

2009

# Jason Tyler Hamblin v. State of Utah : Brief of Appellee

Utah Court of Appeals

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Case No. 20090061

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IN THE  
UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff/ Appellee,

vs.

Jason Tyler Hamblin,  
Defendant/ Appellant.

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Brief of Appellee

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Appeal from convictions for rape of a child, sodomy on a child, and sexual abuse of a child, in the Third Judicial District Court of Utah, Salt Lake County County, the Honorable Randall Skanchy presiding.

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Brief of Appellee

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STATEMENT OF JURISDICTION

Defendant appeals from four convictions: one for rape of a child, a first-degree felony, in violation of UTAH CODE ANN. § 76-5-402.1 (West Supp. 2009); one for sodomy on a child, a first-degree felony, in violation of UTAH CODE ANN. § 76-5-403.1 (West Supp. 2009); and two for sexual abuse of a child, second-degree felonies, in violation of UTAH CODE ANN. § 76-5-404.1 (West Supp. 2009). This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(j) (West 2009) (pour over provision).<sup>1</sup>

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<sup>1</sup> Citations are to current statutes, unless the relative section has been substantively amended.

## STATEMENT OF THE ISSUES

*Issue 1.* Was Defendant's motion for new trial based on an alleged *Brady* violation properly denied, where Defendant knew the essential impeachment facts before trial, knew the full details during trial, and successfully used the information to obtain three acquittals?

*Standard of Review.* The merits should not be considered, because Defendant fails to marshal the facts supporting the trial court's ruling as required by rule 24(a)(9), UTAH RULES OF APPELLATE PROCEDURE. *See United Park City Mining Co. v. Stichting Mayflower Mountain Ponds*, 2006 UT 35, ¶¶ 24-27, 140 P.3d 1200. Alternatively, a trial court's denial of a motion for new trial is upheld on appeal "absent a clear abuse of discretion." *State v. Bisner*, 2001 UT 99, ¶ 31, 37 P.3d 1073 (citation and internal quotation marks omitted).

*Issue 2.* Did the court's partial deferral of Defendant's rule 412 motion deny him confrontation, where without further ruling or objection, Defendant was allowed to fully question the victim and her brother Adam about Adam's prior sexual assaults on her?

*Standard of Review.* The merits should not be considered, because the claim is not preserved and Defendant fails to marshal the facts. *See State v. Patrick*, 2009 UT App 226, ¶ 12, \_\_\_ P.3d \_\_\_; *United Park City Mining Co.*, 2006 UT 35, ¶¶ 24-27. Alternatively, an evidentiary ruling will not be reversed on appeal "unless it is

manifest that the trial court so abused its discretion that there is a likelihood that injustice resulted.” *State v. Tarrats*, 2005 UT 50, ¶ 16, 122 P.3d 581. Whether an evidentiary ruling violated a defendant’s right of confrontation is a question of law that is reviewed for correctness. *State v. Clark*, 2009 UT App 252, ¶ 10, \_\_\_ P.3d \_\_\_.

*Issue 3.* Did the trial court properly permit the Information to be amended to reflect the correct period that Defendant lived in the victim’s family home, where the child-victim consistently stated that Defendant assaulted her when he lived in the home, but was confused as to her exact age?

*Standard of Review.* The merits should not be considered, because the issue is not preserved and Defendant fails to marshal the facts. *See Patrick*, 2009 UT App 226, ¶ 12; *United Park City Mining Co.*, 2006 UT 35, ¶¶ 24-27. Alternatively, a trial court’s decision to permit amendment of an information is reviewed for abuse of discretion. *See State v. Jamison*, 767 P.2d 134, 137 (Utah App. 1989); UTAH R. CRIM. P. 4(d) (both recognizing trial court’s discretion to amend information).

*Issue 4.* Has Defendant established that his counsel was ineffective for not doing “something more” to preserve his appellate claims?

*Standard of Review.* The merits should not be considered, because Defendant fails to adequately brief the issue as required by rule 24(a)(9). *See State v. Green*, 2004 UT 76, ¶¶ 11-15, 99 P.3d 820. Alternatively, “[a]n ineffective assistance of counsel

claim raised for the first time on appeal presents a question of law.” *State v. Perry*, 2009 UT App 51, ¶ 9, 204 P.3d 880.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following rules are reproduced in *Addendum A*:

UTAH R. APPELLATE P. 24 – Briefs;

UTAH R. CRIM. P. 4 – Prosecution of Public Offenses;

UTAH R. CRIM. P. 24 – Motion for New Trial;

UTAH R. EVID. 412 – Admission of Alleged Victim’s Sexual Behavior or Alleged Sexual Predisposition.

## STATEMENT OF THE CASE

In 2006, Defendant was charged with one count each of rape of a child, object rape of a child, and sodomy on a child (R. 1-4). The information alleged that Defendant, an adult, sexually assaulted his nine- or ten-year-old stepsister M.B. in the family home (R. 3). The assaults included vaginal rape, anal rape, and object rape by inserting a “light bulb or M & M container in M.B.’s rectum” (*id.*).

The information was amended before the preliminary hearing began (R. 56-63; R64: 4). The charge of object rape based on use of a light bulb was deleted and all references to the light bulb omitted from the Information (R. 56-63). The amended information now alleged that Defendant raped M.B. by inserting an “M & M candy container and a ‘dildo’ in her anus” (R. 63). *See Addendum B* (First Amended Information). The charges were also expanded to include three counts of rape of a child, two counts of object rape of a child (based on the “M & M” container

and dildo), five counts of sodomy on a child, and four counts of aggravated sexual abuse of a child (R. 56-63; R64: 68-70). The probable cause statement explained that M.B. believed the assaults began when she was “approximately 9 years old, when she lived on Elm Street” and ended “when [Defendant] went to prison on unrelated charges, around the time [she] turned 10 years old in 2000” (R. 63). Defendant did not object to the amendments (R64: 4). After the information was amended, M.B. testified at the preliminary hearing and stated that Defendant used only two objects to penetrate her, an “M & M” container and a dildo (R64: 16-17 & 32-33). Defendant was bound over for trial on the amended charges (R64: 68-71).

Extensive pretrial discovery was requested and provided (R. 11-13, 22-23, 27, 34, 39-40, 53, 70-79, 85-91, 215-216). It included reports and audiotape of an Idaho forensic interview, in which M.B. discussed Defendant’s sexual assaults and disclosed that another brother, Adam, had separately sexually assaulted her (R217: 4 & 13; R415: 137-41; R416: 25-26, 35-36, 55-56, 58-60).

Defendant moved in limine to admit evidence of M.B.’s disclosure that Adam also sexually assaulted her, pursuant to rule 412(b)(3), UTAH RULES OF EVIDENCE, an exception to the rape shield rule (R. 92-103). Defendant acknowledged that rule 412(a) precluded the defense “from going in to all the details of [Adam’s] sexual abuse,” but argued that he should be allowed to explore M.B.’s disclosures to show bias and motive because her “disclosures of the allegations against [Adam] were



made in a manner that raise questions about the propriety of her accusations against the defendant and her motive for doing so” (R217: 42; R. 92-93). The prosecution opposed the motion (R. 113-117 & 202-211).

The court granted the motion in part. It ruled that Defendant could generally question M.B. or other witnesses about her disclosures to show: (1) any bias M.B. harbored against Defendant or for Adam; (2) any material prior inconsistent statements M.B. made concerning the charged crimes; and (3) any matter the prosecutor opened the door to during direct examination (R217: 27-46; R. 265-267). *See Addendum C* (Oral & Written Rulings). The court stated that more specific rulings must wait until trial so that the relevancy of a question could be judged in context (R217: 27-30 & 41-46; R. 267). Defendant agreed, stating more than once that he felt “comfortable waiting to trial” for more specific rulings (R217: 28-30 & 42). Just before trial, the court’s extensive oral ruling was reduced to a short written order (R217: 27-46; R. 265-267).

Before trial, Defendant sought permission to introduce redacted police reports that showed that Defendant lived in New York State in 1999 and much of 2000, the time period that M.B. thought Defendant lived in the Elm Street family home (R. 225-258). It was uncontested, however, that after Defendant left New York, he returned to Utah and moved into the Elm Street residence, where he lived until his arrest on an unrelated charge (R. 262; R64: 62-63; R416: 77 & 81-82). Consequently,

the prosecutor did not object to admission of the police records, but moved to amend the Information to correctly include the period that Defendant lived in the family home, i.e., through September 2001 (R. 259-264 & 339-340). Defendant lodged no objection and the end date in the Information was amended (R. 339-340 & 344-347). *See Addendum D* (Second Amended Information).

On February 27, 2009, a three-day jury trial commenced (R. 348-353). M.B., Adam, Defendant, and others testified. Eight counts were submitted to the jury (R. 352-353; R416: 4-7).<sup>2</sup> The jury convicted Defendant of one count of rape of a child, one count of oral sodomy on a child, and two counts of sexual abuse of a child (R. 352-353 & 409-410). The jury acquitted Defendant of two counts of object rape of a child, one count of anal sodomy on a child, and one count of oral sodomy on a child (*id.*). On June 30, 2008, Defendant was sentenced to terms of fifteen-years-to-life imprisonment on each of the rape and sodomy convictions and one-to-fifteen-years imprisonment on the two sexual abuse convictions (R. 417-418). The four sentences were ordered to run concurrently to each other, but consecutive to a sentence Defendant was already serving (*id.*).

On July 1, 2008, Defendant filed a motion for new trial, based on *Brady v. Maryland*, 373 U.S. 83 (1963), allegedly that the prosecutor failed to disclose until

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<sup>2</sup> The handwritten notations in the Second Amended Information reflect the prosecutor's subsequent dismissal of three counts at trial (R. 344-347 & 352-353).

mid-trial that M.B. recanted her accusation that Defendant used a light bulb and failed to disclose that Adam, in fact, did this (R. 419-446 & 462-463). The prosecutor opposed the motion (R. 451-461). The court found that Defendant knew the essential facts as early as the preliminary hearing, knew the details at trial, and successfully used the impeachment evidence at trial (R. 477-485). Finding no *Brady* violation, the court denied the new trial motion (*id.*). See *Addendum E* (Memorandum Decision). Defendant timely appealed (R. 489-490).

### STATEMENT OF FACTS<sup>3</sup>

Defendant recognized that his younger stepsister M.B. was a perfect victim (R416: 144). After M.B.'s birth mother lost her parental rights, Defendant's stepmother, Christina, adopted the little girl and her brothers, Matt and Isaac (R414: 159-162). But Christina, who was bipolar and a chronic alcoholic, hated M.B. (R414: 117-118, 162; R415: 11, 48; R416: 48; 85 & 89). She singled out the little girl and, in Defendant's words, "persecuted" her (R416: 85). She was extremely abusive to M.B. and frequently pulled her hair, slapped her, hit her with a brush, duct-taped her mouth closed, called her stupid, and treated her rudely and unfairly (R414: 117-118 & 162-164). She also did not believe M.B. and called her a liar (R415: 113; R416: 93).

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<sup>3</sup> The facts are stated in the light most favorable to the jury's verdicts; conflicting evidence is included "only as necessary to understand issues raised on appeal." *State v. Diaz*, 2002 UT App 288, ¶ 2, 55 P.3d 1131 (citation and internal quotation marks omitted).

When M.B. was four or five years old, in 1994 or 1995, she told Christina about “something that [Defendant] had done in the past” (R415: 110-112 & 113). Christina said she was “lying” (R415: 113).<sup>4</sup>

When M.B. was six or seven, around 1996 or 1997, she told Christina that another brother Adam, Christina’s biological son, was molesting her (R414: 50-51).<sup>5</sup> Adam, who was then about fourteen or fifteen years old, admitted to sexually touching M.B. and promised to stop, but sexually assaulted M.B. a “couple of more times” (R414: 50-51; R416: 48-49). Adam finally stopped abusing M.B. in 1999, when he was seventeen years old, because she told him to and because he felt guilty about what he had done (R415: 51; R416: 44 & 48-49). Despite the sexual assaults, M.B. loved Adam:

Adam and I, our relationship was not—he was my brother. He—we played video games. We wrestled. We did things. It wasn’t all about that; like it wasn’t all about what was going on with sexual abuse. I didn’t hate him for it, because he was my brother, you know; like he was there more. He treated me with some kind of respect.

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<sup>4</sup> M.B. alleged that Defendant molested her when she was four years old (R64: 19-21). The incident was not a charged offense and the trial court ruled that evidence of Defendant’s prior bad act was too remote in time to be admissible (R. 266). The fact that Christina did not believe her was admitted only to explain why M.B. did not tell her mother about Defendant’s subsequent assaults.

<sup>5</sup> Calculations of what year an event took place are primarily based on the witnesses’ estimates of their ages. M.B. was born in June 1990 (R414: 159). Defendant was born in August 1980 and was ten years older than M.B. (R. 3). Adam was born in August 1982 and was eight years older than M.B. (R416: 44).

I guess what you would think it was, I didn't have anyone to go to. I had no one. I was always in my basement [bedroom], so I kind of figured that that was some kind of love, in a way. You know what I mean? Like, I know it's really weird to say, I know, but yeah, it was different. I mean Adam and me had a different relationship.

(R415: 52-53).

Adam's sexual assaults stopped before Defendant's sexual assaults began (R415: 21, 84-87, 103; R416: 44, 49 & 85).<sup>6</sup>

Christina and Defendant's father divorced around 1994 and Defendant moved to New York to live with his mother (R414: 118; R415: 7 & 9-10; R416: 46; R416: 74-75). In late 2000 or early 2001, when he was twenty or twenty-one years old, Defendant returned to Utah and moved in with Christina and her children, into a house she was renting on Elm Street (R414: 119-120, 165-166; R416: 82-83). Defendant's bedroom was in the basement, next to M.B.'s room (R414: 125; R416: 83). During the day, Defendant barely spoke to M.B., who was then ten or eleven years old (R414: 124-125; R415: 15 & 91). At night, he sexually assaulted her (R414: 167-185; R415: 90 & 100-101).

The first time, Defendant came into her room, woke M.B. up, massaged her back, and then turned her over and massaged her chest, over her night clothes

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<sup>6</sup> Defendant erroneously asserts that Adam abused M.B. before and after Defendant's charged crimes. See *Br. Aplt.* at 11 & 34 (citing preliminary hearing). At trial, M.B. clarified that this was not true and that Adam stopped abusing her when she was nine years old (R415: 84-87). Adam also confirmed that he stopped abusing M.B. in 1999 (R416: 44 & 49).

