

1999

Utah v. Thomas T. Cherry : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH,
Plaintiff/Appellee,
vs.
THOMAS T. CHERRY,
Defendant/Appellant.

Case No. 990899-CA
Priority No. 2

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY,
STATE OF UTAH, FROM A CONVICTION OF SALE OF AN UNREGISTERED
SECURITY AND BEING AN UNREGISTERED SECURITIES AGENT,
THIRD DEGREE FELONIES, BEFORE THE HONORABLE DONALD J. EYRE

Paulette Stagg
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 990899-CA
vs.	:	
	:	
THOMAS T. CHERRY,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the evidence was sufficient to sustain the jury's verdicts that Cherry willfully offered or sold a security? This Court will reverse a jury conviction for insufficient evidence "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he or she was convicted." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997).

This issue was preserved in a motion for a directed verdict made during trial (R. 580 at 49-51).

CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Thomas T. Cherry appeals from the judgment, sentence and commitment of the Fourth District Court after being convicted by a jury of sale of an unregistered security and being an unregistered securities agent, third degree felonies.

B. Trial Court Proceedings and Disposition

Thomas T. Cherry was charged by information filed in Fourth District Court on or about December 13, 1996, with twelve counts of securities fraud in violation of Utah Code Annotated §§ 61-1-1, 21; one count of pattern of unlawful activity, a second degree felony, in violation of Utah Code Annotated §§ 61-1-1, 3, 7; one count of sale of an unregistered security in violation of Utah Code Annotated §§ 61-1-7, 21; and one count of sales by an unregistered securities agent in violation of Utah Code Annotated §§ 61-1-3(1), 7 (R. 15-16). On May 28, 1998, a fourth amended information was filed which charged Cherry with the same offenses (R. 157-67).

On October 21-23, 1997, a preliminary hearing was held before the Honorable Ray M. Harding, Sr. (R. 99-102). At the close of the hearing the trial court took the matter under advisement (R. 99).

On May 12, 1999, the State filed a notice of expert witnesses relating to S. Anthony Taggart from the Utah Division of Securities, John Hjartarson from the

Montana Board of Oil & Gas Conservation; and John Hansen from the U.S. Bureau of Land Management (Wyoming) (R. 269-81).

On May 20, 1999, a hearing relating to a waiver of a conflict of interest was held (R. 282-83).

On June 1, 1999, the State filed a trial memorandum (R. 332-55).

On June 7-22, 1999, a jury trial was held on the charges with Judge Eyre presiding (R. 439-50). Jury Instructions (R. 372-430).

After deliberation, the jury returned with a verdict of not guilty on all eleven counts of securities fraud¹ and not guilty on the racketeering charge and a verdict of guilty on sales by an unlicensed securities agent and sale of an unregistered security (R. 435-37). Co-defendant, Ron Zenger, was acquitted of all charges.

On August 13, 2001, Cherry was placed on 36 months probation and was ordered to serve 60 days in the Utah County Jail, pay a fine and surcharge in the amount of \$3700.00 (R. 485-487, 491-93). Cherry was also granted a 30 day extension in which to file a notice of appeal up to and including October 13, 1999 (R. 485, 496).

On October 7, 1999, Cherry filed a memorandum regarding the issue of restitution as requested by the trial court (R. 497-504). In his memorandum, Cherry argued that restitution could not be ordered by the trial court for the following reasons: One, that he was acquitted of the securities fraud charges. Two, that the regulatory offenses he was convicted of did not cause an injury to any named individuals. Three, there are no pecuniary damages that attach to the regulatory offenses of which he was

¹One count of securities fraud had been dismissed by the State prior to trial.

convicted. Four, that the imposition of restitution in this case would be violative of Cherry's right to due process. State's response (R. 514-520). Reply memo (R. 524-25).

On January 24, 2000, Cherry was ordered to pay \$2,986, 514.00 jointly and severally with co-defendant Rodney Blackford, who was convicted of securities fraud (R. 532-36). On March 29, 2000, a restitution hearing was held and the amount of restitution was subsequently modified to \$50,000 (R. 546-47, 549-51).

On October 13, 1999, Cherry filed a Notice of Appeal in Fourth District Court (R. 512).

STATEMENT OF RELEVANT FACTS

A. Testimony of Stephen Anthony Taggart

Stephen Taggart testified that since July of 1998 he has been the director of the Utah Division of Securities and is responsible for administering the Securities Act (R. 577 at 94). Prior to July of 1998, Taggart was the Director of Corporate Finance for the Division of Securities (R. 577 at 95). As Director of Corporate Finance, Taggart supervised the examiners that reviewed prospectuses and other offering that came into the Division of Securities (R. 577 at 95). Taggart works for the State of Utah including the Attorney General's office (R. 577 at 135).

Taggart testified that "[m]ost securities statutes will include a list of different financial products that would be considered a security. It will include such things as stock, bonds, investment contracts" (R. 577 at 98). Taggart testified that an investment contract is when there is "an investment of money in a common enterprise with the

expectation of profit to be derived from the essential managerial efforts of a third party or promoter” (R. 577 at 98). Taggert also testified that under Utah law “participation in an oil and gas lease would also be considered a security” (R. 577 at 98).

Taggert testified that the general rule is that before a security can be sold, it must be registered unless an exemption is found (R. 577 at 100). In addition, “whoever is offering securities must be licensed to sell a security in the State of Utah” unless excepted by law (R. 577 at 101). To obtain a license to sell securities, an application has to be filed with the Division of Securities and a test must be taken and passed (R. 577 at 102).

Taggert testified that Blackford Energy Company, Petro Tech, Sharco, Gem Tech, Three Rivers, Bastian Oil & Gas, Power Financial Group, and Equity Partnership were not registered nor exempted from registration with the Division of Securities in the State of Utah (R. 577 at 103). Taggert also testified that neither Thomas T. Cherry nor Ronald Zenger has been licensed as a broker/dealer/agent in the State of Utah (R. 577 at 104). Cherry had filed an application and had passed the test but the application was withdrawn (R. 577 at 104, 124).

