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The State of Utah v. Russell Bisner : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff and Appellee, vs. RUSSELL BISNER, Defendant and Appellant.	Case No. 20000026-SC Priority No. 2

BRIEF OF APPELLEE

AN APPEAL FROM A JUDGMENT OF CONVICTION FOR MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (SUPP. 1996), AND AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1995), IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH, SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK PRESIDING

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BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from a judgment of conviction for murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1996), and aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1995). This Court has jurisdiction under Utah Code Ann. § 78-2-2(3)(i) (1996).

STATEMENT OF THE ISSUES

FIRST ISSUE. Did the prosecutor's seeming failure to disclose alleged "cooperation agreements" with state witnesses violate defendant's due process rights?

Standard of Review. "A trial court has discretion in determining whether to grant or deny a motion for a new trial, and [this Court] will not reverse a trial court's decision absent clear abuse of that discretion." *State v. Harmon*, 956 P.2d 262, 265-66 (Utah 1998).

However, the Court "review[s] the legal standards applied by the trial court for correctness." *State v. Bakalov*, 1999 UT 45, ¶28, 979 P.2d 799.

SECOND ISSUE. Did the trial court abuse its discretion in admitting evidence of the victim's drug debt to defendant under rule 404(b), Utah Rules of Evidence, where that evidence was relevant to motive and intent?

Standard of Review. This Court reviews a trial court's ruling on the admission of evidence under rule 404(b) for an abuse of discretion. *State v. Nelson-Waggoner*, 2000 UT 59, ¶16, 6 P.3d 1120. The Court reviews the record "to determine whether the admission of other bad acts evidence was 'scrupulously examined' by the trial judge 'in the proper exercise of that discretion.'" *Id.* (*quoting State v. Decorso*, 1999 UT 57, ¶18, 993 P.2d 837, *cert. denied*, 120 S.Ct. 1181 (2000)).

THIRD ISSUE. Was the information obtained from the searches of defendant's home, conducted with consent of defendant's mother, properly considered as a basis for the search warrant?

Standard of Review. This Court reviews the factual findings underlying a trial court's ruling on a motion to suppress for clear error. *State v. Troyer*, 910 P.2d 1182, 1186 (Utah 1996). The Court considers the facts "in a light most favorable to the trial court's determination" and will not find clear error unless the factual findings "are not adequately supported by the record." *Id.* The trial court's legal conclusions based on the facts are reviewed for correctness. *Id.*

FOURTH ISSUE. Did the trial court's manslaughter instruction, patterned after the instruction approved in *State v. Piansiaksone*, 954 P.2d 861 (Utah 1998), clearly explain extreme emotional disturbance?

Standard of Review. The propriety of a jury instruction is a conclusion of law reviewed for correctness. *See State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992).

FIFTH ISSUE. Did the trial court properly deny defendant's motion to merge his aggravated robbery conviction with his murder conviction?

Standard of Review. Merger presents a question of law reviewed for correctness, with no deference given to the trial court. *See State v. Brooks*, 908 P.2d 856, 858-59 (Utah 1995).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The interpretation of the following provisions are relevant to a determination of this case: U.S. Const., amend. IV, Utah Code Ann. § 76-1-402(3) (1999), Utah R. Evid. 403, and Utah R. Evid. 404(b). The relevant provisions are reproduced in Addendum A.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged by information with murder and aggravated robbery, both first degree felonies. R. 03-05. Defendant filed motions to quash the bindover and to suppress evidence seized from his house, including the murder weapon. R. 69-70, 81-97. After holding an evidentiary hearing, the trial court denied both motions. R. 372-73, 418-23. Defendant filed a petition for interlocutory review of the order denying his motion to suppress, which this Court denied. R. 427-52, 502-03.

Defendant filed a number of pretrial motions, including motions to exclude evidence of the victim's drug debt to defendant, R. 504-07, and to exclude testimony from any State witnesses with whom the State made any undisclosed "agreements, inducements, offers of leniency, or other understandings" for their cooperation or testimony. R. 549-50. The court heard argument on the motion to exclude the drug debt evidence after the jury had been empaneled and opening statements given. R. 551, 893. The court denied the motion. R. 893: 7. The trial court did not immediately rule on the motion to strike.

Defendant unsuccessfully moved for a directed verdict after the State rested. R. 559-60; R. 891: 283. He also argued the testimony of Chris Lyman, a State witness, should be stricken because the State did not disclose an alleged "cooperation agreement" with Lyman. R. 560; R. 891: 278-83. That motion was denied. R. 560; R. 891: 283-85. The defense rested without presenting evidence. R. 560. The jury found defendant guilty on both counts, and further found that a dangerous weapon was used in the commission or furtherance of the murder. R. 598-600, 604; R. 888: 4-6.

Nineteen days after the verdict, but before sentencing, defendant unsuccessfully moved to merge the aggravated robbery conviction with the murder conviction. R. 608-17, 637; R. 895: 3-8. Defendant was thereafter sentenced to consecutive prison terms of five-years-to-life on each count plus an additional one-year term for use of a firearm. R. 636-37; R. 895: 26-27.

Defendant timely moved for a new trial, renewing his argument that the State did not disclose the alleged "cooperation agreement" with Chris Lyman. R. 642-43. The trial court

denied the motion. R. 685, 730. After the trial court announced its decision denying the motion, but before it entered a final written order, defendant filed a motion to reconsider the denial of the motion for a new trial. R. 687-88. That motion was never decided by the trial court and defendant timely filed a notice of appeal from the denial of his motion for a new trial. R. 732.

In an effort to obtain a ruling on his motion to reconsider, defendant moved to dismiss the appeal without prejudice pending disposition of his motion to reconsider. This Court denied the motion, holding that a motion to reconsider is not valid under the rules and that "[t]he trial court lacks jurisdiction to consider anything further in this case because defendant timely filed his notice of appeal." *See* Order (reproduced in Addendum B).

SUMMARY OF FACTS

In the early morning hours of January 6, 1999, defendant fatally shot Darby Golub with an assault rifle as Darby attempted to flee to safety. R. 890: 145-46, 159; R. 891: 183, 201, 245-47, 251-60, 269-70.[1]

Sometime between 9:00 and 10:30 the night before, defendant and his friend Derek Pearson visited Chris Lyman at his Sandy apartment to purchase LSD. R. 889: 3-4, 21. The two visited Lyman for fifteen to twenty minutes. R. 889: 4-5, 22. During their conversation, defendant told Lyman that he was going to meet someone that night who owed him money.

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[1]On appeal, the Court "review[s] the record facts in a light most favorable to the jury's verdict" and the State therefore "recite[s] the facts accordingly." *State v. Brown*, 948 P.2d 337, 339 (Utah 1997). Conflicting evidence is included "only as necessary to understand issues raised on appeal." *State v. Holgate*, 2000 UT 74, ¶2, 10 P.3d 346.

R. 889: 05. As the two left Lyman's apartment, defendant declared, "Someone is going to die tonight." R. 889: 5; *see also* R. 889: 22-24.

After leaving Lyman's apartment, the two went to the home of Justin Koontz where other friends had gathered to party. *See* R. 890: 56-57; *see also* R. 890: 4-5, 93-94. Justin's mother was working that evening at a nearby 7-Eleven and his father was upstairs sleeping. R. 890: 10-11, 14-15, 94, 99. The friends partied downstairs into the early morning hours of the next day, drinking alcohol and using drugs. R. 890: 5-6, 10, 57, 94, 113-14.[2]

Defendant had discussed with his friends a $350 drug debt Darby owed him. *See* R. 890: 8-9, 58-59. From the party, defendant telephoned Darby, leaving a message that he was supposed to have paid on the drug debt that day. R. 890: 58-59. At approximately 2:00 a.m., Darby returned the call. R. 890: 6, 9-10, 94-96. Darby yelled at Justin because of a late call to his house that night and Justin rejoined with a similar complaint. R. 890: 95, 112. After speaking with Justin, Darby spoke with Dustin Symes, another of defendant's friends. R. 890: 4-6, 34, 58-59, 94. Darby again complained of the late call to his house, and after an angry exchange of words, they agreed to meet in the parking lot of the Canyon Center, a nearby shopping center, to settle the dispute. *See* R. 890: 7-8, 13-14, 34-35, 51, 60-61.[3]

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[2]Derek Pearson, who had accompanied defendant to Lyman's house, testified that he had been smoking marijuana most of the night and that he took six "hits" of LSD at approximately 11:00 that evening. R. 890: 57, 79. Justin Koontz also acknowledged at trial that he had smoked marijuana that evening. R. 890: 114.

[3]The Canyon Center, similar to a strip mall, includes a Smith's grocery store on the west end, a Shopko at the east end, and a variety of smaller businesses in between. A large parking lot lay to the south of the businesses. *See* State's Exhibit (SE) 4 (the exhibits are included in the record in two un-indexed envelopes); R. 890: 13-14, 36, 162,

After hanging up, Dustin discussed the called with defendant, Derek, and Justin, and considered the possibility of taking guns. R. 890: 9-10, 35-36, 60-62, 78.[4] Anticipating a fight, the four left in Dustin's truck to meet Darby at the Canyon Center parking lot. R. 890: 8-12, 36, 39, 53, 61-62, 98. Finding no one there, Dustin drove to the 7-Eleven located on the southeast corner of the parking lot where Justin's mother was working that evening. R. 890: 13-14, 61-62, 99. Defendant, Dustin, and Derek remained outside, talking with Justin's mother who was on break smoking a cigarette. R. 890: 14, 37, 62-63, 78-79, 138-39, 152. Justin went inside, helped himself to the condiment bar, and spoke with another 7-Eleven employee. R. 890: 15, 63, 78, 99, 137-38, 152.

After a few minutes at the 7-Eleven, the three friends outside saw Darby's truck pull into in the Canyon Center parking lot just south of the middle businesses. *See* R. 890: 14-16, 37-39, 63-64, 73-74, 99, 139; SE 6. Justin's mother went back into the convenience store and notified her son of Darby's arrival. *See* R. 890: 140. Extremely agitated and upset, Justin ran out of the store and joined his friends in Dustin's truck. R. 890: 17, 64, 99-100. As Justin exited the store, either he or his mother exclaimed, "That chicken shit wouldn't show up." R. 890: 140, 153. After Justin left, his mother remarked to her co-worker, "I just

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168. A Rainbo Mart and a 7-Eleven sit on the southern-most borders of the Canyon Center parking lot, facing 9400 South—the Rainbo gas station sits directly south of the middle businesses and the 7-Eleven sits in the southeast corner. *See* SE 4; R. 890: 14, 146, 163; R. 891: 176. Witnesses referred to the parking lot as either the Shopko or the Smith's parking lot. See R. 890: 8, 13-14, 36, 61, 64, 97, 100, 114, 140-41; R. 891: 175.

[4]Although both Dustin and Justin denied any talk of weapons, R. 890: 43, 98, 115, Derek testified they did have that discussion. R. 890: 60, 62, 78.

sent him down to a fight at the Smith's. I guess that's not a very good mother to send him down to do that." R. 890: 140.

