No. 20170436-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

DAVID BRUCE BUTTARS,
Defendant/Appellant.

REPLY 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

Buttars raises five issues on appeal. In conjunction with his opening brief, Buttars also filed a rule 23B motion that specifically pertains to Point I.C. of his opening brief. The State does not contend that the existing record is inadequate to address Point I.C. Because the parties appear to agree that Point I.C. may be reached on the existing record, this Court may resolve the case on the present record without addressing the 23B motion. And for the reasons here and in opening, this Court should reverse and remand for a new trial.

This reply is "limited to responding to the facts and arguments raised in the appellee's... principal brief." Utah R. App. P. 24(b). Buttars does not concede any matters not addressed in this reply but believes those matters are adequately addressed in the principle brief.

ARGUMENT

I. The bank record evidence was inadmissible.

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

The State unconstitutionally seized Buttars's protected bank records via an investigatory subpoena without providing notice to Buttars and without making the showing necessary to keep the subpoena secret. The State argues that the seizure did not violate Buttars's constitutional rights and that suppression is unwarranted. SB, 21-38. For the reasons below, the State is incorrect. [1]

1. The State unlawfully seized Buttars's bank records.

The State's use of unlawful subpoenas to seize Buttars's protected bank records was unreasonable under Article I, Section 14 of the Utah Constitution. The State primarily argues that the subpoenas were lawful because they were "issued according to [the SPA's requirements]—the district court approved the investigation upon a showing of good cause, the prosecutor applied to the district court for each subpoena, and the district court authorized each one." State's Brief (SB), 25. The State's argument fails because it (1) overlooks the need for additional procedures when protected or privileged information is subpoenaed; (2) overemphasizes the significance of the court's judicial approval of the subpoenas; and (3) downplays the import of the erroneous secrecy order.

First, the protected nature of Buttars's bank records must be considered in determining lawfulness. State actors can use SPA subpoenas to obtain broad swaths of

[1] The State does not assert that admission of the bank records was harmless beyond a reasonable doubt. *See Broderick v. Apartment Mgmt.,* 2012 UT 17, ¶¶19-20, 279 P.3d 391.

information. But there are recognized privacy protections that accompany information like bank records and medical records that simply do not apply to other types of information that may be sought under the SPA. *See State v. Thompson*, 810 P.2d 415, 416-18 (Utah 1991).

The State does not account for the differences between protected and unprotected information. And while the SPA does not draw such a distinction either, that does not mean that the differences are irrelevant to the lawfulness question. Indeed, our constitutions may hold the State to a higher standard when a protected interest is at stake than when there is no expectation of privacy. *See State v. Moreno*, 2009 UT 15, ¶23, 203 P.3d 1000.

Our supreme court has recognized that defendants enjoy a privacy interest in their bank records and has afforded defendants standing to object to subpoenas issued to third-party banks. *Thompson*, 810 P.2d at 416-18. And it makes sense why it would do so. Bank records, after all, allow the government to discern more than just a generic ledger of financial information. "'[I]t is reasonable for our citizens to expect that their bank records will be protected from disclosure because in the course of bank dealings, a depositor reveals many aspects of her personal affairs, opinion, habit and associations which provide a current biography of her activities.'" *Id.*

Given the protected status of Buttars's bank records, the State needed to employ subpoena procedures that adequately safeguarded Buttars's privacy interests; it needed to provide him with notice and a meaningful opportunity to object. In *State v. Yount*, for instance, this Court determined that 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." 2008 UT App 102, ¶¶1, 16, 182 P.3d 405. As in *Yount*, Buttars's bank records were protected and the failure to provide notice rendered the subpoenas unlawful.

Contrary to the State's claims, it is of little consequence that the SPA does not expressly include a notice requirement. The requirements of notice and a precompliance opportunity to object find their roots in the constitution—namely the due process clause. *Id.* ¶13. Indeed "due process concerns arise where no notice is given to the party whose confidential or privileged records are subpoenaed." *Id.* This makes sense. When the State confers a privilege or entitlement—in this case, a privacy interest in one's bank records—"such entitlement constitutes a property interest, which is protected by the Due Process Clause of the Fourteenth Amendment." *Worrall v. Ogden City Fire Dep't*, 616 P.2d 598, 601 (Utah 1980). And "every significant deprivation… of an interest, which is qualified as 'property' under the due process clause must be preceded by notice and opportunity for hearing appropriate to the nature of case, absent extraordinary or unusual circumstances." *Id.* The protected status of Buttars's records, then, implicates due process concerns that dictate the need for notice and a precompliance opportunity to object.

