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**State of Utah, Plaintiff/ Appellee, vs. Allen Bruun and James  
Didericksen, Defendants / Appellants.**

Utah Court of Appeals

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## IN THE UTAH COURT OF APPEALS

**State of Utah,**

Plaintiff / Appellee,

vs.

**Allen Bruun and James Didericksen,**

Defendants / Appellants.

Case No. 20140295-CA

Case No. 20140296-CA

Appellants are not incarcerated.

Appeal from a judgment of conviction and a restitution order for 7 counts of theft, a second degree felony, 5 counts of theft, a third degree felony, and one count of theft, a class A misdemeanor, in violation of Utah Code § 76-6-404, and one count of Pattern of Unlawful Activity, a second-degree felony, in violation of Utah Code § 76-10-1603 Third District Court in and for Salt Lake County, State of Utah Case Nos. 111903467 and 111903468, The Hon. Katie Bernards-Goodman presiding

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UTAH APPELLATE COURTS

NOV 13 2015

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## ARGUMENT

### **I. THE CONVICTIONS SHOULD BE REVERSED BECAUSE INTERPRETATION OF THE LIMITED LIABILITY ACT AND THE WRITTEN OPERATING AGREEMENT WERE QUESTIONS OF LAW FOR THE COURT AND AUTHORIZED DEFENDANTS' ACTIONS.**

#### **A. Under the LLC Act, the defendants' alleged actions were authorized as a matter of law because they owned more than two-thirds of the profits interests in the LLC.**

As noted in Defendants' opening brief, the state legislature has chosen to grant broad authority as a matter of law to managers of an LLC who also own more than two-thirds of the sharing interests in the LLC. That authority includes express statutory authority to take actions that are (allegedly) "in contravention of... an operating agreement..." (*See Didericksen Br.*, p. 24.)<sup>1</sup>

In its brief, the State recognizes that this issue is one of law to be reviewed for correctness (*State Br.*, p. 2), but argues that it was not preserved. As Defendants have argued, however, the fact that the trial court would not review the governing operating agreement on the sole ground that this is not a criminal case suggests a similar futility had counsel asked the court to review the LLC Act. In

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<sup>1</sup> By order of the Court, briefing has been consolidated in these two cases, but Defendants initially filed separate opening briefs. Because the two briefs were substantively identical, Defendants cite to the initial Didericksen brief except where otherwise noted. Defendants also cite to the Didericksen record.

any event, failing to raise a potentially dispositive defense is plain error, ineffective assistance of counsel, and manifest injustice. (*See Didericksen Br.*, pp. 33-35.)

In disagreeing, the State argues that Defendants “had no such statutory right,” therefore “there was no error, let alone plain error,” and that failing to raise a “futile” argument is not ineffective assistance. (*State Br.*, pp. 16, 21.) The State says Defendants are “misreading” the LLC Act, but Defendants are, instead, reading the Act in its entirety, unlike the State.

The analysis starts with Utah Code § 48-2c-804(4), which states that “no manager shall have authority to do any act in contravention of the... operating agreement, except as provided in Subsection 6(g).” Subsection 6(g) itself states in pertinent part, “(ii) members holding 2/3 of the profits interests in the company, and 2/3 of the managers shall be required for all matters described in Subsection 48-2c-803(3).”<sup>2</sup>

The State notes that § 48-2c-804(6) (not (6)(g)) includes a prefatory statement, “Unless otherwise provided in the articles of organization or operating

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<sup>2</sup> The “matters described” in Subsection 48-2c-803(3) include  
(a)(i) authorizing a member or any other person to do any act on behalf of the company that is not in the ordinary course of the company’s business, or business of the kind carried on by the company;...  
(c) resolving any dispute connected with the usual and regular course of the company’s business; [and]  
(d) making a substantial change in the business purpose of the company;...

agreement of the company....” According to the State, the Operating Agreement “otherwise provided” that the unanimous consent of all members was required to change the purpose of the company, and therefore an action by Defendants without the Poseys’ consent would have been unauthorized even if Defendants held the required majorities. (State Br., p. 18.)

The State’s argument fails to consider the LLC Act as a whole. Under Section 804(4), a manager may take certain actions *in contravention of* an operating agreement. Under the State’s argument, this section could never be triggered; a manager could never act in contravention of an operating agreement because, if the action is in contravention of the operating agreement, that means the operating agreement “otherwise provides” some prohibition against the action.

The only reasonable meaning of Section 804(4) is that, when it mentioned 804(6)(g), that is what it meant – (6)(g) – which states, in pertinent part, that “approval” of “members holding 2/3 of the profits interests in the company, and 2/3 of the managers shall be required for all matters described in Subsection 48-2c-803(3).” By referencing § 804(6)(g), Section 804(4) was intended to authorize actions that would otherwise be in contravention of the operating agreement if: 1) the actions are approved by members holding at least 2/3 interest and 2/3 of the managers, and 2) those actions are one of the specific “matters described” in subsection 48-2c-803(3).