Dustin parked his truck kitty-cornered to Darby's truck some twenty to thirty feet away. R. 890: 17-18, 38, 64-65, 100-01, 116, 141-42, 154. Darby, who was alone, exited his truck and stood with an assault rifle cradled in his arms. R. 890: 19-21, 38-39, 41, 54, 65, 101-02. Defendant and his friends exited their truck and quickly advanced on Darby. R. 890: 18-23, 66-68, 102-05. Although he had a rifle, Darby simply backed up as they advanced and made no threat with the weapon. R. 890: 103.[5] He did not fire the rifle nor did he use it to otherwise defend himself. R. 890: 21, 66-68, 90, 105. Dustin, who brought with him an aluminum baseball bat, thrust the bat at Darby, cutting his forehead, knocking him backward, and causing him to drop the rifle. R. 890: 12-13, 21-23, 43-44, 46, 54-55, 68, 103-04. Justin followed with a punch to Darby's leg. R. 890: 104-05. Having disarmed Darby, Dustin returned to his truck and Justin followed. R. 890: 23-24, 44-45, 105, 120-22. Confused, Darby asked, "Why are you doing this?" R. 890: 69, 83. Darby was eventually forced to the ground as defendant and Derek continued to beat on him for some thirty seconds. R. 890: 22-24, 44-45, 66-68, 83, 104-05, 143. Dustin yelled for his friends to get back in the truck and all but defendant complied. R. 890: 24-25, 47, 69, 84, 105-06, 121.

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[5]Dustin Symes testified that he never saw Darby point the gun at them, R. 890: 19-20, 38-39, 41, 54, and Justin Koontz testified that he didn't remember Darby pointing the gun at them. *But see* R. 890: 102 (claiming Darby was waiving the gun). Only Derek Pearson, who acknowledged he was high on alcohol and drugs, testified that Darby pointed the gun at them. R. 890: 65-66, 82.

Just as the three were climbing back into Dustin's truck, Darby lifted himself off the ground, got into his truck, closed the door, and began speeding away through the parking lot. R. 890: 144, 157. Meanwhile, defendant, picked up the rifle, cocked it, and fired three successive rounds at Darby as he fled in his truck. R. 890: 25-27, 70-71, 106-08, 123, 128-29. Although the shots missed Darby, at least one round broke one of the truck's windows. *See* R. 890: 27; R. 891: 185, 196-97, 252. As Darby continued to speed away through the parking lot, defendant fired another three rounds. *See* R. 890: 145, 159; R. 891: 183, 192, 197. This time, one of the rounds grazed the driver's door, pierced the window, and fatally struck Darby in the back of the head. *See* R. 890: 145-46, 159; R. 891: 183, 201, 245-47, 251-60, 269-70; SE 21; SE 22.

After Darby was struck by the fatal bullet, his truck continued straight through the parking lot towards the Rainbo gas station. It ran over a parking island and small tree, jumped over a curb and snowbank bordering the gas station, ran over a second tree, and hit a concrete trash can, causing the truck to spin out of control before resting in the Rainbo parking lot. R. 890: 27-28, 72, 146, 148; R. 891: 180-81, 183. By the time witnesses reached the truck, Darby was dead, slumped over onto the floor of the passenger side. R. 890: 148-49, 164-65. After defendant shot Darby, Dustin drove away in his truck with Derek and Justin, while defendant fled on foot through an alleyway between the stores at the shopping center. R. 890: 28, 48, 72, 109.

Defendant was taken into custody a few hours later at his home. R. 891: 215. Once defendant was in custody, police searched the home where defendant lived with his mother

and other family members. R. 891: 204-05. Police found the assault rifle used to kill Darby partially hidden behind clothing in an open closet underneath the stairs. R. 891: 206-12.[6]

SUMMARY OF ARGUMENT

I. Nondisclosure of Cooperation Agreements. Defendant's due process rights were not violated by any apparent failure of the prosecution to disclose alleged cooperation agreements with State witnesses. A detective's agreement to seek a reduced jail sentence on behalf of Chris Lyman in an unrelated misdemeanor case was known to the defense before trial and explored during cross-examination. Therefore, any nondisclosure did not result in prejudice. An alleged deal not to prosecute Lyman for felony drug distribution was not an agreement, but a factual statement by the prosecutor to Lyman's attorney that the State could not prosecute his client because it could not independently prove the *corpus delicti*. In any event, the defense knew of the conversation at least by the close of the State's case and defendant therefore suffered no prejudice. Finally, defendant did not preserve his claims that the prosecution failed to disclose cooperation agreements with other State witnesses.

II. Rule 404(b) Evidence. Evidence that the victim owed defendant money on a drug debt was admissible under rule 404(b), Utah Rules of Evidence. The evidence explained the purpose behind the confrontation with the victim and provided a motive for the murder. The evidence was also relevant to counter defendant's claim that in shooting the victim, he was acting under an extreme emotional disturbance. Any risk of unfair prejudice was minimal and did not substantially outweigh the probative value of the evidence.

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[6]Details of the search, elicited at a suppression hearing, are discussed in point III.

III. Suppression of Evidence. The cursory search of defendant's home for suspects following his arrest was conducted with the voluntary consent of defendant's mother and was otherwise justified as a protective sweep. Because the initial search was valid, the second search, also conducted with the consent of the mother, was not tainted. In any event, the second search was sufficiently attenuated from the first to be purged of the primary taint. The trial court, therefore, properly denied defendant's motion to suppress evidence seized from defendant's home pursuant to a search warrant that was based on the information obtained in the first two searches.

IV. Manslaughter Instruction. The manslaughter instruction explaining "extreme emotional disturbance" accurately and clearly stated the law. Contrary to defendant's claim, the instruction could not reasonably be read to mean that a knowing or intentional murder could not be reduced to manslaughter. The instruction was identical to an instruction this Court upheld against similar objections in *State v. Piansiaksone*, 954 P.2d 861, 872 (Utah 1998). Defendant has presented no viable reason for this Court to reconsider that holding.

V. Merger. The trial court properly denied defendant's motion to merge his aggravated robbery conviction with his murder conviction, which was charged under three alternative theories, including felony murder. This Court squarely held in *State v. McCovey*, 803 P.2d 1234, 1239 (Utah 1990), that aggravated robbery does not merge with non-capital felony murder. The distinction that this case involved only one victim, whereas *McCovey* involved different victims, in no way affects the application of *McCovey* to this case.

ARGUMENT

I.

DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY ANY FAILURE OF THE PROSECUTION TO DISCLOSE ALLEGED COOPERATION AGREEMENTS WITH STATE WITNESSES.

Defendant first alleges that the prosecutor failed to disclose so-called "cooperation agreements" with Chris Lyman, Dustin Symes, Derek Pearson, and Justin Koontz. Aplt. Brf. at 18-25. Defendant argues that the alleged failure violated his due process right to the disclosure of favorable evidence as articulated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), and its progeny. *See* Aplt. Brf. at 15-25. Defendant's claim lacks merit.

A. THE PROSECUTOR'S DUE PROCESS DUTY TO DISCLOSE EVIDENCE.

In *Brady*, the United States Supreme Court held that the prosecution's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. The high court later expanded the rule to require disclosure even absent a request. *United States v. Agurs*, 427 U.S. 97, 107, 110, 96 S.Ct. 2392, 2399, 2401 (1976). "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380 (1985). While the duty to disclose plainly includes exculpatory evidence, it also embraces impeachment evidence. *Id.* at 676, 105 S.Ct.

3380 (*citing Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972)); *see also State v. Martin*, 1999 UT 72, ¶9, 984 P.2d 975.

Failure to disclose favorable evidence does not, however, automatically require a new trial. *See Giglio*, 405 U.S. at 154, 92 S.Ct. at 766. The nondisclosure of favorable evidence will result in constitutional error requiring reversal "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381. In sum, a *Brady* violation consists of the following three components: "[1]The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948 (1999). Reversal is not warranted unless the defendant can establish all three components. *Id.*

B. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO STRIKE CHRIS LYMAN'S TESTIMONY AND HIS MOTION FOR A NEW TRIAL.

After the State rested, defendant moved to strike the testimony of Chris Lyman on due process grounds, arguing the prosecutor did not disclose alleged cooperation agreements with Lyman. R. 891: 278. Defense counsel alleged that Lyman was given promises of leniency in two distinct instances: (1) police agreed to recommend a reduced jail sentence for Lyman in an unrelated case, R. 891: 279; and (2) Lyman's attorney was told the State would forego felony prosecution based on his admitted drug distribution. *See* R. 891: 279-80. The prosecutor denied that any such promises or inducements were made. R. 891: 282-83. He

acknowledged that Lyman's attorney had called expressing concern about his client's admission that he sold defendant drugs. R. 891: 282. The prosecutor explained, however, that he told Lyman's attorney he would be unable to prosecute his client because no evidence of the crime existed other than Lyman's own admission. R. 891: 282-83. Thus, the prosecutor explained, no inducement was given. R. 891: 283. The trial court refused to strike the testimony and also denied defendant's subsequent motion for a new trial based on the alleged *Brady* violation. R. 560, 642-43, 685, 730; R. 891: 283-85.

Defendant argues that the prosecution's failure to disclose the alleged agreements violated his due process rights under *Brady*.[7] Aplt. Brf. at 18-23. Defendant's claim fails because he has not shown the presence of all three components of a *Brady* violation.

1. No *Brady* Violation Resulted from Any Failure to Disclose the Agreement to Seek a Reduced Jail Term for Lyman in an Unrelated Case.

Defendant first complains the prosecutor did not disclose the detective's agreement to request that Lyman's jail sentence be reduced in an unrelated case in Sandy City. Aplt. Brf. at 19. Defendant has failed to show prejudice. The defense knew of the agreement days

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[7]Defendant also asserts that the prosecution's alleged failure to disclose the cooperation agreements violated his discovery rights under Utah R. Crim. P. 16, and his constitutional rights to confront the witnesses against him. Aplt. Brf. at 14-15, 26-27. Neither ground, however, was argued as a basis for either the motion to strike or the motion for a new trial. *See* R. 549-50, 642-59; R. 891: 278-81. This Court will not review claims not raised below absent plain error or exceptional circumstances. *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). Because defendant has not argued the applicability of either exception, his new claims are not subject to appellate review. *Id.*

before trial and exposed the agreement to the jury while cross-examining Lyman. In a memorandum supporting defendant's motion for a new trial, the defense acknowledged:

> A few days prior to trial, counsel for Defendant learned during a phone call to counsel for the State that Chris Lyman was being called as a witness. A defense investigator contacted Lyman to discuss his expected testimony and learned that at the time Lyman first spoke to police he had a pending misdemeanor charge, and that after he gave his statement, someone spoke to the judge on his behalf and he got eight days off of a ten day sentence, the dismissal of a fine and "something else."

R. 645. Thus, the defense suffered no prejudice because it knew of the arrangement with the detective *before* trial began and used it to his advantage at trial.

Courts have almost universally held that undisclosed evidence known to the defense, or which should have been known to the defense, does not result in a *Brady* violation. *See, e.g., United States v. Pandozzi*, 878 F.2d 1526, 1529-30 (1st Cir. 1989); *United States v. Zackson*, 6 F.3d 911, 918 (2nd Cir. 1993); *United States v. Perdomo*, 929 F.2d 967, 973 (3rd Cir. 1991); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990); *Rector v. Johnson*, 120 F.3d 551, 560 (5th Cir. 1997), *cert. denied*, 522 U.S. 1120, 118 S.Ct. 1061 (1998); *United States v. Clark*, 928 F.2d 733, 738 (6th Cir.), *cert. denied*, 502 U.S. 846, 112 S.Ct. 144 (1991); *United States v. Wadlington*, 233 F.3d 1067 (8th Cir. 2000); *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999), *cert. denied*, — U.S. —, 120 S.Ct. 1422 (2000); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 184 (1986); *but see In re Sealed Case No. 99-3096*, 185 F.3d 887, 896-97 (D.C. Cir. 1999) (rejecting government's argument that defendant should have learned of the cooperation agreement from the witness himself). In so concluding, these courts have relied

on one of two rationales. The Second Circuit reasons that under the *Brady* doctrine, "[e]vidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. LeRoy*, 687 F.2d 610, 618 (2nd Cir. 1982) (citations omitted), *cert. denied*, 459 U.S. 1174, 103 S.Ct. 823 (1983); *see also Pandozzi*, 878 F.2d at 1529-30 (1st Cir.); *Perdomo*, 929 F.2d at 973 (3rd Cir.); *Rector*, 120 F.3d at 560 (5th Cir.); *Clark*, 928 F.2d 733 at 738 (6th Cir.). On the other hand, the Tenth Circuit reasons that such undisclosed evidence does not result in a *Brady* violation because it is not material. The Tenth Circuit observed:

> [W]hether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information. The only relevant inquiry is whether the information was exculpatory. Nevertheless, a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial.

