

2015

**The State of Utah, Plaintiff/Respondent, v. David M. Rushton,  
Defendant/Petitioner**

Utah Supreme Court

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THE STATE OF UTAH,

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Defendant/Petitioner.

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Petitioner is not incarcerated.

**BRIEF OF PETITIONER  
ON CERTIORARI REVIEW**

This writ of certiorari arises from a court of appeals decision affirming convictions for engaging in a pattern of unlawful activity, a second degree felony; attempted unlawful dealing with property by a fiduciary, a third degree felony; and one count of failure to pay wages, a class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Robin Reese presiding.

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UTAH APPELLATE COURTS

DEC 11 2015

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT.....	3
OPINION BELOW.....	3
STATEMENT OF ISSUE, STANDARD OF REVIEW, PRESERVATION .....	3
CONSTITUTIONAL PROVISIONS AND STATUTES .....	4
STATEMENT OF THE CASE .....	4
STATEMENT OF THE FACTS.....	6
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	19
1. The court of appeals was incorrect to “narrowly” interpret the term “single criminal episode” to allow the state’s subsequent prosecution of Mr. Rushton for offenses that arose from the same criminal episode as the offenses the state had prosecuted him for in a prior case that resulted in a guilty plea .....	19
A. <i>The Single Criminal Episode Statutes’ Bar on Multiple Prosecutions</i> .....	19
B. <i>Under the plain language of Utah Code § 76-1-401, construed in light of the single criminal episode statutes’ purpose in barring multiple prosecutions for offenses in a single criminal episode, Mr. Rushton’s conduct was incident to the accomplishment of a single criminal objective, and the statutes barred the state’s re-prosecution after his guilty plea</i> .....	21

C. <i>The state’s evidence demonstrates that Mr. Rushton’s conduct was all incident to the single criminal objective of misappropriation .....</i>	28
D. <i>The court of appeals erred in interpreting the single criminal episode statute to require “a narrow, rather than an expansive, view” of a single criminal episode in Mr. Rushton’s case, as it also decided “[a]n expansive interpretation of ‘single criminal episode’ is appropriate” in other appeals .....</i>	34
CONCLUSION .....	42
CERTIFICATE OF DELIVERY .....	43
CERTIFICATE OF COMPLIANCE .....	43

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Anderson v. Bell</i> , 2010 UT 47, 234 P.3d 1147 .....	26
<i>Arnold v. Grigsby</i> , 2009 UT 88, 225 P.3d 192.....	22
<i>Ashe v. Swenson</i> , 397 U.S. 436 (1970).....	27
<i>City of Spartanburg v. Parris</i> , 251 S.C. 187 (1968) .....	19
<i>Ciucci v. State of Ill.</i> , 356 U.S. 571 (1958) .....	27
<i>Commonwealth v. Hude</i> , 458 A.2d 177 (Pa. 1983).....	24, 25
<i>Hoag v. State of N.J.</i> , 356 U.S. 464 (1958) .....	27
<i>Hupp v. Johnson</i> , 606 P.2d 253 (Utah 1980) .....	38
<i>Irving Place v. 628 Park Ave.</i> , 2015 UT 91, --- P.3d --- .....	3
<i>Malan v. Lewis</i> , 693 P.2d 661 (Utah 1984).....	41
<i>Marion Energy, Inc. v. KFJ Ranch P'ship</i> , 2011 UT 50, 267 P.3d 863 .....	40
<i>Meza v. State</i> , 2015 UT 70, 359 P.3d 592 .....	21
<i>Provo City Corp. v. Willden</i> , 768 P.2d 455 (Utah 1989) .....	41
<i>State v. Alvarez</i> , 872 P.2d 450 (Utah 1994) .....	35
<i>State v. Bair</i> , 671 P.2d 203 (Utah 1983).....	38
<i>State v. Bauer</i> , 792 N.W.2d 825 (Minn.2011).....	15
<i>State v. Bradshaw</i> , 2006 UT 87, 152 P.3d 288.....	29
<i>State v. Brickey</i> , 714 P.2d 644 (Utah 1986) .....	28
<i>State v. Canton</i> , 2013 UT 44, 308 P.3d 517 .....	21, 22, 40
<i>State v. Cloutier</i> , 286 Or. 579, 596 P.2d 1278 (1979).....	25, 27
<i>State v. Cornish</i> , 571 P.2d 577 (Utah 1977).....	24, 38
<i>State v. Crosby</i> , 927 P.2d 638 (Utah 1996) .....	20

<i>State v. Eyre</i> , 2008 UT 16, 179 P.3d 792 .....	32
<i>State v. Gibson</i> , 37 Utah 330, 108 P. 349 (1910) .....	20, 32
<i>State v. Giron</i> , 943 P.2d 1114 (Utah Ct. App. 1997) .....	22
<i>State v. Harker</i> , 2010 UT 56, 240 P.3d 780 .....	39
<i>State v. Ireland</i> , 570 P.2d 1206 (Utah 1977) .....	24, 38
<i>State v. James</i> , 631 P.2d 854 (Utah 1981) .....	15, 34
<i>State v. Lopez</i> , 789 P.2d 39 (Utah Ct.App.1990) .....	15
<i>State v. Mane</i> , 783 P.2d 61 (Utah Ct.App.1989) .....	15, 34
<i>State v. Mead</i> , 2001 UT 58, 27 P.3d 1115 .....	15, 20, 23, 24, 31, 38
<i>State v. Morgan</i> , 2001 UT 87, 34 P.3d 767 .....	28
<i>State v. Porter</i> , 705 P.2d 1174 (Utah 1985) .....	24, 35
<i>State v. Rasabout</i> , 2013 UT App 71, 299 P.3d 625 .....	15, 27
<i>State v. Rasabout</i> , 2015 UT 72, 356 P.3d 1258 .....	21, 22, 39
<i>State v. Ririe</i> , 2015 UT 37, 345 P.3d 1261 .....	20, 38, 39
<i>State v. Rushton</i> . 2015 UT App 170, 354 P.3d 223 .....	passim
<i>State v. Schroyer</i> , 2002 UT 26, 44 P.3d 730 .....	40
<i>State v. Selzer</i> , 2013 UT App 3, 294 P.3d 617 .....	passim
<i>State v. Sery</i> , 758 P.2d 935 (Utah Ct.App. 1988) .....	6
<i>State v. Sommerville</i> , 2010 UT App 336 .....	12, 27
<i>State v. Sousa</i> , 903 So. 2d 923 (Fla. 2005) .....	35
<i>State v. Steed</i> , 2014 UT 16, 325 P.3d 87 .....	31
<i>State v. Strader</i> , 902 P.2d 638 (Utah Ct.App.1995) .....	passim
<i>State v. Valdez</i> , 748 P.2d 1050 (Utah 1987) .....	35
<i>State v. Wallace</i> , 2006 UT 86, 150 P.3d 540 .....	39

<i>United States v. Pharis</i> , 298 F.3d 228 (3d Cir.2002) .....	29
<i>West Valley City v. Parkinson</i> , 2014 UT App 140, 329 P.3d 833.....	15, 16, 23, 38
<i>Yates v. United States</i> , 135 S. Ct. 1074 (2015).....	22

### Statutes

Utah Code § 77-8a-1 .....	33
Utah Code § 23-19-9 .....	40
Utah Code § 34-28-12 .....	4
Utah Code § 76-10-1603 .....	4, 5
Utah Code § 76-10-1801 .....	4, 5
Utah Code § 76-1-401 .....	passim
Utah Code § 76-1-402 .....	passim
Utah Code § 76-1-403 .....	passim
Utah Code § 76-5-202 .....	35
Utah Code § 76-5b-203 .....	40
Utah Code § 76-6-409 .....	4
Utah Code § 76-6-513 .....	4
Utah Code § 76-8-1101 .....	5
Utah Code § 77-32-604 .....	40
Utah Code § 78A-3-102 .....	2
Utah Code § 78A-5-102 .....	40
Utah Code § 78A-6-103 .....	40



### **Other Authorities**

Black's Law Dictionary (10th ed. 2014) .....	1, 22, 23, 29
Webster's Unabridged Dictionary (Random House 2d ed. 2001).....	22, 23

### **Rules**

Utah R. Crim. Pro. 4 .....	33
Utah R. Crim. Pro. 9.5 .....	40

### **Constitutional Provisions**

Utah Const. art. I, § 24.....	42
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### **Index to Addenda**

Addendum A:	<i>State v. Rushton</i> , 2015 UT App 170, 354 P.3d 223.
Addendum B:	This Court's October 26, 2015 Order Granting Writ of Certiorari
Addendum C:	Trial court's findings of fact and conclusions of law on Mr. Rushton's Motion to Dismiss
Addendum D:	Constitutional Provisions and Statutes
Addendum E:	2011 Amended Information
Addendum F:	2009 Information
Addendum G:	Agent Scott Mann's Investigation Summary

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**INTRODUCTION**

This case presents the question of whether the court of appeals correctly interpreted the statutory definition of a “single criminal episode” to allow this prosecution of Mr. Rushton after his prior guilty plea to offenses that were all incident to a single criminal episode. Utah Code § 76-1-401.

First, under the facts and circumstances of this case, “all conduct” of Mr. Rushton was “incident to . . . a single criminal objective.” Utah Code § 76-1-401. His single criminal objective was the misappropriation of the money he controlled through Fooptube, the company he owned and managed. *See* MISAPPROPRIATION, Black’s Law Dictionary (10th ed. 2014) (“misappropriation” is “[t]he application of another’s property or money dishonestly to one’s own use”). Where all the statutory terms were met, the single criminal episode statute barred the state from subjecting Mr. Rushton to the 2011 prosecution after his guilty plea in the 2009 prosecution.

Second, the court of appeals incorrectly interpreted Utah Code § 76-1-401 to reject Mr. Rushton's appeal. Rather than apply that statute's plain language to the facts of this case, the court employed "a narrow interpretation" of a "single criminal episode" 2015 UT App 170, ¶¶ 10-13, 20-22. The statute contains no such requirement; but the court nonetheless engaged in its "narrow interpretation" in Mr. Rushton's case because he was contesting multiple prosecutions, even though it would take "[a]n expansive view of single criminal episode" in appeals from the state's joinder or severance of charges. *Id.* ¶¶ 13-15. This approach is inconsistent with principles of statutory interpretation, and it contravenes the plain language and purpose of the single criminal episode statutes. Mr. Rushton's case is however, only the most recent one in which the court has employed this incorrect approach to the single criminal episode statutes.

The court of appeals was incorrect to allow this prosecution of Mr. Rushton, and incorrect to interpret Utah Code § 76-1-401 as it did. This Court should reject the court of appeals' narrow/expansive approach to the single criminal episode statute, reverse the court of appeals' *Rushton* decision, and dismiss this prosecution.

## JURISDICTIONAL STATEMENT

The court of appeals issued *State v. Rushton*, 2015 UT App 170, 354 P.3d 223 on July 09, 2015. Addendum A. This Court granted certiorari on October 26, 2015. Addendum B. This Court has jurisdiction under Utah Code § 78A-3-102 (5).

## OPINION BELOW

*State v. Rushton*, 2015 UT App 170, 354 P.3d 223, is attached as Addendum A.

## STATEMENT OF ISSUE, STANDARD OF REVIEW, PRESERVATION.

*Issue:* This Court granted certiorari to review the following issue:

“Whether the court of appeals erred in affirming the district court’s conclusion that the crimes for which Petitioner was prosecuted in this case did not arise from the same “single criminal episode” as the crimes prosecuted in a prior case that resulted in a guilty plea.” *See* Addendum B.

*Standard of Review:* On certiorari, this Court reviews “the ultimate decision of the court of appeals,” which “merits no deference in [the] analysis.” *State v. Strieff*, 2015 UT 2, ¶ 12 (citation omitted), *certiorari granted*, October 1, 2015. When a case “presents legal questions of statutory interpretation,” this court “consider[s] such issues de novo, affording no deference to the district court’s legal conclusions.” *Irving Place v. 628 Park Ave.*, 2015 UT 91, ¶ 11, --- P.3d ---. It is unclear what standard of review the court of appeals applied in *Rushton*, but the result of its holding was a misinterpretation of the single criminal episode statute, which this Court reviews for correctness.

*Preservation:* Petitioner preserved this issue in the trial court. *See* R.35-204 (motion to dismiss the 2011 prosecution, state’s opposition, & reply); *see also* R.391

(transcript of the court's motion hearing); and R.318-23 (trial court's findings of fact and conclusions of law). The findings and conclusions are in Addendum C.

### CONSTITUTIONAL PROVISIONS AND STATUTES

The following are provided in Addendum D:

- |                      |   |
|----------------------|---|
| Utah Code § 76-1-401 | "Single Criminal Episode" defined--Joinder of offenses and defendants.                          |
| Utah Code § 76-1-402 | Separate offenses arising out of single criminal episode--Included offenses.                    |
| Utah Code § 76-1-403 | Former prosecution barring subsequent prosecution for offense out of same episode. <sup>1</sup> |

### STATEMENT OF THE CASE

On April 20, 2011, the state charged David Rushton in Salt Lake District Court case 111903023 (the 2011 prosecution), with: two counts of communications fraud (second degree felonies under Utah Code § 76-10-1801); two counts of unlawful dealing of property by a fiduciary (second degree felonies under Utah Code § 76-6-513); two counts of theft of services (second degree felonies under Utah Code § 76-6-409); and one count of engaging in a pattern of unlawful activity (a second degree felony under Utah Code § 76-10-1603). R.1-6. The state amended its charges, adding twelve failure to pay wages counts, all class A misdemeanors under Utah Code § 34-28-12, in the alternative to the theft of services charges. R.24-32 (Addendum E). These charges stemmed from Mr. Rushton's conduct while he owned and managed Footube, L.L.C., the computer programming and design company he began with his wife in 2005. R.5,82.

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<sup>1</sup> The 2013 amendment to Utah Code § 76-1-403 has no bearing on this appeal.

Previously, on June 24, 2010, Mr. Rushton pleaded guilty to other charges that the state brought in Salt Lake District Court case 091903070 (the 2009 prosecution).<sup>2</sup> Those charges were for: one count of failing to file Foptube's quarterly corporate tax returns for the 2007-2008 tax year (a third degree felony under Utah Code § 76-8-1101(1)(c)); one count of intent to evade paying Foptube's withholding tax obligations for the 2007-2008 tax year (a second degree felony under Utah Code § 76-8-1101(1)(d)); one count of unlawful dealing with property by a fiduciary for failing to remit withholding taxes for Foptube's employees for the 2007-2008 tax year (a second degree felony under Utah Code § 76-6-513); one count of communications fraud for faking Foptube's W-2 forms and withholding-tax statements to employees in 2008 (a second degree felony under Utah Code § 76-10-1801); one count of failing to render proper tax returns (personal) for 2006 through 2008 (a third degree felony under Utah Code § 76-8-1101(1)(c)); and one count of engaging in a pattern of unlawful activity from March 2007 through June 2008, (a second degree felony under Utah Code § 76-10-1603). R.78-84 (Addendum F).

Mr. Rushton was arraigned on December 14, 2009. R.92. He pleaded guilty to two counts: one of failing to render a tax return and one of engaging in a pattern of unlawful activity. R.80,167. He was sentenced December 13, 2010. R.99.

Mr. Rushton moved to dismiss the 2011 prosecution, arguing the single criminal episode statutes barred the state from subjecting him to multiple prosecutions for charges arising from a single criminal episode. R.35-135. The trial court denied Mr. Rushton's

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<sup>2</sup> The state also charged Ms. Rushton with the same offenses, but those charges were dropped through Mr. Rushton's plea deal in the 2009 prosecution. R.167-77.

motion. R.321. Mr. Rushton entered a conditional guilty plea in the 2011 prosecution. R.223;225-35; *see also State v. Sery*, 758 P.2d 935, 938-40 (Utah Ct.App. 1988). Mr. Rushton was sentenced October 12, 2012, and he timely appealed. R.304-06,334-35.

The court of appeals affirmed the trial court's denial of the motion to dismiss. *See Rushton*, 2015 UT App 170. This Court granted Mr. Rushton's petition for certiorari.

## STATEMENT OF THE FACTS

### Background

In 2005, David Rushton and his wife began Fooptube, L.L.C., which like their prior company SensorySweep, was a computer programming and design company. R.5,58-59,82,117,122,227.

In 2008, the state began to investigate Fooptube, through the Utah State Tax Commission's Criminal Investigation Unit and Special Agent Scott Mann. R.54-61 (Addendum G). Agent Mann learned in this investigation that Mr. Rushton made all the decisions at Fooptube, including "decisions of who was to be paid and who was not to be paid," and "the decision to delay or not to pay the [retirement] contributions." R.59,117. That investigation began after the Utah State Tax Commission's unsuccessful attempts to resolve the non-payment of Fooptube's withholding taxes. R.58. Mann's investigation soon revealed that Mr. Rushton had withheld those taxes from the paychecks of Fooptube employees, but failed to remit them to the state, and failed to file related taxes with the Commission. R.82. Eventually, these employees were credited for unpaid withholding-taxes. R.83. Agent Mann also learned that Mr. Rushton failed to remit Fooptube's corporate taxes and his personal returns. R.58-59,81-84,168,58.

Agent Mann also learned what Mr. Rushton had done with these improperly withheld monies, that he “used and continued to use the improperly/fraudulently retained/converted funds to further [the] business enterprise as well as for [ ]personal use,” and that he “had control over the aforementioned-business organization and the funds generated from such organization have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.” R.83.

“During this [2008] investigation,” Agent Mann also “became aware of a criminal investigation being conducted by the Department of Labor’s Employee Benefits Security Administration (EBSA),” involving “allegations that Ffootube had failed to remit employee’s contributions to a traditional 401K and Roth 401K pension plan being operated by Ffootube LLC.” R.58. Mr. Rushton administrated Ffootube’s employee retirement fund, and “[t]he EBSA investigation revealed that Rushton had failed to remit contributions to the [Ffootube] plan for a period of February 2007 through October 2008,” in the amount of “\$107,000 in funds to the pension plan as required by the plan’s policy.” R.58-59. Mann also learned that Mr. Rushton “knew that he was supposed to deposit the funds immediately into the plan’s account,” and he knew “he was responsible for the decision to delay or not to pay the contributions.” R.59.<sup>3</sup>

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<sup>3</sup> The United States Department of Labor also charged Mr. Rushton on November 15, 2010, with failing to remit payments to Ffootube’s 401(k) Profit Sharing plan. *See Solis v. David Rushton, Ffootube, LLC, and the Ffootube, LLC 401(k) Profit Sharing Plan*, Case 2:10-cv-01128-TC. The Department obtained a default judgment for \$107,310.91 plus back interest of \$7,497.22, and post-judgment interest in that case on April 26, 2011, which was only six days after the state filed its 2011 prosecution. This case was available to the state in the public record.