The State's contrary interpretation is not only circular but inconsistent with the actual wording and purpose of the statute. As the State itself suggests, the Act is intended to afford flexibility to LLC members; one way it achieves that is to permit those with the biggest stakes (2/3+ interest holders) in conjunction with those who have been given management authority to take actions in a more flexible and timely manner. Moreover, to the extent the statute is unclear on this pivotal point, Utah recognizes the rule of lenity. *Watkins, supra*, 2013 UT 28, ¶ 38 n.3.

An additional problem with the State's argument is that it disregards other sources of Defendants' statutory authority. As noted above, Subsection 804(6)(g) (in conjunction with Section 48-2c-803(3)) permits 2/3 interest holders to, *inter alia*, "(a)(i) authoriz[e] a member or any other person to do any act on behalf of the company that is not in the ordinary course of the company's business, or business of the kind carried on by the company;... (c) resolv[e] any dispute connected with the usual and regular course of the company's business; [and] (d) mak[e] a substantial change in the business purpose of the company..."

Of those three actions, the State claims a limitation within the Operating Agreement only as to (d), arguing that the Operating Agreement restricted Defendants' ability "to change Tivoli's business purpose" without the Poseys' consent. (State Br., p. 17.) The State does not claim that there was a similar restriction in the Operating Agreement on Defendants' authority to take the actions

described in (a) or (c). Indeed, the Operating Agreement itself provides that Defendants, as the managers, are authorized to resolve “any questions regarding the conduct of the company business.” (*See Didericksen Br.*, pp. 14-15, 32.)

In this regard, the State’s argument that the Operating Agreement is ambiguous becomes particularly important. If the State is correct in that contention, then both the LLC Act and the Operating Agreement gave Defendants the authority to resolve that dispute. They did so. If the Poseys did not agree with that resolution, they had recourse under the LLC Act or in the courts. *E.g.*, Utah Code §§ Utah Code § 48-2c-710, -807, -809, -1210 (actions available for misconduct, dissociation, removal of member or manger, or dissolution); *OLP, L.L.C. v. Burningham*, 2009 UT 75, 225 P.3d 177.

In short, Defendants’ actions were authorized under the LLC Act, and this should have been recognized and addressed by the parties and court below. The State makes a final argument, however, that “it would not have been obvious on this record that they even had the necessary profits interest to assert the claimed authority.” (State Br., p. 19.) “[F]or purposes of the LLC Act, a member’s profits interests is determined by his ‘capital account balances on the date on which compliance is measured,’” the State says. (*Id.*, citing Utah Code § 48-2c-803.1 and Op.Agr. at 3.7.) The State argues that “Defendants provided no proof of what the separate capital account balances were on each of the ‘date[s] on which compliance

is measured,” which the State defines as “the separate dates on which they allegedly authorized each check.” (State Br., pp. 19-20.)

In making this argument, the State’s brief omits part of § 48-2c-803.1.

Immediately before the quoted clause, the statute says (*italics added*):

For the purpose of determining compliance with a provision of this chapter that conditions rights, consents, or actions on the participation of members holding a certain percentage of the company’s profits interests, *unless otherwise provided in the articles of organization or the operating agreement*, each member’s profit interest shall be determined based on the members’ capital account balances on the date on which compliance is measured.

Utah Code § 48-2c-803.1. The Operating Agreement was in evidence and does, in fact, “otherwise provid[e],” expressly defining the members’ profit interests as 75% Defendants (later increased) and 25% Poseys. (*See Didericksen Br.*, p. 10.) That is well beyond the two-thirds statutory threshold.

**B. The terms of the Operating Agreement were not ambiguous on the dispositive issues, or the court should have determined ambiguity as a threshold matter and instructed the jury accordingly.**

The State does not contest that whether Defendants had authority (negating theft) or had a reasonable belief they had authority (negating intent) turns on the language of the Operating Agreement. Nor does the State claim that the court examined the contract or found any of its provisions ambiguous; instead, it simply sent the document to the jury, without instruction, to give whatever weight it chose.

On appeal, the State argues that, “when a contract is ambiguous, its interpretation presents a question of fact that may be submitted to the jury.” (State Br., pp. 2, 22-29.) That is not correct – juries do not “interpret” agreements, they determine what parties intended – if (and only if) a court has first ruled that the parties themselves did not clearly articulate it, and with appropriate instruction. *See Daines v. Vincent*, 2008 UT 51, 190 P.3d 1269 (parol evidence may be considered by a jury only after finding of ambiguity by the trial court).

In an ironic twist, the State asks this Court to do what it successfully persuaded the trial court *not* to do, *i.e.*, examine the Operating Agreement to assess whether it is (un)ambiguous. (State Br., pp. 22-29.) If the Operating Agreement is unambiguous, then it is for the Court to apply its terms, including those relating to authority. (*See Didericksen Br.*, pp. 29-30.) If the State hoped to support a conviction based on a claimed ambiguity, it should have endorsed Defendants’ repeated efforts to have the court review the document before giving it to the jury.<sup>3</sup>

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<sup>3</sup> “[C]ontractual ambiguity can occur in two different contexts: (1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties. The first context presents a question of law to be determined by the judge. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, parol evidence of the parties’ intentions should be admitted. Thus, before permitting recourse to parol evidence, a court must make a determination of facial ambiguity.” *Daines*, ¶ 25 (internal quotation marks and citations omitted).