The State nevertheless stresses that the secret subpoenas were lawful because they were issued after judicial approval and upon a showing of good cause to conduct the investigation. SB, 24-25. It further argues that the "good cause basis for the investigation, or the bank records relevance to that investigation" are "the only factors that could make the subpoenas unlawful or the seizure unreasonable." SB, 26. The State is mistaken.

The provision of notice is an important element of the lawfulness and reasonableness inquiry. And deprivations of notice may render a subpoena unlawful. *Yount* recognized this, holding that "the State's failure to notify [the] [d]efendant of the subpoenas for his medical records was a violation of his rights and rendered the subpoenas invalid." 2008 UT App 102, ¶16. The U.S. Supreme Court has likewise recognized that in some circumstances, a search and seizure might be defective if officers intrude on private spaces without prior announcement or notice. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). Indeed, the Supreme Court has made clear that notice to targets of a physical search or seizure "forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.* at 929; *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012) ("[T]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking."). Thus, the State is wrong to suggest that the court's underlying good cause determination is the only basis for deeming the subpoenas unlawful or unreasonable.

Nor does judicial approval render the subpoenas lawful. In *Yount*, this Court determined the subpoenas were invalid even though the "prosecutor submitted an affidavit of probable cause and received judicial authorization." 2008 UT App 102, ¶1. Similarly here, mere judicial authorization under the SPA—without more—does not save the subpoenas from invalidity. Moreover, it is worth noting that under the SPA, the "substantive standards may be lower than in ordinary criminal prosecutions." *In re Criminal Investigation*, 754 P.2d 633, 646 (Utah 1988). "[O]n its face it appears that the [SPA's 'good cause' standard] may not require the same showing of probable cause that

is necessary to bring a criminal charge, and the [SPA] does not expressly require an allegation of any specific criminal violation." *Id.* Thus, the subpoenas issued to Buttars's banks pursuant to the "good cause" standard were authorized using an even lower standard than the *Yount* subpoenas, which were supported by an affidavit of probable cause. 2008 UT App 102, ¶1.

Finally, the State downplays the significance of the erroneously included secrecy order in the lawfulness inquiry. SB, 30-40. Even though the State secured judicial approval, the fact remains that the State issued secret subpoenas without complying with the specific provisions of the SPA—provisions that were specifically enacted in response to the constitutional concerns raised by the supreme court in *Criminal Investigation*, 754 P.2d at 656. Indeed, *Criminal Investigation* suggests—contrary to the State's claim, *see* SB, 26, 30—that the erroneous inclusion of a secrecy provision undermines the lawfulness of a subpoena.

In *Criminal Investigation*, our supreme court addressed the secrecy provisions of a previous version of the SPA and interpreted them to avoid an unconstitutional construction. In doing so, the court gave the SPA's secrecy provisions a limiting construction, requiring "that the state's attorney apply for and that the court issue a secrecy order" as to each item to be kept secret. *Criminal Investigation*, 754 P.2d at 656. It also concluded that the "state must make a showing justifying such a secrecy order." *Id.* Specifically, the State needed to demonstrate "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 someone or

otherwise impede the investigation." *Id.* Through its limiting interpretations and with the procedural protections imposed, the *Criminal Investigation* court determined that the act survived constitutional scrutiny. *Id.* at 658. Following *Criminal Investigation*, the legislature amended the SPA to adopt the procedural protections imposed by the supreme court, including the requirement that the State must justify a secrecy order before the district court and meet the requisite showing. *Gutierrez v. Medley*, 972 P.2d 913, 916 (Utah 1998); Utah Code §77-22-2(6)(a)(i).

Much of the State's argument hinges on the notion that the subpoenas were lawful because the State complied with the SPA. But it did not. Instead, it shrouded the subpoenas in secrecy without complying with the requisite procedures—procedures that our supreme court specifically read in to save the act from unconstitutionality. The statutory procedures for issuing a secret subpoena are not unimportant, technical requirements, but are necessary to avoid serious constitutional issues. And the supreme court had good reason to require the State to justify its use of a secret subpoena. After all, the unjustified and arbitrary use of secret subpoenas raises significant First Amendment concerns that implicate a defendant's right to be free from unreasonable searches and seizures.

