

1987

Utah v. James V. Crestani : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

Counsel

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DOCKET NO.

870525-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Respondent

vs.

JAMES V. CRESTANI,

Defendant-Appellant

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BRIEF OF DEFENDANT-APPELLANT

Docket No. **87-0252**

PRIORITY CLASSIFICATION NO. 2

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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FILED

APR 15 1988

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

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STATEMENT OF JURISDICTION

Jurisdiction of this appeal lies in the Utah Court of Appeals pursuant to Utah Code Annotated §78-2a-3(2)(e) in that this is an appeal from the District Court in a criminal case not involving a first or a capital degree felony.

STATEMENT OF THE NATURE OF THE PROCEEDINGS

This is an appeal of a criminal conviction of Defendant on four counts of theft and from the denial of a new trial.

STATEMENT OF THE ISSUES

Did trial counsel's numerous failures of trial preparation and investigation fall below an objective standard of reasonableness and amount to constitutionally ineffective assistance of counsel requiring a new trial where such failures included the following:

1. Failure to obtain and examine available material evidence critical to his clients main defense which deprived the Defendant of the use of exonerating evidence at trial.

2. A nearly complete failure to investigate potential factual defenses prior to trial.

3. Failure to examine all of the relevant and material evidence held by the prosecution when the prosecution several times offered to allow such examination prior to trial.

4. Failure properly to prepare himself and his witnesses for trial.

5. Failure to produce a key witness and to elicit crucial testimony at trial.

Is there a reasonable probability that, but for the counsel's unprofessional errors, the result of the trial would have been different?

Was the trial Courts inclusion, without a cautionary instruction in its charge to the jury of a civil statute admitted into evidence forbidding acts with which the Defendant was not charged, prejudicial error requiring a new trial?

Was instruction No. 25 to the Jury so misleading and confusing as to amount to prejudicial error requiring a new trial?

Did the trial court err in failing to instruct the jury with regard to specific intent?

DETERMINATIVE CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. CONST. AMEND. XIV

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law

Utah Const. Art. I, §12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel

Utah Const. Art. I, §7

No person shall be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

This is an appeal from a conviction on four counts of second degree felony theft, from the judgment entered pursuant to that conviction and from the denial of Defendant-Appellant's Motion for a New Trial.

This case was initiated by information filed March 14, 1985 charging five counts of second degree felony theft.

The preliminary hearing was held May 8, 1985 at which hearing Count 5 of the information was dismissed (Record at 4, 5).

The Defendant was arraigned on June 6, 1985 (R at 27). From the arraignment in June of 1985 to trial in July of 1987 trial dates were set and vacated four times. This trial was set to be heard on September 25, 1985 (R at 27), February 19, 1986 (R at 37), June 4, 1986 (R at 38), April 7, 1987 (R at 46), and July 7, 1987 (R at 57).

Trial was held during the four days July 7 through July 11, 1987 with the jury returning verdicts of guilty on all four remaining counts. (R at 80-84)

Defendant's motion for a new trial was filed October 23, 1987, immediately after he was committed to prison. The trial court denied Mr. Crestani's Motion for New Trial on November 23, 1987 (R at 5, T. Nov. 23, p. 3).

The notice of appeal was filed thereafter on November 23, 1987. (R at 224-230, T. Nov 23, p. 7).

STATEMENT OF FACTS

1. Over the years the Defendant, James Crestani, worked his way up in the organization of Alta Title Company in Salt Lake City, Utah until by 1980 he had acquired 100% of the stock of that corporation. (T. Vol. IV to p.p. 502, 503)

2. On February 10, 1982 Alta Title Company opened a bank checking account at Sandy State Bank, Sandy, Utah, which account was known as MMD-2 (Exhibit 17-P).

3. MMD-2 was one of several accounts used by Alta Title Company. It was in existence for approximately 13 months until March of 1983 when Alta Title ceased doing business. (Defendant Exhibit 1-d, p. 4).

4. MMD-2 was an active commercial banking account which during 1982 experienced hundreds of deposits and disbursements amounting to millions of dollars in transactions in some months. (Exhibits 11P, 17P, 18P, 20P, 21P, 22P, 23P, 24P, T. Vol. II p. 158-161)

5. Although opened as a commercial account in the name of Alta Title the account was initially opened with a \$10,000.00 deposit from the personal funds of Defendant Crestani (T. Vol. III p. 412) and during the life of the account numerous other deposits of funds owned by or due to Defendant Crestani were made into MMD-2. (T. Vol. III, p.p. 410-412, 416, 417, T. Vol. IV, p. 508, 509, Defendant's Exhibit 1-d).

6. In March of 1985 James Crestani was charged in a five count information with theft of monies from the MMD-2 account. (R at 21-23) (A fifth count involving another account was later dismissed. R at 7)

7. The gist of the charges contained in the information was that on four occasions in 1982 (on May 7, May 18, June 11 and August 13) the Defendant had withdrawn amounts from the MMD-2 account and used the money for his own personal benefit. It was further implied in the Probable Cause Statement appended to the information that this conduct constituted theft because MMD-2 was an account used exclusively for funds held in escrow for real estate closings and therefore, by the very fact of withdrawal, the Defendant had stolen escrow monies. (R at 23)

8. Shortly after the information was filed in this matter Defendant Crestani approached Mr. Phil L. Hansen, Attorney, ("trial counsel") and requested trial counsel to represent him in this case. Trial counsel agreed to do so for a flat fee of \$50,000.00. Trial counsel agreed to accept a cash downpayment toward the fee with the rest payable over time secured by a note and a pledge of personal property to be held by trial counsel. (Affidavit of James V. Crestani, R at 284, 285)

9. In his initial conversations with trial counsel, Mr. Crestani told trial counsel that his defense to the charges was that the money withdrawn from MMD-2 was personal money belonging to Mr. Crestani. (Affidavit of James V. Crestani, R at 285).

10. Mr. Crestani described to trial counsel the large amount of preparation and auditing of the MMD-2 account that Mr. Crestani felt was necessary to prepare this case for trial. trial counsel assured Mr. Crestani that he would do a thorough and more than adequate job and that for the stated fee trial counsel would identify and interrogate all witnesses, thoroughly review all bank accounts involved including all relevant deposits and withdrawals. Trial counsel assured Mr. Crestani that he would travel to California to prepare Mr. Crestani and his wife for their testimony at trial and would hire paralegals to prepare witnesses and exhibits, thoroughly research the case law and perform all other efforts necessary to prepare the case for trial properly and adequately. (Affidavit of James V. Crestani, R at 285)

11. After he was hired by Mr. Crestani, trial counsel was approached by one James A. McIntyre, an attorney who had previously represented Mr. Crestani and Alta Title Company. Mr. McIntyre related to trial counsel his opinion that a proper defense to the charges leveled against Mr. Crestani absolutely required a thorough review and audit of all available records pertaining to deposits and withdrawals of Mr. Crestani's personal funds into and out of MMD-2. (Affidavit of James A. McIntyre, R at 298)