If the trial court found the Operating Agreement ambiguous, it would also have needed to identify the nature of the ambiguity. Is it specific provisions or the document as a whole that is ambiguous? Does the ambiguity arise from missing terms or the parties' course of conduct? *See Daines*, ¶ 29. Only after making these initial determinations could the court meaningfully direct the jury as to its charge. The trial court here did none of this, for the wholly insupportable reason that this is not a civil case, as if defendants have fewer rights when their liberty is at stake. (*See Didericksen Br.*, p. 16.)

In suggesting that the error inherent in all this is harmless, the State acknowledges that the Operating Agreement contains language conferring broad authority on Defendants to pursue business of real estate development generally, as opposed to specific limitation to the 29 acres in Saratoga Springs. (*State Br.*, pp. 30-31.) The State's assertion that § 7.1 of the Operating Agreement nonetheless limits management authority to development of the 29 acres in Saratoga Springs ignores this additional language and is incorrect. The cited section limits management authority to the "purposes herein stated," which would encompass all of the purposes stated therein, including general real estate development.

The State's argument that specific language controls over general language further supports Defendants' arguments in this case. The sole provision that

explicitly states limitations regarding Defendants' authority in connection with the nature of the business is § 7.4.7.1, which reads:

There is an express limitation on the nature of the Business and the powers granted the Managers herein, the Company is intended to purchase and develop, hold and sale real estate for investment purposes only, and no activities inconsistent with such limited purposes shall be undertaken.

This language is the most specific description of limitations on Defendants' authority on this point and, under the State's argument, trumps the more generic "business purpose" language cited by the State.<sup>4</sup>

The State's assertion (State Br., p. 28) that member approval provisions, *e.g.*, § 7.5.1 prevented the managers from signing the checks at issue is not at all clear. But for a few instances (sequestration of \$100,000, Count 8; and the two checks totaling \$50,000 reimbursement for a finder's fee obligation that even Kerry Posey

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<sup>4</sup> The State's assertion that Defendants violated the Operating Agreement's provision to refrain from doing anything that would make it impossible to carry on the LLC's ordinary affairs because ultimately there were not "funds it needed to bring the 29 acres to entitlement" is legally and factually incorrect. As adduced at trial, the re-zoning of the land and approval of the conceptual plan for the Tivoli Development was accomplished. (R. 1537, p. 150:3-6.) Moreover, the charged offense was spending money that Defendants had no authority to spend on a particular purpose. That is far different from spending money unwisely, or spending money that would become unauthorized later if a deficit developed. The remedy, if any, for alleged violation of this provision would be in the civil courts. In any event, the record reflects that was Bobbie Posey's unauthorized LLC filings and filing of a notice of default (thus precluding further financing), and not the expenditures at issue, that made it "impossible" to carry on. (R. 1537, p. 10:15-11:25; R. 1535, p. 231:21-234:4.)

admitted was agreeable<sup>5</sup>), the checks represented relatively small amounts compared to the whole effort in each case. Nor do these three checks appear to fall into the categories of “Purchase, receipt, lease, exchange or other acquisition of any real or personal property or business” set out in the cited section.

**II. ALL BUT FOUR COUNTS SHOULD HAVE BEEN DISMISSED, OR A NEW TRIAL GRANTED, BECAUSE THE VALUE OF THE PROPERTY ALLEGEDLY STOLEN IS LIMITED TO THE VICTIM’S INTEREST THEREIN.**

In their opening briefs, Defendants pointed out that the Poseys had (at most) a 25 percent profits interest in the LLC. If Defendants were charged with stealing property from the Poseys by writing the checks, the “value” of that property could not exceed the Poseys’ interest. On appeal, the State acknowledges that this issue is one of law reviewed for correctness (State Br., p. 2), and does not contest the correctness of the argument itself. Instead, the State changes its entire theory of the case and asks the Court to find that the property stolen was not that of the Poseys, but instead of the LLC. (State Br., pp. 32-40.) This it cannot do.

The State begins its analysis by noting that it is not a defense to theft that the actor has an interest to the property, if another person has an interest that the actor is not entitled to infringe. (State Br., p. 33.) Correct, but irrelevant: While Defendants could be charged with stealing property, the *value of the property*

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<sup>5</sup> R. 1533, p. 233:9-13.