(R414: 167-168). In later incidents, he massaged her chest, under her clothing, or massaged her when she was naked (R414: 168 & 170). Eventually, he massaged her vagina (R414: 169). When he touched her, she often saw or felt his erection (*id.*).<sup>7</sup>

One night, he told M.B., “I wonder what it would feel like if you kissed me down there” referring to his penis, which was erect and exposed (R414: 169). He then grabbed the back of her head and told her to “suck on it” (R414: 184). She did, giving him “oral sex I guess you would call it” (R414: 169). M.B. also thought he “lick[ed]” her vagina” more than once, but was unsure because the incidents “mush together sometimes” (R414: 185).<sup>8</sup>

M.B. alleged that Defendant inserted an “M & M” candy container into her anus and that another time he inserted a dildo (R414: 171-177). She also alleged that Defendant committed anal intercourse by inserting his penis in her anus (*id.*).<sup>9</sup>

Defendant vaginally raped M.B. multiple times (R414: 177 & 179).<sup>10</sup> The first time, Defendant spit on his hand and wiped the spit on his penis, but otherwise did

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<sup>7</sup> Defendant was charged and convicted of two counts of sexual abuse of a child (R. 344-347, 353 & 409-410; R416: 130-132).

<sup>8</sup> Defendant was convicted of one count of oral sodomy (her mouth on his genitals) and acquitted of one count of oral sodomy (his mouth on her genitals) (R. 344-347, 353 & 409-410; R416: 132-133).

<sup>9</sup> As will be discussed in *Point I*, the jury acquitted Defendant of all counts involving anal contact, that is, one count of anal sodomy and two counts of object rape (R. 344-347, 353 & 409-410; R416: 133-135).

not moisten M.B. (R414: 178). When he inserted his penis, it hurt M.B. so badly that tears were running down her face and she could not breathe (*id.*). She started bleeding, but Defendant did not stop (*id.*). Afterwards, he left the room without saying anything (*id.*). M.B. wiped the blood off herself, washed her bloody sheets in the basement laundry room, and turned her mattress over so no one would see the blood stain (R414: 178-179). The second time was pretty much the same, except Defendant rubbed her body more, but he still just “kind of rammed” his penis into her (R414: 180-181).

When Defendant assaulted M.B., he “never said anything,” but “shh” if she cried out in pain (R414: 176 & 180; R415: 55). “Like, he would come in, and do his thing, and then go” (R414: 180). Though Defendant and Adam committed some of the same sex acts on M.B., she felt there were significant differences between the assaults:

Kind of awkward to say that Adam showed compassion. He did. He showed remorse, like he would stop if I said “ow.” He wasn’t forceful. He wasn’t—we would talk; like not—you know, it was more verbal, you know, when that was going on. It was very different. It was more gentle and different.

(R415: 54).

[Defendant] never said anything to me. “Shh” was about the only thing he ever said to me. He didn’t care. He got—he finished his

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<sup>10</sup> Defendant was charged and convicted of one count of rape of a child (R. 344-347, 353 & 409-410; R416: 135-136).

business and got up and left like I was a rag doll; like you know, like I was a used something or other; like, you know, just came and got his pleasure or whatever and left. And it didn't matter if he hurt me. He was just ruthless.

(R415: 55).

Defendant assaulted M.B. so frequently – every week or two weeks – that M.B. “became kind of numb” (R414: 177 & 180). To survive, she would “do something to take [herself] away from that, you know, to kind of not be there in a way,” such as thinking “about being somewhere else; just being happy, you know; just kind of detach myself I guess you would call it” (R414: 180).

She hated Defendant and wanted the assaults to stop, but felt she was alone:

I hated him. I just – it's like – I felt very alone, that I couldn't even go to my own mother; because she wouldn't believe me, or that – you know, I don't know. I just felt really alone, and I hated him. And, you know, he asked me for favors, like “run out to my truck and get this.” And I'd run out to there and to that, and – or just stuff around the house, like get him water from the water cooler and stuff like that. And I remember that. And I always did it, for some reason. I was just scared of him, I guess is what you would say.

(R414: 185). Though M.B. did not tell Christina about the assaults, she told her aunt that Defendant was touching her and that she was physically afraid of him (R415: 116-117). The aunt told Christina. Christina said M.B. was lying and just wanted attention (R415: 117). The aunt “didn't know what [she] should do,” so she “just dropped it at that point” (*id.*).



M.B.'s brother, Matt, who was a teenager at the time, once saw Defendant leave her bedroom late at night (R415: 7 & 15). Matt thought this was strange, because the two had littler interaction during the day, but Matt told no one (R415: 15 & 36-37). Years later, when M.B. told him Defendant assaulted her, Matt felt guilty for not protecting his younger sister and attempted suicide (R415: 16-17).

Adam also once saw Defendant leave M.B.'s room late at night (R416: 50). Adam asked M.B. what Defendant was doing in her room (*id.*). She said he "was doing stuff and 'bothering' her," which was the code word Adam "used when [he] talked about [his] abuse of her" and "left no question in [his] mind as to what she was talking about" (*id.*). But Adam "didn't say anything at the time, to protect [himself]" (*id.*).

Defendant's assaults on M.B. stopped only when he moved out of the Elm Street home in 2001 (R414: 123-124 & 186-187; R416: 84). M.B. initially believed she was nine when the assaults started and ten years old when Defendant left (R414: 186; R415: 64-65). But based on when her nephew was born and the evidence of when Defendant moved back to Utah, M.B. realized that she must have been a bit older, ten or eleven years old, when the assaults occurred (R414: 165-166 & 186; R415: 65-66 & 70-71). She explained that though she was unsure of her exact age, she knew that Defendant assaulted her when they lived on Elm Street, after he

returned from New York (R414: 165-166). She was equally sure that the assaults stopped only when he moved out of the house (R414: 186-187).

A few months after Defendant moved out, Christina, M.B., and her younger siblings moved to Montana (R414: 126 & 187). M.B. was about twelve or thirteen years old and, by her own admission, “very promiscuous,” into drugs, and out-of-control (R414: 187-188). When M.B. was fifteen years old, her mother Christina died (*id.*). At some point, the juvenile authorities placed M.B. in a Montana teenage group home (R414: 189; R415: 52). There, she told a therapist that Defendant had repeatedly sexually assaulted her (R414: 189; R415: 52, 55, & 57). M.B. thought the police were informed, but they never contacted her (R415: 57-59).

M.B. was transferred to a teenage group home in Idaho (R415: 53-54). She received psychological treatment and filled out treatment packets that required her to detail Defendant’s assaults (*id.*). One packet discussed the destructive effect of keeping sexual abuse a secret, which made M.B. realize that she needed to also disclose Adam’s assaults (R415: 53-54 & 57-58). She did not want Adam to go to jail, but, nevertheless, told her therapist that Adam sexually assaulted her (*id.*).

A child forensic specialist interviewed fifteen-year-old M.B. in April 2006 (R415: 122-123 & 133).<sup>11</sup> The interview began with a discussion of the new disclosures concerning Adam (R415: 127-128, 135-136, & 160-162). Midway through the interview, M.B. began discussing Defendant's assaults (R415: 160-162). She described in detail and drew a picture of how Defendant inserted a Christmas tree light bulb in her anus and said, "Oh shit," when he thought he lost it (R415: 75-81, 154-156). Only later, after she completed the forensic interview and filled out additional treatment packets detailing Adam's assaults, did M.B. realize that it was Adam who had inserted the light bulb into her, not Defendant (R415: 79-81). She at some point informed the prosecutor of her mistake. The light bulb charge was dropped and all references to a light bulb deleted from the Information (R. 56-63; R415: 107-108). At the preliminary hearing, M.B. testified that Defendant used only two objects: a "little, mini M & M tube" and a dildo (R64: 16-17, 32-33, & 68-70).

The police interviewed Adam. He admitted that he had sexually assaulted M.B. when she was younger and disclosed much, but not all, of his criminal conduct. He revealed nothing about Defendant's assaults (R416: 33-39, 50-51, & 58-

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<sup>11</sup> The interviewer testified at trial and was questioned about a report she made summarizing the interview (R415: 132-174 & 188-204). Although the report was preliminarily marked as an exhibit to facilitate her examination, the report was not admitted into evidence (R425: 137-41 & 182-186; R416: 8-18, 70-73, & 95-109). Defendant erroneously cites to and quotes from the report, as if it had been admitted. *See Br.Aplt.* at 8.

59). Adam was charged, pled guilty, and was sentenced (R416: 54). Adam subsequently testified in this case to seeing Defendant leave M.B.'s room, to M.B.'s statement that Defendant was "bothering" her, and to his own sexual assaults on her (R416: 48-68).

At trial, Defendant denied sexually assaulting M.B. (R416: 85-86). He testified that he had little if anything to do with the younger child (R416: 92). He provided no explanation for her allegations (R416: 79-93). His attorney, however, argued, in opening and closing, that all the sex acts M.B. described really occurred, only Adam committed them, not Defendant (R414: 106-112; R416: 145-146). The attorney speculated that M.B. falsely accused Defendant because she did not care for him and wanted to protect Adam from going to jail (R414: 111; R416: 150-151).

The jury disagreed. They found M.B. credible and convicted Defendant of rape, sodomy, and two sexual abuses (R. 409-410). Presumptively, because M.B. confused the light bulb incident, the jury acquitted him of three charges involving anal penetration or contact (*id.*). And based on her equivocation about Defendant licking her vagina, the jury also acquitted him of one count of oral sodomy (*id.*).

### SUMMARY OF ARGUMENT

Defendant's appeal should be summarily rejected because, below, he failed to preserve most of the issues now raised and, on appeal, he fails to comply with

appellate marshaling and briefing requirements. Even if the merits were considered, Defendant establishes no error or prejudice.

*Allegation of Brady Violation.* The trial court properly denied Defendant's motion for new trial after it found that the prosecutor had not suppressed material impeachment evidence.

As early as the preliminary hearing, the defense knew that M.B. no longer alleged that Defendant anally penetrated her with a light bulb and knew that the charge was dropped. In the same hearing, the defense learned that Adam anally raped M.B. in a way similar to Defendant. In light of this evidence and the defense theory — that M.B. was really assaulted, but by Adam, not Defendant — the trial court correctly found that Defendant knew or reasonably should have known before trial that Adam likely anally raped M.B. with a light bulb.

At trial, M.B. and Adam testified that he used a light bulb to anally penetrate her. The trial court rejected Defendant's assertion that he was "blindsided" by this information and correctly found that, even if *arguendo* Defendant did not know the details until trial, he knew the essential impeachment facts before trial and used these facts to shape his trial strategy. That strategy successfully resulted in acquittals on three counts involving anal contact. Based on these facts, the trial court correctly found that no *Brady* violation occurred.

*Rule 412: Evidence of Adam's Abuse of M.B.* Rule 412 was never invoked to bar Defendant's cross-examination of M.B. or any other witness. Nevertheless, Defendant claims that the trial court's failure to fully rule on his rule 412 motion before trial denied him confrontation. According to Defendant, the failure to fully rule prevented him, in his open statement, from specifically referring to M.B.'s recantation concerning the light bulb incident and from referring to Adam's assaults. The claim has no merit. An opening statement does not implicate confrontation. Witness examination does. Her, no limits were placed on that examination.

The trial court ruled that Defendant could explore M.B.'s bias, motive, and material inconsistencies and opined that if the questions were "artful," preclusion under rule 412 could be avoided. The court properly deferred any more specific ruling until trial, so that the questions and objections could be judged in context. At trial, no further ruling was sought and no rule 412 objections were made. Instead, Defendant freely questioned M.B. and other witnesses about her bias, motive, and material inconsistencies, and also about the details of Adam's sexual assaults on her. In sum, no confrontation issue exists.

*Amendment of Information.* The trial court properly permitted the Information to be amended to correctly reflect the period Defendant lived in the family home. M.B. consistently accused Defendant of sexually assaulting her after

he moved into the Elm Street family home, but she was mistaken as to her precise age when this occurred. Other evidence established the correct time period. Defendant did not oppose the amendment below and claims no prejudice from it on appeal.

*Alleged Ineffectiveness of Counsel.* Defendant fails to establish that his counsel was ineffective for not doing “something more” to preserve his appellate arguments. The only deficiency that Defendant alleges is that his trial counsel should have moved for a mid-trial continuance to better preserve his *Brady* issue. The trial court did not procedurally bar the *Brady* claim, however, but fully considered its merits. Consequently, Defendant cannot establish prejudice.

## ARGUMENT

### I.

**THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE NO *BRADY* VIOLATION OCCURRED, WHERE DEFENDANT KNEW THE ESSENTIAL IMPEACHMENT FACTS BEFORE TRIAL, KNEW THEIR DETAILS DURING TRIAL, AND USED THE INFORMATION TO HIS ADVANTAGE**

Defendant asserts that the trial court abused its discretion when it denied his motion for new trial, based on an alleged *Brady* violation. *See Br.Aplt.* at 21-34. According to Defendant, the prosecutor “made a calculated decision” to “willful[ly] and deliberate[ly]” conceal M.B.’s recantation that Defendant inserted a light bulb in her anus and conceal that Adam, in fact, did this. *Br.Aplt.* at 21 & 23. Defendant

alleges that concealment of this impeachment evidence until mid-trial prevented him from making a better opening statement, prevented him from effectively confronting M.B., and prevented him from “asserting his best defense until the trial was half over.” *Br.Aplt.* at 22 & 29. The argument lacks merit.

\* .. \* .. \*

Due process requires that a prosecutor disclose evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (due process requires disclosure of evidence that “would tend to exculpate [a defendant] or reduce the penalty”); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (due process requires disclosure of material impeachment evidence). “[P]rosecutorial nondisclosure of information favorable to the accused does not by itself constitute prejudicial error requiring reversal of a conviction. . . . Rather, nondisclosure violates due process under *Brady* only if the evidence at issue is material and exculpatory, and if the defense did not become aware of the evidence until after trial.” *State v. Bisner*, 2001 UT 99, ¶ 36, 37 P.3d 1073. Evidence is material “if ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Tillman v. State*, 2005 UT 56, ¶ 29, 128 P.3d 1123 (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)).



Accordingly, courts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial, 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[.]

*Bisner*, 2001 UT 99, ¶ 33.