Taggert defined a general partnership as when “two or more people that come together to do business for a profit” and that the partners will “have equal control, equal vote, depending on their capital contribution, and they will also have a passthrough of profits and losses” (R. 577 at 113). Taggert testified that a general partnership is typically not a security because all partners have the “actual ability to protect their investment” and all have access to information; on the other hand, a limited partnership is considered a security (R. 577 at 113-14, 133, 138).

Taggart opined that Blackford Energy Company constituted a security (R. 577 at 115). Taggart based his opinion on the fact that the partners “really exercised very little control” and that “most of the control was in the hands of the managing general partner” (R. 577 at 117). Taggart added that under the voting structure of the partnership it was “so impractical that a small investor that put in, say, a thousand or \$2,000 could actually affect any change in where the money actually went, that it looked more like a security than an actual general partnership” (R. 577 at 119). Taggart also testified that the number of partners was important in looking a control because “if there are so many partners that in effect you really don’t have any control because the control is so diluted, then it tends to indicate that it would be a security because you can’t--you really cannot effectuate control over you investment” (R. 577 at 122).

Taggart testified that he had not reviewed any of the partnership meetings where individual votes were conducted on the affairs of the partnership nor was he aware of how partnership meetings operated in this particular case (R. 577 at 128-29, 133).

B. Testimony of Rodney Blackford

Rodney Blackford lives in Colorado and is a geophysical and geological consultant (R. 578 at 55). Blackford is a co-defendant with Cherry (R. 578 at 55). Prior to trial, Blackford pled guilty to multiple counts of securities fraud pursuant to a plea agreement (R. 577 at 56).

Blackford was the sole owner of Blackford Energy Company until December 31, 1993, when Linda and Bill Cherry became 49 percent owners of the company (R. 578 at 59). Blackford’s role in the 10-well Big Snowy Mountain partnership was to “find oil and produce it” (R. 578 at 59). Cherry’s responsibility in regards to the partnership was

“to raise funds to drill the wells” (R. 578 at 61). Blackford testified that Cherry had a company, Power Financial, that he used to raise capital; and that Power Financial, pursuant to a written agreement between Blackford and Cherry, had the option to approve or reject any drilling proposals submitted by Blackford (R. 578 at 62-63).

Approximately 700 people invested in the Big Snowy Mountain project through seven investment partnerships--including Shareco, Petro Tech, Bastion Oil, Three Rivers and Gem Tech; and approximately 3 million dollars was raised (R. 578 at 63-65). In regards to exhibit 16, Blackford had input in regards to the geological information but the rest of the information was generated by Cherry, Dick Hewitt and others (R. 578 at 67). In regards to exhibit 17, Blackford add a “a few things like [his] personal history” (R. 578 at 68).

Blackford testified that finder’s fees were used to market the Blackford/Big Snowy partnership (R. 578 at 68-69). Blackford testified that at least two partnership votes occurred--one in August of 1993 and one in 1994--the votes were organized by Cherry and others (R. 578 at 71). Blackford indicated that he had no control over how the Big Snowy venture was structured (R. 578 at 76). Blackford also testified that neither Zenger nor Cherry had any more control than any other joint venturer (R. 578 at 125).

According to Blackford, five wells were drilled under the Big Snowy project and possibly two were successful in finding oil but still did not make a profit (R. 578 at 72-74).

Prior to October of 1993, Blackford Energy had drilled to wells and neither was successful (R. 578 at 74). But Blackford had been involved in a number of wells and a great many of them were successful (R. 578 at 80-81). In addition, another well was

being drilled under the Big Snowy project which Blackford believes would have been successful had the SEC not frozen all funds (R. 578 at 97).

Prior to the agreement between Cherry and Blackford, Cherry informed him of prior problems with Texas, Montana and the SEC (R. 578 at 107). Blackford also met with Cherry and Dick Hewitt, who told Blackford that while Cherry could not conduct business in Texas or Montana he was very good at raising money and could see “no problems” with Blackford doing business with Cherry (R. 578 at 107-08). Blackford testified that he and the others relied on Hewitt and that it was Hewitt who had set up the structure of the business venture (R. 578 at 110). Blackford dealt more with Linda Cherry than Tom Cherry (R. 578 at 110).

C. Testimony of Richard Hewitt

Richard Hewitt is a securities lawyer from Texas (R. 579 at 7). From 1964-1979 Hewitt worked with the SEC; and had been in private practice since 1981 (R. 579 at 7).

In 1991, Hewitt was hired by Cherry Energy in Texas (R. 579 at 12). The Texas State Securities Board brought a cease and desist action against Cherry and Cherry Energy (R. 579 at 12). Cherry and company consented to the action and agreed not to violate the Texas Securities Act in the future (R. 579 at 12).

Prior to 1993, Hewitt advised Cherry of “both the federal and state registration requirements for the offer and sale of securities” and “on other parts securities law” (R. 579 at 28). Hewitt also reviewed with him “the broker/dealer licensing provisions” for individual sales agents (R. 579 at 28).

In 1993, Hewitt was contacted by Cherry about a new oil venture (R. 579 at 28). Hewitt testified that he warned Cherry not to return to the oil business given his previous

ventures but that if he did get back in that he should limit his activities to hiring and training salesman and explaining the business to the salesmen (R. 579 at 30). Hewitt informed Cherry that he should not sell, be an officer or director, or handle money for the company and that he should act only as a consultant (R. 579 at 30).

Hewitt then spoke with Blackford and explained to him that because of Cherry's prior history, he would have to be "in charge of the company, would have to run the company, the money would have to go to Colorado and not to Utah, and that he was going to be actively in charge of the company, which we later formed known as Blackford Energy" (R. 579 at 31).

