Activity, includes the terms "intentionally", "knowingly" and "willfully". Each of these terms has a specific definition under the law, as follows:

A person engages in conduct "Intentionally" or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct "Knowingly" or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

The definition for willfully is contained in Instructions No. 41 and 42.

INSTRUCTION NO. 47

You are instructed that opinions concerning what will happen in the future are not statements of fact. Even if the Defendant(s) had an honest belief that an event would occur in the future or made a good faith effort to bring about the future event, he is still not permitted to make a willful misrepresentation or omission of a material fact.

Therefore, to the extent that there exists any such belief that the plan will succeed, that belief does not constitute a defense to the crimes alleged in this case if you find that the Defendant has engaged in willful material misstatements or omissions.

ADDENDUM C

REDACTED

ADDENDUM D

Q. Is that based on what you determined were -- appeared to be investor payments?

A. Yes.

Q. And looking at this, and taking into account all the other information you've heard in this case, have you attended the trial throughout its beginning yesterday?

A. Yes.

Q. Or from its beginning? Taking into account -- and let me also ask, have you reviewed any other documents in your preparation for performing these analyses and testifying?

A. Yes, I've received some -- reviewed some of the case file from the investigation that the state performed. I've participated in a couple of interviews with some of the -- the management of the company, and yeah, I heard the evidence and the testimony today and yesterday.

MR. TAYLOR: Let me have a moment, Your Honor.

Q. So, Mr. Curtis, you've indicated that you have particular experience investigating and analyzing records of companies and individuals -- of companies and individuals alleged to have engaged in fraud, theft, things like that. Is that accurate -- is that correct?

A. Yes.

Q. So, in your experience, are there certain characteristics that you look for? And I -- you may have talked about some of these, but are there certain characteristics that you look for in analyzing a business or an individual to determine fraud, or theft, or deceit?

MR. CUMMINGS: Your Honor, may we approach?

THE COURT: Yes.

(Whereupon a sidebar was held as follows).

MR. CUMMINGS: This is going to be the same, Your Honor. Same issue as Mr. Lloyd. Whether the characteristics track closely to this case, and especially after he laid out all the evidence, and then he asked what characteristics, he's going to go over what the characteristics were as to what the evidence just said. I think that's highly prejudicial, and also for the jury.

MR. TAYLOR: He's giving his opinion as to what characteristics of financial fraud are. I mean, that's -- as an expert, he's qualified to do that.

THE COURT: Go ahead.

MR. CUMMINGS: I was going to say, if you go back to the Moore case, though, what concerned at least one judge on the Court of Appeals there, was that the characteristics track too closely to the case.

THE COURT: Is that the concurrent opinion?

MR. CUMMINGS: Well, it was the -- it was the opinion of the Court that wasn't joined by the two other judges.

THE COURT: Okay. So --

MR. CUMMINGS: So --

THE COURT: Yeah.

MR. TAYLOR: And I'm not asking him to talk -- I'm asking him in general right now.

THE COURT: Mm-hmm.

MR. TAYLOR: And if I recall --

THE COURT: Yeah. The case law says you can ask generally, but you can't tie it specifically to the case. It's part of why I changed my mind on the objection to the material omission because it seemed to me that the case law says that you can't tie it to the case, you can't say that, pursuant to Utah law, these are the things --

MR. TAYLOR: Right.

THE COURT: But a witness can testify generally -- an expert witness can testify generally as to things he looks for, or, you know, things of that nature, as long as it's not tied to this case. So, if you're going to ask generally what characteristics somebody looks for in the -- in the industry, and so forth, I think that was the testimony that the Court of Appeals -- and I can't

remember if it's the Davis case, or Judge Greeley had said was okay. But you cannot say, based on my review in this case, here is what I saw.

MR. CUMMINGS: And that's where that question was going. Because he said, you sat through all the testimony, you've heard all the evidence, we just reviewed all the bank records. Generally, what do you look for?

THE COURT: Mm-hmm.

MR. CUMMINGS: It's tied directly to the case.

MR. TAYLOR: I can rephrase that question. I can say, based on your experience, in your profession in general, what are -- what are characteristics of financial fraud?

THE COURT: Okay. Well, you need to make sure that the witness does not say, "well, in this case here's what I saw.".

MR. TAYLOR: Yeah.

THE COURT: He can testify generally in the industry the things that are looked for, or that somebody looks for in his position, when he's analyzing, you know, in general cases. He can testify about that. But he can't say," well, in this case, here's what I saw."

MR. CUMMINGS: I would still like to lodge an objection that, at this juncture in the direct

examination, there's no way to have this untethered from the case, after he's laid out all the evidence --

THE COURT: Well, he can --

MR. CUMMINGS: -- gone through all the exhibits, so...

THE COURT: -- he can testify about things that were red flags to him.

MR. CUMMINGS: Sure.

THE COURT: That's what he's testified to --

MR. CUMMINGS: Sure. And he -- and he has.

THE COURT: --thus far.

MR. CUMMINGS: But now on a summation saying, what do you look for in fraud, I -- I, just at this point, I would like to lodge the objection.

THE COURT: Okay.

MR. CUMMINGS: You can, of course, overrule it, but --

THE COURT: So -- so, your objection is sustained as to anything -- if the intent was to get him to go through this case and say, what's fraudulent in this case.

MR. TAYLOR: Well, he can opine as to whether there are characteristics of financial fraud in this case. I mean, he's allowed to do that under Rule 704. His testimony -- expert testimony that embraces the ultimate

issue.

THE COURT: So, this is the part of the law that I think is sometimes confusing to lawyers, and I don't profess to be the person that knows this, but as a general proposition, a witness -- and I think Moore and Chapman say that an expert witness, in certain circumstances, can give their opinion about the ultimate issue in a case. But there are some situations where they can't.

And if I'm going to err on the side of not creating an issue for appeal, it would be, you get where you want to go by having the witness testify about what characteristics of fraud that he looks for generally, rather than having him say, you know, here's what I saw was fraud in this case.

MR. TAYLOR: Well, it -- in that case, Your Honor, what I'll do is I'll ask him, in general, based on his practice and his knowledge of --

THE COURT: Right.

MR. TAYLOR: -- of forensic accounting --

THE COURT: Mm-hmm.

MR. TAYLOR: -- what are some characteristics of financial fraud? And then I guess the Court's -- under the Court's ruling, I'm -- I'm just -- I'll have to leave it at that.

THE COURT: Well, and then you can argue it. You can argue it to the jury. Right? But I -- is there any case law that identifies what -- that says a witness -- an expert witness in this situation can say, well, here's the fraudulent things that I saw in this case?

MR. TAYLOR: If I could have a second, Your Honor?

THE COURT: Okay.

(Inaudible conversation).

MR. TAYLOR: Judge, our understanding of case law is that this is territory we can get into, and I would cite the Larsen decision from 1993. Now, that was a case where a securities expert testified, and I believe the Utah Supreme Court held that the securities expert could opine as to whether the -- the alleged material -- omissions were material -- would be material or important to the average investor.

And in addition to that, the Chapman case, we believe, is actually supportive of us, and if the -- I don't mean to ask for a recess, but if the Court wanted to review that, I believe that there's a part of that decision --

THE COURT: There is.

MR. TAYLOR: Well, I believe that there's a part of that decision which says that --

THE COURT: Yeah, and that's why I say, to talk --

let's give the jury a recess and we can talk about this--

MR. TAYLOR: Okay.

THE COURT: -- at length. Okay?

MR. TAYLOR: Okay.

(End of sidebar).

THE COURT: Members of the jury, we're going to take about a five or 10-minute recess. Please do not talk about the case. We just need the time to put some things on the record.

Raine?

(Whereupon the jury left the courtroom).

THE COURT: Please be seated. All members of the jury have now left the courtroom.

The discussion regarding the question asked of Mr. Curtis is -- at sidebar is on the record, and I asked the jury to step outside so that we can talk about this more thoroughly rather than on the record. The state has identified State V. Larsen and State v. Chapman. And let me read this part of Chapman which, again, is what I had indicated to the parties at sidebar.

There are certain things that, under State v. Chapman, an expert witness can testify about. And in fact, State v. Chapman says, quote, an expert witness may testify in the form of an opinion, and can opine on an ultimate issue at trial, so long as that testimony is

otherwise admissible under the rules of evidence.

And then it -- well, and the next -- and then it cites Rule 704. And then it goes on and says, 'an opinion is not objectionable just because it embraces an ultimate issue. An expert witness exceeds the scope of permissible testimony when the witness's legal conclusions blur the separate and distinct responsibilities of the judge, jury, and witness, or there is a danger that the juror may turn to the witness's legal conclusion rather than judge for guidance on the applicable law.'

So, and I'll read the next sentence, because I think it demonstrates why we are struggling with this issue.

The case says, 'no bright line separates permissible ultimate issue testimony under Rule 704, and impermissible overbroad legal responses a witness may give during questioning, and the trial court has wide discretion in determining the admissibility of expert testimony.'

So, as I indicated to counsel at sidebar, there is no complete exclusion of an expert witness from testifying or giving an opinion, or opining on the -- on an ultimate issue at trial. And that's what the case law says. The -- but there are cases, there are situations

where I think the -- the expert witness can overstep their bounds and takes away the determination from the jury as to the ultimate issue at hand. And if that's the case, or when that is the case, the trial court should not allow the witness to give their opinion about certain things. If it appears that that is going to take away from the jury, or the finder of fact, their responsibility of making the ultimate determinations in this case.

Okay. So, the objection has been made by Mr. Cummings. Let me hear, Mr. Taylor, what your position is, and exactly what question, and what you are seeking from the witness, and then I'll hear from Mr. Cummings and make a ruling.

MR. TAYLOR: First, the question that I'm asking Mr. Curtis is, in his experience, if there are certain characteristics that he looks for in analyzing a business or an individual to determine fraud, deceit, or theft. And I could rephrase that to make it clear that I'm asking based on his experience, his knowledge, and -- as a forensic accountant, to explain what those characteristics are. I believe he would give off a list of certain characteristics. For example, business activity is dependant on outside investor money -- investor money not used for its stated purpose, business

enterprise lacks profits sufficient to provide the promised returns to investors, high rates of return relative to the promoted investment risk, business experiences -- that the business experiences increasing insolvency, and preferential treatment to certain investors, disregard to corporate formalities. Those are characteristics of financial fraud that he would outline or list.

And then I would ask him, after reviewing the financial records associated with this case, and listening to the testimony at trial -- and perhaps I should've asked this later -- but based on generally accepted accounting practices, do you see any of these characteristics present in this case? And I would ask him to identify any such characteristics that he -- that he has observed in this case. And I would ask him if he had an opinion as to whether the defendants engaged in the course of business which operated as a fraud, deceit, or theft.

