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Case No. 20170904-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

SCOTT ALAN RASMUSSEN,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for one count of tax evasion, a second-degree felony, and three counts of failure to render a tax return, third-degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Roger S. Dutson presiding

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INTRODUCTION

After the IRS said Scott Alan Rasmussen owed more taxes than he expected three years in a row, Rasmussen decided to study the tax code to determine for himself how much he should be paying in taxes. After months of studying IRS publications and other materials, Rasmussen decided that he did not have to pay any taxes. He decided that his employment wages were not income, that only businesses were required to pay income tax, and that he therefore had no duty to file income tax returns or pay taxes.

The Utah State Tax Commission disagreed. Through twenty-three various notices, it informed Rasmussen that he was required to file a tax

return and pay state income taxes. But Rasmussen dug in and insisted that he was not required to pay taxes or file a tax return.

At his trial for tax evasion and failure to file tax returns over a six-year period, Rasmussen requested an instruction stating that a good-faith misunderstanding of the law was a complete defense even if that misunderstanding was unreasonable. The trial court denied the instruction because it believed the instruction went “too far” – a change in the relevant statute specified that two of the six charges Rasmussen faced for failure to file a tax return required a showing that Rasmussen act without a reasonable, good-faith basis. But the court invited Rasmussen to submit a revised instruction that would distinguish among counts. Rasmussen never did.

On appeal, Rasmussen repeats his argument that he was entitled to an instruction stating that any good-faith mistake of law need not be reasonable. But Rasmussen has not addressed, let alone challenged, the actual basis of the trial court’s ruling. This Court should thus decline to address Rasmussen’s claim on appeal.

It is unnecessary to reach the question of whether Rasmussen was entitled to the instruction he requested for a second reason: Any error in denying the instruction was harmless. First, the requested instruction would not have affected two of Rasmussen’s convictions, which by statute required

Rasmussen' good-faith belief to be reasonable. Second, even if the jury had been instructed as requested, there is no reasonable likelihood that it would have found that Rasmussen actually believed in good faith that he was not required to pay taxes. The Tax Commission repeatedly notified him that his interpretation was wrong and that he did have to pay taxes.

Alternatively, the jury was adequately instructed. Even if Rasmussen were correct that in Utah an unreasonable but good-faith misunderstanding of the law could negate the required mental state for tax evasion and failure to file taxes, Rasmussen was not entitled to a separate instruction on the issue. The law in Utah is clear that a separate good-faith instruction is superfluous when the jury has been instructed on the required mental state.

STATEMENT OF THE ISSUES

1. Did the trial court commit reversible error when it omitted a jury instruction that said a good-faith misunderstanding of the law need not be reasonable?

Standard of Review. Whether a trial court correctly denied a requested jury instruction is a question of law reviewed for correctness. *State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892. However, courts “look at the jury instructions ‘in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case.’”

STATEMENT OF THE CASE

A. Summary of Relevant Facts

Scott Alan Rasmussen did not file a Utah tax return for tax years 2010 through 2015, despite making an average of \$46,000 each of those years. R444-45, 606-07. Rasmussen declared himself exempt from tax withholding and did not file tax returns because he decided that individuals are not required to pay income taxes—only businesses are. R583-84, 590, 592-94. Rasmussen maintained this stance despite the twenty-three notices he received from the Utah State Tax Commission informing him that he had to pay taxes. R473.

Rasmussen takes issue with the income tax.

Rasmussen lived and worked in Washington as a manufacturing engineer, paying federal income taxes without issue for more than a decade. R577, 579. (Washington does not have a state income tax. R605.) But then the IRS informed Rasmussen three years in a row that he owed additional taxes. R581. The first year, Rasmussen “got mad and paid it.” R581. But when he continued to get notices that he owed more in taxes, Rasmussen “studied” his tax liability. R582. For “at least two months,” Rasmussen went to the library and “dug into” IRS materials and tax manuals. R582, 585. Rasmussen concluded that only businesses are required to pay taxes, and because he was

a common-law employee he should be exempt because his wages were not income. R586; SE14; SE16. According to Rasmussen, the only way an individual is required to file and pay taxes is if the individual files a tax return – the act of filing a tax return makes the individual a business. R583.

Based on his interpretation of tax law, Rasmussen changed his federal withholding status to exempt on his W-4 forms and stopped paying federal taxes. R446, 586–88, 603; DE1. Rasmussen moved to Utah but did not start filing state tax returns. R446, 580, 603–05.¹

The Tax Commission repeatedly informs Rasmussen of his tax liabilities.

When the Tax Commission receives wage information from an employer or receives other information indicating that a person may be required to file a tax return, but that person does not file a return, the Tax Commission sends the person a Request for Filing Information. R427–28. If the person does not adequately respond, the Tax Commission sends a Notice of Deficiency and Estimated Income Tax. R427–28. If the person does not pay the estimated amount or appeal the decision, the Tax Commission sends a Notice of Taxes Due and Intent to Lien. R429. If the person does not pay at

¹ Rasmussen’s employers generally did not withhold Utah income tax from his paychecks. SE1; SE3. Some was withheld between 2010 and 2013, but it was insufficient to cover Rasmussen’s full tax liability. SE2; SE21.

least a minimum amount toward the balance due, the Tax Commission records a tax lien against the person and sends a Notice of Lien and Intent to Offset, informing the person that a lien had been recorded and of the methods the Tax Commission intended to use to collect the tax. R429.

In April 2013, the Tax Commission sent Rasmussen two separate Requests for Filing Information for the 2010 and 2011 tax years. R453; SE4; SE8. Rasmussen responded that he did not owe taxes because he was an “employee working for wages, not income.” SE14. The Tax Commission apparently rejected this explanation, sending Rasmussen two separate Notices of Deficiency and Estimated Income Tax in May 2013 and requesting him to pay \$2,904.55 for 2010 and \$3,384.54 for 2011. SE5; SE9.

Rasmussen appealed those assessments. R450-51; SE15; SE16; SE17. As part of the appeals process, he submitted a memorandum presenting his interpretation of the tax code and he participated in an administrative hearing. R475; SE16. In his memorandum, Rasmussen stated that the IRS never contacted him to challenge his claim that he was exempt from withholding. SE16. Rasmussen also claimed that he believed in good faith that his employment wages were not income, and to support his position he

quoted from what he said were several United States Supreme Court cases, though many were from lower courts. SE16.²

In August 2015, the Tax Commission rejected Rasmussen's appeal and upheld the assessment. R573, 599-600; SE17.

In November 2015, the Tax Commission sent Rasmussen two separate Notices of Taxes Due and Intent to Lien for the 2010 and 2011 tax years, directing Rasmussen to pay his tax deficiencies within one month. SE6; SE10. When Rasmussen did not pay, the Tax Commission sent him two separate Notices of Lien and Intent to Offset in January 2016. SE7; SE11. Rasmussen still did not pay. R446-47. The Tax Commission sent Rasmussen additional

² Though it is not clear on the face of Rasmussen's memorandum, most of the cases he quoted – including several federal district court cases labeled as Supreme Court cases – addressed such questions as whether stock dividends are income, not whether wage compensation is income. SE16. The one case that is on points is *Lucas v. Earl*, 281 U.S. 111 (1930). But Rasmussen quotes the party's argument in that case as if it were the Court's holding. Compare SE16, with *Lucas*, 281 U.S. at 112-13. The Court rejected that argument. *Lucas*, 281 U.S. at 114. And it has more recently reiterated that the argument is "frivolous" and has been "repeatedly rejected by the courts." *Cheek v. United States*, 498 U.S. 192, 195 (1991).