The secret subpoenas prohibited, ex ante, Buttars's banks from engaging in core protected speech under the First Amendment, i.e., speech about the State's access to a customers' sensitive records and its use of warrantless procedures to do so. Indeed, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

While Buttars's banks and the public at large suffer from such unjustified stifling of speech, Buttars particularly suffers. The unjustified silencing of Buttars's banks prevented the banks from communicating with Buttars about the subpoenas, leaving Buttars without the information he needed to keep his bank records private and prevent the State from intruding into his private affairs. With the serious consequences of secrecy at play, it is incumbent on the State follow the appropriate procedures. The State failed to do so in this case. This failure strongly counts against the lawfulness of the subpoenas and the reasonableness of the seizure.[2]

2. The violation requires suppression.

Thompson and *Yount* held that exclusion was the appropriate remedy for evidence obtained via unlawful subpoenas. *Thompson*, 810 P.2d at 419-20; *Yount*, 2008 UT App

[2] The State mentions that Buttars did not produce evidence that he would have known about the subpoenas but for the erroneous secrecy order. SB, 30. To the extent this matters, Buttars notes that the State bore the burden below of establishing the reasonableness of its actions. *See State v. Worwood*, 2007 UT 47, ¶40, 164 P.3d 397. And the State did not produce any evidence that the erroneous secrecy order did not sway the banks' decision to produce the bank records without notice. Any dearth of evidence in this regard does not work in the State's favor. *Id.*

In any event, it is reasonably likely that but for the secrecy order, the banks would have notified Buttars of the subpoenas. Our supreme court has recognized that defendants enjoy a privacy interest in their bank records. *Thompson*, 810 P.2d at 416-18. Utah law does not prohibit banks (absent a secrecy order) from providing notice. *See* Utah Code §77-22-2. Moreover, federal law—though not controlling of State-issued subpoenas—requires that customers be notified when the government requests bank records. 12 U.S.C.A. §3405. Our system of laws clearly values the privacy of bank records and fosters an environment where, absent a secrecy order, the banks would be inclined to give notice.

102, ¶24. The State argues that these cases were decided incorrectly and that the Utah Constitution does not require an exclusionary remedy for violations of Article I, Section 14. SB, 32-34. But the State correctly acknowledges that this Court is bound to follow Utah Supreme Court precedent. SB, 32 n.2. And *Thompson*—a Utah Supreme Court case—controls. Thus, the bank record evidence must be excluded pursuant to the reasoning set forth in *Thompson*.

The State also argues that the good faith exception applies. Assuming a good faith exception even exists in this context, it does not apply for the reasons stated in opening, *see* Opening Brief (OB), 26-27, and for the reasons articulated in *Yount*, 2008 UT App 102, ¶26 n.3. The State nevertheless argues that *Yount* is inapplicable because the subpoenas in that case were issued under civil rule 45, and rule 45 "requires no judicial oversight upon which one could reasonable rely." SB, 38. While rule 45 subpoenas might not require judicial approval, a district court in *Yount* nevertheless authorized the subpoena—much like it did here. 2008 UT App 102, ¶¶5, 26 n.3. Thus, contrary to the State's claims, *Yount* involved a subpoena issued with judicial oversight and supports Buttars's argument that the good faith exception is inapplicable.

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

The bank records fail to qualify under a hearsay exception and Buttars was prejudiced by their admission. The State's contrary contentions are not persuasive.

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

The trial court correctly determined that the Frontier records did not qualify under rule 803(6)'s business records exception. But it incorrectly determined that they were admissible under rule 807's residual exception. The State asserts that the bank records were admissible under both rule 803(6) and rule 807. SB, 39-51. For one batch of records—the Frontier records of the Ellipse account and Buttars's personal account (the Ellipse/personal account batch)—it argues rule 803(6) as an alternative ground for admissibility. SB, 39-41. And for another batch of records—the Frontier records of the MovieBlitz account (the MovieBlitz batch)—it argues that the trial court properly admitted the records under rule 807. SB, 41-51. This Court should reject rule 803(6) as an alternate ground for affirmance. Moreover, the State's arguments under the residual exception are unconvincing.

Alternate ground for affirmance. Although this court *may* affirm on alternate grounds, "it falls to the party seeking the benefit of the rule to explain why it is eligible to have the alternative arguments considered." *Francis v. Div. of Wildlife*, 2010 UT 62, ¶21, 248 P.3d 44. The supreme has "caution[ed]" that "the 'affirm on any ground' rule of appellate review… is a tool available only in limited circumstances." *Bailey v. Bayles*, 2002 UT 58, ¶13 n.3, 52 P.3d 1158. This Court "may do so only where the alternate ground is apparent on the record." *Id.* ¶20. Additionally, this Court "must [] determine whether the facts as found by the trial court are sufficient to sustain the decision of the trial court on the alternate ground." *Id.*; *Angel Inv'rs v. Garrity*, 2009 UT 40, ¶38, 216

P.3d 944. In determining whether the alternate theory is factually sustainable, "[t]he court of appeals is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence." *Bailey*, 2002 UT 58, ¶20; *Angel Inv'rs*, 2009 UT 40, ¶38.