*stolen* – a required element of proof – is limited to the other person’s interest. That proposition is both well settled (*see* Didericksen Br., p. 36) and obvious: If a defendant “steals” a stack of 100 one dollar bills of which 50 are his own, he can be charged with theft, but only of \$50.<sup>6</sup>

The State then moves on to its principal argument, that the property stolen was not that of the Poseys, but rather of the LLC. As the State appears to recognize, that is directly contrary to its argument at all prior stages of this case. The State expressly charged Defendants with stealing *the Poseys’* – not the LLC’s – property. *See* R. 69-95 (Amended Information). At trial, the State argued that *the Poseys* – not the LLC – were the victims. (*E.g.*, R. 1554, pp. 80-81, R. 1538, pp. 12-13, 17-19.) After trial, the State argued that *the Poseys* – not the LLC – were the victims entitled to restitution. R. 1064-70 (State’s Restitution Memorandum, and R. 1539 pp. 9, 12 (restitution hearing), and 14 (court referring to Poseys as the “victims”). In ordering restitution for the benefit of the Poseys, the trial court necessarily found them – not the LLC – to be the “victims”. *See*

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<sup>6</sup> The State suggests that the legislature has effectively overruled *State v. Parker*, 137 P.2d 626 (Utah 1943), which first articulated these basic concepts. That is incorrect. *Parker* is cited for the proposition that (only) the value of the victim’s legal interest in the property is dispositive of the level of offense. That principle remains unchanged.



Utah Code §§ 77-38a-102(14) (defining “victim” for purposes of restitution statute), 77-38a-302 (authorizing restitution to “victims”).<sup>7</sup>

The State seeks to excuse this abrupt retreat from its own allegations by arguing that it would not have been required to prove the identity of the victim below. (State Br., p. 38.) That might be true, but when it chose to do so for its own strategic reasons, it could not affirmatively *mislead* Defendants. In *State v. Fulton*, 742 P.2d 1208 (Utah 1987), the defendant argued that “a prejudicial variance had occurred between the dates alleged in the information and the evidence presented by the prosecution at trial.” In addressing that issue, the Utah Supreme Court first observed:

By definition, the right to constitutionally adequate notice requires that the information given by the prosecution must be such that the defendant can confidently rely on it in preparing for trial. Therefore, an essential corollary of the defendant’s right to obtain information on the alleged offense from the prosecution is some rule or doctrine which assures that the information given is reliable. The variance doctrine can fulfill this function by prohibiting the prosecution from introducing at trial evidence that varies from the information previously given, if that variance would prejudice a defendant’s case and if the defendant has not been allowed sufficient time before trial (by means of a continuance if necessary) to prepare to meet the prosecution’s changed position.

The court went on:

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<sup>7</sup> The statute authorizes restitution only for “victims.” If the Court agrees with the State’s new argument that the Poseys were not the victims, then the restitution order in their favor is legally insupportable on its face and must be reversed on that basis alone.

It would be a mockery of the constitutional rights of defendant to allow the state to falsely state the particulars of the offense charged and then without amendment and without giving defendant additional time to meet new evidence beyond those particulars obtain a conviction founded on said evidence.

For this reason, whenever the prosecution changes its position, a defendant may seek a continuance. If the trial court finds the variance to be prejudicial, it must grant a continuance as a matter of right.

*Id.*, quoting *State v. Myers*, 5 Utah 2d 365, 372, 302 P.2d 276, 280 (1956); *see also State in interest of D.B.*, 2012 UT 65, ¶ 44, 289 P.2d 459 (“the Sixth Amendment is satisfied when a defendant (1) receives adequate notice that the State is pursuing accomplice liability and (2) the State has not affirmatively misled the defendant”; reversing conviction for constitutionally inadequate evidence where State developed an alternative liability theory after the close of evidence).

It is far too late now for the State to argue for the first time that the property stolen was that of the LLC, not the Poseys. The trial is long over; no continuance can protect Defendants from lack of notice of this new theory. If the convictions are to be affirmed, it must be on the factual and legal basis that the State charged, and successfully argued at and after trial. That is particularly true when the trial court was invited by the State to, and did, make an implicit factfinding that it was

the Poseys (not the LLC) who had been damaged in the amount of 100% of the checks.<sup>8</sup>

The State's Brief makes no attempt to justify the convictions under the actual basis upon which it charged and tried the case, and reversal is compelled.

### **III. THE CONVICTIONS SHOULD BE REVERSED FOR FAILURE TO INSTRUCT ON THE LESSER-INCLUDED OFFENSE OF WRONGFUL APPROPRIATION.**

From the principal briefs, it appears that several dispositive facts on this issue are undisputed or uncontroverted:

- Wrongful appropriation is a lesser included offense of theft.
- The only difference between wrongful appropriation and theft is the length of time the defendant intended to hold the property.
- Wrongful appropriation is a misdemeanor.
- Convictions of wrongful appropriation would have resulted in non-appealable acquittals on the felony theft charges.
- Convictions of wrongful appropriation would have negated the most serious felony count (Count 29, Utah Pattern of Unlawful Activities Act), because wrongful appropriation is not a predicate act under the UPUAA.

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<sup>8</sup> In a footnote, the State notes that the Defendants attempted to argue at trial that the funds were Tivoli assets, not the Poseys' money. As reflected in the citations, this assertion was for the narrow purpose of rebutting the State's repeated assertion that Defendants had stolen *from the Poseys*.

- Defendants and the State represented to the trial court that defense counsel were withdrawing their request for a wrongful appropriation instruction because an agreement had been reached between them, which agreement was then summarized on the record.

- Defense counsel claims that the agreement involved the State supporting a request for the trial court to interpret the Operating Agreement post-verdict (which seems supported by the transcript),<sup>9</sup> and that the State reneged. The State claims that, despite its concurrence on the record, it never actually intended to give any *quid pro quo* to Defendants in exchange for their withdrawal of the wrongful appropriation instruction.