Quintanilla, 193 F.3d at 1149 (citations, internal quotations omitted). Under either theory, no *Brady* violation resulted here because defendant already knew of the jail-reduction deal.

Moreover, the defense fully exposed the agreement at trial. Lyman acknowledged on cross-examination that he and a detective talked about whether he could "get out of some jail time" if he cooperated and gave a statement in connection with defendant's case. R. 889: 8-10. He testified that when he gave his statement to police, they told him that "they'd see what they could do" to reduce a ten-day sentence to two days. R. 889: 11-12. He further testified that although the detective warned him he could not guarantee anything, he in fact

only served two days in jail. R. 889: 11-12. Armed with this information, defense counsel argued at length in his closing argument that Lyman's testimony was not to be believed because it was given in exchange for a reduced jail sentence. R. 894: 38-40. Defense counsel also pointed out Lyman's reluctance to admit any deal and that he in fact only served two days in jail as hoped. R. 894: 39-40. He further sought to discredit the testimony by arguing police purposely kept the agreement secret. In closing, defense counsel reminded the jury of testimony from the preliminary hearing that the detective told Lyman, with a wink, that he could not promise him anything "because it will look bad in court"—that "[t]hey will think the deal was made for you to talk and you could have made it up." R. 894: 40.

This Court has recognized that there can be no prejudice to a defendant when the undisclosed evidence is nonetheless submitted to the jury. *State v. Hay*, 859 P.2d 1, 7-8 (Utah 1993) (the undisclosed evidence was not submitted to the jury until after they began deliberations). 859 P.2d at 4. Any impeachment value the jail-reduction agreement might have had "was not lost, and any substantial prejudice that might have occurred due to the prosecution's [alleged] misconduct was eliminated." *Id.*

2. No *Brady* Violation Resulted from Any Failure to Disclose the Prosecutor's Statement to Lyman's Attorney That Lyman Would Not Be Prosecuted Based on His Admission He Sold Drugs.

Defendant also alleged that Lyman's attorney sought for and obtained an agreement from the State not to prosecute Lyman on drug distribution charges based on his statement that he sold defendant drugs on the night he and Derek Pearson visited him. R. 642; *see also* R. 891: 279-80. Defendant contends the prosecutor did not disclose the alleged agreement

not to prosecute Lyman and that he is thus entitled to a new trial. Aplt. Brf. at 19. This claim fails because (1) the prosecution made no such agreement, and (2) the defense learned of the conversation before the State rested and therefore had ample opportunity to use it in his case.

a. There Was No Agreement to Forego Prosecution.

When the defense alleged the *Brady* violation at the close of the State's case, the trial court found that no such agreement was reached. *See* R. 891: 283-84. The record supports that finding. When asked on cross-examination whether he received a deal for providing the information, Lyman testified, "No, . . . I was not given immunity or any kind of written statement that I would not be prosecuted." R. 889: 6-7. Moreover, when defense counsel alleged the existence of a no-prosecution deal, the prosecutor denied it, explaining:

> Yes, Mr. Lyman's attorney was concerned. I told him simply that because we certainly had no habias [sic]—we had no corpus of this crime, we wouldn't be able to prosecute his client because we had no evidence other than his statements that there was a crime committed. So there was no inducement. I didn't promise him I wouldn't prosecute him for his testimony. I just told him a simple fact[:] I couldn't prosecute him.

R. 891: 282-83. The prosecutor's explanation is firmly rooted in the law. "An admission or a confession, without some independent corroborative evidence of the *corpus delicti*, cannot alone support a guilty verdict." *State v. Knoefler*, 563 P.2d 175, 176 (Utah 1977); *accord State v. Johnson*, 821 P.2d 1150, 1162 (Utah 1991). Because Lyman did not expose himself to prosecution by making the statement, any promise by the prosecutor not to prosecute him based on that statement would have been illusory.

b. The Defense Knew of the Prosecutor's Conversation with Lyman's Attorney.

Even assuming a deal was made, the defense was aware of it *at least* by the close of the State's case and no *Brady* violation therefore resulted. As noted above, undisclosed evidence otherwise known to the defense does not result in a *Brady* violation. *See Quintanilla*, 193 F.3d at 1149. This is true even when the defense does not become aware of the evidence until the trial. In *Agurs*, the U.S. Supreme Court observed that the *Brady* rule applies to situations "involv[ing] the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103, 96 S.Ct. at 2397 (emphasis added). The *Brady* rule does not, therefore, apply to favorable evidence discovered by the defense *before or during* trial. *See United States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994) (observing that "the *Brady* rule only applies to 'the discovery, after trial, of information which had been known to the prosecution but unknown to the defense'").

The defense raised the alleged no-prosecution deal *during trial* immediately after the State rested. R. 891: 278-79. How long before the State rested that defense counsel learned of the alleged agreement cannot be determined from the record—whether it was before trial or sometime during trial. In any event, the defense had ample opportunity to raise the issue before the jury. However, rather than having Lyman recalled, or calling Lyman in its case-in-chief, the defense simply sought an order striking the testimony. The defense also ignored the court's offer to give a specific jury instruction on the effect of any such agreements on Lyman's credibility. *See* R. 891: 284-85. This "all-or-nothing" strategy did not seek to

remedy any error, but aimed to punish the prosecution, while at the same time obtaining a windfall. That approach does not comport with the rationale underlying the *Brady* rule. The principle behind the rule "is not punishment of society for misdeeds of a prosecutor[,] but avoidance of an unfair trial to the accused." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1197.

This case is not unlike *United States v. Mullins*, 22 F.3d 1365 (6th Cir. 1994). There, the prosecution did not disclose that, contrary to its evidence at trial, an uncalled witness denied paying any kickbacks. *Id.* at 1371. During trial, the defense approached the witness's attorney about testifying for defendant concerning payoffs alleged to have been made by the witness. *Id.* The Sixth Circuit held that "because [the witness's] denial was known by [defendant] in time for him to attempt to make use of it in his defense, . . . the government's failure to disclose that information did not violate due process under *Brady*." *Id.* at 1371-72. As in *Mullins*, because defendant here became aware of the alleged no-prosecution deal in time for him to use it in his defense, the State's failure to disclose it did not violate *Brady*.

Moreover, allowing defendant to challenge the nondisclosure of an alleged agreement on appeal when he was aware of it during trial "would be sanctioning a procedure that fosters invited error." *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990). Defendant is not entitled to both the benefit of not questioning a witness at trial about a known cooperation agreement and the benefit of objecting on appeal to the prosecution's failure to disclose the alleged agreement. *See id.* Such "'invited error' is procedurally unjustified and viewed with disfavor, especially where ample opportunity has been afforded to avoid such a result." *State v. Tillman*, 750 P.2d 546, 560-61 (Utah 1987).

Defendant contends the prosecution tried to conceal the alleged agreement by repeatedly objecting to counsel's cross-examination of Lyman. *See* Aplt. Brf. at 21-22. Whether the prosecutor deliberately concealed the alleged agreement or did so innocently is not relevant to a *Brady* inquiry. A failure to disclose material, favorable evidence constitutes a *Brady* violation "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. Moreover, the prosecution's objections were merely based on a lack of foundation: e.g., the witness's failure to identify who made the promises, R. 889: 7, counsel's compound question of whether the detective talked to a city attorney or district attorney about a reduced jail sentence. R. 889: 8-9.

In any event, even if the jury knew of the conversation, the evidence that defendant intentionally killed Darby was so overwhelming that it could not have affected the outcome of the trial. *See infra*, at 50.

C. DEFENDANT'S CLAIM THAT THE PROSECUTION DID NOT DISCLOSE ALLEGED COOPERATION AGREEMENTS WITH OTHER WITNESSES IS NOT PROPERLY BEFORE THE COURT.

Defendant also argues that his due process rights were violated because the State did not disclose prosecution agreements with Justin Koontz, Derek Pearson, and Dustin Symes. Aplt. Brf. at 24. Because defendant did not preserve these claims in the trial court, he is precluded from raising them now.

Defendant's motion to strike at the close of the State's case and his motion for a new trial after sentencing only alleged the nondisclosure of a cooperation agreement with Chris Lyman. *See* R. 642-59; R. 891: 278-81. It did not allege that the State failed to disclose

cooperation agreements with Koontz, Pearson, or Symes. Having failed to properly raise this claim in the trial court below, defendant is precluded from raising it for the first time on appeal unless he can show plain error or exceptional circumstances. *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996). Defendant, however, has not attempted to demonstrate the applicability of either exception. *See* Aplt. Brf. at 23-25. Accordingly, this Court should not reach his claim on appeal. *See Monson*, 928 P.2d at 1022. (declining to reach defendant's unpreserved claims because he did not attempt to show the applicability of either exception).

Pearson and Koontz. Defendant first attempted to raise the issue with respect to Pearson and Koontz in his motion to reconsider the trial court's denial of his motion for a new trial. R. 687-88. However, the timely filing of his notice of appeal before a ruling on the motion foreclosed further consideration of the matter by the trial court. *See State v. Brown*, 856 P.2d 358, 362 (Utah App. 1993) (holding that a "timely notice of appeal generally 'divests the trial court of further jurisdiction over a matter'"); Order.

Even if defendant had properly preserved the claims pertaining to Pearson and Koontz, they fail on the merits. As explained above, favorable evidence not disclosed by the prosecution, but already known or which should have been known to the defense cannot form the basis for a *Brady* violation. *Quintanilla*, 193 F.3d at 1149. At the preliminary hearing, Derek Pearson testified that he was charged with third degree felony riot for his participation in the incident, but pled guilty to reduced misdemeanor charges for attempted riot and simple assault. R. 886: 130. He also acknowledged that he was told to testify truthfully in defendant's case. *See* R. 886: 130-31. The defense, therefore, was fully aware that Pearson

had agreed to testify truthfully in defendant's case and that he had pled guilty to reduced charges. Justin Koontz did not testify at the preliminary hearing. However, in a sworn affidavit filed in response to defendant's motion to reconsider, the prosecutor attested that he had informed defense counsel that both Koontz and Pearson had pled guilty to reduced misdemeanor charges and that they were expected to testify truthfully for the State. R. 755.

The defense was therefore well aware that the two witnesses received the benefit of pleading to reduced charges and were expected to testify in accordance with their statements to authorities.[8] Moreover, both Koontz and Pearson acknowledged at trial that although they had been charged with felony crimes, they pled guilty to reduced misdemeanor charges. R. 890: 76-77, 109-10, 134-35 (Koontz testifying that he had originally been charged with criminal homicide). Therefore, the necessary information from which the credibility of their testimony could be questioned was before the jury. Where the facts were known not only to the defense, but also to the jury, any failure to further disclose the deal in no way "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381; *see also Hay*, 859 P.2d at 7-8 (recognizing that there can be no prejudice to a defendant when the undisclosed evidence is nonetheless submitted to the jury).

