

1987

Utah v. James V. Crestani : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

870525-A

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Respondent

vs.

JAMES V. CRESTANI,

Defendant-Appellant

Case No. 870525-CA

PRIORITY CLASSIFICATION NO. 2

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal from the Order and Judgment of the Third Judicial
District Court for Salt Lake County, the Honorable John A.
Rokich, District Judge.

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Noted
Clerk of the
Utah Court of App.

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STATEMENT OF ADDITIONAL FACTS

In reply to the Brief of Respondent, Defendant Crestani submits the following facts to correct misstatements or supply omissions necessary for a full understanding of this case:

1. In this case, Defendant Crestani was charged with stealing money from the commercial bank account known as MMD-2 on four separate occasions over a three-month period from May 7 to August 13, 1982. The total amount alleged to have been stolen was \$57,300.00. (R. 23).

2. Originally, the State alleged that the four withdrawals made by Crestani were unlawful because all of the money deposited into MMD-2 was escrow money belonging to the customers of Alta Title Company. (R. 23).

3. At trial, however, substantial evidence was introduced establishing that MMD-2 was, from its inception, used to maintain funds other than escrow monies and that the account at various times contained personal funds of the Defendant Crestani as well as funds belonging to Alta Title Company. This point is conceded in Respondent's Brief in the first paragraph on page 4.

4. No particular victim or rightful owner of the allegedly stolen funds was ever identified by the prosecution. (T. 198-200).

5. MMD-2 was an active account for the 13-month period ending in March, 1983. The State introduced at trial the monthly

account statements and individual checks and deposit items for MMD-2 for only the period February, 1982, through October, 1982. (Plaintiff's Exhibits 11 and 17 through 24).

6. In an attempt to show that the Defendant's withdrawal of money caused a financial loss, the State introduced evidence that when MMD-2 closed in March, 1983, Alta Title's underwriter paid approximately \$125,000.00 to \$150,000.00 due to losses in MMD-2 (T. 57, 58). However, since no bank records were introduced showing what happened to MMD2 during the five-month period from November, 1982, to March, 1983, no evidence was available at trial directly connecting four charged withdrawals with the losses in March, 1983.

7. At trial, the State did not provide any audit or accounting of the MMD-2 account over its entire 13-month existence. The only analysis of what happened in that account offered in the State's case in chief was through the testimony of Roger Piburn, a former employee of Alta Title Company (T. 138-163). Mr. Piburn testified that in November, 1982, he performed a review of deposits into and disbursements out of MMD-2 for the period February, 1982, through October, 1982. (T. 144, 190).

8. Mr. Piburn testified only from memory about his review conducted some five years earlier and he produced no notes, memoranda or records of his review of the account (T. 168).

9. On the first day of trial, Mr. Piburn testified that he couldn't recall any of Defendant Crestani's personal monies being

in MMD-2 (T. 146, 194). The next day, Mr. Piburn testified that he did recall that Defendant Crestani had personal funds in MMD-2 (T. 242). However, Mr. Piburn could not recall any specific deposit of Mr. Crestani's. (T. 243).

10. Contrary to Mr. Piburn's testimony (T. 144, 242), the MMD-2 account was not consistently overdrawn. In fact, the account was never in an overdraft status from its inception until the end of October (Plaintiff's Exhibits 11 and 20-24) and the overdraft disclosed by the October statement was in the amount of only \$2,854.95. That is some Fifty-four Thousand Dollars (\$54,000.00) less than the alleged loss from the Crestani withdrawals. The records for the account show that none of the withdrawals charged to the Defendant caused an overdraft in the account. (Exhibits 20P, 21P and 11P).

11. The record does not disclose that trial counsel made a Motion to Dismiss at the close of the State's case.

12. Had trial counsel called the witness Blake Hammond from Phoenix to testify, Mr. Hammond would have testified that in late February or March, 1983, Mr. Piburn stated in front of other witnesses that he had not performed any reconciliation of MMD-2 (R. 201).

13. After sentencing in this case, in the two-week period between the hearings on Defendant's motion for a new trial on October 26, 1987 and November 12, 1987, the CPA hired by new counsel for Mr. Crestani performed a review of the entire MMD-2 account as well as several other accounts maintained by Alta

Title Co. and Mr. Crestani. The two reports generated by the CPA from this review are attached hereto as Addendum Exhibits "A" and "B".

14. The CPA discovered several deposits of Mr. Crestani's personal funds into MMD-2 which were not known to trial counsel or mentioned at trial.

15. The CPA discovered one deposit made on June 28, 1982, in the amount of \$24,622.50. The CPA further found that these funds were still in the account and available to cover the \$16,500.00 withdrawal on August 13, 1982, which was the basis of Count IV of the Information. Both Mr. Crestani and Raymond Fry have confirmed that the deposited funds were owed to Mr. Crestani personally. (R. 266, 252-254).

16. In addition, the CPA located a deposit of Mr. Crestani's personal funds in the amount of \$50,000.00, made by Mr. Crestani's attorney on August 5, 1982 (Exhibit "A" at p.4). The CPA discovered that this deposit was intended by Mr. Crestani to go into MMD-2, but unknown to Mr. Crestani, was deposited into another account by mistake (Id.). The accountant discovered that these funds were never withdrawn up to the time that Alta Title closed in March, 1983 (Id.).

17. The CPA also discovered that in 1982, Mr. Crestani had available to him in the bank accounts of Alta Title over \$500,000.00 of personal funds from the sale of the Alta Title building (Exhibit "B" at p.2). The CPA further found that because of the numerous deposits into MMD-2 from the various Alta

Title bank accounts, many of which could have been part of the above-described \$500,000 or other funds belonging to Mr. Crestani, a determination of whether or not other funds were available to cover to the withdrawals charged in this case would require a review of all Alta's accounts (Id.). The CPA's report states:

Because there were over \$4,400,000 in deposits into the MMD-2 account classified as "repurchase agreement" funds, and multiple transfers from the general Alta account and the MMD1 account, and many transfers from the MMD-2 account into the Valley Bank escrow account, a full and complete accounting of all transactions must be made before anyone can answer [the question of whether or not Crestani had funds in the MMD-2 account to cover the charged withdrawals] accurately. This has never been done. (Exhibit "B" at pp.2-3. Emphasis in original).

18. The CPA also discovered numerous deposits of Crestani's personal funds into MMD-2 subsequent to the date of the last charged offense. The CPA's report states that because of time constraints, they were not able to obtain adequate documentation from the other deposits to include them in his report. (Exhibit "A" at p.4).

19. The CPA also found that when he showed Mr. and Mrs. Crestani the full records of the MMD-2 account, their memories were prompted with regard to the details of specific transactions (Exhibit "A" at p.1). The CPA reports that the Crestanis were able to recall events surrounding the four charged withdrawals which, because they did not have the documents, they were not able to recall at trial. (Exhibit "A" at pp.2-4).

20. The cash withdrawals referred to on page 7 of Respondent's Brief which Mr. Piburn testified Mr. Crestani made and "placed in his pocket" were not withdrawals from MMD-2, but were from the Alta Title General Fund account (T. 251).