Here, the State's alternate ground for affirmance does not rest on the facts as found by the trial court. The State presumes that the Ellipse/personal account batch is admissible under rule 803(6) because the records were accompanied by custodian certificates. SB, 39-41. But the trial court found that the evidence was not so clear. On the contrary, it found that "it [wa]s unclear from the testimony and evidence what certificates go with which batch." R.3197. The State has not challenged this finding, even though it bears the burden of demonstrating that its alternate ground for affirmance is appropriate. On this record, it is inappropriate to second guess the trial court and conclude that the Ellipse/personal account batch was properly accompanied by custodian certificates. Accordingly, this Court should reject the State's alternate ground for affirmance.

Residual Exception. The State did not produce the custodian certificates necessary to satisfy rule 803(6). When the defense pointed out that the certificates were missing, it did not call the records custodian to establish the requisite foundation. Nor does the record reveal any attempt on the part of the State to do so. On the contrary, the State took the position that it "d[id] not have to bring in a records custodian." R.3136. The State then turned to rule 807. But instead of producing the bank records themselves, the State produced summaries prepared by its own expert, leaving the trial court without any opportunity to examine the trustworthiness of the actual documents. Under these circumstances, the trial court erred in admitting the records under rule 807.

The State disagrees and supports its position by (1) pointing to extra-jurisdictional cases upholding the admissibility of bank records under the residual exception, SB, 42-43; (2) distinguishing *State v. Clopten*, SB, 46-47; and (3) asserting that "there was no more probative evidence to establish Buttars's use of investor funds." SB, 48. The State's claims fail.

First, the cases cited by the State do not address circumstances like those presented here. Indeed, these cases involve situations where the trial court examined the actual records—not state-prepared summaries—and/or where the State made a showing that it was unable to secure the testimony of a records custodian.

In *U.S. v. Turner*, the court had the benefit of the actual bank records. 718 F.3d 226, 233 (3d Cir. 2013). And it held that the bank records were admissible after determining, *inter alia*, that the "documents ha[d] the official appearance of bank records" and "[t]hey b[ore] the insignia of foreign banks." *Id.* The court in *Karme v. Comm'r* likewise had the actual bank records before it, 673 F.2d 1062, 1064 (9th Cir. 1982) ("The records were placed into evidence"), and the same appears to be true in *U.S. v. Wilson*, 249 F.3d 366, 375 (5th Cir. 2001). In this case by contrast, the State merely introduced summaries of the bank records, giving the trial court no occasion to inspect the actual documents and ascertain trustworthiness.

Additionally, in *Wilson*, the State demonstrated a need to resort to rule 807 because there was no custodian available to testify. *Id.* These circumstances are unlike those in this case, where the State made no showing of need, but instead took the position that it "d[id] not have to bring in a records custodian." R.3136.

Moreover, while the above cases held that evidence failing under rule 803(6) or another categorical exception was nevertheless admissible under rule 807, other courts have held the opposite. *E.g.*, *U.S. v. Turner,* 104 F.3d 217, 221 (8th Cir.1997) ("introduce[ing] the medical texts under [the residual exception], when… [rule] 803(18) specifically deals with the admissibility of this type of evidence, would circumvent the general purposes of the rules."); *Bryndle v. Boulevard Towers*, 132 F. Supp. 3d 486, 497 (W.D.N.Y. 2015) ("Rule 807 is not intended to address situations already covered by Rules 803 or 804, such as the business record exception to hearsay recognized by Rule 803(6)"); *see also Conoco v. DOE,* 99 F.3d 387, 392-93 (Fed.Cir.1997); *Lakah v. UBS AG*, 996 F. Supp. 2d 250, 257-58 (S.D.N.Y. 2014); *Glowczenski v. Taser*, 928 F. Supp. 2d 564, 573 (E.D.N.Y. 2013), *aff'd in part, dismissed in part,* 594 F. App'x 723, (2d Cir. 2014); *In re Denslow*, 104 B.R. 761, 766 (E.D. Va. 1989); *U.S. v. Barrett*, 598 F. Supp. 469, 482 (D. Me. 1984), *aff'd,* 766 F.2d 609 (1st Cir. 1985).