The merits of Defendant's *Brady* claim should not be considered, however, because Defendant fails to comply with this Court's marshaling requirement. In any case, the trial court correctly found that no *Brady* violation occurred, because Defendant knew of the impeachment evidence before and during trial and used it to his advantage. *See Add. E.*

**A. The merits should not be considered, because Defendant fails to marshal the facts supporting the denial of the new trial motion.**

Rule 24(a)(9), UTAH RULES OF APPELLATE PROCEDURE, requires Defendant to "marshal all record evidence that supports" a challenged finding or fact-dependent ruling. *See Add. A.* Proper marshaling requires Defendant to amass "every scrap of evidence and draw all reasonable inferences that support the adverse decision and then show why that evidence, even when viewed in the light most favorable to the decision, is legally insufficient. *United Park City Mines v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200; *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 20, 186 P.3d 1023. To accomplish this, Defendant must embrace the State's position:

[Appellants] are required to “temporarily remove their own prejudices and fully embrace the adversary’s position”; they must play the “devil’s advocate.” In so doing, appellants must . . . not attempt to construe the evidence in a light favorable to their case . . . [and must not] merely re-argue the factual case presented in the trial court.

*United Park City Mines*, 2006 UT 35, ¶ 26 (citations and internal quotation marks omitted). When an appellant fails to properly “perform this critical task, [the appellant court] can rely on that failure to affirm the lower court’s findings of facts” and legal ruling. *Id.* at ¶ 27.

Here, Defendant fails to comply with rule 24’s marshaling requirement. Indeed, he never acknowledges it. Consequently, his *Brady* claim may be summarily rejected. *See State v. Pinder*, 2005 UT 15, ¶ 40, 114 P.3d 551.

For example, Defendant asserts that the trial court’s finding that *Brady* was not violated is wrong because “the court failed to recognize that the light bulb testimony was not a mere retraction of a prior allegation, but an admission that it had happened at the hands of Adam.” *Br.Aplt.* at 27. Defendant also claims that the trial court erroneously rejected that he was “blindsided by the testimony that came in the middle of the defense’s cross-examination of [M.B.]” *Id.* The facts, when properly marshaled, do not support these assertions.

The marshaled facts establish and the trial court correctly found that the prosecutor did not suppress material impeachment evidence and that Defendant was aware of the impeachment facts as early as the preliminary hearing (R. 477-482).

*See Add. E.* The original information charged one count of object raped based on the light bulb incident. *See Statement of Case* at 4-5. Before the preliminary hearing began, this charge was dropped and replaced with two charges of object rape based on Defendant's alleged use of an "M & M" container and a dildo. *See id. & Add. B.* The probable cause statement was also amended to delete reference to use of a light bulb and to allege use of the "M & M" container and dildo (*id.*). When M.B. testified at the preliminary hearing, she stated that the only objects Defendant used on her were an "M & M" container and a dildo (R64: 16-17 & 32-33). In the same hearing, M.B. testified that Adam anally raped her in a manner "similar" to Defendant (R64: 50).

These facts establish that Defendant knew of M.B.'s recantation long before trial and that he reasonably should have known that, if Defendant did not use a light bulb, Adam likely did. This is especially true where Defendant never claimed that M.B. fabricated a sex act. To the contrary, the defense conceded that M.B. was sexually assaulted as she described (R414: 106-112). *See also Br.Aplt.* at 21. The defense claimed only that she falsely accused Defendant of these crimes to protect Adam, who committed them (*id.*).

Other record facts, ignored by Defendant, support the trial court's finding that Defendant knew the essential facts for impeachment before trial. In the pretrial hearing on the rule 412 motion, defense counsel informed the court that M.B. had

accused Defendant of anally penetrating her with a light bulb and had drawn a picture showing how the light bulb had been inserted (R217: 12-13). Defendant told the court that in the preliminary hearing, M.B. denied that Defendant did this (R217: 12-13). Defense counsel also stated, “Adam has acknowledged all this [referring generally to the sex assaults]. Adam is not disputing this. So, you also have a situation where Adam is saying, ‘yeah, that’s what I did; I did all this’” (R217: 17). The court asked defense counsel if the defense theory was that Adam, not Defendant, committed all the sex assaults (R217: 31). Defense counsel responded, “I’m trying to be coy with the prosecutor and the court so I can be somewhat prepared at trial, but it’s not—it’s obvious, because of the way in which everything was disclosed, obviously; specifically certain allegations” (*id.*).

Defendant’s failure to acknowledge these facts and their reasonable inferences justify summary rejection of his claim. Additional marshaling failures will be discussed with the merits.

**B. Alternatively, the trial court correctly found no *Brady* violation and properly denied the motion for new trial.**

If the merits are considered, the trial court properly denied the motion for new trial because Defendant failed to establish a *Brady* violation.

As previously discussed, when the facts are properly marshaled, they establish that at the preliminary hearing, Defendant knew that the light bulb rape

charge was dropped and that M.B. no longer claimed Defendant did this. He also knew that Adam anally raped M.B. in a manner “similar” to Defendant. *See discussion, supra*. And he knew that despite the similarity of some of the sex acts, M.B. viewed Adam and Defendant differently:

Adam and [Defendant] are very different. They did the same things, a lot of the same things. But the way they did it, they were very different. Adam showed emotion. If I said “ouch,” started crying, he stopped. [Defendant] had no emotion. He just did what he did and left. . . . I feel Adam was man enough to admit what he did, so I have more forgiveness for him.

(R64: 45-46). In his opening statement at trial, defense counsel told the jury that the sex offenses M.B. described really happened, but were committed by Adam, not Defendant (R414: 106-112). Counsel stated that M.B. vindictively accused Defendant because she “didn’t give a darn about” him (R414: 111). He told the jury that M.B. previously accused Defendant of a specific sex act that she had described in great detail, but that she later said, “No, he never did anything like that” (R414: 108-111).

These facts belie Defendant’s assertion that he was prevented from arguing his “best defense” in opening, that is, that “[M.B.] had been systematically abused by Adam, but had made up the ‘mean and uncaring’ abuser allegations against [Defendant] to protect Adam.” *See Br.Aplt.* at 21. Instead, the facts fully support the trial court’s finding that the defense knew the essential impeachment facts as early as the preliminary hearing and “carefully planned his case for trial by focusing on

the ‘discrepancy between the complaining witness’ initial disclosures and her testimony at the preliminary hearing” (R. 481) (*Add. E.*).

Defendant claims that the court’s finding is erroneous because the “concealed” information was not only M.B.’s recantation, but also that Adam committed the crime. *Br.Aplt.* at 27. More facts, again unacknowledged by Defendant, demonstrate that he knew or should have known before trial that Adam committed the crime.

In pretrial discovery, Defendant sought and obtained police reports of Adam’s investigation and prosecution (R. 39-40). He also obtained other reports of Defendant’s assaults that included within them information on Adam’s assaults (R64: 51-55).<sup>12</sup>

In a 2006 police interview, Adam admitted much of his abuse of M.B., including that he had anally raped her by inserting objects into her (R416: 33-36). At

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<sup>12</sup> Defendant insinuates that the prosecutor tried to block his access to Adam’s investigative reports. *See Br.Aplt.* at 9-10. The record proves otherwise. Defendant requested Adam’s records. When the prosecutor failed to timely produce them, Defendant moved to compel their discovery, but then withdrew the request and informed the court that the parties had settled the matter (R. 41-46 & 53).

Defendant likewise asserts that “[w]e know that the State also changed its approach in mid-trial, from objecting to any evidence of Adam’s abuse to calling him as a State’s witness.” *See Br.Aplt.* at 32. Again, the record is otherwise. The prosecutor told the defense before trial that he intended to call Adam as a witness in its case-in-chief (R. 341-342). Moreover, during trial, the prosecutor never objected to questions about Adam’s assaults.

trial, defense counsel asked the interviewing detective if he had specifically questioned Adam about the light bulb incident:

DEFENSE COUNSEL: And you specifically asked [Adam] if he had ever stuck a light bulb in [M.B.'s] rectum.

DETECTIVE: Yes.

DEFENSE COUNSEL: And you asked him that because, is it fair to say, the information that you reviewed in preparation for Adam's report indicated that Adam had done the light bulb issue.

DETECTIVE: Yes.

DEFENSE COUNSEL: There wasn't any information in the reports that you reviewed, prior to these interviews with Matt and Adam, that indicated [Defendant] had did [sic] the light bulb issue.

DETECTIVE: Not to my recollection, no.

DEFENSE COUNSEL: But you are aware of [the forensic interviewer's] report where she has in her report that [M.B.] said [Defendant] did it.

DETECTIVE: Yes. . . .

DEFENSE COUNSEL: But it sounds like you wanted – at least you wanted to follow up on the information about Adam doing it, and that's why you asked him.

DETECTIVE: Yes.

DEFENSE COUNSEL: And he denied it.

DETECTIVE: Yes.

(R416: 35-36). This exchange evidences defense counsel's pretrial knowledge that information existed that suggested that Adam, not Defendant, used the light bulb.

And though Adam may have initially denied this in 2006, no one but Adam and Defendant were implicated in M.B.'s assaults.

When Adam testified, he agreed that he had not disclosed all of his sexual misconduct in the 2006 interview. He believed, however, that he did disclose the light bulb incident, but concealed a different incident involving "a hypodermic needle and Novocain" (R416: 50-51 & 58-60). In the 2006 interview, he also did not disclose what he knew of Defendant's abuse of M.B. (R416: 58-60).

A week or two before Defendant's trial, Adam was re-interviewed by a different detective (R416: 59-60). This 2008 interview occurred after Adam was convicted. Adam discussed all of his sexual misconduct and revealed that M.B. told him Defendant was "bothering" her (*id.*). Though Defendant claims that the prosecutor concealed this second interview until trial, *see Br.Aplt. 24*, Defendant's trial counsel specifically referred to it in his opening statement:

This time, the interview takes place February 20<sup>th</sup>, 2008, seven days ago. It is conducted by Sgt. Travis Peterson. Sgt. Peterson is a sergeant with the DA's office. He interviews Adam, and he also interviews another lady by the name of Jody.

(R414: 107). These facts support that Defendant was fully aware or should have been fully aware before trial that Adam likely anally raped M.B. with a light bulb. *See Tillman*, 2005 UT 56, ¶ 40 (recognizing *Brady* not violated if defendant knows of undisclosed report prior to trial). *See also United States v. Jeffers*, 570 F.3d 557, 573



(4th Cir. 2009) (“[W]here exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine”) (citation and internal quotation marks omitted); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (“[T]here is no *Brady* violation . . . if the information was available to him from another source”); *United States v. Coplen*, 565 F.3d 1094, 1097 (8th Cir. 2009) (“The government does not suppress evidence in violation of *Brady* by failing to disclose evidence in which the defendant had access through other channels.”) (citation and internal quotation marks omitted).

In any case, as the trial court correctly found, regardless of whether Defendant was fully aware of these facts before trial, he was fully aware of them at trial and had a fair opportunity to use them to his advantage (R. 480-483). Indeed, the defense impeached M.B. sufficiently that the jury acquitted him of the three anal penetration counts. *See Statement of the Case* at 7; *Statement of Facts* at 17. *See also Bisner*, 2001 UT 99, ¶ 33 (holding no *Brady* violation established where “the defense had the opportunity to use the evidence to its advantage at trial”).

Defendant claims that the trial court found the *Brady* issue was unpreserved and denied the new trial motion, because defense counsel failed to seek a mid-trial continuance. *See Br.Aplt.* at 20 & 40. The claim lacks merit. The trial court did correctly note that Defendant’s post-verdict claim of being “blind-sided” was belied

by his failure to claim surprise and seek a continuance during trial (R. 481). However, the trial court did not deny Defendant's *Brady* claim because no continuance was sought (R. 480). The court instead considered this fact with the totality of other facts in ruling on the merits (R. 480-485). *See State v. Workman*, 635 P.2d 49, 53 (Utah 1981) (recognizing that failure to seek continuance negates claim of surprise).

The court also noted, in addressing the materiality of the evidence, that it did not constitute direct impeachment of a charged offense (R. 483-484). Thus, even if the defense "had labored throughout the trial under the illusion that the victim had continued to mistakenly attribute the light bulb incident to [Defendant], the jury was never asked to consider this issue in its deliberations" (R. 483-484). Consequently, the information was not material and its belated disclosure was not prejudicial (R. 484-485). *See Bisner*, 2001 UT 99, ¶ 38; *Pinder*, 2005 UT 15, ¶ 33 (both holding no *Brady* violation where impeachment evidence not material).

In sum, *Brady* was not violated and a new trial was not warranted.

## II.

### THE TRIAL COURT'S PARTIAL DEFERRAL OF DEFENDANT'S RULE 412 MOTION DID NOT DENY HIM CONFRONTATION, WHERE HE WAS ALLOWED TO FULLY QUESTION M.B. AND ADAM ABOUT ADAM'S ASSAULTS

Defendant claims that his right of confrontation was violated when the trial court failed to fully grant his motion in limine to admit evidence pursuant to rule

412, UTAH RULES OF EVIDENCE. *Br.Aplt.* at 34-37. Defendant alleges that the lack of a “full ruling” prevented him from presenting his “best defense” in his opening statement and, thereby, denied him confrontation. *Id.*

The issue should not be considered, because it is not preserved. The merits should also not be considered, because Defendant fails to marshal the facts supporting the trial court’s decision to partially defer its ruling. Moreover, Defendant fails to accurately relate what subsequently occurred at trial. Alternatively, if the merits are considered, confrontation arises only in the context of witness examination, not opening statement. Here, Defendant was allowed to fully confront both M.B. and Adam about Adam’s assaults and was allowed to elicit more details of those assaults than permitted under rule 412 or its exception. In sum, no confrontation issue exists.

\* \* \*

Rule 412(a), the rape shield rule, bars admission of a victim’s past activities “that involve actual physical conduct that imply sexual intercourse or sexual conduct.” *State v. Tarrats*, 2005 UT 50, ¶ 22, 122 P.3d 581 (citation and internal quotation marks omitted). *See also State v. Clark*, 2009 UT App 252, ¶ 14, \_\_\_ P.3d \_\_\_ (same). In adopting rule 412, the Utah Supreme Court “recognized and agreed with the general consensus among courts that an alleged victim’s prior sexual conduct ‘is simply not relevant to any issue in the rape [or other sexual crimes]

prosecution.’” *Tarrats*, 2005 UT 50, ¶ 21 (quoting advisory note) (other citation and internal quotations omitted). Even where such evidence may be marginally relevant, it may still be excluded under rule 403, UTAH RULES OF EVIDENCE, given its “‘unusual propensity’ to unfairly prejudice, inflame, or mislead the jury and . . . “distort the jury’s deliberative process.’” *Tarrats*, 2005 UT 50, ¶ 21 (quoting advisory note) (other citation and internal quotation marks omitted). *See also Clark*, 2009 UT App 252, ¶ 14 (same).