Hewitt was retained to represent Blackford Energy (R. 579 at 8). Hewitt "organized Blackford Energy" as a Colorado corporation and told Blackford to open up a bank account in Denver (R. 579 at 32). At the request of Cherry or Linda Cherry, Hewitt prepared a private placement memorandum in the summer of 1993 which is a "document which would contain information that a prospective investor would want to receive in order to make an informed investment decision" (R. 579 at 33). Although Blackford Energy was claiming to be a joint venture and not a security, Hewitt testified that he "did the private placement memorandum in the same format that [he] would if it were a security" (R. 579 at 33). After initially dealing with Cherry, Hewitt dealt mostly with Linda Cherry (R. 579 at 58). When Linda Cherry informed Hewitt of the second level partnership, Hewitt testified that he informed her that he "thought that these were securities" that probably would need to be registered (R. 579 at 59-60). Hewitt also testified that he thought that they would need a general partnership agreement so he sent them one without knowing the participants (R. 579 at 62-63).

Hewitt also prepared the joint venture agreement between Big Snowy and its partners (R. 579 at 36). Hewitt “envisioned” for Big Snowy “a number of participants each putting up \$29,000 as they purchased an interest in the joint venture, and that that would be the structure of the deal. I did not envision a second level of partnerships” (R. 579 at 39).

Hewitt testified that he was told of the existence of second level partnerships by Linda Cherry (R. 579 at 39). Hewitt said that he “cautioned her against that type of organization” because he felt that the creation of another level would make the unit size too small and too speculative (R. 579 at 39). Hewitt testified that he is not familiar with Petro Tech, Shareco, Gem Tech or Equity Partnership (R. 579 at 38). Hewitt testified that he did not know that there were ultimately approximately 700 investors in Big Snowy and that if he “ever heard that figure” it was only from the SEC after they “stopped the sales” (R. 579 at 44). Hewitt testified that as the attorney for the company he would have liked to have been informed about the number of investors “because if you had 750 investors in two offerings, as a practical matter, unless they are all highly sophisticated, accredited investors, you could not have a private placement, and you have blown your exemption from registration” (R. 579 at 45).

Hewitt testified that in his opinion Blackford Energy constituted a “security” (R. 579 at 41).

Hewitt prepared exhibit 16 but Cherry’s disciplinary history was not included because he understood that Cherry was only acting as a consultant and that the management of Blackford Energy was limited to Blackford (R. 579 at 41-42).

Hewitt was originally charged as a co-defendant in this prosecution but the charges were dismissed prior to the preliminary hearing (R. 579 at 10).

On rebuttal, Hewitt testified he attempted to structure Blackford Energy as a general partnership but that he treated it like a security (R. 583 at 81).

Hewitt also testified that his Blackford Energy files had been destroyed between the time he was fired and before any indictment (R. 583 at 93).

D. Testimony of Linda Cherry

Linda Cherry testified that Tom Cherry is her older brother (R. 581 at 5). Linda first heard of Blackford from Cherry, who had learned of him from Rick Murray and who had been called by Blackford (R. 581 at 7, 8). Linda learned from Cherry that he had been in contact with Hewitt about another project and that Hewitt had told him “about some new legislation” and that if he ever wanted to do another project “he could do it as a non-security if he followed certain strict guidelines” (R. 581 at 8).

After numerous conversations between Cherry and Blackford, Linda and Cherry drove to Denver to meet with Blackford (R. 581 at 8-9). Linda did some investigation of Blackford and received positive responses as to his character and ability in the oil business (R. 581 at 11). Cherry also asked Linda “to handle the legal and business end of things” and she agreed (R. 581 at 14).

Linda spoke with Hewitt and, according to her notes, “He explained that there was new legislation that had occurred in 1986 by Senator Lloyd Bentsen whereby it restored the old Texas oil deal” and that if a project was structured “exactly right it would be a non-security” (R. 581 at 17). Hewitt subsequently sent some court cases to Linda (R. 581 at 17). Hewitt “said we must be a joint venture general partnership. He said that anyone joining that is liable for more than their investment, whereas, in a limited partnership you’re only liable for what you put in” (R. 581 at 21). Linda testified that

Hewitt also told her that “We must structure the program as working interest which is a particular kind of oil and gas ownership where the person is involved they vote and pay expenses and so on. He said, have a joint venture agreement where the operator can be voted out and a new one voted in. He said joint venture partners must have access to the well site, you know, for information to go out and so on. He said the partners must be active in having a vote and voting to keep them very informed. He said the partners must have the opportunity to examine the title information to make sure there were no encumbrances on the piece of land that they were proposing to drill on” (R. 581 at 21-22). Hewitt also told Linda to have monthly partnership meetings and to do a newsletter to keep the partners informed (R. 581 at 22-23). Hewitt also told Linda to give refunds if requested by any partner (R. 581 at 23).

Linda testified that after the company was set up and after Blackford had drilled the first well, a partner vote was taken on the completion aspects of the well and on the second well (R. 581 at 28). Linda testified that she thought ballots were mailed to all partners (R. 581 at 29-30).

Another vote was taken after the SEC acted as to whether the company should keep drilling or offer a refund; and that the partners voted to keep drilling (R. 581 at 30). Approximately 7 people asked for and received refunds (R. 581 at 30-31).

Hewitt informed Linda during one conversation that Blackford was to be the managing general partner and that Cherry was to be a marketing consultant (R. 581 at 52). Hewitt also in another conversation reassured Linda that the venture was not a security but a general partnership (R. 581 at 56).

When others wanted to invest Linda testified that she called Hewitt who indicated to her that second level general partnerships could be established to facility these other

investors without affecting the non-security designation (R. 581 at 65-67). Hewitt subsequently sent “general partnership papers for the little investors” (R. 581 at 68).

Linda also asked Hewitt if Cherry’s past history needed to be in private placement memorandum and that Hewitt indicated that it did not when Linda told him that Cherry was a consultant and not an employee (R. 581 at 108). Linda testified that Hewitt then removed the past history from the memorandum (R. 581 at 108). Linda testified that she never received any indication from Hewitt that the Big Snowy venture needed to be registered as a security (R. 581 at 123).