The EBSA case was resolved via a consent injunction entered on January 29, 2009, and then with an Amended Consent Injunction filed February 18, 2009. R.56,70-76. That amended injunction showed that the EBSA investigation involved wage claims against Mr. Rushton and Fooptube as well. R.70-76. That injunction required Mr. Rushton to pay back-wages of \$942,429.09 by August 10, 2009. R.72. And it required him to continue paying Fooptube employees a minimum wage for the hours they worked, and to account in detail for Fooptube's earned income. R.71,72. The injunction also enjoined Fooptube from selling commerce (video games, etc.), except under certain conditions, until it "paid back all the back wages due to employees and are paying current employees." R.72. Notably, the unpaid wages involved in that federal case included wages from October 2008 through January 2009. R.73.

Agent Mann also learned of wage claims by Fooptube employees when, during his investigation, "the Utah Labor Commission [] contacted [Agent Mann] and advised that the subjects had committed theft of services from approximately 84 individuals who had worked for the company [Fooptube] between October 2008 and October 2009," specifically the "pay periods from October 1, 2008 through December 31 of 2009." R.58. Mann also said Fooptube's management team had "admitted many times" to him that "the company had issued payroll checks that they knew could not be covered by the funds in the bank accounts." R.59. And that even as Fooptube missed "payroll for current employees" it "continued to hire additional employees and operated through the year of 2009." R.58. As reflected by default orders from the Utah Labor Commission, filed in November 2009, Fooptube and Mr. Rushton, Fooptube's employees began filing wage

claims in early 2009. *See* R.65-67. Agent Mann knew of Mr. Rushton's tax, wage, and retirement misappropriations before the state filed the 2009 prosecution. R.58.

These offenses were interrelated, as Ffootube's employees said Mr. Rushton had stopped remitting their retirement money held in trust so that he could continue to pay their wages. *See* R.243 (Former Ffootube employee stating at sentencing, that in the summer of 2008 employees they learned their "401K contributions had not been going into our individual plans . . . apparently as Dave [Rushton] tried to continue paying people wages with it instead"). Their paychecks began to bounce in June or July of 2008 (R.252); and that their the paychecks were late throughout 2008. R.246. Eventually, "95 employees reported wages of \$1,170,164.07 that had not been paid." R.58-59.

*The State's 2009 Prosecution of Mr. Rushton*

On April 14, 2009, the state via Mark Baer, an assistant Utah Attorney General, filed charges against Mr. Rushton for tax offenses. R.78-84. The state alleged that Mr. Rushton misappropriated the withholdings collected from Ffootube employees through their paychecks, by failing to remit either the withholdings or the related tax returns to the State of Utah in 2007 and 2008. R.78-79. They also charged communications fraud for devising a scheme to defraud Ffootube employees by issuing fraudulent W-2 forms and withholding-tax statements to file their income taxes. R.79. He was also charged with failing to file personal tax returns for the 2005-2007 tax years, and for engaging in a pattern of unlawful activity. R.80.

Agent Mann set forth and signed the probable cause statement accompanying the state's 2009 Information. R.84. He alleged that Mr. Rushton "ran the company," and

“asserted control over [Footube] and the funds generated from [Footube] have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.” R.8. Mann also said Mr. Rushton “used and continued to use the improperly/fraudulently retained/converted funds to further the[] business enterprise as well as for [] personal use. R.83.

Less than a month after the 2009 charges were filed, at a May 5, 2009 review hearing, the prosecutor (Mark Baer) was approached by several Footube employees. R.140. They informed Mr. Baer of their wage claims against Footube and Mr. Rushton, which they had filed earlier in 2009. R.140. They followed him to his office where they met with “Mr. Scott Mann along with Mr. Baer.” R.141. The state never amended its 2009 information, and Mr. Rushton was arraigned on December 14, 2009. R.92.

On June 24, 2010, Mr. Rushton pleaded guilty in the 2009 prosecution to two counts pursuant to a plea agreement in which he also agreed to pay “restitution on all counts originally charged in this criminal case,” among other conditions R.167-77. He was sentenced on December 13, 2010, to consecutive sentences of both one-to-fifteen years, and zero-to-five years, to 200 hours of community service, six years of probation, 180 days in jail, he was ordered to pay full restitution of \$1,005,245.00, plus interest, and Mr. Rushton was committed to the jail that day. R.99-100.

*The State's 2011 Prosecution of Mr. Rushton*

Only four months after Mr. Rushton's sentencing, the state filed this case on April 20, 2011. R.1-6. The 2011 charges alleged that Mr. Rushton:

- Committed two counts of communications fraud in 2008 and 2009, by "devis[ing] a scheme or artifice to obtain or defraud money from the defendants' employee compensation and/or retirement arrangements via false pretenses, representations, promises or omissions and did communicate such false promises or false or fraudulent pretenses with said employees;" and that he
- Committed two counts of unlawful dealing of property by a fiduciary, in 2008 and 2009, when "as a fiduciary for his company[he] did obtain and deal with employee wages and/or retirement funds in excess of \$5,000.00 which had been entrusted to him and did fail to remit the same;" and
- Committed two counts of theft of services, when "as the owner/manager/operator of Ffootube, LLC," he failed to pay 95 or more of Ffootube's employees, in 2008 and 2009; and
- Committed twelve failure to pay wages counts from October 2008 through October 2009, (in the alternative to the theft of services charges); and
- Engaged in in a pattern of unlawful activity with the first three charges predicate offenses.

R.24-29.

Agent Mann set forth and signed the probable cause statement accompanying the 2011 Information. R.29-32. He reviewed records from the Utah State Tax Commission and other state agencies. R.30-31. Consistent with what Ffootube employees and the Utah Labor Commission had already told him, he noted that "Utah Labor Commission records . . . reflect that Ffootube employees have made wage claims against the company . . . exceeding \$1,170,164.00. R.31. Mann said Mr. Rushton also "failed to remit funds collected from employees for the purpose of depositing them into retirement funds (a

401K and/or Roth 401K pension fund accounts),” while “he knew he should have remitted those funds.” R.32. These “activities,” Mann said, were “a regular part/pattern of his business operation,” and Mr. Rushton “did improperly keep and/or use such funds as part of the funds within and sustaining his business, Fooptube, LLC.” R.6.

As in the 2009 prosecution, Mann said Mr. Rushton “used and continued to use the improperly/fraudulently retained/converted funds, both funds that were due and owing as wages and/or funds that were part of the employees retirement funds, to further his business enterprise and/or for personal use.” R.32. And that Mr. Rushton “asserted control over the aforementioned business organization and the funds generated from such organization have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.” R.32; *see also* R.6 (same).

*The Motion to Dismiss the 2011 Prosecution Under the Single Criminal Episode Statutes*

Mr. Rushton moved to dismiss the 2011 prosecution under the single criminal episode statutes bar against multiple prosecutions. R.35-135. The state, via Mark Baer, objected and filed a personal affidavit. R.143-66. Relying on *State v. Sommerville* for the statutory elements, the state conceded both that Mr. Rushton’s first prosecution resulted in a conviction, and that the cases were under one court’s jurisdiction. R.151-52 (citing 2010 UT App 336)); *see also* Utah Code §§ 76-1-403 (1)(b)(ii) and 76-1-402(2)(a)). The state argued that Mr. Rushton’s motion should be denied because “the prosecuting attorney was not made aware of the presently charged offenses until May 5, 2009, which was after arraignment in the initial case.” R.152; *but see* R.92 (Mr. Rushton was arraigned on December 14, 2009 in the 2009 prosecution). The state also claimed the

underlying offenses were not incident to a single criminal objective where they affect “multiple and differing victims.” R.152.<sup>4</sup>

The trial court heard argument on the motion. R.391. Then it issued written findings and conclusions. R.318-23. The trial court correctly agreed with the state’s two concessions, and also correctly found that the state knew of the 2011 offenses before Mr. Rushton was arraigned in the 2009 prosecution. R.321. Further, it was correct to find that Mr. Rushton’s conduct underlying the prosecutions “was closely related in time,” under Utah Code § 76-1-401. R.321. That court denied Mr. Rushton’s motion, however, on the basis of its incorrect determination that “[t]he offenses underlying each case were not incident to the accomplishment of a single criminal objective as defined by the Statute and related case law because the offense in each case involved different victims” and therefore “defendant has failed to satisfy” the single criminal episode statute. R.321.

Mr. Rushton entered a conditional guilty plea to one count of attempted unlawful dealing with property of a fiduciary, one payment of wages violation, and one count of pattern of unlawful activity. R.223,225-34. In pleading, he also again agreed to pay “restitution on all years originally charged in this criminal case,” and to do 300 more hours of community service. R.231. At sentencing, the trial court noted Mr. Rushton’s “criminal activity” in this and the 2009 prosecution was “related.” R.358. The court said sentencing was “never an easy task,” but it was even harder in Mr. Rushton’s case as

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<sup>4</sup> In post-conviction proceedings, the prosecutor recently asked the trial court to combine the 2009 and 2011 proceeding, claiming the “two cases are interrelated, both historically and factually, and it would be in the interest of justice and efficiency that [these] cases be combined.” *See* Docket, Salt Lake District Court case 111903023.

“there’s an argument, at least, that even though the law was violated . . . the violation wasn’t done maliciously necessarily, but done with the hope that somehow someday, money may miraculously appear and rescue the company and allow the employees to be paid back what they were” owed. R.324:22. Mr. Rushton was sentenced to concurrent prison terms of zero-to-five years, suspended, with six years of probation and 365 days in jail, and ordered him to pay \$1,214,614.00 plus interest in restitution. R.304-05.<sup>5</sup>

*The Court of Appeals’ Opinion*

On appeal, the court of appeals correctly recognized “the only issue before us in assessing whether the tax case and the wage case arose from a single criminal episode is whether the conduct underlying those charges was ‘incident to an attempt or an accomplishment of a single criminal objective.’” *Rushton*, 2015 UT App 170, ¶ 16 (quoting Utah Code § 76-1-401)). The court of appeals addressed this issue by “employing a narrow interpretation of single criminal episode” in Mr. Rushton’s appeal, even as it determined it would “us[e] a more expansive interpretation in” appeals involving the joinder of multiple charges in a single criminal episode. *Id.* ¶¶ 13-15, 20-23.

To support this narrow/expansive approach to the term “single criminal episode,” the court categorized cases involving the term “single criminal episode.” *Id.* ¶¶ 10-12. The first category included cases involving double jeopardy and the question of whether “a defendant’s conduct could be charged as more than one offense or [ ]only a single offense.” *Id.* (citations omitted). Those cases included *State v. James*, 631 P.2d 854 (Utah

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<sup>5</sup> Mr. Rushton continues to pay \$510 per month in restitution. See Docket, Salt Lake District Court case 091903070.

1981); *State v. Rasabout*, 2013 UT App 71, 299 P.3d 625; *State v. Mane*, 783 P.2d 61 (Utah Ct.App.1989); and *State v. Bauer*, 792 N.W.2d 825 (Minn.2011). *Id.*

The second category comprised only the Utah Court of Appeals' cases where, as in Mr. Rushton's appeal, a defendant claimed that offenses arising from a single criminal episode "must be tried together." *Id.* (citing *West Valley City v. Parkinson*, 2014 UT App 140, 329 P.3d 833; *State v. Selzer*, 2013 UT App 3, 294 P.3d 617; *State v. Strader*, 902 P.2d 638 (Utah Ct.App.1995)). Then, the court's third category included cases where a defendant argued offenses were *not* in a single criminal episode and must "be tried separately." *Id.* (citing *State v. Mead*, 2001 UT 58, 27 P.3d 1115; *State v. Lopez*, 789 P.2d 39 (Utah Ct.App.1990)).<sup>6</sup>

In assigning these categories, the court noted that either a "narrow interpretation" or an "expansive interpretation" of a "single criminal episode." *Rushton*, 2015 UT App 170, ¶¶ 9-12. In its first category of double jeopardy cases, the court of appeals determined "the courts have taken 'a *very narrow perspective*, focusing on whether a subsequent prosecution is for the same offense' as the first prosecution." *Id.* ¶ 10 (emphasis added) (citing *Strader*, 902 P.2d at 642).<sup>7</sup> Then, in its second category, the court concluded the issue of "whether separate offenses arising from a single criminal

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<sup>6</sup> The court of appeals acknowledged "no prior case appears to have explicitly categorized the existing case law as we have done here," but it decided, "Utah appellate courts have long utilized these categories in analyzing the questions that arise under the single criminal episode statutes." *Rushton*, 2015 UT App 170, ¶ 15. That was not accurate as the "courts" it referenced for having "long utilized these categories" were its own cases of *Parkinson*, *Selzer*, and *Strader*. *Id.*

<sup>7</sup> *Strader* was not a double jeopardy case, but it originated the court of appeals' narrow/expansive approach to the term "single criminal episode." 902 P.2d at 642.



episode must be prosecuted together” is “comparable to asserting double jeopardy,” making it “‘appropriate to take a narrow, rather than an expansive, view of what [a single criminal episode] entails.’ ” *Id.* ¶ 11 (quoting *Strader*, 902 P.2d at 642; and *Selzer*, 2013 UT App 3, ¶ 26). But in the third category—“where appellate courts are concerned with whether the mandatory joinder of multiple charges in a single prosecution deprives one or both parties of a fair trial”—the court decided, “[a]n expansive interpretation of ‘single criminal episode’ is appropriate.” *Id.* ¶ 12 (citing *Strader*, 902 P.2d at 641). The court of appeals offered an unclear explanation for its narrow/expansive distinction. *See id.* ¶¶ 13-14.

The court cabined Mr. Rushton’s appeal in the second category, determining “[c]ases in the second category are most useful because they are directly on point.” *Id.* ¶ 15. It used a “narrow interpretation of single criminal episode” in Mr. Rushton’s case, concluding “that as in *Parkinson* and *Strader*, Rushton’s actions in the wage case and the tax case were not incident to the accomplishment of a single criminal objective.” *Id.* ¶ 20 (citing *Parkinson*, 2014 UT App 140; and *Strader*, 902 P.2d 638). Under this narrow approach the court affirmed the district court’s finding. *Id.* ¶ 20. Even though it acknowledged Mr. Rushton’s “criminal objective in each case was to steal money to which he was not entitled,” the court of appeals concluded “[t]he narrow label of single criminal objective is not meant to encompass such a broad criminal goal because if it did, then almost any series of crimes committed for the purpose of illegally obtaining money, say to feed a drug habit, could be described as ‘single.’ ” *Id.* ¶ 21.

The court of appeals concluded, “[i]n short, Rushton has not shown that the district court erred in deciding as it did,” and “although ‘other possible interpretations of [the defendant’s] actions may be possible, the district court could certainly have accepted the State’s argument and determined that the [offenses] did not share a single criminal objective.’” *Id.* ¶ 24 (quoting *Selzer*, 2013 UT App 3, ¶ 27. The court of appeals “affirm[ed] the district court’s determination that Rushton’s actions in the wage case were not incident to or in furtherance of his purpose in the tax case because the two sets of charges did not share a single criminal objective.” *Id.* ¶ 25. This court granted certiorari.

### SUMMARY OF ARGUMENT

In violation of Utah’s single criminal episode statutes (Utah Code §§ 76-1-401 through -403), the court of appeals allowed the state to subject Mr. Rushton to a subsequent prosecution after he had pleaded guilty in a different prosecution to offenses that all arose from the same criminal episode. A plain language interpretation of Utah Code § 76-1-401 reveals that Mr. Rushton’s conduct was all “incident to . . . the accomplishment of a single criminal objective” to misappropriate money in the context of Fooptube. Fooptube was where Mr. Rushton owned, managed, and controlled every decision. His continuing decisions not to pay money that Fooptube owed, and to use it elsewhere, were the basis of the state’s charges in 2009 and 2011. Where Mr. Rushton’s conduct underlying the offenses in both prosecutions was “incident to . . . an accomplishment of a single criminal objective,” the single criminal episode statute barred the state’s subsequent prosecution of him. Utah Code § 76-1-401.

The court of appeals was incorrect to reject his claim by interpreting the single criminal episode “employing a narrow interpretation of single criminal episode.” *Rushton*, 2015 UT App 170, ¶ 13. The court took a “narrow” interpretation of in Mr. Rushton’s case because he was contesting multiple prosecutions, even as it determined it would take “[a]n expansive view of single criminal episode” in appeals contesting the state’s joinder or severance of charges. *Id.* ¶¶ 13-15. That interpretation is incorrect as the plain language and ordinary meaning of Utah Code § 76-1-401 is not concerned with a narrow or expansive approach. Rather that language directs the focus to the defendant’s conduct that is “closely related in time,” to determine if it is also “incident to . . . an accomplishment of a single criminal objective.” Utah Code § 76-1-401. The court of appeals was incorrect to narrowly interpret those terms, particularly where Utah’s statutory bar on multiple prosecutions for offenses in a single criminal episode, is intended to both expand double jeopardy and protect defendants from the unfairness of multiple prosecutions.

Under the facts of this case, the plain language and purpose of the single criminal episode statutes barred the state’s subsequent prosecution of Mr. Rushton after his guilty plea. This Court should dismiss this prosecution of Mr. Rushton.

## **ARGUMENT**

1. **The court of appeals was incorrect to “narrowly” interpret the term “single criminal episode” to allow the state’s subsequent prosecution of Mr. Rushton for offenses that arose from the same criminal episode as the offenses the state had prosecuted him for in a prior case that resulted in a guilty plea.**

Due process is violated when a party is denied fundamental fairness. *Cf. City of Spartanburg v. Parris*, 251 S.C. 187, 191 (1968). Utah’s single criminal episode statutes are meant to ensure this idea of fundamental fairness. *See* Utah Code §§ 76-1-401, -402, and -403. The state unfairly subjected Mr. Rushton to separate prosecutions for offenses that were all part of a single criminal episode. The court of appeals was incorrect to “narrowly” interpret the term “single criminal episode” to allow the state’s subsequent prosecution of Mr. Rushton. *Rushton*, 2015 UT App 170.