Under such facts, only two possible conclusions can be drawn: 1) defense counsel's decision was objectively unreasonable (if they simply dropped a critical instruction for no gain), or 2) the State reneged on a deal. Either way, the convictions are tainted by ineffective assistance of counsel or manifest injustice.

In light of the uncontested circumstances, the State's speculation that the defense could have come up with some other legitimate reason to give up the instruction other than the bargain struck is beside the point. A theoretical basis for foregoing an instruction is immaterial when it is undisputed – and was acknowledged by the State – that counsel was relying on an agreement.

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<sup>9</sup> See Didericksen Br., p. 45.

In any event, however, the State's argument that foregoing the instruction might have been justifiable if it put the State to a higher burden of proof (theft vs. wrongful appropriation) is belied by what actually happened: As noted in Defendants' opening brief, the State told the jury that *any* intended deprivation – even as short as 30 seconds – satisfied the elements of theft. In other words, the State was *not* put to a higher theoretical burden of proof, and this claimed possibility could not serve as a rational basis for foregoing such an important instruction.

As a final attempt to sustain the convictions, the State avers that “there was no reason for the jury to believe that they [Defendants] intended to give the money back after a temporary period.” (State Br., p. 48.) That assertion is perplexing: If there was no way that jurors could think the intended deprivation was temporary, why did the State emphasize to the jury that it could still convict even if it believed the intended deprivation to have been temporary? (*See Didericksen Br.*, pp. 43-44.)

An instruction requires only some supporting evidence, and there was ample evidence from which the jury could have found Defendants to have intended only a temporary deprivation: Among other things, Defendants had – years before any criminal charges were brought – already repaid, either directly or effectively, 11 of the 12 checks upon which they were later convicted – including one check that said “temporary adv[ance]” on the memo line. *See Add. Exh. A hereto.* Moreover,

Defendants had at least a 75% interest in the LLC, so they had a direct financial incentive to return monies when appropriate to see the LLC succeed.

“[W]hen the defense requests a jury instruction on a lesser included offense, the requirements for inclusion of the instruction should be liberally construed.” *State v. Spiller*, 2007 UT 13, ¶ 10, 152 P.3d 315 (citations omitted); *see also State v. Watkins*, 2013 UT 28, ¶ 39, 309 P.3d 209. Defendants were entitled to a wrongful appropriation instruction in this case. It was fatal error not to ask for or give it, and reversal is warranted.

#### **IV. THE UPUAA COUNT SHOULD BE DISMISSED AS A MATTER OF LAW, OR THE CONVICTION REVERSED FOR FAILURE TO GIVE A COMPLETE ELEMENTS INSTRUCTION.**

More than four years before Defendants’ trial, the Utah Supreme Court held that the Utah Pattern of Unlawful Activities Act requires, *inter alia*, that the activities at issue “extend over a substantial period of time.” The State acknowledges this. (*See State Br.*, pp. 52-53.)<sup>10</sup>

The State argues, however, that “Defendants point to no Utah case, and the State is aware of none, in which any Utah court has held that a ‘substantial period of

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<sup>10</sup> The State coyly characterizes *Hill v. Estate of Allred*, 2009 UT 28, 216 P.3d 929 as “suggest[ing] that the ‘continuing conduct’ element of a UPUAA claim is satisfied if the conduct ‘extend[ed] over a substantial period of time.’” (*State Br.*, pp. 52-53.) *Hill* did more than that; it quite clearly *required* a substantial period of time (for closed continuity). *See Didericksen Br.*, pp. 48-49.

time' instruction must be included in a UPUAA case.” (State Br., p. 49.) That might be true, but the Utah Supreme Court *has* held – repeatedly – that a jury must be instructed as to “all the legal elements that it must find to convict of the crime charged, and the absence of such an instruction is reversible error as a matter of law.” *State v. Bluff*, 2002 UT 66, ¶ 26, 52 P.3d 1210 (citations omitted).

The State argues that it is an “open question as to whether such an instruction is required,” and that, “at the time of this trial, federal cases suggested that instructions are sufficient if they instructed the jury on the pattern of activity element, as well as the concept of continuity.” (State Br., p. 53.) That is incorrect. In the cases cited by the State, the temporal aspect of continuity was not at issue; hence, none address a failure to instruct as to that requirement. Instead, the State’s cases (State Br., pp. 54-55) address only the separate issue of relatedness, finding that concept to have been sufficiently described in other instructions.

There is a big difference between relatedness and the threat of continued activity (closed/open continuity). *See, e.g., U.S. v. Pelullo*, 964 F.2d 193, 208-09 (3rd Cir. 1992) (jury instructions were inadequate were they addressed only relatedness and not temporal components of continuity under RICO); *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F. 3d 12 (1st Cir. 2000) (noting distinction between relatedness and temporal components); *Ward v. Nierlich*, 617 F. Supp. 2d

1226 (under RICO, plaintiff must establish that the predicate acts “were related *and* that they amount to a threat of continued criminal activity”) (emphasis added).