Dustin Symes. Defendant also alleges that a deal was reached and fulfilled in which the prosecutor appeared at Symes's sentencing and asked that his conviction "be reduced to

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[8]Apparently, the lead prosecutor was not aware that the witnesses had also agreed to testify consistently with their plea statements to Judge Thorne. *See* R. 790 (State's Memorandum in Opposition to Defendant's Motion to Reconsider Motion for New Trial). However, this additional promise is no different than their promise to testify truthfully.

a misdemeanor, that he be sentenced to probation, and that he be given a lenient jail sentence." Aplt. Brf. at 25. Although defendant supplemented his motion to reconsider with an unofficial transcript of Symes's sentencing hearing, he did not raise the Symes claim in his motion. *See* 642-43, 687-88. He is therefore precluded from raising the issue on appeal. *See Monson*, 928 P.2d at 1022.

Nor does the unofficial transcript of Symes's sentencing hearing support the claim that such a deal was made. To the contrary, the prosecutor affirms that he told Symes's attorney "right from the beginning that he had to plead guilty as charged." R. 783. Although the unofficial transcript contains omissions because they were inaudible, the transcript clearly reveals that the prosecutor's decision to recommend sentencing for a class A misdemeanor came only *after* he heard the testimony at defendant's trial. *See* R. 783 (transcript reproduced in Addendum C). Defendant's claim of a deal is therefore unsubstantiated conjecture.

The defense was also well aware the State would not oppose a more lenient sentence. At the preliminary hearing, Symes testified that he intended to plead guilty to aggravated assault. R. 886: 84. He acknowledged, however, that if he testified truthfully, the State agreed to advise the court that he cooperated and testified at defendant's trial. *See* R. 84-85. In short, any promise of leniency was made known to the defense and failure to provide further disclosure cannot be a basis of a *Brady* violation.

II.

TESTIMONY OF THE VICTIM'S DRUG DEBT TO DEFENDANT WAS PROPER, NONCHARACTER EVIDENCE.

In his second claim on appeal, defendant contends that the trial court erred in denying his motion to exclude testimony regarding the victim's drug debt to defendant, arguing that it constituted improper character evidence under rule 404(b), Utah Rules of Evidence, and that it was otherwise irrelevant and unfairly prejudicial. Aplt. Brf. at 28-31; R. 504-07, 551, 893: 7. A review of the record reveals that after carefully examining the proposed testimony, the court properly exercised its discretion in concluding (1) the testimony was relevant to show "the purpose of th[e] gathering that resulted in [Darby] Golub's death," and (2) the risk of unfair prejudice did not outweigh the probative value of the evidence. R. 893: 7.

A. ADMISSION OF BAD ACTS EVIDENCE UNDER RULE 404(b).

Rule 404(b) governs the admissibility of bad acts evidence:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

Utah R. Evid. 404(b). The rule thus requires a three-part analysis in ascertaining whether bad acts evidence is admissible. First, the court determines whether "the evidence is actually being offered for a proper, noncharacter purpose, such as those specifically stated in the rule." *State v. Decorso*, 1999 UT 57, ¶21, 993 P.2d 837, *cert. denied*, 120 S.Ct. 1181 (2000).

Second, the court assesses the evidence's relevancy under rule 402, Utah Rules of Evidence. *Id.* at ¶22. If the evidence meets the first two requirements, the court examines its prejudicial effect under rule 403, Utah Rules of Evidence. *Id.* at ¶ 23. Under that rule, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Utah R. Evid. 403.

B. APPLICATION OF RULE 404(b) TO THE CHALLENGED DRUG DEBT EVIDENCE.

Defendant challenges the admission of Chris Lyman's testimony. Lyman testified that when defendant and Derek Pearson visited him a few hours before the murder, defendant "*mentioned that someone owed him a small amount of money, $300, something in that area, and that they were going to be meeting with this individual that night.*" R. 889: 5 (emphasis added). When the prosecutor asked Lyman whether defendant said anything else about that, Lyman testified, "*Yeah, out of context, you know, kind of on the way out he said, 'Somebody is going to die tonight,' but . . . I don't know.*" R. 889: 5 (emphasis added). Defendant also challenges testimony of Dustin Symes and Derek Pearson: Symes testified that defendant told him Darby Golub owed him $350 for drugs, R. 890: 8-9; and Pearson testified that defendant told him "and other people in the group" that Darby owed him money for drugs, R. 890: 59.

1. Noncharacter Purpose of the Drug Debt Testimony.

The State offered the drug debt evidence to demonstrate the purpose behind the confrontation and assault on Darby that night. R. 893: 6-7. The testimony also helped establish that defendant knowingly and intentionally killed Darby. Defendant's motive and intent to assault, and ultimately kill, the victim are valid, noncharacter purposes for admitting

the evidence. *See* Utah R. Evid. 404(b) (stating that bad acts evidence may be admitted as proof of motive, intent, or absence of mistake or accident).

Defendant contends that because Koontz, Pearson, and Symes each testified the fight was not over the drug debt, no link existed between the drug debt evidence and the shooting. Aplt. Brf. at 31. Thus, defendant reasons, the drug debt evidence could only be offered for the improper purpose of showing his propensity to commit crime. Aplt. Brf. at 31. That argument mistakenly assumes the court, or the jury for that matter, was required to accept the trio's testimony that the fight was not over the drug debt. A witness's testimony, while generally supporting the State's theory of the case, may in other aspects differ and even contradict that theory. This is especially true when participants in a crime agree to testify in the prosecution of one of their comrades. The fact finder is not bound to believe everything a witness testifies to, *see Snyderville Transportation Co. v. Christiansen*, 609 P.2d 939, 943 (Utah 1980), and the prosecutor is free to present the case from "his or her viewpoint of the evidence." *State v. Dunn*, 850 P.2d 1201, 1223 (Utah 1993).

2. Relevancy of the Drug Debt Testimony.

Because defendant argued that his actions were triggered by the unexpected and threatening conduct of a drug-crazed person, *see* R. 894: 33-38, evidence that he had a motive to kill Darby was critical to the State's case. As explained above, the drug debt evidence helped establish that defendant had a motive to kill Darby. *See* Utah R. Evid. 401 (stating that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable").

Notwithstanding the trio's insistence the fight was not over drugs, defendant told Lyman just hours before the murder that he and Pearson were meeting someone who owed him approximately $300 later than night. R. 889: 5. Although defendant did not identify whom they were meeting, the jury could reasonably infer that it was in fact Darby Golub. *See State v. Housekeeper*, 588 P.2d 139, 140-41 (Utah 1978) (holding the jury is "entitled to draw reasonable inferences from the facts shown to exist"). Pearson and Symes testified that defendant told them and others in the group that Darby owed him money for drugs. R. 890: 8-9, 59. Symes testified that the debt was in the sum of $350. R. 890: 8-9. Pearson testified that defendant had left a message with Darby that evening indicating "he was supposed to pay [on the drug debt] that day." R. 890: 58-59. Neither Pearson, nor any of the other witnesses, testified that they or defendant met with anyone other than Darby later that night. Given the group's confrontation in the parking lot and the fatal shooting of Darby, the jury could reasonably infer from the evidence that defendant spoke of Darby and that it was he who was "going to die." R. 889: 5.

Defendant argues that Pearson's testimony that defendant left a message for Darby earlier in the night should be disregarded because he neither observed nor heard defendant call Darby. Aplt. Brf. at 30. Pearson, however, may have been told by defendant of the call, and in any case, the testimony was given without objection. *See* R. 58-59. Moreover, Pearson's testimony that defendant had called Darby first was substantiated by the accounts of Darby's later telephone conversations with Koontz and Symes. Both testified that when Darby called them early that morning, he angrily complained about a telephone call from

them made late the night before. R. 890: 7, 34-35, 51, 94-95, 112. Darby would have no reason to make such a complaint had a prior message from defendant not been left.

3. Risk of Unfair Prejudice.

Finally, the probative value of the drug debt evidence was not substantially outweighed by the risk of unfair prejudice. The defense disputed that the initial confrontation was over a drug debt, eliciting testimony that defendant was not angry about the debt and that the fight was in fact called on by Darby. R. 890: 35, 88. Moreover, the primary theory of the defense was that defendant acted under an extreme emotional disturbance triggered by the "drug-crazed" victim who unexpectedly exited his truck with an assault rifle after having allegedly threatened to kill the four friends. R. 894: 34-36. Accordingly, the State was required not only to prove that defendant intentionally or knowingly killed Darby, but also to refute the defense theory that defendant had no prior motive to kill Darby and no reason to shoot him but for his fear of the "drug-crazed" victim. Because the probative value of the evidence was at least equal to any risk of unfair prejudice, the trial court properly admitted the evidence under rule 403. *See State v. Johnson*, 784 P.2d 1135, 1141 (Utah 1989).

III.

THE MURDER WEAPON AND OTHER EVIDENCE WAS LAWFULLY SEIZED FROM DEFENDANT'S HOME

Defendant next challenges the trial court's denial of his motion to suppress evidence seized from his home. Aplt. Brf. at 32-42. The challenged evidence, seized pursuant to a

valid search warrant, includes (1) the assault rifle used to kill the victim, R. 891: 207-12; SE18; (2) a photograph taken in the home showing the murder weapon almost completely hidden in a closet, R. 891: 206-007; SE17; and (3) a photograph showing the murder weapon in the closet after police removed the clothing hiding it and also showing athletic pants with a silver chain attached. R. 891: 207-08, 210; SE16.

Defendant does not allege the search warrant was not supported by probable cause. He instead contends that the information in the Affidavit for Search Warrant was illegally obtained from two warrantless searches of the house before the warrant was secured. *See* Aplt. Brf. at 33-42 (the Affidavit is reproduced in Addendum D). Evidence seized pursuant to a search warrant may be suppressed *if* the information establishing probable cause was obtained from a prior illegal search. *United States v. Snow*, 919 F.2d 1458, 1460 (10th Cir. 1990); *cf. State v. Nielson*, 727 P.2d 188, 191 (Utah 1986) (holding that any evidence obtained under an improperly issued warrant must be suppressed), *cert. denied*, 480 U.S. 930, 107 S.Ct. 1565 (1987). The issue on appeal, therefore, is whether the trial court properly considered the information obtained from the two searches conducted shortly after defendant's arrest in upholding the search warrant. *See* R. 418-23 (the Findings of Fact and Conclusions of Law are reproduced in Addendum E).

A. THE POLICE LAWFULLY SEARCHED DEFENDANT'S HOME FOR SUSPECTS IMMEDIATELY FOLLOWING HIS ARREST.

Officer Greg Severson responded to Canyon Center parking lot less than an hour after the murder. R. 887: 8-9. At the scene, Officer Severson learned that Justin Koontz, Dustin

Symes, and two other young men, Derek and Russell, were involved in a confrontation with the victim that led to the shooting. R. 887: 11-12. Officer Severson then went to the Koontz home where Derek Pearson and Justin Koontz were taken into police custody, leaving two suspects still at large. *See* R. 887: 36; R. 890: 30. Upon learning that defendant had telephoned Justin moments earlier, and after ascertaining defendant's name, address, and telephone number, Officer Severson, another Sandy City officer, and three sheriff's deputies responded to defendant's home, arriving at approximately 5:00 a.m. R. 887: 13-15, 38, 50.