I would ask him, what is your opinion? And I believe that he would testify that he does see what appear to be the characteristics of financial fraud, and he would outline which ones he sees.

THE COURT: Okay.

Mr. Cummings.

MR. CUMMINGS: I think the witness has already testified to most of that. He's used the term red flag multiple times. He's said that certain charges are troubling. And so, he's given an expert opinion as to what the summaries elicit, what the charges -- what he believes the charges reflect.

And in Moore, I think this is important, as the Court has said, an expert witness can tie their opinion -- can't tie their opinion to law -- to the law -- to Utah law, but can embrace an ultimate conclusion, but at the end of this paragraph 22, the court says, 'other jurisdictions have determined that expert witness testimony that encompasses an ultimate issue is generally admissible when it alludes to an inference that the trier of facts should make, or uses a term that has both a lay factual meaning and a legal meaning, and it's clear that the witness is using only the factual term.

And in here, the -- it's the legal meaning of fraud. This is indicia of accounting fraud, this is indicia of an enterprise running in a fraudulent manner. I believe that the accounting expert, Mr. Curtis, has laid out all the information, and the jury needs to draw that final inference of whether it constitutes legal fraud.

THE COURT: Okay.

MR. TAYLOR: And --

MR. CUMMINGS: And I would also say it's prejudicial under 403 considering the sequencing of the questions and where we're at in questioning.

THE COURT: Okay.

MR. TAYLOR: If I may, Your Honor?

THE COURT: Sure.

MR. TAYLOR: My recollection of the Moore opinion is that the witness cannot tie his opinion to the requirements of law. In Moore, we're talking about securities fraud, and, of course, there's a lot of gray area when it comes to what the law is -- Utah law, and what the securities statutes say.

Here, we're not talking about the law. We're talking about generally accepted accounting principles. So, there's that distinction.

And also, again, I'm not asking him to -- to say, this is fraud, it's just that these are characteristics of fraud which I see, and that's the distinction there.

And finally, the Chapman decision, in Chapman, the court recognized that where the expert does not specifically testify that the defendant was guilty, or that as a matter of law the facts satisfied the legal standard, I believe the court upheld the expert testimony that was rendered in that case, which was from a

securities expert, I believe.

THE COURT: Okay.

MR. TAYLOR: So, there are those distinctions.

THE COURT: Anything further?

MR. CUMMINGS: I did, and I just totally lost my train of thought. Hold on, one moment.

I don't think my -- I would have an objection if Mr. Curtis testified that certain accounting practices here, as evidenced by the banking records, violated GAAP, or the Generally Accepted Accounting Principles. But it's the -- it's the connection of, do these bank records show fraud? Are these -- you know, what you have reviewed here, is this a fraudulent scheme? And to me, there's an important difference between those two -- between those two lines of questioning.

THE COURT: Okay. Anything further?

So, I'm going to allow the testimony to go through as long as there is no mention of, under Utah law, or under the laws of the State of Utah, or federal law, and so forth. The witness has already testified that he -- I mean, there -- I'm assuming -- and I think I'm correct -- that there are investigations in the industry looking for fraud, or fraudulent conduct, that may not necessarily rise to the level of a criminal offense, that there -- you know, that they may be different. So, so long as the

questioning is tied to the witness's experience as a fraud investigator, his experience in the industry, what the industry looks like, what the industry looks for, and so forth, I -- the testimony can come in. Particularly because testimony related to, what are characteristics of fraud, are not things that are within the kin or the understanding normally of a layperson, it's information that normally would come from an expert, defining what the industry believes are things that are looked for, characteristics, and so forth.

It's part of the reason that I changed my mind and allowed the testimony regarding what the industry considers is material information and so forth during the testimony of Mr. Lloyd. So again, I think so long as the questioning and the answers do not touch on, you know, the ultimate question under Utah law, or under the statutes and so forth, as to what is fraudulent, what is securities fraud, and so forth. The witness can testify about his understanding, what is the accepted standard and characteristics in the industry, and so forth.

Any clarification needed?

Any objection if -- well, Mr. Curtis is here on the witness stand, and I think he's heard the Court's ruling, but I -- as I've indicated in the past, if counsel believe that they are going into an area that might cause

an issue, unless there's an objection, I would be fine if leading questions are used.

Mr. Cummings?

MR. CUMMINGS: I would just like to put on the record that, as with Mr. Lloyd, the initial round of questions with Mr. Lloyd, I don't believe that it's helpful to the trier of fact. And I understand the Court's ruling, we'd just like the record clear that part of our objection is also on that aspect.

THE COURT: Yeah. And I looked at the Chapman case, I think Chapman and Moore -- or one or the other, and the Court of Appeals in one or both of those cases determined that when the witness -- and I think it was Mr. Lloyd, actually, testified -- he testified generally enough, or sufficiently general, did not say that under the laws of the State of Utah this was the case, and my recollection of the question asked by Mr. Palumbo was, according to the industry, or in the industry, yada, yada, yada.

And the case law seemed to me to say that there's not an absolute prohibition against an expert testifying about what a material omission, or what material information is. It depends on the case. And I think in this case, the -- the conduct and the things -- the subscription agreements, things of that nature, are

things that I don't think the ordinary citizen, ordinary juror, would understand unless they have some specialized knowledge. And so, it was necessary for Mr. Lloyd to give that information during his testimony. Okay.

Shall we bring the jury in? Raine?

While Raine is doing that, let me also indicate the following -- in case I forget, will one of you remind me? All the jurors have to leave their copies of the exhibit here. They cannot take them home. But I don't want to forget that. In other words, I don't want somebody taking it home and looking at it tonight. They can look at them here and review them, and then when they're done, they leave everything, and they go home, and come back, and so forth. I think that's the way it should be done, because we don't let them take any exhibits home.

(Whereupon the jury entered the courtroom).

THE COURT: All members of the jury are now in the courtroom, all counsel are present, and the defendant is present.

Mr. Taylor?

MR. TAYLOR: Thank you.

THE COURT: And Mr. Curtis resumes the witness stand, he's previously been sworn in.

Q. (BY MR. TAYLOR) Mr. Curtis, a couple more questions. I can't remember where we left off, so let me

ask you this. You indicated that you have particular experience investigating and analyzing records of companies or individuals alleged to have engaged in fraud, deceit, or theft? Is that correct?

A. Yes. That's right.

Q. In your experience, and based on your practice, are there certain characteristics that you look for in analyzing a business or an individual to determine fraud, deceit, or theft?

A. Yes.

Q. Can you briefly explain what those characteristics are in general?

A. Generally, yeah. As it relates to investment fraud, there would be things like misrepresentations, financial -- that could be financial statement misrepresentations, or misrepresentations of how the money's being used, or failure to disclose material information, or that could be omissions.

So, if the party has knowledge of material information and does not disclose that to investors, that's important. Disregard for corporate formalities. That's where corporations -- business and personal could be commingled and confused, that could be part of that, or disregarded in that way. A business being dependent on investor money. Investor money not being used for the

stated purpose that's stated to investors, it's used for other purposes or unauthorized purposes. Those are -- those are some of the main characteristics we look at.

Q. Maybe you touched on this, but what about the business enterprise lacking profits sufficient to provide the promised returns to investors?

A. Yes. And also, you know, sometimes businesses are insolvent, that means their liabilities exceed their assets, or they become further insolvent as they continue to operate, or operate with very small capital, or undercapitalized.

Q. Thank you. After reviewing the financial records associated with this case, and after listening to the testimony of this trial, based on generally accepted accounting practices, do you -- and principles, do you see any of these characteristics present in this case?

A. Yes.

Q. And which ones, in your opinion?

A. Right. I see characteristics of misrepresentations and omissions, of investor money not being used for the stated purpose, of inadequate capitalization or lack of capital to operate the business. Those are the main ones that come to mind. And dependence on investor money, obviously.

Q. Are those all characteristics that you see?

A. Yes.

MR. TAYLOR: If I could have a second, Your Honor?

THE COURT: Yes.

Q. (BY MR. TAYLOR) Mr. Curtis, what is the significance of -- or what is the importance of keeping money where it belongs?

A. I think it has to do with the representations that are made to -- to those that are owed a duty. For example, those that put the -- put money into a company to invest.

MR. TAYLOR: No other questions. Thank you.

THE COURT: Cross?

CROSS EXAMINATION

BY MR. CUMMINGS:

Q. Mr. Curtis, my name is Robert Cummings. We spoke several months ago, I believe, in Ms. Tangaro's office. I'm the attorney representing Mr. Buttars in this matter.

You're working for the state today essentially, is that correct?

A. That's correct.

Q. And you're being paid to be here, right?

A. Yes.

Q. And you were hired by the prosecutor to come provide this testimony, correct?

ADDENDUM E

Lloyd.

THE COURT: Okay. Would you ask Mr. Wood, if he's not in the courtroom -- he is here. Mr. Wood, make your way up --

MR. PALUMBO: I'm sorry, it's Brian Lloyd.

THE COURT: Oh, Lloyd?

MR. PALUMBO: Yes.

THE COURT: Okay.

Mr. Lloyd, come on up here to the witness stand on my left, and we will ask you just before you have a seat to raise your right hand and take the oath from the clerk.

BRIAN GLEN LLOYD

Having first been duly sworn, testified upon his oath as follows:

THE COURT: Okay. Thank you, sir. Go ahead and have a seat. That microphone in front of you, this is obvious, does two things, it records what you say, and also amplifies what you say, so if you'll speak into that, that will help the jurors hear what you have to say, and also make our record clear.

Mr. Palumbo, whenever you're ready.

DIRECT EXAMINATION

BY MR. PALUMBO:

Q. Sir, could you please state your full name

for the record?

A. Brian Glen Lloyd.

Q. And Mr. Lloyd, could you describe your educational background?

A. I have an undergraduate degree in finance from Brigham Young University and a law degree from Columbia University.

Q. And you mentioned that you have a law degree. Are you admitted to practice anywhere?

A. In the state of Utah.

Q. And when were you admitted to practice in the state of Utah?

A. In 1989.

Q. What's your current occupation?

A. I currently serve as the chief legal officer of Merit Medical Systems located here in the valley.

Q. And prior to holding that position, what did you do prior to that?

A. I practiced law in the areas of corporate governance, securities, and mergers and acquisitions for about 20 -- 26 years.

Q. And did you have any titles or distinctions during the time of practicing law?

A. Well, at the time that I left private practice to take my current position, I was a shareholder

in the firm of Parr Brown Gee and Loveless, a law firm here in Salt Lake City.

Q. And could you describe some of your duties at Parr Brown?

A. I represented a number of clients, primarily in securities, either financing or reporting transactions, corporate governance, mergers and acquisitions.