Rule 412 “safeguards the alleged victim from the invasion of privacy [and] potential embarrassment . . . associated with public disclosure of intimate sexual details.” UTAH R. EVID. 412 Advisory Committee Note. “By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in criminal proceedings against alleged offenders.” *Id.* The rule’s protections apply whether the sexual behavior evidence is “offered as substantive evidence or for impeachment.” *Id.*

Subsection 412(b)(3) provides an exception to the rule. Subsection (b)(3) states that specific instances of a victim’s sexual behavior are admissible, where the evidence is “otherwise admissible under these rules[, and its exclusion] would violate the constitutional rights of the defendant.” *See Add. A.* Stated differently, before evidence of a victim’s sexual behavior may be admitted under the exception, a defendant must “demonstrate both that the evidence was not prohibited by any

other rule of evidence and also that its exclusion would violate his constitutional rights. *Clark*, 2009 UT App 252, ¶ 15.

Here, Defendant claims his Sixth Amendment's right of confrontation is at issue. A defendant's right of confrontation—the right to present evidence and confront witnesses—“is not without limitation” and must necessarily “bow to accommodate other legitimate interests in the criminal trial process.” *See Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (discussing confrontation in context of state rape shield statute) (citation and internal quotation marks omitted). *See also Clark*, 2009 UT App 252, ¶ 16 (same). The right “guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Consequently, under the Confrontation Clause, “[t]rial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness based on concerns about, among other things, harassment, prejudice, confusion of the issues.” *Lucas*, 500 U.S. at 149 (citation and internal quotation marks omitted). *See also* UTAH R. EVID. 403. The right of confrontation is violated, however, if a court prohibits a defendant from ““engaging in otherwise appropriate cross-examination designed to show a proto-typical form of bias on the part of the witness, and thereby to expose the jury to the facts from which [it] . . . could appropriately draw inferences relating to the reliability of the witnesses.”” *Clark*, 2009 UT App 252, ¶ 16

(quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)) (brackets and omission in original).

The merits of Defendant's confrontation claim should not be considered, because the issue is not preserved and the facts are not marshaled. Even if the merits were considered, Defendant was accorded his full confrontation right and more. He not only engaged in appropriate cross-examination to show M.B.'s bias, motive, or inconsistency, but was also allowed to elicit details of M.B.'s sexual behavior far beyond what is permitted under rule 412 or its (b)(3) exception.

**A. The merits should not be considered, because the issue is not preserved and the facts are not marshaled.**

Defendant moved in limine to admit evidence of M.B.'s Idaho forensic interview, in which she discussed Defendant's and Adam's assaults (R. 92-103). Defendant recognized that rule 412 prohibited him from introducing details of the victim's sexual behavior with Adam, but argued that he should be allowed to question M.B. about any bias, motive, or inconsistency (R217: 42; R. 92-93). The trial court agreed. The court ruled that Defendant could generally cross-examine M.B. and other witnesses about M.B.'s bias, motive, and material inconsistencies (R217: 27-46). *See Statement of the Case, supra*.

Beyond this, the court explained that it needed to wait until trial to rule on more specific rule 412 objections because questions and objections concerning M.B.'s

disclosures had to be evaluated in context (R217: 27-30 & 41-46). The court opined that it believed that questions could be artfully framed to avoid rule 412's prohibitions and still probe the areas Defendant wished to examine (R217: 45-46). Defendant agreed and stated more than once that delaying further ruling until trial was appropriate (R217: 28-30 & 42). Just before trial, the court's extensive oral ruling was reduced to a short written ruling (R. 265-267). *See Add. C.* Because Defendant did not object to the court's deferred handling of the rule 412 motion, he may not challenge the lack of a "full" pretrial ruling for the first time on appeal. *See Patrick*, 2009 UT App 226, ¶ 12 (affirming failure to preserve below waives consideration of merits on appeal).

The merits should also not be considered, because Defendant fails to marshal the facts surrounding the rule 412 motion. *See United Park City Mines Co.*, 2006 UT 35, ¶¶ 24-27. Defendant does not marshal significant procedural facts—that he agreed with the deferred ruling and did not seek further ruling at trial. He also does not marshal significant substantive facts—that he was permitted to freely cross-examine M.B. and Adam about Adam's assaults and elicited details of M.B.'s sexual behavior beyond that permitted by rule 412 or its (b)(3) exception.

Specifically, Defendant fails to acknowledge the following facts. In his opening statement, defense counsel explained the defense theory—that M.B. truthfully described her abuse, but falsely accused Defendant to protect Adam, who

committed the crimes. *See discussion, supra.* Defense counsel told the jury that M.B. “doesn’t give a darn about” Defendant and that her accusations were “old-fashioned vindictiveness” (R414: 111). The second time the defense referred to M.B.’s sexual behavior with Adam was in cross-examining Matt, M.B.’s brother. Defense counsel asked Matt what he knew of Adam’s abuse of M.B. and Matt replied, Adam “got in trouble years and years before, back in West Valley when [Defendant] was not around” (R415: 21). Defense counsel asked Matt what occurred and Matt said that Adam touched M.B. inappropriately (R415: 22-24). On re-cross, the defense again asked Matt what Adam did to M.B. and, again without objection, Matt responded: “Adam would go in [M.B.’s] room and like touch her with his hands, and that he would like masturbate at the same time while touching her” (R415: 42).

Following this testimony, the prosecutor asked M.B. if Adam ever touched her sexually (R415: 50). This was the first time that the prosecutor referred to Adam’s abuse. Without providing the details of what Adam had done to her, M.B. replied that Adam abused her when she was six or seven, that M.B. told her mother, that Adam stopped, but then touched her again “a couple of times” before he finally stopped (R415: 50-51). M.B. explained that Adam and Defendant never sexually assaulted her at the same time (R415: 52). *See also Statement of Facts* at 10 & n.6. The prosecutor asked M.B. if she felt there were any differences between Adam’s and Defendant’s assaults, and again without providing the sexual details, M.B. related



what she felt were the differences, i.e., Adam's compassion and Defendant's ruthlessness (R415: 52-55). *See also Statement of Facts* at 9 & 12-13.

On cross-examination, defense counsel extensively questioned M.B. about her prior allegation that Defendant inserted a light bulb into her anus (R415: 75-83). Though the trial court had ruled that Defendant could question M.B. about material inconsistencies regarding the charged crimes, the light bulb incident was not a charged crime (R217: 43-44). Nevertheless, without obtaining a further ruling or incurring additional objection, Defendant questioned M.B. in detail about her prior accusation, including the drawing she made of the incident (R415: 75-83). Defense counsel further questioned M.B. about her preliminary hearing statement that Defendant used only two objects to penetrate her, an "M & M" container and dildo (R415: 79 & 109). M.B. asserted that she knew the defense would question her about this discrepancy and she was prepared to explain it (R415: 79-81). She said that sometime after she made the original accusation in the forensic interview, she worked on treatment packets that forced her to detail Adam's abuse (*id.*). In the course of doing that, she realized that it was Adam who inserted the light bulb into her, not Defendant (*id.*).<sup>13</sup>

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<sup>13</sup> M.B. told the prosecutor and, as a result, the light bulb object rape charge was dropped from the Information before the preliminary hearing. *See Statement of Case* at 4-5; *Statement of Facts* at 16.

Defense counsel continued to ask M.B. about other details of Adam's assaults — some that were discussed in the forensic interview and some that were not. No objections were raised to this questioning. Defense counsel asked M.B. if Adam also inserted a dildo in her anus and how many times he did that (R415: 81-82). M.B. described what he did (*id.*). Defense counsel asked M.B. if Adam had performed oral sex on her and she said he had (R415: 90). Defense counsel asked if she had performed oral sex on Adam and M.B. said she had (*id.*). Defense counsel asked her if Adam had inserted his fingers into her vagina and M.B. said he did not (R415: 91). She explained that Adam did not ever vaginally rape her and that Defendant "took [her] virginity" (R415: 91). Defense counsel asked her if Adam had inserted his fingers into her rectum and she said he had (R415: 91-92).

During an ensuing lunch recess, the court informed counsel that a juror had submitted a question — a procedure the court allowed — asking why M.B. did not tell Christina about Defendant, if she had told Christina about Adam (R415: 110-112). The answer was that years before, Christina had called M.B. a liar when M.B. said Defendant molested her. *See Statement of Facts* at 9 & n.4. The defense objected to this answer because the prior bad act had been deemed irrelevant and inadmissible in the pretrial rule 412 hearing (*id.*). The court reminded defense counsel that the defense had been given wide latitude in questioning M.B.:

We have left open the issue what this court's rulings might be on 412 objections, and no one has made one. So, we've gone fast and far past what otherwise might be protections entitled to [M.B.] pursuant to rule 412.

(R415: 112). Defense counsel agreed (*id.*). The court stated that accordingly, the prosecutor should have "some leeway" in questioning M.B. about why she did not tell Christina (*id.*).<sup>14</sup>

After the jury returned, the prosecutor asked M.B. why she did not tell and she responded that Christina had called her a liar when she had "told on [Defendant], about something that happened in the past" (R415: 113). Throughout the rest of the trial, defense counsel continued, without objection, to question witnesses about M.B.'s and Adam's sexual behavior (R415: 171; R416: 28-29, 33-37, & 58-60).

In sum, Defendant did not object to the court's deferred handling of the rule 412 motion, therefore, the issue is not preserved. Defendant also fails to marshal the facts concerning the rule 412 motion, pretrial ruling, and related trial evidence. These failures justify summary affirmance.

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<sup>14</sup> Defendant wholly mischaracterizes the bench conference. He states that it addressed "what questioning would be allowed regarding allegations against Adam and [M.B.'s] differing attitudes toward Adam" and Defendant. *Br.Aplt.* at 16-17 & 29-30.

B. Alternatively, no denial of confrontation occurred.

Defendant claims that the trial court's failure to make a "full" pretrial ruling on his rule 412 motion deprived him of confrontation. *Br.Aplt.* at 34-37. He asserts that the court's failure to fully rule deprived him of the opportunity to make a better opening, which would have led to a better defense. *Id.* at 37. The claim has no merit.

The right of confrontation "guarantees the right of an accused in a criminal prosecution ""be confronted with the witnesses against him."" *State v. Gonzales*, 2005 UT 72, ¶ 48, 125 P.3d 878 (quoting *Davis v. Alaska*, 415 U.S. 308, 315 (quoting U.S. Const. amend. VI)). An opening statement does not implicate the right.

In any case, here the gist of the defense theory was fully stated in opening. *See supra* at 26. During the ensuing trial, Defendant was allowed to question M.B. about any bias or motive she had to falsely accuse Defendant. And, as discussed, he was also allowed to examine M.B. and other witnesses concerning any inconsistency in her statements. Defendant was also allowed to fully question M.B. and other witnesses about Adam's assaults and, without limitation, to elicit details of M.B.'s sexual behavior. *See discussion of marshaled facts, supra*. In sum, the predicate for a rule 412(b)(3) confrontation claim does not exist, because evidence of M.B.'s sexual behavior was not excluded.

### III.

#### THE TRIAL COURT PROPERLY PERMITTED THE DATES IN THE INFORMATION TO BE AMENDED

Defendant claims that the trial court abused its discretion in allowing the prosecution to amend the end date of the charged period from December 2000 to September 2001. *See Br.Aplt.* at 37-39. *See also Add. B & D* (Informations). Defendant claims the nine-month change was “not justif[ied]” because M.B. was “unequivocal” that she was “nine, or perhaps had just turned ten” when Defendant began assaulting her. *Id.* The merits of the issue should not be considered, because the issue is not preserved and the facts are not marshaled. Alternatively, it lacks merit.

**A. The merits should not be considered, because the issue is not preserved and the facts are not marshaled.**

Defendant claims he objected to the amendment below. *Br.Aplt.* at 37. He did not. He filed no written objection to the prosecutor’s motion to amend the information and there is no other evidence that he objected (R. 339-340). Consideration of the merits is, therefore, waived. *See Patrick*, 2009 UT App 226, ¶ 12.

Even if the issue were preserved, Defendant fails to marshal the facts supporting the trial court’s ruling. Instead, Defendant summarily asserts that M.B. “changed her story [of when the crimes occurred] only when it became apparent if she continued to claim she was nine, she must be lying.” *See Br.Aplt.* at 39. Though unacknowledged by Defendant, the marshaled facts prove otherwise.

When the facts supporting the trial court ruling are properly marshaled, they establish that the probable cause statements in the original and amended Informations stated that the sexual assaults occurred in the Elm Street family home (R. 1-3 & 56-63). M.B. testified at the preliminary hearing that she thought Defendant moved into the home when she was nine or had just turned ten, i.e., 1999 or 2000 (R64: 9, 19, & 24-25). Mariah, M.B.'s older sister, testified at the preliminary hearing that Defendant lived in the Elm Street home for all of 2001 and possibly part of 2002, i.e., when M.B. was eleven years old (R64: 62-63). Subsequently, Defendant produced police records that supported Mariah's recall of the dates and showed that he still lived in New York in 1999 and much of 2000 (R. 225-258). Defendant also agreed that after he left New York in late 2000 or early 2001, he moved to Utah and shortly thereafter moved into the Elm Street family home (R416: 81).

The prosecutor discussed these facts with M.B., who realized that she must have been a year older, eleven years old, when Defendant lived in the home (R. 260). The prosecutor then moved to amend the end date charged in the Information to correctly reflect the time period that Defendant lived in the home (R. 259-264 & 339-340). Defendant did not object to the pretrial amendment (R. 339-340). Defendant's failure to marshal these facts supports summary rejection of his claim. *See United Park City Mining Co.*, 2006 UT 35, ¶¶ 24-27.

**B. Alternatively, the Information was properly amended.**

Alternatively, the claim has no merit. Rule 4(d), UTAH RULES OF CRIMINAL PROCEDURE, permits an information to be amended “at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.” *See Add. A.*

Time is generally not a statutory element. *State v. Robbins*, 709 P.2d 771, 773 (Utah 1985). And children are often unreliable in recalling dates in describing events that occur over a period of time. *See State v. Taylor*, 2005 UT 40, ¶ 12, 116 P.3d 360; *State v. Wilcox*, 808 P.2d 1028, 1033 (Utah 1991); *Robbins*, 709 P.2d at 773. Defendant attempts to distinguish these cases because M.B. testified at the preliminary hearing that she was sure she was nine or ten when the assaults began. *See Br.Aplt.* at 39. The argument is of no avail. In the same hearing, M.B. testified that the assaults took place after Defendant left New York and moved into the Elm Street home (R64: 9, 20 & 23-24). This is exactly the type of “temporal reference point” that children can more reliably identify than a precise year or an exact age. *Robbins*, 709 P.2d at 773.