12. Mr. McIntyre further offered his services and those of Mr. Gary Carlson, a former vice president of Alta Title, to

assist trial counsel in searching for and reviewing all of the MMD-2 records including all deposits and withdrawals. (McIntyre Affidavit, R at 298)

13. Trial counsel acknowledged Mr. McIntyre's offer but neither at that time nor at any time prior to trial did he use the offered services of Mr. McIntyre or Mr. Carlson. (McIntyre Affidavit, R at 298, Affidavit of Gary Carlson, R at 206, 207)

14. Approximately two months after the information was filed, a preliminary hearing was held. (R at 4)

15. At the preliminary hearing the Defendant Crestani was bound over on four counts of felony theft. (R at 5) Trial counsel called no witnesses at the preliminary hearing. (R at 4, 5)

16. Between the preliminary hearing in May of 1985 and the trial two years later in June of 1987, the Defendant Crestani and his wife attempted on numerous occasions to contact trial counsel by telephone or letter regarding this case. All such attempts were unsuccessful and Mr. Crestani was unable to either speak with trial counsel or get him to return written correspondence or telephone calls. (James V. Crestani Affidavit, R at 285, Supplemental Affidavit of James V. Crestani, R at 259, 260)

17. This case was originally set for trial on September 25, 1985, (R at 27) thereafter it was continued four times. (R at 27, 38, 46, 57)

18. For the trial setting February 19, 1986, counsel appeared for pre-trial two weeks prior thereto on February 4, 1986. (R at 38) At that time trial counsel had not obtained the MMD-2 records from Sandy State Bank.

19. On March 16, 1987, trial counsel prepared and served on the prosecutor a demand for discovery. (R at 50, 51) Included in the demand was a request for "an itemization of all physical evidence, including a list of all exhibits the prosecution intends to introduce at the time of trial." (R at 50, 51)

20. Also on March 16, 1987 trial counsel had prepared and served upon Sandy State Bank a subpoena requesting production of certain MMD-2 records (R at 52, 53) and a notice of records deposition. (R at 54, 56) These records were not delivered at the appointed time because trial counsel failed to pay the copying charges requested by the bank. (Affidavit of Shirlene Ivory, R at 274)

21. For the trial setting of April 7, 1987, trial counsel prepared and filed with the court a Motion, Stipulation and Order of Continuance on March 31, 1987, one week prior to trial. (R at 58-60) At that time trial counsel had not obtained the records of the MMD-2 account. (Affidavit of Shirlene Ivory, R at 274)

22. The pretrial preparation of Mr. Crestani's defense prior to trial was primarily undertaken by a paralegal working in trial counsel's office. (Affidavit of Shirlene Ivory, R at 272-276) All contacts with Mr. Crestani prior to the day before

trial were through this paralegal or trial counsel's secretary. (Supplemental Affidavit of James V. Crestani, R at 260). Defendant Crestani several times told the paralegal that the MMD-2 records would be important to his defense (Ivory Affidavit, R at 272). The paralegal assured Mr. Crestani that trial counsel would obtain the MMD-2 records. (Id.)

23. Five weeks prior to trial, the paralegal attempted to pull the office file for trial counsel to assist him in pre-trial preparation. Apparently, however, trial counsel was out of the office for long periods of time in the weeks preceding trial and apparently trial counsel did not review the case file till two days before the trial began. (Affidavit of Shirlene Ivory, R at 271). Defendant Crestani told the paralegal he was very concerned that trial counsel was not prepared to go to trial and that they should request a continuance. (Id. R at 274, 275). When the paralegal relayed Mr. Crestani's concerns, trial counsel assured the paralegal that he was prepared. (Id. R at 275).

24. Some weeks before trial, the paralegal attempted to collect the bank records previously subpoenaed by trial counsel. (Ivory Affidavit, R at 274) However, the bank records had not been paid for and had subsequently been lost. (Ivory Affidavit, R at 274) The paralegal reordered the records that had previously been subpoenaed and these records were picked up two days prior to the beginning of the trial. (Id.)

25. The MMD-2 account records subpoenaed by trial counsel included only deposit items into that account for March, April, May and June of 1982. Trial counsel did not request monthly statements, checks or disbursement items, or credit and debit memos. Trial counsel did not subpoena any records at all for the months of July and August, 1982, which encompassed count four of the information. (R at 52, 54, 55)

26. Trial Counsel apparently began his preparation of the witnesses that he would later call at trial only two days prior to the day the trial was to begin. He first contacted defense witness Gary Carlson two days before trial. (Affidavit of Gary Carlson, R at 205) He first contacted defense witness James McIntyre the day before trial at which time trial counsel was apparently preparing for a portion of the case that had been dismissed at preliminary hearing. (Affidavit of James A. McIntyre, R at 298)

27. Trial counsel received, both directly and through his paralegal, offers from the prosecutor to examine the documentary evidence held by the state prior to trial. (Affidavit of Shirlene Ivory, R at 273, T. Vol. III, p. 443)

28. On at least two occasions prior to trial the prosecutor offered to make available to trial counsel all of the documentary evidence that the prosecution had developed for trial. Further, the prosecutor offered to go over the documents with trial counsel and provide an investigator familiar with the case to go through them with him. (T. Vol. III, p. 443)

29. Trial counsel never took the prosecutor up on these offers and, in the two years between preliminary hearing and trial, never reviewed the state's evidence including many of the account records of MMD-2. (Trans. Vol. IV p. 443, T. Vol, 12 and 17, p. 42)

30. On the evening before trial, trial counsel finally met with Defendant Crestani and his wife. (Supplemental Affidavit of James V. Crestani, R at 259, 260) At that time Mr. Crestani observed that trial counsel had only obtained deposit items for a four month period from the MMD-2 account. He asked trial counsel where the rest of the account records were. Trial counsel responded, "That's all we need. They don't have a case." (Id. at 260)

31. That same night Defendant Crestani asked trial counsel why he had not secured the attendance of Blake Hammond, a former vice-president of Alta Title Company relocated to Phoenix, Arizona, whom Mr. Crestani had felt was an important witness. Mr. Hammond resided in Phoenix, Arizona. Trial counsel admitted that he had not subpoenaed Blake Hammond but told Mr. Crestani that in trial counsel's opinion they did not need Mr. Hammond for the case. (Supp. Affidavit of James V. Crestani, R at 261) Mr. Hammond was never contacted by trial counsel, was never informed about the trial date and did not appear at the trial. (Affidavit of Blake Hammond. R at 202)

32. Prior to trial, the Defendant's wife Vickie R. Crestani was not told by trial counsel that she would be a witness notwithstanding the fact that she had been the Escrow Department Manager at Alta Title Company in 1982 and had been in charge of some deposits made into MMD-2. (T. Vol. III p. 408, Record Affidavit of Vickie Crestani R at 308)

33. In his opening statement at trial, made after the State's case, trial counsel outlined his case for the defense. Trial counsel relied heavily on the fact that he would show that Defendant Crestani had personal money in MMD-2 sufficient to cover the withdrawals that were charged in the information. (T. Vol. III, p. 312-315, 320-322, 326)