After securing the outer premises, Officer Severson called defendant on the telephone, asking him to come out and speak with him. R. 887: 15, 38. When defendant came out one or two minutes later, police ordered him to the ground at gun point and placed him into custody. R. 887: 16, 40. After putting defendant into his squad car, Officer Severson and another officer approached defendant's mother, Erin Stovall, who stood at the front door with her daughters. R. 887: 17-19. Although the officers carried weapons, both were holstered by this time. R. 887: 19-20, 51. Severson briefly explained that a shooting had occurred, that defendant had somehow been involved, and that he believed another suspect may be in her home. R. 887: 17, 42. Officer Severson then asked Ms. Stovall for permission to check her home for the remaining suspect. R. 887: 18, 43-44, 51. "She told [Officer Severson] to go ahead." R. 887: 18, 43-44, 51.

After directing Ms. Stovall and her daughters to wait in the living room/kitchen area, R. 887: 19, 44, Officer Severson and another officer cleared the house, with guns drawn, for additional suspects. R. 887: 22-25. As he approached defendant's bedroom downstairs,

Officer Severson observed a shotgun and assault rifle sitting in a gun rack through a partial opening in the draped entry of defendant's bedroom. R. 887: 21-22. The officers found no one else in the home and observed nothing else of particular significance. R. 887: 22, 25.

The officers lawfully searched defendant's home pursuant to Ms. Stovall's consent. The search was also justified as a valid protective sweep for absconding suspects.

1. Defendant's Mother Voluntarily Consented to the Search.

Warrantless searches "'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990) (*quoting Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967)); U.S. Const., amend. IV. One such exception is a search performed pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973). To fit within the exception, the consent must be voluntary and the burden rests with the prosecution to so establish. *Arroyo*, 796 P.2d at 687. Even voluntary consent searches, however, will be deemed invalid if "consent was obtained by police exploitation of [a] prior illegality." *Id.* at 688.

Defendant argues that the Court should adopt the three-part analysis for assessing consent searches articulated by the Utah Court of Appeals in *State v. Ham*, 910 P.2d 433 (Utah App. 1996). Aplt. Brf. at 36-37. That analysis provides:

> "(1) There must be clear and positive testimony that the consent was 'unequivocal and specific' and 'freely and intelligently given'; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) [when evaluating these first two standards, we] *indulge every reasonable presumption against the waiver of fundamental*

> *constitutional rights and there must be convincing evidence that such rights were waived.*'

Ham, 910 P.2d 439 (citations omitted, brackets in original, emphasis added). The three-part analysis was first adopted by the court of appeals in 1990 and was taken from the Tenth Circuit decision in *United States v. Abbott*, 546 F.2d 883, 885 (10th Cir. 1977). *See State v. Webb*, 790 P.2d 65, 82 (Utah App. 1990). However, within one year of its adoption in Utah, the Tenth Circuit abandoned the three-part "*Villano* standard," named after the 1962 decision from which it originated, *United States v. Villano*, 310 F.2d 680 (10th Cir. 1962). *United States v. Price*, 925 F.2d 1268, 1271 (10th Cir. 1991). This Court should also reject the *Villano* analysis, including the "clear and positive testimony" language which is but an extension of the presumption requirement.

In 1973, the Supreme Court in *Schneckloth* expressly rejected the waiver approach upon which the *Villano* standard is based. The high Court observed that a knowing and intelligent waiver of rights has been applied only to the waiver of "those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial," such as the right of counsel, the right to a speedy trial by jury, the right of confrontation, the right against being twice placed in jeopardy, and the right against compulsory self-incrimination. *Schneckloth*, 412 U.S. at 237-40, 93 S.Ct. at 2052-55. On the other hand, the Court observed, "[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a fair trial." *Id.* at 242, 93 S.Ct. at 2055. The Court thus held that "unlike those constitutional guarantees

that protect a defendant at trial, *it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment*" in the context of a consent to search. *Id.* at 243, 93 S.Ct. at 2056 (emphasis added). The Court observed that "it would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege." *Id.* (internal quotes omitted).

The Court concluded the test is no different than that for determining whether a confession is voluntary. *Id.* at 223-27, 93 S.Ct. at 2045-48. The Court held that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Id* at 227, 93 S.Ct. at 2047-48. Citing *Schneckloth*, this Court adopted that test in *Arroyo*, holding that "whether the requisite voluntariness exists depends on 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of police conduct.'" 796 P.2d at 689 (*quoting Schneckloth*, 412 U.S. at 226).

In abandoning the *Villano* test, the Tenth Circuit explained:

> In subsequent consent search cases, we recited the *Villano* test without explicitly considering the intervening *Schneckloth* holding that the presumption against waiver should not be transposed from the trial rights context to the consent search context. Although we apparently did not rely on the presumption in any of these cases, we have retained the presumption language as part of our test for voluntariness of a defendant's consent to a search. In contrast to our position, every other circuit has followed *Schneckloth* by rejecting the waiver approach and employing the traditional "totality of the circumstances" test in this context.
>
> In light of the *Schneckloth* decision, we are convinced a district court determining the admissibility of evidence should not presume a defendant's consent to a search is either involuntary or voluntary. The voluntariness of

> consent always must be determined from the totality of the circumstances The government, of course, has the burden of proving voluntary consent The general inquiry outlined in *Villano* and its progeny remains relevant. We find only the *Villano* test's application of the presumption against waiver improper

Price, 925 F.2d at 1271 (internal citations and footnotes omitted). Notwithstanding *Schneckloth* and the Tenth Circuit's rejection of the *Villano* waiver analysis a decade ago, the Utah Court of Appeals has repeatedly applied the standard, most recently in *State v Hansen*, 2000 UT App. 353, ¶¶18-25, 410 Utah Adv. Rep. 28.[9] *See, e g ,State v Sterger*, 808 P.2d 122, 127 (Utah App. 1991); *State v Grovier*, 808 P.2d 133, 136 (Utah App. 1991); *State v Carter*, 812 P.2d 460, 467 (Utah App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992); *State v. Harmon*, 854 P.2d 1037, 1040 (Utah App. 1993), *aff'd without applying Villano standard*, 910 P.2d 1196 (Utah 1996); *State v. Genovesi*, 871 P.2d 547, 551 (Utah App. 1994); *Ham*, 910 P.2d at 439. This Court should expressly reject defendant's invitation to adopt the *Villano* test, adhering instead to *Schneckloth's* totality of the circumstances test as in *Arroyo*.

When determining whether a consent was voluntarily given under the totality of the circumstances, this Court considers the following factors: "1) the absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers, 3) a mere request to search; 4) cooperation by the owner [ ]; and 5) the absence of deception or trick on the part of the officer." *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980).

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[9]In *Hansen*, the court of appeals expressly applied the presumption against waiver, not even acknowledging the State's argument that in light of *Schneckloth* and *Price*, the *Villano* standard was no longer good law. *Hansen*, 2000 UT App. 353 at ¶25.

An examination of the search for suspects under the totality of the circumstances supports the trial court's conclusion that Ms. Stovall voluntarily consented to the search. R. 422 (¶2). The officers claimed no authority to search, they did not exhibit a show of force, nor did they resort to deception in gaining consent. Indeed, Ms. Stovall was cooperative throughout. *See* R. 887: 26. Moreover, Officer Severson testified that she was calm, though surprised, and appeared to comprehend what he told her. R. 887: 26.

Defendant contends the officers made a show of authority when they allegedly stepped inside the doorway to speak with the mother. Aplt. Brf. at 38. Officer Severson in fact did not recall whether he and the other officer stood just outside the door on the porch or just inside the door when they first spoke with defendant's mother. R. 887: 17, 42. However, whether he spoke with her just outside or inside the door makes no difference under these circumstances. This was not a situation where the officers entered the house unannounced or against the protests of the homeowner. *See State v. Kelly*, 718 P.2d 385, 389 (Utah 1986) (finding consent for officer to follow defendant into his bedroom when he admitted officer into his home and made no objection when officer followed him). Instead, having just taken Ms. Stovall's son into custody, the officers simply approached her to explain their actions and seek her consent to search for the remaining suspect. R. 887: 18. The officers claimed no authority to search the house or be in the home, but merely requested permission to search the home and explained the reason behind their request. *See* R. 887: 17-18, 44.

Defendant further argues that the presence of several officers on the scene, the officers' use of weapons when taking defendant into custody, and the officers' "physical

touching" of defendant are factors weighing against a finding of voluntary consent. Aplt. Brf. at 38-39. These factors, however, are irrelevant to whether *defendant's mother* gave voluntary consent. The weapons might have been drawn in her direction momentarily because she was near defendant when he first opened the door. R. 887: 16, 41. However, the officers ordered defendant at gunpoint, not his mother, to exit the house with hands over his head, to proceed past the front of the house, to turn around, and to go down on his knees. R. 887: 16, 40. The mother, on the other hand, was simply told to go inside the house as they completed the arrest. R. 887: 86. Only after defendant was handcuffed and safely placed into a police car did the two officers approach defendant's mother to speak with her. R. 887: 16-17, 19-20, 40-41, 51. Even though both officers carried a weapon, each had, by this time, secured his weapon in his holster. R. 887: 19-20, 51.

Defendant also points to testimony that the officers refused Ms. Stovall's request to accompany them during the search and that they did not holster their weapons after the arrest, but kept them drawn until after the protective sweep. Aplt. Brf. at 38-39. However, the trial court rejected that testimony as not credible "[b]ecause of the inconsistencies between Ms. Stovall and [her daughter's] testimonies, the highly charged emotional state of mind they were in at the time of the incident, and the fact that they had no notes or recorded statements to assist them." R. 422 (29). Defendant has not challenged the court's factual findings and he cannot therefore rely on that testimony on appeal. Moreover, the court's findings were adequately supported by the unequivocal testimony of the officers. *See State v. Troyer*, 910 P.2d 1182, 1186 (Utah 1996) (holding that clear error will not be found unless the factual

findings "are not adequately supported by the record"). Officer Severson testified that Ms. Stovall gave her consent and that the officers drew their holstered weapons only when they commenced the protective sweep. R. 887: 18-20, 51. Moreover, permitting the mother to accompany them would have posed a danger not only to themselves, but also to her.

Given the foregoing circumstances, the trial court correctly concluded that Ms. Stovall voluntarily consented to the search of her home for the remaining suspect.

2. The Search Was Justified as a Protective Sweep.

The court also correctly concluded the search was a valid protective sweep. R. 422-23 (¶3). "A 'protective sweep is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers and others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S.Ct. 1093, 1094 (1990). Officers may conduct a protective sweep if they have "a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ ] the officer in believing that the area swept harbor[s] an individual posing a danger to the officer or others." *Id.* at 327, 110 S.Ct. at 1095. Whether a search constitutes a valid sweep is determined "on the basis of the facts and circumstances involved." *Kelly*, 718 P.2d at 391 n. 2.

Defendant first argues that the search was not justified as a protective sweep because he was not taken into custody in his house. Aplt. Brf. at 33, 35-36. Defendant cites to *United States v. Colbert*, 76 F.3d 773 (10th Cir. 1996), to support that proposition. Aplt. Brf. at 35. In *Colbert*, officers were armed with a warrant for defendant's arrest charging him

with escape in relation to *previous* convictions. *Id.* at 775. The police had the home of defendant's girlfriend under surveillance for three hours. *Id.* They were able to trace most of the defendant's movements inside the apartment, though they were unable to see the foot traffic in and out of the front door. *Id.* They knew that defendant's girlfriend lived at the apartment. *Id.* at 777. Moreover, Colbert appeared to be the only suspect and nothing suggests police intended to conduct further investigation at the scene.