Linda testified that she related to Cherry the discussions she had with Hewitt (R. 581 at 143).

Linda testified that when individuals such as Zenger (and others including salesmen and investors) would ask whether or not the partnership constituted a security, that she would respond “We ha[ve] a securities attorney, Richard Hewitt, who [has] worked for the SEC for 15 years, [is] well steeped in oil and gas and he [is] walking us through this non-security and we [are] doing everything he [says] to do to qualify for that” (R. 581 at 144-45).

Linda was charged as a co-defendant in this case and pled “no contest” to six misdemeanors (R. 581 at 138-40).

E. Testimony of Patricia Adams Leach

Patricia Leach testified that she is familiar with Blackford Energy Company through her employment at Power Financial in 1993 (R. 579 at 87). Leach was hired by Cherry (R. 579 at 88). Leach, as part of her employment, made telephone calls and set up appointments for Cherry’s salespeople from a prepared script (R. 579 at 88).

Leach was also granted an investment in Blackford Energy as part of her employment which eventually accumulated to a \$2000 investment (R. 579 at 96-97). Leach attended two partnership meetings where Cherry spoke (R. 579 at 99). Leach received exhibit 17 but not exhibit 16 (R. 579 at 100). Leach from the materials she received from Blackford Energy did not believe that she had any meaningful control of operations (R. 579 at 106). Leach did, however, fill out the ballots that were sent to her and returned them to the partnership (R. 579 at 108).

F. Testimony of Darren Mangum

Darren Mangum testified that he worked with Cherry at Blackford Energy during 1993; and that Cherry is a friend of his father, David (R. 579 at 117). Mangum's official title was "marketing coordinator" (R. 579 at 117). Between December of 1992 and April of 1993, Mangum was involved with sales (R. 579 at 118). As part of his employment, Mangum assisted in developing a marketing support manual to introduce selling agents to the company policies and procedures as well as some form letters (R. 579 at 121). Mangum testified that Cherry's official title was "Marketing Division Consultant" (R. 579 at 122).

Mangum was fired by Linda and Tom Cherry in December of 1993 (R. 579 at 119).

G. Testimony of Steve Smith

Steve Smith was a salesman for Blackford Energy. He testified that Zenger's role in the organization was sales manager (R. 582 at 36).

H. Testimony of Steven Anderson

Steven Anderson testified that he invested in Blackford Energy (R. 582 at 55). Anderson testified that he believed the company to be a general partnership (R. 582 at 56). Anderson became a part-time sales agent for Blackford Energy (R. 582 at 57). Anderson testified that he is familiar with Hewitt because “He was our legal counsel that set up the general partnership entity and he was one we used most of the time” and who set up whatever registering or licensing was required (R. 582 at 59). Anderson never personally talked to Hewitt but was frequently in the room and listening by speaker phone when Linda spoke with him (R. 582 at 59).

Anderson introduced Zenger to Blackford Energy (R. 582 at 61). After several months, Zenger approached Anderson because he was concerned that the partnership might constitute a security (R. 582 at 61-62). The two of them approached Linda Cherry with their concerns and the three of them spoke with Hewitt by telephone (R. 582 at 62). The conversation lasted 30-45 minutes (R. 582 at 63). Hewitt informed the group that Blackford Energy was not a security and that it was a general partnership that did not need to be licensed or registered provided the guidelines which had been previously outlined were followed (R. 582 at 63-64). Hewitt also told the group not to worry (R. 582 at 64).

Anderson also testified that he had seen Hewitt’s resume and knew he worked for the Securities & Exchange Commission and that Hewitt had told them that “we do this all the time in Texas. There are hundreds of companies that are set up this very way” (R. 582 at 64).

Anderson also testified that he was privy to conversations with Hewitt about the little, second-level partnerships (R. 582 at 71-72). Anderson testified that the smaller second-level partnerships were Hewitt's idea and indicated that if these partnerships were not set up then Blackford Energy "would be in jeopardy" of losing their non-security status (R. 582 at 73, 115).

Anderson testified that he had a conversation with Linda Cherry after the SEC had closed down Blackford Energy (R. 582 at 106). Anderson was worried about what was taking place and Linda "related to me that she had been on the phone with Mr. Hewitt that day and said we just have to work through it, it's not a securities and he would take care of it and, you know, it would be okay" (R. 582 at 106).

I. Barry Allensworth

Barry Allensworth said he did some private investigation of Blackford and Blackford Energy prior to investing in the company. As part of his work he spoke with Hewitt (R. 582 at 135). Allensworth asked Hewitt about the partnership and as a former securities broker, Allensworth asked Hewitt about whether the partnership constituted a security because he "didn't want to be involved" with an unregistered security (R. 582 at 135). Allensworth testified that Hewitt informed him that it was a non-security (R. 582 at 136, 148). Allensworth testified that he spoke with Hewitt again in 1994 when the SEC was attempting to close down the company (R. 582 at 139). Again Hewitt told Allensworth that it was not a security (R. 582 at 140).

J. Testimony of Ron Zenger

Ron Zenger testified that after he became involved with Blackford Energy he had conversation with his previous employer who told him that he had concerns that Blackford Energy was a security and that Zenger could get in trouble for being unlicensed (R. 583 at 10). Zenger drove down to Provo and met with Cherry and others and Cherry indicated that their attorney had told them that it was not a security (R. 583 at 11). Zenger was still uncomfortable so they called Hewitt who informed him that “this is absolutely not a securities” (R. 583 at 12). Zenger also asked Hewitt if he could get in trouble and was told that he could only get in trouble if he lied or embezzled money (R. 583 at 12-13). Zenger testified that he only continued his involvement with Blackford Energy because of Hewitt’s representations (R. 583 at 13).

Zenger testified that he was present on several occasions when Linda Cherry spoke with Hewitt (R. 583 at 15). Zenger believes that Hewitt was fully informed as to the parameters and workings of the company (R. 583 at 16, 45). Zenger also testified that it was Hewitt who suggested the creation of the smaller partnerships (R. 583 at 17-18).