34. At trial, trial counsel called attorney James A. McIntyre as a witness for the defense. (T. Vol. III, p. 340)

35. Trial counsel attempted to establish through the testimony of Mr. McIntyre several deposits of Mr. Crestani's personal funds into MMD-2. (T. Vol. III at 346-349) Mr. McIntyre was unable to recall several of the transactions and others he could recall generally but could not specify dates or exact amounts. (Id.) Trial counsel did not provide Mr. McIntyre with any documents of deposit to substantiate his testimony or refresh his recollection. (T. Vol. III, p. 346-350)

36. At trial, trial counsel called Vickie R. Crestani, wife of the Defendant and former Escrow Department Manager for Alta Title Company. (T. Vol. III, p. 408)

37. Trial counsel attempted to have Mrs. Crestani verify deposits of Jim Crestani's personal funds into MMD-2 during 1982 from her own memory without reference to specific records. (T. Vol. III, p. 411, 412 and 419-421)

38. On cross-examination the Prosecutor pointed out that Mrs. Crestani was testifying only from memory and that she had had many years to locate the records of the deposits that she had testified about on direct examination. (T. Vol. III, p. 425)

39. Trial counsel also had Mrs. Crestani identify specific deposit item records representing personal funds deposited into MMD-2 for Defendant Crestani. (T. Vol. III, p. 409, 414, 416)

40. On further cross-examination, the Prosecutor confronted Mrs. Crestani with records showing that the deposits she had testified to on direct examination were immediately withdrawn from MMD-2 and thus not available to cover the charged withdrawals. (T. Vol. III, p. 436-439)

41. Trial counsel objected to cross-examination of Mrs. Crestani using bank records of disbursements on the ground that he had not previously seen or been given an opportunity to examine those documents. (T. Vol. III, pp. 441-449) The prosecution responded that trial counsel had indeed been offered the opportunity to examine all the state's evidence. (Id.)

42. After trial counsel's objection on Thursday night, the court recessed for the evening and instructed trial counsel and the Prosecutor to go over the bank records that the Prosecutor

intended to use to cross-examine Mrs. Crestani. (T. Vol. III, p. 449) Trial counsel admitted that he had never seen these particular documents before. (T. Vol. III, p. 452)

43. On further cross-examination the next day the Prosecutor was able to establish from documentary evidence that Mrs. Crestani withdrew a previously described \$15,000.00 deposit on the same day that it was deposited into MMD-2. (T. Vol. IV, pp. 470, 471) Mrs. Crestani, because she had not reviewed any bank documents except some deposit items subpoenaed by trial counsel, was surprised and did not recall the immediate withdrawal of the \$15,000.00 until the Prosecutor showed her the disbursement item on the last day of trial. (T. Vol. IV, p. 472)

44. On further cross-examination the Prosecutor was able to show that another deposit, described by Mr. Crestani as personal funds of the Defendant, in the amount of \$19,896.73 was likewise withdrawn on the same day. (T. Vol. IV, pp. 474-477)

45. On further cross-examination of Mrs. Crestani, the Prosecutor was able to establish that many of the \$50.00 agent fees that the defense claimed were personal funds of Mr. Crestani were withdrawn from the MMD-2 account and paid to the Alta Title General account. (T. Vol. IV, pp. 480-484)

46. In his closing argument the prosecutor told the jury that the Crestanis knew that the deposits they testified about on direct examination were immediately withdrawn and the Defendant and his wife were merely trying "to pull the wool over [the jury's] eyes". (T. Vol IV, p. 571)

47. At trial, trial counsel called the Defendant Crestani as a witness. (T. Vol. IV, p. 500)

48. Trial counsel attempted to show with the testimony of Mr. Crestani that he had personal funds in MMD-2 at various times. However, except for small deposits, from his personal account, Mr. Crestani was only able to testify from memory because no documents were provided to establish exact deposits. (T. Vol. IV, p. 510)

49. At trial the court, hearing no objection from Defendant's counsel, allowed the prosecutor to question witnesses about the co-mingling of personal and escrow funds in MMD-2 by Defendant Crestani. (T. Vol III, p. 361, T. Vol IV, p. 524)

50. In his closing argument the Prosecutor pointedly referred to the text of the statute prohibiting the co-mingling of escrow funds which had been offered by trial counsel and received in evidence by the court. (T. Vol IV, pp. 553-574) Defendant Crestani was not charged with any specific offense involving co-mingling of funds.

51. At trial the Prosecutor elicited, without objection, testimony from several witnesses that Defendant Crestani had obtained or paid to Alta Title Co. the interest earned on escrow funds deposited into MMD-2 over to Alta Title. (T. Vol III, p. 479, T. Vol. IV, p. 526) Defendant Crestani was not charged with theft of interest monies.

52. Mr. Crestani was convicted of all four counts of second degree felony theft. He was sentenced and committed to prison on October 23, 1987. (R at 191)

53. After the sentencing, new counsel for Mr. Crestani hired a CPA to perform a review of the MMD-2 account. (T. Nov. 12 and 17, p. 5) The CPA prepared two reports which were submitted to the court. The first report was submitted in open court and the Prosecutor agreed to its being considered as an Affidavit. (T. Nov. 12 and 17, p. 6) That report was not appended to the record but is contained in the evidence box marked "Defendant's Exhibit 1-d". The second report was submitted to the court on November 17, 1987 and appears in the record at 302-304. In addition, the CPA gave testimony in support of Defendant Crestani's Motion for a new trial. (T. Nov. 12 and 17, p. 25-32)

54. In his review of the MMD-2 account the CPA found records that substantiate that on June 28, 1982 Mr. Crestani deposited \$24,622.50 from his personal funds into MMD-2. (Ex. 1-d, T. Vol. VI, p. 30) These funds were owed to Mr. Crestani personally as a loan repayment from one Raymond D. Fry. (Id., Affidavit of Raymond J. Fry, R at 252, 253) These funds were still in the MMD-2 account on August 13, 1982 when the \$16,500.00 withdrawal, which was the basis for Count 4 of the information, was made. (T. Nov. 12 and 17, p. 30)

55. In addition, the CPA found that \$50,000.00 of Mr. Crestani's personal funds which should have been deposited into

MMD-2 per his instructions were in fact deposited by Mr. Crestani's attorney James A. McIntyre into an account at Sandy State Bank entitled "Alta Title Contract Servicing Account" on August 5, 1982. (Defendant's Ex. 1-d, p. 4) The CPA found no evidence that this deposit was never withdrawn up to and including the time when Alta Title closed its doors in March, 1983. (Id.)