Second, the State attempts to distinguish *Clopten*, 2015 UT 82, 362 P.3d 1216, arguing that the "bank records… are unlike the oral statements in *Clopten* that were made by a person who could lie." SB, 47. But it is important to point out that the actual bank records were not before the trial court. Instead, the court examined trustworthiness based on extrinsic evidence, including Curtis's testimony and the embellished summaries. And this evidence was susceptible to the gloss of the State, as the summaries reveal. *See* OB, 45-49; *see also Conoco*, 99 F.3d at 392-93 (distinguishing summaries from bank records and holding summaries inadmissible under the residual exception for lack of

trustworthiness); *U.S. v. Kim,* 595 F.2d 755, 760-66 (D.C. Cir. 1979). The embellished summaries and Curtis's testimony might have related to the bank records, but the evidence was still extrinsic to the actual documents themselves. Thus, this case is similar to *Clopten* where extrinsic evidence did not satisfy the trustworthiness prong. 2015 UT 82, ¶25.

Third, the State argues that "there was no more probative evidence to establish Buttars's use of investor funds." SB, 48. It minimizes the importance of the custodial certifications in the analysis, and steers the court away from considering the probative value of the bank records properly accompanied by custodial certifications. *Id.* But a custodial certification ensures the reliability of the bank records, which in turn heightens their probative value. *See* OB, 38-39. Given two identical sets of bank records—with one set certified as being regular entries made near the time of the transaction and kept in the ordinary course of business—the certified set will be more probative because it is more reliable. Yet, the State did not demonstrate reasonable efforts to produce certified bank records (or produce the underlying documents themselves), which was the most reliable and probative evidence of Buttars's expenditures. *See* OB, 38-39; *see also N.D. v. A.B.*, 2003 UT App 215, ¶18, 73 P.3d 971; *Barry v. Trustees*, 467 F. Supp. 2d 91, 104-05 (D.D.C. 2006). The State's reasonable efforts to satisfy rule 803(6) also has bearing on rule 807's "not specifically covered by a hearsay exception in Rule 803" language, which contemplates that rule 807 is available only when the other exceptions are not. Utah R. Evid. 807. If the State does not demonstrate reasonable efforts to procure the testimony of a records custodian as required by rule 803(6)—as was the case here—then the court

lacks assurance that the records are "not specifically covered" by the business records exception. Under these circumstances, the residual exception is unavailable. *Brown v. Crown Equip.*, 445 F. Supp. 2d 59, 67 (D. Me. 2006). Thus, this Court should hold that the bank records were inadmissible under the residual exception.

2. Prejudice.

The State incorrectly asserts that admitting the bank records under rule 807 was harmless. SB, 51-52. It argues that if the records were not admitted under rule 807, the State "could have either gone back to the bank to obtain custodial certifications or called a witness to testify and establish the requirements of rule 803(6)." SB, 51. The State's argument essentially boils down to, "if we hadn't done it wrong, we would have done it right." But the record does not reveal that the State would have done it right. Quite the opposite. Admissibility under rule 803(6) was litigated extensively. OB, 14-16. The State was well aware that the absent custodial certifications posed a problem under rule 803(6). *See* R.910-23. But the State did not seek to cure that problem by obtaining the missing certifications or calling a records custodian to testify. The State had the opportunity to support its case for admissibility under 803(6), but for whatever reason did not do so. On this record, it cannot be said that the State would have sought and obtained admission under rule 803(6).

The State also cites *State v. McNeil*, 2016 UT 3, 365 P.3d 699, in support of its position. But *McNeil* is distinguishable. In *McNeil*, our supreme court held that the defendant failed to show prejudice where the record revealed that the State would have been able to properly lay foundation for the admission of telephone records. *Id.* ¶¶39-42.

There, the prosecutor revealed two separate paths for admitting telephone records: (1) through a detective's testimony or (2) through a phone provider employee's testimony. *Id.* ¶40. When the trial court admitted the records on the first basis, the State did not pursue admissibility through the phone provider's testimony because the court's ruling rendered doing so unnecessary. *Id.* The *McNeil* court nevertheless determined that even if the trial court erred in admitting the telephone records, the State would have been able to establish foundation by way of the phone provider employee's testimony. In reaching this conclusion, it pointed to supporting record evidence, including evidence that the State issued a subpoena to the phone provider and evidence that the State was prepared to call the telephone provider employee as a witness. *Id.* ¶¶39-40.

