

2016

**State of Utah, Plaintiff/Appellee, v. Aaron David Trent Needham,
Defendant/Appellant**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellee, *Utah v. Needham*, No. 20140483 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3571

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Case No. 20140483-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

AARON DAVID TRENT NEEDHAM,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions on eight counts of communications fraud and one count of pattern of unlawful activity, in the Fifth District Judicial District, Washington County, the Honorable A. Lynn Payne presiding

AARON DAVID TRENT NEEDHAM
Inmate No. 21154
Utah State Prison
P.O. Box 140854
Salt Lake City, UT 84114

Appellant Pro Se

JEANNE B. INOUE (1618)
Assistant Attorney General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

JACOB S. TAYLOR
Utah Attorney General's Office

Counsel for Appellee

FILED
UTAH APPELLATE COURTS

FEB 26 2016

Case No. 20140483-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

AARON DAVID TRENT NEEDHAM,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions on eight counts of communications fraud and one count of pattern of unlawful activity, in the Fifth District Judicial District, Washington County, the Honorable A. Lynn Payne presiding

AARON DAVID TRENT NEEDHAM
Inmate No. 21154
Utah State Prison
P.O. Box 140854
Salt Lake City, UT 84114

Appellant Pro Se

JEANNE B. INOUE (1618)
Assistant Attorney General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

JACOB S. TAYLOR
Utah Attorney General's Office

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
INTRODUCTION.....	1
STATEMENT OF THE ISSUES.....	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	3
STATEMENT OF THE CASE	3
A. Summary of facts.....	3
B. Summary of proceedings.....	8
SUMMARY OF ARGUMENT	13
ARGUMENT	15
III. THE TRIAL COURT PROPERLY DENIED THE NEW TRIAL MOTION, WHERE ADMITTING THE CHALLENGED DEPOSITION WAS NEITHER ERROR NOR PREJUDICIAL	15
A. This Court should not reach Defendant's claims that his deposition absence was voluntary and that reasonable counsel would have objected to admitting the deposition at trial.....	16
B. Defendant has not adequately briefed this claim.....	17
C. The trial court did not clearly err in finding that Defendant's absence from the deposition was voluntary.	18
D. Defendant has not shown that the trial court clearly erred when it found that at the time of trial, trial counsel had no reason to believe that Defendant's absence was involuntary and therefore no reason to object to the deposition.....	23
1. Additional facts.....	23
2. Given Defendant's concession that he did not tell trial counsel that he was unable to attend the deposition,	

Defendant has not shown that trial counsel should have objected to admission of the deposition at trial.	24
E. In any event, admission of the deposition at trial was harmless.	26
II. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT PLAINLY ERRED FOR NOT DISMISSING THE STATE'S PROSECUTION ON DOUBLE JEOPARDY GROUNDS	28
A. This court should not reach Defendant's unpreserved claim because he has not argued plain error.	29
B. Defendant has not adequately briefed this claim.	30
C. Because the prosecution in this case was not for the same conduct as the DOPL sanctions, Defendant has not shown a double jeopardy violation.	31
1. Additional facts.	31
2. Defendant has not demonstrated that DOPL's sanctions for contracting without a license in 2003 required dismissal of his criminal charges.	32
D. Defendant has not demonstrated that BACT's civil suit against him required dismissal of his criminal charges.	33
III. THIS COURT SHOULD NOT REACH DEFENDANT'S INADEQUATELY BRIEFED CLAIMS OF UNCLEARLY SPECIFIED ERROR	35
A. Defendant has not adequately identified any other error or adequately briefed any other claim.	35
B. No <i>Brady</i> error occurred.	36
1. Withheld filings.	37
2. John Grealish letter.	39
a. Additional facts.	39

b. Because Defendant has not acknowledged the trial court’s ruling, much less challenged the factual findings upon which it is based, this Court should not review his claim that the prosecutor withheld an exculpatory letter.41

CONCLUSION42

CERTIFICATE OF COMPLIANCE.....43

ADDENDA

Addendum A: U.S. Const. amend. VI

Addendum B: Unofficial, uncorrected typed transcription of body of appellant’s handwritten brief (pp. 5-37)

Addendum C: Docket, civil case 060501877

Addendum D: Ruling on motion for new trial (R1129-37)

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	36
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	27
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	36
<i>Hudson v. United States</i> , 522 U.S. 93 (1997)	32, 33
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	<i>passim</i>
<i>Moon v. Head</i> , 285 F.3d 1301 (11th Cir. 2002).....	36, 38
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	25
<i>Strickler v. Green</i> , 527 U.S. 263 (1999).....	37
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	37

STATE CASES

<i>Allen v. Friel</i> , 2008 UT 56, 194 P.3d 903	30
<i>Golden Meadows Props., LC v. Strand</i> , 2010 UT App 257, 241 P.3d 375.....	16
<i>Hodgson v. Farmington City</i> , 2014 UT App 188, 334 P.3d 484.....	18
<i>State v. Arave</i> , 2009 UT App 278, 220 P.3d 182, <i>rev'd on other</i> <i>grounds</i> , 268 P.3d 163 (Utah 2011);	30
<i>State v. Bisner</i> , 2001 UT 99, 37 P.3d 1073	36, 38
<i>State v. Bond</i> , 2015 UT 88, 361 P.3d 104	25
<i>State v. Bushman</i> , 2010 UT App 120, 231 P.3d 833	33, 34
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993).....	3, 4, 5, 6
<i>State v. Green</i> , 2005 UT 9, 108 P.3d 710.....	<i>passim</i>
<i>State v. Lenkart</i> , 2011 UT 27, 262 P.3d 1	<i>passim</i>

<i>State v. Mitchell</i> , 2013 UT App 289, 318 P.3d 238.....	16, 25, 42
<i>State v. Nebeker</i> , 657 P.2d 1359 (Utah 1983)	37, 38
<i>State v. Nielsen</i> , 2014 UT 10, 326 P.3d 645	18
<i>State v. Pando</i> , 2005 UT App 384, 122 P.3d 672	19
<i>State v. Pledger</i> , 896 P.2d 1226 (Utah 1995)	29
<i>State v. Ross</i> , 951 P.2d 236 (Utah App. 1997).....	34
<i>State v. Thomas</i> , 961 P.2d 299 (Utah 1998).....	17
<i>State v. Wanosik</i> , 2003 UT 46, 79 P.3d 937	19

FEDERAL STATUTES

U.S. Const. amend. V	32
U.S. Const. amend. VI.....	iii, 3

STATE RULES

Utah R. Crim. P. 14	9
Utah R. App. P. 24	17

Case No. 20140483-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

AARON DAVID TRENT NEEDHAM,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions on eight counts of communications fraud and one count of pattern of unlawful activity, all second degree felonies. This Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(e) (West Supp. 2015).

INTRODUCTION

Defendant entered into limited joint venture agreements with Clement Tebbs (Clement) and his company, BACT Limited Partnership, to build and sell homes on specified lots (the joint venture homes). BACT would provide financing for materials and subcontractors. Defendant would do the construction. Defendant made draws to cover the construction costs, but used much of the money for unrelated purposes.

Defendant did not dispute that he had diverted the funds, but claimed that Clement had authorized the diversion.

The State charged Defendant with communication fraud and pattern of unlawful activity. A jury found him guilty. After judgment, he filed a motion for new trial. The trial court denied it.

STATEMENT OF THE ISSUES

1. Has Defendant shown that the trial court erred by denying his motion for a new trial?

Standard of review. An appellate court typically reviews “a denial of a motion for a new trial under an abuse of discretion standard.” *State v. Lenkart*, 2011 UT 27, ¶20, 262 P.3d 1) (citation omitted). However, when the motion includes a claim of ineffective assistance of counsel, the appellate court reviews that claim as a “mixed question of law and fact, ... review[ing] the trial court’s application of the law to the facts under a correctness standard.” *Id.* (citation omitted). If there are factual findings, the Court “will not set them aside unless they are clearly erroneous.” *Id.* (citation omitted).

2. Has Defendant shown that the trial court plainly erred for not sua sponte dismissing the prosecution as a violation of double jeopardy?

Standard of Review. Because this claim is unpreserved, Defendant must establish plain error. He must show that error exists, that the error should have been obvious to the trial court, and that the error was harmful. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This constitutional provision is reproduced in Addendum A:

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Summary of facts.¹

Defendant entered into limited joint venture agreements with Clement Tebbs to build homes on several lots in Washington County, Utah, and in Mesquite, Nevada. *See* State's Trial Ex. 1-5. Clement's company,

¹ The trial court clerk numbered the case transcripts from 1 to 18. Because these numbers appear to reference a pleadings file, the State prefaces those numbers with a "T." Trial transcripts are cited as T2 (day one), T3 (day two), T4 (day three), T6 (day four), T7 (day five), T8 (day six), and T9 (day seven). The State does not cite to T5, a partial transcript extracted from T4 (day three), or to T1, a transcript of the preliminary hearing. The transcript of the April 9, 2014 evidentiary hearing on Defendant's motion for a new trial is cited as T18.

The record contains both the trial exhibits filed in a large manila envelope, listed at R609-10, and the exhibits from the evidentiary hearing on Defendant's motion for a new trial filed in a smaller manila envelope, listed at R1163.

BACT Limited Partnership, would provide financing for the construction; and Defendant would serve as general contractor for the homes, getting funding for the construction by making draw requests on BACT. *See id.*; *see also* State's Trial Ex. 24:14-19; T4:50-60.

The charges in this case are based on transactions in connection with the following properties: lots 26 and 27, LaScala, Mesquite; lots 125 and 131, White Mesa, Mesquite; lot 78, Bloomington Ranches, St. George; and lots 28 and 29, River Hollow, St. George. *See* R272-280. They were based on Defendant's use of some of the funds received from approximately 27 draws on BACT for construction at those locations from March 2005 through June 2005. *See* State's Trial Ex. 7-13.

Defendant began construction on the homes in approximately January 2005. *See* State's Trial Ex. 7. Between January and June, he made draws on BACT for several hundred thousand dollars. *See* State's Trial Ex. 7-13.

In July 2005, Clement asked Greg Adamson, a construction manager for Clement's son John's company, to check on the progress of construction on several of the joint venture lots. T6:125-129. When Adamson visited the sites, he found no workers and saw that almost no construction had been undertaken—workers had dug trenches on some lots, but had poured no

footings. T6:132-33. The few materials that had been delivered to the sites appeared to have been sitting in the sun long enough to become sun bleached. T6:137.

Jolie Bown was an accountant for John Tebbs' company, Bonneville Builders. T6:50. She also did some work for Clement Tebbs and BACT. T6:51. In early August, Leonard McKneely came into her office, asked to speak to her personally, and closed the door. T6:63.

Two minutes after McKneely left, Bown told John Tebbs about her conversation with McKneely. *Id.* McKneely had told her that he felt guilty and wanted to "come clean." T6:211. He told her that Defendant had used checks written for construction on two LaScala lots to pay off work done on McKneely's Green Springs home. T6:211. The payments were "in lieu of a debt" that Defendant owed to McKneely. *Id.*

After talking to Bown, John called Defendant and told him to come to Salt Lake City immediately. T6:214. On August 11, 2005, Defendant met with Clement and John Tebbs, Jolie Bown, Greg Adamson, and Bonneville project assistant Julie Call to try to find out what happened to the money drawn on BACT. T6:66, 149. At that meeting, John confronted Defendant with Jolie's report of McKneely's visit and admissions. T6:212. John accused Defendant of fraud. *Id.* Defendant said he was "really, really

sorry.” *Id.* He said he thought he could sell McKneely’s home, make some money on the joint venture homes, and pay off the money he had taken. *Id.*

Defendant did not claim that Clement had given him permission to use the money for debts on McKneely’s home. T6:216-17. He did not claim that he and Clement Tebbs had an agreement allowing him to use the money drawn for the joint venture homes for his personal expenses. T6:213. He did not refer to “anything in writing that would allow him to do what he did.”² *Id.* Rather, he admitted the diversions, apologized, and agreed to try to “right his wrong.” T6:217-19.

Jolie and Greg Adamson met with Defendant again on October 24, 2005, and Defendant told them that he had spent \$776,783 drawn from BACT for the following purposes: \$200,000 went to pay off debts, liens, and old bills associated with projects in which BACT had no interest; \$130,000 went to regain Defendant’s Utah contractor’s license; and \$446,783 went to Defendant’s personal use. T6:96; State’s Trial Ex. 16. Defendant did not say

² Tebbs did lend Defendant \$21,111.00 in July 2005. *See* State’s Tr. Ex. 6 (“Memorandum of Obligation”). Tebb provided the funds in checks made directly from BACT to Defendant’s creditors. *See id.* He also had Defendant sign for and agree to repay the loan with interest from the first proceeds Defendant received from the project profits. The loan was separate from the money Tebbs provided to construct the joint venture homes and was not the subject of any charge in this case. *See id.*; *see also* T4:118.

in the October 24 meeting that Clement Tebbs had allowed him to use the money for personal expenses or that he and Clement had an agreement allowing him to take the money in the way that he did. T6:93. Jolie and Adamson prepared and signed a memo to Clement and John Tebbs detailing Defendant's admissions. T6:97; State's Trial Ex. 16.