56. In addition, the CPA found records that confirmed that \$8,865.43 was deposited into MMD-2 on September 28, 1982. These funds were personal funds due to James Crestani. (R at 303)

57. In addition, the CPA found that over \$500,000.00 of funds due to James Crestani upon the sale of the Alta Title Building were available to Mr. Crestani in 1982 which funds were deposited in bank accounts maintained by Alta Title. (R at 303)

58. In his closing argument the Prosecutor emphasized that guilty intent on the part of Mr. Crestani was established because he had made no attempt to repay the monies withdrawn from MMD-2, (T. Vol. IV, p. 562), that the Defendant had failed to produce documentary evidence to substantiate that Mr. Crestani had personal funds in the accounts sufficient to cover the disbursements he was charged with (T. Vol. IV, p. 573), and that in each specific instance where the Defendant Crestani claimed the deposits were made in MMD-2, those funds were immediately withdrawn and therefore not available to cover the charged withdrawals. (T. Vol. IV, p. 571)

59. During its deliberations the jury sent out a written message to the court which stated "Was the money 16,500 put back into MMD-2". (This record is maintained and unmarked in the evidence box. A copy is attached hereto as Addendum Exhibit A.) The court responded "refer to your collective memories". (Id. T. Vol IV P. 609, 610)

60. The CPA found that prior to the date of the last count of the information, by which time Defendant Crestani was alleged to have stolen Fifty Seven Thousand Three Hundred Dollars (\$57,300.00), the sum of Seventy Six Thousand Six Hundred One Dollars and Twenty Three Cents (\$76,601.23) representing personal funds of the Defendant Crestani had been deposited by or for Crestani into MMD-2. The CPA also found that additional personal funds of Defendant Crestani were deposited into MMD-2 subsequent to August 13, 1982. (Defendant's Ex. 1-d, p. 4)

SUMMARY OF ARGUMENT

Minimal standards of criminal justice and due process require that defense counsel in a criminal case adequately prepare for trial by gathering as much information as possible about the case, including possible defenses. Where, as in this case, defense counsel is informed at the outset that his client's major defense may be proved or supported by an examination of bank account records, defense counsel's duty to thoroughly

examine those records and present at trial such exculpatory records as he is able to find is even more compelling.

Defense counsel's utter failure to perform any significant investigation of the relevant records on the MMD-2 account fell far below the minimum standards set forth above and prevented Defendant Crestani from presenting evidence at trial that would have completely exonerated him under one count of the information and substantially supported good defenses to the remaining counts.

Numerous other failures of investigation and failures of preparation exacerbated the problem of ineffective assistance of counsel and provide ample evidence of trial counsel's lack of diligence in the case.

This lack of diligence can in no way be called mere strategy. It is clear that trial counsel relied heavily at trial on the very defense that his failure of preparation prevented him from establishing. The circumstances surrounding trial counsel's belated, hurried and error-ridden preparation belie any claim that he intentionally avoided for tactical reasons a full investigation of the MMD-2 account.

In this case, even a brief examination of MMD-2 and related accounts performed after sentencing by new counsel resulted in discovery of deposits that would have exonerated the Defendant from guilt on one count. Other personal funds of Defendant Crestani that were discovered to have been deposited into MMD-2

or that were available to him in other accounts provide strong evidence that would have supported Defendant Crestani's defense of mistake or lack of intent to permanently deprive. The evidence obtained after trial establishes much more than a reasonable probability that the result at trial would have been different but for counsel's failures.

At trial, trial counsel further failed in his duty to assert legal defenses and objections to protect his client's rights. The prosecutor frequently and consistently elicited testimony regarding co-mingling of funds and unauthorized appropriation of interest monies from MMD-2, which uncharged misconduct evidence was severely prejudicial and objectionable under Rules 403 and 404 of the Utah Rules of Evidence. The admission of this testimony was severely prejudicial to the Defendant's right to a fair trial and trial counsel's failure to object thereto falls below standards for minimum competency of representation.

The instructions given to the jury in this case were extremely confusing and prejudicial to the rights of the Defendant Crestani. One instruction (No. 25) virtually required conviction if the jury found that MMD-2 had been used as an escrow account (which the Defendant admitted).

Another instruction (No. 16) specifically outlined numerous unlawful acts involving escrow accounts, co-mingling of funds and use of interest from escrow accounts. The prosecutor during trial elicited testimony from numerous witnesses that each of

these acts occurred at Alta Title during the relevant time period. However, none of these alleged unlawful acts contributed directly to proof of the counts charged and no cautionary instruction was given. The combination of these instructions was extremely unfair and prejudicial to Defendant Crestani. These improper instructions were excepted to by trial counsel and the failure to exclude them justifies a new trial.

Other essential instructions requested by trial counsel were improperly rejected by the Court. The Court refused to instruct the jury on the specific intent required to sustain a theft conviction. This lack of proper instruction also justifies a new trial.

The evidence is overwhelming that trial counsel's lack of effective and necessary preparation and investigation and the resultant unavailability of evidence establishing good defenses to the charges, exacerbated by the admission of extremely prejudicial and inadmissible evidence at trial and the giving of misleading and unlawful instructions to the jury, combined to allow an unjust conviction of this defendant in what must be described as a gross miscarriage of justice. These errors may only be remedied by a new trial.

ARGUMENT

I.

TRIAL COUNSEL'S TRIAL PREPARATION FELL FAR BELOW THE CONSTITUTIONAL STANDARD OF REPRESENTATION AND RESULTED IN THE UNJUST CONVICTION OF DEFENDANT

The right to the effective assistance of counsel is fundamental to American concepts of constitutional liberty and is "rooted in the traditions and conscience of our people". Alires v. Turner, 22 Utah 2d 118, 121, 449 P.2d 241, 243 (1969). In modern case law, the emphasis on effective assistance is evident and the mere appearance of an attorney on behalf of an accused does not satisfy the constitutional standard. The Utah Supreme Court has observed that an accused

is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.

State v. McNichol, 554 P.2d 203, 204 (Utah 1976) (emphasis added).

If an attorney at trial is ignorant of facts or law which would constitute a defense, the trial is reduced to a farce and a sham. Such circumstances constitute inadequate or ineffective assistance of counsel. State v. Pierren, 582 P.2d 69, 70-71 (Utah 1978). The ineffective assistance of counsel is a "departure from due process of law" and requires a remand for new proceedings. Alires, 449 P.2d at 243.

In the trial of this case, trial counsel was completely ignorant of numerous facts constituting complete or substantial defenses to the charged counts because he failed to perform even the most cursory examination of the records of the MMD-2 account. This failure is shocking in light of the fact that trial counsel was informed at the outset that Mr. Crestani believed his primary defense to be that he had deposited sufficient funds into the MMD-2 account to cover the charged withdrawals.

It is incumbent upon every criminal defense lawyer to investigate with reasonable thoroughness all areas of potentially exculpatory factual defenses.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case
.

American Bar Association Standards for Criminal Justice, Defense Function, 4-4.1

It is an elementary principle that when defense counsel is pointed to an available body of records and informed by his client that those records contain the proof of his innocence, counsel's duty to thoroughly examine those records to confirm his defendant's claim is even more compelling.