The State identifies no instruction that even addressed, let alone properly directed, the jury on what was required to find a threat of continued activity (*i.e.*, closed or open continuity). The complete absence of any instruction even touching on this issue precludes a contention that the point was covered in other instructions, as occurred in the cases cited by the State.

The State next speculates that there could have been a tactical reason for Defendants failing to request this important instruction. According to the State, counsel could reasonably have foregone an instruction on closed continuity because the State could then have argued for an alternative theory, open continuity. But that could not have been a rational defense strategy: Requiring the State to prove open continuity would not have subjected Defendants to any greater exposure or more harmful evidence; it would only have increased the State’s burden by requiring additional evidence of intent to violate the statute for the requisite period of time. The State’s own discussion demonstrates this reality. (*See* pp. 56-58.)<sup>11</sup>

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<sup>11</sup> The State indicates that requiring it to prove open continuity would have given it incentive to show that Defendants’ conduct was their “regular way of doing business” and “prompt[ed] the prosecutor to now ask questions about Defendants’ business practices.” (State Br., pp. 58, 59.) But the State *already* asked those questions and repeatedly said this was Defendants’ way of doing business (*e.g.*, R.



Finally, the State argues that “it is not probable that the jury would have acquitted [Defendants] on the UPUAA count if given the additional instruction.” (State Brief, p. 59.) The State theorizes that, had the instruction been given, it could have shifted its theory to open continuity, which the jury would have found. Or, the State says, the jury might have added in the last check to come up with nine months instead of four, and “it is not reasonably likely that the jury would have found that a nine-month period of thefts was not ‘substantial.’” (State Br., p. 60.)

These suggestions are both speculative and improbable. The State was sufficiently concerned about the short period of time involved that it assured the jury that convictions could be entered regardless of the duration of intended deprivations. It is more likely that a jury would find a \$983.81 check written five months after the last one to be an outlier – resulting in a four-month period insufficient to show *closed* continuity – and a lack of *open* continuity where 99.47 percent of the alleged theft had occurred and concluded more than five months earlier.

Defendants, of course, submit that this issue should not even have reached a jury, because either period of less than one year is insufficient as a matter of law. The State does not dispute the long line of cases in which federal courts have reached this same conclusion. (See Didericksen Br., pp. 50-51.) The State,

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1538, p. 10:12-16, p. 31:14-15, p. 30:25-31:5). A jury instruction on continuity would have posed no additional detriment to Defendants.

however, cites two civil cases, one from the Ninth Circuit and one from a court within the Ninth Circuit, *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995), and *California Pharmacy Mgmt., LLC v Zenith Ins. Co.*, 669 F.Supp.2d 1152 (C.D. Cal. 2009) for the proposition that there is no “bright line” threshold in that circuit.

While those opinions do contain that language, even within the Ninth Circuit “[c]ourts routinely find that alleged racketeering activity lasting less than a year does not constitute a closed-ended pattern.” *Barsky v. Spiegel Accountancy Corp.*, 2015 U.S. Dist. LEXIS 16900 \*20 (N.D. Cal. Feb 11, 2015), citing *Turner v. Cook*, 362 F.3d 1219, 1231 (9th Cir. 2004); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992). In *Allwaste* itself, for example, the court allowed amendment of a complaint to add dates after noting that the plaintiff said it could prove conduct over “thirteen months,” which the court said would satisfy the closed continuity requirement.

The State correctly notes that there is not presently a Utah appellate decision recognizing under UPUAA what virtually all federal courts have recognized under its federal counterpart. But it can be both ineffective assistance of counsel and plain error to fail to discover an overwhelming body of law that the Utah Supreme Court has repeatedly recognized as instructive in construing UPUAA, including in *Hill* itself. (See *Didericksen Br.*, p. 52.)

In sum: UPUAA imposes a minimum threshold of at least one year to allege closed continuity. The facts alleged in the State's own Information show that the statute cannot have been violated, and the UPUAA conviction should be reversed. In the alternative only, the jury should have been instructed as to the "substantial period"/threat of continuing activity and temporal requirements.

**V. THE RESTITUTION AWARD IS BOTH LEGALLY ERRONEOUS AND MANIFESTLY UNJUST.**

Defendants have raised several challenges to the trial court's restitution order (to be reached only if the Court rejects all of Defendants arguments on the convictions themselves). Contrary to the State's assertion, Defendants have argued that the prior Settlement Agreement and Release executed by the parties precluded recovery.<sup>12</sup> Appellants have further argued that under *State v. Laycock*, 2009 UT 53, 213 P.3d 104, any restitution awarded needs to be consistent with what could be awarded in a civil action.<sup>13</sup>

In addition to arguing that the settlement precluded an award of restitution, Bruun and Didericksen argued at the restitution hearing below (and on appeal) that

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<sup>12</sup> See, e.g., Bruun brief, pp. 52-53. The State acknowledges that, although there might be some differences in wording, the two Defendants' opening briefs were "substantively identical raising the same arguments and issues in the same order and relying on the same authority." (State Br., p. 4.)