Zenger testified that he was hired and trained by Cherry and that it was Cherry who had communications with Blackford (R. 583 at 49). Zenger testified that he did not believe that Cherry communicated with Hewitt once the company got started and that it was Linda who spoke with Hewitt (R. 583 at 60).

SUMMARY OF ARGUMENT

Cherry asserts that the evidence is insufficient to sustain the jury’s verdicts that he “willfully” offered or sold a security without a license and that reasonable minds must have entertained reasonable doubt as to his guilt. Accordingly, Cherry asks that

this Court reverse his convictions for sale of an unregistered security and sale of a security by an unlicensed agent.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE JURY'S VERDICTS THAT CHERRY "WILLFULLY" OFFERED OR SOLD A SECURITY

Cherry was convicted by the jury of one count of sale of an unregistered security in violation of Utah Code Annotated §§ 61-1-7, 21 and one count of sales by an unregistered securities agent in violation of Utah Code Annotated § 61-1-3(1). Cherry's co-defendant, Ron Zenger, was acquitted of both charges. Cherry asserts that the evidence introduced at trial was insufficient to sustain the jury's verdicts that he "willfully" offered or sold a security; and that the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" that Cherry committed these crimes. *State v. Brown*, 948 P.2d 337, 343 (Utah 1997). This issue requires that Cherry marshal the evidence "in a light most favorable to the jury's verdict." *State v. Stewart*, 729 P.2d 610, 611 (Utah 1996). Cherry has previously marshaled the evidence relevant to these charges in his statement of facts, but also does so as necessary here.

A common element to both crimes for which Cherry was convicted was that he "willfully" offered or sold a security. See Jury Instructions #27 and 29, copies of which are included in the Addenda. Jury Instruction #40, a copy of which is included in the Addenda, defines "willfully" as follows: "A defendant acts willfully if it was his conscious objective or desire to engage in the conduct or cause the result." Cherry

asserts that just as the jury found the evidence insufficient to convict Zenger of the crimes of selling an unregistered security and selling a security without a license, the evidence was also insufficient to sustain the jury's verdicts that he committed these crimes.

Cherry recognizes that the fact that Zenger was acquitted of these crimes does not automatically render his conviction invaled. *See Stewart*, 729 P.2d at 611-12. However, Cherry asserts that, unlike the facts in *Stewart*, there is no rational basis in the evidence for the jury's acquittal of Zenger and their convictions of Cherry. In *Stewart*, two co-defendants were convicted of second degree homicide while two co-defendants were acquitted. 729 P.2d at 611. While all four defendants were identified as aggressors in the attack, the evidence clearly established that the two defendants that were convicted of the crime possessed the knives which inflicted the numerous wounds which caused the death. 729 P.2d at 611-12. In this case, however, there is no evidence in the record to establish that it was Cherry's conscious objective or desire to sell a security nor was there evidence which established that his conduct was "willful" while Zenger's conduct was not..

The jury was instructed on the affirmative defense of reasonable reliance on the advice of legal counsel. "Under Utah law, reasonable reliance on the advice of counsel is an affirmative defense when the issue whether particular conduct meets the elements of a crime." *Hodges v. Gibson Products Co.*, 811 P.2d 151, 159-60 (Utah 1991). The jury was instructed that reliance on the advice of counsel is a factor to be considered in determining the willfulness of each defendants' conduct. Jury Instruction #42. The elements of this defense are as follows:

- (a) that they fully disclosed all relevant facts to counsel; and

(b) that they requested advice from counsel concerning the legality of a proposed action; and

(c) that they received advice from counsel that the proposed action was legal; and

(d) that they relied, in good faith, on that advice; and

(e) the counsel which the defendants claim they relied upon must be independent and unbiased.

Jury Instruction #41. Cherry asserts that the evidence introduced at trial was sufficient to establish this affirmative defense; and that it was insufficient to establish that his conduct was "willful" as was a required element of the two crimes of which he was convicted.

The State's only witness that Cherry possibly acted "willfully" in selling a security and that he did not rely on Hewitt's advice concerning whether the partnership did not constitute a security is Hewitt himself. Hewitt was originally charged as a co-defendant in this prosecution but the charges were dismissed prior to the preliminary hearing. (R. 579 at 10). Hewitt was previously employed with the SEC from 1964-1979, a period of fifteen years, and had been in private practice since (R. 579 at 7). Hewitt prepared the joint venture between Blackford Energy/Big Snowy and its partners (R. 579 at 36). The documentation indicated that the partnership did not constitute a security and was a general partnership.

Hewitt testified that he thought the second level partnership were securities that would probably need to be registered (R. 579 at 59-60). Hewitt testified that he cautioned Linda Cherry about the partnerships because they might become too small and too speculative (R. 579 at 39). Hewitt further testified that he did not know that there were ultimately about 700 investors in Big Snowy and that he would have liked to know that because that "could have blown your exemption from registration" (R. 579 at 44, 45). Hewitt also testified that he thought Blackford Energy constituted a security (R. 579 at 41).

However, Hewitt's testimony is contradicted by every other significant witness--some of whom had not been charged with criminal conduct and who had nothing to hide nor gain from their testimony.

Linda Cherry, who helped handle the legal issues of Big Snowy, testified that she worked with Hewitt to structure the partnership so that it would not be a security. (R. 581 at 8, 14). She testified that Hewitt told her "we must structure the program as working interest" and if it was structured "exactly right it would be a non-security" (R. 581 at 21, 17). When others wanted to invest, Linda Cherry testified that she called Hewitt who indicated to her that second level general partnerships could be established to facility these other investors without affecting the non-security designation (R. 581 at 65-67). Linda Cherry further testified that they were doing everything Hewitt was telling them to do to qualify as a non-security (R. 581 at 144-45). Linda finally testified that she never received any indication from Hewitt that the Big Snowy venture needed to be registered as a security (R. 581 at 123).