The United States Supreme Court has set forth the standard, according to the effective assistance of counsel and due process rights guaranteed by the Sixth and Fourteenth Amendments to the

U.S. Constitution, against which criminal counsel's representation must be measured. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.ed. 2nd, 674 (1984). Under this standard, any defendant claiming ineffective assistance of counsel has the burden of showing: (1) counsel's representation fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for the counsel's unprofessional errors the results of the proceeding would have been different. Id. 104 S.Ct. at 2064, 2067. The reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 2068, State v. Frame, 723 P.2d 401 (Utah 1986)

In a pre-Strickland case, the Utah Supreme Court set forth a usable objective standard of reasonableness in cases where trial counsel's pretrial preparation and investigation is challenged. The court recognized

the vital distinction between those cases where counsel failed to make a careful, factual and legal investigation necessary for a constitutionally adequate defense and those wherein counsel, after making such an investigation, decides for tactical or strategic reasons, which from benefit of hindsight may appear wise or unwise, not to utilize the fruits of his labor.

State v. McNichol, 554 P.2d at 203, 204 (Utah 1976).

The McNichol "vital distinction" can be made in the instant case without difficulty. The record is replete with evidence of trial counsel's egregious failures of preparation and investigation.

A. Trial Counsel's Failure to Obtain and Examine Available, Material Evidence Critical to his Client's Main Defense Deprived the Defendant of the use of Exonerating Evidence at Trial and Amounted to Ineffective Assistance of Counsel.

Trial counsel was informed at the outset of his representation in March, 1985, that defendant Crestani's main defense was that he had deposited sufficient personal funds into MMD-2 to cover the alleged thefts. Trial counsel accepted a large fee on the grounds that much preparation, investigation and auditing of bank records would need to be accomplished prior to trial. Alta Title's former counsel and a former vice president offered their services to trial counsel to assist him in the crucial task of examining the records of MMD-2.

Notwithstanding the instruction of his client and the offer of help to do so, trial counsel made virtually no effort to examine the bank records prior to trial. Nearly two years after the preliminary hearing, trial counsel issued subpoenas for portions of the MMD-2 records for a four month period. This subpoena did not request any of the records covering the full time period involved in the state's charges. Additionally, trial counsel subpoenaed only deposit items and neglected to request withdrawals, monthly statements or other records of the account necessary to understand the transactions.

Even this incomplete effort was rendered nearly useless because trial counsel neglected to pay the copying fees and the

records were subsequently lost and had to be reordered. Thus, even those pitifully few MMD-2 records so vitally needed were not acquired by trial counsel until two days before the trial.

Trial counsel had other sources whereby he could have examined the MMD-2 records including the State's evidence itself. On several occasions the prosecutor offered to allow trial counsel to examine all of the records held by the State and even to supply an investigator to help explain the records. In the two year period between the preliminary hearing and trial, this offer was ignored.

At trial, trial counsel attempted to establish defendant Crestani's main defense without himself having a knowledge of the history of the account, without giving his primary witnesses the benefit of a refreshed recollection of the account, and without significant records to establish and corroborate their testimony. The results were predictable and devastating to the defense.

After the trial, trial counsel was discharged and new counsel was hired. New counsel engaged the services of a Certified Public Accountant to perform the examination of the MMD-2 records that Mr. Crestani had been assured would be done prior to trial. The results of that examination are contained in the two reports of Leland Martineau, CPA contained in the record. (Defendant's Exhibit 1-d, R at 302-304).

In his abbreviated, one-week investigation, the CPA was able to establish that the amount of \$24,662.50 which represented

funds due personally to Defendant Crestani were deposited into MMD-2 on June 28, 1982. The CPA found that those funds were in the account and available to cover the withdrawal in the amount of \$16,500.00 on August 13, 1982, upon which Count 4 of the information was based.

In addition, the CPA found that personal funds of the Defendant Crestani of at least \$76,000.00 had been deposited by or for Defendant Crestani into MMD-2 in the period May through August, 1982, which period encompassed the charges in the information. Though much of this was withdrawn prior to the withdrawals charged in the information, using MMD-2 account records to give a context to the recollection of Mr. Crestani, the CPA found evidence that Mr. Crestani may not have known of all of withdrawals.

In addition, the CPA found that the sum of \$50,000.00 that Defendant Crestani had directed be deposited into MMD-2 on August 5, 1982, was in fact deposited in another account maintained by Alta Title known as the Alta Title Contract Servicing Account. The CPA found no evidence that this money was withdrawn up to and including the time that Alta Title ceased doing business in March, 1983. This money was therefore available to be withdrawn or cover any overdrafts of the Defendant's personal funds in MMD-2. This evidence further establishes the likelihood that Defendant Crestani may have reasonably believed that that money was available to cover withdrawals of funds from the account.

It appears clear that defense counsel's utter failure to perform any significant pretrial investigation of the relevant records of the MMD-2 account fell far below the minimum objective standards of reasonable representation required by the Strickland test. Far worse however, is the fact that trial counsel's ignorance of the contents of the MMD-2 records prevented Defendant Crestani from presenting evidence at trial that would have surely exonerated him under count four of the information and would have substantially supported the defenses to the remaining counts.

Under the circumstance presented in this case, trial counsel's failure to investigate, in the face of repeated pleas from his client presents, one of the most blatant cases of ineffective assistance of counsel imaginable. Nor can trial counsel's failure be excused as mere error in strategy.

From his opening argument, and through his interrogation of witnesses and his closing comments to the jury, trial counsel attempted vainly to establish Defendant Crestani's main defense. It is clear that he relied heavily on the very defense that his failure of preparation prevented him from establishing. The circumstances surrounding trial counsel's belated, hurried and error-ridden preparation belie any claim that he intentionally avoided for tactical reasons a full investigation of the MMD-2 account.

B. Trial Counsel's Additional Failures of Investigation of Facts and Preparation of Witnesses Additionally Damaged His Ability to Present a Defense and Amounted to Ineffective Assistance of Counsel.

Although the inexcusable and almost unbelievable failure of trial counsel to prepare his client's main defense is serious enough to require reversal by itself, counsel's lack of diligence in other aspects of trial preparation is evident throughout the record and can be illustrated by the following points:

1. Trial counsel did virtually no preparation for trial during the nearly two years between the preliminary hearing and trial. He relegated what preparation was done to an inexperienced paralegal and did not open his files until two days prior to trial. In addition, during that time trial counsel avoided contact or communication with the Defendant and the key witnesses in the case.

2. Trial counsel apparently began his preparation for this four-day trial two days before the trial actually began. He contacted the key witnesses over the phone and his preparation of those witnesses was cursory and misguided. He began his preparation of the Defendant for his testimony the night before trial and deflected anxious questions about his trial preparation with hollow assurances. He never told Defendant's wife that she would be a witness until 3 days into the trial. In fact, he apparently

did not intend to call her since he did not identify her to the jury as a potential witness despite the fact that she had been in charge of escrow accounts and had made key deposits in MMD-2.

3. Trial counsel's attempt to subpoena bank records crucial to his clients defense was woefully incomplete and sloppily handled.