Defendant's version. At trial, Defendant testified that Clement had authorized the diversions. T8:79-82 (referencing State's Tr. Ex. 17; Defendant's Tr. Ex. 31). Defendant also presented a document allegedly signed by Clement agreeing to advance Defendant the funds needed to cover his personal expenses until the first closing. *See* State's Tr. Ex. 17; Defendant's Tr. Ex. 31 (with extra page).

At neither the August 11 nor the October 24 meeting did Defendant show anyone the document in State's Tr. Ex. 17, allegedly signed by Clement Tebbs, stating that BACT would cover his personal expenses until the first home sold. T6:93-94. Gordon Summers, DOPL investigator, testified that the signature on the document appeared to have been "cut and pasted."³ T7:31.

³ State Trial Exhibit 17 was allegedly a joint venture agreement signed by Defendant and Clement Tebbs. The third paragraph of the agreement provided that BACT would advance Defendant funds to cover his personal
(continued on next page)

B. Summary of proceedings.

The Salt Lake District Attorney's Office charged Defendant with eight counts of communications fraud and one count of pattern of unlawful activity. R19, 272. After Defendant repeatedly failed to attend pre-trial proceedings, allegedly because of his poor health as a paraplegic, the trial was transferred to St. George, where Defendant lived and could more easily attend. R102-03; *see also* R70, 73, 74-76, 78-79, 80-81, 85-86.

Deposition of Clement Tebbs. Eighty-year-old Clement Tebbs lived in or near Salt Lake City. He was also in poor health, suffering from diabetes, cancer, and esophageal constriction. R390. His esophageal constriction required that he remain within four hours of his physician at the University of Utah Medical Center in Salt Lake City. *Id.* Thus, he could not travel to St. George for any future trial in Defendant's case. R391.

expenses until the first closing on the joint venture properties. Clement Tebbs testified at his deposition that he had never seen the document and would never have agreed to. While the signature looked like his signature, it was not. *See* State Tr. Ex. 24 (Clement Tebbs' Deposition) at 35-36 (referring to Deposition Ex. 7, which is also the State's Trial Exhibit 17).

Defendants Trial Exhibit 31 was the same as State's Trial Exhibit 17, but had a second page. The signature on the second page, which Defendant claimed to be that of Clement Tebbs, appears to be an exact duplicate of the signature on the first page—the signature that Gordon Summers testified appeared to have been "cut and pasted." T7:31.

The State therefore applied under rule 14(a)(8), Utah Rules of Criminal Procedure, for an order that Clement be examined by deposition in Murray, Utah on April 20, 2012. R388, 391. In the application, the State noted that if Defendant should assert that his health would prohibit his traveling to Murray, the deposition could take place at Fillmore.⁴ R391-92. Defendant objected to the State's application, arguing that a deposition would not satisfy the demands of the Confrontation Clause. R395. He asserted that cross-examination "in person or by videoconference allows the factfinder to observe subtleties of demeanor ... as the attorneys ask questions." *Id.* He asked that Clement testify in person at trial or by videoconference. *Id.* 396. Alternatively, he asked that the date of the deposition be postponed to allow him more time to prepare. *Id.* 397.

The State replied that it needed to preserve Clement's testimony in case his health further deteriorated. R400. But the State agreed to have the deposition videotaped and transcribed. *Id.* In addition, the State agreed

⁴ The driving distance from Salt Lake City to St. George is about 300 miles. The distance from Salt Lake City to Fillmore is about 144 miles and from Fillmore to St. George is about 159 miles. See travelmath.com. Thus, Fillmore is about halfway between Salt Lake City (or Murray) and St. George.

that Clement could testify by videoconference at trial if he was physically able at that time. *Id.*

On May 24, 2012, the trial court granted the State's application, ordered the deposition taken on June 14, 2012 at Utah Attorney General's Murray office, and ordered that Defendant "appear at the deposition either in person or by electronic/video transmission." R415-16. The court thereby granted the extension of time Defendant had requested. The order was served on Defendant's then trial counsel, Aric Cramer. R417. The prosecutor arranged for a videographer and court reporter to attend the deposition. T18:22-23.

Cramer's investigator, Brooke Karrington, spoke with Defendant on June 8 about "next week[']s deposition." T18:105. When Karrington talked to Defendant again on June 10 or 11 about the upcoming deposition, Defendant told her he would not be able to travel to Murray because of his physical limitations. T18:110. Karrington talked to him about other options for him to participate in the deposition, such as through Skype or videoconferencing. T18:98, 110. Defendant said for the first time, "Oh, by the way, I've been subpoenaed just now to appear in this ... arbitration hearing." T18:110.

Karrington asked Defendant for a copy of his subpoena to attend the arbitration matter, because counsel would need proof that Defendant had to be elsewhere in order to change the date of the deposition. T18:108. Karrington also asked Defendant to phone the attorney who had subpoenaed him in the arbitration matter to see if the attorney could work around his deposition schedule. *Id.* Defendant did not provide Karrington with the subpoena before or after the deposition. T18:104-05. And nothing suggests that he tried to contact the arbitration attorney to reschedule the date of the arbitration hearing. *See* T18:104-110.

Counsel Aric Cramer therefore appeared at the deposition and cross-examined Clement in Defendant's absence. T18:61. As explained, in the deposition Clement testified that he did not authorize Defendant to divert funds provided for construction on the joint venture lots to pay personal expenses or for any other purposes. State's Tr. Ex. 24:32.

Clement's deposition was later admitted and played at trial. T4:116, 120. John Tebbs, Jolie Bohn, and Greg Adamson also testified at trial. Each of them testified that in the August 11, 2006 meeting, Defendant admitted to Clement Tebbs that he had taken the money, apologized, and promised to return it. T6:68, 150, 212, 217. They each further testified that Defendant made no claim in that meeting that Clement had authorized Defendant to

use the money for other purposes. T6:93, 150-51, 219. Bown and Adamson testified that Defendant did not show them any document in which Clement agreed to pay for Defendant's personal expenses. T6:94, 150-51 (both referencing State's Tr. Ex. 17)

John Grealish, a witness who had been Defendant's partner in the joint venture agreements with Clement Tebbs, but had not been present at the August 11 meeting, also testified at trial. T4:47-50. Grealish testified that none of the BACT financing was to be used "outside the specific costs" required for the construction—no money was to be "moved around," used to get Defendant's contractor's license back, given to Leonard McKneely or his company, or used for construction of the home McKneely was building in the St. George Green Springs neighborhood. T4:63-64.

Judgment. Defendant was convicted of eight counts of communications fraud and one count of pattern of unlawful activity. R1019-21. He was sentenced to nine concurrent one- to fifteen-year prison terms and ordered to pay restitution of \$776,783. *Id.*

Motion for a new trial. Defendant filed a timely motion for a new trial, arguing that he was involuntarily absent from the Clement Tebbs deposition and asserting that admitting the deposition at trial violated his confrontation rights. R1031-46; *see also* R1019-21. He claimed that he had

been subpoenaed to testify at an arbitration matter in St. George on the same day. R1033-34. He also asserted that he did not learn about the deposition until June 12, 2012, and that he was too disabled to make the trip without resting two days before driving to Salt Lake City. R1033. Defendant also claimed that trial counsel was ineffective for not objecting to admission of the deposition at trial. R1044.

Following an evidentiary hearing, the trial court found that Defendant was voluntarily absent from the deposition and concluded that defense counsel was not ineffective for not objecting to its admission at trial. R1136-37. The court then denied Defendant's new trial motion. R1129-37.

Appeal. On appeal, Defendant reasserts his motion-for-new-trial argument that his deposition absence was involuntary and that trial counsel was ineffective for not moving to exclude the deposition at trial. Br.Appt. 19-32. He also argues for the first time that because he had been subject to administrative sanctions and a civil lawsuit for his conduct, his criminal prosecution violated his double jeopardy rights. *Id.* 13-19. He also vaguely suggests that some additional error occurred.

SUMMARY OF ARGUMENT

1. Defendant argues that the trial court erred in denying his new trial motion, reasserting that he was involuntarily absent at Clement Tebbs'

deposition and that trial counsel was ineffective for not moving to exclude the deposition at trial. But Defendant has not challenged that trial court's bases for the ruling. Nor has he shown that the court's factual findings supporting its ruling were clearly erroneous. In any event, the evidence supports both the trial court's findings and its ruling.

2. Defendant argues that the trial court plainly erred for not dismissing his prosecution as a violation of double jeopardy. First, Defendant claims that the Double Jeopardy Clause precludes his prosecution because he was previously subject to administrative sanctions for his conduct. But the administrative sanctions were for contracting without a license in 2003, not diverting BACT's money in 2005.

Alternatively, Defendant claims that his prosecution is precluded under the Double Jeopardy Clause because BACT sued him civilly for his conduct. But Defendant does not tie the lawsuit to the conduct for which he was criminally prosecuted in this case. In any event, double jeopardy protects only against multiple criminal prosecutions or punishments for the same conduct. And Defendant cites no legal authority holding that a private civil lawsuit constitutes a criminal punishment or prosecution.

3. Defendant vaguely suggests that some other error may have occurred. Defendant has not adequately identified that error or adequately briefed any claims related to it. This Court should not reach those claims.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED THE NEW TRIAL MOTION, WHERE ADMITTING THE CHALLENGED DEPOSITION WAS NEITHER ERROR NOR PREJUDICIAL

Following his conviction, Defendant moved for a new trial, arguing that he was involuntarily absent from Clement Tebbs' deposition. R1033-34. He argued that admitting the deposition therefore violated his confrontation rights and that trial counsel should have objected to it. R1034. The trial court denied the motion, finding that Defendant was voluntarily absent from the deposition. R1136. The court found that Defendant's testimony that he had a conflicting arbitration hearing was not credible. R1133. The court also found that Defendant's testimony that his health prevented his attending the hearing was not credible. R1135. The court further ruled that even if Defendant absence was not knowing and voluntary, Defendant had not shown that, based on the information available to trial counsel, counsel should have moved to exclude the deposition. R1136-37. Defendant now challenges the trial court's denial of

his new trial motion. But Defendant has not attempted to show why the trial court clearly erred in finding that his absence was voluntary. Nor has Defendant attempted to show why counsel should have moved to exclude the deposition where Defendant had not told counsel that he was involuntarily absent from it.

A. This Court should not reach Defendant's claims that his deposition absence was voluntary and that reasonable counsel would have objected to admitting the deposition at trial.

An appellant contesting a trial court's ruling must challenge all the bases for that ruling. If he does not, this Court will not address the appellant's claim. *See State v. Mitchell*, 2013 UT App 289, ¶10, 318 P.3d 238 (rejecting challenge to trial court's evidentiary ruling because defendant failed to challenge the basis of that ruling); *Golden Meadows Props., LC v. Strand*, 2010 UT App 257, ¶17, 241 P.3d 375 (rejecting claim that district court erred in striking affidavits, where party "fail[ed] to attack the district court's reasons" for striking them). Here, Defendant has not addressed, much less challenged, the bases for the trial court's ruling or explained why the underlying factual findings are clearly erroneous. *See Br.Aplt. 12*. Accordingly, this Court should not review his claim.

B. Defendant has not adequately briefed this claim.

“It is well established that a reviewing court will not address arguments that are not adequately briefed.” *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998). The rules of appellate procedure require the argument section of a brief to contain “the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.” Utah R. App. P. 24(a)(9). An appellant may not just baldly cite authority, but must develop that authority and provide “reasoned analysis based on that authority.” *Thomas*, 961 P.2d at 305.

Defendant has not done that. His brief has almost no record cites. *See* Br.Aplt. 5-37 (citing record only on pages 23-25, where Defendant addresses other issues). And while Defendant cites some minimal legal authority, he provides no reasoned analysis based on that authority. *See* Br.Aplt. 10-11.

Moreover, Defendant has not marshaled the evidence supporting the trial court’s finding that Defendant voluntarily absented himself from Clement Tebbs’ deposition. To properly challenge a fact finding on appeal, an appellant must “marshal all record evidence that supports the challenged finding.” Utah R. App. P. 24(a)(9). The appellant must then

“show that despite the supporting facts and in light of the conflicting evidence, the findings are not supported by substantial evidence.” *Hodgson v. Farmington City*, 2014 UT App 188, ¶13, 334 P.3d 484 (quotations and citation omitted). A “party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues.” *State v. Nielsen*, 2014 UT 10, ¶40, 326 P.3d 645.

Defendant has not marshaled the evidence supporting the trial court’s finding that he was not credible in claiming that he had an arbitration hearing that conflicted with the deposition. R1133. Defendant also has not marshaled the evidence supporting the trial court’s finding that he was not credible in claiming that his health prevented his appearance at the deposition. R1135. Defendant does not reference the supporting evidence, much less show that the findings are not supported by substantial evidence.

C. The trial court did not clearly err in finding that Defendant’s absence from the deposition was voluntary.

Defendant has not met his burden to set forth the law governing whether a defendant’s absence from a deposition or any other proceeding is voluntary. That, by itself, defeats his claim.

Assuming for purposes of argument that the standard that governs absences from trial and sentencing also governs absences from depositions,

Defendant has not shown that the trial court clearly erred in finding that his absence from the deposition was voluntary. Before finding a defendant voluntarily absent at trial or sentencing, a court must find that the defendant knowingly and voluntarily waived his right to be present. The court cannot presume that a defendant is voluntarily absent simply because he has notice, but does not appear. *State v. Wanosik*, 2003 UT 46, ¶15, 79 P.3d 937. Rather, the court must make some inquiry about why the defendant might be absent. *Id.* The “question of voluntariness is highly fact-dependent, is tied to the totality of circumstances in particular cases, and, where there is virtually no explanation for an absence, requires some form of inquiry by the trial court.” *Id.* Once “inquiry appropriate to the case has been made, and a compelling reason for defendant’s absence remains unknown, voluntariness ... may then be properly inferred.” *Id.* (citation and quotation omitted). Whether a defendant is voluntarily absent is a question of fact. *State v. Pando*, 2005 UT App 384, ¶13, 122 P.3d 672. Thus, review is for clear error. *Lenkart*, 2011 UT 27, ¶20.