Nor does it make any difference that M.B.’s realization that she must have been older resulted in part from Defendant’s “alibi.” *See Br.Aplt.* at 39. The purpose of “notice-of-alibi” statutes is to “preven[t] “last minute surprises and enable[e] the prosecution to make a full and thorough investigation.” *State v. Masetas*, 815 P.2d

1319, 1325 (Utah App. 1991). And if that investigation results in amendments in the charges, those amendments are permissible because a defendant “has no statutory or constitutional right to a charge framed so as to facilitate an alibi defense.” *State v. Northcutt*, 2006 UT App 269, ¶ 17, 139 P.3d 1066 (quoting *Wilcox*, 808 P.2d at 1033) (brackets in original).

Defendant’s claim of error also fails because he does allege prejudice. *See Br.Aplt.* at 37-39. *See also* UTAH R. CRIM. P. 4(d) (amendment permissible unless substantial rights prejudiced). And indeed, no prejudice exists. Defendant never denied that he *could have* assaulted M.B. when he lived in the home; he claimed only that he *did not* assault her. Under this theory, M.B.’s exact age was of little import. *See Taylor*, 2005 UT 40, ¶ 5 (recognizing where defendant denies crime, change in time frame of allegations does not violate his substantial rights).

#### IV.

##### **DEFENDANT FAILS TO ESTABLISH THAT HIS TRIAL COUNSEL WAS INEFFECTIVE**

Defendant asserts that if any issue is found to be unpreserved, the procedural default should be excused, because his trial counsel was ineffective “for not doing something more.” *See Br.Aplt.* at 40-41. The issue should be summarily rejected for inadequate briefing. *See Green*, 2004 UT 76, ¶¶ 11-15.

“To establish ineffective assistance of counsel, a defendant must demonstrate both that ‘counsel’s performance was deficient, in that it fell below an objective



standard of reasonable professional judgment,’ and that ‘counsel’s deficient performance was prejudicial.’” *State v. Perry*, 2009 UT App 51, ¶ 11, 204 P.3d 880 (quoting *Litherland*, 2000 UT 76, ¶ 19 & citing *Strickland v. Washington*, 466 U.S. 668 (1984)). A reviewing court “‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.’” *Benvenuto v. State*, 2007 UT 53, ¶ 19, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 689). “[A]n ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel’s actions.” *State v. Tennyson*, 850 P.2d 461, 468 (Utah App. 1993).

Moreover, “proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.” *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993). To establish prejudice, a defendant must affirmatively establish that “‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Templin*, 805 P.2d 182, 188 (Utah 1990) (quoting *Strickland*, 466 U.S. at 694). “And as with the first prong of the *Strickland* standard, there is a ‘strong presumption’ that the

outcome of the particular proceeding is reliable.” *Benvenuto*, 2007 UT 53, ¶ 23 (quoting *Strickland*, 466 U.S. at 699).

Though both prongs of the *Strickland* standard must be established, both need not be analyzed. In resolving an ineffectiveness claim, “an appellate court may skip to the second prong of the *Strickland* standard and determine that the ineffectiveness, if any, did not prejudice the trial’s outcome.” *State v. Goddard*, 871 P.2d 540, 545 (Utah 1994) (citing *Strickland*, 466 U.S. at 697).

Ignoring this authority, Defendant simply presumes that any failure to preserve an issue is necessarily deficient and prejudicial. *See Br.Aplt.* at 40-41. This wholly fails to satisfy the briefing requirements of rule 24(a)(9) and justifies summary rejection of the claim.

In any case, Defendant’s appellate issues have no merit, *see Points I-III, supra*, and, consequently, any failure of counsel to preserve them cannot be prejudicial. The only specific deficiency Defendant identifies is that his counsel failed to seek a mid-trial continuance after it became “clear . . . that the State had failed to disclose exculpatory evidence,” that is, after M.B. revealed “the misattribution of the light bulb incident.” *Br.Aplt.* at 40. The trial court did not rely on defense counsel’s failure to seek a continuance to bar the *Brady* claim. The court simply noted that counsel had not claimed surprise and sought a remedy during trial (R. 481). The court then proceeded to fully consider the merits of the *Brady* claim before rejecting


it (R. 477-487). *See Point I, supra, & Add. E.* In sum, seeking a mid-trial continuance would not have changed the *Brady* ruling and, therefore, no prejudice exists.

### CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted November 2, 2009.

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Counsel for Appellee

## CERTIFICATE OF SERVICE

I certify that on November 2, 2009, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Sara Pfrommer  
2663 Little Kate Road  
Park City, UT 84060

A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Fryer

## Addenda

## Addendum A

## Utah R. App. P. 24. Briefs

**(a) Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall 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. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opin-

ion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

**(b) Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

**(c) Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

**(d) References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

**(e) References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

**(f) Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

**(g) Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.



**(h) Permission for over length brief.** While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

**(i) Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

**(j) Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

**(k) Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

#### **Utah R. Crim. P. 4. Prosecution of Public Offenses**

**(a)** Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

**(b)** An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

**(c)** The court may strike any surplus or improper language from an indictment or information.

**(d)** The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

**(e)** When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

**(f)** An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

**(g)** It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

**(h)** Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

**(i)** Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.

**(j)** The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.

**(k)** If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.

Current with amendments received through July 1, 2009.

**Utah R. Crim. P. 24. Motion for New Trial**

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made not later than 10 days after entry of the sentence, or within such further time as the court may fix before expiration of the time for filing a motion for new trial.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

**Utah R. Evid. 412. Admissibility of Alleged Victim's Sexual Behavior or Alleged Sexual Predisposition**

**(a) Evidence Generally Inadmissible.** The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in paragraphs (b) and (c):

- (1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) evidence offered to prove any alleged victim's sexual predisposition.

**(b) Exceptions.** The following evidence is admissible, if otherwise admissible under these rules:

- (1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of the semen, injury, or other physical evidence;
- (2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered:
  - (A) by the accused to prove consent; or
  - (B) by the prosecution; and
- (3) evidence the exclusion of which would violate the constitutional rights of the defendant.

**(c) Procedure to Determine Admissibility.**

- (1) A party intending to offer evidence under paragraph (b) must:
  - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and
  - (B) serve the motion on all parties. The prosecutor shall timely notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
- (2) Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the alleged victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

## Addendum B

LOHRA L. MILLER  
District Attorney for Salt Lake County  
ROBERT G. NEILL, 8439  
Deputy District Attorney  
111 East Broadway, Suite 400  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

MAY 25 2007

SALT LAKE COUNTY  
By R. Neill  
Deputy Clerk

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

THE STATE OF UTAH,  
  
Plaintiff,

-vs-

**JASON TYLER HAMBLIN**  
DOB 08/19/80,  
**Gunnison Prison**  
067-74-0558  
OTN  
SO# 0258073

Defendant.

Assigned to: R. Neill (Tuesday)  
DAO # 06019648

**AMENDED  
I N F O R M A T I O N**

Case No. 061907251FS

The undersigned under oath states on information and belief that the defendant committed the crimes of:

**COUNT I**

**RAPE OF A CHILD**, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 402.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, had sexual intercourse with a child under the age of 14 years at the time of the offense.

**COUNT II**

**RAPE OF A CHILD**, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 402.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, had sexual intercourse with a child under the age of 14 years at the time of the offense.

AMENDED INFORMATION

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COUNT III

RAPE OF A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 402.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, had sexual intercourse with a child under the age of 14 years at the time of the offense.

COUNT IV

OBJECT RAPE OF A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 402.3, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, caused penetration of the genital or anal opening of a child who is under the age of 14 years by any foreign object, substance, instrument, or device, with intent to cause substantial emotional or bodily pain to the child or with the intent to arouse or gratify the sexual desire of any person.

COUNT V

OBJECT RAPE OF A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 402.3, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, caused penetration of the genital or anal opening of a child who is under the age of 14 years by any foreign object, substance, instrument, or device, with intent to cause substantial emotional or bodily pain to the child or with the intent to arouse or gratify the sexual desire of any person.

COUNT VI

SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

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COUNT VII

SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

COUNT VIII

SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

COUNT IX

SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

COUNT X

SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.



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COUNT XI

AGGRAVATED SEXUAL ABUSE OF A CHILD, a First Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 404.1(4), Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, touched the anus, buttocks or genitalia of a child, the breasts of a female child, or otherwise took indecent liberties with a child, or caused the child to take indecent liberties with the defendant or another with the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and the child was younger than 14 years of age, further that the defendant did during the course of committing the Sexual Abuse of a Child use or threaten the victim by the use of a dangerous weapon, or used force, duress, violence, intimidation, coercion, menace, or threat of harm or the Sexual Abuse of a Child was committed during the course of a kidnapping, or caused bodily injury or severe psychological injury to the victim during or as a result of the offense, or the defendant was a stranger to the victim or made friends with the victim for the purpose of committing the offense, or the defendant used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition, or the defendant has been previously convicted of any felony or of a misdemeanor involving a sexual offense, or the defendant committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct, or the defendant committed, in Utah or elsewhere, more than five separate acts which if committed in Utah would constitute an offense described in Title 76, Chapter 5, and were committed at the same time, or during the same course of conduct, or before or after the instant offense, or the defendant occupied a position of special trust in relation to the victim, or the defendant encouraged, aided, allowed or benefited from acts of prostitution or sexual acts by the victim with any other person or sexual performance by the victim before any other person, or the defendant caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

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COUNT XII

AGGRAVATED SEXUAL ABUSE OF A CHILD, a First Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 404.1(4), Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, touched the anus, buttocks or genitalia of a child, the breasts of a female child, or otherwise took indecent liberties with a child, or caused the child to take indecent liberties with the defendant or another with the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and the child was younger than 14 years of age, further that the defendant did during the course of committing the Sexual Abuse of a Child use or threaten the victim by the use of a dangerous weapon, or used force, duress, violence, intimidation, coercion, menace, or threat of harm or the Sexual Abuse of a Child was committed during the course of a kidnapping, or caused bodily injury or severe psychological injury to the victim during or as a result of the offense, or the defendant was a stranger to the victim or made friends with the victim for the purpose of committing the offense, or the defendant used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition, or the defendant has been previously convicted of any felony or of a misdemeanor involving a sexual offense, or the defendant committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct, or the defendant committed, in Utah or elsewhere, more than five separate acts which if committed in Utah would constitute an offense described in Title 76, Chapter 5, and were committed at the same time, or during the same course of conduct, or before or after the instant offense, or the defendant occupied a position of special trust in relation to the victim, or the defendant encouraged, aided, allowed or benefited from acts of prostitution or sexual acts by the victim with any other person or sexual performance by the victim before any other person, or the defendant caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

COUNT XIII

AGGRAVATED SEXUAL ABUSE OF A CHILD, a First Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 404.1(4), Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, touched the anus, buttocks or genitalia of a child, the breasts of a female child, or otherwise took indecent liberties with a child, or caused the child to take indecent liberties with the defendant or another with the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and the child was younger than 14 years of age, further that the defendant did during the course of committing the Sexual Abuse of a Child use or threaten the victim by the use of a dangerous weapon, or used force, duress, violence, intimidation, coercion, menace, or threat of harm or the Sexual Abuse of a Child was committed during the course of a kidnapping, or caused bodily injury or severe psychological injury to the victim during or as a result of the offense, or the defendant was a stranger to the victim or made friends with the victim for the purpose of committing the offense, or the defendant used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition, or the defendant has been previously convicted of any felony or of a misdemeanor involving a sexual offense, or the defendant committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct, or the defendant committed, in Utah or elsewhere, more than five separate acts which if committed in Utah would constitute an offense described in Title 76, Chapter 5, and were committed at the same time, or during the same course of conduct, or before or after the instant offense, or the defendant occupied a position of special trust in relation to the victim, or the defendant encouraged, aided, allowed or benefited from acts of prostitution or sexual acts by the victim with any other person or sexual performance by the victim before any other person, or the defendant caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

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COUNT XIV

AGGRAVATED SEXUAL ABUSE OF A CHILD, a First Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through December 31, 2000, in violation of Title 76, Chapter 5, Section 404.1(4), Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, touched the anus, buttocks or genitalia of a child, the breasts of a female child, or otherwise took indecent liberties with a child, or caused the child to take indecent liberties with the defendant or another with the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and the child was younger than 14 years of age, further that the defendant did during the course of committing the Sexual Abuse of a Child use or threaten the victim by the use of a dangerous weapon, or used force, duress, violence, intimidation, coercion, menace, or threat of harm or the Sexual Abuse of a Child was committed during the course of a kidnapping, or caused bodily injury or severe psychological injury to the victim during or as a result of the offense, or the defendant was a stranger to the victim or made friends with the victim for the purpose of committing the offense, or the defendant used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition, or the defendant has been previously convicted of any felony or of a misdemeanor involving a sexual offense, or the defendant committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct, or the defendant committed, in Utah or elsewhere, more than five separate acts which if committed in Utah would constitute an offense described in Title 76, Chapter 5, and were committed at the same time, or during the same course of conduct, or before or after the instant offense, or the defendant occupied a position of special trust in relation to the victim, or the defendant encouraged, aided, allowed or benefited from acts of prostitution or sexual acts by the victim with any other person or sexual performance by the victim before any other person, or the defendant caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

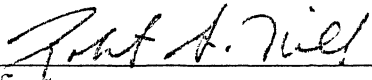
THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Detective McNees, M.B., M.B.

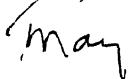
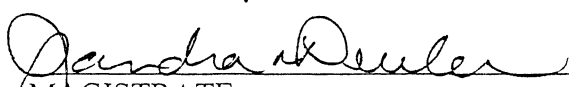
PROBABLE CAUSE STATEMENT:

Your Affiant bases this Information upon the following:

1. The statement of M.B., DOB 6/17/1990, that when she was approximately 9 years old, when she lived on Elm Street in Salt Lake County, her older step-brother, JASON TYLER HAMBLIN began sexually abusing her. She states that he began by touching her breasts and rubbing her vaginal area. M.B. states that HAMBLIN on separate occasions digitally penetrated her vagina and would bite her breasts. M.B. states that HAMBLIN had anal intercourse with her and caused her anus to bleed. M.B. states that HAMBLIN had anal intercourse with her numerous times. She also states that HAMBLIN put an M&M candy container and a "dildo" in her anus. M.B. states that HAMBLIN also had vaginal intercourse with her numerous times and that it hurt and she bled profusely. M.B. states that HAMBLIN put his mouth on her vagina and would force her to perform oral sex on him. M.B. states that these things occurred numerous times a week and that HAMBLIN stopped when he went to prison on unrelated charges, around the time M.B. turned 10 years old in 2000.