Q. And have you ever been affiliated with any bar sections related to any area of practice?

A. I have been. I have been a member of the securities section of the Utah State Bar throughout most of my career.

Q. And have you ever testified in court about security matters?

A. Yes, I have.

Q. About how many times?

A. Probably -- actually, in court testimony, six or eight times.

Q. Okay. And were those civil cases or criminal cases?

A. They were primarily criminal cases.

Q. Could you give the Court a basic definition of a security?

A. Now, the easiest way to understand a

security, in general terms, is that it's an investment.

Q. Can you give some examples of what a security might be?

A. Sure. It could be the acquisition of stock in a company, it could be the ownership of a partnership interest, it could be an ownership interest in a limited liability company, it could be certain types of notes that are made for investments are securities, bonds are securities, options and warrants are all forms of securities.

Q. And based on your experience in the securities industry, does a security have to be in writing?

A. No, it does not.

Q. Based on your experience in the industry, is there any specific set of laws that exist in the various states and federally that regulate securities?

A. There are. There are laws both on the federal level, and then each individual state has adopted laws which govern the regulation of securities.

Q. And has Utah adopted its own securities laws?

A. It has.

Q. Based on your experience in the securities industry, could you explain how security differs from other types of consumer transactions? For example, like

-- how does a security differ from buying a refrigerator?

A. Well, in the industry relating to securities, that industry is regulated because a security involves trust, it involves an -- as I mentioned earlier, an investment in -- with the expectation of profit.

When you purchase a hard good, a car, a refrigerator, you have an opportunity to open and close the doors, and the expression with cars is, you kick the tires. You can look at it, you can touch it, you can feel it, and you can assess what that object is, and what kind of condition it's in, whether it's been treated well, or whether it's been abused.

When you purchase a security, you're relying on the representations that are being made to you by the seller of the security, and it's much more difficult to kick the tires, so to speak. And so, the federal and state securities laws operate under the presumption that a seller of securities has an obligation to make disclosure so that a purchaser can assess what it is that he or she may be purchasing.

Q. And you mentioned a minute ago that sellers of securities may have certain obligations. Could you describe what some of those obligations are?

A. In general, the obligations in the industry are that they have an obligation not to make

misstatements of material facts, not to omit information that's necessary in order to understand material fact.

Q. And based on your experience in the securities industry, could you explain how fraud is defined in the securities industry?

A. Generally, it's -- fraud is considered when you have a misstatement of material information, or the omission of material information necessary to address a misstatement, or a deceit.

Q. And you mentioned the phrase 'material statements'. Based on your experience in the securities industry, could you give some examples of what material statements may entail?

A. That's -- it's information --

MR. CUMMINGS: Objection, Your Honor.

THE COURT: Approach.

(Whereupon a sidebar was held as follows).

MR. CUMMINGS: This is the situation, I believe that the Chapman court addressed two things, one is defining what is a material misstatement, the second thing is providing examples. My concern is that the examples are going to be too closely related to this case, and at least one judge in -- was it Chapman, or --

THE COURT: Moore.

MR. PALUMBO: I think you're thinking of Moore.

MR. CUMMINGS: Moore, thank you.

MR. PALUMBO: (Inaudible).

MR. CUMMINGS: But it was too prejudicial to give the examples of the statements. The second thing I would submit is that in this case, all these statements or alleged statements and alleged omissions are squarely within a reasonable jury's mindset. It's not needed. We don't need expert testimony to say that -- whether a jury will -- a reasonable investor in a jury's mind will say what about credit card debt needs to know about the prior (inaudible) stuff along those lines. It's not complex.

MR. PALUMBO: And Your Honor, I have a copy of the Moore decision if you would like it for your reference, but I believe the issue in Moore is that there was a discussion of material misstatements, and how the security expert defined them. The issue was that the expert in that case was opining on what the law said rather than what the industry dictates. And so, when I ask, based on your experience in the industry, I'm not asking the expert to tell me what the law is. I'm asking him to tell me what his experience in the industry when he forms his opinion.

MR. CUMMINGS: The distinction with that is the (inaudible) would still be able to make a conclusion that's in the jury's providence. And again, these aren't

complex issues.

MR. PALUMBO: I'm simply asking also for an example of what the material misstatement might be. I'm not asking the expert to talk about what's going on in this case, and to tell the jury that what's happening in this case is a material distinction.

THE COURT: If the wit -- if the witness says something that is -- was a material omission in this case, do you see that as a problem?

MR. PALUMBO: Pardon me?

THE COURT: If the witness says -- gives an example of a material omitment -- a material omission, and it's something that was done in this case, do you see the problem with that?

MR. PALUMBO: No, because I think he could provide a number of examples, as long as the examples don't exactly track the facts of this case, and he's not --

MS. TANGARO: And that's what she's asking.

THE COURT: That's what I'm saying.

MR. PALUMBO: But I'm saying, if those are the only examples he provides, rather than providing a -- you know, an inclusive list of various types of examples in other cases that would be material --

THE COURT: Do you anticipate that the witness will give examples that are included in this case?

MR. PALUMBO: Yes. Yeah. But not exclusively.

THE COURT: Mm-hmm.

MS. TANGARO: I don't think that's --

MR. CUMMINGS: That's the concern.

MS. TANGARO: I think that's objectionable (inaudible).

THE COURT: Okay. I'm going -- I'm going to sustain the objection for now, but you can ask the witness to define what the definition is of material statements, and so forth, but I don't think it would be appropriate for him to give examples that would include what was mentioned in this case because then he would be saying, you know, that's a material omission (inaudible).

MR. PALUMBO: Sure.

THE COURT: Okay.

MR. PALUMBO: Thank you.

(End of sidebar).

Q. (BY MR. PALUMBO) Mr. Lloyd, based on your experience in the industry, could you give a working definition of material misstatement?

A. Well, it would be a misstatement of information that a reasonable investor would consider important in making a decision whether to purchase or to sell a security.

Q. In the context of the securities industry,

are you familiar with the term, 'willful'?

A. Yes.

Q. And in the securities industry, what does that term mean?

A. It's generally understood to mean an intentional -- in the case, for example, of statements, an intentional statement.

Q. And based on your experience in the industry, is a seller required to disclose all material information?

A. A seller is -- the industry expectation is that a seller will not misrepresent any material information or omit to provide material information that's necessary to correct a misstatement.

Q. With respect to a purchaser of a security, in the securities industry, does a purchaser of a security have any obligations?

A. None, other than a contract they may enter into.

Q. On the part of a purchaser of a security, is there any legal obligation in the securities industry for a purchaser to engage in any kind of due diligence or investigation?

A. No, there's no obligation on the part of the purchaser.

Q. I'd like to refer now -- I believe earlier you mentioned some examples of things that are securities. And I believe you mentioned stocks. Could you please explain what a stock is?

A. Yes. Stock represents an ownership interest in a particular type of enterprise called a corporation. And so, a corporation takes in money from investors or other purchasers, and in exchange for the proceeds that it receives, it can issue shares of stock, which represent the ownership interest in the corporation.

Q. And does acquiring stock come with any rights or obligations?

A. Well, stock is, in the industry, considered to be a security. And so, a party which sells shares of stock is subject to the obligations we've discussed, not to make material misstatements, and not to omit information that is necessary to correct a misstatement, not to engage in deceit.

Q. And are there different types of stock?

A. There can be, yes.

Q. Can you give some examples of what those different types of stock might be?

A. Principally you have either common stock or preferred stock.

Q. And what's the difference between those two?

A. You know, it varies based on the corporation and the type of stock, but generally common stock is the basic form of ownership interest in a corporation. It may be voting stock or it may be non-voting stock, but it is the evidence of an ownership interest which would then permit a shareholder, someone holding that stock, to receive the benefits of the operations of that corporation.

Preferred stock is called preferred because it has some type of a preference, which means, maybe it has the right to receive payment from the corporation before payment goes to the holders of the common stock, maybe it has the right to vote in preference to the holders of the common stock. It may have a right to liquidation in preference to the holders of the common stock, or even within the preferred holders, there may be a structure that some preferred holders have benefits that are superior to the benefits of other preferred holders. But preferred stock just indicates that it has some type of right or privilege that ranks ahead of another group of shareholders.

Q. A moment ago you mentioned that there are -- there's voting stock and non-voting stock. Could you just briefly describe what the difference between those two types of stock are?

A. Sure. The -- in general, shares of stock entitle the shareholders to vote on certain matters relating to the operating of the corporation. They may be able to vote regarding the election of directors. They may be able to vote regarding certain business activities. And so you can have common stock, which is voting common stock, and permits the shareholders to vote on those matters.

You can have common stock which is non-voting, which means that except in certain very limited situations, the shareholders holding that non-voting common stock do not have a right to vote. They simply have a right to receive whatever the economic benefit -- excuse me -- the economic benefit of the corporation might be.

Q. Is another type of security called an investment contract?

A. Yes.

Q. And could you explain what that is?

A. Yes. An investment contract is a contract between two parties which is formed by an investment in a common enterprise with the expectation of profits to be generated from the activities of one of the parties.

Q. And is another type of security called a warrant?

A. Yes.

Q. And what is that?

A. A warrant generally represents the right to acquire another security. And so, a warrant might be the right at some point in the future to purchase shares of stock. And the warrant is a contract that's executed that gives a party the right to purchase shares in this -- you know, in -- an example I'm using, to purchase shares of stock at some point in the future.

Q. And I'd like to maybe take a step back and ask you, in the securities industry, if there are multiple sellers of a security, do -- what are the obligations of each of the sellers?

A. Each of the sellers would have the same obligations as the other -- the obligations we've discussed previously.

MR. PALUMBO: Your Honor, if I could have a moment?

THE COURT: Yes. Could I ask counsel to approach one more time?

(Whereupon a sidebar was held as follows).

THE COURT: So you guys know this case has been around and I just read a new case and Judge Davis did not find any problem with a witness - with this witness generally stating examples, so long as it wasn't something that explicitly mirrored (inaudible) used

occurred in this case. I understand that there was some comment about a concurrence by a judge hearsay from one of the other judges, but the state of the law doesn't seem to say that any stating of examples is is exclusively precluded. I think it's so long as it doesn't explicitly -- I mean, it could mention these things as an example, as long as the witness is -- is not saying, well, in this case, this conduct would be -- and that's what paragraph two says --

MR. PALUMBO: That is my understanding of the law, too, Your Honor.

THE COURT: -- in Moore, right? So, the witness in Moore gave a definition of material, and then gave a list of examples. And the opinion was that the list of examples was general enough that it was okay -- that an expert witness can give that opinion, so long as it's not explicitly tied to, or the words used, explicitly mirrors the allegation made in this case. You don't anticipate, if you were to ask the witness, that he would just list these things and then talk about how the allegations in this case --

MR. PALUMBO: I don't anticipate that, Your Honor.