(When *Lucas* was decided, the Supreme Court Reporter often included excerpts from the parties' arguments in the official report of the case, immediately preceding the opinion of the Court. While that language has been removed from Westlaw's online publication of the report, it is available in hard copy, or online through the Library of Congress at <http://cdn.loc.gov/service/ll/usrep/usrep281/usrep281111/usrep281111.pdf>.)

notices for tax years 2012 through 2015, with the total number of notices for all tax years reaching twenty-three. R473, 604; SE12; SE13. Yet Rasmussen did not file tax returns for the 2010 through 2015 tax years or pay any taxes for those years beyond a minimal amount withheld from his paychecks from 2010 through 2013. R606-07; SE20; SE21. A Tax Commission investigator determined that Rasmussen owed \$11,641 in taxes from 2010 through 2015. SE21.

B. Summary of Proceedings

The State charged Rasmussen with one count of failure to render a tax return and one count of tax evasion for each tax year from 2010 to 2015, totaling six counts of tax evasion (a second-degree felony) and six counts of failure to render a tax return (a third-degree felony). R98-103. The State also charged Rasmussen with one count of a pattern of unlawful activity (a second-degree felony). R103-04.

At trial, Rasmussen's defense was that he did not file tax returns or pay taxes based on a good-faith understanding that he was not required to do so. R418-21. Rasmussen asked the court to instruct the jury that "[a] person who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or

unreasonable.” R188. Rasmussen argued that this instruction should apply “to all of the tax statutes where willfulness is a requirement.” R514, 516.

The trial court ruled that the instruction “goes too far” “the way it’s written.” R516. Although the court did not elaborate on its reasoning, the context of the parties’ arguments and the court’s questions indicate that the court was concerned that the jury would apply the unreasonable-belief instruction to all counts, and not just the counts requiring a willful mental state. R512-16.

Tax evasion requires an intentional or willful mental state. Utah Code §76-8-1101(1)(d)(i).³ The elements instructions for each count of tax evasion included this mental state. R240, 242, 244, 246, 248, 250. The mental state for failure to file a tax return changed in 2014. Before 2014, failure to file required an intent to evade. Utah Code §76-8-1101(1)(c)(i) (superseded 5/13/2014). Beginning in 2014, a person could be guilty of failing to file only if he acted “knowingly and intentionally, and without a reasonable good faith basis.” Utah Code §76-8-1101(1)(c)(i). The elements instructions for failure to file for

³ The State cites to the code published on the Utah Legislature’s website, and unless otherwise noted, any citation is to the current version of the code.

tax years 2014 and 2015 thus included an explicit requirement that any good-faith belief be reasonable. R249, 251.

Rasmussen conceded that his proposed instruction would not apply to the last two counts of failure to file. R513. The court asked Rasmussen how he could reword the proposed good-faith instruction to make that clear, and Rasmussen responded that the instruction's reference to willfulness sufficed to limit its application to the tax-evasion counts. R513-14. The court disagreed, but it said it "might reconsider" if Rasmussen wanted to "try a redraft." R516. Rasmussen never proposed a revised instruction to account for the court's concern.

Additional instructions addressed a good-faith defense. The jury was instructed that "intent to evade" requires proof of "a conscious desire to avoid a legal requirement with which the actor knows he or she is obligated to comply." R253. The jury was further instructed specific to the pre-2014 failure-to-file counts that "[a]n intent not to file a tax return, even if required by law to file, is an 'intent to evade' only if the actor is aware that he or she is legally required to file." R261. Finally, the jury was instructed consistent with the general mistake-of-law statute: Ignorance or mistake about "the existence or meaning" of the law is no defense unless "the actor *reasonably* believed his conduct did not constitute an offense" and the belief was based on reasonable

reliance on (1) an official statement by an agency charged with enforcing the law in question or (2) a written interpretation by a court or public servant charged with interpreting the law in question. R265 (emphasis added). In closing, Rasmussen argued that he acted under a reasonable, good-faith belief that he was not required to pay taxes or file a return. R648, 651–54.

The court dismissed the pattern-of-unlawful-activity charge for insufficient evidence. R569. The jury convicted Rasmussen of four counts — one count of tax evasion for 2015 and three counts of failure to render tax returns for 2013 through 2015 — and acquitted him of the remaining counts. R247–51, 279–80. The court sentenced Rasmussen to concurrent terms of zero to five years on the three counts of failure to file and one to 15 years on the single count of tax evasion. R292–93. The court ordered Rasmussen to pay the back taxes, penalties, and interest as restitution. R293, 313–14. Rasmussen timely appealed. R295.

SUMMARY OF ARGUMENT

Rasmussen claims that the trial court should have given his good-faith defense instruction. He contends that a key element of a good-faith defense for tax evasion and failure to file a tax return is that a good-faith misunderstanding of the law need not be reasonable. He also contends that he was entitled to a separate instruction on this good-faith defense — that the

instructions on mental state were insufficient to adequately present the defense to the jury.

This Court should not reach Rasmussen's claim that he was entitled to the instruction he requested because he has not challenged the basis of the trial court's ruling. The court did not directly reach the question of whether reasonableness was required for tax evasion and pre-2014 charges of failure to file a tax return. Rather, the court ruled that because the failure-to-file statute changed in 2014 to explicitly require that any good-faith misunderstanding of the law be reasonable, Rasmussen's requested instruction went too far. Rasmussen has not grappled with that ruling, and he has therefore forfeited any right to review of the trial court's actual ruling.

In any event, this Court need not decide whether Rasmussen was entitled to the instruction he sought because any error was harmless. First, as to the two convictions of failure to file a tax return for 2014 and 2015, the statute explicitly required a reasonable good-faith basis. Thus, any instruction on an unreasonable good-faith basis would not have applied to these counts, and denial of the instruction at most could have affected the 2013 conviction for failure to file a tax return and the 2015 conviction for tax evasion.

But there is no prejudice even as to those two convictions. Rasmussen explained his understanding of the law to the Tax Commission, and it was rejected. The jury acquitted Rasmussen of every count that related to his actions before Rasmussen received notice that he owed taxes and that his understanding of the law was wrong. But it convicted him of offenses starting with the 2013 tax year. And by the time Rasmussen had to file his 2013 taxes – April 2014 – he was already on notice that his interpretation of the tax code was wrong. Even if the jury had been instructed that Rasmussen’s belief did not have to be reasonable, there is no reasonable likelihood that the jury would have found that he held that belief in good faith by 2014.

Rasmussen’s claim also fails on the merits. Although the law in Utah is unclear on whether an unreasonable misunderstanding of the law can negate a mental state – and Rasmussen has not carried his burden to show that this unsettled point should be resolved in his favor – the law is clear on one point: instructing the jury on the mental state required for an offense is adequate to convey a good-faith defense, and any separate instruction on good-faith is superfluous.

ARGUMENT

Rasmussen does not challenge the basis of the trial court's ruling; in any event, he was not prejudiced when the trial court declined to give an instruction stating that his good-faith belief need not be reasonable, nor was he entitled to the instruction.

Rasmussen challenges the trial court's refusal to give his requested good-faith defense instruction. He argues that a good-faith belief that he was not required to pay or file taxes is a complete defense to both tax evasion and failure to file a tax return, even if his belief was unreasonable. Br.Aplt.9-14. He also argues that a separate good-faith belief instruction was required to adequately instruct the jury. Br.Aplt.15-18. Finally, Rasmussen argues that he was prejudiced by the exclusion of his proposed instruction. Br.Aplt.18-19.

This Court should not address Rasmussen's claim because he has not challenged the basis of the trial court's ruling. In any event, Rasmussen has failed to establish either prejudice or error in the denial of the instruction. Rasmussen could not have continued to hold a good-faith belief that he owed no taxes after he was authoritatively told that his interpretation of the tax law was wrong. And as a matter of law, the mental-state instruction sufficiently apprised the jury of the good-faith defense.