Steven Anderson, who was an investor and part-time sales agent for Blackford Energy (R. 582 at 56-57), testified that Hewitt was the "legal counsel that set up the general partnership entity and he was the one we used most of the time" and that Hewitt was the one that set up whatever registering or licensing was required (R. 582 at 59). Anderson testified that he became concerned whether the partnership might constitute a security, but then he was personally informed by Hewitt via telephone that Blackford Energy was not a security and that it did not need to be licensed or registered (R. 582 at 63-64). Anderson also testified that he saw Hewitt's resume and knew that he had worked for the SEC (R. 582 at 64). Anderson further testified that Hewitt told him,

referring to the partnership, “we do this all the time in Texas. There are hundreds of companies that are set up this very way” (R. 582 at 64). After Anderson found out that the SEC had closed down Blackford Energy, he testified that Linda Cherry told him that she had been on the phone with Hewitt and Hewitt said he would take care of it and that it was not a securities (R. 582 at 106).

Barry Allensworth testified that, before he invested in the company, he asked Hewitt whether the partnership constituted a security because he “didn’t want to be involved” with an unregistered security (R. 582 at 135). Allensworth testified that Hewitt informed him that it was a non-security (R. 582 at 136, 148). After the SEC was attempting to close down the company in 1994, Allensworth testified that Hewitt again told him that it was non-security (R. 582 at 140).

Rodney Blackford was the sole owner of Blackford Energy until December 31, 1993 (R. 578 at 59). Blackford testified that he and the others relied on Hewitt and that it was Hewitt who had set up the structure of the business venture (R. 578 at 110).

Ron Zenger testified that after he became involved with Blackford Energy he had conversation with his previous employer who told him that he had concerns that Blackford Energy was a security and that Zenger could get in trouble for being unlicensed (R. 583 at 10). Zenger drove down to Provo and met with Cherry and others and Cherry indicated that their attorney had told them that it was not a security (R. 583 at 11). Zenger was still uncomfortable so they called Hewitt who informed him that “this is absolutely not a securities” (R. 583 at 12). Zenger also asked Hewitt if he could get in trouble and was told that he could only get in trouble if he lied or embezzled money (R. 583 at 12-13). Zenger testified that he only continued is involvement with Blackford Energy because of Hewitt’s representations (R. 583 at 13).

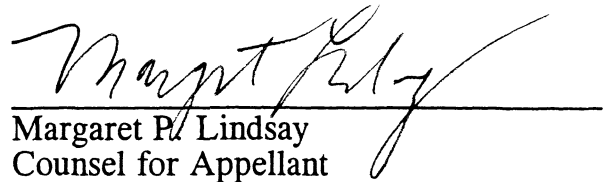
Zenger testified that he was present on several occasions when Linda Cherry spoke with Hewitt (R. 583 at 15). Zenger believes that Hewitt was fully informed as to the parameters and workings of the company (R. 583 at 16, 45). Zenger also testified that it was Hewitt who suggested the creation of the smaller partnerships (R. 583 at 17-18).

Cherry asserts that the evidence introduced at trial was sufficient to establish that he, like Zenger, reasonably relied on the advice of counsel and that the evidence was insufficient to sustain the jury's verdicts that he "willfully" offered or sold a security. Accordingly, as the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt" that Cherry committed these crimes, Cherry requests that this Court reverse his convictions for sale of an unregistered security, a third degree felony, and sale of a security by an unlicensed agent, a third degree felony. *Brown*, 948 P.2d at 343.

CONCLUSION AND PRECISE RELIEF SOUGHT

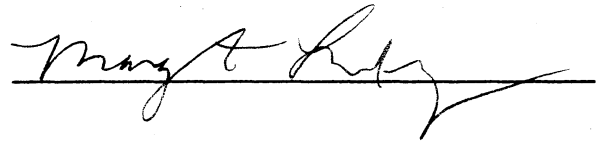
For the foregoing reasons, Cherry asks that this Court reverse his convictions.

RESPECTFULLY SUBMITTED this 14th day of June, 2002.


Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 14th day of June, 2002.

A handwritten signature in cursive script, appearing to read "Mary T. Kelly", is written over a solid horizontal line.

ADDENDA

Investment adviser — Unlawful acts.

It is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, or through the issuance of analyses or reports or otherwise to:

- (a) employ any device, scheme, or artifice to defraud the other person;
- (b) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person; or
- (c) divide or otherwise split any consideration with any person not licensed under this chapter as an investment adviser or investment adviser representative.

(3) (a) Except as may be permitted by rule of the division, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing that:

- (i) the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;
- (ii) no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and
- (iii) the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

(b) Subsection 61-1-2(2)(a)(i) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date.

(c) "Assignment," as used in Subsection 61-1-2(2)(a)(ii), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor.

(d) If the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

(4) It is unlawful for any investment adviser to take or have custody of any securities or funds of any client if:

- (a) the division by rule prohibits custody; or
- (b) in the absence of a rule, the investment adviser fails to notify the division that he has or may have custody.

(5) The division may by rule adopt exemptions from Subsections 61-1-2(2)(a)(i), (ii), and (iii) where such exemptions are consistent with the public interest and within the purposes fairly intended by the policy and provisions of this chapter.

1993

61-1-3. Licensing of broker-dealers, agents, and investment advisers.

(1) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless the person is licensed under this chapter.

(2) (a) It is unlawful for any broker-dealer or issuer to employ or engage an agent unless the agent is licensed. The license of an agent is not effective during any period when he is not associated with a particular broker-dealer licensed under this chapter or a particular issuer.

(b) When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the division.

(3) It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless:

(a) the person is licensed under this chapter; or

(b) the person's only clients in this state are investment companies as defined in the Investment Company Act of 1940, other investment advisers, federal covered advisers, broker-dealers, banks, trust companies, savings and loan associations, insurance companies, employee benefit plans with assets of not less than \$1,000,000, and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the director; or

(c) the person has no place of business in this state and during the preceding 12-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

(4) (a) It is unlawful for any:

(i) person required to be licensed as an investment adviser under this chapter to employ an investment adviser representative unless the investment adviser representative is licensed under this chapter, provided that the license of an investment adviser representative is not effective during any period when the person is not employed by an investment adviser licensed under this chapter; or

(ii) federal covered adviser to employ, supervise, or associate with an investment adviser representative having a place of business located in this state, unless such investment adviser representative is licensed under this chapter or is exempt from licensing.