THE COURT: Okay.

MS. TANGARO: Well, have you discussed it with him?

MR. PALUMBO: Yes.

MS. TANGARO: Okay.

MR. CUMMINGS: One -- I would still like my objection. Candidly, Moore is one judge.

THE COURT: Okay.

MR. CUMMINGS: So it's not a majority (inaudible).

THE COURT: Sure, sure. And it's the Court of Appeals.

MR. CUMMINGS: It's the Court of Appeals, too, so there's --

THE COURT:Supreme Court could still say something--

MR. CUMMINGS: It's still an open issue.

THE COURT: Mm-hmm.

MR. CUMMINGS: I do think there's issues of law here.

THE COURT: Sure.

MR. CUMMINGS: Specifically giving examples. And it's -- and again, with this case, different (inaudible) this case, the issues that we're discussing are squarely within the layman's understanding of what it is (inaudible). We're not talking complex issues, we're talking (inaudible).

THE COURT: Okay.

MR. CUMMINGS: So...

THE COURT: Okay. So, I'll allow it, as long as you're within the parameters of State v. Moore.

MR. PALUMBO: Okay.

THE COURT: Okay?

MR. PALUMBO: Thank you.

(End of sidebar).

MR. PALUMBO: And, Your Honor, if I could just have a moment?

THE COURT: Yes. Sure.

Q. (BY MR. PALUMBO) Mr. Lloyd, just a few more questions. Based on your understanding of the securities industry, a few moments ago we discussed the issue of material information. Could you give some examples, in the securities industry, what material information might include, just generally?

A. Yes. It depends on the individual entity, but material information would be again information that's important to an investor making a decision. It could include information about the business, the underlying assets of the business, if those assets are fixed assets that you can touch and feel, or are they technology assets where you have to understand the nature of the particular technology. It would include information about the management, who is it that's running this enterprise, what's their background, what's their experience, have they ever been involved in criminal or other inappropriate activity, have they ever

been sanctioned by regulators.

It can involve looking at the financial information about the enterprise in order to determine whether the financial assets are sufficient to conduct the operations, and what the -- what the financial statements look like. It could include risks, what are the risks of the business, where could this business have problems in the future, and what's the type of information that an investor would want to -- would want to know about potential risks? Those are a few examples.

Q. Thank you. And a few moments ago, you described various types of securities. Does a security have to fall into only one category?

A. No, you could have instruments which satisfy multiple categories.

MR. PALUMBO: Thank you.

And Your Honor, if I could just have one more moment?

THE COURT: Yes.

MR. PALUMBO: Thank you, Mr. Lloyd. Those are all the questions I have.

THE COURT: Okay. Cross examination?

MR. CUMMINGS: Thank you, Your Honor.

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CROSS EXAMINATION

BY MR. CUMMINGS:

Q. And good afternoon, Mr. Lloyd. We met previously several months ago.

A. Good afternoon.

Q. But just to refresh your memory, my name's Robert Cummings and I'm representing Mr. Buttars in this action.

Now, securities can kind of be an ominous word. But as you said, a security is ostensibly or essentially an investment, right?

A. Generally, in the industry, that's correct.

Q. Now, I want to give you a definition, and I want to see if you would understand -- or if you would agree with me. But a security is one person giving another person money, and this other person has the discretion on how to use the money, but the original person has an expectation of profit. Is that kind of a fair layout, or --

A. Yeah, roughly, I think that's accurate. Again, it's generally, in the industry, understood that the type of security you're referring to would be an investment contract, which is where one party makes an investment with the expectation that there will be a profit from the efforts of the other party.

Q. Or a purchase of stock could be the same, couldn't it?

A. Purchase of stock would -- is generally considered to be an investment, so --

Q. Okay. Okay. Perfect. And the company that you work for, Merit Medical, they issue securities, correct?

A. We do.

Q. Are you -- is it a public company, or a --

A. It is publicly traded.

Q. And so, by -- when you say publicly traded, it means that it has shares of stock that are traded on the NASDAQ or some other -- some other market, correct?

A. Correct. They're traded on the NASDAQ exchange.

Q. Okay. Now, in order for your company to go -- to issue those stock, or I think you would agree that the term is called, 'go public', they had to engage in a public offering, correct?

A. That's correct.

Q. And in that process, they did what you might refer to as an IPO, or an initial public offering, and they had to make certain disclosures under what you've referred to as the securities laws, correct?

A. There's a little detail to that, but

generally yes, that's correct.

Q. Well, and that's an interesting point that you bring up. The securities laws are very detailed, right?

A. They are.

Q. IPOs, or initial public offerings that public companies go through, it's a very complex process, correct?

A. It is.

Q. So, very smart men like you that are the general counsels of the company, associate with very reputable law firms, spend a lot of money to issue these stocks, correct?

A. In an initial public offering, that's correct.

Q. Okay. Now, along -- so, those are public offerings. We also have what are called private offerings, correct?

A. Yes.

Q. Now, in a private offering -- so, let me take a step back. In a public offering, the IPO package, there is information disclosed in a complex disclosure, I can't think of the term for what that disclosure would be, I don't know if it's proxy, or what would -- what would the initial disclosure be?

A. You're probably thinking of a prospectus.

Q. Prospectus, thank you. So, in the prospectus, there's detailed, detailed information, correct?

A. Correct.

Q. And all that information is required by the securities laws or the SEC, correct? And then we have private offerings, right? And the same obligations to disclose information are required in private offerings as well, correct?

A. Yeah. In the industry, the obligations of disclosure don't change fundamentally between public and private companies. There are additional obligations that public companies would be subject to; but fundamentally, with respect to the sale of a security, the requirements are the same for public and private companies.

Q. Okay. But would you agree that the Securities and Exchange Commission, or the Utah Division of Securities Laws sets a baseline for the information as required?

A. Yes.

Q. And can -- would you agree also that an investment promoter -- do you understand when I say like an investment promoter, what I mean?

A. I think generally in the industry I

understand what a promoter is.

Q. So, what would be your --

A. In the industry generally, a promoter is someone that is looking to sell securities.

Q. Okay. So, would you also agree that an investment promoter can, through a contract, alter some of the obligations, or at least disclose to an investor, 'hey, I'm required -- I'm relying upon you to do some due diligence here.' An investment promoter can do that, correct?

A. Well, you can't alter the fundamental obligations that we discussed earlier, which are, you can't, by contract, alter the obligation not to make misrepresentations --

Q. Sure.

A. -- or alter the obligation not to omit material information, or alter the obligation not to engage in deceit. Those -- those are established by statute. And so -- so, you wouldn't -- in the industry, you wouldn't see a contract that somehow tries to alter those fundamental obligations.

Q. So, obviously I can't say, in this contract, I may or may not commit fraud, and by signing it, you're relieving me of that obligation. Is that essentially what you just said?

A. That's --

Q. Right?

A. -- that's an accurate statement.

Q. So, putting that aside, other information that might be required, so I can't willfully withhold information, and I can't willfully lie about information with a statement, but additional information, a promoter can tell an investor, you're -- you're relying upon your own due diligence. That can be done, correct?

A. I'm not sure -- again, you can have contractual obligations back and forth, and a promoter can certainly encourage a purchaser to do due diligence. And, you know, most purchasers engage in some form of due diligence. But they can't alter by contract the fundamental obligations that are established by federal and state laws.

Q. I think we're saying the same things. I can't by contract tell an investor I may or may not commit fraud, and I may or may not like you. That's the baseline that I'm discussing here. But if -- let's assume that the information does not fall within that box.

A. Mm-hmm.

Q. Those -- the duties and obligations between the parties can be defined by contract, correct?

A. Well, you can -- you can have a contract that defines what the parties will do in the -- for example, in the course of due diligence. Again, subject to the fundamental principle that you can't alter the federal or state statutes that govern securities fraud.

Q. Sure. So, let me take a step back there. You referenced that you worked at Parr Brown Gee and Loveless before you became general counsel at Merit, is that correct?

A. That's correct.

Q. Now, you did private offerings for clients, correct?

A. I did.

Q. Now, in those private offerings, you prepared subscription agreements for those clients, or something similar, correct?

A. Yes.

Q. And in those agreements, there was listed out representations of warranties, correct?

A. Yes.

Q. And a representational warranty is essentially what the signatory, in this context, the investment -- the person making the investment, it's basically a promise that they're making, is that correct?

A. Yes, that's correct.

Q. Okay. Now, going back, when I initially said securities were ominous, at least to me I think it's kind of a daunting -- daunting concept. And if anybody's ever delved into the SEC rules, it gives me a headache. But they're all over the place, right?

A. Securities?

Q. Yes.

A. Are all over the place? You frequently find securities in most businesses.

Q. In fact, it can -- there can be securities where you don't even think one -- where one exists, right?

A. There could be.

Q. And so, we talked about Merit Medical being a publicly traded company, and stock being traded on like the NASDAQ, but you could have a mom and pop shop that says, 'I have a great idea for this bakery, but I need money.' And one way that a lot of small business owners get money is through investment and securities, correct?

A. That's true.

Q. And so, for an -- and that's why securities are all over the place. Anybody that needs money, an injection of capital, theoretically is entering into the securities realm?

A. In many instances, yes.

Q. And so, just the sheer fact that somebody's giving money to a promoter, doesn't in and of itself create fraud, right?

A. No. It would be dependant on the facts and circumstances of that particular investment.

Q. And in a lot of contexts, or would you agree, that securities are kind of the backbone of our economy? Now, let me specifically add on that, for small businesses and small business growth. Would you agree with that?

A. Yeah, I guess I'm a little unsure exactly what the backbone is, but certainly any small business needs to raise capital, and one of the most common ways to do that is by issuing securities of some form -- some sort.

Q. And in your experience as a professional who worked for Parr Brown Gee and Loveless -- actually, let me take a step back. You admire your old law firm, correct?

A. I do.

Q. Merit Medical, I presume with you being counsel, hires Parr Brown for some of its securities stuff.

A. We do.

Q. Would you also consider -- what other firms

in town would you consider to be reputable securities firms?

A. Oh, there are a number of them.

Q. So --

A. Dorsey and Whitney --

Q. Okay.

A. -- Holland and Hart, I could probably come up with others. Durham Jones and Pinegar.

Q. Ray Quinney and Nebeker?

A. I'm familiar with Ray Quinney Nebeker, yes.

Q. And would you consider them a reputable securities firm?

A. They are one of the oldest firms in the state.

Q. Now -- so, going back to -- with private offerings, a small mom and pop shop needing to raise money, and if somebody wants to go into that realm, it's a complex realm, right? And so, in your private practice, you assisted a lot of people in that arena, correct? In raising money?