Colbert, however, expressly rejected a *per se* rule against protective sweeps following arrests outside the home. The court held that "in some circumstances, an arrest taking place just outside a home may pose an equally serious threat to arresting officers." *Id.* at 776. The court continued, observing that "the fact that the arrest takes place outside rather than inside the home affects only the inquiry into whether the officers have a reasonable articulable suspicion that a protective sweep is necessary by reason of a safety threat." *Id.* at 776-77. An evaluation of the facts and circumstances involved in this case reveals that the officers were justified in conducting the protective sweep, regardless of Ms. Stovall's consent.

In contrast to *Colbert*, Officer Severson arrived at defendant's home just hours after the fatal shooting of Darby Golub; he was in the midst of a fluid and rapidly moving investigation. He did not have the luxury of placing defendant's home under surveillance for hours and he was wholly unaware of the occupants' movements inside the home. Although the officers had effected defendant's detention, they undoubtedly intended to remain on the scene to question defendant's mother concerning her son's whereabouts and what he was wearing the last time she saw him. *See* R. 887: 55-59. Because the

investigation was not complete at the home, police had a legitimate concern for their safety until the house was clear of additional suspects. And although the officers did not have any eyewitness information that the fourth suspect had concealed himself in the home, R. 887: 37, the following circumstances, taken together with the rational inferences from those facts, supported Officer Severson's belief that the fourth suspect may have been in the home: (1) a murder, implicating four young men, had occurred just a few hours earlier; (2) the officer understood, even if mistakenly, that all four suspects left the scene in the same vehicle, R. 887: 36; (3) two suspects were apprehended about an hour earlier at the Koontz home, R. 887: 36; (4) only moments earlier, defendant was apprehended, leaving one suspect still at large, R. 887: 19; and (5) defendant lied about his own whereabouts, claiming on the telephone that he had just awakened, R. 887: 15.

Defendant counters that because the house was quiet and the residents told the officer no one else was in the home, the officer could not hold a reasonable belief anyone else was present. *See* Aplt. Brf. at 34. However, police are not obligated to take the word of residents, especially those who had been asleep in bed, nor can they safely assume that no one is concealed within a house merely because it is quiet. Defendant also contends that because the officer did not identify the fourth suspect by name, he had no basis to search. Aplt. Brf. at 34. That fact, however, does not abate an officer's legitimate concern for safety when he knows a fourth suspect is still at large and may very well be hiding in the home.

Finally, defendant argues that the search did not constitute a protective sweep because he was not then arrested, but only detained for questioning. Aplt. Brf. at 33-34. That

distinction is illusory and without significance under *Buie*. The underlying justification for a protective sweep is officer safety and the safety of others. *Buie*, 494 U.S. at 334, 110 S.Ct. at 1098 (observing that "arresting officers are permitted under such circumstances to take reasonable steps to ensure their safety after, and while, making arrest"). This concern is valid whether the suspect has been formally arrested or has only been detained for questioning. As observed in *Buie*, just as officers are justified in frisking an individual for weapons in an investigatory stop, officers are likewise justified "in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." *Id.* at 333, 110 S.Ct. at 1097-98. The risk of danger to officers is no different whether the defendant was arrested or only detained as a suspect or witness for questioning. *See United States v. Meza-Corrales*, 183 F.3d 1116 (9th Cir. 1999) (upholding the protective sweep of defendant's residence although his detention did not escalate to a full-blown arrest).

Accordingly, notwithstanding defendant's argument to the contrary, the facts and circumstances surrounding defendant's arrest were sufficient to create a reasonable belief that the fourth suspect may be hiding in the home, justifying a protective sweep.

B. The Consent Search of the Home for Evidence Following the Protective Sweep Was Valid.

After Officer Severson cleared the house of suspects, he again spoke with Ms. Stovall, further explaining the shooting and her son's possible involvement. R. 887: 25. Approximately five minutes after the sweep, Officer Severson obtained the written consent

of Ms. Stovall to search the house for evidence. R. 887: 29-31, 47-48 (reproduced in Addendum F). The officers, however, did not immediately commence a search of the home, but waited for Detective Soper, who arrived some ten to fifteen minutes later. R. 887: 32. After being briefed by Officer Severson and speaking with Ms. Stovall, Detective Soper searched the home for evidence. R. 887: 33, 54-59.

Because Detective Soper was concerned that defendant had previously paid rent, police did not search defendant's bedroom or the storage area underneath the stairs used by defendant as a closet. R. 887: 62-65. Soper observed through the partially open entry into defendant's bedroom the guns in the gun rack and clothing matching the description given by defendant's mother. R. 887: 61-62. He also saw from the common area outside the closet the mid-section of an assault rifle, later identified as the murder weapon, with the stock and barrel hidden behind clothes. R. 887: 65. He saw black pants with a silver chain matching the description of defendant's attire that night given by another witness. R. 887: 64.

Detective Soper did not, at that time, remove any evidence observed in those areas controlled by defendant. R. 887: 66. He instead secured a search warrant based on the evidence he observed in the home. R. 887: 66-68, 76. With search warrant in hand, Detective Soper returned to the home with a search team near noon that day. R. 887: 68-69. At that time, police seized a number of items, including the guns seen in the gun rack, the athletic pants with the silver chain, and the assault rifle in the closet. R. 887: 70-72.

Defendant does not contend that police coerced his mother's consent to the second search of the home or that her consent was otherwise involuntary. *See* Aplt. Brf. at 40-42.

Instead, he argues that the consent was obtained by police exploitation of the "illegal" protective sweep. Aplt. Brf. at 40-42. Because the protective sweep was valid, defendant's claim that the second search was tainted vanishes.

Even assuming, *arguendo*, that the protective sweep was invalid, the consent for the second search was sufficiently attenuated "to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417 (1963) (internal quotes omitted). In assessing "whether a consent is sufficiently attenuated from prior police illegality to permit the introduction of the resulting evidence[,] . . . courts should consider 'the purpose and flagrancy of the official misconduct,' the 'temporal proximity' of the illegality and consent, and 'the presence of intervening circumstances.'" *State v. Thurman*, 846 P.2d 1256, 1263 (Utah 1993) (*quoting Arroyo*, 796 P.2d at 691 n. 4). The Court then "balanc[es] [ ] the relative egregiousness of the misconduct against the time and circumstances that intervene before consent is given." *Id.* at 1264.

Here, the purpose of the officers' protective sweep was to ensure that another suspect had not secreted himself inside the house, R. 887: 17, 42, thus posing a risk to the safety of officers and home occupants alike. That such was their purpose was born out by the cursory nature of their search—they did not search for evidence, nor did they touch or handle anything, but limited their search to persons. R. 887: 22-25. Their purpose was not to achieve consent, nor was it to gather evidence. *See Thurman*, 846 P.2d at 1264 (noting that "if the purpose of the misconduct was to achieve the consent, suppression of the resulting evidence clearly will have a deterrent effect and further analysis rarely will be required").

Indeed, although they checked the closet for suspects, they did not see the partially hidden gun. *See* R. 887: 22, 25. Accordingly, any misconduct was not flagrantly abusive.

The time interval between the sweep and Ms. Stovall's written consent to a second search was relatively short—approximately five minutes. R. 887: 47-48. However, other intervening factors dissipated any taint. Following the protective sweep, Officer Severson again explained the situation to Ms. Stovall. R. 887: 25. He returned to his car, obtaining a consent form and speaking with the scene commander. R. 887: 26. He asked the scene commander to request that a detective respond to the home. R. 887: 27. He returned to the kitchen where he explained the consent form to Ms. Stovall. R. 887: 27-28. Ms. Stovall read the consent form and Officer Severson asked her to sign it "if she felt comfortable letting [him] look through her house." R. 887: 29. Ms. Stovall signed the consent form without asking any questions. R. 887: 29.[10] In other words, after further explaining the situation to Ms. Stovall following the sweep, Officer Severson left her alone for a few minutes and then explained the consent. Moreover, the officers did not conduct an immediate search, but waited another ten to fifteen minutes for Detective Soper's arrival. R. 887: 31-32. Upon the detective's arrival, Officer Severson briefed him on the events at the home. R. 887: 32-33, 54. Detective Soper then spoke with Ms. Stovall privately. R. 887: 55. She told the detective she had last seen her son at 6:30 the previous evening and described the clothing he was wearing. R. 887: 56-57. Detective Soper learned that defendant had once paid rent,

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[10]Only two officers were present in the house when Officer Severson explained the consent form. R. 887: 32. Their guns were holstered. R. 887: 28, 32. Ms. Stovall was "extremely calm" and she asked no questions. R. 887: 29.

but had not done so for two months. R. 887: 57. Detective Soper then reviewed the consent form with Ms. Stovall anew, reconfirmed that she had read the form and did not have any questions, and again asked her if police could search the home for evidence. R. 887: 58-59. "She said yes. That's fine." R. 887: 58-59.

When the misconduct is not extreme, "the lapse of time between the misconduct and the consent and the presence of intervening events becomes less critical to the dissipation of the taint." *Thurman*, 846 P.2d at 1264. The intervening events here, which further delayed the search, and the reconfirmation of Ms. Stovall's consent to search, are sufficient to dissipate any prior taint. Accordingly, the trial court correctly denied defendant's motion to suppress the evidence.

IV.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON MANSLAUGHTER.

Defendant next objects to Instruction No. 25 which explained the meaning of "extreme emotional disturbance" under the lesser-included-offense of manslaughter. That instruction provided:

> For manslaughter to apply, the "extreme emotional disturbance" must be triggered by something external to the accused, and his reaction to such external stimulus must be reasonable.... ***Such disturbance, therefore, cannot have been brought about by the defendant's own peculiar mental processes or by his own knowing or intentional involvement in a crime.***

R. 589 (emphasis added) (the instructions discussed in this part are reproduced in Addendum G). Defendant argues that the last sentence is confusing because it could be read "to exclude

from consideration the offense of manslaughter once the jury determines the homicide was committed knowingly and intentionally, even when the accused suffers from an extreme emotional disturbance. Aplt. Brf. at 43-44.

Defendant's argument lacks merit. The instruction simply and clearly instructs the jury that a defendant's "extreme emotional disturbance" cannot be triggered by the defendant's knowing or intentional involvement in a crime. It in no way affects the plausibility that a knowing and intentional murder could be reduced to a manslaughter offense if defendant acted under an extreme emotional disturbance. All that is proscribed by the instruction are those emotional disturbances brought on by the defendant's knowing or intentional participation in a crime. Nothing in the instruction is confusing.

Moreover, any possible misconception about the instruction, however unreasonable, was certainly eliminated in Instruction No. 23, which read as follows:

> You are instructed that Manslaughter is a lesser included offense of Murder. After considering the elements of both offenses, if you find that the prosecution has not proven all of the elements of Murder beyond a reasonable doubt then you should consider whether or not the prosecution has proven all of the elements of manslaughter beyond a reasonable doubt.
>
> ***In addition, even if you find that the prosecution has proven all of the elements of murder beyond a reasonable doubt, you must then go on to consider whether the defendant acted under the influence of an extreme emotional disturbance for which there is a reasonable explanation.***

R. 587 (emphasis added). In other words, even if the jury found that the evidence proved all elements of intentional murder, the jury could only return a verdict for manslaughter if they found that he "acted under the influence of an extreme emotional disturbance for which there is a reasonable explanation." R. 587.