This case is readily distinguishable. Here, the State's reason for not securing admission under rule 803(6) was not the trial court's ruling—as was the case in *McNeil*—but a failed effort to establish the requisite foundation. It is not reasonable to presume that the State would have succeeded in satisfying rule 803(6) after failing to do when it had the opportunity. Moreover, unlike *McNeil*, where record evidence demonstrated that the State would be able to lay the requisite foundation, the present record reveals no evidence that the State would have been able to produce the missing custodial certificates or a custodian's testimony. *Id.* Thus, the record does not demonstrate that the State would have been able to lay the proper foundation under rule 803(6). This Court should hold that admission of the records under rule 807 was prejudicial.

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

In opening, Buttars argues that counsel was ineffective for failing to object to the embellished summaries because they did not prove the content of the underlying bank records. In an abundance of caution, Buttars filed a 23B motion containing supplemental facts relevant this issue. The State does not contend that the existing record is inadequate to address this issue. Accordingly, this Court need not address the 23B motion and may decide this issue on the existing record.

The State nevertheless asserts that this issue does not merit reversal. It argues that counsel did not perform deficiently because "Curtis was clear to testify that expenses he labeled as 'questionable' could be legitimate" and the categorization was used to Buttars's advantage. SB, 60-61. Moreover, it argues that Buttars did not demonstrate prejudice and relies on *U.S v. Spaulding*, 894 F.3d 173, 185-86 (5th Cir. 2018) to support its position. The State's arguments are unpersuasive.

The State's argument that "Curtis was clear to testify that expenses he labeled as 'questionable' could be legitimate" misses the point. SB, 60. Curtis's concession that the payments could be legitimate mattered little where the jury was left with the impression that the underlying "cold, hard" bank records themselves flagged certain payments as questionable. R.6593-94. Curtis's concession based on his subjective opinion could not ameliorate the damage done by the summaries, which the jury would understand as objective evidence. In fact, the State argued that the records "don't have a motive. Their credibility's not at issue. [They] are cold, hard facts." R.6593-94.

The State also argues that the summaries labeled some expenses at "potentially legitimate" and thus, gave Buttars favorable evidence as well. SB, 60. Categorizing a small number of transactions as "potentially legitimate" is hardly favorable. On the contrary, labeling the transactions as only "potentially legitimate" undermined the notion that the payments were *actually* legitimate. The State also argues that counsel used the "questionable" categorization to its advantage by showing that Curtis did not know what the "questionable" payments were for. SB, 60. Again, this misses the point. If the jury believed that the objective bank records themselves flagged certain payments as questionable, Curtis's concessions would be of little consequence. Failing to object created a high risk that the jury would accept the State's opinions as objective evidence. It is not reasonable trial strategy to allow a situation where the jury had no reliable way to discern the State's opinions from fact.

The State also relies on *Spaulding*, 894 F.3d 174, arguing that "similar inferences contained in rule 1006 summaries [have been found] to be harmless." SB, 62. But *Spaulding* is distinguishable in two ways. First, the underlying bank records were in evidence and available for the jury to review. *Spalding*, 894 F.3d at 186 n.18; Appellee Br., *Spaulding*, 894 F.3d 174, 2017 WL 6448026 *29 ("the government offered the exhibits from which the information in the charts were drawn"). Second, each time the trial court admitted a challenged summary, it gave a cautionary instruction that stated: "[T]hese documents are summary documents of other records and express the conclusion of [a] witness... It is up to you to determine if these summaries and conclusions are accurate. The best evidence of what occurred are the underlying records themselves."

Spalding, 894 F.3d at 186 n.18. No such cautionary instruction was given in this case. And the general instruction on expert testimony that was given—which told the jury that they did "not have to accept an expert's opinion" and could give it "whatever weight you think it deserves"—was of little value. R.1391. Indeed, without the underlying bank records, the jury was unable to ferret out the opinions that the instruction told them they could reject. *U.S. v. Taylor*, 210 F.3d 311, 316 & n.11 (5th Cir. 2000) (noting that summaries "premised on the government's assumptions permissible as long as supporting evidence has been presented" and reversing where summary "did not accurately reflect the underlying testimony"). Accordingly, Buttars was prejudiced by the embellished summaries.

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

Contrary to the State's suggestions, this Court may hold that trial counsel was ineffective notwithstanding the conscious avoidance/ignorance language in *State v. Moore*, 2015 UT App 112, 349 P.3d 797. The State is also wrong to claim that Buttars's exceptional circumstances argument was inadequately briefed and that the conscious avoidance/ignorance language was nonprejudicial.