A. That's correct.

MR. CUMMINGS: Can I have one moment, Your Honor?

THE COURT: Yes.

MR. CUMMINGS: And it appears -- I just want to reserve my rights. It appears that you'll be appearing

at the end of the trial on behalf of the state to testify, so I'll have questions at that point. But I think that's all.

THE COURT: Can I ask you both to approach? Or all of you?

(Whereupon a sidebar was held as follows).

THE COURT: I'm just kind of confused about that. Is he not testifying today for the -- right now for the state?

MR. PALUMBO: Yes. I think what Mr. Cummings is referring to is that the state intends to recall --

THE COURT: Okay.

MR. PALUMBO: -- Mr. Lloyd at the end of the trial.

THE COURT: Okay.

MR. PALUMBO: To kind of refute some additional securities process.

THE COURT: Okay. That's fine.

MR. CUMMINGS: And to give his opinion.

THE COURT: Right.

MR. PALUMBO: Yeah.

THE COURT: But the issue is that you -- you said you want to reserve your rights to do what?

MS. TANGARO: Just ask him more questions.

MR. CUMMINGS: Ask additional questions. Yeah.

THE COURT: Oh. Sure, sure. I guess what I'm

saying is, if the state doesn't call him, do you want to call him? Do you want to put him on call?

MS. TANGARO: We might.

MR. PALUMBO: Within --

THE COURT: So, that's where I'm going. Yes.

MR. PALUMBO: We're calling him.

THE COURT: Are you? Okay.

MS. TANGARO: It's on my list.

THE COURT: Okay.

MS. TANGARO: (Inaudible).

MR. CUMMINGS: And, Your Honor, I'm just going to telegraph too that I'm going to have some objections on his opinions on the (inaudible) for the same reasons under State v. Moore.

THE COURT: That's fine.

MR. CUMMINGS: So...

THE COURT: That's fine.

(End of sidebar).

THE COURT: Okay. Thank you.

Any redirect?

MR. PALUMBO: If I could just have a moment, Your Honor?

THE COURT: Sure.

MR. PALUMBO: Thanks.

THE COURT: Sure.

MR. PALUMBO: Your Honor, just one question on redirect.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. PALUMBO:

Q. Mr. Lloyd, in the securities industry, you and Mr. -- Mr. Cummings asked you some questions about subscription agreements. Could you just describe again what a subscription agreement is?

A. A subscription agreement is generally understood to be an agreement between two parties that defines the terms of the sale of a security. So, it could relate to stock, it could relate to limit liability company interest, it could relate to partnership interest, but the subscription agreement identifies what's being sold and what's being paid, and then may contain other provisions that relate to the transaction.

Q. And in your experience in the industry, are subscription agreements typically signed prior to, or after the sale of a security?

A. The intention is that they would be executed before, because they define the terms of the transaction. So, to execute it afterwards leaves in question what actually happened at the time the transaction was completed.

MR. PALUMBO: Thank you.

Nothing further, Your Honor.

THE COURT: Thank you.

Re-cross?

MR. CUMMINGS: Not at this time, Your Honor. Thank you.

THE COURT: Okay.

Thank you, sir. You may be excused. And again, subject to recall if either of the parties do.

Next witness for the state?

MR. TAYLOR: The state calls Vince Romney.

THE COURT: Okay. Will you ask Mr. Romney to please step in, if he's not already in the courtroom?

Mr. Romney, if you'll make your way up here to the witness stand on my left, please. And before you have a seat there, please raise your right hand and take the oath.

VINCENT CLIVE ROMNEY

Having first been duly sworn, testified upon his oath as follows:

THE COURT: Okay. Thank you.

DIRECT EXAMINATION

BY MR. TAYLOR:

Q. Can you please tell us your full name?

A. Vincent Clive Romney.

contain the obligations of the parties with respect to the transaction and define what's being sold, and what's being paid, in exchange for that particular security.

Q. And based on your experience, can a subscription agreement alter the obligations of a seller of securities in the securities industry?

A. Well, the subscription agreement defines the obligations of the two parties as it relates to, you know, contractual obligations. So what are the contractual obligations of the two parties? But what a subscription agreement does not and cannot do is to change the fundamental obligations that are established under law with respect to disclosure.

Q. And why is that?

A. We spoke at the outset about how securities are different from other types of items that you can purchase. And the public policy is that, because a security is something that you can't kick the tires, you can't open and close the doors, you can't touch and feel a security the same way you can with a car, or a refrigerator, that the seller of a security has an obligation to make accurate disclosure. And that the seller of a security cannot make misrepresentations, or cannot omit to provide information that's necessary for the purchaser to assess the merits and the risks of the

transaction.

Q. And perhaps we could take that a little further. And you know, if you were to, for example, advise a client in your practice regarding a seller's obligations to make certain disclosures, would you advise -- would you ever advise a client to withhold certain disclosures if it was agreed to withhold those disclosures in a subscription agreement?

A. No, I -- you would not advise a client ever to withhold information that's -- that's necessary for the purchaser to assess the merits and the risks of the transaction.

Q. I believe earlier when you testified previously, you talked about what a seller's obligations are in the securities industry. And could you remind us what those obligations generally entail?

A. Generally, they are not to make misrepresentations, not to omit material information, and not to engage in deceit.

Q. And I'd like to ask you a few questions based on your training and experience of types of things that you might advise a client to disclose, or that you might consider important based on your experience in the securities industry.

Based on that experience, would you consider it an

ADDENDUM F

etcetera. This is not a buyer beware situation, this is a seller beware situation. Purchasing a security is not like purchasing, as Mr. Lloyd explained, a vehicle or a refrigerator, something that you can touch, look at, inspect, take for a test drive. You can't take an investment for a test drive. You're relying even more on what the person selling the security is telling you.

And so for that reason, the securities industry and the law, it all requires the seller to be up front, to make full disclosures about information that the average reasonable investor would want to know. And that's contained in the jury instructions.

If you look at instruction number 45, section three, a material fact is something which a buyer of ordinary intelligence and prudence would think to be of importance in determining whether to buy a security.

And then if you turn to number 46. Under this allegation, the allegation of securities fraud, this is the second paragraph, it is not necessary for the state to prove that the individual investors believed the statements to be true, nor that they relied upon the statements in their decisions making -- in their decision making process. So long as the statements made were such that a reasonable person in similar circumstances would have relied upon the statements in making an investment

ADDENDUM G

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. **DAVID BRUCE BUTTARS**, Defendant.	**FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS** Case No. 131901512 Judge: Vernice Trease

INTRODUCTION

On September 7, 2015, Defendant David Bruce Buttars filed a motion to suppress bank records the State obtained from JP Morgan Chase Bank and Frontier Bank through investigative subpoenas issued under the Subpoena Powers for Aid in Criminal Investigation and Grant of Immunity Act ("Subpoena Powers Act"), Utah Code Ann. Section 77-22-1. The Court held an evidentiary hearing on Defendant's motion to suppress and other motions on September 14, 2015. The State filed an opposition to Defendant's motion to suppress on October 13, 2015.

Defendants filed a reply on November 13, 2015.

On December 3, 2015 the Court heard oral arguments on the Defendant's motion. Assistant Attorneys General Jacob Taylor and Michael Palumbo appeared on behalf of the State. Cara Tangaro and Robert Cummings appeared on behalf of the Defendant. Defendant was present at the hearing. The District Court, having reviewed the written materials filed by the parties and hearing oral arguments, ruled from the bench on December 3, 2015 denying the Defendant's motion. The Court now enters the following written Findings of Fact, Conclusions of Law, and Order denying Defendant's motion consistent with its December 3, 2015 ruling.

FINDINGS OF FACT

The following factual findings are undisputed and based on filings by the parties, exhibits, and testimony obtained during the September 14, 2015 evidentiary hearing in this matter.

The Defendant's September 7, 2015 motion to suppress concerned investigative subpoenas issued by the State between April 2011 and August 2012 under the Subpoena Powers Act during an investigation of Defendant for securities fraud and other crimes. The subpoenas sought bank records from Frontier Bank and JP Morgan Chase Bank.

The subpoenas contained references to an irrelevant section of the Utah Criminal Code, Utah Code Ann. Section 77-22a. Specifically, the subpoenas told the recipients of the subpoenas (JP Morgan Chase Bank and Frontier Bank) that under Utah Code Ann. Section 77-22a, they were prohibited from disclosing the subpoenas to any third party. The inclusion of this language was an error.

Prior to issuing the investigative subpoenas, the State filed a Statement of Good Cause with the Third District Court and obtained an Order authorizing the investigation under the

Subpoena Powers Act from a magistrate. A magistrate reviewed and signed the Statement of Good Cause.

A magistrate reviewed each subpoena before it was issued. The magistrate's review was for the purpose of determining whether the subpoenas were reasonably related to the criminal investigation authorized by the court, as required under Utah Code Ann. Section 77-22-2(3)(b)(ii). The Defendant does not challenge the good cause basis for the criminal investigation or that the subpoenas were reasonably related to the criminal investigation.

The State did not seek or obtain a secrecy order from the Court to keep the investigation or materials obtained through the subpoenas secret.

After serving the subpoenas on JP Morgan Chase Bank and Frontier Bank, the State obtained bank records of the Defendant.

The State did not notify Defendant when it sought an order authorizing a criminal investigation, nor did the State notify Defendant when it issued subpoenas to the Defendant's banks.

The bank records obtained by the state through the investigative subpoenas were used in an investigation that led to criminal charges against Defendant.

CONCLUSIONS OF LAW

The questions presented by Defendant's motion are: (1) Whether the subpoenas issued by the State were unlawful due to the erroneous reference to Utah Code Ann. Section77-22a or because the State did not give notice to the Defendant when the subpoenas were issued; (2) if the subpoenas were unlawful, would the good faith exception apply; (3) and finally, if the subpoenas were unlawful, whether exclusion would be the appropriate remedy.

Although individuals in Utah have an expectation of privacy right in bank records, the State may nevertheless search and seize bank records through a lawful subpoena under the Subpoena Powers Act.

A. The State is Not Required to Give Notice to a Suspect in a Criminal Investigation When the State Issues Subpoenas to Banks for a Suspect's Bank Records

The Subpoena Powers Act does not require the State to provide notice to the subject of a criminal investigation when the State initiates an investigation or issues subpoenas under the Subpoena Powers Act. Neither *State v. Yount*, 2008 UT App 102, 182 P.3d 405 (2008), nor *State v. Thompson*,810 P.2d 415 (Utah 1991), creates a notice requirement for subpoenas issued under the Subpoena Powers Act. Furthermore, the Subpoena Powers Act, itself, does not contain a requirement that the State provide notice to the subject of records when the State issues an investigative subpoena. The notice requirements in the Subpoena Powers Act pertain only to the party to whom the subpoena is issued—in this case, the banks.