***A. The Single Criminal Episode Statutes’ Bar on Multiple Prosecutions.***

Three statutory provisions that set forth the terms under which “a defendant shall not be subject to separate trials for multiple offenses . . . arising out of a single criminal episode.” Utah Code §§ 76-1-402(1)(2). The terms that must exist are:

1. “The offenses are within the jurisdiction of a single court,” (Utah Code § 76-1-402(2)(a));
2. “The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment,” (Utah Code § 76-1-402(2)(b));
3. “[T]he former prosecution . . . resulted in conviction,” (Utah Code §§ 76-1-403(1), (1)(a),(1)(b)(ii)), which includes “a plea of guilty accepted by the court” (Utah Code § 76-1-403(3)); and
4. The offenses are part of a “single criminal episode,” which includes:
  - a. “all conduct which is closely related in time,” and

- b. “incident to an attempt or an accomplishment of a single criminal objective” (Utah Code § 76-1-401).

As this Court has noted, the statutes “impose a one-bite-at-the-apple rule for multiple offenses arising out of a single criminal episode.” *State v. Ririe*, 2015 UT 37, ¶ 8, 345 P.3d 1261. When these terms are present, the statute is unequivocal, “a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred.” Utah Code § 76-1-403(1).

These statutory terms all existed in Mr. Rushton’s case. The trial court and court of appeals were correct to find that both the prosecutions were under the same court’s jurisdiction, the 2009 prosecution resulted in conviction, the state knew of all the offenses before Mr. Rushton was arraigned on the 2009 information, and the conduct was closely related in time. R.320-21. *See generally Rushton*, 2015 UT App 170.<sup>8</sup> Both courts were incorrect to deny Mr. Rushton’s motion to dismiss this prosecution based on the

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<sup>8</sup> Mr. Rushton’s conduct was “closely related in time.” Utah Code § 76-1-401. The trial court correctly found that it was (R.321), which the court of appeals was correct to affirm. *Rushton*, 2015 UT App 170, ¶ 8 n.5 (“[t]he State also argues that the charges were not closely related in time” but “does not directly challenge the district court’s finding that they were”). Our courts have interpreted “closely related in time” to require “temporal proximity.” *Selzer*, 2013 UT App 3, ¶ 25. Moreover, where an “overarching scheme” manifests “a single, clear, criminal objective, the timing between the two incidents is not as crucial.” *Mead*, 2001 UT 58, ¶ 56, n.10.

Mr. Rushton’s conduct was an “overarching scheme” of continuous conduct from 2006 through 2009. Mr. Rushton’s offenses also necessarily require time to occur, as taxes are (un)paid annually, and wages and retirement contributions are paid on monthly schedules. *See State v. Gibson*, 37 Utah 330, 108 P. 349, 350 (1910) (continuous embezzlements over a period of time may constitute one continuous transaction); *see also State v. Crosby*, 927 P.2d 638, 645 (Utah 1996) (“[A]lthough the transactions underlying Crosby’s theft convictions occurred over a period of time, they were part of a single plan and should have been charged as a single offense”). The state also regularly prosecutes business offenses committed over years in a single criminal episode, with a single prosecution. *See* n.11, *infra*.

determination that his conduct was not “incident to an attempt or an accomplishment of a single criminal objective.” Utah Code § 76-1-401.

***B. Under the plain language of Utah Code § 76-1-401, construed in light of the single criminal episode statutes’ purpose in barring multiple prosecutions for offenses in a single criminal episode, Mr. Rushton’s conduct was incident to the accomplishment of a single criminal objective, and the statutes barred the state’s re-prosecution after his guilty plea.***

When faced with a question of statutory interpretation, a court’s “primary goal is to effectuate the intent of the Legislature,” and “[t]he best evidence of the Legislature’s intent is the statute’s plain language.” *Meza v. State*, 2015 UT 70, ¶ 10, 359 P.3d 592 (quotation omitted)). Where Utah Code § 76-1-401 readily yields itself to a plain language interpretation, this Court “begin[s] with the plain language of the provision at issue in [a] broader effort to ascertain the intent of the Legislature disclosed by the language of the act as a whole, the act’s operation, and its purpose.” *State v. Rasabout*, 2015 UT 72, ¶ 10, 356 P.3d 1258. Under the plain language of Utah Code § 76-1-401, as influenced by the statutory purpose in barring multiple prosecutions, the facts of this case make patent that Mr. Rushton’s conduct was “incident to an attempt or an accomplishment of a single criminal objective.” Utah Code § 76-1-401.

That interpretation of the statute is confirmed by the ordinary meaning of those terms. *See State v. Canton*, 2013 UT 44, ¶ 13, 308 P.3d 517 (to determine “the ordinary meaning of nontechnical terms of a statute,” this Court’s “starting point is the dictionary” (quotation omitted)); *Rasabout*, 2015 UT 72, ¶ 12 (same). In this case a dictionary

dictates “the meaning that the statutory terms must bear in this context.” *Canton*, 2013 UT 44, ¶ 14 (quotation omitted).<sup>9</sup>

### The Plain Language

Under Utah law, a “single criminal episode” includes “all conduct,” or all “[p]ersonal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person’s deeds.” CONDUCT, Black’s Law Dictionary (10th ed. 2014). Including “all conduct” indicates an intent to consider a range of behavior, actions, and inactions. The only limitations on that conduct are specified by the statute, which requires that it be both “closely related in time and incident to an attempt or an accomplishment of a single criminal objective.” 76-1-401.

That phrase “incident to” means something is “[d]ependent upon, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance).” Webster’s Unabridged Dictionary, 830 (Random House 2d ed. 2001). Our courts understand this term in the context of the Fourth Amendment, which is a consistent with the single criminal episode statute’s understanding of “incident to.” *See, e.g., State v. Giron*, 943 P.2d 1114, 1118 (Utah Ct. App. 1997) (noting the terms “incident to arrest”

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<sup>9</sup> The language of Utah Code § 76-1-401 is clear and “cannot reasonably be understood to have more than one meaning,” therefore, “it is not ambiguous.” *Arnold v. Grigsby*, 2009 UT 88, ¶ 19, 225 P.3d 192. The state has never argued this language was ambiguous; and in *Rushton*, the court of appeals neither addressed its plain language nor suggested it was ambiguous. If this Court’s “recourse to traditional tools of statutory construction leaves any doubt about the meaning of” those terms, it should “invoke the rule that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (citations omitted); *Rasabout*, 2015 UT 72, ¶ 22 (same). Lenity comports with the purpose of Utah’s statutory bar against multiple prosecutions for offenses in a single criminal episode.

mean “in other words, the search must be conducted pursuant to a lawful arrest and cannot be remote in time or place from the arrest.” (quotations omitted)). An “accomplishment” is “[a]n act or instance of carrying into effect; fulfillment.” Webster’s Unabridged Dictionary, 12 (Random House 2d ed. 2001). Thus the statute requires that the defendant’s conduct be connected to the defendant’s “single criminal objective.”

To be “single” is to “[c]onsist of one alone,” or be “individual.” SINGLE, Black’s Law Dictionary (10th ed. 2014). An “objective” is “something that one’s efforts or actions are intended to attain or accomplish; purpose; goal; target.” *Id.* at 1360. That objective must of course be criminal, or single objective “[o]f, relating to, or involving a crime; in the nature of a crime.” CRIMINAL, Black’s Law Dictionary (10th ed. 2014).

Thus and under the plain language and ordinary meaning of the terms of Utah Code § 76-1-401, the test for a single criminal objective requires focusing on the defendant’s conduct, to ascertain whether it is both connected in time, and connected by a single criminal purpose, goal, or target, that the defendant’s conduct is intended to attain or accomplish. *See Parkinson*, 2014 UT App 140, ¶ 7 (correctly noting the statute “focuses more on a defendant’s actions, that is, whether the two sets of charges arose out of actions that were ‘incident to an attempt or an accomplishment of a single criminal objective.’” (quoting Utah Code § 76-1-401)). This interpretation of Utah Code § 76-1-401 is supported by our cases that have correctly interpreted that statute.

In *Mead*, for example, this Court looked to the defendant’s conduct to see his “single criminal objective” and determined, “[t]here can be no doubt that the solicitation and murder charges share an identical criminal objective: the death of” the victim. 2001



UT 58, ¶ 56. In looking to the defendant's conduct this Court noted that even though his actions occurred over time, they were only "separate manifestations of [a] single, ongoing criminal objective" and was all part of his "overarching scheme to rid himself of his wife." *Id.*; see also *Commonwealth v. Hude*, 458 A.2d 177, 181 (Pa. 1983) (noting, "[g]enerally, charges against a defendant are clearly related in time and require little analysis to determine that a single criminal episode exists," but "in defining what acts constitute a single criminal episode, not only is the temporal sequence of events important, but also the logical relationship between the acts must be considered."); see also *State v. Porter*, 705 P.2d 1174, 1178 (Utah 1985) (two separate burglaries, first of an apartment complex's laundry room then an apartment were "committed during a single criminal episode").

That same focus on the defendant's conduct may also appropriately result in a court allowing the subsequent prosecution. See, e.g., *State v. Ireland*, 570 P.2d 1206, 1207 (Utah 1977) (no shared objective where the defendant's "criminal objective of robbery was entirely different than that of kidnapping which was totally disconnected in time, place or purpose"); *State v. Cornish*, 571 P.2d 577, 578 (Utah 1977) (no single criminal episode where the defendant's conduct showed the "objective of the unlawful taking was to obtain possession, be it permanent or temporary, of another's automobile," while "[t]he objective of the failure to stop was to avoid arrest for the traffic violations he had just committed and/or to avoid being found in a stolen motor vehicle").

Although Utah's statutory bar on multiple prosecutions is somewhat unique—all states prohibit double jeopardy but not all prohibit multiple prosecutions under the same

terms—states with similar statutes also focus on the defendant’s conduct to ascertain a single criminal objective. For example, Oregon’s statute defines a “[c]riminal episode” as “continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective.” Or. Rev. Stat. Ann. § 131.505. As Oregon’s Supreme Court held, this language reveals “the legislature’s view of the critical factor in treating criminal conduct as a unitary event,” which is “not the coincidence of ‘time, place and circumstances’ . . . but the resulting inference that the conduct is ‘directed to the accomplishment of a single criminal objective.’” *State v. Cloutier*, 286 Or. 579, 595, 596 P.2d 1278 (1979); *see also id* at 596 (noting Oregon’s Legislature has “chosen to attach importance to the ‘singleness’ of a defendant’s criminal objective rather than only to the ‘singleness’ of his acts.”).

Pennsylvania’s statutory bar on multiple prosecutions does not define a “single criminal episode,” but its courts have endeavored to do so. *See* 18 Pa. Stat. and Cons. Stat. Ann. § 110; *see also Hude*, 458 A.2d 177 at 182 (“in defining what acts constitute a single criminal episode, not only is the temporal sequence of events important, but also the logical relationship between the acts must be considered, but stressing (at 491-92) that “the definition of a ‘single criminal episode’ should not be limited to acts which are immediately connected in time,” since by “requiring that criminal acts be logically related instead of temporally related, the courts will be better able to implement the policies which the “single criminal episode” test is designed to promote”).

The clearest reading of the Utah Code's definition of a "single criminal episode" is, to look to the facts and circumstances of a case, to find evidence of a defendant's temporarily-related conduct, to ascertain whether it is intended to attain or accomplish a single criminal purpose, goal, or target. Utah Code § 76-1-401.

This interpretation comports with the purpose of the single criminal episode statutes' bar against multiple prosecutions, which both ensures that a defendant is properly prosecuted for the offenses committed in any single criminal episode, but also that s/he is not harassed by repeatedly having to defend against harassing and inefficient prosecutions.

*The single criminal episode statutes' purpose has an influence on the plain language.*

A Court's "plain language analysis is not so limited that [it will] only inquire into individual words and subsections in isolation," rather the "interpretation of a statute requires that each part or section be 'construed in connection with every other part or section so as to produce a *harmonious whole*' and "the purpose of the statute has an influence on the plain meaning of a statute." *Anderson v. Bell*, 2010 UT 47, ¶ 9, 234 P.3d 1147 (quotation omitted) (emphasis original). Where Utah Code § 76-1-401 is incorporated into the other provisions that collectively bar multiple prosecutions for offenses in a single criminal episode. *See* Utah Code §§ 76-1-403(2), 76-1-402(2). Thus, the plain language of 76-1-401 must be construed in harmony with the underlying purpose behind the statutory bar on multiple prosecutions.

At its heart, the purpose behind this procedural bar is a concern for the fundamental fairness required by the due process clause of the Fourteenth Amendment.

*Cf. Ciucci v. State of Ill.*, 356 U.S. 571, 575 (1958) Douglas J. and Brennan J., *dissenting* (noting the state's use of three consecutive trials was "an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment, whatever its ultimate scope is taken to be"); *Hoag v. State of N.J.*, 356 U.S. 464, 467 (1958) (suggesting there are situations where the Fourteenth Amendment would prevent consecutive prosecutions) (overruled on other grounds); *Ashe v. Swenson*, 397 U.S. 436, 454 (1970) (noting the "increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience"); *see also Cloutier*, 286 Or. at 595 (Oregon's statute consolidates "[m]ultiple statutory violations . . . in one prosecution, not merely because they involve evidence common to the time, place and circumstances, but *because the responsibility of the defendant for his conduct in pursuit of one 'criminal objective' should be fully determined in one proceeding*") (emphasis added).

Utah's statutory bar against multiple prosecutions for single criminal episode offense, comports with these ideas as it is intended to both "protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode," and "to ensure finality without unduly burdening the judicial process by repetitious litigation." *Selzer*, 2013 UT App 3, ¶ 22 (quotation omitted); *see also Sommerville*, 2013 UT App 40, ¶ 7 (same); *Strader*, 902 P.2d at 641 (same)); *Rasabout*, 2013 UT App 71, ¶ 11 (those statutes are "designed to protect a defendant from multiple trials for offenses that are part of a 'single criminal episode.'" (citation omitted) (aff'd, 2015 UT 72, ¶ 11, 356 P.3d 1258)). Indeed, Utah's statutes

generously protect defendants, by expanding “the scope of offenses barred from multiple trials beyond the same offense focus in double jeopardy, to all offenses arising from a single criminal episode.” *Rushton*, 2015 UT App 170, ¶ 10 (quoting *Strader*, 902 P.2d at 641). These notions are intimately tied with due process, as they prevent the state from being “free to refile criminal charges under all circumstances,” as “[c]onsiderations of fundamental fairness preclude vesting the State with such unbridled discretion.” *State v. Brickey*, 714 P.2d 644, 646-47 (Utah 1986).<sup>10</sup>

Under the plain language of Utah Code § 76-1-401, particularly in light of the single criminal episode statutes’ purpose in preventing multiple prosecutions to ensure fundamental fairness, Mr. Rushton’s conduct was incident to accomplishing a single criminal objective and the single criminal episode statutes should have protected him under the facts and circumstances of these cases.

***C. The state’s evidence demonstrates that Mr. Rushton’s conduct was all incident to the single criminal objective of misappropriation.***

Mr. Rushton’s conduct—his behavior, actions, and inactions—from 2006 through 2009—in failing to pay Fooptube’s taxes, retirement fund obligations, and wages—all arose from a single criminal objective: misappropriation. *See* MISAPPROPRIATION, Black’s Law Dictionary (10th ed. 2014) (“misappropriation” is “[t]he application of another’s property or money dishonestly to one’s own use”); *see also Rushton*, 2015 UT

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<sup>10</sup> *Brickey* recognizes the due process implications of requiring a defendant to repeatedly defend against prosecutions, principles that also apply here. *See State v. Morgan*, 2001 UT 87, ¶ 15, 34 P.3d 767 (“The lodestar of *Brickey* . . . is fundamental fairness”).

App 170, ¶ 20 (acknowledging “his criminal objective in each case was to steal money to which he was not entitled”).

That Mr. Rushton’s conduct was incident to one criminal objective is clear from the fact that his conduct occurred entirely within the Fooptube enterprise, where he controlled and managed the “decisions of who was to be paid and who was not to be paid,” and whether “to delay or not to pay the [retirement] contributions.” *See* R.59,117. Whether he decided to misappropriate money he should have used to pay Fooptube’s taxes, or Fooptube’s employees’ wages, or with which he should have remitted their retirement contributions, he was misappropriating that money. Regardless of how he did it, Mr. Rushton continuously put money that was not his “dishonestly to one’s own use.” MISAPPROPRIATION, Black’s, *supra*. Indeed, his conduct was all under an overarching scheme, as a series of misappropriations in an extended but single criminal episode. *Cf. State v. Bradshaw*, 2006 UT 87, ¶ 13, 152 P.3d 288 (“the fact that schemers may alter slightly their methodology or effect the fraud on various victims at different times is not conclusive evidence that the separate acts of fraud are separate schemes” (citing *United States v. Pharis*, 298 F.3d 228, 234 (3d Cir.2002) (Cowen, J., dissenting) (“By itself, changing the method used to commit a fraud does not inaugurate a new fraudulent scheme”))).

Agent Mann saw Mr. Rushton’s conduct as all being directed to the single criminal objective of misappropriation. *See, e.g.,* R.83 (Mann alleging in the 2009 prosecution that Mr. Rushton “used and continued to use the improperly/fraudulently retained/converted funds to further the[] business enterprise as well as for [] personal

use”); *compare* R.32 (Mann alleging in the 2011 prosecution that Mr. Rushton “used and continued to use the improperly/fraudulently retained/converted funds, both funds that were due and owing as wages and/or funds that were part of the employees retirement funds, to further his business enterprise and/or for personal use” in the 2011 prosecution). Mann also correctly recognized that Mr. Rushton “asserted control over [Fooptube] and the funds generated from [Fooptube] have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.” R.32. Mann made verbatim allegations in 2009, alleging Mr. Rushton “ran the company,” and “asserted control over [Fooptube] and the funds generated from [Fooptube] have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.”

R.83. Agent Mann’s assertions can lead to only one conclusion, that he saw Mr. Rushton’s conduct as all incident to the criminal objective of misappropriation.

That there was a continuous timeline of conduct, all within Fooptube, also shows Mr. Rushton’s conduct was motivated by his singular objective. Agent Mann began investigating Fooptube in 2008, only after the Utah State Tax Commission made “several attempts,” unsuccessfully, to have Mr. Rushton “remit or work toward remitting the improperly held withholding taxes.” R.82. Also in 2008, Fooptube employees began to report their wages going unpaid in the spring R.252. By January/February of 2009, Mr. Rushton was under the Department of Labor’s injunction to pay Fooptube employees a tremendous amount in back and continuing wages, even as he was almost entirely enjoined from shipping products for sale. R.70-75. Under those circumstances, where Mr. Rushton had to pay those wages any way he could, he misappropriated Fooptube

retirement contributions. *See* R.124-131 (detail of wages paid to employees in 2008 and 2009). Fooptube’s employees learned in the summer of 2008, that their “401K contributions had not been going into our individual plans . . . apparently as Dave [Rushton] tried to continue paying people wages with it instead.” R.243.