4. Trial counsel failed to perform other crucial investigation that resulted in the lack of needed evidence at trial. For example, he failed to obtain documentary evidence that James Crestani was entitled to agency fees paid by the Bajan partnerships amounting to hundreds of thousands of dollars. In addition he failed to interview and subpoena a key witness (Blake Hammond) who would have given testimony discrediting the prosecution's only accountant witness (Roger Piburn). (Affidavit of Blake Hammond R at 200-203).

Counsel's duty to investigate facts and interview witnesses possessing relevant information exists whether or not counsel believes his client's claims. Jennings v. State, 744 P.2d 212 (Okla. Cr. 1987)

When counsel knows of the existence of a person or persons who possess information relevant to his client's defense, and he fails to use due diligence to investigate that evidence, such a lack of industry cannot be justified as "strategic error".

Id. at 214. Citation omitted.

The predictable and tragic consequence of trial counsel's lack of preparation was painfully evident at trial. Witnesses

were asked to testify from memory as to specific deposits made over five years prior to trial. Few documents were available to substantiate their testimony. In addition, rebuttal evidence presented by the State, of which trial counsel and his witnesses were unaware, effectively destroyed their testimony and their credibility before the jury and allowed the prosecutor to argue that the Defendant and his witnesses were attempting to "pull the wool over the [jury's] eyes".

C. There Exists at Least a Reasonable Probability that, but for Trial Counsel's Unprofessional Errors, the Result of the Trial Would Have Been Different.

The second prong of the Strickland test requires a determination as to whether or not the result at trial would have been different had it not been for trial counsel's below-standard representation. As the court in Strickland stated

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland at 2064. The Utah Supreme Court citing Strickland further defined the standards to be met by a claim of ineffective assistance of counsel.

Defendant must prove what specific, identified acts or omissions fall outside the wide range of professionally competent assistance. The claim may not be speculative, but must be a demonstrative reality,

sufficient to overcome the strong presumption that counsel rendered adequate assistance and exercised "reasonable professional judgment"
. . . .

Furthermore, any deficiency must be prejudicial to defendant. It is not enough to claim that the alleged errors had some conceivable effect on the outcome or could have had a prejudicial effect on the fact finders
. . . .

However, these principles are not applied as a mechanical test, but are guides to the ultimate focus upon the fundamental fairness the proceeding challenged. The purpose of the inquiry is simply to ensure the defendant receives a fair trial.

State v. Frame, 823 P.2d 401, 404 (Utah 1986).

Applying the above standards to this case, it is clear that trial counsel's preparation fell well below the minimum level of his duty to his client. Further, it is clear beyond any speculation that had trial counsel performed an adequate investigation of MMD-2, the jury verdict as to count four would have been completely different.

It is also clear that had the Defendant and his wife been able to refresh their recollections as to the sequence of deposits and withdrawals from MMD-2, they would likely not have been made out to look like liars in front of the jury.

In addition, it is probable that had the jury heard the evidence of tens of thousands of dollars of deposits of the Defendant's personal funds into MMD-2 before and after August 13, 1982 and to other accounts of Alta Title, they would have felt

very differently about the elements of unauthorized control and intent to permanently deprive.

It is apparent that the jury was concerned about this issue from its note to the court during deliberations. The note asked the question "Was the money 16,500.00 put back into MMD-2" The court's very appropriate response "refer to your collective memories", was probably not very helpful to the jury because of the lack of specific evidence presented at trial as to the deposits of the Defendant's personal funds into MMD-2 after August 13, 1982. Had this evidence been known to trial counsel and presented to the jury, the probability exists that the jury would have found a lack of sufficient evidence to support the element of intent to permanently deprive.

The other failures of preparation of investigation itemized above, when combined with the prejudicial effect of the uncharged misconduct evidence and the misleading and confusing jury instructions (discussed infra), had a cumulatively devastating effect on Defendant Crestani's defense. Viewing all of these factors there is a serious question whether or not the trial can be relied on as having produced a just result.

II.

TRIAL COUNSEL'S REPRESENTATION AT TRIAL FELL BELOW THE CONSTITUTIONAL STANDARD AND AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL

Given trial counsel's inadequate trial preparation described above it is no surprise that trial counsel was frustrated in nearly every attempt to establish an effective defense. Trial

counsel's hapless attempts through various witnesses on direct examination to reconstruct financial transactions without complete records or adequate witness preparation were easily impeached.

Trial counsel's cross-examination of the State's witnesses also suffered from his lack of preparation. Unarmed with a thorough knowledge of his case or with the documents from MMD-2 to prove his position, counsel resorted to arguing with the State's witnesses.

Another devastating blow to the defense occurred because of trial counsel's failure to object to the admission of irrelevant and highly prejudicial evidence. The prosecutor continually elicited, without objection, testimony that MMD-2 was an interest bearing escrow account, that Defendant co-mingled his personal monies with escrow funds and that Alta Title Company kept the interest earned on the escrow funds. The State also attempted to question a witness using the text of a civil statute which prohibited the co-mingling of personal funds with escrow funds and required that any interest paid on such account be disbursed to the escrow owners and not to the title company. (T. Vol. III, p. 355) Trial counsel initially objected to reference to this misleading and dangerous piece of evidence. Later, however, trial counsel himself offered the rejected exhibit and it was admitted. (T. Vol. IV, pp. 492, 493).

Evidence of uncharged misconduct "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Utah Rules of Evidence 404(b). The courts have long recognized that evidence of misconduct other than that charged is highly prejudicial. Such evidence should not be admitted unless it is probative of an issue in the case and the probative value outweighs the prejudicial nature of the evidence. Rule 403 Utah Rules of Evidence. In this case evidence that Defendant co-mingled his own monies in the MMD-2 account in violation of a civil statute has no bearing whatever on the State's theft charges. Thus, it follows that the evidence of the civil statute was not probative and in fact, it was not even relevant to the case. Irrelevant evidence is not admissible. Utah Rules of Evidence 402.

An accused is entitled to be tried only for the acts he is charged with committing. State v. Lopez, 626 P.2d 483, 485 (Utah 1981). Accordingly, the State should not be allowed to "besmirch, disgrace or prejudice the defendant in the eyes of the jury" by evidence of unrelated misconduct. State v. Gibson, 565 P.2d 783, 786 (Utah 1977). See also State v. Tanner, 675 P.2d 539, 547 (Utah 1983).

The Utah Supreme Court has recognized the importance of raising appropriate objections in a criminal case. In State v. Gray, 601 P.2d 918, 920 (Utah 1979). The Court observed that competent counsel is

"one who will take such actions and present whatever defenses and interpose whatever objections he can in honesty and good conscience justify in the interest of his client."

Although counsel is not required to object when doing so would futile, State v. Malmrose, 649 P.2d 56, 59 (Utah 1982), it is clear in the case at bar that an objection to this irrelevant and prejudicial evidence would have been well taken and should have been made.

Trial counsel's failure to object to the irrelevant and prejudicial evidence and argument regarding alleged violations of the civil statute was conduct falling below a reasonable standard of competency. The prejudicial nature of this evidence creates a reasonable probability that the verdict would have been different if it had been disallowed.