The State asserts that trial counsel did not perform ineffectively because "case law at the time support[ed] his course of conduct." SB 67. But the ineffective assistance analysis does not necessarily hinge on the legal landscape at time of trial, as clarified by our supreme court in *State v. Silva*, 2019 UT 36. There our supreme court "repudiate[d] [] language in [its] case law limiting [its] review of an attorney's performance to the law

in effect at the time of trial" and determined that an attorneys' performance is not to be based solely on settled law. *Id.* ¶¶19-20. Thus, the ineffective assistance analysis does not end simply because Instruction 42 contained language that mirrored dicta in *Moore*, 2015 UT App 112, ¶17. As argued in opening, the conscious avoidance/ignorance language lifted from *Moore* was non binding dicta; it incorrectly described the willfulness requirement; and it had the effect of reducing the State's burden of proof. OB, 49-57. Under these circumstances, counsel performed deficiently by submitting the conscious avoidance/ignorance language to the jury.

In any event, this Court may review this issue under the exceptional circumstances doctrine—an argument the State incorrectly characterizes as inadequately briefed. SB, 65 n.5. This Court may deem an issue inadequately briefed if the argument contains "no citations to authority to support [the] claim," *State v. Timmerman*, 2009 UT 58,¶25 n.5, 218 P.3d 590, or "when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the… court." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1988). Barring substantial inadequacies, this Court "will not automatically decline to address an issue on the basis of inadequate briefing." *2010-1RADC/CADC Venture v. Dos Lagos,* 2017 UT 29, ¶30 n.8, 408 P.3d 313. Rather, adequate briefing "is a 'natural extension of an appellant's burden of persuasion.'" *Id.* (quoting *State v. Roberts*, 2015 UT 24, ¶18, 345 P.3d 1226. Ultimately, "[t]he focus should be on the merits." *State v. Nielsen*, 2014 UT 10, ¶42, 326 P.3d 645.

Here, Buttars adequately briefed his exceptional circumstances argument. He cited relevant case law, applied that law to the circumstances of this case, and developed

reasons as to why unique procedural circumstances exist here. OB, 57-58. Accordingly, the Court may reach the merits of this claim.

Furthermore, the State is wrong to suggest that the instruction was nonprejudicial because the conscious avoidance/ignorance language was not at issue. It contends that the evidence revealed that "Buttars made untrue statements and had actual knowledge of material facts that he did not tell investors in order to make what he did tell them not misleading." SB, 68. But as discussed in opening, the evidence was not as straightforward as the State suggests. OB, 58-60. The evidence described in opening paints a picture of a defendant who had minimal interaction with the investors and who did not actually know what Gerritsen and LaCount did and did not tell investors. *See id.* For instance, if Buttars consciously avoided the possibility that LaCount did not tell the investors about Ellipse, then the jury could infer Buttars had actual knowledge that the investors had not been informed about the past company. To provide another example: If Buttars believed his assertion that the investment would be "used to bring [the product] to market," but consciously avoided a possibility that the money would be used differently, then the jury could infer Buttars actually knew the money would be used in other ways. This allowed the jury to find a misstatement where none would otherwise be found. These are just a few examples, but they serve to show that the conscious avoidance language mattered and 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.

This reply challenges the State's arguments regarding Instruction 47, which incorrectly stated that a mere finding of "willful material… omissions" meant that it did not matter if Buttars believed what he said about future events. R.1419. The opening brief adequately addresses the State's arguments regarding the improper expert testimony and prosecutorial argument, as well as prejudice.

Buttars's honest beliefs did not constitute a defense only if he willfully violated the securities statute by misstating or omitting material facts *necessary to correct a misleading predicate statement*. Utah Code §61-1-1(2). Instruction 47 omitted the italicized language. The State argues that counsel could reasonably decide to withhold an objection to the omission on the basis that the jury was properly instructed elsewhere and the omission was just a "common abbreviation." SB 73-75. It is incorrect.

No amount of instructions correctly stating the elements of securities fraud can cure an instruction that incorrectly describes when a certain defense may be invoked. Indeed, the real problem with Instruction 47 is that it incorrectly shut down an otherwise viable defense, regardless of the utterance of any *misleading* omissions. The availability of particular defense is a matter separate from the elements and instructions purporting to describe the operation of a defense must be drafted with precision. And contrary to the State's suggestion, there is a difference between an "abbreviation" and an incomplete recitation of the circumstances under which a defense is allowed. Abbreviations are fine if they correctly encapsulate all the necessary legal concepts, but that was not the case

here. Thus, Instruction 47 was incorrect and any failure to properly object constituted deficient performance.

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.

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

Contrary to the State's claim, *State v. Larsen*, 865 P.2d 1355 (Utah 1993) and *State v. Harry*, 873 P.2d 1149 (Utah Ct. App. 1994) do not help its case. Moreover, Buttars's rule 702 arguments are preserved and adequately briefed. The opening brief adequately addresses prejudice.