Here, the trial court engaged in an inquiry appropriate to the case when the court took evidence on the voluntariness of Defendant’s deposition absence at the evidentiary hearing on Defendant’s new trial motion. T18:4-180. Although the record strongly suggested that Cramer,

his counsel, and Karrington, counsel's investigator (collectively "counsel" or "defense counsel"), both notified Defendant of the June 14 deposition date some time in late May or early June, *see* T18:59-60, 87-88, the trial court found for purposes of its ruling that Defendant received notice on June 12, 2012, R1132.

The trial court nevertheless found that Defendant was voluntarily absent. First, Defendant did not provide a copy of his arbitration hearing subpoena to defense counsel before the deposition. R1132. Thus, counsel was unable to verify Defendant's scheduling conflict or request that the deposition be continued based on Defendant's obligations to attend the arbitration hearing. *Id.* Second, the subpoena did not, in fact, require Defendant to be present at the arbitration hearing on June 14, the day of the deposition, but rather on June 15, the following day. *Id.*; *see* State's Evid. Hear. Ex. 6 (Affidavit of D. T. Needham), at Ex. 3. Moreover, despite Defendant's allegation that someone from the arbitration attorney's law office told him by telephone to be present on June 13 and 14 and despite Defendant's allegation that he was at the arbitration attorney's office on those days, Defendant did not present any evidence to support the allegations. R1132-33.

The court further found that Defendant did not send his counsel a copy of the subpoena because he knew that the subpoena did not require him to be present for the arbitration matter on June 14, the day of the deposition. *Id.* The court also found that Defendant's claim that he was required to be at the arbitration attorney's office on June 13 and 14 was not credible. R1133. The court then concluded that Defendant's obligation with respect to the arbitration hearing did not prevent his being present at the deposition. *Id.*

The court also found that Defendant's health did not prevent his attending the deposition. The court acknowledged that Defendant is a paraplegic. R1134. The court also noted that Defendant presented his physician's letter listing Defendant's medical conditions. R1135. But Defendant claimed that he could not travel the distance to or from Salt Lake City on successive days, and the doctor's letter said nothing about Defendant's ability to travel. *Id.* Thus, Defendant's statement that he could not make the trip was the only evidence on that matter.⁵ *Id.* But Defendant gave self-contradictory statements on several matters and the court found

⁵ The motion court noted that the parties stipulated that Defendant's mother would testify that long trips increased Defendant's pain and sapped his energy. R1135 (referencing T18:179).

him to be untruthful about other matters, including whether defense counsel had suggested that Defendant attend the deposition through videoconferencing. *Id.* The court therefore did not credit Defendant's testimony and found, based on all the testimony, that Defendant's medical conditions did not prevent his traveling to the deposition. *Id.* The court also found that Defendant had made no effort to arrange for alternative transportation, such as airline flights or travel in a vehicle where Defendant could recline or lie down, that could have made his travel to Murray more manageable. R1136.

The trial court concluded that Defendant "chose not to attend in the belief that the deposition would not go forward in his absence." *Id.* "He was aware of the fragile health of Mr. Tebbs and sought to delay the date for the deposition to a date that Mr. Tebbs may not have been available to give testimony." *Id.* Accordingly, the court found that Defendant was able to travel to Salt Lake to attend the deposition on June 14, 2012, and that his absence was voluntary. R1136.

The trial court's findings were supported by the testimony of Defendant's counsel, Aric Cramer, and Cramer's investigator, Brooke Karrington. *See* T18:55-78, 81-118. The trial court acted within its discretion in ruling that the State had met its burden to prove that Defendant

“knowingly and voluntarily absented himself from the deposition.” R1136.

Accordingly, the trial court did not err when it ruled that by voluntarily absenting himself, Defendant “waived his right to be present and confront Mr. Tebbs during his testimony.” *Id.*

D. Defendant has not shown that the trial court clearly erred when it found that at the time of trial, trial counsel had no reason to believe that Defendant’s absence was involuntary and therefore no reason to object to the deposition.

Moreover, while Defendant claimed in his new trial motion that his absence from the deposition was involuntary, he admitted that he did not tell his trial counsel that he was unable to attend the deposition before the State played the deposition video at trial. Accordingly, counsel did not object to admission of the video.

1. Additional facts.

Before trial, Douglas Terry replaced Aric Cramer as Defendant’s counsel. He did not object to the trial court’s admitting the deposition at trial.

Defendant argued for the first time in his new trial motion that because his absence at the deposition was involuntary, trial counsel should have objected to admitting the deposition as a violation of Defendant’s confrontation rights. R1040-41. But in an affidavit supporting his new trial motion, Defendant stated that at the time of trial he had talked to his then

trial counsel, Doug Terry, about the use of the deposition. Defendant also stated that based on those discussions, he did not believe that "Mr. Terry was aware that the deposition had been scheduled at a time when I could not be present" Defendant's Evid. Hear. Ex. 7, pp. 3-4, ¶¶5-6.

Also, during Defendant's testimony at the new trial hearing, the prosecutor asked him on cross-examination, "[Y]ou never told Doug Terry anything about thinking that the date [of the scheduled deposition] was a different day ...?" T18:165. Defendant responded, "Doug Terry and I never talked about it." *Id.* Asked again, "You never told him, yes or no?" Defendant responded, "He never asked me." *Id.* The prosecutor asked again, "[A]nd it's your testimony that you never told Doug Terry why you missed the deposition because he simply didn't ask?" T18:166. Defendant responded, "I'm not an attorney." *Id.*

2. **Given Defendant's concession that he did not tell trial counsel that he was unable to attend the deposition, Defendant has not shown that trial counsel should have objected to admission of the deposition at trial.**

To prove ineffective assistance of counsel Defendant must show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that ... counsel's

performance prejudiced the defendant.” *State v. Bond*, 2015 UT 88, ¶14, 361 P.3d 104, 109-10 (citation and quotation omitted). “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

Here, the trial court found that from the time of Clement Tebb’s deposition, Defendant “possessed all of the information which would have given Mr. Terry grounds to object to the introduction of the Tebb’s deposition.” R1137. But Defendant “failed to provide this information to trial counsel. Without this information, trial counsel had no basis to object.” *Id.*

Defendant has not addressed the trial court’s ruling, let alone challenged the findings supporting it. Thus, he has not shown that the trial court erred in rejecting his ineffective assistance claim and in denying his new trial motion. *See Mitchell*, 2013 UT App 289, ¶10.

Moreover, while not addressed by the trial court, trial counsel had a second strategic reason not to object to the admission of Clement’s deposition testimony. As trial counsel testified at the evidentiary hearing

on the new trial motion, he did not “necessarily wanted Clem Tebbs in trial as a live witness.” T18:43. Asked if he was concerned that Clement “would come across as compassionate or as sympathetic,” trial counsel stated, “I was concerned that it ... wouldn’t be any better ... for our case, for [Clement] to be there live and definitely could be much better for the State to have him there live.” T18:43-44.

Thus, counsel’s not objecting to the deposition was also strategically reasonable. Trial counsel could reasonably have determined that having Clement testify in person would have emphasized to the jurors—to Defendant’s detriment—that the victim in this case was elderly and suffering from serious health problems. That could have undermined the sympathy the jurors might otherwise have had for Defendant’s disabilities and any disposition they may have had to judge him less harshly because of his disabilities.

In sum, Defendant has not shown that the trial court erred in concluding that defense counsel was not ineffective for not objecting to admission of Clement’s deposition.

E. In any event, admission of the deposition at trial was harmless.

Finally, the trial court did not err in denying Defendant’s new trial motion because admitting Clement’s deposition at trial was harmless

beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

The central issue in the case was not whether Defendant diverted BACT's funds for his personal use, but whether Clement Tebbs had authorized Defendant to do so. *See* R1130. Clement Tebbs testified in his deposition that he did not. State's Tr. Ex. 24:32. But four additional witnesses independently testified to the same thing. T7:63-64; T6:68, 150, 212. They testified that Clement had not authorized the diversion of the BACT funds. *Id.* Three of those four witnesses were present in an August 11, 2005 meeting where Clement confronted Defendant about diverting the funds. T6:66. All three of them testified that Defendant admitted to taking BACT funds for other purposes and apologized. T6:68, 150, 212. All of them testified that Defendant made no claim that Clement had authorized the diversions. T6:93, 150-51, 213. And all of them testified that Defendant, when accused, did not claim the existence of an agreement authorizing the diversion of the funds.⁶ T6:93, 150-51, 213. Although not present at the

⁶ In convicting, the jury necessarily found that the letter allegedly authorizing Defendant to use BACT money for his personal expenses, purportedly signed by Tebbs, was a forgery. *See* State's Trial Ex. 17; Defendant's Trial Ex. 31. As explained, three witnesses other than Tebbs testified that Defendant never referenced the document in the August 11, 2005 meeting. *See also* T7:31 (Gordon Summers, DOPL investigator, (continued on next page)

August 11 meeting, the fourth witness, John Grealish, also testified none of the BACT financing was to be used "outside the specific costs" required for the construction—no money was to be "moved around," used to get Defendant's contractor's license back, given to Leonard McKneely or his company, or used for construction of the home McKneely was building in the St. George Green Springs neighborhood. T4:63-64.

Thus, even without Clement's deposition testimony, the evidence of Defendant's guilt was overwhelming. Under these circumstances, any error in admitting Clement's deposition was harmless beyond a reasonable doubt. Accordingly, the trial court did not err in denying Defendant's new trial motion.

II.

DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT PLAINLY ERRED FOR NOT DISMISSING THE STATE'S PROSECUTION ON DOUBLE JEOPARDY GROUNDS

Defendant argues that the trial court plainly erred when it failed to sua sponte dismiss his charges under the Double Jeopardy Clause. Br.Aplt. at 6. Defendant's argument is unclear. He apparently believes that his criminal prosecution violated double jeopardy (1) because the Utah Division

testifying that Tebbs' signature on the document appeared to have been "cut and pasted").

of Occupational and Professional Licensing (DOPL) had earlier investigated and sanctioned him for contracting without a license and allegedly acquitted him of all charges in November 2007 and/or (2) because BACT had brought a civil case against him that resulted in the release of a lis pendens. *See* Br.Aplt. 5-7, 13-19. In making this argument, Defendant references the trial testimony of DOPL auditor Kim Quach. *See* Br.Aplt. 5-6. But Defendant has provided no page number, and the State can find no reference in Kim Quach's trial testimony to an acquittal of any charges in November 2007.

A. This court should not reach Defendant's unpreserved claim because he has not argued plain error.

Defendant has not argued and the State has not found that Defendant preserved this claim below. This Court will decline to review an unpreserved issue where a defendant does not argue that "exceptional circumstances" or "plain error" justifies its review. *See State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995).

Here, Defendant has not argued either exceptional circumstances or plain error. *See* Br.Aplt. 13-19.⁷ Thus, this Court should not review his double jeopardy claim.

B. Defendant has not adequately briefed this claim.

This Court also need not consider Defendant's claim because it is inadequately briefed. Specifically, Defendant cites no authority applying the Double Jeopardy Clause to criminal prosecutions following administrative sanctions or civil cases. An "appellate court is not 'a depository in which [a party] may dump the burden of argument and research.'" *Allen v. Friel*, 2008 UT 56, ¶9, 194 P.3d 903 (citation omitted). When a party does nothing more than "cursorily" raise an issue, this Court should "decline[] to address" it on appeal. *State v. Arave*, 2009 UT App 278, ¶12 n.3, 220 P.3d 182, *rev'd on other grounds*, 268 P.3d 163 (Utah 2011); *see also State v. Green*, 2005 UT 9, ¶11, 108 P.3d 710 ("A brief which does not fully identify, analyze, and cite its legal arguments may be disregarded or stricken by the court.") (citation and quotation omitted).

⁷ Defendant mentions "plain error" three times in his brief, but not to argue that the trial court plainly erred for not sua sponte dismissing the prosecution. *See* Br.Aplt. 16, 18. More significantly, he does not set forth what Defendant must show to establish plain error, much less attempt to explain why not sua sponte dismissing this case constituted plain error.

- C. Because the prosecution in this case was not for the same conduct as the DOPL sanctions, Defendant has not shown a double jeopardy violation.

In any event, Defendant has not shown that the prosecution in this case is for the same conduct addressed and sanction by DOPL.

1. Additional facts.

Kim Quach did testify at Defendant's trial. T7:2-20. She testified that in 2005 she was given Defendant's audit file from a previous investigator. T7:3. She stated that Defendant had been a licensed contractor, but that his license expired in July 2003 for failure to renew. T7:4. He later entered into a stipulation with DOPL acknowledging that between August 1, 2003, and August 26, 2003, he "acted as a contractor without a current license." State's Tr. Ex. 19 at 2. He was then issued a citation, which included a \$200 fine and a cease-and-desist order. T7:6; State's Tr. Ex. 19 at p.2-3.