SUMMARY OF ARGUMENT

The requisite showing of prejudice to Defendant Crestani's case is made out by the evidence that trial counsel's lack of preparation and his incomplete factual investigation left him completely ignorant of facts providing a complete defense to count IV of the information and arguably good and sufficient defenses to the remaining counts. Trial counsel was unaware of many of the deposits of Defendant Crestani's personal monies into MMD-2 both before and after the charged withdrawals and he was further ignorant of the facts and circumstances surrounding the deposits that were relied upon by the defense at trial.

Trial counsel's lack of understanding of the case also prevented him from making a motion to dismiss which should have been made and probably would have been granted at the close of the State's case. Further, trial counsel's ignorance caused him unwittingly to supply a missing element of the State's proof.

Defense counsel's unprofessional conduct which deprived Defendant Crestani of exonerating evidence cannot be excused as sound trial strategy. Since trial counsel completely failed in his duty to carefully investigate the facts of the case, his tactical decisions were the result of inadequate preparation and therefore lacked a rational basis.

Trial counsel's failures to object to the admission of irrelevant and prejudicial evidence at trial were the result, not of trial strategy, but of ignorance and negligence.

Respondent's argument that Instructions 16 and 25 were "helpful" or "clarifying" instructions is completely refuted by a careful reading of both instructions.

Notwithstanding the abandonment of the terms "general and specific intent", in Utah's statutory scheme, Defendant Crestani's proposed intent instructions were improperly denied because the instructions given by the Court did not clearly explain that the required mental state was a separate element of the crime.

ARGUMENT

POINT I

TRIAL COUNSEL'S PREPARATION AND TRIAL OF THIS CASE FELL BELOW THE CONSTITUTIONAL STANDARD AND RESULTED IN SEVERE PREJUDICE TO DEFENDANT CRESTANI'S CASE

Against the overwhelming evidence of trial counsel's lack of preparation and factual investigation presented in Appellant's Brief, the State sets up only a few "straw man" arguments which simply ignore the thrust and substance of this appeal.

Most assuredly, Defendant Crestani bases this appeal on the violation of his right to effective assistance of counsel secured by article I sections VII and XII of the Utah Constitution and by the sixth and fourteenth amendments to the United States Constitution. Meaningfully applied, that right includes the

opportunity to receive effective aid of counsel in the preparation and trial of the case. People v. Douglas, 61 Cal. 2d 430, 434, 392 P.2d 964, 38 Cal. Rptr. 884 (1964); People v. Carter, 66 Cal. 2d 666, 669, 427 P.2d 214, 58 Cal. Rptr. 614 (1967).

According to Utah law, the threshold inquiry in a case alleging ineffective assistance of counsel is whether or not the conduct of trial counsel prejudiced the defendant's case. State v. Archuleta, 747 P.2d 1019 (Utah 1987). The parties agree that prejudice is established by affirmatively showing that a reasonable probability exists that, but for counsel's unprofessional errors, the trial result would have been different. State v. Frame, 723 P.2d 401, 405 (Utah 1986). (Br. of Resp. p.14.)

This standard, adopted from Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), is less restrictive than the "farce and sham" standard previously used by Utah Courts (See State v. McNicol, 554 P.2d 203 (Utah 1976)). Under the modern standard, a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case, Strickland at 683, 104 S.Ct. at 2067, but only the existence of a reasonable probability that the result would have been different.

Respondent acknowledges that prejudice is established where the conduct of trial counsel "probably resulted in the forfeiture of a substantial defense." (Br. of Resp. p.17, quoting Commonwealth v. Sellon, 402 N.E.2d 1329, (Mass. 1980)).

However, Respondent baldly and incorrectly asserts that: "Defendant does not assert he lost a substantial defense nor that

'any issue of law or fact could have but was not exploited by counsel for the Defendant's benefits'" (Br. of Resp. p.17, citations omitted).

In fact, Defendant Crestani has repeatedly and strongly asserted that because of trial counsel's inadequate preparation, he lost an absolute defense to count IV of the information. In addition, the true facts of Defendant's financial situation, his numerous deposits into MMD-2 both before and after the charged withdrawals, and, the true facts and circumstances surrounding some of the contested deposits were kept from the jury because of trial counsel's failure to obtain and review with Defendant and the other witnesses the relevant account records.

The clearest prejudice results from trial counsel's failure to identify the \$24,000.00 deposit of June 28, 1982. Against this powerful piece of evidence, Respondent can only point out that the CPA did not establish, as of course he could not have established, the personal source of the loan to Raymond Fry. However, Respondent ignores the evidence submitted to the trial court that both Defendant Crestani and Mr. Fry identified the loan as having come from personal funds of Defendant Crestani. (R. 266, 253). More importantly, however, trial counsel was completely ignorant of this transaction, which a thorough review of MMD-2 and even an adequate interrogation of his own client would surely have revealed. It is solely because of trial counsel's constitutionally inadequate preparation for trial that

this evidence and the complete defense it would have provided was lost to Defendant Crestani.

Additional evidence of trial counsel's ignorance of the case is found in the fact that the CPA, in going over the MMD-2 account records with Defendant and his witnesses, was given reasonable explanations for the charged withdrawals that were not presented at trial. Contrary to the assertions of Respondent's Brief, this evidence is not presented here to "show that Defendant lacked the requisite intent" (Br. of Resp. p.15). This evidence is submitted to show that adequate investigation and preparation would have discovered additional important evidence and testimony helpful to the defense that should have been heard by the jury. The fact that it was not severely prejudiced Defendant's case.

POINT II

TRIAL COUNSEL FURTHER PREJUDICED DEFENDANT CRESTANI'S CASE BY FAILING TO PERCEIVE A FATAL WEAKNESS IN THE STATE'S CASE.

The legal case constructed against Defendant Crestani at trial was remarkably weak. The prosecution's case was originally based upon the flawed premise that MMD-2 was exclusively an escrow account. When it became clear at trial that an MMD-2 was also used, before and after the alleged thefts, as a depository for Defendant Crestani's personal funds, as well as funds of Alta Title over which he would have had authority, the State's case was left with a glaring deficiency.

The State's case was suddenly without any proof that the Defendant Crestani did not withdraw his own funds or funds he believed to be his own. The \$2,800.00 overdraft in the account in October was insufficient to demonstrate the theft of \$57,000.00, and, because of the gap in the bank record evidence between October 1982 and March 1983, there was no evidence to tie the Crestani withdrawals to the \$150,000.00 loss that occurred when the account was closed.

Because trial counsel was largely ignorant of the history of the account, he failed, at the close of the State's evidence, to move to dismiss the State's case for failure to prove the elements of lack of authority and intent to permanently deprive. Instead, he took on the burden of disproving that which the State has failed to prove in the first place by introducing evidence of deposits which he thought would have covered the charged withdrawals.

However, because trial counsel had failed to subpoena the records of disbursements from MMD-2, both he and his woefully unprepared witnesses were unaware that the few deposits for which they had records had been disbursed from the account prior to the charged withdrawals. He also tested the jury's credulity by having Mrs. Crestani testify to huge deposits for which they could produce no records.