State v. Thompson was a case decided under the pre-1989 version of the Subpoena Powers Act and the changes in the Act appear to be a direct response to the issues in *Thompson* and *In the Matter of Criminal Investigation*, 754 P.2d 633 (1988). In those cases, the issues centered on whether a defendant had a right to privacy in bank records, and whether the state should seek judicial approval to obtain bank records because of defendant's expectation of privacy.

B. The Erroneous Reference to Utah Code Ann. Section 77-22a Did Not Render the Subpoenas Unlawful

The inclusion of the secrecy language from Utah Code Ann Section 77-22a in the

subpoenas did not make the subpoenas unlawful or unreasonable under the Fourth Amendment or Article I, Section 14 of the Utah Constitution. The state met all the requirements of obtaining a lawful subpoena by having the subpoenas reviewed and signed by a magistrate who also determined that the subpoenas were reasonably related to a criminal investigation based on good cause.

The secrecy provision of the Subpoena Powers Act exists to protect the innocent and to prevent criminal suspects from having access to information prior to prosecution. The fact that the 77-22a language was included in the subpoenas does not render the subpoenas unlawful. Whether a secrecy order is properly granted is not a basis for attacking the validity of the underlying subpoena. This is particularly true in the present case where the Defendant has not attacked the good cause statement or that the subpoenas were reasonably related to the criminal investigation. The purpose of the secrecy order is not to create a right for the defendant to move to suppress the evidence.

Even if the secrecy provision was not included in the subpoena, there is no evidence that the defendant would have known about the subpoenas or that he would have successfully moved to quash them.

C. Even if the Subpoenas Were Found to be Unlawful, the Good Faith Exception Would Apply

The reasoning applied by the Utah Supreme Court in *State v. Dominguez*, 248 P.3d 473 (2011), is compelling in the present case. Failing to meet perfectly the procedural requirements

of the subpoena powers act, or in this case, including the language from 77-22a, does not automatically implicate the Defendant's constitutional rights. The Court has determined that including the 77-22a language did not render the subpoenas unlawful. But, even if it did, the good faith exception to the exclusionary rule would apply to this case. The state and federal cases that have applied to the good faith exception are on par with the present case. Specifically, the cases dealing with search warrants are instructive.

The ruling in *State v. Thompson,* is based on different facts, and was decided under the pre-1989 Subpoena Powers Act. Under the Act in effect at the time of *Thompson*, the State had the unilateral authority to issue subpoenas without judicial oversight. *Thompson* is distinguishable from the present case due to the fact that the State obtained judicial review of the investigative subpoenas and reasonably relied on the Court's approval of the subpoenas.

ORDER

WHEREFORE, consistent with the District Court's December 3, 2015 ruling from the bench, the District Court hereby ORDERS that Defendant's Motion to Suppress is DENIED.

SIGNATURE CONTAINED ON TOP OF FIRST PAGE

ADDENDUM H

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, -v- DAVID BRUCE BUTTARS, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON STATE'S MOTION FOR ADMISSION OF EVIDENCE** Case No.: 131901512 Judge: Vernice Trease

Plaintiff, the state of Utah (the "State") filed a Motion for Admission of Evidence (the "Motion") on August 28, 2015. The Court held an evidentiary hearing regarding the Motion, along with Defendant David Bruce Buttars' ("Mr. Buttars") Motion to Suppress, on September 14, 2015. Pursuant to the Court's scheduling order entered on the record on September 14, 2015 (docket, 9/24/2015, Hr'ing Trans, at 96-97), the State filed a Supplemental Brief in Support of Motion for Admission of Evidence on October 13, 2015. Mr. Buttars filed his Opposition to the State's Motion on November 13, 2015. Finally, on November 27, 2015, the State filed its reply in further support of

the Motion. Further more the Court incorporates by reference the ruling issued on the record on this motion.

Having considered the briefs and arguments of counsel, the Court hereby DENIES the Motion without prejudice. The State may resubmit the motion and raise Rule 703 second prong and other hearsay issues. As explained below, while the Court finds that the State met its burden of proving the authenticity of the bank records at issue, the bank records are still nonetheless hearsay evidence. And the State has not met its burden of providing sufficient evidence to establish foundation for a hearsay exception to apply. Because the parties did not brief the second prong of Utah R. Evid. 703 (i.e., the probative value of disclosing the bank records to the jury substantially outweighs their prejudicial effect), the Court denies the State's Motion at this time.

BACKGROUND

The State moves for an order of the Court admitting evidence in advance of trial pursuant to Utah R. Evid. 104. Specifically, the State seeks admission of summaries of bank records at issue in this case. In its supplemental brief in support of the Motion, the State argues that the summaries are admissible pursuant to Utah R. Evid. 703, 803(6), and 1006. Mr. Buttars makes two arguments as to why the summaries are not admissible. First, Mr. Buttars argues that the summaries are not admissible based upon his arguments raised in his Motion to Suppress Evidence. (Docket, 9/7/2015.) The Court denied Mr. Buttars' Motion to Suppress. (Docket, 1/12/2016.) Therefore, the Court rejects Mr. Buttars' first argument based upon the reasons stated in the order denying Mr. Buttars' Motion to Suppress. (*Id.*)

Second, Mr. Buttars argues that the summaries are inadmissible because the underlying bank records upon which the State bases its summaries are inadmissible. Specifically, Mr. Buttars argues that the bank records have insufficient foundation and lack authenticity. The Court will address each of these arguments in turn.

FINDINGS OF FACT

1. The State has seven (7) summaries prepared based upon various bank records collected pursuant to subpoenas issued in this case. (Docket, 9/14/2015, State's Exhs. 1 through 7.)
2. The State's accounting expert, John Curtis, prepared the summaries based upon the bank records obtained from JP Morgan Chase and Frontier Bank.
3. John Curtis has been a forensic accountant for 17 years.
4. Based upon the submissions by the parties, Mr. Curtis appears to be qualified to opine as a forensic accountant.
5. Mr. Curtis received and reviewed the bank records.
6. Regarding the Frontier Bank records, it appears that the Agent Nesbit collected the records in person, via U.S. Mail, and also via E-Mail.
7. There are, however, only two custodian certifications provided by Frontier Bank with some of the records.
8. Mr. Curtis testified during the September 14, 2015 evidentiary hearing that it did not appear that any of the bank records were missing.
9. Likewise, Mr. Curtis testified that he received and reviewed the verifications provided by Frontier Bank with the bank records.
10. There are two records custodian certificates from Frontier Bank.
11. Agent Nesbit testified that he received records from Frontier Bank on three or four occasions.
12. The bank records are voluminous in nature.

CONCLUSIONS OF LAW

The State bears the burden of proving admissibility. At play in the State's Motion are Utah R. Evid. 703, 803, 901, and 1006. Each are discussed below.

I. **Utah R. Evid. 1006**

Utah R. Evid. 1006 provides, in pertinent part, "[t]he proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." This is an exception to the best evidence rule, Utah R. Evid. 1002. As noted above, the moving party, the State here, bears the burden of "establish[ing] a foundation that the underlying materials on which [the summaries] are based are admissible evidence." *Trolley v. Square Assocs. v. Nielson*, 886 P.2d 61, 67 (Utah Ct. App. 1994).

Here, the voluminous requirement of Utah R. Evid. 1006 is satisfied. Rule 1006, however, cannot be used as a cover for inadmissible evidence. Therefore, in order to make the summaries admissible, the State must: 1) there must be competent evidence to establish authenticity; and 2) provide testimony to establish the foundation for the underlying bank records.

I. **Authenticity**

Pursuant to Utah R. Evid. 901, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Utah R. Evid. 901(a). The rule provides a non-exhaustive list of examples through which the proponent of evidence can satisfy the requirement. Relevant here are subsection (1) and (4). Subsection (1) states: "Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be." Utah R. Evid. 901(b)(1). Subsection (4) states: "Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Utah R. Evid. 901(b)(4).

These two subsections are met here. To the first subsection, Agent Nesbit is a "witness with knowledge." At the September 14, 2015 evidentiary hearing, Agent Nesbit testified that he either

personally picked up the bank records from Frontier Bank or otherwise received them via U.S. Mail or E-Mail from Frontier Bank. To the fourth subsection, Mr. Curtis, the State's forensic accountant, testified that the bank records appeared to be complete. Therefore, the State has met its burden of authentication as required by Utah R. Evid. 901.

I. **Expert's Reliance on Inadmissible Evidence**

The State contends that the bank records are admissible based upon Utah R. Evid. 703 and 901. Utah R. Evid. 703 provides, in pertinent part, that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." In other words, once the expert is qualified, that expert can rely upon inadmissible evidence. But the rule continues: "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Utah R. Evid. 703.

Regardless if the bank records are ultimately admissible on their own, the Court finds that Mr. Curtis can rely upon the bank records as part of his expert opinion. Mr. Curtis appears to be qualified to testify as a forensic accountant. He has practiced as a forensic accountant for 17 years, and otherwise appears to be competent to testify in that field. Because Mr. Curtis appears to be qualified to opine as a forensic accountant, Mr. Curtis can rely upon the bank records to form his opinion.

I. **Admissibility of Bank Records**

Utah R. Evid. 802 states that "[h]earsay is not admissible except as provided by law or by these rules." While the Court finds that the State has provided sufficient evidence to authenticate the

bank records and that Mr. Curtis can rely upon the bank records pursuant to Utah R. Evid. 703, the hearsay consideration is different than authentication and Rule 703. And the Court finds that the entries on the bank records are hearsay.

The State contends that Utah R. Evid. 803(6) applies here as an exception to the hearsay rule. That rule states that "[a] record of an act, event, condition, opinion, or diagnosis [is admissible] if" certain conditions are met. Utah R. Evid. 803(6). In order to meet this requirement, the State must show: "(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; … [and] (E) neither the source of information nor the method or circumstances of preparation indicate of lack of trustworthiness." Utah R. Evid. 803(6)(A)-(E). The rule provides, however, that (A) through (C) can be "shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification[.]" Utah R. Evid. 803(6)(D).

In short, the State needs to provide foundation in support of the bank records to establish an indicia of reliability. The State has not been able to establish the necessary foundation. The record reflects that there are two records custodian certificates from Frontier Bank, and the State has conceded that there are no other records custodian certificates. Agent Nesbit testified, however, that he received records from Frontier Bank on three or four occasions. Therefore, the State has not met its burden under Utah R. Evid. 803(6) and 902(11)-(12). The bank records contain inadmissible hearsay, and are therefore inadmissible on their own.