Then in 2009, the state filed its 2009 prosecution, demanding that Mr. Rushton pay Fooptube’s unpaid taxes, while he was still trying to meet his obligations under the Amended Consent Injunction.. R.78-84. By that time, Mr. Rushton’s misappropriations had mostly stopped, because the injunction prohibited Fooptube from selling products, thus there was little income to continue to misappropriate. Yet the state waited until April of 2011 to finally charge Mr. Rushton for the offenses he committed in 2008 and 2009, even as it knew Mr. Rushton had not only committed tax offenses but also wage and retirement fund offenses as well from Agent Mann. R.58. The state’s own agent saw Mr. Rushton’s conduct as “separate manifestations of [a] single, ongoing criminal objective” in an “overarching scheme.” *Mead*, 2001 UT 58, ¶ 56. Under these circumstances, and the single criminal episode statute, it is inexplicable why the state waited to separately prosecute Mr. Rushton until after he pleaded guilty in the first case, as the single criminal episode statute protects a defendant “from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode.” *Selzer*, 2013 UT App 3, ¶ 22.<sup>11</sup>

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<sup>11</sup> The state of Utah, through the same prosecutor, regularly prosecutes multiple offenses from an extended single criminal episode in a single prosecution. *See, e.g., State v. Steed*, 2014 UT 16, 325 P.3d 87 (same prosecutor charging: five counts of failure to file a proper tax return, with one a pattern of unlawful activity count, and four counts of



Moreover, a single prosecution of Mr. Rushton for all the offenses would have better “ensure[d] finality” and kept the state from “unduly burdening the judicial process by repetitious litigation.” *Selzer*, 2013 UT App 3, ¶ 22 (quotation omitted)). Even though the state charged Mr. Rushton in separate prosecutions with twenty-six interrelated offenses, nineteen of the charges were brought in the 2011 prosecution alone, and all the charges shared a single source for facts and witnesses: Foptube. R.1-6;78-84. Other evidence to support the state’s charges, as Mann made clear, would come from shared sources and interrelated state agencies. *See* R.81 (Agent Mann listing his sources for the 2011 prosecution as “The Utah State Tax Commission/The Utah Department of Commerce/The Utah Department of Public Safety/The Utah Department of Workforce Services/The West Valley City Business License Department/The Utah Labor Commission/The U. S. Department of Labor”). Further, with a continuous timeline for all offenses, presenting that single timeline to jurors would have been less confusing in a single consolidated prosecution. A single prosecution was the more efficient means of prosecuting Mr. Rushton, and the single criminal episode statute allowed the state to bring all charges in a single case. *See* Utah Code § 76-1-402(1) (“A defendant may be

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tax evasion, in a single prosecution of offenses committed over a longer time than in Mr. Rushton’s case); *Gibson*, 2006 UT App 490 (same prosecutor charging multiple counts for tax evasion, unlawful dealing with property by a fiduciary, communications fraud, unlawful/ unprofessional conduct, and pattern of unlawful activity, in a single prosecution for offenses committed over two years); *State v. Eyre*, 2008 UT 16, 179 P.3d 792 (same prosecutor charging failure to file taxes, tax evasion, failure to obtain a license to act as a dealer or salesperson of motor vehicles, for offenses that spanned 5 years). The fact that the state alleged Mr. Rushton committed multiple offenses over years, was clearly no bar to the state prosecuting Mr. Rushton in a single prosecution.

prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode”).

The state also could have easily amended its 2009 prosecution with the 2011 charges. *See* Utah R. Crim. Pro. 4 (d) (“The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced”). Or the state could have also easily joined its charges in a single prosecution and Mr. Rushton would have had difficulty arguing the prejudice necessary to sever them. *See* Utah Code § 77-8a-1 (4)(a) (Allowing a court to sever into separate trials, offenses which, if tried together may prejudice the prosecution or defense). However, where the state instead proceeded in violation of the single criminal episode statutes, it was barred from subjecting Mr. Rushton to an additional prosecution after his guilty plea in the 2009 prosecution. Utah Code Ann. § 76-1-403(1) (when “a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred”).

When Mr. Rushton’s conduct is viewed under the plain language of Utah Code § 76-1-401 and in light of its purpose to expand due process protections and ensure fundamental fairness, while also prevents inefficiencies, the court of appeals was incorrect to affirm the trial court’s conclusion that the offenses in this case did not arise from the same “single criminal episode” as those offenses in the 2009 prosecution.

***D. The court of appeals erred in interpreting the single criminal episode statute to require “a narrow, rather than an expansive, view” of a single criminal episode in Mr. Rushton’s case, as it also***

*decided “[a]n expansive interpretation of ‘single criminal episode’ is appropriate” in other appeals.*

The court of appeals was incorrect to affirm the trial court’s ruling, by “employing a narrow interpretation of single criminal episode” in Mr. Rushton’s case. *Rushton*, 2015 UT App 170, ¶ 13.

Underlying the court of appeals’ decision was the trial court’s erroneous finding that “[t]he offenses underlying each case were not incident to the accomplishment of a single criminal objective as defined by the Statute and related case law because the offense in each case involved different victims.” R.321. The trial court’s finding was incorrect because the plain language of Utah Code § 76-1-401 is, as noted, concerned only with the defendant’s conduct and whether it was “incident to an attempt or an accomplishment of a single criminal objective.” Utah Code § 76-1-401. That language does not direct a court to look at victims or any other consequences of that conduct.

Indeed, under that definition, multiple victims may result from a single criminal episode. *See James*, 631 P.2d at 855 (defendant kidnapped five hostages and could be subjected to five convictions, as “[i]n crimes against the person (as contrasted with crimes against property), a single criminal act or episode may constitute as many offenses as there are victims.”); *id.* at 856 (“offenses committed against multiple victims are not the same, for double jeopardy purposes even though they may arise from the same criminal episode”); *Mane*, 783 P.2d at 63-64 (multiple victims did not prevent defendant’s conviction for murder and two counts of aggravated assault where the underlying “shootings were part of a single criminal episode”).

Similarly, Utah law also punishes, as aggravated murder, a homicide “committed incident to one act, scheme, course of conduct, or criminal episode during *which two or more persons were killed*.” Utah Code § 76-5-202(1)(b) (emphasis added); *see also State v. Valdez*, 748 P.2d 1050, 1052 (Utah 1987) (two homicides committed during a ninety-minute period part of one criminal episode); *State v. Alvarez*, 872 P.2d 450, 459 (Utah 1994) (finding a single criminal objective shared by a group, which was “to remove two uninvited guests from [a] residence by means of unlawful and violent force, which could have, and did, result in the intentional deaths of two persons”); *State v. Sousa*, 903 So. 2d 923, 924 (Fla. 2005) (defendant shot two victims “in rapid succession during a single criminal episode”). The trial court’s ruling was incorrect.

The court of appeals understood Mr. Rushton’s single “criminal objective in each case was to steal money to which he was not entitled,” yet nonetheless it employed a “narrow interpretation” to reject his claim. *Rushton*, 2015 UT App 170, ¶¶ 20, 21 (“[t]he narrow label of single criminal objective is not meant to encompass such a broad criminal goal because if it did, then almost any series of crimes committed for the purpose of illegally obtaining money, say to feed a drug habit, could be described as ‘single’”); *but see Porter*, 705 P.2d at 1178 (court of appeals concluding two separate burglaries taking money from separate buildings were “committed during a single criminal episode”). It was an incorrect approach to statutory interpretation for the court of appeals to employ a “narrow” interpretation of “single criminal episode” to reject Mr. Rushton’s claims, especially where it also determined it would apply an “expansive interpretation” of the same statutory term “single criminal episode,” in appeals “when one of the parties

challenges joinder for trial.” *Id.* ¶ 14. The court of appeals’ approach is contrary to the statute’s plain language, contrary to our courts’ rules of statutory interpretation and construction, it undermines the legislative purpose of the single criminal episode statute, and it results in the disparate treatment of litigants.

It is important to note the history of the court of appeals’ unique and repeated approach to statutory interpretation. That court first conjured its narrow/expansive distinction in *Strader*, calling it an “interpretive model.” 902 P.2d at 641.<sup>12</sup> There, the defendant, like Mr. Rushton, appealed from a second prosecution for offenses he argued were in a single criminal episode. *See id.* at 640 (“the sole issue . . . is whether the trial court erred in refusing to dismiss the charge of possession of a controlled substance, based on its determination that the charge did not arise from the same criminal episode as the previously prosecuted charge of giving false identification to a police officer”). The court of appeals suggested some indifference to *Strader*’s claim under the single criminal episode statute, stating “*Strader*’s appeal is somewhat atypical. It is not the usual defendant who clamors for all pending charges against him to be tried together before the same jury,” *Id.*; *see also id.* n. 3 (“a cynic might suggest that if the three charges would have been brought together initially, *Strader* would have moved to sever, arguing that the three offenses were completely distinct wrongs and that he would be prejudiced if they were all tried together”). A majority of the court of appeals held that the offenses did not share a single criminal objective. *Id.* at 639, 643.

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<sup>12</sup> The court of appeals relied heavily on *Strader in Rushton*, citing it eleven times in eight sections of the opinion. 2015 UT App 170, ¶¶ 9,10,11,12,16,18,20, n.7.

To reach that holding, rather than apply the plain language of Utah Code § 76-1-401, the court of appeals looked to other types of cases involving the term “single criminal episode.” *Id.* at 641. The court decided it had used an “expansive interpretation of ‘single criminal episode’ in cases contesting joinder of multiple offenses,” while its “review of a double jeopardy issue employs a very narrow perspective, focusing on whether a subsequent prosecution is for the same offense without regard to whether multiple offenses were part of the same criminal episode.” *Id.* at 642. The court was not clear in why those cases should affect how it interpreted the single criminal episode statutes’ bar on multiple prosecutions. *See id.* Nonetheless, it determined “the circumstances of Strader’s claim place this case closer to a double jeopardy analysis than to a joinder of offenses analysis.” *Id.* at 643. And therefore, “although our focus must be on the inherently broader term ‘criminal episode,’ in the unique posture of defendant’s case we believe it is appropriate to take a narrow, rather than an expansive, view of what that term entails.” *Id.* The court then concluded, “viewing all of the facts and circumstances in a narrowly focused way . . . there was no common criminal purpose” and the offenses were not “part of the same criminal episode.” *Id.* at 643.

Judge Davis concurred, specifically writing to criticize the majority’s analytical approach. *Id.* at 644. He noted their analysis was “not only unnecessary to the result but analytically flawed.” *Id.* He articulated the flaw in analogizing Strader’s case to double jeopardy when he was “seeking to avail himself of the provisions of Utah Code Ann. §§ 76-1-401 to -405 (1990),” and “not claiming that he was ‘twice put in jeopardy’ within the meaning of the Fifth Amendment to the United States Constitution.” *Id.* Judge Davis

also clarified that nothing in the statutory language “suggests an ‘expansive’ interpretation where the government is pursuing joinder or a ‘very narrow perspective’ where the defendant is attempting to benefit from the statutory provisions.” *Id.* He concluded “the majority’s application of a double standard for interpreting the definition of a single criminal episode set out in section 76-1-401 is unnecessarily confusing,” and was not “logically suggested by the statute.” *Id.*

Nonetheless, the court of appeals has continued to apply this “double standard,” to take a narrow view of a single criminal episode when a defendant appeals from a subsequent prosecution. *Id.*; see *Selzer*, 2013 UT App 3, ¶ 26 (“where a defendant is arguing that a subsequent prosecution is barred by a prior conviction, ‘it is appropriate to take a narrow, rather than an expansive, view of what [a single criminal episode] entails,’” and finding no single criminal episode) (alteration original) (quotation omitted)); *Parkinson*, 2014 UT App 140 (“where a defendant is arguing that a subsequent prosecution is barred by a prior conviction, ‘it is appropriate to take a narrow, rather than an expansive, view of what [a single criminal episode] entails,’” and reversing trial court’s bar on second prosecution) (alterations original) (quotations omitted); *Rushton*, 2015 UT App 170 (same). This Court has never applied a narrow/expansive interpretation of the statutory definition of a “single criminal episode.”<sup>13</sup>

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<sup>13</sup> See, e.g., *Mead*, 2001 UT 58; *Cornish*, 571 P.2d 577; *State v. Ireland*, 570 P.2d 1206 (Utah 1977); *Ririe*, 2015 UT 37; *Hupp v. Johnson*, 606 P.2d 253, 254 (Utah 1980); see also *State v. Bair*, 671 P.2d 203, 208 (Utah 1983) (concluding the offenses for which the defendant “was prosecuted in the first and second . . . prosecutions were closely related in time and pursuant to a single criminal objective”).

There are several problems with the court of appeals' bifurcated approach to the single criminal episode statute. The first problem is that it is an incorrect approach to statutory interpretation and construction, the central objective of which is to ascertain legislative intent through the statute's plain language. *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780. ("Our primary objective when interpreting statutes is to give effect to the legislature's intent." (quotations omitted)); *Anderson*, 2010 UT 47, ¶ 9 (same). The court of appeals' "narrow" approach finds no support in the statute's plain language, none of which "suggests an 'expansive' interpretation where the government is pursuing joinder or a 'very narrow perspective' where the defendant is attempting to benefit from the statutory provisions." *Strader*, 902 P.2d at 644.

Utah Code § 76-1-401's language is not at all narrow as it includes "all conduct." Moreover the statutory bar on multiple prosecution for offenses in a single criminal episode, was meant to "expand the scope of offenses barred from multiple trials beyond the same offense focus in double jeopardy, to all offenses arising from a 'single criminal episode.'" *Strader*, 902 P.2d at 641 (quotation omitted); *Ririe*, 2015 UT 37, at ¶ 6 ("[t]he single criminal episode statute . . . takes the matter a step further" than double jeopardy). Had the Legislature intended for a narrow interpretation to apply to appeals contesting multiple prosecutions, it would have said so. *See State v. Wallace*, 2006 UT 86, ¶ 12, 150 P.3d 540 ("Had that been the Legislature's intent . . . it easily could have said so"); *Rasabout*, 2015 UT 72, ¶ 36 n.1 (J. Durrant, concurring) (applying "the presumption . . . that the legislature intends that words be understood in statutes as they are ordinarily used, unless there are indicia to the contrary" (citing *Marion Energy, Inc. v. KFJ Ranch*



*P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863)). The court of appeals' approach incorrectly imposes an arbitrary meaning to the statute. *See Canton*, 2013 UT 44, ¶ 12 (rejecting an "abstract construct of" an ordinary legal term, "both as a matter of (a) the ordinary meaning of statutory language consisting of common, daily, nontechnical speech . . . . [A]nd (b) under the possibility that the statute may employ a legal term of art . . . with a settled meaning in the law." (quotation omitted)).

Then, that the Legislature intended for Utah Code § 76-1-401 to apply in the same fashion (rather than narrowly in some appeals and expansively in other) is evident from the fact that it contains the Utah Code's only definition of a "single criminal episode," and nine other statutes—across a range of contexts—all reference that single definition.<sup>14</sup> Thus, and contrary to the court of appeals' approach—giving the statutory terms protean meaning depending on the appeal—the Legislature intended for a single definition to apply in all appeals involving a single criminal episode including: merger, severance, joinder, and the bar on multiple prosecutions. *Cf. State v. Schroyer*, 2002 UT 26, ¶ 16, 44 P.3d 730 (noting, "in the context of *joinder and severance*, that murder coupled with another crime to avoid responsibility for the murder constitutes a "single criminal

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<sup>14</sup> Those nine provisions are: Utah Code §§ 76-1-402(1) (double jeopardy); 76-1-403(1) (bar against multiple prosecutions); 76-5b-203(5)(b) (referencing 76-1-401 (incorrectly) to enhance the penalty for convictions for distributing intimate images); 23-19-9(6)(a) (limiting driver's license suspensions to one per single criminal episode); 77-32-604(1) & 704(1) (relating to the indigent capital defense trust fund); 78A-5-102(8)(c) (district court jurisdiction), 78A-6-103(2)(c) (juvenile court jurisdiction). Even the Utah Rules of Criminal Procedure reference this singular definition. *See* Utah R. Crim. Pro. 9.5(1)(a) (requiring "[u]nless otherwise provided by law," that "complaints, citations, or informations charging multiple offenses . . . arising from a single criminal episode as defined by [§] 76-1-401, shall be filed in a single court that has jurisdiction of the charges offense with the highest possible penalty of all the offenses charged" (emphasis added)).

objective” linking the two offenses together (as long as the time element is satisfied)” (emphasis added)).

The court of appeals’ “double standard” approach also embeds a method for disparate treatment of litigants in its statutory construction. *Strader*, 902 P.2d at 644. On one hand, litigants appealing from multiple prosecutions are doomed to “a narrow interpretation,” which will likely result in the court allowing a subsequent prosecution as the court of appeals will presume the statutes’ protections do not apply. *Rushton*, 2015 UT App 170, ¶ 13 (the statutes’ “concerns for judicial economy and protection of defendants simply do not arise when the conduct is not part of a single criminal episode because the offenses do not share an intertwined factual or legal history that makes separate prosecutions inefficient or repetitive”). On the other hand, in an appeal involving severance or joinder decisions made by the state, the prosecution will receive the benefit of “[a]n expansive view of single criminal episode.” *Rushton*, UT App 170, at ¶ 13 (an “expansive view” serves to “ensure that the joinder requirement does not unduly preclude prosecution for charges that do not arise out of a single criminal episode”).

The court of appeals’ approach also represents a stark departure from the principle that “persons similarly situated should be treated similarly.” *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984); *see also* Utah Const. art. I, § 24 (stating, “All laws of a general nature shall have uniform operation.”); *see also Provo City Corp. v. Willden*, 768 P.2d 455, 458 (Utah 1989) (“This Court seeks to construe laws so as to carry out the legislative intent while avoiding constitutional conflicts”).

A plain language interpretation of Utah Code § 76-1-401, considering the ordinary meaning of its terms, influenced by its purpose, should result in the dismissal of this prosecution of Mr. Rushton. The state had ample time and opportunity to subject Mr. Rushton to a single prosecution for all his offenses. The single criminal episode statute should have protected Mr. Rushton “from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode.” *Selzer*, 2013 UT App 3, ¶ 22 (quotation omitted).