III.

THE TRIAL COURT ERRED IN GIVING INSTRUCTIONS TO THE JURY THAT WERE MISLEADING AND UNFAIRLY PREJUDICIAL

The purpose of jury instructions is to enlighten, rather than confuse. It follows that:

"[i]nstructions should be clear, explicit, and free from ambiguities and contradictions; otherwise they may confuse and mislead the jury."

Scaggs v. State, 417 P.2d 331, 336 (Okla. Cr. 1966). If in a criminal case erroneous instructions might have influenced the jury's deliberations they are deemed prejudicial and the judgment should be reversed. Id.

A. The Recitation in the Instructions of a Civil Statute Forbidding Acts with which Defendant was not Charged was Prejudicial Error.

The Court's instructions to the jury included the following:

Instruction No. 16

You are instructed that the laws of the State of Utah applicable at the pertinent times in this case provide that a title insurance agent may engage in the escrow, settlement or closing business, or any combination of such business, and operate as escrow, settlement or closing agent provided that all funds deposited with the agent in connection with any escrow, settlement or closing shall be deposited in a bank in a separate trust account, or accounts and such funds shall be the property of the person or persons entitled thereto under the provisions of the escrow, settlement or closing and segregate [sic] escrow by escrow, settlement by settlement, or closing by closing in the records of the agent. These funds shall not be subject to any debt of the agent and shall be used only to fulfill the terms of the individual escrow, settlement or closing under which the funds were accepted, and none of the funds shall be used until all conditions of the escrow, settlement or closing have been met.

Any interest received or funds deposited with the agent in connection with any escrow, settlement or closing which are deposited in a bank shall be paid over to the depositing party to the escrow, settlement or closing and shall not be transferred to the account of the agent.

R at 140. This instruction quotes selected portions of Utah Code Ann. §31-25-26 (1981) which was in effect during 1982.

Instruction 16 is seriously misleading. Instruction 16 highlights and draws the jury's attention to allegations of civil

misconduct with which the Defendant was not charged and which, even if proved, was irrelevant to the theft charges. The prejudicial effect of Instruction 16 was compounded by its placement in the instructions immediately before the four theft instructions. R at 140-144. The implication in the instruction that allegations of misconduct involving the escrow account had anything to do with proof of the charged crimes is contrary to law and simply unfair.

Although, in some circumstances, a court may instruct the jury using statutory language, this is proper only if the instruction is confined to the issues in the case and does not mislead the jury. Day v. Goodwin, 3 Wash. App. 940, 944, 478 P.2d 774, 777 (1970). Abstract statements of the law, however correct, should not be given in jury instructions unless they are geared to the issues in the case being tried. Gill v. People, 139 Colo. 401, 412, 339 P.2d 1000, 1006 (Colo. 1959).

The issue of compliance with §31-25-26 has nothing to do with the issue of whether or not the Defendant committed the charges of theft. The issue of compliance was therefore not properly before the jury. However, because of the tactics and argument of the prosecutor and the inclusion of Instruction 16, the jury was surely misled into believing that the issue of compliance somehow was probative evidence of theft. Because of this misleading instruction, it is likely that the jury erroneously viewed Defendant's alleged failure to comply with

§31-25-26 as evidence of his guilt on the theft charges. The prosecutor improperly compounded that likelihood by continually eliciting testimony that Defendant co-mingled funds and that he did not pay interest to the escrow owners and by focusing on the claims in his closing argument. The combination of these factors surely poisoned the attitude of the jury toward the Defendant and tainted the verdict.

Other courts have recognized this danger. In State v. Leonard, 292 S.C. 133, 355 S.E.2d 270, 272 (S.C. 1987), the defendant was convicted of reckless homicide. On appeal, the South Carolina Supreme Court reversed the conviction on several grounds. One of the errors the Court noted was that the trial court, in its instructions to the jury, quoted verbatim a statute with which the defendant had not been charged. The South Carolina Supreme Court noted that the quoted language did not enlighten the jury regarding the issues to be decided. The Court held that when

the inclusion of [a] non-charged offense has the effect of confusing the issues the jury must determine, the statute should not be read to the jury.

Id. at 273.

Instruction 16 was unnecessary, irrelevant and prejudicial to the Defendant's right to a fair trial before an impartial jury.

B. Instruction Number 25 Prejudiced the Defendant's Right to Require the State to Prove Each Element of the Offense Beyond a Reasonable Doubt.

The court's charge to the jury included the following instruction:

Instruction No. 25

You are instructed that if you find that the MMD-2 Account was used as an escrow account then the Defendant had no authority to use the funds of another for his own use.

Instruction No. 25 is logically flawed and legally wrong. However, even more serious than that, the insidious effect of the instruction is to establish an irrebuttable presumption of the truth of a contested element of the charged offenses. Instruction No. 25 was simply the last and most serious of the prosecutor's misguided attempts to convict the Defendant of theft based upon evidence of unrelated and improper use of an escrow account.

The logical problem with the instruction is that it sets up a false syllogism. It is simply not true that the lack of Defendant's authority to use the funds of another flows automatically from the fact that MMD-2 may have ever been used as an escrow account. The account may have also been used to maintain the un-escrowed funds of Defendant's wife. The account was certainly used for the funds of Alta Title. Because the owner of

the funds withdrawn by the Defendant was never established at trial, the funds could have been funds belonging to a person or entity that gave authority to the Defendant for their use.

The problem is that Defendant never claimed at trial that he used the funds of another. His defense was that he withdrew his own funds from the account. Therefore, Instruction 25 seems to have no relevance to the issues in the case.

Because the Defendant may or may not have had authority to use the funds of another in the MMD-2 account it is logically and legally incorrect and prejudicial to imply that the fact the account was ever used as an escrow account eliminates the possibility of authority whether or not the funds withdrawn were escrowed funds.

The most ominous implication that can be drawn from this Instruction is that it eliminates the requirement that the State prove the element of lack of authorization beyond a reasonable doubt. The Instruction can be read to mean, in connection with Instruction 16, that if the account was used as an escrow account then even the Defendant's money became "funds of another" by the mere fact they were deposited into this account and the Defendant somehow automatically lost the authority thereafter to use them as his own.

It may be that the Instruction was meant to say that if the Defendant withdrew escrowed funds from MMD-2 then the jury is instructed to find he had no authority to do so. Of course, even

this statement is legally and factually incorrect and would have the effect of unlawfully shifting the burden of proof on the issue of authorization to the Defendant. If the State proved that Defendant withdrew escrowed funds, it would have to prove that Defendant had no permission to do so.

No matter how it is read, Instruction 25 allows the jury to logically link the finding of no authority to a finding that MMD-2 was used as an escrow account. Such an instruction violates the Defendant's right to due process.

Due process requires the State to prove "every ingredient of an offense beyond a reasonable doubt" Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 2329 (1977). "[A] jury's verdict cannot stand if the instructions . . . do not require it to find each element of the crime under the proper standard of proof" Cabana v. Bullock, __U.S.__, 106 S.Ct. 689, 696 (1986).