Though the prosecutor was apparently also unaware of the deposits of Crestani's personal funds in MMD-2, he was able, during an overnight recess, to locate the disbursement records

that deprived the defense evidence of any probative force. The Crestani's, unprepared as they were for this unexpected evidence, could offer no explanation. Then, through his questioning and in his closing argument, the prosecutor used this monumental defense error to supply the very evidence of lack of authority that was otherwise lacking in his own case. The prosecutor was able to say to the jury, in essence, if Mr. Crestani had authority to withdraw these funds, he and his wife would not have had to try to "pull the wool over" the jury's eyes by inventing bogus deposits or claiming deposits covered the withdrawals when they knew full well the deposits either did not exist or had been withdrawn before the thefts.

Trial counsel's ignorance of the facts and failure of preparation and the devastating effect achieved by the prosecution in pointing out those defects to the jury can be confirmed by even a brief review of the record.

After suddenly being told she would be a witness for her husband three days into the trial, Vicki Crestani took the stand and was asked immediately to confirm a deposit of Defendant Crestani's personal funds into MMD-2 in the amount of \$15,000.00. (T. 408-410). The next day, on cross examination, the prosecutor confronted her with the damning evidence that she herself had withdrawn the \$15,000.00 deposit at the same time it was put into MMD-2. The following exchange occurred between the prosecutor and Mrs. Crestani:

Mr. Bown: So you knew that money was out of that account when you testified about that \$15,000.00?

Mrs. Crestani: No. I did not.

Mr. Bown: You didn't recall that he told you to take the \$15,000.00 out until just now?

Mrs. Crestani: No sir, not until I was shown this document.

(T. 472)

As a further example, on direct examination, trial counsel tried to get Mrs. Crestani to establish, from memory without benefit of deposit documents, two \$100,000.00 deposits into MMD-2 (T. 419). The ineptness of this defense tactic was emphasized by numerous foundational objections which caused considerable embarrassment because Mrs. Crestani was unable to recall the dates of the deposits except within a general time frame of "mid-1982." (T. 419-421)

Trial counsel then attempted to have Mrs. Crestani explain why no documents were available to prove the existence of the deposits and the following exchange occurred:

Mr. Hansen: And were there documentations of these amounts?

Mrs. Crestani: In these--

Mr. Hansen: Of the hundred and the hundred?

Mrs. Crestani: Yes, there are documents.

Mr. Hansen: And do you have access to them?

Mrs. Crestani: No, I'm sorry, we don't.

Mr. Hansen: Can you tell me where they are?

Mrs. Crestani: I believe those are with attorneys, with the Alta Title attorneys, our personal attorneys. They are not in our possession.

(T. 421, 422)

Trial counsel did not attempt to explain to the jury why, if these crucial documents were in the possession of the Crestanis' own attorneys, they were not produced at trial.

On cross examination, the prosecutor repeatedly asked Mrs. Crestani if she could find either of the \$100,000.00 deposits in the MMD-2 bank statements. (T. 423, 424) Mrs. Crestani had to admit that she had not previously looked for those deposits (T. 424). The prosecutor then pointedly highlighted the frailty of Mrs. Crestani's testimony:

Mr. Bown: You don't know?

Mrs. Crestani: But the loan document was for \$100,000.00.

Mr. Bown: That's all you know?

Mrs. Crestani: I know that the loan was for \$100,000.00.

Mr. Bown: How long have you known about that loan?

Mrs. Crestani: I knew about it when it was taken out.

Mr. Bown: You still haven't found that on the MMD-2? You can't pinpoint it to any specific--

Mrs. Crestani: I have only looked through this particular one. I can look through these others.

I don't see one for exactly \$100,000.00 deposit.

Mr. Bown: Okay. So, you are just relying on your memory to say it went into MMD-2?

Mrs. Crestani: No. I believe it did.

Mr. Bown: You are relying on your memory?

Mrs. Crestani: Yes.

(T. 425)

The prejudice to the defense case of this devastating sequence of trial events, caused solely by trial counsel's inadequate preparation, is painfully clear.

POINT III

TRIAL COUNSEL'S FAILURES AMOUNTED TO CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL AND CANNOT BE CALLED SOUND TRIAL STRATEGY.

It is difficult to understand Respondent's argument that, even if prejudice was established, trial counsel's conduct can be dismissed as "sound trial strategy." (Br. of Resp. at p.17). One wonders what possible sound trial strategy would encompass a defense attorney's decision to withhold from the jury exonerating evidence.

It is not difficult to perceive why Respondent asserts this argument. Tactical trial decisions are usually insulated from appellate "second guessing." Layton City v. Noon, 736 P.2d 1035 (Utah App. 1987); State v. McNicol, 554 P.2d 203, 205 (Utah 1976). People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587 58 Cal. Rptr. 281 (1979).

However, courts have pointed out that:

Even tactical decisions may demonstrate incompetence if made without the benefit of 'substantial factual inquiry. Frierson, supra, citing In re Saunders, 2 Cal. 3d 1033, 1048-1049, 472 P.2d 921, 88 Cal. Rptr. 633 (1970).

Respondent's Brief ignores the fact that the constitutional guarantee of effective assistance of counsel imposes a "duty on defense attorneys to investigate carefully all defenses of fact and law that may be available to the Defendant, and that this duty to investigate requires that counsel gather as much information as possible about the case." Barber v. Municipal Court, 24 Cal. 3d 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979).

When confronted with the claim that trial counsel's apparently unprofessional conduct was "sound trial strategy", an appellate court must decide "whether counsel's actions were the result of informed judgment or constitutionally inadequate preparation." Stough v. State, 618 P.2d 301 (Hawaii 1980).

Trial tactics can never be called sound when counsel fails to make a substantial factual inquiry into the specifics of his client's defense. Indeed, other courts have reversed convictions where trial counsel's inaction deprives him of a rational basis

upon which to reach informed tactical and strategic decisions. See People v. Frierson, supra.

In the instant case, trial counsel failed to make the careful factual investigation necessary for a constitutionally adequate defense. He entered the trial completely ignorant of a large amount of factual information necessary for an understanding of his client's defense. As such, he could not function as adequate counsel. Whatever tactical and strategic decisions he made were without rational basis and, by definition, wholly unsound. No such unprofessional conduct can meet the constitutional standard of effective assistance of counsel.

In addition, trial counsel's conduct was constitutionally deficient in another respect. For nearly two years trial counsel avoided any contact or communication with his client. Only on the literal eve of trial was Defendant Crestani able to discuss some of the factual defenses and evidence necessary to defend the case with trial counsel.

A meaningful discussion with one's client of the realities of the client's case is as important to the concept of constitutionally effective assistance of counsel as the informed evaluation of potential defenses. Goodwin v. Balkom, 684 F.2d 794, 805 (11th Cir. 1982). cert. den., 460 U.S. 1098 (1983). Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). Adequate consultation between an attorney and the client is an essential element of competent representation of a criminal defendant. United States v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983).

While the amount of consultation required will depend on the facts of each case, the "consultations should be sufficient to determine all legally relevant information known to the Defendant." Id. See also, U.S. ex rel Cross v. DeRobertis, 661 F. Supp. 683 (N.D. Ill. 1986).

Where trial counsel's representation was so obviously deficient in both investigation of factual defenses and consultation with his client, there is little question that his conduct fell far below the constitutional standard.

POINT IV

TRIAL COUNSEL'S FAILURE TO PREVENT THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE PREJUDICED DEFENDANT'S CASE.