(b) When an investment adviser representative required to be licensed under this chapter begins or terminates employment with an investment adviser, the investment adviser shall promptly notify the division.

(5) Except with respect to investment advisers whose only clients are those described under Subsections (3)(b) or (3)(c), it is unlawful for any federal covered adviser to conduct advisory business in this state unless such person complies with the provisions of Section 61-1-4.

1997

61-1-4. Licensing and notice filing procedure [Effective until July 1, 2002].

(1) (a) A broker-dealer, agent, investment adviser, or investment adviser representative must obtain an initial or renewal license by filing with the division or its designee an application together with a consent to service of process under Section 61-1-26.

(b) (i) The application shall contain the applicant's social security number and whatever information the division by rule requires concerning such matters as:

- (A) the applicant's form and place of organization;
- (B) the applicant's proposed method of doing business;

(C) the qualifications and business history of the applicant; in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser;

- (iii) additional information is requested by the division regarding the withdrawal application.
- (b) (i) If a proceeding described in Subsection (5)(a) is pending or instituted, the director shall designate by order when and under what conditions the withdrawal becomes effective.
- (ii) If additional information is requested, withdrawal is effective 30 days after the additional information is filed.
- (c) (i) If no proceeding is pending or instituted, and withdrawal automatically becomes effective, the director may initiate a revocation or suspension proceeding under Section 61-1-6 within one year after withdrawal became effective.
- (ii) The director shall enter any order under Subsection (1)(b) as of the last date on which the license was effective.

1991

61-1-5. Court-ordered discipline.

The division shall promptly withhold, suspend, restrict, or ~~revoke~~ the use of a license issued under this chapter if so ~~ordered~~ by a court.

1997

61-1-7. Registration before sale.

It is unlawful for any person to offer or sell any security in ~~this state unless it is registered under this chapter, the security or transaction is exempted under Section 61-1-14, or the security is a federal covered security for which a notice has been made pursuant to the provisions of Section 61-1-15.5.~~

1997

61-1-8. Registration by notification.

(1) The following securities may be registered by notification, whether or not they are also eligible for registration by ~~notification~~ under Section 61-1-9:

- (a) any security whose issuer and any predecessors ~~have~~ been in continuous operation for at least five years if ~~there~~ has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer, or any predecessor, with a fixed maturity or a fixed interest or dividend provision, and the issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting principles:

- (i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed and equal to at least 5% of the amount of such outstanding securities, as measured by the maximum offering price or the market price on a day, selected by the registrant, within 30 days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within 90 days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price; or
- (ii) which, if the issuer and any predecessors have not had any security of the type specified in Subsection (1)(a)(i) outstanding for three full fiscal years, equal to at least 5% of the amount, as measured in Subsection (1)(a)(i), of all securities which will be outstanding if all the securities being offered or proposed to be offered, whether or not they are proposed to be registered or offered in this state, are issued;

- (b) any security, other than a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease,

registered for nonissuer distribution if any security of the same class has ever been registered under this chapter or a predecessor act, or the security being registered was originally issued pursuant to an exemption under this chapter or a predecessor act.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Section 61-1-26:

- (a) a statement demonstrating eligibility for registration by notification;
- (b) with respect to the issuer and any significant subsidiary:

- (i) its name, address, and form of organization;
- (ii) the state or foreign jurisdiction and the date of its organization; and
- (iii) the general character and location of its business;

- (c) with respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution:

- (i) his name and address;
- (ii) the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and
- (iii) a statement of his reasons for making the offering;

- (d) a description of the security being registered;
- (e) the information and documents specified in clauses (h), (i), and (j) of Subsection 61-1-10(2); and
- (f) in the case of any registration under Subsection 61-1-8(1)(b) which does not also satisfy the conditions of Subsection 61-1-8(1)(a):

- (i) a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; and
- (ii) a summary of earnings for each of the two fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than two years.

(3) If no stop order is in effect and no proceeding is pending under Section 61-1-12, a registration statement under this section automatically becomes effective at 3 p.m. Mountain Standard Time of the second full working day after the filing of the registration statement or the last amendment, or at such earlier time as the division determines.

1991

61-1-9. Registration by coordination.

(1) Any security for which a registration statement or a notification under Regulation A or any successor to Regulation A has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Section 61-1-26:

- (a) one copy of the disclosure statement together with all its amendments filed under the Securities Act of 1933;

- (b) if the division by rule or otherwise requires, a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered and a specimen or copy of the security;

- (c) if the division requests, any other information, or copies of any other documents, filed under the Securities Act of 1933; and

- (1) (a) the director may issue an order directing the person to appear before the division and show cause why an order should not be issued directing the person to cease and desist from engaging in the act or practice, or doing any act in furtherance of the activity;
- (b) the order to show cause shall state the reasons for the order and the date of the hearing;
- (c) the director shall promptly serve a copy of the order to show cause upon each person named in the order;
- (d) the director shall hold a hearing on the order to show cause no sooner than ten business days after the order is issued;
- (e) after a hearing, the director may issue an order to cease and desist from engaging in any act or practice constituting a violation of this chapter or any rule or order under this chapter. The order shall be accompanied by written findings of fact and conclusions of law;
- (f) the director may impose a fine; and
- (g) the director may bar or suspend that person from associating with a licensed broker-dealer or investment adviser in this state.
- (2) (a) The director may bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter;
- (b) upon a proper showing in an action brought under this section, the court may:
 - (i) issue a permanent or temporary, prohibitory or mandatory injunction;
 - (ii) issue a restraining order or writ of mandamus;
 - (iii) enter a declaratory judgment;
 - (iv) appoint a receiver or conservator for the defendant or the defendant's assets;
 - (v) order disgorgement;
 - (vi) order rescission;
 - (vii) impose a fine of not more than \$500 for each violation of the act; and
 - (viii) enter any other relief the court considers just; and
- (c) the court may not require the division to post a bond in an action brought under this subsection.