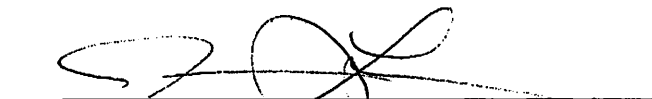
The court of appeals should have dismissed this case under the single criminal episode statutes.

### **CONCLUSION**

Mr. Rushton’s conduct in the 2009 and 2011 offenses was all “incident to . . . an accomplishment of a single criminal objective.” Utah Code § 76-1-401. The single criminal episode statute should have protected Mr. Rushton from having to defend against the state’s multiple prosecutions. The court of appeals was incorrect in its interpretation of the single criminal episode statute, and wrong to allow this prosecution.

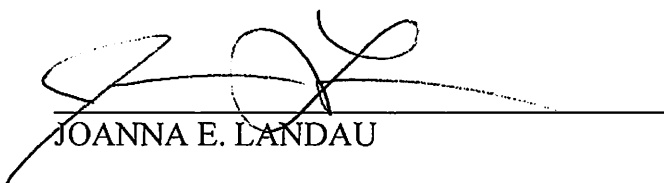
Mr. Rushton respectfully requests that this Court reverse the court of appeals’ *Rushton* opinion and dismiss this prosecution.

SUBMITTED this 11<sup>th</sup> day of December, 2015.

  
JOANNA E. LANDAU  
Attorney for Defendant/Petitioner

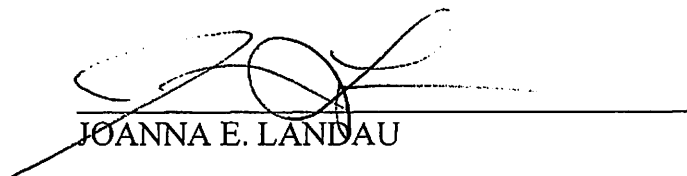
**CERTIFICATE OF DELIVERY**

I, JOANNA E. LANDAU, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 11<sup>th</sup> day of December, 2015.

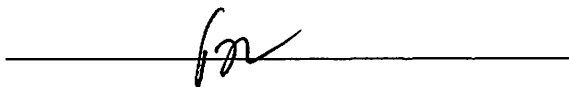
  
JOANNA E. LANDAU

**CERTIFICATE OF COMPLIANCE**

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 11,876 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief was prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

  
JOANNA E. LANDAU

DELIVERED this 11 day of December, 2015.



### Index to Addenda

Addendum A:	<i>State v. Rushton</i> , 2015 UT App 170, 354 P.3d 223
Addendum B:	This Court's October 26, 2015 Order Granting Writ of Certiorari
Addendum C:	Trial court's findings of fact and conclusions of law on Mr. Rushton's Motion to Dismiss.
Addendum D:	Constitutional Provisions and Statutes
Addendum E:	2011 Amended Information
Addendum F:	2009 Information
Addendum G:	Agent Scott Mann's Investigation Summary

## **ADDENDUM A**

Tab A

THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff and Appellee,

*v.*

DAVID M. RUSHTON,  
Defendant and Appellant.

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Opinion  
No. 20120969-CA  
Filed July 9, 2015

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Third District Court, Salt Lake Department  
The Honorable Robin W. Reese  
No. 111903029

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Joanna E. Landau, Attorney for Appellant  
Sean D. Reyes, Ryan D. Tenney, and Mark W. Baer,  
Attorneys for Appellee

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JUDGE STEPHEN L. ROTH authored this Opinion, in which JUDGES  
JAMES Z. DAVIS and J. FREDERIC VOROS JR. concurred.

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ROTH, Judge:

¶1 David M. Rushton entered a conditional guilty plea to one misdemeanor and two felony offenses stemming from his failure to pay employee wages and remit retirement withholdings while he owned and operated Fooptube, LLC, a computer programming and design company. He argues that the district court should have granted his motion to dismiss the charges because they arose from the same criminal episode as charges to which he had previously pleaded guilty. We affirm Rushton's convictions.



BACKGROUND

¶2 In 2008, the Utah State Tax Commission began investigating Rushton and Fooptube on suspicion of tax evasion. On April 14, 2009, the State charged Rushton with six tax crimes alleged to have been committed during calendar years 2006, 2007, and 2008 (the tax case). During the same time period, a number of Fooptube employees filed claims for unpaid wages with the Utah Labor Commission. Also at about this time, the United States Department of Labor's Employee Benefits Security Administration was investigating whether Rushton had failed to remit employee retirement contributions. At a review hearing in the tax case on May 5, 2009, Fooptube employees personally notified the tax commission investigator and the prosecutor of the wage claims. Rushton was arraigned in the tax case in December 2009, and in June 2010, he pleaded guilty to two charges pursuant to a plea agreement.

¶3 On April 20, 2011, the State filed this second case (the wage case) against Rushton, charging him with two second degree felony counts of communications fraud; two second degree felony counts of unlawful dealing with property by a fiduciary; two second degree felony counts of theft of services or, alternatively, twelve class A misdemeanor counts of failing to pay wages; and one second degree felony count of engaging in a pattern of unlawful activity for his failure to pay his employees an estimated \$1.17 million in wages and his failure to remit an estimated \$1.2 million in withheld retirement funds. Rushton moved to dismiss, arguing that his convictions in the tax case barred the State from prosecuting the wage case because the charges in the wage case were part of the same criminal episode as the charges in the tax case. The district court denied Rushton's motion, concluding that the two cases did not arise from a single criminal episode. The court explained that although the charges in both cases were "closely related in time," the conduct from which the respective charges arose was "not in furtherance of the same criminal objective." The court reasoned that there was not a single criminal objective because the "victim in the [tax] case is

*State v. Rushton*

the state of Utah” and “[t]he issue is . . . tax laws,” while the wage case involves Rushton’s alleged “defraud[ing of] his employees.”<sup>1</sup> After the district court denied his motion, Rushton entered *Sery* pleas<sup>2</sup> to three counts. He now appeals the district court’s refusal to dismiss the wage case.

ISSUE AND STANDARD OF REVIEW

¶4 Rushton challenges the district court’s decision to deny his motion to dismiss the wage case. “A trial court’s decision to grant or deny a motion to dismiss presents a question of law,

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1. In the tax case, Rushton pleaded guilty to one count of failure to render personal tax returns and one count of engaging in a pattern of unlawful activity. The State of Utah is the victim of both of those crimes. Rushton’s failure to pay taxes resulted in the state being deprived of funds legitimately owed to it. The pattern of unlawful activity conviction was based in part on Rushton’s failure “to file or truthfully file corporate tax returns and remit employee withholding taxes” while operating Fooptube. But, in filing their own tax returns, Fooptube employees relied on Rushton’s representation that the taxes had been remitted to the state on their behalf. The state therefore “applied [credits] for the benefit of such employees” in the amount of “about \$585,917.89.” Thus, the state shouldered the loss from the unpaid employee taxes.

In the wage case, the employees are the victims because they were not paid wages for which they had worked and their retirement withholdings were never remitted.

2. A guilty plea entered pursuant to *State v. Sery*, 758 P.2d 935 (Utah Ct. App. 1988), is conditional. It permits a defendant to reserve the right to appeal an issue raised in the district court, such as the denial of the motion to dismiss in this case, and then to withdraw the plea if he or she is successful on appeal. *See id.* at 938.

which we review for correctness.” *State v. Selzer*, 2013 UT App 3, ¶ 14, 294 P.3d 617 (citation and internal quotation marks omitted).

#### ANALYSIS

¶5 Rushton argues that in denying his motion to dismiss, the district court wrongly determined that the charges in the wage case did not arise out of the same criminal episode as the charges in the tax case. We conclude that the district court correctly denied Rushton’s motion to dismiss.

¶6 Multiple charges arise from a single criminal episode if the conduct underlying the charges “is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.” Utah Code Ann. § 76-1-401 (LexisNexis 2012).<sup>3</sup> Except under certain circumstances not relevant here, separate offenses arising out of a single criminal episode must be tried together when “(a) [t]he offenses are within the jurisdiction of a single court; and (b) [t]he offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.” *Id.* § 76-1-402(2). Failure to comply with this mandate may bar subsequent prosecution for conduct arising from the same criminal episode:

If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

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3. We refer to the current version of the Utah Code because the pertinent statutes do not differ substantively from the versions in effect at the time of the underlying offenses.

*State v. Rushton*

- (a) the subsequent prosecution is for an offense that was or should have been tried under [section 402(2)] in the former prosecution; and
- (b) the former prosecution:
  - (i) resulted in acquittal;
  - (ii) resulted in conviction;
  - (iii) was improperly terminated; or
  - (iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

*Id.* § 76-1-403(1) (LexisNexis Supp. 2014). “The purpose of such compulsory joinder is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation.” *Selzer*, 2013 UT App 3, ¶ 22 (citation and internal quotation marks omitted).

¶7 It is undisputed that the offenses in both the wage case and the tax case fell within the jurisdiction of the district court and that conduct supporting the wage case was known to the prosecuting attorney at the time that Rushton was arraigned on the tax case.<sup>4</sup> *See* Utah Code Ann. § 76-1-402(2) (LexisNexis 2012). It is also undisputed that the State’s prosecution in the tax case resulted in a conviction when Rushton entered his guilty pleas to two counts. *See id.* § 76-1-403(1)(b)(ii) (LexisNexis Supp. 2014). Thus, the only point of contention here is whether the tax

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4. The State conceded the first factor in the district court, and the court made the latter finding in the face of the State’s opposition. The State, however, “does not contest” the finding on appeal.

case charges and wage case charges arose out of a “single criminal episode” because they were closely related in time and were incident to the attempt or accomplishment of a single criminal objective. *See id.* § 76-1-401 (LexisNexis 2012).

¶8 The district court determined that the charges in each case did not arise from a single criminal episode because, although they were “closely related in time,” the conduct from which the two sets of charges arose was “not in furtherance of the same criminal objective” where “the offense[s] in each case involved different victims.” Rushton challenges the court’s latter determination, arguing that the offenses in both cases were “incident to one criminal purpose, that of misappropriating corporate money from Fooptube.” The State counters that the court correctly determined that the two sets of charges were not part of a single criminal episode because they had separate criminal objectives, that is, the offenses in the tax case were aimed at taking funds owed to the government while the offenses in the wage case were aimed at taking funds owed to the Fooptube employees.<sup>5</sup> The parties rely on a number of cases in support of their respective positions. Although all of these cases may help inform our decision, we consider it useful to first address the differing contexts in which they arose to explain why some are more useful than others in resolving the particular single criminal episode question here.

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5. The State also argues that the charges were not closely related in time. In doing so, however, the State does not directly challenge the district court’s finding that they were. We do not specifically address the timing issue, however, other than to consider it as part of the context in which the crimes took place, because we affirm on the basis that Rushton did not have a single criminal objective in engaging in the conduct underlying each case.

I. Categorization of Our Precedent

¶9 The cases cited by the parties seem to fit primarily into three categories: (1) cases that address whether a defendant's conduct could be charged as more than one offense or amounted to only a single offense, *see, e.g., State v. James*, 631 P.2d 854 (Utah 1981); *State v. Rasabout*, 2013 UT App 71, 299 P.3d 625, *cert. granted*, 308 P.3d 536 (Utah 2013); *State v. Mane*, 783 P.2d 61 (Utah Ct. App. 1989); *see also State v. Bauer*, 792 N.W.2d 825 (Minn. 2011); (2) cases that address whether separate offenses arguably arising from a single criminal episode must be tried together, *see, e.g., West Valley City v. Parkinson*, 2014 UT App 140, 329 P.3d 833; *State v. Selzer*, 2013 UT App 3, 294 P.3d 617; *State v. Strader*, 902 P.2d 638 (Utah Ct. App. 1995); and (3) cases that address whether separate offenses arguably arising from a single criminal episode may be tried separately, *see, e.g., State v. Mead*, 2001 UT 58, 27 P.3d 1115; *State v. Lopez*, 789 P.2d 39 (Utah Ct. App. 1990).

¶10 The first category of cases addresses the constitutional protection against double jeopardy. *Strader*, 902 P.2d at 642. Double jeopardy prevents "a defendant from being tried more than once for the same crime." *Id.* Although the concepts of single criminal episode and double jeopardy are distinct, the double jeopardy issue has been addressed within the single criminal episode framework. This may be because the enactment of the single criminal episode statutes resulted in an "expansion of] the scope of offenses barred from multiple trials beyond the same offense focus in double jeopardy, to all offenses arising from a single criminal episode." *Id.* at 641 (citation and internal quotation marks omitted); *State v. Sommerville*, 2013 UT App 40, ¶ 7, 297 P.3d 665 (explaining that the single criminal episode statutes were primarily "designed to protect a defendant from multiple trials for offenses that are part of a single criminal episode" (citation and internal quotation marks omitted)). In other words, the single criminal episode statutes seem to extend the protection against multiple prosecutions encompassed within the double jeopardy doctrine from single offenses to separate offenses arising out a single criminal episode. It may be

because of this expansion that the single criminal episode statutes include a provision emphasizing that they are not intended to undermine double jeopardy protection:

A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

Utah Code Ann. § 76-1-402(1) (LexisNexis 2012); *see, e.g., Mane*, 783 P.2d at 63–65 (using this provision of the single criminal episode statutes in its analysis of whether there was one or more crimes committed). In this first category of cases, where the primary focus is double jeopardy, the courts have taken “a very narrow perspective, focusing on whether a subsequent prosecution is for the same offense” as the first prosecution.<sup>6</sup> *Strader*, 902 P.2d at 642 (emphasis omitted).

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6. Though our courts have addressed single criminal episode concerns in cases raising double jeopardy issues, we are not convinced that this first category actually provides much guidance on single criminal episode questions such as the one presented here because, in the end, double jeopardy is not concerned with whether multiple offenses arose out of the same criminal episode but rather with whether particular conduct constitutes a single offense or multiple offenses. Because *Rushton* has relied on cases from this category and at times our decisions have used a single criminal episode framework as an analytical tool in the context of a double jeopardy issue, we include it within our categorization of case precedent.

¶11 In the second category of cases, the appellate court's focus is on the compulsory joinder requirement established in Utah Code section 76-1-402(2); these cases directly address whether separate offenses arising from a single criminal episode must be prosecuted together. In these cases, the defendant's conduct constitutes more than one prosecutable offense and the issue is whether the offenses arose from a single criminal episode so as to bar separate prosecutions in the interest of judicial economy and finality for the defendant. *See, e.g., Selzer*, 2013 UT App 3, ¶ 22. We have concluded that this type of claim is "comparable to asserting double jeopardy." *Strader*, 902 P.2d at 642. Thus, "it is appropriate to take a narrow, rather than an expansive, view of what [a single criminal episode] entails." *Selzer*, 2013 UT App 3, ¶ 26 (alteration in original) (quoting *Strader*, 902 P.2d at 642).

¶12 Finally, in the third category of cases, appellate courts are concerned with whether the mandatory joinder of multiple charges in a single prosecution deprives one or both parties of a fair trial. *See, e.g., Lopez*, 789 P.2d at 42 (noting that severance is available if trying charges together would prejudice either the prosecution or the defense). Consequently, there are two related issues that arise in these cases. The first is whether the offenses occurred as part of a single criminal episode so that they should ordinarily be tried together, and the second, which arises only if they did, is whether trying the charges together in the particular case would result in undue prejudice to either party. *Strader*, 902 P.2d at 641 n.6. In this context then, "[a]n expansive interpretation of 'single criminal episode' is appropriate." *Id.* at 641.

¶13 There are sound reasons for employing a narrow interpretation of single criminal episode in the first two categories while using a more expansive interpretation in the third category. The single criminal episode statutes serve to "expand the scope of offenses barred from multiple trials beyond the same offense focus in double jeopardy to all offenses arising from a single criminal episode." *Id.* (citation and internal quotation marks omitted). In doing this, the legislature sought to promote judicial economy and to protect defendants by



requiring joinder into a single trial any charges arising from conduct that was close in time and done in furtherance of the same criminal objective. *Id.*; accord *Selzer*, 2013 UT App 3, ¶ 22. But these same concerns for judicial economy and protection of defendants simply do not arise when the conduct is not part of a single criminal episode because the offenses do not share an intertwined factual or legal history that makes separate prosecutions inefficient or repetitive. A narrow perspective thus serves to ensure that the joinder requirement does not unduly preclude prosecution for charges that do not arise out of a single criminal episode.

¶14 On the other hand, when one of the parties challenges joinder for trial, that party is concerned about the prejudice that may inure to the party's position if the charges are heard together. An expansive view of single criminal episode allows the trial court to more readily balance the interest in judicial economy that the joinder requirement serves with the defendant's constitutional right to a fair trial and the State's interest in a fair prosecution. See *State v. Strader*, 902 P.2d 638, 641 n.6 (Utah Ct. App. 1995). Moreover, "because appellate courts review decisions regarding joinder or severance of offenses only for abuse of discretion, it follows that the reviewing court would, as a practical matter, take a broad view of what constitutes a single criminal episode in that context." *Id.* at 641–42 (citations omitted).

¶15 Given the question before us in this case—whether the tax offenses and wage offenses all arise from a single criminal episode so as to bar the prosecution in the wage case—cases in the second category are the most useful because they are directly on point. The first category of cases provides only limited guidance because although the cases use the same narrow standard for determining whether conduct arises from a single criminal episode, they are more directly focused on the double jeopardy-related question of whether the conduct constitutes a single offense or can legitimately be prosecuted as different offenses. Here, there is no dispute that Rushton's conduct constituted more than one offense that could be punished under

multiple code provisions. The severance-related cases in the third category are even less instructive as they employ a much broader standard for assessing whether offenses arise from the same criminal episode because the focus is on prejudice at trial.<sup>7</sup> We therefore rely primarily on the second category of cases in assessing whether Rushton's charges arose from a single criminal episode so as to warrant compulsory joinder.