In its Brief, Respondent attempts to defend the manner in which the civil statute, Exhibit 30-p, was received into evidence. Of course, this event was but one of several raised by Defendant Crestani to illustrate trial counsel's ineffectiveness caused by lack of preparation and lack of understanding of the case.

On the last day of trial, trial counsel recalled witness Gary Carlson apparently for the sole purpose of establishing that out-of-state partnerships had to have individuals rather than corporations as their registered agents and therefore, Mr. Crestani and not Alta Title was necessarily the recipient of the \$50.00 partnership fees. (T. 491-495). Trial counsel himself was apparently confused about the difference between Mr. Crestani's

status as a title insurance agent and agent for the partnerships. In his effort to clarify the point he picked up Exhibit 30-p, which had not been admitted, and began questioning Mr. Carlson about the statute for the sole purpose of showing that it did not apply in the case. The Court, and not trial counsel, insisted that the statute be admitted if trial counsel were going to question the witness about it. Trial counsel attempted to limit the purpose for which the civil statute was admitted but the Court denied his motion. (T. 493).

Later, counsel tried to object because the civil statute in question did not relate to Mr. Crestani's partnership agency. The following exchange occurred:

Mr. Hansen: I object to that because it refers to this statute which is not the partnership act that we are talking about with Mr. Crestani. This is to issue title insurance policies.

The Court: The fact remains that Mrs. Crestani testified that Mr. Crestani is a title insurance agent.

Mr. Hansen: Well, that's true. But the evidence as to the \$50.00 that were--

The Court: We're talking about the dealings of an agent. The objection is overruled.

(T. 496)

Shortly thereafter Mr. Bown began questioning Mr. Carlson about the requirement in the civil statute that interest earned on trust account monies be paid to the customer and not the agency. (T. 496, 497). This line of questioning, allowed by the Court presumably because the civil statute was in evidence, was reemphasized in Mr. Bown's closing argument and in Instruction No. 16. This highly irrelevant and prejudicial evidence, which had nothing to do with the theft charges, ought to have been excluded. Trial counsel, in fact, never objected to any of the misappropriation of interest evidence. Defendant Crestani submits that this was not the result of trial strategy but negligence.

POINT V

THE GIVING OF JURY INSTRUCTIONS NO. 16 AND 25 WAS MISLEADING, PREJUDICIAL AND CONTRARY TO LAW.

In its Brief, Respondent defends both jury instructions 16 and 25 on the ground that they were "relevant to prove the element of unauthorized control." (Br. of Resp. at p.26) Aside from the fact that jury instructions are not proof and a relevance standard does not apply, these two challenged instructions were improper because they do not correctly state the law applicable to the evidence received at trial.

Part of Instruction No. 16, the verbatim selected portions of the civil statute referred to above, would have been proper under the prosecution's original theory of the case. Had the money in MMD-2 been only escrow monies, the first paragraph of

Instruction 16 would have been proper to define the restrictions on Defendant Crestani's use of those monies. But because MMD-2 was shown to contain Defendant Crestani's own money and Defendant Crestani did not claim that he had any authority to use escrowed funds, Instruction No. 16 became irrelevant to the case.

Even if, for the purposes of argument, the first paragraph of Instruction No. 16 could be considered proper to emphasize a lack of authority that Defendant Crestani never asserted he had, the second paragraph dealing with the restrictions on the use of interest from the account was absolutely prejudicial and irrelevant. Interestingly, the second paragraph of Instruction No. 16 was selectively lifted from among the other provisions of Utah Code Ann. § 31-25-26 (Supp. 1985), repealed by Utah Laws, Ch. 242, § 58. It is clear that this paragraph was inserted in the instruction solely for the improper purpose of emphasizing uncharged civil misconduct in order to portray the Defendant in a bad light.

Instruction No. 25 and the disturbing interaction between these two improper and unlawful instructions is fully addressed in Appellant's Brief. Respondent's argument that Instruction No. 25 was properly given to "clarify" anything (Br. of Resp. at p. 27) is simply not supported by a careful reading of this extremely misleading instruction.

The use of these instructions at trial provides a separate and independent ground for reversal unrelated to the other issues raised herein.

POINT VI

THE COURT ERRED IN NOT GIVING DEFENDANT'S REQUESTED INSTRUCTIONS.

The State, in its Brief at Page 28 cites State v. Calamity, 735 P.2d 39, 43 (Utah 1987). The portion of that case cited by the State simply holds that the terms "general and specific intent" are no longer used in our statutory scheme and therefore, instructions on the mental state required should be drawn to enlighten the jury as to requirements of the current statute and need not use the terms "general" or "specific" intent as terms of art. Nothing more was stated or implied by the statement quoted by Respondent. The Court in Calamity went on to identify the required mental state for the crime and stated:

The trial court instructed the jury that defendant could not be convicted unless he acted intentionally or with knowledge. The court then defined 'intentionally' and 'knowingly.'

What is sought in the instant case is merely the same thoroughness of instruction required in Calamity.

The holding that instructions need not be couched in terms of "general" or "specific" intent does not change the requirement that the jury must be properly instructed on all of the elements of the crime. The instruction given as number 14 cited by the State contains the statutory elements defining purpose to deprive, but it does nothing to alert the jury that this is a separate element of the crime.

Defendant's offered instructions merely state the necessity of finding the required mental state as a separate element. The instructions given did not do this adequately and were therefore inadequate to ensure that the jury was fully informed of the requirement of adequate proof of mens rea.

Defendant's case depended partly upon his assertion that he did not withdraw any funds with "purpose to deprive" any rightful owner thereof. Therefore, the Defendant's theory of the case was not adequately presented to the jury by the instructions given. "A defendant is entitled to have a jury instructed on his theory of the case, if there be any substantial evidence to justify giving the instruction." State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969); Accord State v. Reedy, 681 P.2d 1251, 1252 (Utah 1984). In the instant case not only was defendant's theory of the case not properly presented, but the jury was not properly instructed as to all the elements of the offense. "An accurate instruction on the basic elements of the offense charged is essential, and failure to so instruct constitutes reversible error." State v. Laine, 618 P.2d 33 (Utah 1980).

CONCLUSION

Respondent's Brief addresses only a selected few of the numerous factual and legal issues raised and substantiated in this appeal. Even in those few issues, Defendant Crestani's position is misstated or truncated. The true facts of this case

establish overwhelmingly the constitutionally ineffective nature of trial counsel's representation.

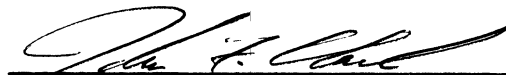
The deficiencies of representation described here are so glaring that one could conclude that the trial was reduced to a "farce and a sham", thus meeting even the more restrictive standard of prior case law justifying a reversal of the conviction. There is no doubt that these deficiencies undermine any confidence in the justness of the verdicts.

Having been deprived of his right to counsel vouchsafed by the constitutions of the State of Utah and the United States, Defendant Crestani is entitled to a new trial.