A. This Court should disregard Rasmussen’s claim because he does not challenge the basis of the trial court’s decision.

As a threshold matter, this Court should decline to consider Rasmussen’s claim because he has not carried his burden of persuasion on appeal. “[O]ne of the most fundamental principles of the appellate process” is that an appellant must “identify ... flaws in the district court’s order.” *Allen v. Friel*, 2008 UT 56, ¶4, 194 P.3d 903. Thus, “[t]o carry his burden of persuasion on appeal, an appellant must address ‘the actual basis for the district court’s ruling.’” *Gollaher v. State*, 2017 UT App 168, ¶13, 405 P.3d 831. An appellant “cannot make the same arguments anew while ignoring the proceedings below that adjudicated the same issues.” *State v. Newton*, 2018 UT App 194, ¶20, --- P.3d ----. If an appellant does not challenge the actual basis of the trial court’s ruling, “that decision will be placed beyond the reach of further review.” *Allen*, 2008 UT 56, ¶7; *see also id.* ¶¶4, 7, 14, 15 (refusing to consider claim when appellant “failed to address any of the district court’s holdings”); *State v. Needham*, 2016 UT App 235, ¶2, 391 P.3d 295 (same).

When Rasmussen asked the trial court for an instruction that a good-faith belief need not be reasonable, the court rejected the instruction because it went “too far” given the legislature’s inclusion of a reasonableness requirement in 2014 for failure to file a tax return. R512-16. The court invited Rasmussen to submit a revised instruction to address this concern, but he did

not do so. R516. The court appears to have been concerned that even with the proposed instruction's reference to willfulness, the jury may have been confused as to when a good-faith belief needs to be reasonable and when it does not. That concern is valid. Two counts referred explicitly to a reasonableness requirement, and the statutory mistake-of-law instruction—to which Rasmussen did not object—also included a reasonableness requirement. R249, 251, 265, 516–17. Including another instruction stating that a mistake of law need not be reasonable, without clarifying which counts it applied to or how it related to the statutory mistake-of-law instruction, would have confused the jury. *See State v. Steele*, 2010 UT App 185, ¶31, 236 P.3d 161 (equating good-faith defense with mistake-of-law defense); Br.Aplt.14 (same).

Because Rasmussen has not addressed what actually happened at trial, and has not shown why the trial court's actual ruling was erroneous, this Court should reject his claim without further consideration.

B. Even if Rasmussen was entitled to an instruction that a good-faith belief need not be reasonable, its exclusion was not prejudicial because Rasmussen was repeatedly informed that his belief was incorrect.

Appellate Courts “do not upset the verdict of a jury merely because some error or irregularity may have occurred.” *State v. Urias*, 609 P.2d 1326, 1329 (Utah 1980). Only if a defendant demonstrates with reasonable

likelihood that a “substantial and prejudicial” error affected the outcome of his trial will a reviewing court reverse. *Id.* In the context of alleged error in failing to instruct the jury on a defense, that analysis considers whether there is a “‘reasonable likelihood’ that the outcome of trial would have been any different” had the instruction been given. *State v. Reece*, 2015 UT 45, ¶43, 349 P.3d 712.

There is no reasonable likelihood of a better result for Rasmussen had the jury received a separate instruction stating that his legal interpretation need not be reasonable.

First, any instruction would necessarily exclude the two charges for failure to file a tax return for 2014 and 2015. The statute explicitly required proof that Rasmussen act “without a reasonable good faith basis.” Utah Code §76-8-1101(1)(c)(i). Even if Rasmussen were entitled to an instruction on an unreasonable good-faith defense, that instruction would have been limited to the tax-evasion charges and perhaps the pre-2014 failure-to-file charges. And Rasmussen was acquitted of all but two of those counts. Thus, denial of the instruction at most could have affected the 2013 conviction for failure to file a tax return and the 2015 conviction for tax evasion.

But even as to those two convictions, any error was harmless. Rasmussen relies on *Cheek v. United States*, 498 U.S. 192 (1991), to establish

that his good-faith defense need not be reasonable. But *Cheek* recognized that notices like those Rasmussen received from the Tax Commission may lead a jury to reject a defendant's claim that his interpretation of the law was held in good faith. *Id.* at 202. In *Cheek*, for example, the defendant allegedly believed, like Rasmussen, that wages are not income. *Id.* at 195. The Court held that the defendant's belief need not be reasonable to avail himself of the good-faith defense. *Id.* at 202-03. But the Court noted that the jury's assessment of whether the defendant "truly believed" he did not have to pay taxes or file a tax return would turn on evidence showing the defendant's awareness of "the relevant provisions of the Code or regulations, ... court decisions rejecting his interpretation of the tax law, ... authoritative rulings of the Internal Revenue Service, or ... any contents of the personal income tax return forms and accompanying instructions that made it plain that wages should be returned as income." *Id.* at 202. The Court also acknowledged that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties." *Id.* at 203-04. And disagreement with the law is not a defense. *Id.* at 205-06.

By Rasmussen's own account, he based his interpretation in part on IRS publications. But one of the exhibits the jury received included an IRS

publication that plainly included wages in the definition of earned income. SE21. And the Tax Commission told Rasmussen that his contrary interpretation was wrong. Yet he continued to not pay taxes. Given the evidence against him, there is no reasonable likelihood that a jury would have found that Rasmussen acted in good faith, even if it had been instructed that the belief need not be reasonable.

The State presented substantial evidence that Rasmussen knew he was violating the law – in other words, that Rasmussen did not hold his belief in good faith. *Cf. Reece*, 2015 UT 45, ¶40 (concluding that error was harmless because of “overwhelming evidence” against defendant). In 2013 the Tax Commission sent Rasmussen two separate Requests for Filing Information. R453; SE4; SE8. Rasmussen explained his theory to the Tax Commission, SE14, and in response the Tax Commission sent Rasmussen two separate Notices of Deficiency and Estimated Income Tax. SE5; SE9. All of these notices occurred before April 2014, when Rasmussen was required to file his 2013 taxes. R247, 279–80. Yet Rasmussen did not choose to pay his taxes under protest and contest the validity of the Tax Commission’s interpretation in court. *Cf. Cheek*, 498 U.S. at 205–06 (discussing avenues available for someone to challenge the legitimacy of the tax code). Instead, he chose not to file his taxes.

And by April 2016—the time of Rasmussen’s first and only conviction for tax evasion—Rasmussen had more fully explained his theory to the Tax Commission through the administrative appeals process, SE16, the Tax Commission rejected his interpretation and upheld the assessment, SE17, and the Tax Commission sent him additional notices for other tax years, with the total number of notices reaching twenty-three. R473. Despite all of this, Rasmussen maintained that he had a good-faith belief that he was not violating the law. But there is no reasonable likelihood that the jury would have agreed if only it had been told that Rasmussen’s good-faith belief could be unreasonable. Reasonable or not, Rasmussen knew his interpretation was wrong by the time he did not file his 2013 taxes, and certainly by the time he evaded his 2015 taxes.

Even if omitting a separate jury instruction on good faith was error, it could not have affected two of his convictions. And for the remaining two convictions for which the instruction would have been relevant, it is not reasonably likely that the jury would have believed Rasmussen’s good-faith defense.

C. Rasmussen was not entitled to a separate good-faith defense instruction.

Rasmussen argues that because tax evasion and failure to file a tax return require a mental state of specific intent to violate the law, even an

unreasonable but good-faith belief that he was not required to pay taxes would be a complete defense. Br.Aplt.9-15. Rasmussen further argues that instructing the jury on the requisite mental state was insufficient to adequately convey a good-faith defense; rather, a separate good-faith instruction was necessary. Br.Aplt.15-19.