## II. Single Criminal Objective

¶16 The only issue before us in assessing whether the tax case and the wage case arose from a single criminal episode is whether the conduct underlying those charges was "incident to

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7. While no prior case appears to have explicitly categorized the existing case law as we have done here, Utah appellate courts have long utilized these categories in analyzing the questions that arise under the single criminal episode statutes. *See West Valley City v. Parkinson*, 2014 UT App 140, ¶¶ 6–8, 329 P.3d 833 (relying on multiple-prosecution cases to determine whether a separate crime arose out of the same criminal episode as an earlier prosecuted offense so as to bar a subsequent prosecution); *State v. Strader*, 902 P.2d 638, 642 n.7 (Utah Ct. App. 1995) (observing that the defendant's reliance on severance cases was unpersuasive where the question presented for appeal involved whether multiple prosecutions were appropriate); *id.* at 642 n.5 (noting that "cases considering whether offenses are separate for double jeopardy purposes are not applicable in single criminal episode cases contesting the court's decision to join offenses" (citation and internal quotation marks omitted)); *State v. Lopez*, 789 P.2d 39, 44 (Utah Ct. App. 1990) (stating that "the line of cases relied upon by defendant to establish that the present circumstances were not part of a single criminal episode are not applicable because they do not deal with the issues of joinder and severance of charges, but with determining if criminal acts are separate for double jeopardy purposes").

an attempt or an accomplishment of a single criminal objective.” Utah Code Ann. § 76-1-401 (LexisNexis 2012). “Whether or not there is a single criminal objective ‘depends on the specific facts of the case viewed under . . . the totality of the circumstances.’” *State v. Selzer*, 2013 UT App 3, ¶ 26, 294 P.3d 617 (omission in original) (quoting *Strader*, 902 P.2d at 642). In assessing the circumstances, a court must “focus[] more on a defendant’s actions,” and not on external factors that may link the charges together, to determine whether “objectively” the conduct is “incident to an attempt or an accomplishment of a single criminal objective.” *West Valley City v. Parkinson*, 2014 UT App 140, ¶ 7, 329 P.3d 833 (citation and internal quotation marks omitted).

¶17 In applying the definition of single criminal episode, case law within the second category suggests that a recurring concern is whether the commission of one crime is aimed at furthering the accomplishment of the other crime. For example, in *West Valley City v. Parkinson*, 2014 UT App 140, 329 P.3d 833, police responded to a call of domestic violence to find that the defendant was no longer at the home. *Id.* ¶ 2. While one officer was interviewing the victim, the officer saw the defendant drive by the house. *Id.* Based on his interview with the victim, the officer believed that the defendant had a child in the car, and he therefore attempted to stop the vehicle through hand gestures and verbal commands. *Id.* The defendant failed to stop, and the officer pursued by vehicle, eventually apprehending the defendant. *Id.* After being charged with four misdemeanor domestic violence charges in justice court, the defendant pleaded guilty to misdemeanor domestic violence assault. *Id.* ¶ 3. About one week after the defendant’s guilty plea, the City filed an information in district court charging the defendant with crimes related to the police chase. *Id.* ¶ 4. On the defendant’s motion, the district court concluded that the new charges were part of the same criminal episode as the domestic violence charges and dismissed them. *Id.* The City appealed, and we reversed, concluding that “the domestic violence charges filed with the justice court and the conduct for which charges were filed in

the district court did not share a common criminal objective.” *Id.* ¶ 7. We reasoned that, viewing the circumstances in an objective manner and with a narrow view of “single criminal episode,” the defendant’s actions in leaving the scene once the police had been called were “not incident to the accomplishment of his domestic violence objectives,” which were to “harm[] or frighten[]” the victim, but rather were “motivated by [the defendant]’s objective of eluding police.” *Id.* ¶ 9.

¶18 Likewise, in *State v. Strader*, 902 P.2d 638 (Utah Ct. App. 1995), we concluded that the defendant’s actions in stealing a circular saw, providing false identification, and possessing drugs did not have a single criminal objective. *Id.* at 639, 643. There, an officer pulled over the defendant’s vehicle after the officer saw the defendant enter a construction site and return to his car carrying an object. *Id.* at 639. When asked for identification, the defendant gave his correct name but provided the officer with a clearly altered license that had a false name on it. *Id.* The officer arrested the defendant for false identification and, in a search incident to impounding the car, discovered methamphetamine as well as the object (a stolen circular saw) that the officer had seen the defendant carrying from the construction site. *Id.* The defendant pleaded guilty to the false identification charge. *Id.* at 640. Later that month, the State filed charges for all three offenses: theft, false identification, and possession of a controlled substance. *Id.* The defendant moved to dismiss, arguing that the conduct arose from a single criminal episode for which he had already been prosecuted. *Id.* The district court denied the defendant’s motion, except as to the false identification charge to which the defendant had already pleaded guilty. *Id.* The defendant then entered a plea agreement under which he would plead guilty to the possession charge in exchange for the dismissal of the theft charge and the right to appeal the denial of the motion to dismiss. *Id.*

¶19 On appeal, we affirmed the district court’s denial of the motion to dismiss. *Id.* at 643–44. Again taking a narrow view of what constituted a single criminal episode, we reasoned that the “only possible nexus between the crimes was [the defendant’s]

intent to avoid arrest on the [theft and possession] charges by giving false identification.” *Id.* Yet the defendant’s provision of “a forged driver’s license [that he had] at hand seem[ed] to indicate that obscuring his identity was an ongoing and routine course of conduct” and was “not specifically done to somehow further his theft or drug possession activities.” *Id.*; see also *Selzer*, 2013 UT App 3, ¶¶ 3–5, 26 (concluding that a sexual assault followed by a physical assault on the same victim nearly three hours later did not share a criminal objective because the acts were conducted for “very different purpose[s]” in that the physical assault, which was an act of “rage,” did not further the defendant’s purpose in committing the earlier sexual assault, which was done to fulfill the defendant’s desire for “sexual gratification and domination of the victim in a sexual act” (internal quotation marks omitted)).

¶20 Considering the totality of the circumstances of this case, we conclude that as in *Parkinson* and *Strader*, Rushton’s actions in the wage case and the tax case were not incident to the accomplishment of a single criminal objective. Rather, the crimes in each case are entirely separate. In the tax case, Rushton’s actions involved taking funds owed to the *government* by failing to pay taxes and falsifying withholding-tax statements and W-2s, while in the wage case, he took funds owed to *employees* when he failed to pay earned wages and to remit withheld retirement savings to the designated retirement funds. And although Rushton contends that the activities underlying each case had the common purpose of keeping Fooptube afloat, keeping a company financially stable is a lawful objective, not a criminal one. Rather, his criminal objective in each case was to steal money to which he was not entitled.

¶21 Moreover, Rushton’s actions in stealing from employees did not further his objective of stealing from the government, even if it did advance his ultimate goal of keeping Fooptube financially viable. And Rushton’s argument that the crimes were linked by his ultimate goal of unlawfully appropriating the money of others views his “objective” from too elevated a vantage point. The narrow label of single criminal objective is

not meant to encompass such a broad criminal goal because if it did, then almost any series of crimes committed for the purpose of illegally obtaining money, say to feed a drug habit, could be described as “single.”<sup>8</sup> Rather, the fact that the thefts ultimately benefitted the same company is merely an external factor that provides some link between the offenses, but it does not appropriately “focus[] more on the defendant’s actions” or his purpose in committing the acts.<sup>9</sup> See *Parkinson*, 2014 UT App 140, ¶ 7.

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8. Indeed, from this viewpoint, a defendant’s entering an apartment building first to steal dimes from its laundry room and then to steal money or other items of value from an apartment unit ought to meet the single criminal objective requirement. See *State v. Porter*, 705 P.2d 1174, 1176–78 (Utah 1985). Yet, the Utah Supreme Court concluded that these activities constituted two separate burglary offenses despite the defendant’s apparent common objective of stealing as much as possible from a single building. *Id.* at 1178 (considering whether the defendant could be prosecuted for more than one crime for activities arising out a single criminal episode); cf. *State v. Bauer*, 792 N.W.2d 825, 830 (Minn. 2011) (explaining, in the context of determining that the State’s decision to charge the defendant with both the sale of a controlled substance and failure to affix tax stamps to a controlled substance did not punish the same conduct twice, that “the criminal plan of obtaining as much money as possible is too broad an objective to constitute a single criminal goal” (citation and internal quotation marks omitted)).

9. That conclusion is underscored by the fact that Rushton’s actions in stealing from the government and stealing from the employees, though characterized by the district court as occurring “close in time” due to the overlap in their commission, also had some temporal distinctions. Rushton falsified tax documents and failed to pay taxes from 2006 until June 2008, which was about the time that the state tax commission began  
(continued...)

¶22 We are unpersuaded by Rushton's other arguments for treating the wage case and the tax case as having the same criminal objective. For instance, Rushton argues that less emphasis should be placed on the number of victims because even when there are multiple victims, the underlying actions can still arise from a single criminal episode. In support of his position, Rushton cites several cases where the defendant was tried on multiple charges resulting from his actions toward multiple victims.

¶23 The cases Rushton relies on, which fall into category one, do not support his contention. In the cited cases, the defendants had already been prosecuted (in one trial) for multiple offenses and were appealing on the basis that the convictions constituted multiple punishments for the same conduct. Thus, the analysis on appeal focused on whether the defendant was properly convicted for multiple offenses, not on the issue presented here—whether the defendant's actions against multiple victims were aimed at the accomplishment of a single criminal objective so as to mandate their prosecution together. For example, in *State v. James*, 631 P.2d 854 (Utah 1981), the defendant was convicted on five counts of aggravated kidnapping for taking five people hostage during a drugstore robbery. *Id.* at 855. On appeal, the defendant argued that "his actions constituted a

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(...continued)

investigating him on suspicion of tax evasion. Although Rushton also stopped paying employees their wages and remitting their retirement withholdings sometime in 2008, that conduct continued through 2009, well after Rushton had ceased his tax-related crimes. That Rushton stopped his tax scheme and turned to stealing money owed to his employees around that same time supports a determination that these two sets of criminal activities were not part of a single criminal objective but rather were two separate illegal means for achieving the ultimate goal of keeping the business afloat.

single criminal act, hence his constitutional right to not be twice placed in jeopardy for the same offense was violated.” *Id.* The Utah Supreme Court concluded that double jeopardy did not preclude multiple convictions because “offenses committed against multiple victims are not the same.” *Id.* at 856; *see also State v. Rasabout*, 2013 UT App 71, ¶¶ 10, 12, 33, 299 P.3d 625 (stating, in the course of reversing the trial court’s merger of twelve discharge of a firearm convictions, that whether the charges arose out of a single criminal episode “does not resolve the question” because the issue presented in the case “was one of multiplicity and double jeopardy”), *cert. granted*, 308 P.3d 536 (Utah 2013); *State v. Mane*, 783 P.2d 61, 63 (Utah Ct. App. 1989) (addressing “whether a single criminal act resulting in multiple victims constitutes a single offense or multiple offenses”).

¶24 In short, Rushton has not shown that the district court erred in deciding as it did. *See State v. Selzer*, 2013 UT App 3, ¶ 27, 294 P.3d 617 (affirming the district court’s denial of a motion to dismiss because although “other possible interpretations of [the defendant’s] actions may be possible, the district court could certainly have accepted the State’s argument and determined that the sexual assaults and [the physical] assault did not share a single criminal objective”); *cf. State v. Ireland*, 570 P.2d 1206, 1207 (Utah 1977) (concluding that although the defendant made a plausible argument that “all [his] acts were directed toward escape,” “the facts adequately support[ed] the trial court’s determination that two separate and distinct offenses were committed”).

¶25 For these reasons, we affirm the district court’s determination that Rushton’s actions in the wage case were not incident to or in furtherance of his purpose in the tax case because the two sets of charges did not share a single criminal objective. Accordingly, the district court correctly denied Rushton’s motion to dismiss.



CONCLUSION

¶26 We conclude that there was a basis for the district court's decision that the actions underlying the wage case were not incident to the accomplishment of the criminal objective in the tax case. Consequently, the two sets of charges could properly be prosecuted in two separate actions and denial of the motion to dismiss was correct. We therefore affirm Rushton's convictions.

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## **ADDENDUM B**

Tab B

OCT 26 2015

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,  
Respondent,

ORDER

v.

Appellate Case No. 20150737-SC

DAVID M. RUSHTON,  
Petitioner.

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This matter is before the court upon a Petition for Writ of Certiorari, filed on September 8, 2015.

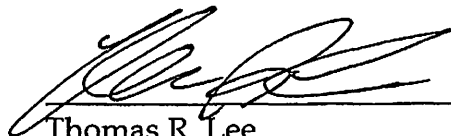
The Petition for Writ of Certiorari is granted as to the following issue:

Whether the court of appeals erred in affirming the district court's conclusion that the crimes for which Petitioner was prosecuted in this case did not arise from the same "single criminal episode" as the crimes prosecuted in a prior case that resulted in a guilty plea.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

October 26, 2015  
Date

  
Thomas R. Lee  
Associate Chief Justice

## ADDENDUM C

Tab C

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**IN THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

v.

DAVID M. RUSHTON,

Defendant.

**DEFENDANT'S PROPOSED FINDINGS  
OF FACT, CONCLUSIONS OF LAW,  
AND ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS**

Case No. 111903029  
Judge Robin W. Reese

A hearing was held on May 3, 2012, on defendant's Motion to Dismiss in the above-cited matter which motion was denied at that time. Based upon the pleadings entered, arguments of counsel and good cause appearing, the court hereby enters the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. David Rushton ("Rushton"), a resident of the State of Utah, owned and operated a company called Fooptube, LLC ("Fooptube" or the "company").

2. The State filed an Information in Case No. 09190370 (hereinafter the "Tax Case") on April 14, 2009.

3. In the Tax Case, defendant David Rushton was charged with Failure to render Proper Tax Returns, Tax Evasion, Unlawful Dealing of Property by a Fiduciary, Communications Fraud, Failure to Render Proper Tax Returns, and Engaging in a Pattern of Criminal Activity.

4. The charges in the Tax Case Information related to events occurring in the years 2005, 2006, and 2008 and concerned both personal and business taxes and allegations of crimes with respect thereto, and the sole victim in the Tax Case is the State of Utah.

5. The defendant was arraigned on the charges in the Tax Case on December 14, 2009, entering a guilty plea on all counts.

6. The prosecution knew of the offense charged in the Wage and Benefit case prior to December 14, 2009.

7. The latter charges (which comprise the present "Wage and Benefit Case") involved only private individuals as alleged victims and involve calendar years 2008 and 2009.

8. The defendant entered a Change of Plea in the Tax Case on June 24, 2010.

9. At that time, the defendant entered guilty pleas to Charges 5 and 6 (Failure to Render Proper Personal Income Tax Returns and Engaging in a Pattern of Criminal Activity).

10. The remainder of the charges--Counts 1 to 4--were dismissed.

11. Subsequent to the completion of its investigation, the State filed an Information in the present case (the Wage and Benefit Case) on April 20, 2011.



12. The Wage and Benefit charges defendant David Rushton with two counts of Communication Fraud, two counts of Unlawful Dealing of Property by a Fiduciary, 13 counts of Failure to Pay Wages or Advising New Employees of Unpaid Wages, and one count of Engaging in a Pattern of Criminal Activity.

13. The charges in the Wage and Benefit Case Information related to events occurring in the years 2008 and 2009.

14. The defendant filed a Motion to Dismiss ("Motion") claiming that the Single Criminal Episode doctrine, as embodied in Utah Code Section 76-1-401 *et seq.*, prevented prosecution of the offenses enumerated in the Wage and Benefit Case.

15. The defendant in his Motion argued for dismissal under the Single Criminal Episode statute, claiming *inter alia*, that the State could not meet the four-factor test described in State v. Sommerville, 248 P.3d 50, 52 (Ut. Ct.App. 2010) to avoid dismissal.

16. A hearing was held on May 3, 2012, on defendant's Motion.

17. The defendant's Motion was denied at that time.

#### **CONCLUSIONS OF LAW**

1. The defendant's Motion is governed by the Single Criminal Episode doctrine as enumerated in § 76-1-401 *et seq.*, which is further explained and governed by the four-factor test described in State v. Sommerville, 248 P.3d 50, 52 (Ut. Ct.App. 2010).

2. The State conceded, as a matter of law, element (2) of the Sommerville test, acknowledging defendant's prior conviction in his initial prosecution (the Tax Case).

3. The State conceded, as a matter of law, element (3) of the Sommerville test, acknowledging the Court's jurisdiction over both the Tax Case and the Wage and Benefit Case.

4. The Court held that the defendant's appearance on December 14, 2009, to enter his not guilty plea to charges in the Tax Case constituted his arraignment in the Tax Case for purposes of the Single Criminal Episode doctrine.

5. The Court concluded that because the State became aware of the allegations of the Wage and Benefit Case no later than May 5, 2009, which was prior to the defendant's December 14, 2009, arraignment in the Tax Case, the defendant, as a matter of law, satisfied element (4) of the Sommerville test.

6. The Court held that the events underlying both cases were sufficiently close in time.

7. The Court held that the offenses underlying each case were not incident to the accomplishment of a single criminal objective as defined by the Single Criminal Episode Statute and related case law because the offense in each case involved different victims.

8. Were the two cases charged in a single matter, presenting the full evidence and corresponding jury instructions encompassed by such a matter would confuse a jury and such confusion would not serve the interests of justice and fairness.

9. As the Court held that the offenses were not incident to the accomplishment of a single criminal objective, therefore, the defendant has failed to satisfy the second prong of element (1) under the State v. Sommerville test for the Single Criminal Episode Statute.

FILED DISTRICT COURT  
Third Judicial District  
OCT 31 2012  
SALT LAKE COUNTY  
By MD  
Deputy Clerk

10. The defendant's motion fails as a matter of law for law of satisfying the  
aforementioned element (1) of the Sommerville test.

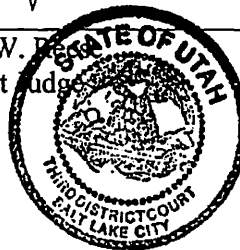
**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, pursuant to the  
Ruling of this Court dated 03 May 2012, defendant's Motion to Dismiss is DENIED.

DATED this 31 day of Oct 2012.

BY THE COURT:

Robin W. Pelt  
Hon. Robin W. Pelt  
District Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11<sup>th</sup> day of October 2012, I caused to be served a true and correct copy of the foregoing **DEFENDANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS** by the method indicated below, to the following:

Mark Baer  
Assistant Attorney General  
160 E. 300 S.  
Salt Lake City, UT 84114

☒ (X) U.S. Mail, Postage Prepaid  
☐ ( ) Hand Delivered  
☐ ( ) Overnight Mail  
☐ ( ) Facsimile  
☐ ( ) Email

Shirley Hamer

## ADDENDUM D

Tab D

**76-1-401. "Single criminal episode" defined -- Joinder of offenses and defendants.**

**76-1-401**

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-8a-1 in controlling the joinder of offenses and defendants in criminal proceedings.