This Court's decision in *State v. Piansiaksone*, 954 P.2d 861 (Utah 1998), is dispositive. In that case, the Court upheld an instruction using identical language. *Piansiaksone*, 954 P.2d at 872. The Court rejected a claim similar to defendant's here and the Court's holding applies with equal force:

> [Defendant's] argument confuses knowledge and intent in causing the death of the victim with knowing or intentional involvement in a crime which in turn brings about an extreme emotional disturbance. The instruction merely explains that the manslaughter statute excludes defendant's intentional involvement in a crime from the class of circumstances that can give rise to an extreme emotional disturbance which mitigates murder to manslaughter. It says nothing about whether a defendant can intentionally kill another and still be guilty of manslaughter only.

Id. Defendant has presented no viable reason for this Court to reconsider that holding.[11]

Defendant argues that the court's alleged error in its instruction was compounded by its failure to give a proposed instruction that "[i]f [the jury] find[s] defendant committed a homicide, but there is reasonable doubt as to whether he committed murder or manslaughter, [the jury] may convict him only of the lesser included offense of manslaughter." Aplt. Brf. at 46. Because the Court properly instructed the jury, its refusal to give the proposed instruction could not compound any "error." Moreover, the instruction was unnecessary in light of the other instructions given. Both the elements instruction, R. 581, and Instruction No. 23, advised the jury that the State had to prove each element beyond a reasonable doubt. Instruction No. 23 also made it clear that even if an intentional murder was proven, the jury was required to determine whether defendant "acted under the influence of an extreme

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[11]Contrary to defendant's claim, the concern behind the red question mark next to the instruction, or who placed it there, whether judge, jury, or counsel, cannot be known.

emotional disturbance for which there is a reasonable explanation." R. 587. Defendant's claim therefore fails.

V.

THE AGGRAVATED ROBBERY CHARGE DOES NOT MERGE INTO THE MURDER CHARGE.

In his final claim on appeal, defendant contends the trial court erred in not merging aggravated robbery with murder. Aplt. Brf. at 47. He reasons that under Utah Code Ann. § 76-1-402(3) (1999), he could not be convicted of both murder and aggravated robbery because the aggravated robbery was a lesser included offense of murder, charged here under three alternative theories, including felony murder. Aplt. Brf. at 47.

Defendant relies on this Court's decision in *State v. Shaffer*, 725 P.2d 1301 (Utah 1986), to support his claim. That case, however, involved a defendant's conviction for both *aggravated* murder and aggravated robbery, the predicate offense of the aggravated murder charge. *Shaffer*, 725 P.2d at 1302. In contrast, this case involves defendant's conviction for non-capital *murder* based, under the felony murder alternative, on the predicate offense of aggravated robbery. *Shaffer* does not therefore apply. Instead, this case is governed by the Court's decision in *State v. McCovey*, 803 P.2d 1234 (Utah 1990).

As is in this case, the defendant in *McCovey* was convicted of aggravated robbery and *murder*, but not aggravated murder. *McCovey*, 803 P.2d at 1234. The issue squarely before the Court in *McCovey* was "whether the legislature intended aggravated robbery to be a lesser included offense of second degree felony murder." *Id.* at 1235. The Court concluded

that it did not. *Id.* at 1239. Defendant argues that this case is distinguishable from *McCovey* because only one victim was involved here whereas different victims were involved in *McCovey*. Aplt. Brf. at 49-50. Although the Court in *McCovey* acknowledged a similar distinction between that case and *Shaffer*, the Court did not rely on that distinction alone. Indeed, that distinction bore no relevance to the Court's overriding conclusion that the purpose of the felony murder law is to "allow the State to obtain a second degree murder conviction without proving any form of mens rea" and thereby "deter the use of force or weapons in the commission of a felony." *Id.* at 1238. The Court reasoned that because *Shaffer* involved a capital murder conviction imposing penalties of death or life imprisonment, conviction of the predicate offense would be mere surplusage. *Id.* On the other hand, conviction for aggravated robbery "would not be needless or surplusage" in the case of a murder conviction because it only carries a sentence of five years to life. *Id.* That rationale applies with equal force whether different victims or only one victim is involved.

The Court thus held that "the Utah State Legislature did not intend the multiple crimes of felony murder to be punished as a single crime, but rather, that the homicide be enhanced to second degree felony murder *in addition to* the underlying felony. To conclude otherwise would be to defeat the deterrent purpose of the felony murder statute and result in unjust consequences." *Id.* at 1239 (emphasis added). Nowhere does the statute differentiate between felony murders involving one victim or different victims and such a distinction would defeat the very purpose of the law as recognized in *McCovey*.

Moreover, the evidence was overwhelming that defendant knowingly and intentionally killed the victim. The victim was beaten badly. R. 890: 12-13, 21-24, 43-46, 54-55, 66-68, 83, 103-05, 143. He had fled to his truck and was speeding away. R. 890: 144, 157. After defendant fired the first three rounds, the victim continued to flee in his truck. R. 890: 25-27, 70-71, 106-08, 123, 128-29, 145, 159. Nonetheless, defendant, in no danger whatsoever, persisted, finally killing the victim with one of his next successive rounds. R. 890: 145-46, 159; R. 891: 183, 192, 197, 201, 245-47, 251-60, 269-70.

In light of the foregoing, the trial court correctly concluded the aggravated robbery conviction should not merge with the murder conviction.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted this 19th day of January, 2001.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
Attorneys for Appellee, State of Utah

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2001, I served two copies of the attached Brief of Appellee upon the defendant/appellant, RUSSELL BISNER, by causing them to be [ ] hand delivered [X] mailed, via first class mail, postage prepaid, to his/her counsel of record, as follows:

Richard P. Mauro
43 East 400 South
Salt Lake City, UT 84111

Jeffrey S. Gray
Assistant Attorney General

Addenda

Addendum A

U.S. Const., amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah Code Ann. § 76-1-402(3) (1999)

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

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

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

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

Utah R. Evid. 403

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

Utah R. Evid. 404(b)

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

Addendum B

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Appellee,

v. No. 20000026-SC

Russell Bisner,
Defendant and Appellant.

ORDER

Defendant's motion to dismiss this appeal without prejudice while the trial court considers defendant's motion to reconsider the denial of defendant's motion for a new trial is denied. It is well settled that a motion to reconsider one of the time-extending motions of Rules 50(b), 52(b) or 59, Utah Rules Civil Procedure is not valid. *Watkiss & Campbell v. FOA & Son*, 808 P.2d 1061, 1064 (Utah 1991); *Drury v. Lunceford*, 18 Utah 2d 74, 415 P.2d 662, 663 (1966). Dismissal of this appeal would necessarily be <u>with</u> prejudice, resulting in loss of defendant's appeal.

The trial court lacks jurisdiction to consider anything further in this case because defendant timely filed his notice of appeal on December 30, 1999.

FOR THE COURT:

August 31, 2000
Date

Richard C. Howe
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on September 5, 2000, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the party(ies) listed below

RICHARD P MAURO
MICHAEL R SIKORA
ATTORNEY AT LAW
43 E 400 S
SALT LAKE CITY UT 84111

RUSSELL BISNER, USP# 29334
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GUNNISON UT 84634

and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the following office (s) to be delivered to the party(ies) listed below

J FREDERIC VOROS, JR
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court(s) listed below

THIRD DISTRICT, SALT LAKE
ATTN SUZY CARLSON
450 S STATE ST
PO BOX 1860
SALT LAKE CITY UT 84114-1860

By Deputy Clerk

Case No 20000026-SC
THIRD DISTRICT, SALT LAKE, 991900723

Addendum C

SENTENCING TRANSCRIPT

State OF UTAH V. DUSTIN SYMES

CASE NO. 991900725fs
JUDGE: HOMER F. WILKINSON
ATTORNEY FOR DEFENDANT: KENT HOLLAND (ATD)
ATTORNEY FOR PROSECUTION: ROBERT L. STOTT (ATP)
CHARGE: AGG. ASSAULT, 3°
DATE OF HEARING: 12/30/99

JUDGE: State of Utah v. Dustin Symes. This is the time set for sentencing --inaudible--.

ATD: Not that I'm aware of, Your Honor.

JUDGE: You may proceed.

ATD: Your Honor, I have read the AP&P --inaudible-- recommendations and although there's no recommended time, I agree with the fact that they believe that he is a suitable candidate for supervision. The circumstances in this particular instance, it was a matter of something escalating without any participation in the escalation by Mr. Symes. What I purport what happened in this case --inaudible-- had Dustin and three of his friends went to where this, where the fight was supposed to be. When they got there they saw the deceased in his truck, standing in the door of his truck holding a firearm. At that time Dustin took a bat that he had in his truck out and he and the three approached the gentleman with the gun. Dustin struck the gentleman with the gun on the forehead. The gentleman put the gun down or dropped the gun --inaudible--. At that point Dustin said let's go. So Dustin left the scene, went back to his truck. The other three remained, two of them struck with their hands and fists the victim. And then they

at Dustin's urging came to the truck. The victim was later killed and that's why we're here today. And I think the point is that there would be a real argument possibly, there was an argument for self defense, the fact that the one gentleman was holding, the victim was holding a loaded rifle at the time that Dustin struck him with the bat. He only struck him one time then he left the scene. --inaudible-- down he said let's go. I think the other important thing to understand is that in the year that I have known Dustin and the --inaudible-- I have seen a dramatic change in his personality. He has, he has matured. He is in a --inaudible-- full time job and working towards an apprenticeship as an electrician. And he is a, I've seen a real change. He's done very very well. And he is not, he has gone from a young, kind of cocky individual to a very --inaudible-- individual. He understands the seriousness of what happened and the seriousness of, of the situation. I think it's important --inaudible-- understands --inaudible-- and how sorry he is that --inaudible--. He is responsible --inaudible--.

JUDGE: --inaudible-- State.

ATP, ROBERT L. STOTT

ATP: Robert Stott for the State, Your Honor. You know, this is a case where --inaudible-- three men, four men challenged --inaudible-- parking lot early in the morning. One man --inaudible-- other four. And after this defendant, Mr. Symes, hit him over the head with a bat. Mr. Symes then left, he went back to his truck. Two of the other individuals then hit Mr. Golub with --inaudible-- and hands and then they left and went back to his truck. Mr. Golub got in his truck and was leaving. Mr. Bisner, who is

charged with murdering the victim, then picked up Mr. Golub's rifle and as Mr. Golub was leaving, he shot six times, killing Mr. Golub. Mr. Bisner is charged with murder --inaudible--. In the beginning I charged Mr. Symes with aggravated assault --inaudible-- told Mr., told his attorney right from beginning that he had to plead guilty as charged. --inaudible-- negotiations --inaudible--. After the trial on the other case, after seeing what happened, and after knowing that the two other individuals who were involved were not part of the murder were also --inaudible-- sentencing involving Class A misdemeanor and --inaudible-- jail time. I determined that --inaudible-- sentence in this case from the standpoint of the District Attorney's office --inaudible-- Class A, to give him probation and a condition of probation that he do at least four months --inaudible--. That is --inaudible--. I believe there are some family members here of the victim, Your Honor, and they may want to speak.