Rule 703, however, has an additional component. In order to have inadmissible evidence upon which an expert relies disclosed to the jury, the proponent of the evidence must establish that

the "probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." The parties have not briefed this issue. Therefore, the Court cannot at this point decide the issue of admissibility under the second prong of Rule 703.

IT IS SO ORDERED.

[Court's Signature Appears at the Top of the First Page of this Order]

STIPULATED AS TO FORM BY:

This is not stipulated as to form by the State, as discussed in the concurrently filed Notice of Lodging

UTAH ATTORNEY GENERAL

JAKE TAYLOR
Counsel for the State of Utah
Electronically signed with permission

THE SALT LAKE LAWYERS

/s/ Robert B. Cummings

ROBERT B. CUMMINGS
Counsel for David Bruce Buttars

CERTIFICATE OF SERVICE

On the 15th day of March, 2016, I mailed/delivered/electronically filed a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON STATE'S MOTION FOR ADMISSION OF EVIDENCE**. Either a copy was mailed to the Utah Attorney General's Office, 5272 South College Drive, #200, Utah 84321, or electronic notice was sent to the email address on record with the court.

/s/ Robert B. Cummings

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. **DAVID BRUCE BUTTARS**, Defendant.	**FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER GRANTING STATE'S MOTION FOR ADMISSION OF EVIDENCE** Case No. 131901512 Judge: Vernice Trease

INTRODUCTION

After considering the State's Motion for the Admission of Evidence, as well as all briefs, evidence, and arguments by the parties, the Court GRANTS the State's motion to admit bank record summaries at trial.

FINDINGS OF FACT

On August 28, 2015, the State moved this Court to rule on the admissibility of bank record summaries prior to trial. The State argued, among other things that the summaries are

admissible under Utah R. of Evid. 1006 because they distill voluminous bank records that cannot be conveniently examined in court. Further, the State argued that the underlying bank records upon which the summaries are based are admissible under Utah R. of Evid. 703, or alternatively under Utah R. of Evid. 803(6).

An evidentiary hearing was held on September 14, 2015 during which John Curtis, the State's forensic accounting expert, and Special Agent Scott Nesbitt testified. During that hearing, Agent Nesbitt testified that beginning in 2011 he sought and obtained investigative subpoenas through the Salt Lake County District Attorney's Office. Agent Nesbitt described the process he followed for obtaining the subpoenas, and further testified that he obtained responsive bank records on several occasions from Frontier Bank and JP Morgan Chase. Agent Nesbitt testified that he scanned and made copies of these records and provided them to the Attorney General's Office and the Division of Securities. Agent Nesbitt testified that the records he obtained from Frontier Bank and JP Morgan Chase appeared to be complete. In total, Agent Nesbitt obtained records for six Frontier Bank accounts, and four JP Morgan Chase bank accounts. In addition Agent Nesbitt obtained certificates of authenticity from Frontier Bank and JP Morgan Chase Bank.

Also during the September 14, 2015 hearing, John Curtis testified that he received copies of the bank records from the Attorney General's Office. Mr. Curtis reviewed all of the bank records, which consisted of approximately 500-700 pages. Mr. Curtis determined that the bank records appeared to be complete. Mr. Curtis testified that some check images were missing from the records. However, Mr. Curtis testified, this is not uncommon. Mr. Curtis did not send out his own subpoenas, but he verified and analyzed the records he reviewed. Based on Mr. Curtis's

review, it appeared to him that the bank records were what they purported to be. Based on Mr. Curtis's review of the bank records, he formed an opinion as to whether the transactions at issue in this case had characteristics of fraud.

This Court heard oral argument on the State's motion for the admission of evidence, and other motions, on December 3, 2015.

On February 22, 2016 this Court denied the State's motion without prejudice. The Court issued written Findings of Fact and Conclusions of Law on April 8, 2016. The Court denied the State's motion to admit evidence pursuant to Utah R. of Evid. 703 because, while the State established the first prong of Utah R. of Evid. 703 (i.e. bank records are the type of evidence a forensic accounting expert would typically rely upon), the State did not address the second prong of Rule 703 (i.e. the evidence is more probative to helping the jury evaluate the expert opinion). The Court also held that the State met its burden of proving authenticity of the bank records. The Court invited further briefing on the issue of admissibility of the bank records and/or summaries to address the second prong of Rule 703 and other hearsay issues.

On March 16, 2016 the State submitted its Second Supplemental Brief in support of its motion to admit evidence. In that brief, the State addressed the second prong of Utah R. of Evid. 703. The State also made an alternative argument under the residual hearsay exception, Utah R. of Evid. 807. Defendant filed an opposition, and the State filed a reply. Oral argument was held on May 10, 2016.

On May 23, 2016 the Court issued an oral ruling on the State's second supplemental brief, and GRANTED the State's motion for admission of evidence. The Court incorporated by reference its prior Findings of Fact, Conclusions of Law, and Order from February 22, 2016.

CONCLUSIONS OF LAW

Evidence admitted under Utah R. of Evid. 703 can be used only for the purpose of assisting the jury in evaluating an expert's opinion. Evidence admitted under Utah R. of Evid. 807 can be used for its substance. The Court finds that the bank records and bank summaries are admissible under the residual hearsay exception, Utah R. of Evid. Rule 807. Because the bank records and summaries are admissible for their substance under Rule 807, the Court does not address whether the records or summaries are also admissible under Rule 703.

I. The Bank Records Are Admissible Under Utah R. of Evid. 807

Utah R. of Evid. 807 allows hearsay statements to be admitted even if the statement is not specifically covered by a hearsay exception Utah R. of Evid. 803 or 804, as long as the statement satisfies four prongs:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

Additionally, in order for a statement to be admitted under Utah R. of Evid. 807, the proponent of the evidence must provide the opposing party "reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."

The bank records that the State seeks to introduce were lawfully obtained through subpoena (*See* Order, December 28, 2015). Additionally, the bank records have been properly authenticated. (*See* Order, April 8, 2016, at 5). Taking all facts and arguments into

consideration, this Court finds that the bank records from Frontier and JP Morgan Chase satisfy each of the four prongs of the residual hearsay exception, Utah R. of Evid. 807.

a. The Notice Requirement Has Been Met

On August 28, 2015 the State provided notice to this Court and the defendant that it intends to introduce summaries of bank records at trial. The defendant has been on notice of the State's intent to introduce the bank records and/or summaries for many months.

The State initially sought to introduce the bank records and summaries under Rule 703. However, on March 16, 2016 the State argued for admission of the bank records or summaries under Utah R. of Evid. 807 in its second supplemental brief. Defendant has had an opportunity to respond to this argument in his opposition, filed on April 11, 2016. At that time, a jury trial was not set. It was not until May 10, 2016 that the Court set a four day jury trial for September 2016. The jury trial is several months away. The defendant has had a fair opportunity to respond to the State's argument for admission under Utah R. of Evid. 807. Additionally, the defendant has had an opportunity to cross examine John Curtis and Agent Nesbitt regarding the records. Defendant will have further opportunities to do so at trial. The defendant has a substantial amount of time to prepare to meet the evidence at trial. Therefore the Court finds that the State has satisfied the notice requirement of Utah R. of Evid. 807.

b. The Bank Statements Have Equivalent Circumstantial Guarantees of Trustworthiness

The question under the first prong of Rule 807 is whether the bank records have equivalent circumstantial guarantees of trustworthiness, similar to other exceptions under the hearsay rules such as business records, family records, certain public records, and so forth. In this case, the bank records have equivalent circumstantial guarantees of trustworthiness. There is

both intrinsic and extrinsic evidence to support the trustworthiness of the records. Therefore, the first factor of Utah R. of Evid. 807 weighs in favor of admission of the bank records.

First, although the State cannot produce authentication certificates for all bank records the State obtained from Frontier Bank, the State does have certificates for some of the Frontier bank records.[1] These certificates state the things required by Utah R. of Evid. 803(6) to establish trustworthiness for records of regularly conducted activity. For example, the certificates state that that the records were kept in the usual course of business, and that the entries in the bank records were generally prepared contemporaneously with the events described. In other words, the certificates generally describe the authenticity of records maintained by that bank, and speak to the reliability of the bank records. All Frontier bank records were provided to the State by the same personnel and in the same manner in response to lawful subpoenas.

Further, the bank records have been authenticated under Rule 902 through the testimony of Agent Nesbitt and John Curtis. Agent Nesbitt testified about how he obtained the records through an investigative subpoena. Mr. Curtis is a forensic accountant with 17 years of experience and a CPA. In light of testimony presented about his qualifications, education, and experience, the Court has found that he is an expert qualified to testify and give an opinion on bank records, fraudulent activities related to finances, including investigating and analyzing records of companies, banks, and individuals alleged to have engaged in fraud. Mr. Curtis testified that he received and reviewed the bank records from Frontier and JP Morgan Chase. He also testified that he reviewed these accounts and all the information related to these accounts. It did not appear to Mr. Curtis that any records were missing from the bank records, aside from one

1 JP Morgan Chase provided certificates of authentication that appear to meet the requirements of Rule 803(6).

or two missing check images. But, this is fairly common, and not a big issue in determining the accuracy and so forth of the records. Mr. Curtis also testified that there were approximately 500-700 pages of the records. He reviewed the records to determine if they were what they purported to be and if he could rely on the records to render his opinion. He testified that in every way, the bank records appeared to be authentic documents.

The Court finds that the bank records have equivalent circumstantial guarantees of trustworthiness, and so meet the first prong of Utah R. of Evid. 807.

c. The bank records are evidence of a material fact

It is uncontroverted that bank records and/or summaries are crucial to this case. The bank records/summaries are evidence of a material fact. This factor weighs in favor of admission.

d. The bank records are more probative than any other evidence to show how investor funds were used

The third factor of Utah R. of Evid. 807 weighs in favor of admission. The bank records, and/or summaries, are more probative of whether a fraud or theft occurred because they show what happened to the investment money of victims. There is no other evidence that can be presented or obtained through other reasonable means or efforts to show what happened to investor funds, which is a vital question in this case.

e. Admitting the bank records will serve the best interests of justice.

A jury trial is a search for truth. The evidence contained in the bank records and summaries can assist in that search. Whether the bank records and summaries benefit the state or the defendant is not the determining factor. The testimony given by Mr. Curtis and Agent Nesbitt

is that these records contain information about the money alleged to be invested and how it was used. The bank records come in regardless of whether the records show the money was used appropriately or inappropriately. The purposes of the rules and interest of justice is met when trustworthy, relevant information and evidence is admitted to assist the jury in the search for the truth.