Defendant also stipulated that on September 22, 2003, his employees were found working on a site even though Defendant was not then licensed. State's Tr. Ex. 19 at p.3. Defendant was issued another citation, which included a \$600 fine and a cease-and-desist order. *Id.*

Defendant then stipulated that on October 23, 2003, his employees were again found working on a site even though Defendant was not then

licensed. *Id.* Following this violation, the Santa Clara City building inspector issued Defendant a stop-work order. *Id.*

Finally, Defendant stipulated that he had engaged in unlicensed contracting between August 1 and August 31, 2003. *Id.*; T7:6. DOPL fined him \$60,000, but agreed to stay \$57,000 of the fine if Defendant paid \$3000 of the fine within thirty days of the stipulation. T7:6. Defendant did not timely pay the \$3000. *Id.* As a result, Defendant had to pay the \$60,000 fine with interest. T6:9. Defendant regained his license in September 2005. T8:133.

2. Defendant has not demonstrated that DOPL's sanctions for contracting without a license in 2003 required dismissal of his criminal charges.

The Double Jeopardy Clause states that no person shall "be subject *for the same offence* to be twice put in jeopardy of life or limb." U.S. Const. amend. V (emphasis added). Defendant apparently asserts that he was put in jeopardy for the first time when DOPL sanctioned him for contracting without a license in 2003.

But the Double Jeopardy Clause protects "only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (emphasis in *Hudson*) (citation omitted). Even if Defendant were being punished for the same conduct for which he was

administratively sanctioned, he would likely have a difficult time showing that DOPL's administrative sanctions were "criminal punishments" for purposes of double jeopardy. *See id.*; *see also State v. Bushman*, 2010 UT App 120, 231 P.3d 833 (holding that administrative fine did not constitute criminal punishment or trigger double jeopardy protections). Defendant has not attempted to do so.

Even assuming for purposes of argument that contracting without a license is a criminal offense, it was not the "same offense" as that for which Defendant was prosecuted in this case. Defendant was sanctioned by DOPL for contracting without a license in 2003. State's Ex. 19 (Stipulation and Order, DOPL-2003-230). The charges in this case stem from Defendant's diverting BACT's funds from March 2005 to June 2005. State Tr. Ex. 7-13.

Thus, Defendant has not established error, much less obvious and harmful error, in the trial court's not sua sponte dismissing the prosecution of this criminal case as a violation of double jeopardy based on Defendant's DOPL proceedings.

D. Defendant has not demonstrated that BACT's civil suit against him required dismissal of his criminal charges.

Alternatively, Defendant argues that a civil suit by BACT required the trial court to dismiss this prosecution under the Double Jeopardy Clause. Defendant claims that on October 31, 2006, BACT (Clement Tebbs) filed a

lawsuit against him for approximately \$800,000 and a lis pendens (a notice that property is the subject of legal action) on eighteen properties worth seven million dollars. Br.Aplt. 5, 15 (referencing case no. 060501877) (Docket reproduced in Addendum C). He further claims that on November 30, 2006, his attorney filed for a release of the lis pendens and that the district court ordered the release in December 2006. Br.Aplt. 15-16. Defendant apparently believes that BACT's filing the lawsuit placed him in jeopardy and/or that the court's release of the lis pendens was equivalent to an acquittal of wrongdoing.

Defendant, however, points to no authority holding that a civil action between two private parties to resolve a contract dispute places either party in jeopardy for purposes of double jeopardy. *See* Br.Aplt. 13-19. Nor does Defendant point to any holding that the release of a lis pendens acts as an acquittal for double jeopardy purposes. *See id.* Defendant's failure to cite such authority defeats his plain error claims. *See State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997) (error is not obvious when "there is no settled appellate law to guide the trial court").

Thus, Defendant has not shown that the trial court plainly erred in not sua sponte dismissing the prosecution in this case under double jeopardy.

III.

THIS COURT SHOULD NOT REACH DEFENDANT'S INADEQUATELY BRIEFED CLAIMS OF UNCLEARLY SPECIFIED ERROR

Defendant suggests that other errors occurred. But Defendant does not clearly specify the errors nor adequately brief his claims with respect to them. This Court therefore should not reach them.

A. Defendant has not adequately identified any other error or adequately briefed any other claim.

Defendant suggests that the prosecution withheld exculpatory evidence. *See* Br.Aplt. 6. Defendant has not adequately identified what exculpatory evidence was withheld. Even assuming for purposes of argument that he had identified that evidence, he has cited no legal authority to support his claim, nor has he analyzed the facts in light of any relevant legal authority. Thus he has not adequately briefed his claims, and this Court should not review them. *See Green*, 2005 UT 9, ¶11 (“A brief which does not fully identify, analyze, and cite its legal arguments may be disregarded or stricken by the court.”) (citation and quotation omitted).

Defendant's inadequately briefed claims are not clear. The State responds to what Defendant's arguments might be, but only summarily.

B. No *Brady* error occurred.

Defendant suggests that the State withheld exculpatory evidence of some kind. See Br.Aplt. 6 (referencing “filings ... withheld by [the] prosecution” apparently constituting “exculpatory material”). But Defendant has not established that error occurred or that, if it did, it was prejudicial.

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny, the prosecution has a duty to disclose exculpatory information to the defense in criminal cases. This duty applies to both substantively exculpatory evidence and to evidence that may be used for impeachment. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972)). Moreover, the prosecutor has a duty to learn of any favorable evidence known to the others acting on behalf of the government and to disclose that evidence to the defense. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). But evidence available to a defendant upon exercise of reasonable diligence does not support a *Brady* claim. See *Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002). No *Brady* violation occurs where the defendant reasonably should have known of the evidence, or where the defense had the opportunity to use the evidence to its advantage during trial but failed to do so.” *State v. Bisner*, 2001 UT 99, ¶33, 37 P.3d 1073. Finally, not every violation of the prosecutor’s duty to disclose

establishes constitutional error. *See Strickler v. Green*, 527 U.S. 263, 281 (1999). Nondisclosure of favorable evidence constitutes a *Brady* violation “only if the evidence is material.” *United States v. Bagley*, 473 U.S. 667 (1985). Evidence is material under *Brady* only “‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Kyles*, 514 U.S. at 433-34 (citation omitted). “The mere *possibility* that an item of undisclosed information *might* have helped the defense, or *might* have affected the outcome of the trial does not establish ‘materiality’ in the constitutional sense.” *State v. Nebeker*, 657 P.2d 1359, 1363 (Utah 1983) (citation omitted) (emphasis altered).

1. Withheld filings.

As explained under Point II, above, Defendant asserts that DOPL renewed his contractor’s license in 2007, allegedly after finding that he owed nothing to Clement Tebbs. Br.Aplt. 5-6. He apparently claims that DOPL’s action and a trial court’s release of a lis pendens on one or more of his properties constituted acquittals in this case. *See id.*

Defendant apparently argues that the State withheld the filings associated with the DOPL actions and the release of the lis pendens. *See id.*

6. He states in his brief: “Both of these filing were withheld by the

prosecution” *Id.* Defendant requests that the court admit “the exculpatory material” alluded to in the trial. *Id.*

But Defendant does not show that the evidence was not available to him upon the exercise of reasonable diligence or that he had no opportunity to use the evidence to its advantage during trial. The stipulation that provided the basis for DOPL’s suspending Defendant’s contractor’s license and imposing fines was produced at trial as State’s Ex. 19. The Labor Commission documentation confirming that he had paid the penalties was produced at trial as State’s Ex. 20. Kim Quach, DOPL auditor, testified to the matters included in the documents. T7-20. She also testified that Defendant’s license was reinstated in September 2005. T7:16. Thus, Defendant had the opportunity to use this evidence to its advantage during trial. *See Bisner*, 2001 UT 99, ¶33.

As to the release of the lis pendens, Defendant states in his own brief that his attorney filed for the release in November 30, 2006, and that the district court ordered the release in December 2006. Defendant thus should have had reasonable access to those documents. *See Moon*, 285 F.3d 1301 at 1308.

Moreover, Defendant does not show that the allegedly suppressed evidence was material, i.e., that it would have made a difference in the

outcome of the trial. *See Kyles*, 514 U.S. at 433-34. Finally, nothing suggests that either the reinstatement of his license or the release of his pendens would have established an acquittal of the charges in this criminal prosecution.

In sum, Defendant has not shown a *Brady* violation based on withheld filings.

2. John Grealish letter.

a. Additional facts.

Defendant also references a letter written by prosecutor Wade Farraway to federal judge Clark Waddoups on June 13, 2011, in connection with a federal case against John Grealish. Br.Aplt. 25. The letter asks Judge Waddoups to take into consideration Grealish's cooperation in making himself available to testify in the case against Defendant. *See State's Evid. Hear. Ex. 1.*

In his new trial motion, Defendant claimed that the State withheld the letter and that it could have been used for impeachment. R1035-36. The trial court took evidence on that matter. The State presented the testimony of Scheree Wilcox, the paralegal who had worked with Farraway in preparing the letter. R18:11. Wilcox testified that she asked Mr. Farraway whether a copy of the letter should be sent to defense counsel. R18:13.

When he said that she should send the letter, she made a notation on the bottom of the letter, "Copy to Def. Atty.—Nathan Reeve," initialed the notation, copied the letter, and sent it to Mr. Reeve. R18:13. Nathan Reeve did not testify, but succeeding attorneys Aric Cramer and Douglas Terry did. They both testified that the letter was not in the file when they received it. *See* T18:33, 75.

The trial court found the paralegal's testimony that she mailed the letter credible. R1130. Without testimony from Mr. Reeve, however, the court could not determine whether Reeve received it. *Id.* But, the court held, whether the letter was received or not made no difference, given the evidence in this case. *Id.* For purposes of analyzing the *Brady* issue, the court therefore assumed that the letter was not mailed. *Id.*

The court then denied the new trial motion on the basis that the defense's inability to cross-examine Grealish with the letter to Judge Waddoups made no difference in the trial result. T18:1131. The court noted that Defendant "did not contest that he had diverted funds to his own use." T18:1130. "Therefore, the central issue was whether he had authority to do this." *Id.* And while Defendant claimed that he had been given that authority, "four witnesses testified that they were present" when Defendant admitted "to using the funds without authority and apologized for doing

so.” *Id.* Moreover, They testified that when confronted, Defendant “did not claim to have authority to divert the funds” or “make any reference to a document which granted him such authority.” *Id.* The court also noted that Defendant’s credibility had been called into question by testimony he gave that was refuted by a Nevada building official. R1131.

The trial court accordingly concluded that the State’s case was strong and the Defendant’s weak. *Id.* “Based upon all the evidence presented at trial,” the court found that there was no reasonable probability that the result would have been different had the defense been able to cross-examine Mr. Grealish with the letter. *Id.*

- b. Because Defendant has not acknowledged the trial court’s ruling, much less challenged the factual findings upon which it is based, this Court should not review his claim that the prosecutor withheld an exculpatory letter.**

Defendant mentions the John Grealish letter in his brief of appellant. *See* Br.Aplt. at 25. Defendant asserts that if the letter was provided to counsel, counsel would have been “grossly insufficient” for not cross-examining Grealish about it. *Id.* 26-26. But his purpose in mentioning the Grealish letter is apparently to show that the prosecutor “was in possession of the documents emailed to [Scheree] Wilcox.” *Id.* 26. This claim is

unclear. Defendant has not explained what documents he is referencing or why they are important to the case. The State therefore cannot respond.

Defendant apparently is not challenging the trial court's denial of his new trial motion based on any *Brady* error. But if he is, he has not mentioned the trial court's ruling, nor challenged the factual findings upon which it was based. This Court should therefore not review the claim. *See Mitchell*, 2013 UT App 289, ¶10.

And, in any case, nothing suggests that the trial court erred in concluding that, based on all the evidence presented at trial, any cross-examination of Grealish on the basis of Wade Farroway's letter to Judge Waddoups would have made no difference in the outcome of the trial. Therefore, even assuming the letter was withheld, the letter did not constitute material evidence under *Brady*. *See Kyles*, 514 U.S. at 433-34 (evidence material under *Brady* on if there is a reasonable probability that had evidence been disclosed, result of proceeding would have been different).


Thus, Defendant has not established any *Brady* violation.

CONCLUSION

For the foregoing reasons, the Court should affirm.

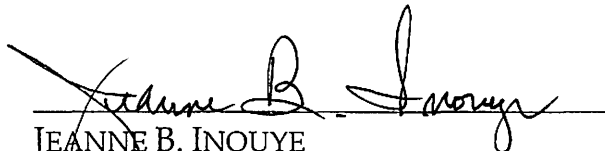
Respectfully submitted on February 26, 2016.

SEAN D. REYES
Utah Attorney General


JEANNE B. INOUE
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 8875 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.


JEANNE B. INOUE
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on February 26, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Aaron David Trent Needham
Inmate No. 21154
Utah State Prison
P.O. Box 140854
Salt Lake City, UT 84114

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

A handwritten signature in black ink, appearing to be "T. Allright", is written over the text of the second checkbox option.