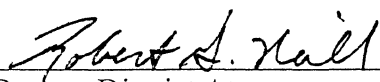
  
\_\_\_\_\_  
Affiant

Subscribed and sworn to before me this 25  
day of March, 2007.

  
  
\_\_\_\_\_  
MAGISTRATE

Authorized for presentment and filing:

LOHRA L. MILLER, District Attorney

  
\_\_\_\_\_  
Deputy District Attorney  
October 27, 2006  
CGB/om/06019648  
Amended/ww/March 26, 2007

Antibodies:

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Defendant.

PRELIMINARY HEARING

SCOTT M. MATHESON COURTHOUSE  
450 SOUTH STATE STREET  
SALT LAKE CITY, UTAH 84114-1860

**FILED DISTRICT COURT**  
Third Judicial District

SALT LAKE COUNTY

By                     

FILED Deputy Clerk

FEB 25 2009

1 Q Could you tell us about the first time?

2 A I just, I remember that I had to hold myself up, like  
3 I had to hold myself on my hands and my knees, and it was so  
4 hard for me to -- it felt like -- I don't know how to explain  
5 it. Like I was more -- I couldn't take myself away from the  
6 situation, and so I was more in tune, I was more there. And he  
7 just started having anal intercourse with me. And I couldn't  
8 go to the bathroom afterwards. And I remember when I tried it  
9 like cracked and bled.

10 Q What cracked and bled?

11 A My anus.

12 Q Did he say anything to you the first time that  
13 happened?

14 A He never said anything. All he ever said was, Shh,  
15 be quiet.

16 Q By "anal intercourse" what do you mean? What part of  
17 him went into what part of you?

18 A His penis went into my anus.

19 Q Did that happen once or more than once?

20 A It happened more than once. And there were objects  
21 involved sometimes.

22 Q Could you tell us about the objects?

23 A You know the M&M tubes that the little, mini M&M's  
24 come in? That was shoved up my ass.

25 Q Who did that?

1           A     Jason.

2           Q     Anything else?

3           A     And a dildo.

4           Q     Where did he put that?

5           A     My anus.

6           Q     Did that happen once or more than once?

7           A     The objects just once. But himself multiple times.

8           Q     Did he ever put his mouth on any part of your body  
9 other than your vagina? Did he ever put his mouth on your  
10 breasts or anything like that?

11               MR. NAKAMURA: Judge, I am going to object on the  
12 grounds it is leading. I think he can ask her what else  
13 happened. He has asked her that now. He is starting to lead  
14 her in terms of what particular acts he is contending allegedly  
15 occurred.

16               THE COURT: Sustained.

17           Q     (By Mr. Neill) Did he ever put his mouth on any other  
18 part of your body?

19           A     No.

20           Q     Did you ever do anything to try to get out of the  
21 situation or to prevent him from coming into your room?

22           A     I had my shoelaces, and I would take my shoelace out  
23 of my shoe. And in my room there was a wooden handle in the  
24 inside, and there was no lock on the inside. You can only be  
25 locked in from the outside. I took my shoelace and I tied it



1 Q But there were apparently other objects that he did  
2 stick inside you?

3 A Yes.

4 THE COURT: Could you answer out loud, please.

5 THE WITNESS: Yes.

6 Q (By Mr. Nakamura) Those were two, the M&M container  
7 and the dildo; is that right?

8 A Yes.

9 Q I'm sorry to keep having to go over these areas, but  
10 I have to ask. But in terms of where he put those, where did  
11 he actually put those into?

12 A My anus.

13 Q One time each with each object?

14 A Yes.

15 Q There were no other objects other than those two?

16 A No.

17 Q You have indicated that he also put his penis inside  
18 your anus.

19 A Yes.

20 Q Did he do that on the same time that he did the M&M  
21 or the dildo?

22 A No.

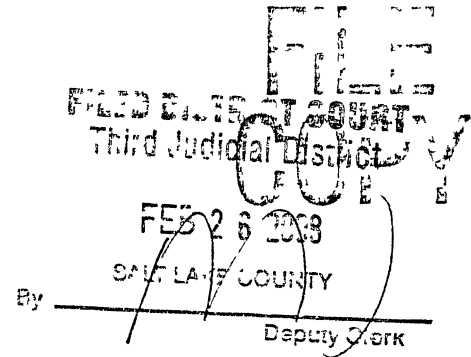
23 Q Those were separate occasions?

24 A Yes.

25 Q Do you recall if when the M&M container or the dildo

## Addendum C

LOHRA L. MILLER  
District Attorney for Salt Lake County  
ROBERT G. NEILL, 8439  
Deputy District Attorney  
111 East Broadway, Suite 400  
Salt Lake City, Utah 84111  
Phone (801) 363-7900



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

STATE OF UTAH,  Plaintiff,  -vs-  JASON TYLER HAMBLIN,  Defendant.	FINDINGS AND ORDER  Case No. 061907251  Honorable Randall Skanchy
--	---

On Thursday, October 11, 2007, a Motion Hearing was held before this Court to determine the admissibility of evidence which the Defendant seeks to introduce at trial. The State was represented by Robert G. Neill, Deputy District Attorney for Salt Lake County, and Mr. Hamblin, who was present, was represented by Mr. Blake Nakamura. The Court reviewed several motions and memoranda submitted by the Defendant as well as responses filed by the State. The Court heard arguments and also received evidence in the form of a portion of an audio-recorded forensic interview ("the interview") conducted by Ms. Amanda Wilson of the alleged-victim Mandi Boyd (Ms. Boyd). After resolving various issues themselves, the parties left the Court with the following issues to decide: 1) Whether statements made by Ms. Boyd regarding an alleged incident of sexual abuse perpetrated against her when she was four or five years old are admissible; 2) Whether statements made by Ms. Boyd regarding her feelings about what happens to the Defendant and another step-brother, Adam Boyd, who is also the subject of a criminal

prosecution, are admissible, and 3) Issues relating to statements made by Ms. Boyd during the interview which the Defendant claims are inconsistent, and the purpose and identity of the subject of the interview.

After considering the evidence, arguments and the applicable Utah Rules of Evidence, the Court makes the following Findings and Order with regard to issues one and two, but reserves ruling with regard to issue three.


### **FINDINGS AND ORDER**

1. On October 31, 2006, the State filed numerous sexual-offense charges against the Defendant in this case. All of the charged offenses are alleged to have occurred between January 1, 1999 and December 31, 2000, when Ms. Boyd was approximately nine and ten years old. The Defendant seeks to introduce statements Ms. Boyd made during the interview where Ms. Boyd referred to an alleged incident of sexual abuse which occurred nearly thirteen years ago, when Ms. Boyd was approximately four or five years old. Ms. Boyd ~~stated~~ that this particular incident was perpetrated by her step-brother, Adam Boyd, then corrected herself and stated it was the Defendant, not Adam Boyd, who perpetrated this particular alleged-abuse. This incident was first reported to law enforcement when Ms. Boyd was thirteen years old and is barred from prosecution by the statute of limitations. The Court finds that statements made by Ms. Boyd regarding this particular incident, when she was four or five years old, are not the subject of any of the charged offenses and any testimony or cross-examination associated with a matter that's not a subject of the charged allegations is irrelevant pursuant to Utah Rule of Evidence 402 and is additionally barred by Utah Rule of Evidence 412. Therefore any correction or contradiction on a piece of information associated with this alleged incident that occurred several years prior are not relevant and are hereby ordered inadmissible.

2. The second issue the Court considered is whether the Defendant may inquire of the alleged victim, Ms. Boyd, about statements she made indicative of her anger towards the Defendant and preference or sympathy towards her step-brother, Adam Boyd. The Court finds that any statements associated with bias or prejudice are subject to cross-examination, are admissible, and are not violative of Utah Rule of Evidence 412.
3. The Defendant, pursuant to his Motion, has raised additional issues regarding the admissibility of evidence pertaining to alleged inconsistencies in Ms. Boyd's statements and whether Adam Boyd or the Defendant was to be the subject of the the interview with Ms. Boyd. At the present time, the Court reserves any order regarding the admissibility of these issues until the issues are raised, if at all, during trial.

DATED this 26 day of ~~November~~ <sup>February 2008</sup>, 2007.

BY THE COURT:

  
\_\_\_\_\_  
RANDALL N. SKANCHY  
DISTRICT COURT JUDGE

Approved as to form:

\_\_\_\_\_  
Blake Nakamura  
Attorney for Defendant

5-18-1951

Defendant.

MOTION HEARING

SCOTT M. MATHESON COURTHOUSE  
450 SOUTH STATE STREET  
SALT LAKE CITY, UTAH 84111-1860

OCTOBER 11, 2007

**1**

1           And we would ask the court to rule that, under 412,  
2 mention of the victim's sexual -- any sort of abuse would be  
3 irrelevant and confusing for this jury.

4           THE COURT: Let me -- just before you -- before I let  
5 you go, let's walk through the 412 for just a minute and see  
6 how applicable it is to the four areas we've been talking  
7 about.

8           412 simply requires that it's not admissible in a  
9 criminal proceeding involving alleged sexual misconduct, and it  
10 sets forth the exceptions: But the evidence is not admissible  
11 -- "evidence offered to prove that any alleged victim engaged  
12 in other sexual behavior."

13           So what you argue to the court today is that sexual  
14 behavior, that is incident to sexual abuse, that occurred  
15 between her and her brother Adam, as opposed to her stepbrother  
16 Jason, would be barred by this rule; correct?

17           MR. NEILL: Correct. And as well as we would ask  
18 that it's irrelevant as well.

19           THE COURT: All right. However, as this case  
20 unfolds, you can certainly ask the victim to provide testimony  
21 about sexual abuse that occurred between her and the defendant,  
22 and she is subject to cross-examination as to those incidents.

23           And indeed she would be subject to any  
24 cross-examination associated with incidents of sexual abuse  
25 perpetrated by -- alleged to have been perpetrated by Jason in

1 this particular case.

2 In particular, all of that arises from this  
3 interview, which she has a mixed summary of sexual abuse that  
4 takes place with one individual and with another. Is that  
5 correct?

6 MR. NEILL: Correct.

7 THE COURT: And at the end of it, she at least gives  
8 her own impressions about her particular feelings about why she  
9 would like to see Adam not be punished, but why she doesn't  
10 care about Jason. Is that correct?

11 MR. NEILL: Yes.

12 THE COURT: That would be -- let's deal with that one  
13 first. That would certainly be subject to cross-examination.  
14 And wouldn't it fall within a proscription associated with Rule  
15 412 for barring it, because it simply goes to motive or bias?  
16 Correct?

17 MR. NEILL: Correct.

18 THE COURT: And it has to be put in some context.  
19 That context would be, "well, you were interviewed about your  
20 sexual abuse associated with Jason, correct?" And that's how  
21 it comes up. Is that right?

22 MR. NEILL: Yes.

23 THE COURT: Now she'll also be subject to  
24 cross-examination associated with -- well, "when did you first  
25 report this? How did you report it?" And there's going to



1 be -- I'm trying to think through how this court would work  
2 through an application of 412 associated with the testimony  
3 that comes in. The beginning of the interview process, the  
4 fact that she was there, that's not going to be prohibited by  
5 412. Is that right?

6 MR. NEILL: Yes.

7 THE COURT: So ultimately, if, in her initial  
8 rendition to the therapist, she is there to talk about abuse  
9 perpetrated by her brother Adam, it comes in. I mean that's a  
10 statement that's more likely than not to be elicited on direct  
11 examination, to which she is subject to cross-examination.  
12 Right?

13 MR. NEILL: Yes.

14 THE COURT: "When did this first come in?" "In an  
15 interview I gave to a sexual counselor, abuse counselor."  
16 "When did that interview take place? What did you tell her?"

17 Mr. Nakamura gets up to cross-examine and says,  
18 "didn't you identify someone else, too; that you had been the  
19 subject of sexual abuse by other individuals not identified  
20 here in this case?" And indeed, for the purpose of following  
21 that discussion, "didn't you meet with a counselor specifically  
22 to talk about that abuse?" Right? Is that -- have we passed  
23 412 at this point?

24 Where does 412 come in in the context of the court --  
25 Mr. Nakamura wanting to carry forward and the right he has to

1 confront the witness on that particular issue?

2 MR. NEILL: Well, anticipating --

3 THE COURT: Because it is evidence offered to prove  
4 that the alleged victim engaged in other sexual behavior. That  
5 certainly falls within 412.

6 MR. NEILL: I was planning to craft my direct  
7 examination very narrowly, and I mean my attempt would -- I  
8 think I could also ask her, you know, "during that interview,  
9 did you disclose allegations against the defendant?" I think I  
10 could certainly avoid any mention of the defendant -- or, I  
11 mean, excuse me, of Adam Boyd.

12 THE COURT: Then the exception to this, specifically  
13 things associated with why -- there may be argument that Mr.  
14 Nakamura could make today -- and that is evidence of specific  
15 incidents of sexual behavior by the alleged victim offered to  
16 prove that a person other than the accused was the source of  
17 the injury, or other physical evidence.

18 Typically that arises in the context of, you know, a  
19 single incident; an incident where, in interviews with this  
20 person, "this person, Person X did this," and you can get that  
21 information by examining the sort of physical evidence that may  
22 come from it. There may be physical evidence available. But  
23 it still falls within this exception, unless I'm misreading it.

24 Your only argument is it's not relevant; it's not  
25 charged.

1 MR. NEILL: That also, and I think the way I read  
2 that exception is that it is specific to a finding of physical  
3 evidence, whether it's semen, injury -- and I would assume  
4 that's referring to bruises or some sort of physical injury  
5 and/or other physical evidence. In this case, we have none of  
6 that. We have no one to compare, no semen samples to compare  
7 or bruises. It's very old.

8 My reading of that is that that would fall in to play  
9 if there were some physical evidence that they were contesting.

10 THE COURT: How about then Exception B, evidence of  
11 specific instances of sexual behavior by the alleged victim  
12 with respect to the person accused of the incident -- that's  
13 Mr. Hamblin in this case -- an incident that occurred three or  
14 four years prior? I guess that only comes in if it's offered  
15 by the accused and/or the prosecution brings it up. In a  
16 sense, it's not an issue in this particular case. Anything  
17 else you wish to say?