1994

61-1-21. Penalties for violations.

- (1) A person is guilty of a third degree felony who willfully violates any provision of this chapter except Sections 61-1-1 and 61-1-16, or who willfully violates any rule or order under this chapter, or who willfully violates Section 61-1-16 knowing the statement made to be false or misleading in any material respect.
- (2) A person who willfully violates Section 61-1-1:
 - (a) is guilty of a third degree felony if, at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than \$10,000;
 - (b) is guilty of a second degree felony if:
 - (i) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth \$10,000 or more; or
 - (ii) (A) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth less than \$10,000; and
 - (B) in connection with that violation, the violator knowingly accepted any money representing:

- (I) equity in a person's home;
- (II) a withdrawal from any individual retirement account; or
- (III) a withdrawal from any qualified retirement plan as defined in the Internal Revenue Code; or

(c) is guilty of a second degree felony punishable by imprisonment for an indeterminate term of not less than three years or more than 15 years if:

- (i) at the time the crime was committed, the property, money, or thing unlawfully obtained or sought to be obtained was worth \$10,000 or more; and
- (ii) in connection with that violation, the violator knowingly accepted any money representing:
 - (A) equity in a person's home;
 - (B) a withdrawal from any individual retirement account; or
 - (C) a withdrawal from any qualified retirement plan as defined in the Internal Revenue Code.

(3) No person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

(4) In addition to any other penalty for a criminal violation of this chapter, the sentencing judge may impose any penalty or remedy provided for in Subsection 61-1-20(2)(b). 2001

61-1-21.1. Limitation of prosecutions.

(1) No indictment or information may be returned or civil complaint filed under this chapter more than five years after the alleged violation.

(2) As to causes of action arising from violations of this chapter, the limitation of prosecutions provided in this section supersedes the limitation of actions provided in Section 76-1-302 and Title 78, Chapter 12, Articles 1 and 2. 1992

61-1-21.5. Legal counsel — Prosecutions.

(1) The attorney general shall advise and represent the division and its staff in all civil matters, administrative or judicial, requiring legal counsel or services in the exercise or defense of the division's power or the performance of its duties.

(2) With the concurrence of the attorney general, the staff of the division may represent the division in hearings conducted during the course of adjudicative proceedings of the division.

(3) In the prosecution of all criminal actions under this chapter, the attorney general, county attorney, or district attorney of the appropriate jurisdiction, shall provide all legal services for the division and its staff. The division may refer such evidence as is available concerning violations of this chapter to the attorney general or the appropriate county attorney or district attorney for criminal prosecution. 1993

61-1-22. Sales and purchases in violation — Remedies — Limitation of actions.

- (1) (a) A person who offers or sells a security in violation of Subsection 61-1-3(1), Section 61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15, which requires the affirmative approval of sales literature before it is used, any condition imposed under Subsection 61-1-10(4) or 61-1-11(7), or offers, sells, or purchases a security in violation of Subsection 61-1-1(2) is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.

(b) Damages are the amount that would be recoverable upon a tender less the value of the security when the

INSTRUCTION NO. 27

In order for you to find the Defendant, THOMAS CHERRY, guilty of the crime "OFFER OR SALE OF UNREGISTERED SECURITIES", as alleged in Count Twelve of the Fourth Amended Criminal Information, you must find from the evidence all of the following elements of the crime:

1. From November 1992 through on or about March 1994, in the State of Utah, Cherry;
2. Willfully;
3. Offered or sold a security;
4. To a Person;
5. When the securities were not registered or exempt from registration with the Utah Division of Securities.

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant Cherry guilty as to Count Twelve of the Fourth Amended Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find Defendant Cherry not guilty of the crime charged in Count Twelve.

INSTRUCTION NO. 29

In order for you to find the defendant, THOMAS CHERRY, guilty of the crime "SALES BY AN UNLICENSED BROKER-DEALER OR AGENT", as alleged in Count Thirteen of the Fourth Amended Criminal Information, you must find from the evidence all of the following elements of the crime:

1. From November 1992 through on or about March 1994, Defendant Cherry;
2. Willfully;
3. Transacted business in the State of Utah as an agent by;
4. Offering or selling a security, directly or indirectly;
5. To a Person;
6. When Cherry was not licensed as an agent with the Utah Division of Securities.

If you believe that the evidence establishes each and every one of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant Cherry guilty as to Count Thirteen of the Fourth Amended Criminal Information. If you believe that the evidence has failed to establish one or more of the above elements beyond a reasonable doubt, it shall be your duty to find the Defendant Cherry not guilty of the crime charged in Count Thirteen.

INSTRUCTION NO. 40

The State of Utah must prove, that the defendants acted willfully in committing the elements set forth in Instruction Numbers 12 to 30. A defendant acts willfully if it was his conscious objective or desire to engage in the conduct or cause the result--not that it was the defendants' conscious desire or object to violate the law, nor that the defendants knew that they were committing fraud in the sale of the security.

INSTRUCTION NO. 41

The elements of the defense of reliance upon counsel are as follows:

- (a) that they fully disclosed all relevant facts to counsel; and
- (b) that they requested advice from counsel concerning the legality of a proposed action; and
- (c) that they received advice from counsel that the proposed action was legal; and
- (d) that they relied, in good faith, on that advice; and
- (e) the counsel which the defendant(s) claim they relied upon must be independent and unbiased.

INSTRUCTION NO. 42

Whether or not each defendant relied on the advice of counsel as defined in Instruction No. 41, is one factor among others which you may consider in determining the willfulness of each defendants' conduct. It is a means of demonstrating good faith and may be evidence as to whether each defendant acted willfully.