Addenda

Addendum A

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Addendum B

UTAH COURT OF APPEALS

Appellate Brief

Case No. 101500067

Appellate Case No: 20140483

LAURA B DUPAIX
Assistant Attorney General
160 EAST 300 South 6th Floor
P.O. Box 140854
Salt Lake City UT, 84114

ARON DAVID TRENT NEEDHAM-21154
UTAH STATE PRISON
P.O. Box 250
DRAPER UT. 84020
OQ - 2 - 212

STATEMENT OF THE CASE

A. Summary of facts.

II. Needham was wrongfully convicted of nine (8) counts of communication fraud and (1) count of pattern of unlawful conduct. This case was first brought before the fifth district court - Washington County on October 31, 2006, Needham attorney responded to the civil suit for approximately \$800,000.00 and the lis pendens filed on 18 properties owned by Needham on November 30, 2006. After review of sworn testimony and documentation admitted to the court, the lis pendens was released on all (18) eighteen properties in December 2006 in case no. 060501877. Affidavit.

A complaint was filed at the Division of Professional Licensing in June 2006. Needham and counsel met with Wayne Holman of DOPL in September 2006 to admit sworn testimony and documentation. On November 2007, DOPL renewed Needham's license after a fourteen month investi-

gation finding no financial obligation owed to Clement Tebbs. Kim Quon testimony at trial. The court and counsel have refused to provide day 4 and day 5 of the trial that contain Kim Quom testimony.

Both of these filings were withheld by prosecution and appointed counsel that has been substantially and injurious to Needham in violation to due process. Needham respectfully request an opportunity to admit to the court the exculpatory material eluded to in the trial but never factually developed due to ineffective counsel.

Claims of conformation clause, double jeopardy, ineffective assistance of counsel and their cumulative effect have been preserved on trial record.

Claims of imminent danger exception, wrongful search and seizure and cruel and unusual punishment have not been

preserved in trial record or under rule 23B motion and affidavit. Needham will address these issues at the hearing to affirm the threats to life living under the conclusions at the State Prison of Draper.

III. Related and or prior appeals

There are no prior appeals. There is case no. 07150092 and 20140658 and that represents a case that has been collaterally attacked by case no. 101500067 and 20140483-ca. The case no. 07150092 is a plea in abeyance that was violated by defendant by the wrongful conviction.

IV. Other UT R. App P. 24(f)

Given that defendant, Needham is proceeding pro se, Needham reserves the right to raise additional issues in his opening brief after full review of the record that the court or appellate counsel has yet to provide a full copy.

V. Standard of Appellate review (UT R. App. P. 24(a)(5):

“Generally, we review a trial court’s legal conclusions for correctness according the trial court no particular deference.” *Wilson Supply Inc. v. Fradan Mfg Corp* 2002 UT 94 ¶11, 54 P.3d 1177 citing *Orton v. Carter* 970 P.2d 1254, 1256 (UTAH 1998) also *Newspaper Agency Corp v. Auditing Divi of State Tax Com* 938 P.2d 266, 267 (UT 1997). Further, whether a trial court has properly interpreted and applied a statute is a question of law reviewed for correctness.

Standard of Appellate review (UT R. App. P. 24(a)(5):

We review the trial courts imposition of sentence for an abuse of discretion. “*State v. Winbelly*, 2013 UT App 160, 916, 305 P.3d 1072 citing *State v. Killpack*, 2008 UT App. 49, 9118, 191 P.3d 17 (explaining that an appellate court will overturn a sentencing decision only if it is clear that the actions of the trial court were so inherently unfair as to constitute an abuse of discretion.

This appeal is from a final judgement, sentence, order referring outstanding fine is the Office of Debt Collection, and commitment, defined more particularly post, of the Fifth District Court in and for Washington County, State of Utah. Defendant Aaron Needham (here in after "Needham") submits the following in accordance with the requirements set forth in Utah R. App. P. 24.

VI. Appellate Jurisdiction (UT R. App. P. 24(c)(2):

This court has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-4-103(2)(e).

VII. Underlying Criminal Conviction (UT R. App. P.24 (c)(6)

Judgement, sentence, order referring outstanding fine to the Office of Debt Collection, and commitment, filed June 5th, 2014 that Needham would serve nine concurrent terms of not less than one year and not more than fifteen years in the Utah State Prison.

VIII. Statement of Issues and Standard of Review Rule 24 (a)(5)

UT R. App. P. Showing issues preserved in Trial Court

A Motion for new trial generally is permitted for correction errors made in trial court or for reviewing a conviction obtained by unfair or unlawful methods. "*State v. Owens*, 753 P.2d 976, 978(UT App 1988).

The Defendant, Needham was denied his right to confront witnesses against him and his counsel provided ineffective assistance of counsel. The right of Confrontation is embodied in the Sixth Amendment of the United States Constitution and Article I, section 12 of the Utah Constitution. The confrontation clause of the Sixth Amendment, made applicable to the states through the fourteenth amendment, provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against

Utah Const. Art I, § 12, emphasis added. The Utah Constitution expressly provides that the accused is entitled to an actual “face to face” confrontation. Sixth Amendment jurisprudence establishes that the United States Constitution also requires such confrontation. See eq. *U.S. v. Begay*, 937 P.2d 515 (10th Cir. 1991), holding that the confrontation clause provides defendants with both “the right to face physically” the governments witnesses and the right of cross-examination). The rationale behind the face-to-face rule is discussed in *Coy v. Iowa*, 987 U.S. 1012 rooted in the concept that it is exceedingly more difficult for a man to tell a lie while he is looking into the eyes of the one about whom he is talking. The Supreme Court stated: the Sixth Amendment quarantined face to face encounter between witness and accused serves ends related both to appearances and to reality. This

opinion is embellished with referenced to and quotations from antiquity in part to convey that there is something deep in human nature that regards face to face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution "*Pomter v. Texas*, 380 U.S. 400, 404(1965)

In this case, due to the combination of Mr. Cramer's conduct which deprived Needham of the opportunity to be physically present at the deposition of Tebbs and Ms. Reid and Doug Terry's failure to object to the admission of Tebb's deposition into evidence, Needham was entirely deprived of his rights to confront Tebbs face to face. This deprivation was deeply compounded by Cramer's failure to discuss or address the material and questions prepared by Needham in cross-examining Tebbs at the deposition, which Cramer was in possession same material given to Attorney General's Office.

III. Needham was denied his rights under “Double Jeopardy-duel sovereignty protection that the Supreme Court has articulated policy justifications for each protection conferred by the Double Jeopardy Clause. The prohibition against second prosecution after acquittal conviction protect individuals from the continued embarrassment, anxiety and expense of second prosecution, while decreasing the risk of an erroneous conviction or an impermissibly enhanced sentence “*Ohio v. Johnson*, 467 U.S. 493, 498-99 (1989)” Double Jeopardy attached to hung counts that shared key elements with acquitted counts. *U.S. v Caughlin*, 610 P.3d 89, 96-98 (D.C. Cir. 2010). Needham claims that the charges are conviction be judicated on grounds that double jeopardy attached in September 2006 when the Division of Professional (DOPL) began reviewing the sworn testimony, then

concluded that Needham had done no wrong and was acquitted of all charges in November 2007. This can be verified on court transcripts, Kim Quon of DOPL on p. Whether offense is lesser-included offense determined by textual comparison of statutory elements because such test lends itself to certain and predictable outcomes. "*U.S. v. Carter*, 530 U.S. 255, 260-61 (2000). Double Jeopardy clause prohibited successive prosecution by different sovereigns, sovereigns with lesser interest might proceed first and preclude prosecution by sovereigns with greater interest *U.S. v. Rinaldi*, 434 U.S. 22, 28 (1977). Local governments are not considered sovereigns for double jeopardy purposes. Consequently, successive prosecutions by a local government and a state in which it is located, or by two local government in the same state are prohibited. "Georgetown law Journal P. 511(2013).

After dismissal of city's reckless driving charge, state prosecution for aggravated assault stemming from same incident barred by double jeopardy. "Abramson v. Griffen, 693 P.2d 1009, 1010-11 (10th Cir. 1982). Town barred from prosecution defendant for car theft following prosecution by another town for joy victim because charges constituted some offense "Brown v. Ohio, U.S. 1611, 169-70 (1977). The Supreme Court has suggested that federal and state or federal authorities may not manipulate a system to achieve the equivalent of a second prosecution. Georgetown law journal 2013 P. 511. Prosecution misrepresented to the court that DOPL's decision to renew Needham's license was to earlier in the investigation, when in fact it had been over a fourteen month period. In support of DOPL's decision, Tebbs filed a lawsuit and Lis Pendens of eighteen properties worth seven million dollars on October 31, 2006. Needham's attorney, Brad Parson filed for release on

November 30, 2006. The Fifth District Court-Washington County in case no. 060501877 order release of all properties with no financial obligation owed to BACT after reviewing documentation submitted to DOPL in September 2006, in December 2006.

The letter to DOPL and supporting documents were given to the Attorney General Office of State of Utah in 2006, 2008, 2011. Therefore, by with holding exculpatory material, the state was able to manipulate court proceedings affirming "sham prosecution". Several circuits have cited *Bartkus* and considered whether the sham prosecution exception exists or was applied in that case. *Bartkus v. Ill* 359 U.S. 121, 122-241 (1959). The court may vacate earlier findings of no prior jeopardy if new evidence at trial later supports reviewed motions, *U.S. v. Stricklam*, 591 P.2d 1112, 1119 (5th Cir. 1979).

Under plain error where defendant convicted of two crimes

on same facts in violation of the 5th amendment right to defree from duplicative prosecution and punishment, *U.S. v. Jackson*, 443 P.3d 293, 301(3rd cir 2006). Even when a defendant failed to assert a double jeopardy claim at the start of the trial, the claim is reviewable under a plain error standard. *U.S. v. Tann*, 577 P.3d 533-35 (3rd cir. 2009). Error that falls between structural and trial error is presumptively prejudicial, *U.S. v. Harbim*, 250 P.3d 532, 544 (7th cir. 2001). A structural discovery error occurs when the government with holds material evidence favorable to defendant. *Brady v. Md*, 373 U.S. 83, 87(1963). Evidence is material and requires reversal of conviction when there is a reasonable probability that disclosure would have altered the results of the trial, a mere possibility is not enough, *U.S. v. Aqurs*, 427 U.S. 97, 112-13 (1976). "Confrontation clause violation not harmless because jurors otherwise could

have found reasonable doubt on element of crimes, *U.S. v. Santos*, 449 P.3d 93, 100 (2nd cir 2005). The claim reviewed for plain error because objection to admission of testimony from witness reviewed for plain error because claim not raised at trial, *U.S. v. Ferguson*, 676 P.3d 260, 281-82(2nd Cir. 2011). "Claims of prosecutorial misconduct reviewed for plain error because no objection made at trial." "Claim of prosecutorial misconduct preserved despite defendants failure to raise issue at trial because misconduct deprived defendant of real opportunity to object." *U.S. v. Blueford*, 312 P.3d 962, 974 (9th Cir. 2000). Needham alleges prosecutorial misconduct and ineffective assistance of counsel with holding of exculpatory material and deceptive arraignments of scheduling of deposition, violated

double jeopardy-duel sovereignty protection and rights of confrontation clause.

IV. Ineffective Assistance of Counsel

The question of ineffective assistance of counsel is governed by the two part test set forth in, *Strickland v. Washington*, 466 U.S. 688(1984). Assistance of counsel is ineffective if (1) counsel's performance was deficient and, (2) the deficient performance prejudiced the defense, *State v. Eyre*, 2008 UT 16 (UT 2008), quoting *Strickland* at 687. As to the first prong of *Strickland* the erroneousness of those errors is measured by whether counsel's representation fell below an objective standard of reasonableness. *Id.* a convicted defendant....must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement. *Id.* at 688.

If counsel was unaware of the right to confrontation ramifi-

cations as was said in one case where the attorney was unaware of the statute, then his decision not to cross examine the witness cannot be accorded the same presumption of reasonableness as is accorded most strategic decisions because it was not based on strategy but rather on a startling ignorance of the law, *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).

It is clear that Mr. Cramer failed in his obligation to provide the defendant an opportunity to be present during Mr. Tebbs deposition further it is clear from the trial record that Mr. Tebbs, as the principal of BACT, was a key witness for the state. Without the testimony through his deposition, the government would have had little or no basis for prosecution. As such, his credibility was pivotal to the State's case. In some circumstances, the Supreme Court of the United States has found that ineffective assistance of counsel and prejudice there from are preserved. Such

circumstances include (1) when there is a complete denial of counsel (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing and (3) where it is unlikely that any attorney could provide effective assistance under the circumstances, *U.S. v. Cronin*, 466 U.S. 648, 659-60 (1984). In this case, Mr. Cramer did not subject Mr. Tebbs testimony at deposition to meaningful adversarial testing, because he did not prepare with defendant for the deposition to know appropriate avenues of cross-examination and his conduct prevented the defendant from attending the deposition, depriving Mr. Needham of right to face to face confrontation. Based solely on that factor, the assistance provided to Needham is presumed to be ineffective and prejudicial.