<sup>13</sup> See, e.g., Didericksen Br., pp. 54-55, and Bruun Br., pp. 54-55.

due to the consideration paid and release given in connection with the Settlement Agreement entered into by all parties, any recovery more than zero dollars would be precluded by the restitution statutes. As pointed out to this Court, this is consistent with the instructions the Supreme Court gives in *Laycock*. (Bruun Br., p. 54.)

The State essentially does not dispute most of these substantive points, but instead seeks to recharacterize the argument in a certain way (“estoppel”), and then claim that the thus-characterized argument was not preserved. (State Br., p. 62.)<sup>14</sup>

However characterized (recovery precluded as a matter of law, as an offset, as double recovery that is outside the restitution statute), Defendants have consistently argued that the settlement and release preclude an award of restitution, just as the State agrees was argued below (R. 1539, pp. 6-8). It cuts off a civil recovery of any

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<sup>14</sup> The State says that Defendants’ arguments below are “estoppel” arguments, *i.e.*, that the court below could not order any restitution due to the prior settlement. Defendants did argue that the Settlement Agreement and Release had the effect of precluding a recovery in a civil action, and that the very definition of pecuniary damages that a court may award as restitution is limited to those recoverable in a civil action (Utah Code § 77-38a-102(6)) – and thus no restitution should be awarded – and also argued that the payment of valuable consideration to the Poseys (some \$8 million worth of real property and \$174,000 cash) made anything more than no recovery (\$0.00) in restitution a double recovery for the Poseys and outside the restitution statute. (R. 1350-53, R. 1539, p. 4:5-8:11.) The *Laycock* case was also argued below at the restitution hearing. (R. 1539, pp. 21-22). So the State’s contention that the argument made on appeal (including the *Laycock* issue of prior consideration in a settlement bearing on the award of restitution at *least* as to the amount of complete restitution awarded) is unpreserved is simply wrong.

pecuniary damages the Poseys might have suffered, and places them outside the restitution statute by definition (*e.g.*, definition of pecuniary damages recoverable).

Defendants also argued below that there was consideration for the settlement (which the Poseys admitted in the document granting release) which the court should have considered, and that the consideration already paid made an award of restitution not only unjust but barred by statute and controlling case law (*Laycock*). Defendants argued that due to giving the Poseys the greatly increased-in-value property in the settlement (one consideration for their release of claims against Defendants), the amount of possible recovery by the Poseys was \$0.00, which is what the Court should award in restitution. (R. 1348, 1350-52.) (In fact, Defendants argued that the Defendants had *overpaid* in the settlement. *See* R. 1351.) The State's contention that the argument of consideration or set-off was not made below is unfounded.

The State mischaracterizes the \$25,000 payment in the settlement as consideration for the Property returned. (State Br., p. 64.) To suggest that property with an ultimate value of between \$6.7 and \$8.75 million (R. 1349-50) would be exchanged for \$25,000 is nonsensical. Indeed, the State's claim is not supported by the cited settlement agreement, as the \$25,000 payment is not identified as consideration for transfer of property, but rather relates to the settlement agreement and release generally. (R. 294.)

The State now suggests that if setoffs are considered, there should be some further accounting and Defendants should pay back the \$25,000 they received in the settlement. Although that would seem more an issue for the trial court on remand, the contention lacks logical force: The settlement included a release of all claims, including a release by Defendants of their claims against the Poseys.<sup>15</sup>

In short, the Poseys released their claims regarding the checks in return for consideration, taking the amounts of money represented by those checks outside the definition of restitution awardable under § 77-38a-102(6). Under *Laycock*, those amounts should not be included in court-ordered restitution even if the court would be allowed to include the amounts in its calculation of “complete” restitution.

The State argues further that the restitution awarded could be justified as part of a total effect of the thefts on Poseys, launching into some calculations that were neither argued by the State nor addressed by the court below. But if calculating is to be done: The defendants bought a property valued at less than one million dollars at the time, re-zoned it, and signed it back over to the Poseys when it was worth (according to UDOT) more than \$8 million. The “total effect” on the supposed victims was to make them very wealthy, at least in terms of land value. Defendants

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<sup>15</sup> That the Poseys did, too – in fact, for the very checks on which Defendants were convicted, individually identified by check number – is another independent reason why restitution is inappropriate. (See Exhibit B to the Settlement Agreement, State Br. Add. E and Bruun Br. Add. F.)

also kicked in \$175,000 in cash to boot. Even subtracting the \$25,000 the State suggests, this leaves the victims much enriched.

In the restitution proceeding, the State cherry-picked language from *Laycock* to support its argument, and does so now on appeal. Under *Laycock*, amounts that were the subject of a prior settlement can be included in determination of “complete restitution,” but that is not the same thing – nor should it be – as actually ordering those amounts be paid. *Laycock*, at least in dictum, reaffirms that an amount not recoverable in a civil action is not properly awarded in restitution. This direction was not heeded by the court below in this case.