Rasmussen has not established that an unreasonable mistake of law is a defense under Utah law. But even if it were, Utah law is clear that defendants are not entitled to separate good-faith instructions when the defense is aimed at negating an element of the offense.

The general rule in criminal cases is that “‘ignorance or mistake of law provides no defense or excuse for a crime ... [, and] a good faith or mistaken belief that one’s conduct is legal does not relieve a person of criminal liability for engaging in proscribed conduct.’” *Steele*, 2010 UT App 185, ¶30 (quoting what is now 21 Am. Jur. 2d Criminal Law §132 (2019 update)); accord *Cheek*, 498 U.S. at 199.

There are two common exceptions to this rule. One is a “narrow exception” that excuses otherwise criminal conduct when the defendant acts with a mistaken belief that he is not violating the law and “the mistake arises from a reasonable reliance on an official written statement of the law.” *Steele*, 2010 UT App 185, ¶30. The other negates the mental state for a specific-intent

crime—or a crime that requires awareness of or intent to violate the law—when the defendant mistakenly believes in good faith that his actions do not violate the law. *Id.* ¶31; *Cheek*, 498 U.S. at 199–202; 1 Wayne R. LaFare, SUBSTANTIVE CRIMINAL LAW §5.6(a) (3d ed. Oct. 2018 update). Unlike with the excuse-based exception, some courts have held that under the mental-state exception the defendant’s misunderstanding of the law need not be reasonable. *See Cheek*, 498 U.S. at 202–03.

Utah clearly adopted the first, excuse-based exception when it enacted the mistake-of-law statute. *Steele*, 2010 UT App 185, ¶30; *see* Utah Code §76-2-304(2) (stating that ignorance or mistake of law is a defense only when defendant’s belief that his conduct did not constitute an offense is reasonable and is based on an official written statement either from a court, administrative agency, or public servant charged with interpreting the law in question).

But this Court has stated that it is an open question whether Utah’s mistake-of-law statute was intended to “define the exclusive exception to the general prohibition on the mistake of law defense or whether there remains room for a specific intent exception.” *Steele*, 2010 UT App 185, ¶32. The Court also stated that even in jurisdictions that recognize a mental-state exception,

courts have not uniformly allowed unreasonable mistakes to negate a required mental state. *Id.* ¶31.

The mistake-of-law statute speaks in absolute terms, stating that “[i]gnorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless” the specific conditions of the statute are satisfied. Utah Code §76-2-304(2) (emphases added); *see also* Utah Code §76-1-103(1) (“The provisions of this code shall govern the construction of, the punishment for, and defenses against any offense defined in this code”); Utah Code §76-2-304(1) (treating negation of mental state as affirmative defense for purposes of mistake-of-fact defense). On its face, the mistake-of-law statute appears to allow for the mental-state exception only as long as the defendant’s misunderstanding was reasonable and was based on a written official interpretation of the law.⁴

⁴ In *State v. Granato*, 610 P.2d 1290 (Utah 1980), the supreme court overturned a conviction where the defendant had no knowledge that he was violating a campaign contribution law. *Id.* at 1291–92. A dissenting opinion suggested that the conditions of the mistake-of-law statute had not been satisfied. *Id.* at 1293 (Christoffersen, J., dissenting). The majority ruled that the evidence of intent was insufficient, but it merely acknowledged the mistake-of-law statute without analyzing it. *Id.* at 1292 (majority opinion). While the result of *Granato* is consistent with recognizing a separate mental-state exception that coexists with the mistake-of-law statute, the court’s silence on the issue supports this Court’s subsequent conclusion that it is an open question.

Although some Utah cases have spoken generically of a good-faith defense, they have been inconsistent on when it applies, they have been silent on whether an unreasonable mistake would suffice, and they have been silent on whether the mistake-of-law statute was intended to be the exclusive exception to the general rule.⁵

Rasmussen has not addressed the plain language of the mistake-of-law statute, let alone explained why that statute does not occupy the field when it comes to mistake-of-law defenses. And while he refers to *State v. Steele*—the case in which this Court acknowledged that the issue was unsettled—he quotes only the portion of the opinion that says the mental-state exception “arguably” applies in Utah. Br.Aplt.14 (quoting *Steele*, 2010 UT App 185, ¶32). Rasmussen’s failure to engage the issue this Court has identified

⁵ See *State v. Eyre*, 2008 UT 16, ¶19, 179 P.3d 792 (implicitly recognizing good-faith defense for tax evasion, which requires an intentional or willful mental state); *State v. Larsen*, 865 P.2d 1355, 1357, 1360 & n.8 (Utah 1993) (concluding that good-faith defense was unavailable because securities fraud statute required willful mental state but not specific intent); *State v. Stringham*, 2001 UT App 13, ¶¶20–21, 17 P.3d 1153 (recognizing good-faith defense in communications fraud case requiring reckless mental state); see also *Bryan v. United States*, 524 U.S. 184, 191–96 (1998) (distinguishing *Cheek* and concluding that firearms statute requiring showing of willful violation of law “does not carve out an exception to the traditional rule that ignorance of the law is no excuse”). Cf. *Benjamin v. Utah State Tax Comm’n*, 2011 UT 14, ¶32, 250 P.3d 39 (recognizing reasonable, good-faith defense to *civil* tax penalty imposed for negligence).

amounts to a failure to carry his burden to show that he is entitled to an instruction stating that an unreasonable mistake of law negates a willful mental state. This Court should reject Rasmussen's claim without deciding whether he was entitled to the instruction. *See State v. Robison*, 2006 UT 65, ¶21, 147 P.3d 448 ("It falls squarely upon an appellant to surmount the filing, briefing, and persuasion burdens associated with an appeal. ... An appellate court that does the lifting for an appellant distorts this fundamental allocation of benefits and burdens.").

But even if a mental-state exception survives the mistake-of-law statute, and even if an unreasonable misunderstanding of the law can negate the mental states at issue in this case, Rasmussen was not entitled to a separate good-faith instruction to that effect. This Court has squarely held that instructions on the required mental state are adequate to convey a good-faith defense. In *State v. Stringham*, 2001 UT App 13, 17 P.3d 1153, the Court explained that "a jury finding that the defendant has acted knowingly and willfully is inconsistent with a finding that the defendant acted in good faith." *Id.* ¶¶20–21. The Court thus held that a separate good-faith instruction is "merely surplusage," "a redundant version" of the instructions on the required mental state. *Id.* ¶20. This Court later applied that holding to the

very statutes at issue here – tax evasion and failure to file a tax return. *State v. Smith*, 2003 UT App 179, ¶¶21-23, 72 P.3d 692.

The primary case Rasmussen relies on – *State v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc) – has been overruled on this very point because every federal circuit “has come to reject the idea that district courts must give a separate ‘good faith’ jury instruction in fraud cases.” *United States v. Bowling*, No. 08-6184, 2009 WL 6854970, at *1 n.* (10th Cir. Dec. 23, 2009) (en banc). Likewise, the United States Supreme Court has rejected this argument in the context of tax law. In the very case Rasmussen relies on to establish that a good-faith mistake of law need not be reasonable, the Supreme Court reiterated that “after instructing the jury on willfulness, ‘[a]n additional instruction on good faith [is] unnecessary.” *Cheek*, 498 U.S. at 201 (first alteration in original).

The law in Utah and elsewhere is clear: A separate good-faith instruction is unnecessary. The jury was instructed that to convict Rasmussen of tax evasion, it had to find that he intentionally or willfully attempted to evade or defeat a tax that he owed. R240, 256. The jury was told that a person acts intentionally or willfully “when it is his or her conscious objective or desire to engage in the conduct or cause the result.” R252. It was instructed that evade means “avoidance of something by effort, skill, dexterity,

contrivance, subterfuge, ingenuity, or artifice,” and that “intent to evade” requires proof of “a conscious desire to avoid a legal requirement with which the actor knows he or she is obligated to comply.” R253.