Unfortunately, Mr. Terry and Ms. Reid failed to exercise

the skill, expertise, diligence and professional judgement of a reasonable attorney in failing to ascertain whether Mr. Needham had knowingly and intelligently waived his right to confront Tebbs during the deposition. The Supreme Court has emphasized that the fairness of a proceeding is challenged by a claim of ineffective assistance of counsel because the right to counsel plays a crucial role in the adversarial system embodied in the sixth amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled, *State v. Classon*, 935 P.2d 524, 533 (Utah App. 1997). Quoting Strickland, *supra* worse, Mr. Terry and Ms. Reid failed even to investigate the reason for Needham's failure to confront Tebbs. See *State v. Templin*, 805 P.2d 188 (holding that if defense counsel fails to adequately investigate the underlying facts of a case,

counsels performance cannot be viewed as reasonable. At a minimum, Mr. Terry and Ms. Reid should have inquired of Needham as to the reason for his absence for the critical deposition of Tebbs. Additionally, Mr. Terry and Ms. Reid were given the same documentation given to DOPL and fifth district court Washington County that had judicated any financial obligation to BACT ro Tebbs, and refused to admit any of the documents alleging it "was little to no evidentiary value" Evidential hearing April 9, 2014 p. 41, was the question by Mr. Gordan and Mr. Terry response, "that is correct". (p. 41 id)

Mr. Terry answer of his evaluation of the exhibits presented in the rule 23B remand affidavit, that Needham wanted to present. Yeah, even though Aaron Needham had an ongoing concern that he was not present at the deposition I did not feel that those concerns or that the reason

he was not there was any grounds to not have the deposition be used in trial pursuant to the stipulation....Inadvertently thought about trying to keep the deposition out of the trial.....id p. 43.

Mr. Terry and Ms. Reid submitted to the court a witness list in November 2012 that supported the exhibits in the affidavit of the rule 23B remand and notified petitioners the day of the trial that they had subpoena none of the witnesses, I will tell you that all of the witnesses and potential witnesses that we have intended to call during our case, it won't be necessary to call them because that information will either come forward through Mr. Needham testimony or has already come out in the testimony of the state's witnesses "so the only witness that we will have, the only witness for the defense will be Mr. Needham, himself. Trial date January 14, 2013 - sixth day p.3 and Terry identified

at the April 9, 2014 hearing on page 36 that he had been a criminal defense attorney for "thirty years last year". The exhibit 7 of the evidential hearing was also submitted to the court on April 26, 2013 by paid counsel Herschel Bullen that identified six transactions performed at the title companies of funds issued to Needham by the title companies after Clement Tebbs signed on the dockets that contradicts Tebbs statements on the deposition page 46-47.

Ms. Reid and Mr. Terry claim this evidentiary material is not evidential and refused to present it to the court or bring a single witness to testify in support of the exhibits presented in the remand affidavit. Additionally if as indicated by the handwritten note on the Grealish letter, it was provided to defense counsel, it would have been grossly insufficient for trial counsel to have entirely failed to cross-examine

Mr. Grealish about it. Such a failure would have amounted to entirely failing to subject Grealish testimony to meaningful adversarial testing.

By the State admitting to the court the John Grealish agreement with the State that was prepared by Wade Farroway, Assistant Attorney General. It does show that Jake Taylor was in possession of the documents emailed to Scherie Wilcox for Mr. Farroway review after the preliminary hearing in July 2011. Upon completion of Farroway's review of the documents, he proposed a plea deal be arranged on August 2011 per remand affidavit exhibits. Shortly after offering the plea deal, Farroway was substituted by Jake Taylor, Assistant Attorney General to whom admitted none of the documents admitted to Scherie Wilcox and Wade Farroway except the John Grealish letter. Also, none of the appointed counsel

would admit the documents given to Farroway. Only paid counsel ever presented the exhibits to the courts.

There are multiple standards in Utah under which new trial should be granted based on ineffective assistance of counsel. The base standard is that but for counsels deficient performance there is a reasonable probability that the outcome of the trial would have been different, *State v. Smith*, 65 P.3d 648, 656 (Utah App. 2003). Confidence in the outcome may be undermined at some point substantially short of the more probably than not portion of the spectrum, *State v. Knight*, 734 P.2d 913, 920 (Utah 1987). In other cases, counsel's ineffective assistance arises to the level of a structural error. A structural error is a defect that affects the frame work within which the trial proceeds, rather than simply an error in the trial process itself, *State v. Russell*, 917 P.2d 557, 560 (Utah App. 1986) quoting, *Arizona v. Fulmmante*,

499 U.S. 279, 310 (1991). Structural error is reserved for a limited class of cases in which a constitution error so undermines the fairness of the proceedings that prejudice must be presumed. *Johnson v. U.S.*, 520 U.S. 461, 468-69(1997), several courts have held that confrontation clause violations constitute just such a structural defect. See *Campbell v. Rice*, 302 P.3d 892, 900 (9th 200), holding that exclusion of defendant from in chamber hearings was structural error. *State v. Garcia-Contreras*, 953 P.2d 533, 540-42(Arizona 1998), (en banc)(holding that the defendants exclusion from the jury selection process was a structural defect. *State v. Calderon*, 13 P.3d 871, 878-79 (Kansas 2000), moreover, the rational of these holdings is buttressed by *Crawford v. Washington*, 541 U.S. 36 (2004), which held that the right of confrontation is not merely a right to reliable testimony but is a right to cross examination per se, *Crawford*, 541 U.S. at 67-68.

“Where testimonial statements are at issue the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually preserves: confrontation, *id* at 68-69.

Unfortunately the type of confrontation, face to face and by well prepared counsel, contemplated by the constitution did not occur in this case. As a consequence, an egregious sixth amendment violation occurred, which amounted to a structural defect, requiring reversal regardless of whether the court believes the error may have been harmless. If an error is structural, it defies analysis by harmless error standards by affecting the entire adjudicatory frame work. *Fulmmante*, *supra* at 309. Finally, where ther error in question amounts to a violation of a defendants right of confrontation guaranteed by the sixth amendment to the United States Constitution, its harmlessness is to judged by a higher standard, i.e. reversal is required unless the error is harmless beyond a reasonable doubt.”

State v. Villareal, 889 P.2d 419, 425 (Utah 1995), quoting *State v. Hackford*, 737 P.2d 200, 204 (Utah 1987). If a constitutional error has occurred, the burden shifts to the state to show that the error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 24 (1967), finally, it should be noted that when there is a constitutional requirement of effective assistance of counsel and a public defender's acts or omissions constitute ineffective assistance, the error is inputed to the state because the state is required to provide effective assistance of counsel to indigent criminal defendants, *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991). The defacto exclusion of Mr. Needham from Mr. Tebbs deposition, combined with trial counsels failure to object to the admission of the deposition into evidence at trial was deeply prejudicial to Needham. Moreover it amounted to a significant deprivation of state and federal constitutional rights, which shifts

the burden to prove harmless beyond a reasonable doubt to the state. This the state can not do. As noted herein, the testimony of Tebbs was the cornerstone upon which the state case rested. To assert that a failure to subject it to meaningful cross-examination was harmless is laughable. However, the use of the deposition of Tebbs at trial, under the circumstances under which it was taken, without objection from trial counsel, was structural error. Under both Utah Constitution and the United States Constitution, a defendant has the right to the assistance of counsel at all critical stages of his criminal proceeding. *Wagstaff v. Barnes*, 802 P.2d 774, 778 (Utah App. 1990), critical stages of a criminal proceedings include arraignment, preliminary hearing and trial. See, *Hamilton v. Alabama*, 386 U.S. 52, 55 (1961), the instances of ineffective assistance of counsel in this case during a critical stage of the proceedings amount to a constructive denial and thus a complete

deprivation of the right to counsel amounting to a double violation of Needham's rights to confrontation under the sixth amendment.

If a litigant is constructively denied the assistance of counsel in a proceeding in which he is entitled to counsel, the adversary process itself is rendered inherently unreliable and prejudice is legally presumed. See, *Flores-Ortega*, 528 U.S. 470 at 483. A litigant can be constructively denied counsel in several ways, a constructive denial of counsel occurs if counsel completely fails to subject the oppositions case to meaningful adversarial testing, *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006). Voluntariness of absence may not be presumed by the trial court, rather an inquiry into the defendants ability to appear at the proceeding is required and voluntariness of a defendant's absence from a proceeding is determined by considering the totality of the circumstances. *State v. Wasamick*,

31 P.3d 615, 624 (Utah App. 2001). Tebbs testimony was so integral to the states case, and because the defendant was so thoroughly denied assistance of counsel, he was constructively denied assistance of counsel in the fullest sense enunciated by the Mezie court. This structural error, prejudice presumed remands for a new trial. Therefore, the court may review ineffective assistance of counsel claim on direct appeal because record was sufficiently developed. *U.S. v. Gigley*, 213 P.3d 509, 516 n.2 (10th Cir. 2000), counsels failure to assert that trial counsel operated under a prejudicial conflict of interest was ineffective assistance because issue was obvious and would have resulted in reversal on appeal. *Hammon v. Ward*, 466 P.3d 919, 927-31 (10th Cir. 2006), counsels failure to assert timely claim of double jeopardy violation was ineffective assistance of counsel because there was reasonable probability that defendant would have

prevailed on merger argument and neglecting to challenge duplicitous counts was not objectively reasonable tactical decision, *U.S. v. Weathers*, P.3d 229, 230-39 (D.C. Cir. 2007). The cumulative error violate due process guarantee of fundamental fairness and necessitate a new trial. *Taylor v. Ky*, 436 U.S. 478, 488 n.15 (1978). Cumulative effect of 3 claims required reversal of conviction because individually claims warranted relief. *Breakiron v. Horn*, 642 P.3d 126, 131-32 n.5 (3rd Cir. 2011). Errors of prosecutions misconduct, improper jury instructions and deficient transcripts of proceedings required reversal because concerned central legal and factual issues of case and rendered trial fundamentally unfair. *U.S. v. Delgado*, 631 P.3d 685, 710-11 (5th cir. 2011). The water shed procedural rule is one that raises the possibilities that someone convicted with use of the invalidated procedure might have been acquitted otherwise. *Teague v. Lane*, 489 U.S. at 311 (1989).

The presumption of correctness overcome by clear and convincing evidence in exculpatory defense affidavit. *Norton v. Spencer*, 351 P.3d 1, 6-8 (1st Cir 2003). Needham claims the right to a Writ of Habeas Corpus for the Writ is clear and indisputable per 28 U.S. cs 1651 1(a) and the issuance of writ is extraordinary remedy. *U.S. Dist Court v. Kerr*, 426 U.S. 394, 400(1976). The right to release from confinement on charges for which a petitioner could not be tried without a violation of Double jeopardy can be raised by habeas corpus under this rule, *McNair v. Hayward*, 666 P.2d 321 (UT 1983). Habeas Corpus may be used to test alleged violations of basic rights such as prohibition against cruel and unusual punishment. *Ziegler v. Milken*, 583 P.2d 1175 (UT 1978). The denial of the court's decision to grant a new trial by not recognizing the right of confrontation clause. A writ granted because district court abused its discretion in erroneously deciding a legal issue."

Qwest Communications Int. Inc., 450 P.3d 1179, 1182-84 (10th Cir. 2006). Also, the denial of motion to dismiss on double jeopardy claim immediately appealable under collateral order doctrine. *U.S. v. Carpenter*, 494 P.3d 13, 25 (1st Cir. 2007). Double jeopardy preserved by the statements and testimony of Kim Quon of DOPL who affirmed at the trial that DOPL did in fact have an investigation that resulted in Needham's license being renewed in November 2007.

IX. Conclusion Rule 24(e)(10) UT R. App P

Because the cumulative errors of the state's failure to disclose exculpatory impeachment evidence and the gross denial of Needham's fifth amendment constitutional rights of Double Jeopardy protections, the sixth amendment constitutional rights to confrontation and effective assistance of counsel, and the fourteenth amendment rights of due process, the proceeding

here in were manifestly unfair. The cumulative effect of violating rights of Confrontation Clause, Double Jeopardy, effective assistance of counsel, rights of due process that were all violated by prosecutorial misconduct at a level of contempt on the court. Needham respectfully request of the court to issue a writ of Habeas Corpus and grant the Writ to protect Needham with relief from further injury. The multiple injuries inflicted qualify for an injunction under the "imminent danger exception." The State actors appointed by the court acted under conflict of interest by holding exculpatory material and inflicting multiple injuries that Needham has had to seek medical care everyday of incarceration. I envoke prison male box rule 21(f)

Addendum C

FIFTH DISTRICT COURT-ST GEORGE
WASHINGTON COUNTY, STATE OF UTAH

BACT LP vs. AARON NEEDHAM

CASE NUMBER 060501877 Contracts

CURRENT ASSIGNED JUDGE

G MICHAEL WESTFALL

PARTIES

Plaintiff - BACT LP
Represented by: KENNETH B GRIMES JR
Defendant - AARON NEEDHAM
Defendant - DT DEVELOPMENT INC
Defendant - NEEDHAM HOMES INC
Defendant - NEEDHAM HOMES AND DEVELOPMENT
Defendant - KILAUEA PROPERTIES INC
Defendant - LMM DEVELOPMENT INC
Defendant - CHERYL A MOUNT
Defendant - BILLY MOUNT
Defendant - JOHN DOES 1-100
Third Pty Cmplainant - AARON NEEDHAM
Third Pty Defendant - CLEMENT F TEBBS
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - JOHN B TEBBS
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - GREG ADAMSON
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - JOLIE BOWN
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - ROY THACKER
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - BONNEVILLE BUILDERS LLC
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - DOES I - X
Represented by: KENNETH B GRIMES JR
Third Pty Defendant - ROE CORPORATIONS I - X
Represented by: KENNETH B GRIMES JR

ACCOUNT SUMMARY

Printed: 01/27/16 11:23:32

Page 1

TOTAL REVENUE	Amount Due:	342.00
	Amount Paid:	342.00
	Credit:	0.00
	Balance:	0.00
REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE		
	Amount Due:	155.00
	Amount Paid:	155.00
	Amount Credit:	0.00
	Balance:	0.00
REVENUE DETAIL - TYPE: COUNTER 10K-MORE		
	Amount Due:	105.00
	Amount Paid:	105.00
	Amount Credit:	0.00
	Balance:	0.00
REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL		
	Amount Due:	75.00
	Amount Paid:	75.00
	Amount Credit:	0.00
	Balance:	0.00
REVENUE DETAIL - TYPE: COPY FEE		
	Amount Due:	7.00
	Amount Paid:	7.00
	Amount Credit:	0.00
	Balance:	0.00

CASE NOTE

PROCEEDINGS

10-10-06 Case filed

10-10-06 Judge JAMES L SHUMATE assigned.