ORDER

The bank records satisfy all four prongs of Utah R. of Evid. 807. The State has also provided notice to the defendant as required under that rule. Therefore, the bank records are admissible for their substance. Because the bank records are admissible, this Court finds the summaries of bank records are admissible under Rule 1006

WHEREFORE, the Court hereby GRANTS the State's Motion for Admission of Evidence.

COURT'S SIGNATURE CONTAINED ON TOP OF FIRST PAGE

ADDENDUM I

Utah Constitution Article I, Section 14

Article I, Section 14. [Unreasonable searches forbidden -- Issuance of warrant.]
The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

U. S. Constitution Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah R. Evid. 403

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977)(surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979); State v. Johns, 615 P.2d 1260 (Utah 1980); Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

Utah R. Evid. 702

Rule 702. Testimony by Experts

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(1) are reliable,
(2) are based upon sufficient facts or data, and
(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah R. Evid. 704

Rule 704. Opinion on Ultimate Issue.

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Utah R. Evid. 801

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Utah R. Evid. 802

Rule 802. The Rule Against Hearsay

Hearsay is not admissible except as provided by law or by these rules.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

Utah R. Evid. 803

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter

stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other exceptions.] [Transferred to Rule 807.]

Utah R. Evid. 807

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule transfers identical provisions Rule 803(24) and Rule 804(b)(5) to a new Rule 807 to reflect the organization found in the Federal Rules of Evidence. No substantive change is intended. This rule is the federal rule, verbatim.

Utah Rules of Evidence, Rule 1006

RULE 1006. SUMMARIES TO PROVE CONTENT

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Credits

[Amended effective December 1, 2011.]

Utah Code § 61-1-1

§ 61-1-1. Fraud unlawful

It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

(1) employ any device, scheme, or artifice to defraud;

(2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Credits

Laws 1963, c. 145, § 1; Laws 1983, c. 284, § 4.

Utah Code § 61-1-21

§ 61-1-21. Penalties for violations

Effective: May 10, 2016

(1) A person is guilty of a third degree felony who willfully violates:

(a) a provision of this chapter except Sections 61-1-1 and 61-1-16;

(b) an order issued under this chapter; or

(c) Section 61-1-16 knowing the statement made is false or misleading in a material respect.

(2) Subject to the other provisions of this section, a person who willfully violates Section 61-1-1:

(a) is guilty of a third degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000; or

(b) is guilty of a second degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth $10,000 or more.

(3) A person who willfully violates Section 61-1-1 is guilty of a second degree felony if:

(a) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than $10,000; and

(b) in connection with that violation, the violator knowingly accepted any money representing:

(i) equity in a person's primary residence;

(ii) a withdrawal from an individual retirement account;

(iii) a withdrawal from a qualified retirement plan as defined in the Internal Revenue Code[1];

(iv) an investment by a person over whom the violator exercises undue influence; or

(v) an investment by a person that the violator knows is a vulnerable adult.

(4) A person who willfully violates Section 61-1-1 is guilty of a second degree felony punishable by imprisonment for an indeterminate term of not less than three years or more than 15 years if:

(a) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth $10,000 or more; and

(b) in connection with that violation, the violator knowingly accepted any money representing:

(i) equity in a person's primary residence;

(ii) a withdrawal from an individual retirement account;

(iii) a withdrawal from a qualified retirement plan as defined in the Internal Revenue Code;

(iv) an investment by a person over whom the violator exercises undue influence; or

(v) an investment by a person that the violator knows is a vulnerable adult.

(5) When amounts of property, money, or other things are unlawfully obtained or sought to be obtained under a series of acts or continuing course of business, whether from the same or several sources, the amounts may be aggregated in determining the level of offense.

(6) It is an affirmative defense under this section against a claim that the person violated an order issued under this chapter for the person to prove that the person had no knowledge of the order.

(7) In addition to any other penalty for a criminal violation of this chapter, the sentencing judge may impose a penalty or remedy provided for in Subsection 61-1-20(2)(b).

Credits

Laws 1963, c. 145, § 1; Laws 1971, c. 155, § 1; Laws 1983, c. 284, § 30; Laws 1990, c. 133, § 14; Laws 1991, c. 161, § 12; Laws 1992, c. 216, § 4; Laws 1997, c. 160, § 10, eff. May 5, 1997; Laws 2001, c. 149, § 1, eff. April 30, 2001; Laws 2009, c. 347, § 11, eff. May 12, 2009; Laws 2009, c. 351, § 20, eff. May 12, 2009; Laws 2011, c. 319, § 4, eff. May 10, 2011; Laws 2016, c. 401, § 7, eff. May 10, 2016.

Utah Code § 76-2-103

§ 76-2-103. Definitions

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Credits

Laws 1973, c. 196, § 76-2-103; Laws 1974, c. 32, § 4; Laws 2007, c. 229, § 4, eff. April 30, 2007.

Utah Code § 77-22-2

§ 77-22-2. Investigations--Right to subpoena witnesses and require production of evidence--Contents of subpoena--Rights of witnesses--Interrogation before closed court--Disclosure of information

(1) As used in this section, "prosecutor" means the attorney general, county attorney, district attorney, or municipal attorney.

(2)(a) In any matter involving the investigation of a crime or malfeasance in office, or any criminal conspiracy or activity, the prosecutor may, upon application and approval of the district court and for good cause shown, conduct a criminal investigation.

(b) The application and statement of good cause shall state whether or not any other investigative order related to the investigation at issue has been filed in another court.

(3)(a) Subject to the conditions established in Subsection (3)(b), the prosecutor may:

(i) subpoena witnesses;

(ii) compel their attendance and testimony under oath to be recorded by a suitable electronic recording device or to be given before any certified court reporter; and

(iii) require the production of books, papers, documents, recordings, and any other items that constitute evidence or may be relevant to the investigation.

(b) The prosecutor shall:

(i) apply to the district court for each subpoena; and

(ii) show that the requested information is reasonably related to the criminal investigation authorized by the court.

(4)(a) The prosecutor shall state in each subpoena:

(i) the time and place of the examination;

(ii) that the subpoena is issued in aid of a criminal investigation; and

(iii) the right of the person subpoenaed to have counsel present.

(b) The examination may be conducted anywhere within the jurisdiction of the prosecutor

issuing the subpoena.

(c) The subpoena need not disclose the names of possible defendants.

(d) Witness fees and expenses shall be paid as in a civil action.

(5)(a) At the beginning of each compelled interrogation, the prosecutor shall personally inform each witness:

(i) of the general subject matter of the investigation;

(ii) of the privilege to, at any time during the proceeding, refuse to answer any question or produce any evidence of a communicative nature that may result in self-incrimination;

(iii) that any information provided may be used against the witness in a subsequent criminal proceeding; and

(iv) of the right to have counsel present.

(b) If the prosecutor has substantial evidence that the subpoenaed witness has committed a crime that is under investigation, the prosecutor shall:

(i) inform the witness in person before interrogation of that witness's target status; and

(ii) inform the witness of the nature of the charges under consideration against the witness.

(6)(a)(i) The prosecutor may make written application to any district court showing a reasonable likelihood that publicly releasing information about the identity of a witness or the substance of the evidence resulting from a subpoena or interrogation would pose a threat of harm to a person or otherwise impede the investigation.

(ii) Upon a finding of reasonable likelihood, the court may order the:

(A) interrogation of a witness be held in secret;

(B) occurrence of the interrogation and other subpoenaing of evidence, the identity of the person subpoenaed, and the substance of the evidence obtained be kept secret; and

(C) record of testimony and other subpoenaed evidence be kept secret unless the court for good cause otherwise orders.

(b) After application, the court may by order exclude from any investigative hearing or proceeding any persons except:

(i) the attorneys representing the state and members of their staffs;

(ii) persons who, in the judgment of the attorneys representing the state, are reasonably necessary to assist in the investigative process;

(iii) the court reporter or operator of the electronic recording device; and

(iv) the attorney for the witness.

(c) This chapter does not prevent attorneys representing the state or members of their staff from disclosing information obtained pursuant to this chapter for the purpose of furthering any official governmental investigation.

(d)(i) If a secrecy order has been granted by the court regarding the interrogation or disclosure of evidence by a witness under this subsection, and if the court finds a further restriction on the witness is appropriate, the court may order the witness not to disclose the substance of the witness's testimony or evidence given by the witness to others.

(ii) Any order to not disclose made under this subsection shall be served with the subpoena.

(iii) In an appropriate circumstance the court may order that the witness not disclose the existence of the investigation to others.

(iv) Any order under this Subsection (6)(d) must be based upon a finding by the court that one or more of the following risks exist:

(A) disclosure by the witness would cause destruction of evidence;

(B) disclosure by the witness would taint the evidence provided by other witnesses;

(C) disclosure by the witness to a target of the investigation would result in flight or other conduct to avoid prosecution;

(D) disclosure by the witness would damage a person's reputation; or

(E) disclosure by the witness would cause a threat of harm to any person.

(e)(i) If the court imposes an order under Subsection (6)(d) authorizing an instruction to a witness not to disclose the substance of testimony or evidence provided and the prosecuting agency proves by a preponderance of the evidence that a witness has violated that order, the court may hold the witness in contempt.

(ii) An order of secrecy imposed on a witness under this Subsection (6)(e) may not infringe on the attorney-client relationship between the witness and the witness's attorney or on any other legally recognized privileged relationship.

(7)(a)(i) The prosecutor may submit to any district court a separate written request that the

application, statement of good cause, and the court's order authorizing the investigation be kept secret.

(ii) The request for secrecy is a public record under Title 63G, Chapter 2, Government Records Access and Management Act, but need not contain any information that would compromise any of the interest listed in Subsection (7)(c).

(b) With the court's permission, the prosecutor may submit to the court, in camera, any additional information to support the request for secrecy if necessary to avoid compromising the interests listed in Subsection (7)(c).

(c) The court shall consider all information in the application and order authorizing the investigation and any information received in camera and shall order that all information be placed in the public file except information that, if disclosed, would pose:

(i) a substantial risk of harm to a person's safety;

(ii) a clearly unwarranted invasion of or harm to a person's reputation or privacy; or

(iii) a serious impediment to the investigation.

(d) Before granting an order keeping secret documents and other information received under this section, the court shall narrow the secrecy order as much as reasonably possible in order to preserve the openness of court records while protecting the interests listed in Subsection (7)(c).

Credits

Laws 1980, c. 15, § 2; Laws 1988, c. 101, § 5; Laws 1989, c. 123, § 1; Laws 1990, c. 217, § 1; Laws 1993, c. 38, § 92; Laws 2000, c. 223, § 1, eff. May 1, 2000; Laws 2008, c. 382, § 2199, eff. May 5, 2008; Laws 2009, c. 6, § 1, eff. Feb. 18, 2009.