18 MR. NEILL: No.

19 THE COURT: You have the last word, if there's  
20 anything further.

21 MR. NAKAMURA: Judge, I think I'm understanding the  
22 court's thoughts on this one. And I want to address the third  
23 issue, if you will, that I have raised in the motion. It's the  
24 issue we talked about that we may have to wait for trial to  
25 develop.

1 I understand where the State's concerns are. I  
2 certainly understand the court's, and I understand 412.  
3 Clearly, it would preclude me from going in to all the details  
4 of the sexual abuse that happened; no question about that.

5 THE COURT: Yes.

6 MR. NAKAMURA: What I'm really saying on Point Three  
7 is that I'm comfortable waiting to trial to raise that because  
8 of what I'm anticipating happening; and this is what I think  
9 would occur.

10 She'll be examined by the State, asked questions  
11 about what she contends Jason did to her. And then, as she  
12 describes that incident -- but previously she has described  
13 Adam committing acts against her.

14 It would seem that, under those circumstances, I  
15 certainly am able to cross-examine her about the fact she had  
16 previously said X was considered by Adam. Is that a fair  
17 reading of what the thought is on at least the third point?

18 THE COURT: Yes, the factual scenario you have given  
19 me, though, is one that's in issue.

20 MR. NAKAMURA: Right. Because that's I think why we  
21 have to wait until we get to trial because we have to see  
22 exactly what evidence -- what she says, frankly, and what she  
23 says that there's an allegation against Jason that she has  
24 previously described as being committed by Adam. And if that's  
25 the case, it would seem to me that right to confront is very

1 much real. And I don't really have to get in to sexual  
2 behavior, and I'm not doing it for 412 purposes.

3 But at that point, I'm entitled to show identity  
4 issues. And 412 doesn't even apply, I would argue at that  
5 point.

6 But that's really what I was trying to get in with  
7 Point Three. And if it comes out that way, I can't see how I  
8 wouldn't be permitted to at least bring it to the jury's  
9 attention. That's the only point I wanted to make on Point  
10 Three, because I think that clearly is what may well happen.  
11 And I want to be able to respond to that.

12 Perhaps the court could give us some guidance if we  
13 ever get to that point. But I think if it was something  
14 contrary, that we could maybe take a break, bring it to the  
15 court's attention so the court can make a decision at that  
16 point whether it be that we have the described evidence, that  
17 it was by Adam on a different occasion.

18 THE COURT: The parties certainly are subject to  
19 impeachment or cross-examination on material inconsistent  
20 statements. This case presents a particular issue in terms of  
21 the factual pattern, if I understand the parties today, that  
22 relates to an incident that occurred three or four years prior  
23 to what might otherwise be the relevant and germane allegations  
24 associated with this particular information.

25 And therefore the issue becomes two-fold. First,

1 whether or not it's relevant at all. That's an argument that I  
2 think is made by the State, and seems to be persuasive, at  
3 least to this court at this time, in terms of the way we're  
4 proceeding.

5 Any testimony and cross-examination associated with a  
6 matter that's not a subject of these allegations is not  
7 relevant. And therefore correction or contradiction on a piece  
8 of information associated with incidents that occurred three or  
9 four years prior, and that is not subject to charge in this  
10 particular case, are not relevant and wouldn't be delved into  
11 at the time of trial, precluding the ability to ask questions  
12 associated with that.

13 However, of course in the context of the testimony,  
14 if the testimony comes in, it is certainly subject to being  
15 reopened, because it's been made a matter of testimony in the  
16 trial proceedings, et cetera.

17 I think I can -- I think there's some guidelines I  
18 can give you today associated with at least the four points.

19 I have put four, but it seems that two and three kind  
20 of blend themselves together; maybe it's one and two. And  
21 here's my preliminary ruling, subject to modification at the  
22 time of trial.

23 And that is statements associated with the fact of  
24 bias or prejudice are certainly subject to cross-examination.  
25 Therefore, indications she, in the context of an interview,

1 indicated she preferred Jason to or as opposed to Adam are  
2 subject to examination, direct and/or cross, and would not be  
3 violative of 412.

4 That, as is present, presently represented by the  
5 parties, the burden required by the defendant in this  
6 particular case to show relevance associated with  
7 cross-examination on an incident that occurred when she was  
8 three or four -- which is not, as the parties represent to the  
9 court today, at least the State does, subject to these  
10 allegations in this particular complaint -- would not be  
11 relevant and would also be barred by Rule 412. And therefore a  
12 correction associated with it would be as well.

13 The issue associated with Number three, and that is  
14 she went to the interview and stated at the beginning of the  
15 interview that this was to be interviewed about somebody other  
16 than this individual, and then proceeded, in the interview, to  
17 give testimony associated with somebody else, is a little more  
18 problematic for the court.

19 And I don't think that today, at the present posture  
20 of where we are, it's an important issue -- it may overshadow  
21 the rest of these -- but that I can give you the ruling. We  
22 may just ultimately have to reserve that until we get to trial.

23 But it would seem to me that, in some context, I  
24 could foresee that that, artfully handled, could come in  
25 without an appropriate objection to Rule 412, or for that -- or

1 412 rules, or for the objection to be sustained if it's handled  
2 correctly. Does that help at all?

3 MR. NAKAMURA: Judging is tough, and this is how you  
4 handle it.

5 THE COURT: Well, I'm not sure I can -- that's why  
6 I've always recognized the fact that the heavy lifting in any  
7 court is done by the parties who sit at counsel table. And I  
8 recognize that. You have tremendous responsibilities and  
9 burdens, and I just get to make the calls from the sidelines as  
10 I may be required to do so.

11 I have, I think, articulated in a manner in which the  
12 parties can perhaps come to the preparation of an order. I'll  
13 ask counsel for the State to prepare that order. Mr. Neill,  
14 you'll do that. We'll have that as an order associated with  
15 evidence as it may be received at the time of trial. Okay?  
16 Are there any other matters we can handle today?

17 MR. NAKAMURA: Judge, there is one other matter.  
18 It's kind of a housekeeping one. It's the trial setting.  
19 We've got the trial setting I think on the 5th of December, and  
20 that was set with the understanding that was a City trial date  
21 but that you guys may be bumped if they had other matters to  
22 go, but --

23 THE COURT: Well, I'm not certain we bump City  
24 matters if we have somebody in custody and who's charged with  
25 felony offenses, but go ahead.



## Addendum D

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**ORIGINAL**  
**FILED DISTRICT COURT**  
Third Judicial District

FEB 26 2008

By                       
SALT LAKE COUNTY  
Deputy Clerk

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

THE STATE OF UTAH,

Plaintiff,

-vs-

**JASON TYLER HAMBLIN**

DOB 08/19/80,  
Gunnison Prison  
067-74-0558  
OTN  
SO# 0258073

Defendant.

Assigned to: R. Neill (Tuesday)  
DAO # 06019648

**AMENDED  
INFORMATION**

Case No. 061907251FS

The undersigned under oath states on information and belief that the defendant committed the crimes of:

**COUNT I**

**RAPE OF A CHILD**, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through September 23, 2001, in violation of Title 76, Chapter 5, Section 402.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, had sexual intercourse with a child under the age of 14 years at the time of the offense.

**COUNT II**

~~**RAPE OF A CHILD**, a First Degree Felony, at 1015 East Elm Street , in Salt Lake County, State of Utah, on or about January 1, 1999 through September 23, 2001, in violation of Title 76, Chapter 5, Section 402.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, had sexual intercourse with a child under the age of 14 years at the time of the offense.~~

AMENDED INFORMATION

DAO No. 06019648

Page 3

~~COUNT VI~~ <sup>VI</sup> ~~rs~~  
COUNT VII

SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through September 23, 2001, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

~~COUNT VII~~ <sup>VII</sup>  
COUTN VIII

~~SODOMY UPON A CHILD, a First Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through September 23, 2001, in violation of Title 76, Chapter 5, Section 403.1, Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, engaged in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.~~ <sup>rs</sup>

~~COUNT VII~~ <sup>VII</sup> ~~rs~~  
COUNT IX

SEXUAL ABUSE OF A CHILD, a Second Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through September 23, 2001, in violation of Title 76, Chapter 5, Section 404.1(3), Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, touched the anus, buttocks or genitalia of a child, the breasts of a female child, or otherwise took indecent liberties with a child, or caused the child to take indecent liberties with the defendant or another with the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and the child was younger than 14 years of age.

~~COUNT IX~~ <sup>IX</sup> ~~rs~~  
COUNT X

SEXUAL ABUSE OF A CHILD, a Second Degree Felony, at 1015 East Elm Street, in Salt Lake County, State of Utah, on or about January 1, 1999 through September 23, 2001, in violation of Title 76, Chapter 5, Section 404.1(3), Utah Code Annotated 1953, as amended, in that the defendant, **JASON TYLER HAMBLIN**, a party to the offense, touched the anus, buttocks or genitalia of a child, the breasts of a female child, or otherwise took indecent liberties with a child, or caused the child to take indecent liberties with the defendant or another with the intent to cause substantial emotional or bodily pain to any person, or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant, and the child was younger than 14 years of age.

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**ORIGINAL**

**FILED DISTRICT COURT**  
**Third Judicial District**

**FEB 25 2008**  
By                       
SALT LAKE COUNTY  
Deputy Clerk

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

THE STATE OF UTAH,	STATE'S MOTION TO AMEND DATES ON INFORMATION
Plaintiff,	
-vs-	Case No. 061907251
JASON TYLER HAMBLIN,	Hon. Randall N. Skanchy
Defendant.	

The State of Utah, by and through its attorney, ROBERT G. NEILL, Deputy District Attorney, hereby moves this court, pursuant to Utah Rule of Criminal Procedure 4(d), to permit the dates on the Information filed in this case, to be amended to read from January 1, 1999 through September 23, 2001.

**BRIEF STATEMENT OF PERTINENT FACTS**

On April 25, 2006, Child Forensic Interviewer Amanda Wilson interviewed 15 year-old M.B. at the North Idaho Behavioral Health Juvenile Unit. M.B. disclosed to Ms. Wilson that the defendant had sexually abused her multiple times when she was a child. M.B. states that these incidents began when she was nine and lasted until she was ten years old. She stated that they occurred while she lived at 1015 Elm Avenue in Salt Lake County, a residence which her family rented. Both of M.B.'s parents passed away prior to this interview and therefore could not be resources for any dates. Based upon M.B.'s statements, the State's Information reads "on or about January 1, 1999 through December 31, 2000," which includes M.B.'s ninth year and half of her tenth year.

On February 19, 2008, the defendant filed a Notice of Alibi Defense. The defendant alleges that between April 1999 and October 2000 he had periodic contact with the police in New York State.

The State has presented this information to M.B. who will testify that the facts supporting the incidents of abuse are the same but the abuse could have happened into the year 2001.

## ARGUMENT

### **I. This Court Should Permit the State to Amend the Information Because Utah Law Permits the State to Amend an Information Any Time Prior to Verdict.**

This Court should permit the State to amend the dates in the information because under Utah Rule of Criminal Procedure 4(d): “The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.” Because no additional or different offenses are being charged, this Court should permit the requested amendment of dates. Utah appellate courts have upheld trial courts’ decisions to permit amending the dates of offenses on informations prior to verdict, particularly on child sex abuse cases.

In *State v. Taylor*, 116 P.3d 360 (Utah 2005), the defendant was convicted of Rape of a Child and Sodomy Upon a Child. The State’s Information alleged that the offenses occurred “on or about November 1, 2002 through January 9, 2003.” *Id.* at 361. During her testimony, the victim was imprecise on dates and times and the State moved to amend the information, following her testimony, to expand the range of dates by six months. *Id.* The trial court allowed the amendment and the Utah Supreme Court upheld the trial courts’ decision. The Supreme Court stated:

We have also acknowledged that in child sexual abuse prosecutions, identifying the specific date, time, or place of the offense is often difficult owing to the inability of young victims to provide this information. Responding to the realities of cognitive development, we have been less demanding of exact times and dates when young children are involved. We have noted that [i]f we were to hold that ... no offense could be charged because the alleged victim is too young to testify with certainty concerning

the time, dates, or places where the abuse occurred, we would leave the youngest and most vulnerable children with no legal protection. An abuser could escape prosecution merely by claiming that the child's inability to remember the exact dates and places of the abuse impaired the abuser's ability to prepare an alibi defense. *Id* at 363.

Similarly in this case, Ms. Boyd is recalling events which occurred when she was a child: nine and ten years old. Therefore, the State requests the Court to be "less demanding of exact times and dates" and permit the State to amend the information.

**II. This Court Should Permit the Amendment Because Time is Not an Element of Any of the Offenses Charged and Therefore the Substantial Rights of the Defendant are Not Prejudiced.**

This Court should permit the State to amend its information because the State is not required to prove the precise time the offense was committed and therefore, the substantial rights of the defendant are not prejudiced. In *State ex Rel D T*, 1134 P.3d 1148 (Utah Ct. App. 2006), the State charged the juvenile with Sexual Abuse of a Child, of which he was adjudicated. During cross-examination of the victim, she testified that the year of the offense could have been 2003 or 2004. *Id* at 1150. On appeal, the defendant argued that the victim's "testimony was insufficient because she could not remember the precise year the incidents had occurred[.]" *Id* at 1151. The Utah Court of Appeals stated that: "The only element of the offense at issue was where [the victim] had been touched; the State did not need to prove the precise year in which the abuse occurred." *Id*.

In *State v Marcum*, 750 P.2d 599 (Utah 1988), the defendant was convicted of Sexual Abuse of a Child. During the trial, the victim could not recall any abuse happening on the date charged in the Information. The defendant argued that "the child's testimony failed to support the charge against him since she could not recall any abuse occurring on the date alleged in the information[.]" *Id* at 601. The Supreme Court stated: "Time was not an element of the offense that the State was required to prove." *Id*.

Similarly in this case, all of the offenses with which the defendant is charged do not require “time” as an element the State is required to prove. The alleged offenses occurred while M.B. was younger than fourteen years of age (around nine and ten years of age) and the issue of whether or not she was a “child” is not at issue. Therefore, this Court should permit the State to amend the information because the State is not required to prove the precise time the offense was committed and therefore, the substantial rights of the defendant are not prejudiced.