Because the main contested issue in the case was whether or not the money was the property of another withdrawn without authority, the instruction is in effect an instruction for a directed verdict.

In People vs. Figueroa, 41 Cal. 3d 714, 715 P.2d 680, 686, (1986), the Court recognized that a jury instruction may have the effect of a directed verdict although not stated in so many words.

The prohibition against directed verdicts "includes perforce situations in which the Judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true."

Citing United States v. Hayward, 420 F.2d 142, 144 (D.C. Cir. 1969).

In the case at bar, Instruction 25 tells the jury that upon a finding that MMD-2 was ever used as an escrow account any withdrawal of MMD-2 monies by Defendant was without authority even if the monies withdrawn were not escrowed monies.

This instruction in effect commands the Jury to ignore the evidence that Defendant had authority to withdraw funds, or that he withdrew his own funds.

The instruction is so insidious in effect that by itself it casts doubt upon the fairness of the jury's verdict.

C. The Combined Effect of Instructions 16 and 25 was to Grossly Confuse the Issues and Mislead the Jury. Either Instruction 16 or Instruction 25, taken alone, would constitute reversible error in this case. These two instructions taken together have the perverse synergistic effect of more than doubling the prejudice of either instruction alone.

On one hand, the jury was subject to a barrage of evidence and argument to the effect that the Defendant co-mingled personal monies with escrow funds. The jury was then instructed that it is illegal to co-mingle personal and escrow monies. Finally, the

jury was given an instruction implying that withdrawal of money from an escrow account without more established the element of unauthorized control for the purpose of the theft charge.

The apparent purpose of this coordinated attack was to convince the jury that the alleged misuse of the escrow account was some how connected with, and required conviction on, the charges of theft. The probability is great that this abusive and unfairly prejudicial tactic worked. The likelihood is high that the combined effect of these two instructions was to justify the conviction of the Defendant, not on the evidence of theft, but on the basis of the prejudicial flood of uncharged misconduct evidence.

IV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE A SPECIFIC INTENT INSTRUCTION

Defendant offered four instructions on specific intent. (R at 106, 117, 118, 125) These are reproduced as Exhibit 2 in the Addendum for convenience of the Court. The Court's charge to the jury, however, included none of these instructions.

Because theft is a specific intent crime, a defendant is entitled to an instruction on specific intent; An instruction on general intent alone is inadequate. People v. Mingo, 181 Colo. 390, 392, 509 P.2d 800, 801 (Colo. 1973). Since specific intent is an element of the crime, it must be proved beyond a reasonable

doubt. People v. Erickson, 695 P.2d 804, 805 (Colo. App. 1985); State v. Anderson, 102 Idaho 464, 466, 631 P.2d 1223, 1225 (1981). Accordingly, the jury should be instructed regarding the meaning of specific intent and the State's burden of proof.

In State v. Bachicha, 84 N.M. 397, 503 P.2d 1175 (N.M. App. 1972), the defendant was tried on the charge of theft of an automobile. In the court's instructions to the jury, the charging statute was quoted: "Any person who shall take any vehicle intentionally and without consent of the owner thereof shall be guilty of a felony." Id. at 1175. An additional instruction read as follows:

You are instructed that the intent with which an act is done is a mental process and, as such, generally remains hidden within the mind where it was conceived and is seldom, if ever, susceptible of proof by direct evidence, but must be inferred and established by the acts, conduct and doings of the persons having such intent and from the facts and circumstances surrounding such acts, conduct and doings, and in determining the intent with which the defendant in this case committed the act or acts charged in this indictment, if you find that he did so, it is proper for you to consider his acts, conduct and doings, together with all other facts and circumstances proved on the trial of this case.

Id. at 1176. The State claimed that the two instructions, when read together, adequately instructed the jury on criminal intent. The appellate court found, however, that the instructions were insufficient to inform the jury of the importance of the element of intent. The court observed that "[t]he jury must have more

than a suggestion. It must be instructed on the essential element of a 'conscious wrongdoing.'" Id.

As in Bachicha, the court's instructions in the case at bar gave the jury no more than a suggestion. The elements instructions superficially address intent by the use of "purpose to deprive" language. (R at 141, 142, 143, 144) Instruction 15 offers a definition of intent using language similar to that offered in Bachicha. Nowhere does the court define specific intent nor does it inform the jury of the importance of specific intent as an element which must be proven beyond a reasonable doubt.

The court was offered an instruction defining specific intent and distinguishing it from general intent. (R at 118) Counsel also offered the court three additional specific intent instructions any one of which would have satisfied the requirements of Bachicha. (R at 106, 117, 125) The court's failure to instruct on this important element left the jury utterly without direction.

The element of specific intent is extremely crucial in the instant case since Defendant's defense was based in part on the fact that he had no intent to permanently deprive anyone of the money in MMD-2. Accordingly, Defendant's convictions should be reversed.

CONCLUSION

This record provides overwhelming evidence of trial counsel's lack of effective and necessary preparation and investigation and the resultant unavailability of evidence establishing good defenses to the charges. The problem was exacerbated by the admission of extremely prejudicial and inadmissible evidence at trial and misleading, prejudicial and unlawful instructions to the jury. These factors combined to allow an unjust conviction of this defendant in what must be described as a gross miscarriage of justice. These errors may only be remedied by a new trial.

Defendant Crestani requests that this Court grant him that remedy.

Respectfully submitted,

DATED this _____ day of April, 1988.

SESSIONS & MOORE

JOHN F. CLARK
JOHN K. WEST
Attorneys for Defendant Crestani

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on the 15th day of April, 1988, the foregoing document was served on the Plaintiff-Respondent by hand delivering true and correct copies thereof to:

Gregory Bown
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

WAS The money 16,500
Put Back into mind 2
Refer to your collective
memories

INSTRUCTION NO. _____

To constitute the crime charged in the information there must be the joint operation of two essential elements, an act forbidden by law and an intent to do the act.

Before a defendant may be found guilty of a crime the prosecution must establish beyond a reasonable doubt that under the statute described in these instructions defendant was forbidden to do the acts charged in the information, and that he specifically intended to commit those acts.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. He has no burden of proof whatsoever.

000106

INSTRUCTION NO. _____

In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such crime may not be committed.

Thus, in the crimes of theft such as are charged in the information of this case, a necessary element is the existence in the mind of the defendant of the specific intent to obtain or exercise unauthorized control of the property of the persons named in each count with a purpose to deprive the owner thereof.

And, unless such specific intent so exists, the crimes charged were not committed.

INSTRUCTION NO. _____

"Specific intent" means that intent which is precisely formulated and is distinguished from all other intents, that it is definite, particular, restricted, explicit, exact, limited, and the opposite of general intent.

INSTRUCTION NO. 22

The crime charged against the defendant in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the prosecution must prove that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law. Such intent may be determined from all of the facts and circumstances surrounding the case.

An act or failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.