On the pre-2014 failure-to-file counts, the jury was instructed that it had to find that Rasmussen acted with intent to evade or with a “conscious desire to evade.” R241, 261. It was further instructed that “[a]n intent not to file a tax return, even if required by law to file, is an ‘intent to evade’ only if the actor is aware that he or she is legally required to file.” R261. And for the 2014 and 2015 failure-to-file counts, the elements instructions stated that the jury could only convict Rasmussen if it found that he acted knowingly and intentionally *and* “without a reasonable good faith basis.” R249, 251; *see also* R262 (defining “intentionally” and “knowingly”).

Nothing in the instructions precluded Rasmussen from arguing on the tax evasion and pre-2014 failure-to-file charges that his understanding of the law need not have been reasonable. Rather, the instructions adequately conveyed to the jury that if Rasmussen in good faith believed, even unreasonably as to the pre-2014 counts, that he did not owe taxes and was not required to file a tax return, he did not act willfully, intentionally, or

knowingly. Taken as a whole, these instructions “fairly instruct the jury on the law applicable to the case.” *Maestas*, 2012 UT 46, ¶148.⁶

CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Rasmussen’s convictions.

Respectfully submitted on April 1, 2019.

SEAN D. REYES
Utah Attorney General

/s/ William M. Hains

WILLIAM M. HAINS
Assistant Solicitor General
Counsel for Appellee

⁶ In his prejudice argument, Rasmussen makes several unpreserved challenges to the accuracy of the mental state in the elements instructions on the 2014 and 2015 failure-to-file charges, which largely track the statutory language. Br.Aplt.18–19; *see also* R249, 251; Utah Code §76-8-1101(1)(c). Rasmussen invited any error in these instructions when he told the trial court that he had no further objections to the jury instructions beyond the one instruction that was rejected. R516–17; *State v. Crespo*, 2017 UT App 219, ¶22 n.5, 409 P.3d 99 (“Because defense counsel stated that he did not have any objections to the jury instructions at trial, the invited error doctrine precludes us from reviewing this claim under plain error.”).

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 28 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ William M. Hains

Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 1, 2019, the Brief of Appellee was served upon appellant's counsel of record by mail email hand-delivery at:

BRETT J. DELPORTO
DelPorto Law
1168 South Foothill Dr. #636
Salt Lake City, Utah, 84108

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

was filed with the Court on a CD or by email and served on appellant.

will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melissa Walkingstick Fryer

Addendum A

Statutes

76-2-304 Ignorance or mistake of fact or law.

- (1) Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime.
- (2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:
 - (a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense, and
 - (b) His ignorance or mistake resulted from the actor's reasonable reliance upon:
 - (i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question;
or
 - (ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.
- (3) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed.

Amended by Chapter 32, 1974 General Session

Effective 5/13/2014

76-8-1101 Criminal offenses and penalties relating to revenue and taxation -- Rulemaking authority -- Statute of limitations.

- (1)
- (a) As provided in Section 59-1-401, criminal offenses and penalties are as provided in Subsections (1)(b) through (e).
 - (b)
 - (i) Any person who is required by Title 59, Revenue and Taxation, or any laws the State Tax Commission administers or regulates to register with or obtain a license or permit from the State Tax Commission, who operates without having registered or secured a license or permit, or who operates when the registration, license, or permit is expired or not current, is guilty of a class B misdemeanor.
 - (ii) Notwithstanding Section 76-3-301, for purposes of Subsection (1)(b)(i), the penalty may not:
 - (A) be less than \$500; or
 - (B) exceed \$1,000.
 - (c)
 - (i) With respect to a tax, fee, or charge as defined in Section 59-1-401, any person who knowingly and intentionally, and without a reasonable good faith basis, fails to make, render, sign, or verify any return within the time required by law or to supply any information within the time required by law, or who makes, renders, signs, or verifies any false or fraudulent return or statement, or who supplies any false or fraudulent information, is guilty of a third degree felony.
 - (ii) Notwithstanding Section 76-3-301, for purposes of Subsection (1)(c)(i), the penalty may not:
 - (A) be less than \$1,000; or
 - (B) exceed \$5,000.
 - (d)
 - (i) Any person who intentionally or willfully attempts to evade or defeat any tax, fee, or charge as defined in Section 59-1-401 or the payment of a tax, fee, or charge as defined in Section 59-1-401 is, in addition to other penalties provided by law, guilty of a second degree felony.
 - (ii) Notwithstanding Section 76-3-301, for purposes of Subsection (1)(d)(i), the penalty may not:
 - (A) be less than \$1,500; or
 - (B) exceed \$25,000.
 - (e)
 - (i) A person is guilty of a second degree felony if that person commits an act:
 - (A) described in Subsection (1)(e)(ii) with respect to one or more of the following documents:
 - (I) a return;
 - (II) an affidavit;
 - (III) a claim; or
 - (IV) a document similar to Subsections (1)(e)(i)(A)(I) through (III); and
 - (B) subject to Subsection (1)(e)(iii), with knowledge that the document described in Subsection (1)(e)(i)(A):
 - (I) is false or fraudulent as to any material matter; and
 - (II) could be used in connection with any material matter administered by the State Tax Commission.
 - (ii) The following acts apply to Subsection (1)(e)(i):
 - (A) preparing any portion of a document described in Subsection (1)(e)(i)(A);
 - (B) presenting any portion of a document described in Subsection (1)(e)(i)(A);
 - (C) procuring any portion of a document described in Subsection (1)(e)(i)(A);

- (D) advising in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A);
 - (E) aiding in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A);
 - (F) assisting in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A); or
 - (G) counseling in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A).
- (iii) This Subsection (1)(e) applies:
- (A) regardless of whether the person for which the document described in Subsection (1)(e)(i)(A) is prepared or presented:
 - (I) knew of the falsity of the document described in Subsection (1)(e)(i)(A); or
 - (II) consented to the falsity of the document described in Subsection (1)(e)(i)(A); and
 - (B) in addition to any other penalty provided by law.
- (iv) Notwithstanding Section 76-3-301, for purposes of this Subsection (1)(e), the penalty may not:
- (A) be less than \$1,500; or
 - (B) exceed \$25,000.
- (v) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the State Tax Commission may make rules prescribing the documents that are similar to Subsections (1)(e)(i)(A)(I) through (III).
- (2) The statute of limitations for prosecution for a violation of this section is the later of six years:
- (a) from the date the tax should have been remitted; or
 - (b) after the day on which the person commits the criminal offense.

Amended by Chapter 52, 2014 General Session

Superseded 5/13/2014

76-8-1101 Criminal offenses and penalties relating to revenue and taxation -- Rulemaking authority -- Statute of limitations.