## **VII. CUMULATIVE ERROR**

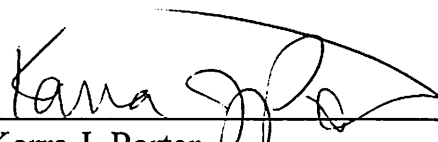
The State acknowledges that, if the cumulative effect of multiple errors undermines confidence that Defendants received a fair trial, this Court should reverse. (State Br., p. 66.) This case involved numerous irregularities and the errors argued by Defendants on appeal, even if no single one warranted reversal itself, would compel reversal to remedy their cumulative effect.

## **CONCLUSION**


For the foregoing reasons and those stated in the opening brief, the Court should reverse and remand the judgment with instructions to dismiss all counts or alternatively for a new trial on some or all of the issues presented on appeal.

DATED this 13th day of November, 2015.

**CHRISTENSEN & JENSEN, P.C.**

  
Karra J. Porter  
*Attorney for Appellant James Didericksen*

**LAW OFFICES OF  
CLIFTON W. THOMPSON**

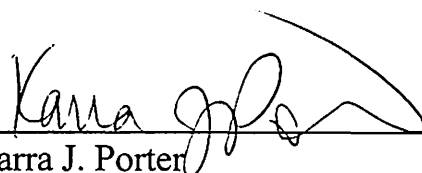
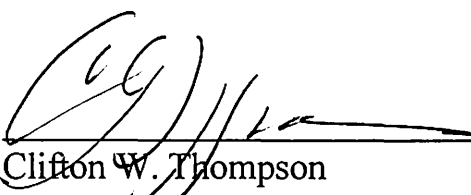
  
Clifton W. Thompson  
*Attorney for Appellant Allen Bruun*



## CERTIFICATE OF SERVICE

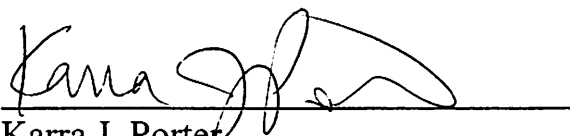
This is to certify that on the 13th day of November, 2015, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed, first-class postage prepaid, to:

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Salt Lake City, Utah 84114-0854

  
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*Attorney for Appellant James Didericksen*  
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Clifton W. Thompson  
*Attorney for Appellant Allen Bruun*

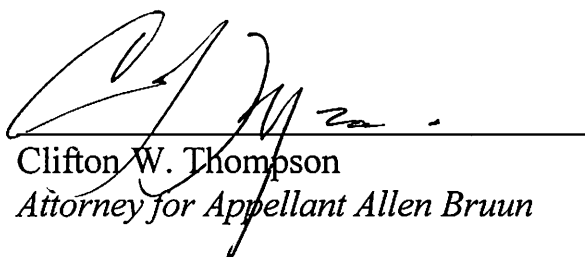
## CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Defendants/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 6,583 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.

A handwritten signature in black ink, appearing to read 'Karra J. Porter', written over a horizontal line.

Karra J. Porter

*Attorney for Appellant James Didericksen*

A handwritten signature in black ink, appearing to read 'Clifton W. Thompson', written over a horizontal line.

Clifton W. Thompson

*Attorney for Appellant Allen Bruun*

## **ADDENDUM**

### **Addendum A: Schedule of Repayments**

## ADDENDUM A

Check #	Check Memo	Amount	Count	Repaid/Witness	Record Citation re Repayment
1012	Advance	\$5,300.00	3	Yes/Bruun Yes/Mutter (State Investigator)	R1523, p 278:23-25 R1534, p 215:10-15
1015	Dump Fees Lot #16	\$4,080.00	4	Yes/Bruun	R1536, p 179:18-182:10
1016	Temp Adv	\$4,500.00	5	Yes/Bruun	R1536, p 137:5-139:6
1029	GWT, Inc. – Landscaping	\$3,475.00	15	Yes/Bruun	R1536, p 213:13-17
1041	Trailer	\$4,015.52	19	Yes/Mutter	R1534, p 281:18-283:10
1047	[no memo]	\$5,000.00	21	Yes/Bruun	R1536, p 267:3-269:4
1098	Advance/Dier	\$4,000.00	22	Yes/Bruun	R1536, p 243:3-244:24
1051	Uinta Shadows, Roosevelt, UT Earnest Monies	\$7,500.00	24	Yes/Bruun Yes/Mutter	R1536, p 277:20-281:10 R1534, p 246:23-247:5
1007	Lot Closing Hidden Acres Lot #2	\$31,506.85	2	Yes/Mutter (by “finders fee” to John Sather) Yes/Bruun	R1534, p 213:13-215:3  R1535, p 313:6-314:1 R1536, p 127:13-128:6
1018	Loan	\$18,493.15	7	Yes/Bruun	R1536, p 151:12-158:1
		<b>*\$50,000.00</b>			
1019	Const. Deposit	\$100,000.00	8	Yes/Prince (Bookkeeper)	R1537, p 134:4-135:17 (these monies were used to pay the obligations of Tivoli Properties, LLC)

\*Total of \$50,000.00 to Granite Builders – approximate value of a Granite Builders truck given to John Sather as a “finders fee” – composition to satisfy \$100,000 fee obligation to Mr. Sather – effectively reimbursing Tivoli.