10-10-06 Filed: Complaint 10K-MORE

10-10-06 Fee Account created Total Due: 155.00

10-10-06 COMPLAINT 10K-MORE Payment Received: 155.00

Note: Code Description: COMPLAINT 10K-MORE, Mail Payment;

12-29-06 Filed: Notice of Appearance

02-20-07 Filed: Answer, Counter-Claim, Third-Party Complaint

AARON NEEDHAM

02-21-07 Fee Account created Total Due: 105.00

Printed: 01/27/16 11:23:32 Page 2

02-21-07 COUNTER 10K-MORE Payment Received: 105.00
Note: Code Description: COUNTER 10K-MORE, Mail Payment;
03-13-07 Filed: Demand Civil Jury
03-15-07 Filed: Motion for Damages, Attorney's Fees, and Costs regarding
Wrongfully Filed Lis Pendens Oral Argument Requested
Filed by: DT DEVELOPMENT INC,
03-16-07 Filed: Reply to Counterclaim and Jury Demand
03-19-07 Fee Account created Total Due: 75.00
03-19-07 JURY DEMAND - CIVIL Payment Received: 75.00
Note: Code Description: JURY DEMAND - CIVIL, Mail Payment;
04-04-07 Filed: Notice of Withdrawal of Motion for Damages, Attorneys'
Fees, and Costs Regarding Wrongfully Filed Lis Pendens
04-06-07 Filed: Notice of Change of Firm Name and Address
04-16-07 Filed: Attorney's Planning Meeting Report
05-07-07 Fee Account created Total Due: 7.00
05-07-07 COPY FEE Payment Received: 7.00
Note: COPY FEE
05-08-07 Filed: Aaron Needham's Early Case Conference List of Witnesses
and Documents
05-29-07 Filed: Answer to Third Party Complaint
CLEMENT F TEBBS
06-05-07 Filed return: Summons
Party Served: BONNEVILLE BUILDERS LLC,
Service Type: Personal
Service Date: May 17, 2007
06-05-07 Filed return: Summons
Party Served: BOWN, JOLIE
Service Type: Personal
Service Date: May 17, 2007
06-05-07 Filed return: Summons
Party Served: TEBBS, JOHN B
Service Type: Personal
Service Date: May 17, 2007
06-05-07 Filed return: Summons
Party Served: TEBBS, CLEMENT F
Service Type: Personal
Service Date: May 17, 2007
06-07-07 Filed return: Summons
Printed: 01/27/16 11:23:32 Page 3

Party Served: ADAMSON, GREG

Service Type: Personal

Service Date: June 01, 2007

06-11-07 Filed: Aaron Needham's First Supplement to Rule 26(a)(1)
Disclosures

06-25-07 Filed: Answer to Third-Party Complaint
GREG ADAMSON

08-31-07 Filed: Attorney's Planning Meeting Report

08-31-07 Filed return: Acceptance of Service

Party Served: Kurt C. Faux

Service Type: Personal

Service Date: January 23, 2007

09-10-07 Filed: Notice to Appear or Appoint Counsel

09-19-07 Filed: Notice of Withdrawal as Attorney for Defendants Aaron
Needham, Kilauea Properties LLC, Needham Homes Inc., and DT
Development

10-09-07 Filed: Certificate of Readiness for Trial

08-23-10 Notice - Notice of Intent for Case 060501877

Clerk: loris

Notice is hereby given that, due to inactivity, the above entitled
matter may be dismissed for lack of prosecution pursuant to Rule
4-103, Code of Judicial Administration. Unless a written statement
is received by the court within 20 days of this notice showing good
cause why this should not be dismissed, the court will dismiss
without further notice.

11-10-10 Notice - Order of Dismissal for Case 060501877

Based on a review of this file and Rule 4-103 Utah Code of Judicial
Administration, the Court orders this case be dismissed, without
prejudice, for failure to file a Certificate of Readiness for Trial
within 330 days of the first answer.

11-10-10 Case Disposition is Dismsd w/o prejudice

Disposition Judge is JAMES L SHUMATE

11-10-10 Note: The case was taken off of OTSC hold

11-18-10 Filed order: Order of Dismissal

Judge JAMES L SHUMATE

Signed November 18, 2010

07-28-14 Judge G MICHAEL WESTFALL assigned.

Addendum D

IN THE FIRTH DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

2014 MAY 27 AM 9:38

STATE OF UTAH,)	RULING ON THE DEFENDANTS MOTION
Plaintiff,)	FOR A NEW TRIAL
Vs.)	
AARON D.T. NEEDHAM)	Case No: 101500067FS
Defendant.)	Judge A. Lynn Payne

This matter came before the court on April 9, 2014, for an evidentiary hearing on the Defendant's Rule 24 URCrP Motion for a new trial. Based upon the evidence, the court finds as follows:

1. Prior to trial, the State filed a motion to have the jury view a video deposition which had been taken on Jun 14, 2014. In the spring of 2012, the State had filed a URCrP rule 14(a)(8) motion to take the deposition of Clement Tebbs. The basis for the motion was that Mr. Tebbs would not be able to attend trial based on his health. On the 24th of May, 2012, Judge John J. Walton entered an order allowing the State to take the deposition of Mr. Tebbs. The order indicates that the parties had agreed that the deposition would be taken in Murray, Utah on the 14th day of June 2012, beginning at 9:00 am. The Defendant did not objection to the State's motion and the video deposition was admitted into evidence and was shown to the jury.

2. Mr. Tebbs and Mr. Needham had been in a business relationship wherein Mr. Tebbs financed the construction of homes in Southern Utah and Nevada. The State's charges were that Mr. Needham had converted funds to his own use. The defendant did not contest that he had received money from Mr. Tebbs which he had used for his own benefit. However, the Defendant claimed that Mr. Tebbs had authorized him to use the funds for his own use. In support of this defense, the defendant produced a document which was purportedly signed by Mr. Tebbs. Therefore, the central issue in this case was not whether funds had been diverted, it was whether Mr. Tebbs had authorized the diversion of the funds. The State presented evidence that when Mr. Tebbs became aware that funds had been diverted, he asked Mr. Needham to meet with him. At trial the State produced four witness who were present at this meeting. Each witness testified that during the meeting: Mr. Needham admitted he had diverted fund; he apologized for his conduct and promised to pay the money back; and that he

made no claim that he had been given prior permission to use the funds for his own use. Later, an investigator from the State licensing board interview Mr. Needham. During this meeting, Mr. Needham did not claim that he had authority to use the funds for his own benefit.

3. At trial, the state called John Grealish as a witness. Mr. Grealish was transported to Utah from another state, where he was serving a sentence on an unrelated offense. Mr. Grealish testified that Mr. Needham had diverted funds for his own benefit. Prior to trial and prior to the sentencing of Mr. Grealish, the State had sent a letter to the Honorable Clark Waddoups. (see exhibit 1) The letter informed the Court that Mr. Grealish had co-operated in the prosecution of Mr. Needham and had made himself available to testify in this matter.

The State clearly had a duty to provide this letter to the defense prior to trial so that it was available for the cross-examination of Mr. Grealish (impeachment as to motive). Scheree Wilcox, a para legal for the Attorney General's Office, mailed a copy of the Grealish letter to Nathan Reeve, who was then counsel for Mr. Needham. The court believes that the letter was mailed to Mr. Reeve. However, Mr. Reeve withdrew and Erick Cramer was appointed. Mr. Cramer testified that he reviewed the file which he had received from Mr. Reeve and the Grealish letter was not in the file. Mr. Cramer later withdrew and Douglas Terry (trial counsel) was appointed. Mr. Terry testified that the Grealish letter was not in the file that he received from Mr. Cramer. It is therefore clear that the letter was not available to trial counsel and that trial counsel was not aware of its existence.

This then presents an issue of whether the letter was actually received by Mr. Reeve. Mr. Nathan did not testify at the trial and neither party has addressed the issue of whether the State's duty under Brady is met when the material is mailed; or whether the State bears the burden to prove the material was actually received. Given the evidence in this case, the court need not resolve this issue. For the purposes of the analysis of this case, the court will assume that the letter was not mailed.

As indicated, the defendant did not contest that he had diverted funds to his own use. Therefore, the central issue was whether he had authority to do this. At trial he claimed that he did and that Mr. Tebbs had signed a document agreeing that he could use the funds as he did. However, four witness testified they were present when Mr. Needham admitted to using the funds without authority and that he apologized for doing so. When he was confronted he did not claim to have authority to divert the funds; neither did he make any reference to a document which granted him such authority. If Mr. Needham had prior authority he would not have admitted to wrong doing; and if he had an agreement which gave him authority to act as he did, he would have referred to the agreement and the document that memorialized the agreement. In a subsequent interview with an investigator from the licensing board, Mr. Needham did not claim that he had authority to use the funds for his own benefit. Also, at trial,

Mr. Needham testified that he could not work on a project in Nevada because the building inspector would not allow the construction to proceed. The State brought Mr. Needham's credibility into question by calling the Nevada building official, who testified that the city did not prevent the construction from going forward.

Based upon all the evidence presented at trial, the fact that counsel for the defense could not cross examine Mr. Grealish with the letter to Judge Waddoups does result in a reasonable probability that the results would have been different. This court's confidence in the jury verdict is not undermined. The State's case was strong and the defendant's case relied primarily on his testimony and a document that purportedly gave him authority to use the funds. This was the heart of his defense and it was presented and considered by the jury. The Defendant's Brady motion is therefore denied.

4. Scheree Wilcox, a para legal for the Attorney General's Office undertook the responsibility to schedule the video deposition of Mr. Tebbs. She sent Aric Cramer (counsel for Mr. Needham) a list of possible dates for the deposition. The lists included five dates (June 13, 14, 15, 26, and 27). Mr. Cramer then provided this list to his investigator, Brooke Karrington. Mr. Cramer asked Ms. Karrington if she was available on these dates; he also asked her to check to see if Mr. Needham was available. Ms. Karrington called Mr. Needham and gave him the dates. Mr. Needham said that he preferred the June 26th date. At the hearing Mr. Needham testified that Ms. Karrington told him that the deposition would be on the 26th unless she called him back. Ms. Karrington testified that she did not tell Mr. Needham the deposition would be on the 26th unless she called him back. I find the testimony of Ms. Karrington to be more credible.

5. The record is not clear as to when Mr. Needham actually received notice of the date of the deposition. Mr. Cramer testified that Mr. Needham "would have been notified". However, he did not have any specific memory that Mr. Needham was notified of the date of the deposition; nor did he have any record of a notice being sent to Mr. Needham. His testimony that Mr. Needham "would have been notified" merely indicates that it is his practice to notify clients of hearings. Ms. Karrington had the most contact with Mr. Needham during this time. She testified that she did not give Mr. Needham notice that the deposition would be held on the 14th. She testified that in the weeks prior to the deposition she had many conversations with Mr. Needham in preparation for the deposition and that she "probably" referred to the deposition date in these conversations. On the other hand, Mr. Needham testified that he did not receive notice of the June 14th hearing prior to the 12th of June. The record does not contain specific evidence that Mr. Needham had notice of the deposition until the 12th of June when Ms. Karrington called Mr. Needham to finalize their preparation for the deposition. In this matter the State has the burden to prove that Mr. Needham knowingly and

voluntarily absented himself from the deposition. To prove this, the State must prove that Mr. Needham had notice of the deposition. Notice is a prerequisite to a finding that Mr. Needham knowingly and voluntarily absented himself from the proceeding. Because the State has the burden of proof, the court will find that Mr. Needham was first notified of the date of the deposition on June 12, 2012.

6. On the 12th of June 2012 Ms. Karrington again talked to Mr. Needham about the deposition. Mr. Needham said that he thought the deposition was scheduled on the 26th. Mr. Needham said that he could not attend the deposition because he was required to be a witness in an Arbitration hearing and that he had just got back from Salt Lake City that day and his health would not allow him to travel back to Salt Lake for the deposition. Ms. Karrington asked him to provide her with a copy of the Subpoena to the arbitration hearing. Mr. Needham promised to do this, but did not provide the subpoena until the 15th (which was after the deposition has held). Without a subpoena, the parties where unable to verify Mr. Needham's scheduling conflict. Therefore, Mr. Cramer was unable to request a continuance based upon Mr. Needham's obligations to attend the arbitration hearing.