Amended by Chapter 20, 1995 General Session

**76-1-402. Separate offenses arising out of single criminal episode -- Included offenses.**

**76-1-402**

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction



may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Amended by Chapter 32, 1974 General Session

**76-1-403. Former prosecution barring subsequent prosecution for offense  
out of same episode.**

**76-1-403**

(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) the subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2) in the former prosecution; and

(b) the former prosecution:

(i) resulted in acquittal;

(ii) resulted in conviction;

(iii) was improperly terminated; or

(iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(2) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. A finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(3) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty accepted by the court.

(4) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impaneled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(a) the defendant consents to the termination;

- (b) the defendant waives his right to object to the termination; or
- (c) the court finds and states for the record that the termination is necessary because:
  - (i) it is physically impossible to proceed with the trial in conformity with the law;
  - (ii) there is a legal defect in the proceeding not attributable to the state that would make any judgment entered upon a verdict reversible as a matter of law;
  - (iii) prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state;
  - (iv) the jury is unable to agree upon a verdict; or
  - (v) false statements of a juror on voir dire prevent a fair trial.

Amended by Chapter 278, 2013 General Session

## ADDENDUM E

Tab E

**FILED DISTRICT COURT**  
Third Judicial District

NOV - 3 2011

SALT LAKE COUNTY

By                      Deputy Clerk

By: MARK BAER #5440  
Assistant Attorney General  
MARK SHURTLEFF #4666  
Attorney General  
Attorney For The State of Utah  
160 East 300 South  
Salt Lake City, Utah 84114  
Ph: (801) 366-0199

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT  
SALT LAKE COUNTY, STATE OF UTAH**

**STATE OF UTAH,**  
**Plaintiff,**

**v.**

**DAVID M. RUSHTON**  
**DOB:**  
**Defendants.**

**AMENDED  
INFORMATION**

**Criminal No. 111903029**

The undersigned SCOTT MANN, states on information and belief that the defendant committed the crime(s) of:

**COUNT 1**

**COMMUNICATIONS FRAUD, (Employment Agreement)** a Second Degree Felony, in Salt Lake County, State of Utah, on or about calendar year 2008 in violation of Utah Code Title 76 Chapter 10 Section 1801 and Title 76 Chapter 2 Section 202 defendant, DAVID M. RUSHTON, as a party to the offense, did devise a scheme or artifice to defraud another or to obtain money, property, or anything of value from another by false or fraudulent pretenses, representations, promises, or material omissions, and communicated directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice and the value of the property defrauded or obtained was or exceeded \$5,000.00; to wit, the defendant devised a scheme or artifice to obtain or defraud money from the defendants' employee compensation and/or retirement arrangements via false pretenses, representations, promises or omissions and did communicate such false promises or false or fraudulent pretenses with said employees.

**COUNT 2**

**COMMUNICATIONS FRAUD (Employment Agreement),** a Second Degree Felony, in Salt Lake County, State of Utah, on or about calendar year 2009 in violation of Utah Code Title 76

Chapter 10 Section 1801 and Title 76 Chapter 2 Section 202 defendant, DAVID M. RUSHTON, as a party to the offense, did devise a scheme or artifice to defraud another or to obtain money, property, or anything of value from another by false or fraudulent pretenses, representations, promises, or material omissions, and communicated directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice and the value of the property defrauded or obtained was or exceeded \$5,000.00; to wit, the defendant devised a scheme or artifice to obtain or defraud money from the defendants' employee compensation and/or retirement arrangements via false pretenses, representations, promises or omissions and did communicate such false promises or false or fraudulent pretenses with said employees.

**COUNT 3**

**UNLAWFUL DEALING OF PROPERTY BY A FIDUCIARY (Employees Compensation),** a Second Degree Felony, in Salt Lake County, State of Utah, during calendar year 2008, in violation of Utah Code Title 76 Chapter 6 Section 513, the defendant DAVID M. RUSHTON, as a party to the offense, did deal with property that has been entrusted to him as a fiduciary, in a manner which he knew was a violation of his duty and which involved substantial risk of loss or detriment to the owner(s) or to a person(s) for whose benefit the property was entrusted, and the value of the property was or exceeded \$5,000.00; to wit, the defendant as a fiduciary for his company did obtain and deal with employee wages and/or retirement funds in excess of \$5,000.00 which had been entrusted to him and did fail to remit the same. 3<sup>0</sup>  
FC/JSW

**COUNT 4**

**UNLAWFUL DEALING OF PROPERTY BY A FIDUCIARY (Employees Compensation),** a Second Degree Felony, in Salt Lake County, State of Utah, during calendar year 2009, in violation of Utah Code Title 76 Chapter 6 Section 513, the defendant DAVID M. RUSHTON, as a party to the offense, did deal with property that has been entrusted to him as a fiduciary, in a manner which he knew was a violation of his duty and which involved substantial risk of loss or detriment to the owner(s) or to a person(s) for whose benefit the property was entrusted, and the value of the property was or exceeded \$5,000.00; to wit, the defendant as a fiduciary for his company did obtain and deal with employee wages and/or retirement funds in excess of \$5,000.00 which had been entrusted to him and did fail to remit the same.

**COUNT 5**

**THEFT OF SERVICES (Employees Work),** a Second Degree Felony, in Salt Lake County, State of Utah, during calendar year 2008, in violation of Utah Code Title 76 Chapter 6 Section 409, the defendant DAVID M. RUSHTON, as the owner/manager/operator of Footube, LLC, did obtain services which he knew were available only for compensation by deception, threat, force, or any other means designed to avoid the due payment for them; to wit, the defendant obtained the use/benefit of the services up to 95 or more employees without the benefit of compensating said employees for their services, and the services were valued in excess of \$5,000.00.

**COUNT 6**

**THEFT OF SERVICES (Employees Work)**, a Second Degree Felony, in Salt Lake County, State of Utah, during calendar year 2009, in violation of Utah Code Title 76 Chapter 6 Section 409, the defendant DAVID M. RUSHTON, as the owner/manager/operator of Fooptube, LLC, did obtain services which he knew were available only for compensation by deception, threat, force, or any other means designed to avoid the due payment for them; to wit, the defendant obtained the use/benefit of the services up to 95 or more employees without the benefit of compensating said employees for their services, and the services were valued in excess of \$5,000.00.

**In the Alternative to Counts 5 & 6 Only - Counts 7-19 Below:**

**COUNT 7**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during October 2008, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid. c d p

**COUNT 8**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during November 2008, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 9**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during December 2008, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.



**COUNT 10**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during January 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 11**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during February 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 12**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during March 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 13**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during April 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Fooptube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 14**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES,** a Class A Misdemeanor, in Salt Lake County, State of Utah, during May 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Ffootube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 15**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES,** a Class A Misdemeanor, in Salt Lake County, State of Utah, during June 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Ffootube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 16**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES,** a Class A Misdemeanor, in Salt Lake County, State of Utah, during July 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Ffootube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 17**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES,** a Class A Misdemeanor, in Salt Lake County, State of Utah, during August 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Ffootube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 18**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES,** a Class A Misdemeanor, in Salt Lake County, State of Utah, during September 2009, in violation

of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Ffootube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 19**

**FAILURE TO PAY WAGES OR ADVISING NEW EMPLOYEES OF UNPAID WAGES**, a Class A Misdemeanor, in Salt Lake County, State of Utah, during October 2009, in violation of Utah Code Title 34 Chapter 28 Section 12, defendant DAVID M. RUSHTON, as the owner/manager/employer of Ffootube, LLC, did refuse to pay wages to his employees which were due and payable, or with an intent to secure for himself or any other person any discount upon such indebtedness, or who hired additional employees without advising each of them of every wage claim due and unpaid.

**COUNT 20**

**ENGAGING IN A PATTERN OF UNLAWFUL ACTIVITY, a SECOND DEGREE FELONY**, a Second Degree Felony, in Salt Lake County, State of Utah on or about years 2008 and 2009, in violation of Utah Code Title 76 Chapter 10 Section 1603, concerning the establishment known as Ffootube LLC, located in or doing business in Salt Lake County, in that the defendant DAVID M. RUSHTON as a party to the offense: CDP

(1) received proceeds derived, either directly or indirectly, from a pattern of unlawful activity in which the defendant participated as a principal, and then used or invested, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise; or

(3) was employed by or associated with the enterprise, and did conduct or participate, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.

**Notice of Predicate Offenses:**

For purposes of establishing defendant's pattern of unlawful activity, the State of Utah asserts that defendant, DAVID M. RUSHTON, has engaged in conduct, which constitutes the commission of at least three episodes of unlawful activity, which conduct is alleged as follows:

**COMMUNICATIONS FRAUD**, two (2) Second Degree Felony offenses, in Salt Lake County, State of Utah, for years 2008 and 2009, in violation of Utah Code §76-10-1801.

**UNLAWFUL DEALING BY A FIDUCIARY**, two (2) Second Degree offenses, in Salt

Lake Count, State of Utah, for the calendar years 2008 and 2009 inclusive, in violation of Utah Code §76-6-513.

**THEFT OF SERVICES**, two (2) Second Degree Felony offenses, in Salt Lake County, State of Utah, for years 2008 and 2009 inclusive, in violation of Utah Code §76-6-409.

**THIS INFORMATION IS BASED ON INFORMATION OBTAINED FROM AN INVESTIGATION WHICH INCLUDES THE FOLLOWING WITNESSES OR EVIDENCE RELEVANT TO THE FOLLOWING WITNESSES:**

1. Scott Mann, Utah State Tax Commission (USTC) Special Agent.
2. Negyssue A. Abraha, Agent, U.S. Dept of Labor Employee Benefits Security Administration.
3. Ronald Ludlow, Utah Labor Commission.
4. Keeper of the Records, Utah Labor Commission.
5. Keeper of the Records, Utah Department of Commerce.
6. Keeper of Records, Utah Department of Public Safety.
7. Keeper of the Records, Utah Department of Workforce Services.
8. Various employees/former employees of Ffootube LLC.

#### **PROBABLE CAUSE STATEMENT**

Affiant, under oath, bases this Information upon the following:

1. I, Scott Mann, am a Special Agent with the Utah State Tax Commission's Criminal Investigation Unit. I am a certified law enforcement officer for the State of Utah with over 33 years of experience, which includes more than 21 years of conducting in-depth white collar fraud investigations and I currently hold a designation as a Certified Fraud Examiner.

2. I have conducted an investigation into the activities of David M. Rushton who owned and operated a business listed as Ffootube LLC. As part of my investigation, I have personally reviewed documents from the Utah Department of Commerce, the U.S. Department of Labor, the Utah Labor Commission, the Utah Department of Public Safety and the Utah Department of Workforce Services. As well, I interviewed multiple individuals who were denied their wages by the defendant individually and/or by and through the business Ffootube, LLC.

3. The files and/or records of the following agencies have been reviewed as part of my investigation:

The Utah State Tax Commission.  
The Utah Department of Commerce.  
The Utah Department of Public Safety.  
The Utah Department of Workforce Services.  
The West Valley City Business License Department.

The Utah Labor Commission.  
The U. S. Department of Labor.

4. At all times relevant to this Information, the defendant appears to have lived and/or worked in the State of Utah and at times relevant to this matter the defendant, owned and managed the business Fooptube L.L.C. in the State of Utah.

5. Records of various governmental agencies identify defendant DAVID M. RUSHTON as the principal/co-principal and/or operator of the business Fooptube LLC offering computer programming and design services.

6. The defendant began this business on or about January 2005.

7. Interviews with employees and with others confirmed that the defendant managed the company and was the individual who make decisions relevant to wages, compensation and the payment of same.

8. During the years 2008 and 2009, the defendant promised wages and compensation to at least 95 individuals. Those individuals were never or completely compensated consistent with the information communicated by the defendant.

9. During the years 2008 and 2009, the defendant kept and/or failed to remit wages to the aforementioned approximately 95 individuals.

10. Acting as a fiduciary for said wages/funds, the defendant kept said wages/funds and/or failed to remit the same to said employees.

11. The defendant accepted the services of said employees during years 2008 and 2009 while knowingly failing to recompense said individuals

12. The results of my investigation show that at or about 95 of the defendant's employee, or at or about 50% of the defendant's workforce were not paid as required/promised.

13. Moreover, during the same time period, the defendant did compensate/pay the wages of selected individuals, such as himself, his spouse, family members and other selected individuals.

14. Utah Labor Commission records, which I personally reviewed, reflect that Fooptube employees have made wage claims against the company in an amount exceeding \$1,170,164.00.

15. I have also reviewed records wherein the defendant David M. Rushton admits that he failed to pay employee wages.

16. Furthermore, the same records reflect that the defendant failed to remit funds collected from employees for the purpose of depositing them into retirement funds (a 401K and/or Roth 401K pension fund accounts) that were set up or represented to have been set up at the Footube business for the benefit of the employees.

17. The defendant has admitted to having not remitted funds so withheld on account of the aforementioned retirement funds and has also admitted that he knew he should have remitted those funds.

18. In addition to any other unpaid wages, the defendant improperly withheld and failed to account for funds withheld from employees in/about the amount of \$1,214,164.00 (as of February 2011).

19. The defendant undertook the aforementioned activities as a regular part/pattern of his business operation and did improperly keep and/or use such funds as part of the funds within and sustaining his business, Footube, LLC.

20. Several attempts had been made by employees and others to ameliorate the situation. To date, there has been a complete failure by the defendant to respond and/or remedy the situation concerning unpaid wages and/or the non-funding of the retirement accounts or take any meaningful steps in that direction.

21. The defendant have used and continued to use the improperly/fraudulently retained/converted funds, both funds that were due and owing as wages and/or funds that were part of the employees retirement funds, to further his business enterprise and/or for personal use.

22. The defendant asserted control over the aforementioned business organization and the funds generated from such organization have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.

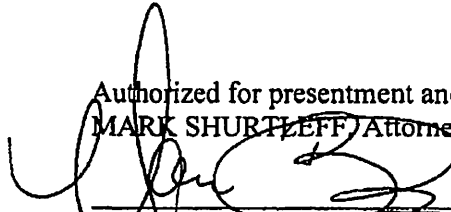
  
Scott Mann

USTC Investigator, Affiant

Subscribed and sworn to before me this 2nd day of NOV, 2011.

  
JUDGE / MAGISTRATE

Authorized for presentment and filing:  
MARK SHURTLEFF Attorney General

  
Mark Baer, Assistant Attorney General

F:\User\MB\AER\RushtonEmploymentCase\RushtonDavidInformationEmployeeWageCase2ndAmended(Alternative Counts).wpd

## **ADDENDUM F**

Tab F



**FILED DISTRICT COURT**  
Third Judicial District

APR 14 2009

By                      SALT LAKE COUNTY  
Deputy Clerk

MARK BAER #5440  
Assistant Attorney General  
MARK SHURTLEFF #4666  
Attorney General  
Attorney For The State of Utah  
160 East 300 South  
Salt Lake City, Utah 84114  
Telephone (801)366-0199

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT  
SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH,	INFORMATION
Plaintiff,  v.	
MAUREEN D. RUSHTON DOB:	Criminal No. 09191020129
DAVID M. RUSHTON DOB:	Criminal No. 0919102070
Defendants.	

The undersigned SCOTT MANN, states on information and belief that the defendants committed the crime(s) of:

**COUNT 1**

**OFFENSES RELATING TO TAXATION:**

**FAILING TO RENDER PROPER TAX RETURNS (Withholding Tax Returns)**, a Third Degree Felony, in Salt Lake County, State of Utah, on or before the 31<sup>st</sup> day of March 2007, 30<sup>th</sup> day of June 2007, 30<sup>th</sup> day of September 2007, the 31<sup>st</sup> of December 2007; the 31<sup>st</sup> day of March 2008, and/or the 30<sup>th</sup> day of June 2008, in violation of Title 76, Chapter 8, Section 1101(1)(c), Utah Code, in that the defendants, MAUREEN D. RUSHTON and DAVID M. RUSHTON, as parties to the offense, with an intent to evade any tax or requirement of Title 59 or any lawful requirement of the State Tax Commission, failed to make, render sign, or verify any return or to supply any information within the time required, or did make, render, sign, verify any false or fraudulent return or statement, or supplied false or fraudulent information; to wit, the defendants failed to file withholding tax returns and/or filed a false withholding returns for quarterly reporting requirements for the tax year(s) 2007 through 2008 inclusive.

## COUNT 2

### **OFFENSES RELATED TO TAXATION:**

**INTENT TO EVADE (Withholding Taxes)** 31<sup>st</sup> day of March 2007, 30<sup>th</sup> day of June 2007, 30<sup>th</sup> day of September 2007, the 31<sup>st</sup> of December 2007, the 31<sup>st</sup> day of March 2008, and/or the 30<sup>th</sup> day of June 2008, in violation of Title 76, Chapter 8, Section 1101(1)(d), Utah Code, the defendants MAUREEN D. RUSHTON and DAVID M. RUSHTON, as parties to the offense, intentionally or willfully attempted to evade or defeat a tax or the payment thereof; to wit, the defendants did take distinct actions and undertook specific acts to evade their withholding tax obligations in that they did co-mingle funds and/or created false documentation, as well as other steps to evade the payment of their withholding tax obligations for tax years from 2007 through 2008.

## COUNT 3

**UNLAWFUL DEALING OF PROPERTY BY A FIDUCIARY (Employees W2 Withholding)**, a Second Degree Felony, in Salt Lake County, State of Utah on or before the 31<sup>st</sup> day of March 2007, 30<sup>th</sup> day of June 2007, 30<sup>th</sup> day of September 2007, the 31<sup>st</sup> of December 2008, the 31<sup>st</sup> day of March 2008, and/or the 30<sup>th</sup> day of June 2008, in violation of Utah Code Title 76 Chapter 6 Section 513, inclusive, in Salt Lake County, State of Utah, the defendants MAUREEN D. RUSHTON and DAVID M. RUSHTON, as parties to the offense, did deal with property that has been entrusted to them as fiduciaries, in a manner which they knew was a violation of their duty and which involved substantial risk of loss or detriment to the owner(s) or to a person(s) for whose benefit the property was entrusted, and the value of the property was or exceeded \$5,000.00; to wit, the defendants as a fiduciary for their company did obtain and deal with withholding of employee taxes in excess of \$5,000.00 and did fail to remit the same to the State of Utah.