The State argues that *Larsen* "held that 'Rule 704 permits [an expert] to express an opinion regarding the ultimate resolution of that disputed issue'—whether misstatements or omitted facts are material." SB, 82. But the *Larsen* court did not condone expert testimony that uses the term "material" in its legal sense. On the contrary, *Larsen* said that the State's expert "certainly should have avoided employing the specific term 'material.'" 865 P.2d at 1362. Nevertheless, the expert in *Larsen* "seem[ed] to use 'material' as a synonym for 'important.'" *Id*. Thus, the *Larsen* court held based on the facts of the case that the use of the term "material" was not "an 'inadmissible legal conclusion'" because the expert did not use the term in its legal sense. *Id.* at 1361-63.

As explained in opening, Lloyd—unlike the *Larsen* expert—used the term "material" in its legal sense, giving a definition of the term that mirrored the legal definition given set forth in the instructions. R.1416. Accordingly, the testimony was improper under *Larsen*.

Harry does not help the State's case either. There, the State testified "to the materiality of information that [the defendant] allegedly failed to reveal" to investors. *Harry*, 873 P.2d at 1152. It appears that as in *Larsen*, the *Harry* expert used the term "material" as a synonym for "important." *Id.* at 1152-54. There is no indication that the *Harry* expert gave a legal definition of material as was the case here. *See* OB, 68. Thus, this case is distinguishable from *Larsen* and *Harry* because Lloyd used the term material in its legal sense.

Moreover, contrary to the State's claims, Buttars adequately briefed and preserved an argument under rule 702. In opening, Buttars developed his argument by citing case law, including citations to the record, and pointing to certain considerations that the trial court did not adequately weigh.[3] *See Timmerman*, 2009 UT 58, ¶25 n.5; *Thomas*, 961 P.2d at 305; *Roberts*, 2015 UT 24, ¶18. Buttars's rule 702 argument was adequately briefed, and this Court should "focus… on the merits." *Nielsen*, 2014 UT 10, ¶42.

Buttars also preserved this issue by timely arguing that the materiality question was "squarely within the layman's understanding." R.4827. This is the same argument on appeal. OB, 69-70. Buttars also reasserted his objection after Lloyd testified. R.5225-26. Accordingly, this Court should reach the merits of the rule 702 issue.

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

The State is wrong to assert that Curtis did not "discuss Utah statutes." SB 85. Moreover, this Court should reject the State's arguments and consider the merits of

[3] The trial court's ruling on helpfulness in many ways overlaps with other aspects of its ruling that Buttars challenges on appeal.

Buttars's claims under rules 702 and 403. The opening brief adequately addresses prejudice.

First, Curtis's opinions pertained to Utah statutes. The prosecutor asked Curtis if he had "particular experience investigating and analyzing records of companies or individuals *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." R.5227-28. Moreover, as argued in opening, Curtis further offered a legal interpretation of these terms by providing case-specific examples of "characteristics" used "to determine" fraud, deceit, or theft. R.5227-28. Accordingly, Curtis tethered his testimony to Utah law. [4]

The State also argues that Buttars failed to preserve an objection under rule 403. SB, 85 n.7. Part of Buttars's objection to Curtis's testimony was that "it's prejudicial under 403 considering the sequencing of the questions and where we're at in the questioning." R.5222. Buttars gave the court an opportunity to rule on the issue and properly preserved an objection under rule 403. Buttars likewise adequately briefed his rule 702 argument. It was appropriate to brief the rule 702 and 403 challenges together because the 702 analysis involves a balancing that "mimics that under rule 403." *Larsen*, 865 P.2d at 1363 n.12. Moreover, Buttars developed his argument by citing case law,

[4] This case is also distinguishable from *State v. Brown*, 2019 UT App 122. There, this court determined that expert opinion testimony was admissible where "the information provided was general and not tied to a specific law." *Id.* ¶32. Here, by contrast, Curtis tied his opinion to a specific law because his opinions concerned the statutory crimes that Buttars was "alleged to have engaged in." R.5227-28.

citing the record, and pointing to certain considerations that the trial court did not fully weigh. *See Roberts*, 2015 UT 24, ¶18. Thus, this Court should reject the State's arguments and consider the merits of his rule 403 and 702 arguments.

CONCLUSION

For the reasons here and in opening, Buttars asks this Court to reverse and remand for a new trial on all counts.

SUBMITTED this 30th of September 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 6,967 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 foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 30th day of September 2019. A searchable pdf 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 September 2019.