7. Mr. Needham had received a subpoena on June 1, 2012 which required that he appear at an arbitration hearing on June 15, 2012. The letter which accompanied the subpoena indicated the hearing was scheduled to begin on June 12, 2012 and that Mr. Needham would be called as a rebuttal witness. However, the letter informed Mr. Needham that he might not be needed to testify; but that if he had not heard from the attorney who issued the subpoena by June 14th, he should appear on the 15th. The stated date for Mr. Needham to appear was on the 15th; the letter did not indicate that Mr. Needham was to make himself available to appear on the 12th, 13th, or 14th. Nevertheless, Mr. Needham testified that he was concerned about when he should appear so he called the attorneys office and was instructed to appear on the 13th. He testified that he appeared at the attorney's office on the 13th and was instructed to appear again on the 14th. He testified that he appeared on the 14th but was then released from his subpoena and never testified. At the hearing Mr. Needham initially testified that he had never talked to JoAnne Jorgensen (the attorney who had issued the subpoena). After his counsel referred him to a prior statement in his deposition, he changed his testimony and testified that he had talked to JoAnne Jorgensen. In his deposition, Mr. Needham had stated that it was JoAnne Jorgensen who had requested that he appear on the 13th.

When Ms. Karrington talked to Mr. Needham on the 12th, she asked Mr. Needham to send her a copy of the subpoena that he had received to attend the arbitration hearing. This was obviously an attempt to verify the conflict so that Mr. Cramer could request that the deposition be continued. Mr. Needham had the subpoena in his possession at that time and promised to send her a copy of the subpoena, but he did not send Ms. Karrington a copy of the

subpoena until the 15th (the day after the deposition). Mr. Needham testified at the hearing that, at the request of someone from the office that had issued the arbitration subpoena, he went to the attorneys office on the 13th and 14th of June. He testified that he signed something that said that he had appeared on the 13th and 14th. However, he did not produce this document. There was certainly someone from that office that could verify that Mr. Needham was present at the arbitration on the 13th and 14th (or some documentation that would show his presence at those times); however, no witness was called to verify his attendance at the arbitration hearing and no explanation was given as to why this information may not have been available. Mr. Needham knew that, because the subpoena only required him to attend on the 15th (the day following the deposition), the subpoena did not prevent him from attending the deposition on the 14th. In the Courts judgment, that is the reason that he did not send Ms. Karrington a copy of the subpoena on the 12th as he had promised. In the Courts judgment, Mr. Needham also testified that he was required to be at the arbitration on the 13th and 14th in order to create a conflict in his schedule. The Court does not believe that he was required to be present at the attorney's office on the 13th or the 14th.

Based on the evidence, the Court concludes that the Mr. Needham's obligations with respect to the arbitration hearing, did not prevent Mr. Needham from being present at the deposition.

8. During the June 12th conversation, Ms. Karrington explained that Mr. Needham could attend the hearing via video conferencing and explained how a video conference could be arranged and how it would work. At the hearing, Mr. Needham testified that Ms. Karrington never talked to him about video conferencing. Mr. Needham also testified that, when he talked to Ms. Karrington on the 12th, Ms. Karrington told him the date of the deposition had been changed. Ms. Karrington testified that the date of the deposition had not been changed and that she never told Mr. Needham that it had been changed. Ms. Karrington's testimony regarding these issues is more credible.

9. In his March 7, 2013 deposition hearing (paragraph 2) Mr. Needham states: "On May 24th, 2012 this court issued an Order Granting Application for Order Allowing Deposition of Clement F. Tebbs. It was my understanding that this deposition was being taken in Salt Lake City Utah due to the failing health of Mr. Tebbs and that the deposition would be used in lieu of his personal appearance and live testimony at trial in the above matter." In his email to Brooke Karrington dated June 15th Mr. Needham stated: "The deposition was set up so Clem would not be at trial because of his medical issues." Mr. Needham was therefore aware that the deposition would be used at trial and that the deposition would likely present the only opportunity to cross-examine Mr. Tebbs. Mr. Needham was aware that it was expected that the medical problems of Mr. Tebbs would preclude him from appearing in St. George to testify

at trial. Although he was clearly aware that Mr. Tebbs' health was fragile and that he was unable to travel; when Counsel for the State cross-examined Mr. Needham at the evidentiary hearing, Mr. Needham would not acknowledge that he was aware that Mr. Tebbs was in failing health or unable to travel. The State contends that Mr. Needham was aware that Mr. Tebbs could not attend trial and that Mr. Needham believed that the deposition would not go forward if he did not attend; thus delaying the trial. In the court's judgment, this argument has merit.

10. At the hearing, Mr. Needham testified that he always believed the deposition would be held on the 26th of June. However, on the 15th of June, 2012 (a day after the deposition), Mr. Needham sent Ms. Karrington an email which stated: "I just for(sic) back from salt lake city from picking up my kids and had I known that the meeting was this week. I would have made arrangements to stay. But I didn't know I had set up for august 26 is which is the date that I agrees too." (Exhibit C to Exhibit 6) This statement conflicts with his testimony at the hearing that he had always believed that the deposition would be held on the 26th of June.

11. After the Defendant received notice on the 12th of June, he did not take any action to arrange to be in Murray on the 14th. There is regular airline service between South West Utah and Salt Lake. Flights to Salt Lake City are available from both Cedar City and St. George on a daily basis. Therefore, it was possible for Mr. Needham to fly to Salt Lake, which would have dramatically reduced the time he was required to sit. Mr. Needham testified that, in the past, he had agreed to fly to the Middle East in connection with his business as a carbon footprint expert. He testified that this long flight was possible in spite of his medical conditions because he would be flying on a private plane which would allow for him to lay down. Therefore, according to Mr. Needham, it is possible for him to travel over long periods of time, if he is able to lay down. Yet, Mr. Needham made no attempt to arrange for someone to drive him to Murray in a vehicle that would have allowed him to recline or lay down.

12. Mr. Needham is a paraplegic. In this case Mr. Needham has testified that his physical condition prevented him from attending the hearing. He testified that it is extremely difficult for him to travel. However, he does drive a vehicle to Salt Lake City or Brigham City to pick up his children for summer visitation. He testified that in order to do this, it is necessary for him to go up (to Salt Lake City or Brigham City) on one day, rest one day, and then travel back to St. George on the third day. However, in his March 7, 2013 affidavit (exhibit 6, para 7) Mr. Needham stated that he went to Salt Lake on June 11th and returned on the next day, June 12th. At the hearing, Mr. Needham changed his testimony and testified that he did not go to Salt Lake on 11th. He testified that he went to Fillmore on the 11th to pick up his children; and that he was only able to return the next day because Fillmore was much closer than Salt Lake. However, in an email to Ms. Karrington dated June 15, 2012 (Exhibit C to Exhibit 6) Mr. Needham stated that he just got from "Salt Lake". This email was sent just two days after his

travel on the 12th. This conflict in his testimony is troubling, especial in view of the fact that he also testified at the hearing that when he prepared the affidavit he had his records before him. At the hearing he repeatedly stated that, because he had his records before him when he prepared the affidavit, the affidavit would be the most accurate (as compared to his testimony at the hearing). These statements of Mr. Needham are in direct contradiction to his testimony at the hearing that he went the Fillmore on the 11th; and that he was unable to travel to and from Salt Lake City on successive days; and seriously undermine his testimony that his physical condition prevents him from travelling to and from Salt Lake City on successive days.

Mr. Needham testified that for the past several years he has been in need of frequent medical assistance; including that he was on life support at one time. It is therefore likely that there are medical professionals (including his primary physician, Dr. Gandhi) who possessed information concerning how his medical condition may affect his ability to travel. Mr. Needham did present a letter from Dr. Gandhi, which lists his medical conditions. However, the letter does not discuss how these conditions may affect Mr. Needham's ability to travel. While it is clear that, as a paraplegic, Mr. Needham has many limitations; there is no medical evidence that these limitation would prevent him from travelling to and from Salt Lake on successive days. (Which is, in fact, what Mr. Needham stated he did in his March 7, 2013 affidavit; and in his June 15th email to Ms. Karrington. (Exhibit 6))

Because his primary physician, Dr. Gandhi, did not indicated that Mr. Needham could not travel to and from Salt Lake on successive days. We must rely on Mr. Needham's statement that travel on successive days is impossible.¹ There are many instances where Mr. Needham, in the Courts judgment has been untruthful in his testimony. He testified that he has always believed that the Deposition was scheduled on June 12th; however, in his June 15th email to Ms. Karrington, Mr. Needham indicated that he believed the deposition was scheduled in August. The court has found that he was not truthful when he testified that Ms. Karrington told him that he should consider the deposition to be scheduled on June 26th unless Ms. Karrington notified him otherwise. He was untruthful when he testified that when Ms. Karrington talked to him on the 12th she said that deposition dated had been changed to the 14th. He was untruthful when he said that Ms. Karrington did not talk to him about video conferencing. These statements severely undermine the credibility of Mr. Needham.

Based on all of the evidence, the Court will find that Mr. Needham's medical conditions did not prevent him from travelling to Murray to attend the deposition. The Court finds that Mr. Needham can travel to and from Salt Lake City on successive days. Mr. Needham was therefore able to travel to Salt Lake to attend the deposition on June 14, 2012. In addition,

¹ At the conclusion of the hearing, the parties entered a stipulation to the testimony of Mr. Needham's mother. The Court has considered this stipulation and its effect on the evidence in reaching its findings in this matter.

other arrangements could have been made that would not have required Mr. Needham to drive (i.e. airline flights or travel in a vehicle where Mr. Needham could recline or lay down). However, Mr. Needham made no attempts to arrange for alternate transportation. In addition, Mr. Needham was aware that it was possible to conduct the hearing via video conferencing. Given the technology which is available to conduct hearings in this manner, Mr. Needham could have viewed the entire deposition proceedings and would have been able to communicate confidentially with Mr. Cramer. Under the circumstances of this case, that process would have been sufficient to afford Mr. Needham his constitutional rights to be present and confront Mr. Tebbs.

Mr. Needham was aware of the date and time of the deposition and had the ability to attend in person or be present via video conferencing. He made no effort to attend the hearing; and he declined to conduct the hearing via video conferencing. He chose not to attend in the belief that the deposition would not go forward in his absence. He was aware of the fragile health of Mr. Tebbs and sought to delay the date for the deposition to a date that Mr. Tebbs may not have been available to give testimony.

13. The Court finds that the State has met its burden to prove that Mr. Needham knowingly and voluntarily absented himself from the deposition. He therefore waived his right to be present and confront Mr. Tebbs during his testimony.

14. In his motion, Mr. Needham claims that Mr. Cramer was ineffective in his cross-examination of Mr. Tebbs at the deposition. At the hearing on this motion, the state presented exhibit 5 which is a multiple page list of questions (and in some instances anticipated answers) which Mr. Needham wanted Mr. Cramer to ask Mr. Tebbs. Mr. Needham has failed to identify which questions were not asked and how the failure to ask a question or question demonstrates ineffective assistance of counsel. The Defendant has also provided question that he believes Mr. Cramer should have asked at the deposition. (Exhibit 7) However, the Defendant has failed to provide the court with an explanation or analysis as to how the failure to ask a question or question demonstrates ineffective assistance of counsel. Counsel for Mr. Needham (Mr. Terry and Mr. Cramer) each testified that many of the defenses that Mr. Needham wanted to rely on were not relevant to his defense. The court has reviewed the questions in Exhibit 7 and has not identified any questions which relate to the central issue of whether Mr. Needham had authority to use funds for his own benefit. The questions in Exhibit 7 are questions which go to the credibility of Mr. Tebbs. There is no analysis to help the court understand how the failure to ask these questions shows ineffective assistance of counsel. The Strickland analysis requires the defendant to initially show that counsel's performance was deficient. There is no evidence that the failure of Mr. Cramer to ask any question at the

deposition constituted ineffective assistance of counsel; therefore, the Defendants motion with respect to that issue is denied.

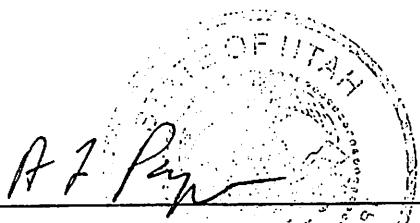
15. With respect to the claim that Mr. Terry was ineffective in failing to object based on the right of confrontation, the defendant waived the right of confrontation when he voluntarily absented himself from the deposition. Therefore, it was not ineffective assistance of counsel to object based on a right that the defendant had knowingly and voluntarily waived.

16. In his affidavit (Exhibit 7) at paragraph 6, Mr. Needham stated that he did not believe that Mr. Terry knew the deposition was scheduled at a time when he could not be present. Mr. Needham does not claim that he informed trial counsel that he could not be present at the deposition because he was required to testify at an arbitration hearing, or that he could not travel due to his medical condition. Mr. Needham further indicated that he did not believe that Mr. Terry was aware of his claims concerning Mr. Cramer's lack of preparation, or his claim that Mr. Cramer did not have documents which were important for the cross-examination of Mr. Tebbs. (Exhibit 7, para 6)

From the time of the deposition of Mr. Tebbs, Mr. Needham possessed all of the information which would have given Mr. Terry grounds to object to the introduction of the Tebbs deposition. He failed to provide this information to trial counsel. Without this information, trial counsel had no basis to object. Therefore, Mr. Terry was not ineffective in failing to object.

Mr. Needham also claims that Mr. Terry failed to subpoena record from title companies. This goes to the credibility of Mr. Tebbs. However, in view of the issues presented at trial, and considering all of the evidence which was presented, the Court does not believe that the failure to subpoena these records constituted ineffective assistance of counsel.

Dated this 26th day of May, 2014.


A. Lynn Payne Sr. District Court Judge