## COUNT 4

**COMMUNICATIONS FRAUD**, a Second Degree Felony, in Salt Lake County, State of Utah, on or about January 31, 2008 in violation of Utah Code Title 76 Chapter 10 Section 1801 and Title 76 Chapter 2 Section 202 defendants, MAUREEN D. RUSHTON and DAVID M. RUSHTON, as parties to the offense, did devise a scheme or artifice to defraud another or to obtain money, property, or anything of value from another by false or fraudulent pretenses, representations, promises, or material omissions, and communicated directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice and the value of the property defrauded or obtained is or exceeds \$5,000.00; to wit, the defendants devised a scheme or artifice to obtain or defraud money from the State of Utah by issuing fraudulent W-2 forms and withholding-tax statements to employees for use in filing individual income tax returns to the State of Utah.

**COUNT 5**

**OFFENSES RELATING TO TAXATION:**

**FAILING TO RENDER PROPER TAX RETURNS (Tax Returns - Personal)**, a Third Degree Felony, in Salt Lake County, State of Utah, on or before the 15<sup>th</sup> day of April for each of the following years, 2006, 2007 and/or 2008, in violation of Title 76, Chapter 8, Section 1101(1)(c), Utah Code, in that the defendants, MAUREEN D. RUSHTON and DAVID M. RUSHTON, as parties to the offense, with an intent to evade any tax or requirement of Title 59 or any lawful requirement of the State Tax Commission, failed to make, render sign, or verify any return or to supply any information within the time required, or did make, render, sign, verify any false or fraudulent return or statement, or supplied false or fraudulent information; to wit, the defendants failed to file personal income tax returns for the tax year(s) 2005, 2006 and/or 2007.

**COUNT 6**

**ENGAGING IN A PATTERN OF UNLAWFUL ACTIVITY, (RACKETEERING)**, a SECOND DEGREE FELONY, a Second Degree Felony, in Salt Lake County, State of Utah on or about the 31<sup>st</sup> day of March 2007 through June 2008 in violation of Utah Code Title 76 Chapter 10 Section 1603, concerning the establishment known as Fooptube LLC, located in or doing business in Salt Lake County, in that the defendants MAUREEN D. RUSHTON and DAVID M. RUSHTON as a parties to the offense:

(1) received proceeds derived, either directly or indirectly, from a pattern of unlawful activity in which the defendants participated as a principal, and then used or invested, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise; or

(3) was employed by or associated with the enterprise, and did conduct or participate, directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.

**Notice of Predicate Offenses:**

For purposes of establishing defendant's pattern of unlawful activity, the State of Utah asserts that defendants, MAUREEN D. RUSHTON and DAVID M. RUSHTON, has engaged in conduct, which constitutes the commission of at least three episodes of unlawful activity, which conduct is alleged as follows:

**FAILURE TO FILE OR RENDER A PROPER TAX RETURN**, two (2) Third Degree Felony offenses, in Salt Lake County, State of Utah, for the tax years/periods 2005, 2006, 2007 and/or 2008, in violation of Utah Code §76-8-1101(1)(c).

**INTENT TO EVADE**, one (1) Second Degree offense, in Salt Lake County, State of Utah, for the tax reporting quarters of 2007, through the first two tax reporting quarters of 2008 inclusive, in violation of Utah Code §76-8-1101(1)(d).

**UNLAWFUL DEALING BY A FIDUCIARY**, one (1) Second Degree offense, in Salt Lake County, State of Utah, for the tax reporting quarters of years 2007 through the first two quarters of 2008 inclusive, in violation of Utah Code §76-6-513.

**COMMUNICATIONS FRAUD**, one (1) Second Degree Felony in Salt Lake County, State of Utah, occurring or about January 31, 2008, in violation of Utah Code §76-10-1801 and 76-2-202.

**THIS INFORMATION IS BASED ON INFORMATION OBTAINED FROM AN INVESTIGATION WHICH INCLUDES THE FOLLOWING WITNESSES OR EVIDENCE RELEVANT TO THE FOLLOWING WITNESSES:**

1. Scott Mann, (USTC) Utah State Tax Commission Investigator.
2. Dolores Furness, Keeper of the Records, USTC.
3. Utah State Tax Commission, Auditing Department.
4. Keeper of the Records, Utah Department of Commerce.
5. Keeper of Records, Utah Department of Public Safety.
6. Various employees/former employees of Footube LLC.

**PROBABLE CAUSE STATEMENT**

Affiant, under oath, bases this Information upon the following:

1. I, Scott Mann, am an investigator with the Utah State Tax Commission's Criminal Investigation Unit.
2. I have reviewed information in my file and investigated allegations of violations of the Utah Criminal Code as it relates to taxes and related criminal activity against the above cited defendants, MAUREEN D. RUSHTON and DAVID M. RUSHTON.
3. The files and/or records of the following agencies have been reviewed as part of my investigation:  
  
The Utah State Tax Commission.  
The Utah Department of Commerce.  
The Utah Department of Public Safety.  
The Utah Department of Workforce Services.  
The West Valley City Business License Department.

4. At all times relevant to this Information, the defendants appear to have lived and/or worked in the State of Utah and at times relevant to this matter the defendants, owned a business and/or managed or was employed and/or was receiving income in the State of Utah.

5. Records of various governmental agencies identify defendants MAUREEN D. RUSHTON and DAVID M. RUSHTON as the owners and/or operators of a business offering programming and design services, the business being known as Fooptube LLC and/or was an officer or manager of said business at times relevant to these allegations. Records of various government agencies indicate that the defendants began this business on or about January 2005. Interviews with employees, Fooptube LLC's corporate counsel and with defendant David M. Rushton confirmed that the Rushtons ran the company.

6. MAUREEN D. RUSHTON AND DAVID M. RUSHTON are and/or have been husband and wife with a common residence during all times relevant to this matter.

7. The defendants have been principals and/or held themselves out to be a principal of said business since its creation and in any event at all times relevant to this Information. The business has operated with as many as 211 employees.

8. During the course of my investigation I interviewed current and former employees of Fooptube LLC and reviewed information obtained that related to withholding taxes collected by Fooptube LLC from employees working at the company.

9. That information was cross-referenced with information and records gathered from the various governmental agencies listed above.

10. The results of this records check shows that the defendants, while acting as principals with authority over the business of Fooptube LLC, withheld payroll taxes from individual employees and held such funds as fiduciaries and failed to remit the same to the Utah State Tax Commission.

11. In addition, the defendants failed to file withholding tax returns as required with the Utah taxing authorities.

12. During the course of my investigation, defendants MAUREEN D. RUSHTON AND DAVID M. RUSHTON, were informed and/or became aware of their failures to file withholding tax returns on behalf of the aforementioned business. Subsequent to that time, the defendants, untimely, filed various withholding tax returns, however they have failed to remit withheld funds to date.

13. Several attempts have been made by representative of the Utah State Tax Commission to contact the defendants in this case to have the defendants remit or work

toward remitting the improperly held withholding taxes. To date, there has been a failure to respond and remit the same.

14. For various years before the years included in this Information, the defendants were informed of their failure to file withholding tax returns and/or remit withholding taxes by and through various civil proceedings at or with the Utah State Tax Commission. These hearings reiterated and reinforced the defendants' knowledge of their obligations and further illustrates that the defendants actions in this matter were knowingly and/or intentionally committed.

15. In January 2008, Fooptube LLC was required by law to provide W-2 reports to employees. At that time, the defendants communicated, or caused to be communicated untruthful/bogus W-2 documents purported to represent the withholding of Utah state withholding taxes for the time periods in question in the aggregate amount of in excess of \$585,917.89 from, at or about, 211 employees of Fooptube LLC.

16. None of the funds referenced in the aforementioned W-2 documents were ever remitted to the State of Utah.

17. Nevertheless, based upon the aforementioned bogus W-2 documents and by and through the filing of individual tax returns by the employees of Fooptube, credits were applied for the benefit of such employees and/or refunds were mailed out to such taxpayers. The amount of funds so refunded and/or credited totals in the amount at or about \$585,917.89.

18. The defendants have used and continued to use the improperly/fraudulently retained/converted funds to further their business enterprise as well as for their personal use.

19. The defendants had control over the aforementioned business organization and the funds generated from such organization have been used, at least in part, to help continue such operation and/or continue the unlawful criminal activity.

20. The total amount of taxes, interest and penalty that the defendants have failed to remit now total in or in excess of \$1,213,528.02, this amount being calculated to February 17, 2009.

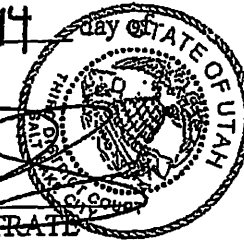
21. In addition, the defendants failed to file any personal income tax returns for years 2005, 2006 and/or 2007 despite having income in amounts in excess of the minimum filing requirement amount at which point individuals are required to file Utah state income tax returns; to wit, the withheld withholding taxes alone were in excess of said minimum requirements, and those improperly retained funds/income were only one component of income attributable to the defendants during that time period.

22. It appears to this affiant that the defendants have, at a minimum, committed offenses relating to taxation, have unlawfully dealt with monies as fiduciaries, committed communication fraud with respect to the improper/bogus W-2s and engaged in a pattern of unlawful activity.



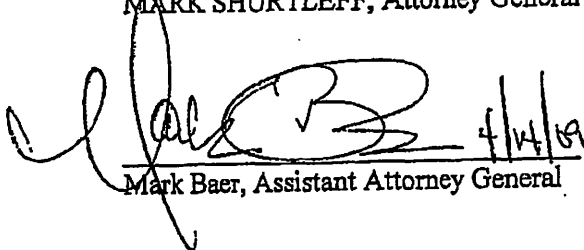
Scott Mann  
USTC Investigator, Affiant

Subscribed and sworn to before me this 14 day of April, 2009.



JUDGE / MAGISTRATE

Authorized for presentment and filing:  
MARK SHURTLEFF, Attorney General

 4/14/09  
Mark Baer, Assistant Attorney General

## **ADDENDUM G**



Tab G

**UTAH STATE TAX COMMISSION**  
**Criminal Investigations Unit**



Case # 10-009  
David M. Rushton  
Fooptube LLC

Special Agent Scott Mann

# Section

1

**Utah State Tax Commission  
Report of Investigation**

**Case # 10-009**

**David M. Rushton  
Fooptube LLC**

**Table of Contents**

	<u>Section</u>
Case Report	1
Suspect Identification	2
Corporate Files	3
Utah Labor Commission Summary of Wage Losses	4
Fooptube Consent Decree in Case #2:09cv00026	5
Report of Interview of David M. Rushton	6
Report of Interview of Carrie Doulgerakis	7
Utah Department of Workforce Services Report	8
Information & Warrants	9
Utah State Codes	10



February 1, 2011

**Report of Criminal Investigation**

Submitted by: Special Agent Scott S. Mann

In re: Case No. 10-009

Name: David M. Rushton

DOB:

SSN:

Address:

Representation: Darin Goeff

Disposition: Pending Prosecution

**CASE TYPE / CRIMINAL VIOLATION:**

This investigation involves charges of Theft (76-6-405 UCA), Theft of Services (76-6-409 UCA), Unlawful Dealing of Property by a Fiduciary (76-6-513 UCA) and violation of engaging in a Pattern of Unlawful Activity (76-10-1603).

**SOURCE OF REFERRAL:**

The case was referred by Assistant Utah Attorney General Ronald V. Ludlow who is assigned to the Utah Labor Commission and investigators for the U.S. Department of Labor Employee Benefits and Security Administration.

**VENUE / JURISDICTION:**

The company was located and operated within Salt Lake County. Any charges filed in this investigation will be filed in the Third District Court of Utah located in Salt Lake City.

**RELATED CASES:**

This case relates to CIU Case #08-011 that investigated the subject for theft of withholding taxes and engaging in patterns of unlawful activity.

## **CRIMINAL HISTORY:**

The subject was charged by the Utah State Tax Commission's Criminal Investigation Unit with tax violations of Failure to File, Tax Evasion, Communication Fraud, and Engaging in a Pattern of Unlawful Activity. David Rushton pled guilty to one count of Failure to File and one count of Engaging in a Pattern of Unlawful Activity in September of 2010. The charges against Maureen Rushton were dismissed as part of the plea negotiations.

## **INVESTIGATION SUMMARY:**

In 2008, the Criminal Investigation Unit began an investigation into allegations of theft of withholding taxes by Fooptube LLC, a company owned and operated by David M. Rushton and Maureen D. Rushton. During the investigation, the Utah Labor Commission (ULC) contacted this investigator and advised that the subjects had committed theft of services from approximately 84 individuals who had worked for the company between October 2008 and October 2009. Additional persons reported unpaid wages since this original contact. As of the date of this report 95 employees have reported unpaid wages for services provided.

The ULC stated that David Rushton and Maureen Rushton had operated Fooptube LLC in Utah for several years. In 2008 and 2009, the company failed to pay employees for services received as required by Utah State statute. Many Fooptube employees filed wage claims with the ULC when payroll checks were not issued within the required time period. These missed pay cover pay periods from October 1, 2008 through December 31 of 2009. While the company was missing payroll for current employees they continued to hire additional employees and operated through the year of 2009. Eventually 95 employees reported wages of \$1,170,164.07 that had not been paid (see section #4). This summary identifies the claimants and the amount wages owed for services provided to the company.

During this investigation, I became aware of a criminal investigation being conducted by the Department of Labor's Employee Benefits Security Administration (EBSA) out of San Francisco. This investigation involved allegations that Fooptube had failed to remit employee's contributions to a traditional 401K and Roth 401K pension plan being operated by Fooptube LLC.

According to the EBSA, David Rushton established the plan as an employee benefit pension plan effective January 1, 2006. David Rushton and Carrie Doulgerakis (David Rushton's niece) were established as the plan administrators. The authorization of the plan by David Rushton established a fiduciary relationship between the employees, the plan and himself (as the administrator). The EBSA investigation revealed that Rushton had failed to remit contributions to the plan for a period of February 2007 through October 2008. The total amount diverted from the employees' pension plan is \$107,000.00.

In the EBSA investigation, EBSA Senior Investigator Negussie Abraha interviewed David Rushton on April 28, 2009 at the Residence Inn City Center in Salt Lake City, Utah. A copy of the interview report is included in this report (see section #6). During the interview, Rushton admitted that he knew that he was supposed to deposit the funds immediately into the plan's account. He further admitted that "he was responsible for the decision to delay or not to pay the contributions" (see paragraph #35).

As part of my investigation on the theft of withholding taxes, I interviewed several members of Ffootube LLC's management team. During the interviews it was determined that the management team were members of Rushton's family. Each of the individuals stated that David Rushton made the decisions of who was to be paid and who was not to be paid. During these interviews the management team admitted that many times the company had issued payroll checks that they knew could not be covered by the funds in the bank accounts.

I interviewed the person who was the office manager of Ffootube from February 2006 through March 2009. She advised that David Rushton made all of the decisions on who was to be paid and who was not to be paid. She also advised of certain expenses paid out of company funds to the Rushtons that appeared to be of a personal nature (see section #7).

#### **COMPUTED LOSSES OF WAGES AND PENSION CONTRIBUTIONS:**

The ULC said they had received 95 claims filed by employees of Ffootube LLC for losses of wages. The total losses claimed by employees through the date of this report total \$1,170,164.81. The 95 employees responding to the survey amount to 47% of the total number of known Ffootube LLC employees.

In the issue of the regular 401K and Roth 401K contributions, it was determined by the EBSA that David Rushton had failed to remit \$107,000 in funds to the pension plan as required by the plan's policy.

The total theft of services and contributions is determined to be \$1,214,164.81.

#### **SUBJECT OF INVESTIGATION INTERVIEW:**

The subject refused to be interviewed by SA Scott Mann on the advice of his attorney. However during the investigation the subject was interviewed by EBSA Investigator Negussie Abraha. A copy of this interview report is incorporated into this report. (see section #6)

## **ADDITIONAL INTERVIEWS**

I conducted additional interviews in the previous matter involving Fooptube LLC. The management team that was interviewed included Anthony and Corrine rushton, Mist Scott, Hal Rushton Don Milham, and Nadine Milham.

## **EVIDENCE:**

1. Spreadsheets identifying the actual wage claims submitted by individual employees of Fooptube LLC.
2. Survey results, survey forms, and summary sheet identifying wages claimed to be owed to various employees.
3. Interview report/statement of EBSA Senior Investigator Negussie A Abraha who interviewed subject David M. Rushton.
4. The admission of David Rushton to owing employees wages and 401K funds to employees
5. Statements of Fooptube LLC management staff that David Rushton made the decisions on who and what expenses to pay.

## **Conclusion and Recommendations**

This investigation disclosed that Fooptube LLC failed to pay wages to employees of the company as required by Utah Code section 34-28-5, during the years of 2008 through 2009. The total amount of wages not paid for services provided exceeds \$1,170,164.00. The subject knew that the work being provided was on pay basis and established wages for individual employees. The failure to pay the wages of some employees while paying other employees on a continuing basis constitutes a theft of services in violation of Utah Code section 76-6-409. The subject accomplished the theft of services by issuing insufficient funds checks to employees and promises to pay.

In addition to failing to pay wages owed to 47% of his employees, the subject David Rushton collected contributions to a regular 401K and a Roth 401K plan, during the years of 2007 and 2008. Rushton then failed to remit the funds to the Pension Plan's trust account as required by law. The subject thereby breached his fiduciary responsibility in remitting the funds collected from employees. The evidence also shows that his failure to pay the wages of the employees and the failure to remit the pension funds were intentional. The total amount of funds not remitted to the pension funds is \$107,000.00.



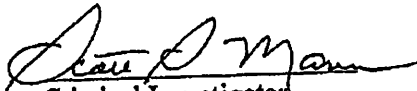
The investigation revealed that numerous people were victimized, the victimization took place over an extended period of time, and two different schemes were used to divert funds. These schemes constitute a pattern of unlawful activity in violation of Utah State Statute 76-10-1601 through 76-10-1603.

Based upon the above facts, I recommend that David M. Rushton be prosecuted under the provisions of the following criminal violations, and in conjunction with Utah State Codes:

Utah Criminal Code Ann. § 76-6-409 Theft of Services, a Second-degree felony, (2) counts,

Utah Criminal Code Ann. § 76-6-513, Unlawful Dealing of Property by a Fiduciary, a Second-degree felony, (2) counts.

Utah Criminal Code Ann. § 76-10-1603, Conducting a Pattern of Unlawful Activity, a Second-degree felony, (1) counts.

  
Criminal Investigator