- (1)
- (a) As provided in Section 59-1-401, criminal offenses and penalties are as provided in Subsections (1)(b) through (e).
 - (b)
 - (i) Any person who is required by Title 59, Revenue and Taxation, or any laws the State Tax Commission administers or regulates to register with or obtain a license or permit from the State Tax Commission, who operates without having registered or secured a license or permit, or who operates when the registration, license, or permit is expired or not current, is guilty of a class B misdemeanor.
 - (ii) Notwithstanding Section 76-3-301, for purposes of Subsection (1)(b)(i), the penalty may not:
 - (A) be less than \$500; or
 - (B) exceed \$1,000.
 - (c)
 - (i) Any person who, with intent to evade any tax, fee, or charge as defined in Section 59-1-401 or requirement of Title 59, Revenue and Taxation, or any lawful requirement of the State Tax Commission, fails to make, render, sign, or verify any return or to supply any information within the time required by law, or who makes, renders, signs, or verifies any false or fraudulent return or statement, or who supplies any false or fraudulent information, is guilty of a third degree felony.
 - (ii) Notwithstanding Section 76-3-301, for purposes of Subsection (1)(c)(i), the penalty may not:
 - (A) be less than \$1,000; or
 - (B) exceed \$5,000.
 - (d)
 - (i) Any person who intentionally or willfully attempts to evade or defeat any tax, fee, or charge as defined in Section 59-1-401 or the payment of a tax, fee, or charge as defined in Section 59-1-401 is, in addition to other penalties provided by law, guilty of a second degree felony.
 - (ii) Notwithstanding Section 76-3-301, for purposes of Subsection (1)(d)(i), the penalty may not:
 - (A) be less than \$1,500; or
 - (B) exceed \$25,000.
 - (e)
 - (i) A person is guilty of a second degree felony if that person commits an act:
 - (A) described in Subsection (1)(e)(ii) with respect to one or more of the following documents:
 - (I) a return;
 - (II) an affidavit;
 - (III) a claim; or
 - (IV) a document similar to Subsections (1)(e)(i)(A)(I) through (III); and
 - (B) subject to Subsection (1)(e)(iii), with knowledge that the document described in Subsection (1)(e)(i)(A):
 - (I) is false or fraudulent as to any material matter; and
 - (II) could be used in connection with any material matter administered by the State Tax Commission.
 - (ii) The following acts apply to Subsection (1)(e)(i):
 - (A) preparing any portion of a document described in Subsection (1)(e)(i)(A);
 - (B) presenting any portion of a document described in Subsection (1)(e)(i)(A);
 - (C) procuring any portion of a document described in Subsection (1)(e)(i)(A);

- (D) advising in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A);
 - (E) aiding in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A);
 - (F) assisting in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A); or
 - (G) counseling in the preparation or presentation of any portion of a document described in Subsection (1)(e)(i)(A).
- (iii) This Subsection (1)(e) applies:
- (A) regardless of whether the person for which the document described in Subsection (1)(e)(i)(A) is prepared or presented:
 - (I) knew of the falsity of the document described in Subsection (1)(e)(i)(A); or
 - (II) consented to the falsity of the document described in Subsection (1)(e)(i)(A); and
 - (B) in addition to any other penalty provided by law.
- (iv) Notwithstanding Section 76-3-301, for purposes of this Subsection (1)(e), the penalty may not:
- (A) be less than \$1,500; or
 - (B) exceed \$25,000.
- (v) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the State Tax Commission may make rules prescribing the documents that are similar to Subsections (1)(e)(i)(A)(I) through (III).
- (2) The statute of limitations for prosecution for a violation of this section is the later of six years:
- (a) from the date the tax should have been remitted; or
 - (b) after the day on which the person commits the criminal offense.

Addendum B

Argument & Ruling on
Requested Good-faith Defense Instruction

(R512-17)

1 **MR. PALUMBO:** It says, "The government must prove
2 beyond a reasonable doubt that Mr. Rasmussen knew that the law
3 imposed a duty on him and Mr. Rasmussen intentionally and
4 voluntarily violated that duty."

5 **THE COURT:** This is a defense request?

6 **MR. PALUMBO:** It is, Your Honor.

7 **MR. HANSEEN:** It is.

8 **THE COURT:** Okay. "The government must prove," and
9 what's your argument there?

10 **MR. PALUMBO:** Well, my argument is that it says that
11 Mr. Rasmussen intentionally and voluntarily violated that duty.
12 Those are not the mental states that the State is required to
13 prove. So that's one concern.

14 The other concern is in the second paragraph. It
15 says, "A person who acts on a good faith misunderstanding as to
16 requirements of the law does not act willfully even if his
17 understanding of the law is wrong or unreasonable."

18 In the amended failure to file count -- the good
19 faith belief actually has to be reasonable in order to be a
20 defense to the mental state. So saying that it could be
21 unreasonable for those two counts is legally wrong. So that's
22 my objection to that.

23 And then I also do not believe that that would apply
24 to the other counts that are charged.

25 **THE COURT:** Defense?

1 **MR. RICKEY:** Judge, in so far -- I mean, this
2 instruction comes from the Cheek decision in so far as far as
3 the two new statutes specifically say that a good faith belief
4 must be reasonable.

5 **THE COURT:** On that the -- which statute?

6 **MR. RICKEY:** The two -- the evasion statutes for I
7 believe it's 2015 and '16, failure to render -- sorry, not the
8 evasion, the failure to render. Yeah, I would agree that
9 the -- since those specifically say that the good faith belief
10 needs to be reasonable, that that language -- the
11 unreasonableness language shouldn't apply.

12 **THE COURT:** So how would you reword it to meet the
13 objection of the State?

14 **MR. PALUMBO:** Your Honor, in fact --

15 **MR. RICKEY:** I understand willfully, Judge, to answer
16 your question, I think the sentence should say the law -- a
17 person who acts on a good faith misunderstanding as to
18 requirements of the law, and we can even make relative to the
19 failure to render counts does not act willfully in that
20 sentence there.

21 **THE COURT:** So honest mistake is not acting
22 willfully? Is that where you're going? I don't know exactly
23 what you would -- how you get around the problem here.

24 **MR. RICKEY:** Right, Judge, I think that -- I mean,
25 it's provided for in the 2015/2016 files --

1 **THE COURT:** Counts.

2 **MR. RICKEY:** 10 and 12.

3 **THE COURT:** 10 and 12.

4 **MR. HANSEEN:** That a good faith reasonable belief
5 applies. I think that also given, given the ruling in Cheek, I
6 believe it applies to all of the tax statutes where willfulness
7 is a requirement. That's the argument we're making. That one
8 can have the good faith belief as a defense to not
9 understanding the duty imposed by the tax law.

10 **THE COURT:** Well, so you're saying if your client had
11 an opinion that the law did not impose a duty on him, that he
12 can't be found to intentionally violate that duty, huh?

13 **MR. HANSEEN:** Not necessarily. And, Your Honor, I
14 think the case law suggests good faith belief relative to the
15 federal --

16 **THE COURT:** Let's see, have we defined good faith
17 belief in this --

18 **MR. HANSEEN:** No.

19 **THE COURT:** Is there a definition of good faith
20 belief anywhere?

21 **MR. PALUMBO:** The reference that defense counsel
22 included with the proposed jury instruction was to Cheek versus
23 United States, which is Utah -- or I'm sorry, a Supreme Court
24 of the United States case, and it was an interpretation of the
25 IRS's criminal statute which is distinct from the Utah statute.

1 They are similar, but the mental state that was at issue in the
2 IRS statute is willfulness. That is a component of mental
3 state for one charge in this case, the evasion statute. But
4 again, I think just quoting to the holding of Cheek is improper
5 in this case because our mental states are completely
6 different.

7 And so I'm not sure if that actually solves the
8 problem. Furthermore, the legislature introduced a good faith
9 exception to the mental state in 2014.

10 **THE COURT:** Right.

11 **MR. PALUMBO:** They know how to do that. They did not
12 include it for evasion. They did not include before 2014. I
13 think that shows the legislative intent not to have good faith
14 defense or exception to the evasion or failure to file a
15 statute prior to 2014.

16 **THE COURT:** How about after 2014?

17 **MR. PALUMBO:** After 2014 for the failure to file,
18 there is absolutely in the statute a good faith defense.

19 **THE COURT:** Well, yes.

20 **MR. PALUMBO:** The good faith has to be reasonable.
21 The belief has to be reasonable or else it's not a defense. An
22 unreasonable defense does not work post 2014 failure to file.

23 **MR. RICKEY:** And, Judge, just to address that --

24 **THE COURT:** So your opposition is to the -- if his
25 understanding is unreasonable that they are arguing here should

1 apply, you are saying no way.