Respectfully submitted,

DATED this 23rd day of September, 1988

SESSIONS & MOORE



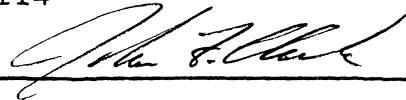
JOHN F. CLARK
Attorneys for Defendant-Appellant
James V. Crestani

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of September, 1988, the foregoing document was served on the Plaintiff-Respondent by mailing true and correct copies thereof by first-class mail, postage prepaid, to:

Gregory Brown
Deputy Salt Lake County Attorney
231 East 400 South
Salt Lake City, Utah 84111

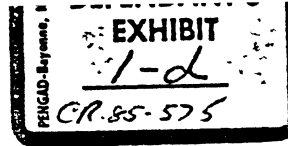
David L. Wilkinson
Attorney General
236 State Capitol
Salt Lake City, Utah 84114





**MARTINEAU
& COMPANY**

CERTIFIED PUBLIC ACCOUNTANTS



MEMBERS
AMERICAN INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS
UTAH ASSOCIATION OF
CERTIFIED PUBLIC ACCOUNTANTS
PRIVATE COMPANIES
PRACTICE SECTION
SEC PRACTICE SECTION

November 11, 1987

Mr. John F. Clark
Attorney at Law
Sessions & Moore
300 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102

Re: James V. Crestani

Dear John:

You have requested that we analyze certain records of James V. Crestani (hereinafter Crestani) and Alta Title Company (hereinafter Alta) to determine if there were funds in the Alta MMD2 account which were, or Crestani had reason to believe were, Crestani's funds at or about the time funds were withdrawn which Crestani was charged with theft for.

We reviewed all files in the Prosecutor's office, the evidence files at the Clerk's office, files at Main Hurdman's office and files at attorneys for the underwriter's office. We also received certain documentation in the form of microfilm copies of checks, drafts and deposits of the MMD2 account from Sandy State Bank. We interviewed James V. Crestani, Vickie R. (Peterson) Crestani (hereinafter Vickie), Ray D. Fry, Dick Romono, a private investigator, and James A. McIntyre, attorney for Crestani, regarding various documents and chronology of events, while at the same time presenting them with copies of documents and dates, in this case. We also discussed scope of audits, accounting detail and other matters with prosecutors, accountants with Main Hurdman, attorneys and certain customers of Alta. We have relied upon these conversations and information which they gave us in arriving at our conclusions.

When presented with specific documentation and correlated chronology, Crestani's memory seemed to be prompted with regard to the sequence of events and details of transactions in this matter. We will detail events and documentation in relationship to each of the four (4) counts of theft.

John F. Clark
James V. Crestani matter
November 11, 1987

The four Counts of theft were as follows:

Count 1:	May 7, 1982	\$ 4,000
Count 2:	May 19, 1982	20,000
Count 3:	June 11, 1982	16,800
Count 4:	August 13, 1982	16,500
		<u>\$57,300</u>
		=====

We will address each count separately so as to show specific funds which Crestani believed were on deposit in the MMD2 account at the time of the respective withdrawals to show, where applicable, specific correlations and/or cumulative funds which Crestani could have believed he was withdrawing.

Count 1:

On March 30, 1982, Crestani deposited \$15,000.00 into the MMD2 account (see Exhibit 1). The money originated from life insurance proceeds upon his mother's death. The \$15,000.00 was withdrawn from MMD2 account on the same day by draft signed by Vickie R. Peterson and transferred to an Alta account at Valley Bank & Trust Co. (Valley Bank) (see Exhibit 1A). Vickie indicates Roger Piburn (Piburn) directed her to withdraw the funds; Crestani maintains he did not know the funds were withdrawn.

On April 14, 1982, Crestani deposited \$19,896.73 into the MMD2 account (see Exhibit 2). The money originated from Crestani's account at Merrill Lynch. Crestani maintains he called Ron Carnego, President of Sandy State Bank, and asked him how much he had to deposit for 30 days to receive \$20,000.00 at interest and that is the amount he deposited for that purpose. The \$19,896.73 was withdrawn from MMD2 account on the same day by draft signed by Vickie R. Peterson and transferred to an Alta account at Valley Bank (see Exhibit 2A). Vickie indicates Piburn directed her to withdraw the funds; Crestani maintains he did not know the funds were withdrawn.

This reflects \$34,896.73 was deposited into the MMD2 account by or for Crestani prior to the May 7, 1982 disbursement of \$4,000 (Count 1) which Crestani maintains he thought was still in the account on May 7, 1982. The entire \$34,896.73 had been withdrawn and transferred to an Alta account at Valley Bank by that date.

Count 2:

The April 14, 1982, deposit referred to above of \$19,896.73 (see Exhibit 2) was deposited into MMD2 account by Crestani to draw interest for one month. As of May 19, 1982, according to Crestani's recollection of his conversation with Ron Carnego,

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James V. Crestani matter
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It would have accumulated both principal and interest of \$20,000.00 (had it not been withdrawn) by May 19, 1982.

On May 4, 1982, Sandy State Bank credited \$1,306.25 into the MMD2 account (see Exhibit 3) for interest earned for the month of April, 1982. This is noted to show that interest was credited to the account and would have accrued on the \$19,896.73, had it not been withdrawn.

On June 7, 1982, Sandy State Bank credited \$402.52 into the MMD2 account (see Exhibit 4) for interest earned for the month of May, 1982. This is noted for the same reason indicated above.

This reflects \$34,896.73 was deposited into the MMD2 account (not including the interest) by or for Crestani prior to the May 7, 1982 disbursement of \$4,000.00 (Count 1) and May 19, 1982 disbursement of \$20,000.00 (Count 2). The entire \$34,896.73 had been withdrawn and transferred to an Alta account at Valley Bank by that date.

Count 3:

On June 4, 1982, Sandy State Bank credited \$17,082.00 into the MMD2 account (see Exhibit 5) by mistake. The funds originated from a personal loan Crestani had made at Sandy State Bank against a boat and should have been deposited into Crestani's personal account at Sandy State Bank. When the bank called Crestani on June 11, 1982 to advise him his personal account was overdrawn, he advised them of the deposit from the loan, they discovered the error, and he stopped by the bank to sign a "counter check" to transfer the funds to his personal account, taking \$800.00 of cash from the funds and depositing \$16,000.00 into his personal account. On June 10, 1982, (the day before) the \$17,082.00 was withdrawn from MMD2 by draft signed by Vickie R. Peterson and transferred to an Alta account at Valley Bank (see Exhibit 5A). Vickie indicates Piburn directed her to withdraw the funds; Crestani maintains he did not know the funds were withdrawn.

This reflects that \$51,978.73 was deposited into the MMD2 account (not including interest) by or for Crestani prior to the Counts 1, 2 and 3 disbursements totalling \$40,800.00 as of June 11, 1982. The entire \$51,978.73 had been withdrawn and transferred to an Alta account at Valley Bank by that date.

Count 4:

On June 24, 1982, James A. McIntyre, attorney for Crestani, deposited \$30,000.00 into the MMD2 account for Crestani (see Exhibit 6). The funds originated from Crestani's trust

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account with McIntyre's firm.

On June 28, 1982, Crestani deposited \$24,622.50 into the MMD2 account (see Exhibit 7). The funds originated from a loan repayment from Ray D. Fry to Crestani of \$24,000.00 plus interest.

We found no records to indicate the above two deposits totalling \$54,622.50 were ever withdrawn from the MMD2 account, except for the \$16,500 withdrawal on August 13, 1982 (Count 4) up to and including the time in March, 1983 when Alta closed.