**III. This Court Should Permit the State to Amend the Information Because the Evidence Suggested that the Alleged-Abuse Could Have Gone Into 2001, Therefore, the Substantial Rights of the Defendant Are Not Prejudiced.**

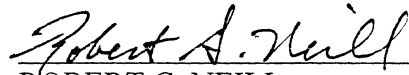
This Court should permit the State to amend the Information because the evidence did suggest that the abuse could have happened in 2001 and therefore the substantial rights of the defendant have not been prejudiced. In her original interview, M.B. told Ms. Wilson that the defendant sexually abused her when she was nine and ten years old. At the Preliminary Hearing, M.B. testified that incidents of the sexual abuse occurred when the defendant was living at their house. She testified that the defendant came and lived at their house when she was nine, and that he began to sexually abuse her. Preliminary Hearing Transcript p. 9 – 10, 23 - 24. M.B. testified that the sexual abuse occurred a lot from when she was nine until he went to jail. PH p. 15. She testified that she thought she just turned ten or was about to turn ten when the defendant stopped living at their house and went to jail. *Id.* To defense counsel’s question of how long the abuse continued, M.B. stated, “I’m not – I’m not really sure. Like, I think I was about ten or ten when he went to jail. I’m not really sure whether he went after or before, when he went to jail. Because when he went to jail it stopped.” PH p. 24 ll. 9 – 10. Records reveal that the defendant was arrested on September 23, 2001, for Aggravated Robbery.

Because M.B. has repeatedly stated that she remembered the abuse stopping when the defendant went to jail, the evidence also supports the proposed amendment to the information: that the alleged-abuse continued into 2001 because that is when the defendant went to jail.

Because the defendant had knowledge of this information, he suffers no substantial prejudice to his rights and the Court should permit the State's amendment.

DATED this 25th day of February, 2008.

LOHRA L. MILLER  
District Attorney

  
\_\_\_\_\_  
ROBERT G. NEILL  
Deputy District Attorney



## Addendum E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. 061907251
vs.	:	
JASON TYLER HAMBLIN,	:	Judge Randall N. Skanchy
Defendant.	:	

-----

The Court has before it defendant Jason Hamblin's ("Mr. Hamblin") Motion for New Trial. The matter has been fully briefed, and the parties argued the matter before the Court on November 14, 2008. The matter is now ready for decision.

BACKGROUND

On February 29, 2008, after a three day jury trial, the jury returned guilty verdicts against Mr. Hamblin in the above-entitled matter on the following counts: Rape of a Child, a First Degree Felony; Sodomy of a Child, a First Degree Felony; and two counts of Sex Abuse of a Child, Second Degree Felonies. The jury acquitted Mr. Hamblin on two counts of Object Rape of a Child, First Degree Felonies, and two counts of Sodomy of a Child, First Degree Felonies. The charges arose as a result of alleged sexual abuse of the female victim who was nine and/or ten years old at the time.

On April 25, 2006, the victim told police during an initial interview that two separate people, Adam Boyd ("Mr. Boyd") and defendant, Jason Hamblin, had sexually abused her. During this interview, she stated that Mr. Hamblin had abused her by inserting into her body an M&M candy tube, a dildo, and a lightbulb. At a subsequent preliminary hearing in May 2007, the victim reiterated that Mr. Hamblin had sexually abused her by inserting the M&M tube and the dildo into her body, but she made no mention of the lightbulb. From her statements, the State proceeded on two counts of Object Rape against Mr. Hamblin, one for the M&M tube and one for the dildo. In February, 2008, the State amended its Information against Mr. Hamblin, but proceeded on the same two counts of Object Rape,

At trial, the prosecution questioned the victim about the lightbulb. The victim responded, "Do you not remember me telling you...that's not true." (Trial Transcript, Second Day Trial, page 108, lines 18-20.) Mr. Hamblin's counsel also questioned the victim as to the discrepancy between her initial interview and the preliminary hearing. The victim responded that she later had realized that it was Mr. Boyd who raped her with the lightbulb, not Mr. Hamblin. At the close of trial, the State amended some of the counts against Mr. Hamblin, but once again kept the two counts of Object Rape for the M&M tube and the dildo. The jury acquitted Mr. Hamblin of both counts of Object Rape.

Mr. Hamblin now requests a new trial citing two reasons. He argues that the State violated his due process right to a fair trial by withholding evidence that could be used for impeachment purposes and that he was denied a unanimous decision by an impartial jury. Rule 24(a), Utah Rules of Criminal Procedure, allows the Court to grant a new trial in the interest of justice if there is error or impropriety which had a substantial adverse effect upon the rights of a party.

#### LEGAL DISCUSSION

##### 1. The State did not Suppress Evidence that Denied Mr. Hamblin a Fair Trial

The State is required to disclose to the defense all known evidence that may tend to negate the guilt of the accused. Utah Rule of Criminal Procedure 16(a)(4); See also, State v. Carter, 707 P.2d 656, 662 (Utah 1985) (citing State v. Jarrell, 608 P.2d 218, 224 (Utah 1980)). Mr. Hamblin argues that the State violated Rule 16 by failing to disclose that the victim retracted her accusation that it was Mr. Hamblin who perpetrated the lightbulb incident.

In Brady v. Maryland, the U.S. Supreme Court held that suppression of evidence favorable to the accused violates due process where the evidence is material to guilt or punishment. 373 U.S. 83, 87 (1963). The duty to disclose applies to substantively exculpatory evidence, and may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676 (1985). In deciding whether due process has been violated, courts look

at whether the defense was provided the potentially exculpatory information in a timely manner, and if not, whether the information was material and the absence of which prejudiced the defense.

(i.) The Defense had the Opportunity to Address the Discrepancy at Trial

At the heart of the duty to disclose is the quest for a fair trial based on the totality of facts, not simply an adversarial contest between two sides. Carter, 707 P.2d at 662. That being said,

[C]ourts universally refuse to overturn convictions where the evidence at issue is known to the defense prior to or during trial, 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 (2001).

In Bisner, the defense learned of exculpatory information three days before trial, and the Utah Supreme Court found no Brady violation because the defense had had the opportunity to address the information at trial. The Court sustained the conviction. 2001 UT at ¶20. In United States v. Adams, 834 F.2d 632, 634-35 (7th Cir. 1987), the prosecution gave potentially exculpatory evidence to the defense during trial but before the testimony of the witness presenting impeachable evidence. Again the reviewing court sustained the conviction because the defense had the opportunity during trial to recall the witness or request a continuance or recess.

Mr. Hamblin cites the Knight case as an example where potentially exculpatory evidence was presented for the first time at trial, and the

Utah Supreme Court found the defendant's due process had been violated. State v. Knight, 734 P.2d 913 (Utah 1987). Knight is easily distinguished from Mr. Hamblin's situation. In Knight, upon hearing of the evidence, the defense immediately motioned the court for a mistrial, a continuance, and a withdrawal of counsel. The trial court refused each motion, and the Supreme Court ultimately reversed the conviction. In Mr. Hamblin's case, it is likely that his counsel had already known of the victim's retraction before trial, but made no effort to bring the Court's attention to the supposedly new information. No Motion for a mistrial or continuance was made by Mr. Hamblin.

It is unclear as to when Mr. Hamblin's counsel knew of or should have known of the victim's lightbulb retraction, but it certainly was prior to the end of trial. On one hand, the victim's statement at the preliminary hearing clearly omitted mention of the lightbulb in relation to Mr. Hamblin. Mr. Hamblin's counsel specifically asked the victim about the M&M container and dildo, and clarified with the victim that those were the only two objects used by Mr. Hamblin. (See State's Opp. at 4-5 for excerpts from Preliminary Hearing Transcript.) Moreover, Mr. Hamblin's counsel indicates that he had carefully planned his case for trial by focusing on the "discrepancy between the complaining witness' initial disclosures and her testimony at the preliminary hearing." Thus, Mr. Hamblin's counsel knew that the victim had retracted her accusation as to the lightbulb and intended to use that as part of his final

strategy. Def. Mot. at 6. Notwithstanding this assertion, Mr. Hamblin appears to claim he was blind-sided with the lightbulb retraction at trial:

At the trial, after defense counsel had mapped out his trial strategy during the opening statement and referred to the lightbulb, only then does defense counsel learn that there has been yet another turnabout with respect to which person perpetrated acts of sexual abuse.

Id. at 4. The defense argues that it went into trial under the impression that the victim had not retracted her lightbulb statement.

Id. at 7 and 8.

Regardless of whether the victim's lightbulb retraction came to the attention of Mr. Hamblin before or during trial, Mr. Hamblin's due process was not violated. At trial, the State mentioned the lightbulb to the victim, who adamantly reminded counsel of her previous retraction. Mr. Hamblin's cross-examination of the victim also brought up the lightbulb inconsistency. It would seem that Mr. Hamblin was put out that the State approached the lightbulb issue first, and the victim had an opportunity to give explanation to the discrepancy prior to his questioning rather than being blind-sided by the testimony. Nevertheless, Mr. Hamblin was aware of the evidence at the time he cross-examined the victim on the stand and had an opportunity to impeach her inconsistent statements. He also had the opportunity at trial to bring his grievance to the attention of the Court, and did not do so.

Mr. Hamblin claims that the withholding of the lightbulb retraction had a substantial adverse effect on his right to a fair trial, given that the State's initial mention of the lightbulb foreclosed the defense from impeaching the victim. That the defense's trial strategy had its thunder stolen is not a *per se* violation of due process.

(ii) The Evidence was Immaterial and did not Adversely Affect the Outcome

Because Mr. Hamblin knew of the potentially exculpatory evidence in time to impeach the victim at trial, the Court does not need to address the next step of analysis: whether the evidence was material to the guilt or punishment of Mr. Hamblin. Brady, 373 U.S. at 87. Yet even if the lightbulb retraction had not surfaced until after trial, the potential impact to Mr. Hamblin's case would have been negligible, if any.

The Supreme Court has refined the Brady standard for whether evidence is material as meaning there is reasonable likelihood that the result would have affected the outcome of the trial, or in other words, that the suppression undermines confidence in the outcome of the trial. Bagley, 473 U.S. at 678; see also, State v. Bakalov, 1999 UT 45, ¶ 32, 979 P.2d 799, 812 (1999); State v. Pinder, 2005 UT 15, ¶ 26, 114 P.3d 551 (2005) (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

Here, even if the lightbulb retraction had not been disclosed until after trial and Mr. Hamblin had been precluded from using it to impeach the victim, the information is largely immaterial. The State charged Mr. Hamblin with only two charges of Object Rape, not including the



lightbulb The jury acquitted Mr. Hamblin on the two counts of Object Rape. Even if Mr. Hamblin had labored throughout the trial under the illusion that the victim had continued to mistakenly attribute the lightbulb incident to Mr. Hamblin, the jury was never asked to consider this issue in its deliberations. Mr. Hamblin simply cannot show that the victim's retraction was likely to have any significant outcome on the jury's ultimate decision, and therefore it did not undermine confidence in the trial.

The Court finds a resemblance of Mr. Hamblin's situation to that in State v. Pinder. Mr. Pinder claimed that his murder conviction was undermined by the State's failure to disclose a cohort's criminal record, police corruption, and a witness' plea deal. The Utah Supreme Court disagreed and held that not only could Pinder have discovered the evidence through a reasonable investigation, but even if he had the information at trial, "we would still be hard pressed to find that the evidence was material, as that term is used in the Brady context." 2005 UT ¶¶ 33, 37. There, the jury was presented with information effectually leading to the same conclusion it would have come to if presented with the material the defense claimed was suppressed. Id. at ¶ 33. In our case, Mr. Hamblin intended to impeach the victim to demonstrate doubt as to her "accuracy and reliability." (Def. Mot. at 7.) Despite Mr. Hamblin's claim to the contrary, both he and the State through oral examination presented to the jury evidence of the victim's retraction.

The overriding concern of this Court is that Mr. Hamblin was afforded a fair trial and that justice prevailed in the finding of guilt. See, United States v. Agurs, 427 U.S. 97, 112 (1976); State v. Bishop, 753 P.2d 439, 473 (Utah 1988). While the State is required to disclose to the defense potentially exculpatory evidence before the end of trial, and while the defense must have an opportunity to address the evidence to the trier of fact, the defense also has a duty to discover the evidence through reasonable investigation. Pinder, 2005 UT ¶ 32. But even suppressed and undiscovered evidence will not erode confidence in a conviction if its disclosure and use would have been unlikely to alter the outcome to the extent that the accused was not afforded a fair trial. Mr. Hamblin cannot show that, first, he was without knowledge of the lightbulb retraction before or during trial, and second, that he was likely to receive any other outcome at trial.

## 2. The Jury Decision was Unanimous and Impartial

By 10:15 p.m. on the third and last day of trial, the jury had been deliberating for approximately five hours. The Court asked the jurors if they thought they might reach a decision within an hour; if unlikely, the Court would adjourn for the day and recall the jury for Monday morning. The foreperson indicated that an hour would suffice, and the jury did render its unanimous decision within the hour.

Mr. Hamblin argues that the Court's question to the jury pressured the jurors to come to a unanimous decision, perhaps compromising the

deliberative process. His argument that "it is very likely" that the verdict was compromised is unfounded speculation.

The Court's question to the jury in no way can be seen as a coercive instruction. In State v. Clements, the Utah Court of Appeals upheld the trial court's instruction to the jury as follows:

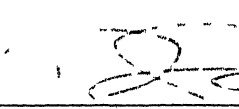
I would sincerely hope that you can reach a verdict this evening. This is not a complicated case. There's only one real issue here on the one count, and it's either "yes" or "no." You have to make up your minds, folks.

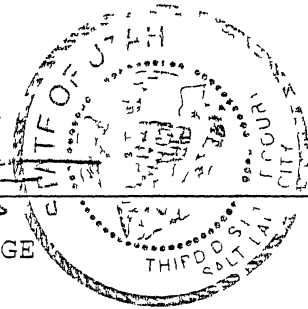
967 P.2d 957,959 (Utah Ct. App. 1998). The appeals court held that while a court may urge a verdict to a deadlocked jury as long as it is not coercive, when the jury is not deadlocked the court is free to instruct that the jurors must come to some consensus from among the options of returning at a later time to deliberate, letting the court know if they are deadlocked, or reaching a verdict. Id. In the instant case, the jury was not deadlocked, nor was the Court's instruction at all coercive. The Court simply asked for an estimate of time needed and suggested that they return Monday morning if they felt they required much more time.

Mr. Hamblin has asked for a new trial under Rule 24(a), Utah Rules of Criminal Procedure, claiming that errors of prosecutorial misconduct and flawed jury instruction had a substantial adverse effect upon his rights. For the above-mentioned reasons, the Court finds that Mr.

Hamblin was afforded a fair trial in line with his due process rights. Accordingly, Mr. Hamblin's Motion for New Trial is denied.

Dated this 12 day of December, 2008.

  
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RANDALL N. SKANCHY  
DISTRICT COURT JUDGE

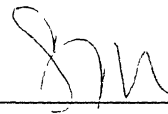


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 12 day of December, 2008:

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