2 **MR. PALUMBO:** Correct.

3 **MR. JONES:** Correct, it's not the law.

4 **MR. RICKEY:** And, Your Honor, just if I may briefly.

5 We also referenced in this -- one of the other citation was the
6 Eyre case. I understand the concern, the Cheek is a federal --
7 it involves the federal tax statute. Eyre does say that when
8 statutes are similar to one another, Utah will look at the
9 federal statute as well as the reasoning and the case law
10 behind how the federal statute has been applied and that's why
11 I think the way -- the way the United States Supreme Court
12 addressed willfulness relative to the federal tax statutes, I
13 think it should -- it can equally apply to Utah statutes when
14 willfulness is a mental state requirement.

15 **THE COURT:** Well, I'm -- I'm going to not allow this
16 instruction the way it's written to come in. If you wish to
17 try a redraft and maybe a real informal brief on it, I might
18 reconsider that before we actually give it, but I -- I don't
19 think this instruction would be proper. It goes too far.

20 What I did this morning is -- when I saw you had
21 filed these proposed instructions, I just asked her to put them
22 in and we would discuss them and that's what I am doing here.

23 Anything else?

24 **MR. PALUMBO:** Not from the State, Your Honor.

25 **THE COURT:** Defense?

1 **MR. HANSEEN:** No, Your Honor. We'll --

2 **THE COURT:** So other than this instruction, we're in
3 agreement on the instructions?

4 **MR. HANSEEN:** Yes, I believe so.

5 **THE COURT:** So we pull out your No. 27 and what was
6 this one you numbered?

7 **MR. HANSEEN:** 35.

8 **THE COURT:** 35.

9 Now, do you have any concern about this ordering that
10 I've done? It's a little unique, I acknowledge, but I've
11 tried, like I said, to make it clear. I did not want to throw
12 in the RICO with everything else, frankly. I wanted to see
13 what -- or have them look at the elements of that. I don't
14 know how they are going to do it in the jury room, but you
15 never know. But at least I wanted to separate them a bit from
16 each other so they just don't get overwhelmed with all of this
17 legalese stuff we've got. Willful, all of these definitions
18 that keep popping up in different places that are a little
19 different are confusing frankly.

20 Okay. We'll see you at 8:30 in the morning.

21 **MR. PALUMBO:** Thanks, Judge.

22 **THE COURT:** Thank you.

23 **MR. HANSEEN:** Judge, maybe one more housekeeping
24 issue before we go. I guess procedurally, I don't know where
25 we are. Has the State rested? Is that where we are?

Addendum C

Rasmussen's Requested Jury Instructions

(R187-90)

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

SCOTT RASMUSSEN,

Defendant.

**DEFENDANT'S REQUESTED
JURY INSTRUCTIONS**

Case No. 161910347

JUDGE SHAUGHNESSY

The defendant, SCOTT RASMUSSEN, by and through counsel, SAMUEL J. HANSEEN and MITCHELL Z. RICKEY, hereby respectfully requests this court to include the attached jury instructions.

Respectfully submitted this 28th day of August, 2017.

/s/ Samuel J. Hanseen
SAMUEL J. HANSEEN
/s/ Mitchell Z. Rickey
MITCHELL Z. RICKEY
Counsel for Defendant

Jury Instruction _____

The government must prove beyond a reasonable doubt that Mr. Rasmussen knew that the law imposed a duty on him, and Mr. Rasmussen intentionally and voluntarily violated that duty.

A person who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law. To find Mr. Rasmussen guilty, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that he was complying with the law.

Cheek v. United States, 498 U.S. 192, 201 (1991); *State v. Eyre*, 2008 UT 16, ¶ 13; 179 P.3d 72, 796.

Jury Instruction _____

To prove that Mr. Rasmussen intentionally or willfully attempted to evade any tax, fee, or charge previously defined, the State must first prove the existence of a tax deficiency. If the State has not proved the existence of such a deficiency, you must find Mr. Rasmussen not guilty.

State v. Eyre, 2008 UT 16 ¶ 14-15; 179 P.3d 792, 796-797.

Jury Instruction ____

“Evade” is defined as avoidance of something by effort, skill, dexterity, contrivance, subterfuge, ingenuity, or artifice. In order to prove that Mr. Rasmussen had an intent to evade, the State must prove a conscious desire to avoid a legal requirement with which the actor knows he or she is obligated to comply.

An intent not to file a tax return, even if required by law to file, is an “intent to evade” only if the actor is aware that he or she is legally required to file.

Silver v. Auditing Div. of State Tax Com’n, 820 P.2d 912, 915 (1991)

Addendum D

Jury Instructions 1-26

(R240-66)

INSTRUCTION NO. 1

SCOTT ALAN RASMUSSEN is charged in Count 1 with committing Tax Evasion on or about April 18, 2011. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) Intentionally or willfully attempted;
- (3) To evade or defeat;
- (4) Any tax, fee, or charge as defined in Section 59-1-401; OR
- (5) The payment of a tax fee or charge as defined in Section 59-1-401.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 2

SCOTT ALAN RASMUSSEN is charged in Count 2 with committing Failure to Render Tax Returns on or about April 18, 2011. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) With intent to evade any
 - a. Tax, fee, or charge as defined in Section 59-1-401; or
 - b. Requirement of Title 59, revenue and taxation; or
 - c. Any lawful requirement of the State Tax Commission
- (3) Failed to make, render, sign, or verify any return or to supply any information within the time required by law; or
- (4) Made, rendered, signed or verified any false or fraudulent return or statement;
or
- (5) Supplied any false or fraudulent information.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 3

SCOTT ALAN RASMUSSEN is charged in Count 3 with committing Tax Evasion on or about April 17, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) Intentionally or willfully attempted;
- (3) To evade or defeat;
- (4) Any tax, fee, or charge as defined in Section 59-1-401; OR
- (5) The payment of a tax fee or charge as defined in Section 59-1-401.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 4

SCOTT ALAN RASMUSSEN is charged in Count 4 with committing Failure to Render Tax Returns on or about April 17, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) With intent to evade any
 - a. tax, fee, or charge as defined in Section 59-1-401; or
 - b. requirement of Title 59, revenue and taxation; or
 - c. Any lawful requirement of the State Tax Commission
- (3) Failed to make, render, sign, or verify any return or to supply any information within the time required by law; or
- (4) Made, rendered, signed or verified any false or fraudulent return or statement;
or
- (5) Supplied any false or fraudulent information.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 5

SCOTT ALAN RASMUSSEN is charged in Count 5 with committing Tax Evasion on or about April 15, 2013. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) Intentionally or willfully attempted;
- (3) To evade or defeat;
- (4) Any tax, fee, or charge as defined in Section 59-1-401; OR
- (5) The payment of a tax fee or charge as defined in Section 59-1-401.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 6

SCOTT ALAN RASMUSSEN is charged in Count 6 with committing Failure to Render Tax Returns on or about April 15, 2013. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) With intent to evade any
 - a. tax, fee, or charge as defined in Section 59-1-401; or
 - b. requirement of Title 59, revenue and taxation; or
 - c. Any lawful requirement of the State Tax Commission
- (3) Failed to make, render, sign, or verify any return or to supply any information within the time required by law; or
- (4) Made, rendered, signed or verified any false or fraudulent return or statement;
or
- (5) Supplied any false or fraudulent information.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 7

SCOTT ALAN RASMUSSEN is charged in Count 7 with committing Tax Evasion on or about April 15, 2014. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) Intentionally or willfully attempted;
- (3) To evade or defeat;
- (4) Any tax, fee, or charge as defined in Section 59-1-401; OR
- (5) The payment of a tax fee or charge as defined in Section 59-1-401.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 8