Other deposits:

On August 5, 1982, James A. McIntyre, attorney for Crestani, deposited \$50,000.00 for Crestani into what McIntyre described as the "escrow" account at Sandy State Bank (see Exhibit 10). It should have been deposited into MMD2 per Crestani's instructions to McIntyre, but was deposited to "Alta Title Company Contract Servicing Account" instead. We found no records to indicate the above deposit of \$50,000.00 was ever withdrawn from Alta up to and including the time in March, 1983 when Alta closed.

Although we discovered other deposits made into Alta by Crestani subsequent to the above transactions, they have not been included herein because we were not able, because of time restraints, to obtain adequate documentation for inclusion herein.

The above information reflects that \$106,601.23 was deposited into the MMD2 account (not including interest) by or for Crestani which were, or Crestani had reason to believe were, Crestani's funds at or about the time funds were withdrawn which Crestani was charged with theft for. Counts 1, 2, 3 and 4 totalled \$57,300.00 as of August 13, 1982. In addition, the \$50,000.00 deposit on August 5, 1982 should have been deposited into MMD2 for Crestani, the two amounts totalling \$156,601.23. Three withdrawals totalling \$51,978.73 were made and transferred to an Alta account at Valley Bank which Crestani maintains he did not know about. In addition, Crestani made two withdrawals totalling \$33,300.00. The combined withdrawals total \$85,278.73.

This leaves a balance of \$21,322.50 in the MMD2 account which was apparently not withdrawn (not including interest) and a balance of \$71,322.50, including the \$50,000.00 deposit of August 5, 1982, which went into an Alta account at Sandy State Bank.

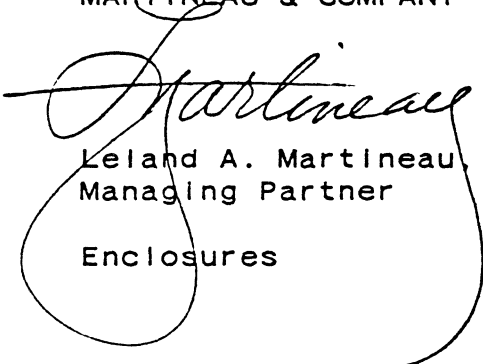
John F. Clark
James V. Crestani matter
November 11, 1987

5

We are available to review this information.

Sincerely,

MARTINEAU & COMPANY



Leland A. Martineau, CPA
Managing Partner

Enclosures

NOV 09 '87 15 09 WESTLAND TITLE


JIM CRESTANI
202 WEST 400 SOUTH 532-2852
SALT LAKE CITY, UT 84101

299

87-247/1243

Pay to the order of ALTA DINE CO.

FIFTEEN THOUSAND & NO/100 Dollars

 **Sandy State Bank**
140 West 900 South Sandy, Utah 84070

For [Signature]
⑆ 2430247710299 ⑆ 0311350 ⑆ 50 ⑆000⑆500000⑆

Printed Name of Bank

NOV 09 '87 15 11 WESTLAND TITLE

*for deposit only
Alta Dine Co
min D #2
91010728*

CUSTOMER'S DRAFT

ALTA TITLE COMPANY
202 West 400 South
Salt Lake City, Utah



No. 12

March 30 19 82

PAY TO THE ORDER OF ALTA TITLE COMPANY \$ 280.155.45

ALTA TITLE COMPANY
202 WEST 400 SOUTH
SALT LAKE CITY, UTAH 84143

VALUE RECEIVED AND CHANGE THE SAME TO ACCOUNT OF

WITH EXCHANGES DOLLARS

To 2007-27, 440.41/20126-20, 135.49/20004-1
18, 745.94/20110-2, 937.94/20125-184, 356.35
20098-5, 809.66/20099-5, 709.66/JC-15, 600.00 2

121213021771

91010728

0028015545

PAY TO THE ORDER OF
VALLEY BANK & TRUST CO.
SALT LAKE CITY, UTAH
FOR DEPOSIT ONLY
ALTA COMPANY, INC. - VI.
ESCROW ACCOUNT NO. 3
09 - 020144

VB27

RECEIVED
MAR 30 1962
VALLEY BANK AND TRUST CO.
SALT LAKE CITY, UTAH

MR 31 P. E.
SALT LAKE CITY
PAY ANY BANK
125-000-0451

000000

00000000
00050000

17

ACCOUNT 1 74468	SS-OR-ID 528-58-5147	A/E 1635	STATEMENT PERIOD. FROM-MAR 27 1982 TO-APR 30 1982	PAGE 4
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MR JIM CRISTANI
 202 WEST 400 SOUTH

Exh

***** SUMMARY OF VISA CARD ACTIVITY *****

DATE	DESCRIPTION	LOCATION	TRANSACTION DATE	AMOUNT
04 21	POLO/RALPH LAUREN	SLC UT	04/15	\$668.8
TOTAL VISA CARD ACTIVITY				\$668.8

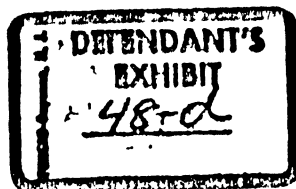
***** SUMMARY OF CHECKING ACTIVITY *****

DATE	CHECK NUMBER	PAYEE	DATE WRITTEN	AMOUNT
04 19	101	ALTA TITLE CO	04/14	\$19896.7
TOTAL CHECKING ACCOUNT ACTIVITY				\$19896.7

1 - YOUR ACCOUNT HAS AVAILABLE CREDIT OF: \$6020 LESS ANY PENDING AUTHORIZATIONS FOR PURCHASES OR CHECKS WHICH HAVE NOT CLEARED. ANY QUESTIONS REGARDING YOUR AVAILABLE CREDIT, CREDIT CARD AND CHECK ACTIVITY SHOULD BE DIRECTED TO THE FOLLOWING TOLL FREE NUMBER: NEW YORK STATE 800-522-5510, ALASKA AND HAWAII 800-221-8802, ALL OTHER STATES 800-221-4 IF YOUR CARD IS LOST OR STOLEN, PLEASE CALL US COLLECT IMMEDIATELY ON OUR 24 HOUR HOT LINE: 614-895-4242.

WHAT CRITERIA SHOULD YOU BE USING NOW TO SELECT STOCKS? FOR THE ANSWER, READ YOUR ENCLOSURE; YOU'LL ALSO LEARN ABOUT TWO NEW SPECIAL INVESTMENTS.

USE RETAIN THIS STATEMENT TO ENABLE YOU TO COMPUTE ANY INTEREST ON YOUR NEXT STATEMENT.



