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SALT LAKE COUNTY
By JMC

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

<p>STATE OF UTAH, Plaintiff, v. SHAWN H. MOORE, Defendant.</p>	<p>OMNIBUS MOTION IN LIMINE RE: ANTICIPATED STATE EXHIBITS AND TESTIMONY</p> <p>Case No. 081908861 (Judge Katie Bernard's-Goodman)</p>
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In speaking with State witnesses and reviewing proposed State Exhibits, the Defendant, by and through his attorney, raises the following objections and motions in limine.

- I. THIS COURT SHOULD PROHIBIT THE STATE AND ITS WITNESSES FROM USING THE TERM "PONZI SCHEME" OR RENDERING ANY LEGAL CONCLUSION THAT THIS BUSINESS OPERATED AS A FRAUD.**

Anticipated Evidence:

In reviewing the anticipated testimony from some of the State's expert witnesses, the belief that the business at issue here was operating a "Ponzi Scheme" arises.

This Court should not allow testimony or evidence as to the "legal conclusion" that this business, of which the defendant was an employee, was a "Ponzi scheme" or the legal conclusion that this business "operated as a fraud." Defendant moves this Court to exclude this anticipated

evidence under Rules 704 and 403 of the Utah Rules of Evidence.

Rule 403 of the Utah Rules of Evidence provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403.

Pursuant to this rule, evidence of limited relevance, but with a high risk of prejudice, should be excluded, *see Skultin v. Bushnell*, 82 F.Supp.2d 1258 ,1260 (D. Utah 2000), and a court's weighing of the probative value of the evidence against its danger of unfair prejudice, confusion of issues, or misleading the jury may result in exclusion when the evidence would have an undue tendency to suggest a decision on an improper basis. *See State v. Menzies*, 889 P.2d 393, 403 (Utah 1994). Accordingly, evidence may be "unfairly prejudicial," and therefore inadmissible, if it appeals to a jury's sympathies or otherwise **might cause a jury to base its decision on something other than established propositions of the case**. *See e.g., State v. Lindgren*, 910 P.2d 1268, 1272 (Utah 1996); *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 455 (Utah 1994) ("[e]vidence is unfairly prejudicial if it has a tendency to influence the outcome of the trial by improper means, or ...otherwise causes a jury to base its decision on something other than the established propositions of the case").

Furthermore, as a general rule, questions of law are subject of the court's instructions and not the subject of expert testimony. Thus, an expert witnesses' testimony to the effect that certain actions violated the law are impermissible legal conclusions. *See e.g., Utah R. Evid. 704; State v. Tenney*, 913 P.2d 750, 756 (Utah App. 1996), *cert. denied*, 923 P.2d 693.

Here, some of the anticipated State expert testimony involves opinions regarding the validity of this business, with the ultimate opinion being this business operated as a fraud and specifically a “Ponzi Scheme.” These terms are not only legal conclusions, but are emotionally charged words, especially in this economic environment and the hatred and venom felt for “Bernie Madoff” and the like. Use of the terms would tend to inflame the jury and direct them away from the specific issues in this case. As such, the terms are unfairly prejudicial and therefore inadmissible, since they appeal to a jury's emotion and might cause a jury to base its decision on something other than the established propositions of the case.

II. THIS COURT MUST EXCLUDE AND PROHIBIT TESTIMONY OR EXHIBITS OFFERED IN VIOLATION OF HEARSAY RULES AND THE DEFENDANT’S RIGHT TO CONFRONTATION AND CROSS EXAMINATION.

Anticipated Evidence:

In reviewing some anticipated testimony and exhibits from the State, some graphs, documents, or emails set forth in exhibits were generated by individuals other than either the Defendant or the testifying witness (as the custodian of the records). Admission of, and any interpretation of these documents, amounts not only to improper hearsay but denies the Defendant his right to cross- examination and confrontation.

Unless one of enumerated exceptions, hearsay is not admissible. *See* Utah R. Evid. 802.

More importantly, a defendant has the right to confrontation and cross examination. As this Court is well aware, the Sixth Amendment to the United States Constitution, as well as Article I section 12 of the Utah Constitution, guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. This Right to Confrontation also embodies the right to cross examination.¹ In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme

¹*See e.g., Davis v. Alaska*, 415 U.S. 308, 315 (1974) (“Confrontation means more than being allowed to confront the witness physically..a primary interest secured by it is the right of

Court held that this Sixth Amendment right to confrontation applies to out-of-court testimony admitted into evidence at trial. *See* 541 U.S. at 67. Thus, a party can only introduce a witness's hearsay testimonial statements into evidence if the witness is unavailable to testify at trial and the opposing party has had a prior opportunity to cross-examine. *See Id.* at 68.

Accordingly, any anticipated exhibit involving an email, chart, graph, etc. that was stated or created by someone other than the witness on the stand, should be excluded since it amounts to hearsay, and most importantly, since the Defendant will have no ability to confront and cross examine the preparer of the document.

III. THIS COURT MUST EXCLUDE AND PROHIBIT TESTIMONY AND EXHIBITS OF “OTHER ACTS” NOT SPECIFIC TO THE CHARGED COUNTS AS VIOLATIONS OF UTAH RULES OF EVIDENCE 401, 402, 403 AND 404.

Anticipated Evidence:

In reviewing the proposed State exhibits and anticipated testimony, some testimony, graphs, or documents set forth information concerning purported “other acts” of the Defendant not specific to the victims alleged in the counts in this case. For example, one proposed exhibit entails a chart detailing that Mr. Moore was remunerated for work with other investors– investors *other than* the purported victims in this case. Other exhibits and anticipated testimony concerns Mr. Moore’s purported dealings and statements made about other investors; again, others not specified in this case.