SCOTT ALAN RASMUSSEN is charged in Count 8 with committing Failure to Render Tax Returns on or about April 15, 2014. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) With intent to evade any
 - a. tax, fee, or charge as defined in Section 59-1-401; or
 - b. requirement of Title 59, revenue and taxation; or
 - c. Any lawful requirement of the State Tax Commission
- (3) Failed to make, render, sign, or verify any return or to supply any information within the time required by law; or
- (4) Made, rendered, signed or verified any false or fraudulent return or statement;
or
- (5) Supplied any false or fraudulent information.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 9

SCOTT ALAN RASMUSSEN is charged in Count 9 with committing Tax Evasion on or about April 15, 2015. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) Intentionally or willfully attempted;
- (3) To evade or defeat;
- (4) Any tax, fee, or charge as defined in Section 59-1-401; or
- (5) The payment of a tax fee or charge as defined in Section 59-1-401.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 10

SCOTT ALAN RASMUSSEN is charged in Count 10 with committing Failure to Render Tax Returns on or about April 15, 2015. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) With respect to a tax, fee, or charge as defined in Section 59-1-401
- (3) Knowingly and intentionally, without a reasonable good faith basis;
- (4) Failed to make, render, sign, or verify any return;
- (5) Within the time required by law; or
- (6) Failed to supply information within the time required by law or
- (7) Made, rendered, signed, or verified any false or fraudulent return or statement; or
- (8) Supplied any false or fraudulent information.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 11

SCOTT ALAN RASMUSSEN is charged in Count 11 with committing Tax Evasion on or about April 15, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) Intentionally or willfully attempted;
- (3) To evade or defeat;
- (4) Any tax, fee, or charge as defined in Section 59-1-401; or
- (5) The payment of a tax fee or charge as defined in Section 59-1-401.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 12

SCOTT ALAN RASMUSSEN is charged in Count 12 with committing Failure to Render Tax Returns on or about April 15, 2016. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

- (1) Scott Alan Rasmussen;
- (2) With respect to a tax, fee, or charge as defined in Section 59-1-401
- (3) Knowingly and intentionally, without a reasonable good faith basis;
- (4) Failed to make, render, sign, or verify any return;
- (5) Within the time required by law; or
- (6) Failed to supply information within the time required by law or
- (7) Made, rendered, signed, or verified any false or fraudulent return or statement; or
- (8) Supplied any false or fraudulent information.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 13

Before you can convict the defendant of Tax Evasion, as charged in Counts 1, 3, 5, 7, 9, and 11 of the Information, you must find beyond a reasonable doubt that the defendant acted "intentionally" or "willfully." These are specifically defined terms that have the following meanings under the laws of the State of Utah:

"Intentionally" or "willfully": 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 or her conscious objective or desire to engage in the conduct or cause the result.

INSTRUCTION NO. 14

“Evade” is defined as avoidance of something by effort, skill, dexterity, contrivance, subterfuge, ingenuity, or artifice. In order to prove that Mr. Rasmussen had an intent to evade, the State must prove a conscious desire to avoid a legal requirement with which the actor knows he or she is obligated to comply.

INSTRUCTION NO. 15

Every resident individual is required to file a state tax return in any year they are required to file a federal return. And a federal return must be filed whenever certain income thresholds are met—a tax does not necessarily need to be owed. Accordingly, Title 59 also requires residents to file income tax returns whenever these same income thresholds are met. Utah tax returns must be filed on or before April 15 or on or before the federal filing date.

The filing thresholds for the relevant years are as follows:

2010 - \$9,350

2011 - \$9,500

2012 - \$9,750

2013 - \$10,000

2014 - \$10,150

2015 – 10,300

INSTRUCTION NO. 16

“Resident individual” of the State of Utah means:

(A) an individual who is domiciled in this state (Utah) for any period of time during the taxable year, but only for the duration of the period during which the individual is domiciled in this state; or

(B) an individual who is not domiciled in this state but:

(I) maintains a permanent place of abode in this state; and

(II) spends in the aggregate 183 or more days of the taxable year in this state.

(ii) For purposes of this Subsection (1)(q)(i)(B), a fraction of a calendar day shall be counted as a whole day.

INSTRUCTION NO. 17

With respect to the offense of Tax Evasion, as charged in Counts 1, 3, 5, 7, 9 and 11 of the Information, the State must prove as an element of the offense that the defendant owed state income tax for the period alleged.

INSTRUCTION NO. 18

"Taxable income" or "state taxable income" for a resident individual, means the resident individual's adjusted gross income after making the additions, and subtractions, and adjustments required by Title 59. However, if an individual fails to file tax returns, unclaimed deductions are completely unavailable to him or her.

INSTRUCTION NO. 19

Unless a resident individual is exempt, a tax is imposed on the state taxable income of a resident individual equal to 5% of the resident individual's state taxable income for that taxable year.

INSTRUCTION NO. 20

An individual is exempt from a tax imposed by Utah Code, Title 59, if the individual's adjusted gross income on the individual's federal individual income tax return for the taxable year is less than or equal to the sum of the individual's:

- a. personal exemptions for the taxable year; and
- b. standard deduction for that taxable year

"Personal exemptions" means the total exemption amount an individual is allowed to claim for the taxable year under Section 151, Internal Revenue Code.

"Standard deduction" means the standard deduction an individual is allowed to claim for the taxable year under Section 63, Internal Revenue Code.

Personal Exemptions for the relevant years were as follows:

2010 - \$2,738
2011 - \$2,775
2012 - \$2,850
2013 - \$2,925
2014 - \$2,962.50
2015 - \$3,000

Standard deductions for the relevant years were as follows:

2010 - \$5,700
2011 - \$5,800
2012 - \$5,950
2013 - \$6,100
2014 - \$6,200
2015 - \$6,300

INSTRUCTION NO. 21

The defendant's state of mind with regard to the alleged conduct may be inferred from the defendant's actions or from the surrounding circumstances. Reasonable inferences regarding the defendant's intent, willfulness, knowledge, or recklessness, or lack thereof, may be drawn from the surrounding facts.

INSTRUCTION NO. 22

With respect to Counts 2, 4, 6 and 8, Failure to Render Tax Returns, the State must prove that it was the defendant's conscious desire to evade any

- a. tax, fee, or charge as defined in Section 59-1-401; or
- b. requirement of Title 59, revenue and taxation; or
- c. any lawful requirement of the State Tax Commission

An intent not to file a tax return, even if required by law to file, is an "intent to evade" only if the actor is aware that he or she is legally required to file.

INSTRUCTION NO. 23

Before you can convict the defendant of Failure to Render a Tax Return, as charged in Counts 10 and 12 of the Information, you must find beyond a reasonable doubt that the defendant acted “knowingly” and “intentionally.” These are specifically defined terms that have the following meanings under the laws of the State of Utah:

- (1) “Intentionally”: 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 or her conscious objective or desire to engage in the conduct or cause the result.
- (2) “Knowingly”: a person engages in conduct knowingly, or with knowledge, with respect to his or her conduct or to circumstances surrounding his or her conduct when he or she is aware of the nature of his or her conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his or her conduct when he or she is aware that his or her conduct is reasonably certain to cause the result.

INSTRUCTION NO. 24

If a person required to file a return with the Utah State Tax Commission fails to file the return with the Commission, the Commission may estimate the tax, fee, or charge due from the best information or knowledge the Commission can obtain.

INSTRUCTION NO. 25

Gross income is all income from whatever sources.

INSTRUCTION NO. 26

Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless:

- (a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense; and
- (b) His ignorance or mistake resulted from the actor's reasonable reliance upon:
 - (i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
 - (ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

INSTRUCTION NO. 27

A person acts "intentionally," "willfully," or "with intent" when his or her conscious objective is to engage in certain conduct. Conduct means either an act or an omission.