*19 079 06
 14 516.72
 10326*

Check deposits at this time

CUSTOMER'S DRAFT

ALTA TITLE COMPANY
202 West 400 South
Salt Lake City, Utah



Sandy State Bank
140 West 900 South • Sandy, Utah 84070

No. 16

April 14 1982

PAY TO THE ORDER OF ALTA TITLE COMPANY \$ 41,425.87

41425.87

VALUE RECEIVED AND CHARGE THE SAME TO ACCOUNT OF

DOLLARS

To 20272-157,00/ 20150-420.78
20219-15,515.86/ 26299-5067.50
20128-368,00/ 20201-19,896.73

97247
Richard Peterson

124302

91010728

0004142587

PAY TO THE ORDER OF
 VALLEY BANK & TRUST CO.
 SALT LAKE CITY, UTAH
 FOR DEPOSIT ONLY
 ALTA TITLE COMPANY
 ESCROW ACCOUNT NO. 3
 09 - 020144
 2 2 9 5 3
 VB&T
 018

37-154 97-154
 PAY ANY BANK P.E.
 VALLEY BANK AND
 TRUST COMPANY
 HIGHLAND DRIVE OFFICE
 SALT LAKE CITY UTAH
 210 11 15 1954

IAP '82' 15
 L2: SALT CITY
 AN BANK

125444
 125444
 125444

GPB Sandy State Bank
100 West 100th Street, Sandy, Utah 84070

WE HAVE CREDITED YOUR ACCOUNT

Interest for the month of April 82

ACCT NO *91-01023-8* DATE *5/4/82* AMOUNT *1.00*

TO *MEMO #2 Alta Title*

01243024770 910107280 79 0000

DO NOT FAIL TO MAKE THIS ENTRY IN YOUR RECORD BOOK

QIB Sandy State Bank

WE HAVE CREDITED YOUR ACCOUNT WITH *THIRTY*

ONE HUNDRED 1982

ACCT NO. *11-000000* DATE *6-7-82* AMOUNT *95*

10/11/11 & 12/11/11

51243026778

71010986P 79

DO NOT PAY TO HAVE THIS ENTRY IN YOUR RECORD BOOK

\$402.52



Sandy State Bank
140 West 9000 South • Sandy, Utah 84070

WE HAVE CREDITED YOUR ACCOUNT

Commercial Loans

ACCT NO 91 00563 7 DATE 6/4/82 APPD 1k AMOUNT 7.000

to Alta Title Co.

202 West 400 South

Slat Lake City, 84101

10 24 30 24 7710

DO NOT FAIL TO MAKE ENTRY IN YOUR RECORD BOOK


79 10001708 20

10 24 30 24 7710

91010728

79 10001708 20

James L. ...
SIXTEEN THOUSAND EIGHT HUNDRED & NO

 Sandy State Bank
1401 West 10th Street - Sandy, Utah 84070

12345678901234567890

June 11

1982

No.



917010172

1001

ACCOUNT
OF THE WINDFALL FUND
SAID TO BE PAID
4 7 6 5
ANY BANK P.O.
SAID
STATE BANK
CHANDLER, ILL.
97-17 97-47

574

CUSTOMER'S DRAFT



Sandy State Bank
140 West 9000 South - Sandy, Utah 84070

No. 1014

EXCHANGE CHECK

June 10 19 82

PAY TO THE ORDER OF

ALTA TITLE COMPANY

\$ 17,082.00

17,082.00

DOLLARS

VALUE RECEIVED AND CHARGE THE SAME TO ACCOUNT OF

WITH EXCHANGE

To MMD #2 ALTA TITLE COMPANY
202 WEST 400 SOUTH
SALT LAKE CITY, UTAH 84101

Robert Peterson

12430247

010728

0001708200

12

McINTYRE & DENNIS
A PROFESSIONAL CORPORATION
202 WEST 400 SOUTH NO. 18 (801) 355-8800
SALT LAKE CITY, UTAH 84101

1069

June 24, 1982

31-248/1240

Pay to the order of ALTA TITLE COMPANY

\$ 30,000.00

Thirty Thousand and No/100

Dollars



UNION BANK
615 SOUTH 7TH EAST
SALT LAKE CITY, UTAH 84102

TRUST ACCOUNT

John L. Haas

or

⑈001069⑈ ⑆124002489⑆1101068 3⑈

⑈0003000000⑈

PAY TO THE ORDER OF
SANDY STATE BANK
SANDY, UTAH
FOR DEPOSIT ONLY
ALTA TITLE CO. MMD #4

91010728

8 6 4 0

PAY ANY BANK, P.E.G.
SANDY
STATE BANK
SANDY, UTAH

97-2-7 97-247

JUN 28 82

JE '82' 28 97-1
PAY ANY BANK P.E.G.
FIRST SECURITY BANK
OF UTAH
SALT LAKE CITY, UTAH

97-2-7 97-247
JUN 28 1982

ALTA TITLE - MMD2 ACCOUNT SUMMARY BY ESCROW NUMBER

REC#	ST#	TYPE	DATE	CK#	PAYEE	AMOUNT	CLD
* ESCROW # FLINT							
2700	13	DP	820602		0 FLINT/IVY TERRACE	2504.05	820602
2848	13	CK	820609	1013	ALTA TRANS V.B.	-2504.05	820611
** SUBTOTAL **						0.00	

* ESCROW # FOXFIR							
1204	6	CK	821215	4017	WESTERN STATES TITLE	-641669.87	821217
1369	6	DM	821215	0	RETURNED CHECK	-614079.19	821215
1404	6	DP	821207	0	FOXFIRE LOTS	614079.19	821207
1420	6	DP	821215	0	FOXFIRE LOTS	641669.87	821215
** SUBTOTAL **						0.00	

* ESCROW # FRIEDL							
2749	13	DP	820623	0	FRIEDLAND/COHEN/RICH	50096.76	820623
2800	13	CK	820623	1028	ALTA TITLE COMPANY	-50.00	820625
2801	13	CK	820623	1029	ALTA TITLE COMPANY	-50000.00	820625
2805	13	CK	820624	1037	ALTA TITLE COMPANY	-615.00	820629
** SUBTOTAL **						-568.24	

568.24 CONCEPT
-0-

* ESCROW # FRY							
2070	11	DP	820628	0	RAY D. FRY	24622.50	820701
** SUBTOTAL **						24622.50	

* ESCROW # GARDEN							
758	4	CK	820922	1771	WESTERN FLOORING	-11380.00	820927
759	4	CK	820923	1772	ALTA TITLE COMPANY	-20.00	820929
851	4	DP	820923	0	GARDEN TOWERS	11400.00	820923
** SUBTOTAL **						0.00	

* ESCROW # GATSBY							
984	2	CK	830110	4234	TRACY COLLINS BANK	-97247.52	830112
** SUBTOTAL **						-97247.52	

PURCHASE T.D.

* ESCROW # GB2043							
2029	10	DP	830321	0	WESTRA/CARNELL	30.00	830321
** SUBTOTAL **						30.00	

TO
GBE8704
L

DO NOT FAIL TO MAKE THIS ENTRY IN YOUR RECORD BOOK



Sandy State Bank

140 West 9000 South • Sandy, Utah 84070

WE HAVE CREDITED YOUR ACCOUNT

Interest earned

June 1982

ACCT NO. <i>91-01072-8</i>	DATE <i>7/6/82</i>	APPD. <i>Clu</i>	AMOUNT <i>1,101.25</i>
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TO *MMD #2 Alta Title*

10-1



Sandy State Bank

140 West 9000 South • Sandy, Utah 84070

WE HAVE CREDITED YOUR ACCOUNT Interest on account

for July, 1982

ACCT NO. <u>91-010728</u>	DATE <u>8-3-82</u>	APPD. <u>ph</u>	AMOUNT <u>1437.72</u>
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TO Alta Title M.M.F. #2

DO NOT FAIL TO MAKE THIS ENTRY IN YOUR RECORD BOOK



Sandy State Bank

140 West 9000 South • Sandy, Utah 84070

WE HAVE CREDITED YOUR ACCOUNT Interest earned

CUSTOMER'S DRAFT

\$ 25,000.00 Bajun Exp
\$ 11,463.50 1982 Dis.
\$ 83,270.00 July 1
\$ 221,060.15 July 16
\$ 499,432.70 Aug. 1
\$ 50,000.00 McIntyre



Sandy State Bank

140 West 9000 South • Sandy, Utah 84070

No. _____

August 5, 1982

PAY TO THE ORDER OF ALTA TITLE COMPANY \$ 890,226.35

89022635

DOLLARS

VALUE RECEIVED AND CHARGE THE SAME TO ACCOUNT OF

WITH EXCHANGE

To ALTA TITLE COMPANY
202 West 400 South
Salt Lake City, Utah 84101

SALT
LAKE
CITY

⑆124302477⑆

91009563⑈

⑈0089022635⑈

1-11A



1111 113 5 6 3
CREDITED TO THE ACCOUNT
THE WITHIN NAMED PAYEE.