This court must exclude or strictly limit evidence of Mr. Moore’s purported dealings with other investors or “other acts.”

Rule 404 of the Utah Rules of Evidence specifically provides that the prosecution in a criminal case shall provide reasonable notice in advance of trial of the nature of any evidence of

cross-examination”); *State v. Maestas*, 564 P.2d 1386, 1387 (Utah 1977) (“the right to cross-examine is an invaluable right embodied in Article I, Section 12 of the Utah Constitution and in the Sixth Amendment of the United States Constitution”).

other crimes, wrongs or acts, it intends to introduce at trial. *See* Utah R. Evid. 404(b)(2). This is so the defendant may prepare to meet or object to the admission of such allegations. This Court also has a duty to determine the admissibility of such evidence pretrial so that the defendant is not unfairly prejudiced by attempts during the crunch of trial to introduce evidence that the rules recognize has a very high potential to bias the jury against the defendant. Before admitting bad acts evidence, then, the trial court must engage in a “scrupulous examination” of the evidence outside the presence of the jury in order to properly exercise its discretion. *See, e.g., State v. Verde*, 2012 UT 60, ¶ 13 (slip. copy); *State v. Fedorowicz*, 2002 UT 67, ¶ 24, 52 P.3d 1194 (citing cases); *State v. Widdison*, 2001 UT 60, ¶ 42, 28 P.3d 1278.

Rule 404(b) of the Utah Rules of Evidence governs the admissibility of “other acts” evidence. *See State v. Nelson-Waggoner*, 6 P.3d 1120, 1125 (Utah 2000). However, under Rule 404(b), evidence of a defendant's acts is still not admissible to prove that a defendant has a propensity for bad behavior or has acted in conformity. *See State v. Burke*, 2011 UT App 168, ¶ 29, 256 P.3d 1102 (quoting *State v. Hildreth*, 2010 UT App 209, ¶ 39, 238 P.3d 444). “In determining whether bad acts evidence is admissible, the trial court must first determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b).” *Nelson-Waggoner*, 6 P.3d at 1125. If the court resolves that the evidence is being offered for a proper purpose, the court then moves on to determine whether the evidence meets the requirements of Utah Rules of Evidence 402 and 403. *See id.* *See also Burke*, 2011 UT App 168, ¶ 27 (noting three-part analysis); *State v. Chrisman*, 2011 UT App 189, ¶ 6 (same); *Hildreth*, 2010 UT App 209, ¶ 40 (same).

Under this analysis, the State's proposed evidence should not be admitted. Initially, evidence concerning Mr. Moore's dealings with other investors is not relevant to the very specific counts charged in this case. Thus, the evidence is inadmissible under Rules 401 and 402. Thereafter, the State cannot show that such evidence is being offered for a proper, noncharacter purpose, other than to infer that Mr. Moore has also committed wrongdoing against other uncharged persons. Such evidence is thus impermissible under Rule 404. If the State can ultimately justify a proper purpose for such evidence, Rule 403 should still limit or exclude this evidence dealing with other individuals, since it will mislead the jury away from the true focus and specific facts of this case—Mr. Moore's specific dealings in the charged counts and with the charged victims. Again, under this analysis, the State's proposed evidence should not be admitted.

IV. THE STATE AND ITS EXPERTS MUST BE VIGILANT IN NOT OFFERING LEGAL CONCLUSIONS, INVADING BOTH THE PROVINCE OF THE COURT AND THE JURY.

There is a fine line in this case, and the State and its witnesses must be vigilant in not crossing into impermissible expert testimony. Counsel is aware that *State v. Larsen*, 865 P.2d 1355 (Utah 1993) allows "securities experts" to testify to certain topics in a case such as this. These topics include certain historical aspects of the securities laws of which an average layman is not aware, as well as certain terms and phrases used in the industry.


In a prior motion to the Court regarding the State expert testimony, the State indicated that it "understands that the expert cannot tell the jury what result to reach or give legal conclusions about the meaning or applicability of the law." See State Response to Motion to Exclude or Limit Expert Witness Testimony at 4. The State represented that "the expert is not being called for that

purpose.” *See id.* And, the State promised that the expert “will not tell the jury that this is what the law is or whether the facts they hear at trial meet the test.” *Id.* at 5.

It must be understood that opinions that tell the jury what result to reach or give legal conclusions continue to be impermissible under the evidentiary rules, even those that allow expert testimony regarding ultimate issues. *See State v. Davis*, 2007 UT App 13, ¶15; *Tenney*, 913 P.2d at 756. **Thus any application of the facts of the case to prohibitions in the statute, are impermissible renderings of legal conclusions.** *See State v. Davis*, 2007 UT App 13, ¶16 (citing numerous cases as authority). **Nor is a witness allowed to give legal conclusions on hypothetical questions consisting of exact actions of which a defendant is accused.** *See State v. Stringham*, 957 P.2d 602, 607-08 (Utah App. 1998).

This Court must therefore not permit the State to stray from permissible expert testimony.


DATED this 25 day of January 2013.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OMNIBUS MOTION IN LIMINE RE: ANTICIPATED STATE EXHIBITS AND TESTIMONY was hand-delivered or mailed, postage prepaid, to Che Arguello, Assistant Attorney General, 5272 South College Drive, Suite 200, Murray, Utah 84123, this 25 day of January 2013.



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