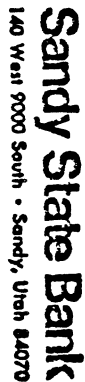
SANDY STARBYE BANK, P.E.G.

SANDY, UTAH

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97-47 97-247

ALB 5 R2



140 West 9000 South • Sandy, Utah 84070

TO THE CREDIT OF

ALTA TILE COMPANY

CONTRACT SERVICING ACCOUNT

220 WEST 400 SOUTH

SALT LAKE CITY, UTAH 84101

ALL ITEMS ARE RECEIVED FOR THE PURPOSES OF COLLECTION AND ARE SUBJECT TO PROVISIONAL CREDIT. THE UNIFORM COMMERCIAL CODE WHERE APPLICABLE AND THE RULES AND REGULATIONS OF THIS INSTITUTION. ALL CREDITS FOR ITEMS ARE PROVISIONAL UNTIL COLLECTED.

DATE 8/5 19 80

CURRENCY/			
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CHECKS (LIST SEPARATELY)		
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81	TOTAL FROM	
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OTHER SIDE

W. 7/19/1941

6/14/68 TOTAL 254 400000

RECEIVED BY _____

ENDORSE ALL ITEMS PROPERLY
LIST SEPARATELY

CHECKS	DOLLARS	CENTS
1		
2		
3		
4		
5		
6	914	00
7		
8		
9		
10	CT	41-257
11		
12		
13		
14		
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16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		
29		
30		
TOTAL		
ENTER TOTAL ON FRONT OF THIS DEPOSIT SLIP		
CASH COUNT	FOR BANK USE ONLY	
X 100		
X 50		
X 20		
X 10		
X 5		
X 2		
X 1		
TOTAL		



**MARTINEAU
& COMPANY**

CERTIFIED PUBLIC ACCOUNTANTS

FILED

RECEIVED
UTAH JUDICIAL BRANCH
CERTIFIED PUBLIC ACCOUNTANTS
PRIVATE COMPANIES
PRACTICE SECTION
SEC. PRACTICE SECTION

FILED IN CLERKS OFFICE
Salt Lake County, Utah

DEC 3 1987

H. Dixon H. Hays, Clerk of Dist. Court
By [Signature] Deputy Clerk

November 16, 1987

Mr. John F. Clark, Esq.
Attorney at Law
Sessions & Moore
300 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102

Re: James V. Crestani - Supplemental Report

CR-85-575

Dear John:

This supplements our report of November 11, 1987.

Since the November 11, 1987 report was issued we found explanation for the June 24, 1982 deposit in the amount of \$30,000.00. These funds were disbursed out of the MMD2 account at or about the time of the deposit and were therefore not on deposit at the time of the August 13, 1987 disbursement of \$16,500.00 (Count 4).

In the November 11, 1987 report, page 4, next to last paragraph, next to last sentence, reads as follows; "Three withdrawals totalling \$51,978.73 were made and transferred to an Alta account at Valley Bank which Crestani maintains he did not know about" (emphasis by undersigned). We wish to clarify that Crestani knew about the Valley Bank account; maintains he did not know about the three withdrawals referred to.

Also subsequent to our November 11, 1987 report we found additional evidence that Crestani had funds which were deposited into Alta accounts upon which Crestani would have been able to draw which were totally unrelated to any "escrowed funds" belonging to customers or depositors of Alta, as follows:

In September, 1981, Crestani sold the Alta Title Building located on the corner of 200 West Fourth South, Salt Lake City, Utah. The sales price was \$1,350,000.00 with a \$350,000.00 down payment; the mortgage of approximately \$750,000.00 was paid off by the buyer, and the balance of

Mr. John F. Clark, Esq.
James V. Crestani - Supplemental Report
November 16, 1987

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approximately \$250,000.00 was due in monthly payments with a balloon payment in September, 1982. After commissions and other selling costs, the net cash to Crestani in September, 1981 was approximately \$300,000.00, which, according to Crestani was deposited into Alta or into McIntyre's trust account for Crestani's benefit. According to Crestani the balloon payment due in September, 1982 was also deposited into Alta or McIntyre's trust account for Crestani's benefit. This would have resulted in over \$500,000.00 of funds being available to Crestani which did not originate from MMD2 or any other "escrowed funds" at Alta.

On September 28, 1982, Crestani deposited \$8,865.43 into the MMD2 account. According to Crestani the funds originated from a loan repayment from Ray D. Fry to Crestani out of the 5300 South Partnership closing.

Because of time constraints we were unable to verify all of the above information, however our search for and of the Alta records continues.

We believe that our reports contradict the Prosecution's position that "there is no real evidence that the money did not come out of the MMD2 account and the money was merely being replaced into the original account", so far as the \$24,622.50 deposit of June 28, 1982 and the \$8,865.43 deposit of September 28, 1982 are concerned. The funds derived from the sale of the Alta Title Building were also obviously not those of customers or depositors of Alta.

The above information, as it supplements our report of November 11, 1987, reflects that Crestani had deposited funds into MMD2 account in excess of the funds withdrawn (Counts 1 through 4) including the September 28, 1982 deposit of \$8,865.43. The \$50,000.00 deposit of August 5, 1982, and over \$500,000.00 in proceeds from the Building sale were additional funds available to Crestani.

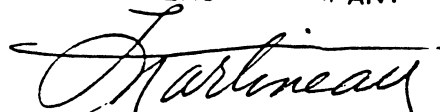
As to the question asked us as to "whether or not there were funds in the Alta MMD2 account which were, or Crestani had reason to believe were, Crestani's funds at or about the time funds were withdrawn which Crestani was charged with theft for", we advise you and the Court that no one can answer that question accurately at this time. Because there were over \$4,400,000.00 in deposits into the MMD2 account classified as "repurchase agreement" funds, and multiple transfers from the general Alta account and the MMD1 account, and many transfers from the MMD2 account into the Valley Bank escrow account, a full and complete accounting of all transactions must be made before anyone can answer this question accurately. This has

Mr. John F. Clark, Esc.
James V. Crestani - Supplemental Report
November 16, 1987

never been done!

Sincerely,

MARTINEAU & COMPANY

A large, stylized handwritten signature in cursive script, appearing to read "Martineau". The signature is written in dark ink and is positioned above the printed name and title.

Leland A. Martineau, CPA
Managing Partner