??: --inaudible--

EDWARD GOLUB

EDWARD: --inaudible-- it all sounds good that he somehow was a nice person and he just happened to be driving around --inaudible-- with a baseball bat and out of the blue three and his friends decided to go over and meet with my son and beat the daylights out of him. Now he can say all that he wants about the fact that it was self defense. The fact of the matter was that none of those four boys --inaudible-- testimony in court ever felt threatened by my son. He put the gun--there's some consideration of the fact that the gun was being used to pay off a debt, and that's why the four walked up.

Otherwise, the four wouldn't have had, wouldn't have been that brave to walk up to a man with a gun who they thought was going to shoot 'em. And that's why he was defenseless, the gun was down according to testimony. And this gentleman over here hit my son over the head with a bat which ultimately led to his death. I think I wrote you a letter, I hope you read it, in which I said that to, to take--an act like that, a bat in January, he was looking for trouble. He even admits that he had the bat in his truck prior to this incident and I'm thinking what is he doing with a bat anyway, unless he's going to defend himself or he's going to get in trouble, an aggressive personality, walks up to my son who was standing relaxed and beats him in the head with a baseball bat and left a hole so large in his head that --inaudible-- that if you had seen it you would have thought that was the entry wound of the bullet that killed him, not a baseball bat, it had punctured it so hard. Of course, my son dropped the gun, he laid it down, he fell down, beat the daylights out of him, and he was shot subsequently. My feeling is that you take this particular charge and drop it to a misdemeanor is an unjust --inaudible-- to my family, it's unjust. This boy deserves to go to jail, and he deserves to go to jail for a few years to cool his jets while he grows up. And he had the last six months -- inaudible-- become a, he's got the fear of God into him, but that's temporary, he really hasn't changed and I think that he should go to prison, and he should be hit with that felony charge and not some four months in the county jail. Hell, the other boys served six months in the county jail and he never picked up the bat. All he did was use his fists and his, his feet kicking. I think that the request by the District Attorney--with all due respect--is not fair to myself and my family.

JUDGE: Thank you, sir. --inaudible--

EDDIE GOLUB

EDDIE: I'm Eddie Golub, I'm Darby's little brother. I just would like to say that I know how it is to have friends that, you know, and do stupid things like what happened here. And I know my, I've got away from all those guys and I know my friends, I know that they were deranged people and if they wanted me to go do something, and I was smart enough to know, you know, I'm going to stay, you guys are crazy. And obviously he wasn't man enough to say hey, you know, I don't want to be a part of this and he could see where it was going. I, I think that he should have to pay, that he wasn't wise enough to see that his friends were crazy --inaudible--. And I don't know, if he isn't man enough to pay for what he's done then, I don't know, I just, I think --inaudible--.

NATALIE GOLUB

NATALIE: My name's Natalie Golub --inaudible--. I sat there through the whole trial --inaudible--. And I don't know, I'm not sure. To, if someone was vicious enough to pull out a baseball bat and hit somebody with a baseball bat I --inaudible--. If there's anybody vicious enough, in my eyes, to bring a baseball bat to a fight than --inaudible--. And I've heard --inaudible-- my husband. In my eyes, he's a horrible man, I don't see how anybody can --inaudible-- that vicious --inaudible--. I think that if you, you give him a Class A misdemeanor he should --inaudible-- enough to the point that my husband

died --inaudible--. I can't think about --inaudible-- how much pain my husband had to have been in --inaudible--. It hurts me so much to think about it.

JUDGE: Counsel?

ATD, KENT HOLLAND

??: Let me state --inaudible-- made by Mr. Stott --inaudible-- with Mr. Stott --inaudible--. And I would still state to you that I --inaudible-- much more, a lot more lenient, a lot more severe --inaudible--.

ATP: --inaudible-- recommendations --inaudible-- for a couple of reasons. --inaudible-- important to understand that Mr. Symes did not strike --inaudible-- over the head --inaudible--. At that point Mr. Symes turned and said let's leave, let's get out of here, and he left, he left the scene at that point. The other two gentleman that were sentenced as Class A's remained and beat Mr. Golub with their fists and their hands, which to me is a much severe situation than somebody who went and struck the gentleman once which caused him to put the rifle down. The --inaudible--, assaulted --inaudible--. That is not someone who is there to --inaudible-- or something for drugs or for whatever he was there for. A loaded assault rifle was not something you would fool around with. At that time Mr. Symes left. He then yelled at everybody, everybody to let's get, let's leave, let's go. Also, Mr. Golub was very, was, was not as severely injured such that he couldn't get in his truck and start to leave, because he did, he got in his truck and began to leave at which point he was shot by one of the remaining individuals six times. So this, this is a different situation. Here is something where somebody went,

they expected Mr. Golub to have a bunch of his friends there, that is why they all went because they thought he was coming with a large group. He showed up by himself with an assault, a loaded assault rifle. When they saw, when he saw the assault rifle that's when he went and got the bat and he approached him. At that point he struck him in the forehead with the end of the bat --inaudible-- his forehead. The gun was placed either set down or dropped, one or the other. My client was not aware of what happened, he just knew that the gun was no longer in Mr. Golub's hands. He was holding it like this, he wasn't holding it anymore and at that point he left and went and got in his truck and yelled for everybody else to go. He tried to get everybody else to leave the scene. He tried to get everybody to quit. --inaudible-- any physical, any further physical injury to Mr. Golub. He said let's go, let's get out of here. And at that point that's when the matter happened. I think that is why Mr. Stott --inaudible-- in his, in his sentencing recommendations. He makes the recommendations --inaudible--

JUDGE: --inaudible--. Is there anything you want to state on your own behalf?

DUSTIN SYMES

DUSTIN: I would just like to apologize --inaudible--

SENTENCE

JUDGE: --inaudible-- concern is that justice be done. --inaudible--. I'm not persuaded at this point that this --inaudible--. I'm also not persuaded that this gentleman should go to prison. It seems like to me this gentleman did try to, to alleviate the

situation, he walked away --inaudible-- just shouldn't have been --inaudible--. Nine months in the Salt Lake County jail --inaudible-- forthwith. That he be responsible for full restitution --inaudible--. That he enter into and complete any --inaudible-- program that's recommended by the probation department. --inaudible-- Odyssey House or Cornerstone, drug alcohol --inaudible--. That he pay a recoupment fee of two hundred dollars, that he obtain full time employment during, full time employment and/or school during the period of probation. And that he --inaudible--, that he not use any alcohol or do any drugs during the period of probation --inaudible--. That he --inaudible--, that he not frequent places where alcoholic beverages are sold or --inaudible-- and that he not associate with known drug users --inaudible--. And that he have no contact with the victim's family --inaudible-- this matter --inaudible--. Counsel?

??: --inaudible--

** END OF TRANSCRIPTION **

Addendum D

DAVID E. YOCUM
District Attorney for Salt Lake County
SUSAN L. HUNT, Bar No. 6574
Deputy District Attorney
321 East 400 South
Salt Lake City, Utah
Telephone: 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: _____ 450 South State

MAGISTRATE ADDRESS

STATE OF UTAH)
: ss
County of Salt Lake)

The undersigned affiant, Mark Soper, being first duly sworn, deposes and says:

That your affiant has reason to believe

That on the premises known as a house located at 9118 South Shad Circle

In the City of Sandy, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

1. Any firearms.
2. Any ammunition including bullets, shotgun shells, centerfire cartridges.
3. Black sweat pants or polar fleece pants.
4. A navy t-shirt.
5. A long sleeved t-shirt and\or short-sleeved t-shirt.
6. A beanie type hat.
7. Any documents related to Russell Bisner's residence at 9118 Shad Circle in Sandy.

8. Any documents related to Russell Bisner's ownership interest in any weapons or ammunition.
9. Any documents related to Russell Bisner's ownership interest of any property described above or any property seized as evidence of the crime of homicide.
10. Any spent shell casings.
11. Any other fruits or instrumentalities that are evidence of the crime of criminal homicide.

and that said property or evidence:

has been used to commit or conceal a public offense, or

is being possessed with the purpose to use it as a means of committing or concealing a public offense, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct.

Affiant believes the property and evidence described above is evidence of the crime or crimes of homicide.

The facts to establish the grounds for issuance of a Search Warrant are:

1. Your affiant is a detective with the Sandy City Police Department. I have four years law enforcement experience with Sandy Police Department and Alpine Police Department. I am assigned to the Crimes Against Persons Investigations Unit.

2. At approximately 2:40 a.m. Sandy City Police Department received a call relating to a shooting that occurred in the area of 2095 East 9400 South. Officers responded to the scene where they located a shooting victim inside of a vehicle in a parking lot near an Amoco gas station and a Smiths Grocery Store at that location. Emergency Medical Personnel determined that the victim was deceased. The victim appeared to have at least one gunshot wound to the head. Officers also found several spent shell casings in the area.

3. Sandy City Police Officer Severson questioned Michelle Koontz an employee of 7-11 at 2175 East 9400 South, next to the parking lot where the victim was found. She told Officer Severson that her son, Justin Koontz had been at the 7-11 just prior to the shooting. She stated that he was with three friends. She stated that one of the friends with Justin was named Russell. She stated that Russell's last name starts with "Bis" but she was unsure of the exact last name. She stated that Russell was wearing black sweat pants or warm-up type pants. She further stated that she observed a silver chain hanging from the pocket of Russell's pants.

4. Ms. Koontz stated that she heard Justin and his friends talking about going to Smith's parking lot to fight someone. She stated that one of Justin's friends came into the 7-11 and said "they're here." She said that Justin and his friends then left in a small black pick-up truck with a black shell. She stated that the shell was higher than the cab of the truck. Ms. Koontz and another clerk walked outside and saw the truck drive west from 7-11 to the Smith's store where another truck was parked. She stated that she heard arguing and then saw the second truck start to pull away. It was at that time that she heard gun shots and then saw the second truck crash. She stated that the truck her son was in drove away.

5. Officers determined that the second truck Ms. Koontz saw was the same truck in which the shooting victim was found.

6. Officers responded to Ms. Koontz' home at 2431 Woodchuck Way where they located Justin Koontz, and two other suspects. Justin Koontz' father was at the residence. He told officers that Russell Bisner called the residence shortly before the officers arrived. Russell asked to speak with Justin, but Mr. Koontz would not allow him to do so. Mr. Koontz told the officer that the number on the caller i.d. was Russell Bisner's number.

7. Officers went to the home of Russell Bisner located at 9118 Shad Circle in Sandy. They called the residence and asked Russell to come outside. Russell went outside of the house where he was detained by the officers at the scene.

8. Officers asked for permission from Russell's mother, Erin Stovall, to conduct a protective sweep of the residence for the safety of the officers and to determine if any other suspects were on the premises. No other suspects were identified at the home.

9. After conducting the sweep of the home, Mrs. Stovall gave the officers permission to search the residence. Mrs. Stovall identified a downstairs bedroom as belonging to Russell. The doorway to the bedroom was approximately eight feet wide. There was no door. A curtain covered about half of the doorway. The inside of the bedroom was visible from a common area of the house. Mrs. Stovall also identified a storage area adjacent to the bedroom as an area Russell uses for his closet. The closet area is visible from a common storage area of the house.

10. During the protective sweep of the of the house, officers observed a gun rack on the floor of a downstairs bedroom. They observed a shotgun with a pistol grip and a SKS Assault Rifle on the rack.

11. During the consent search of the house I also observed a wadded up dark navy blue t-shirt on the floor near the gun rack. I also observed black fleece sweat pants with a silver chain attached to the pants and a wallet. The pants were located in a storage area adjacent to the bedroom. I did not move the pants, but I could see the trigger section or mid-section of what appeared to be a black rifle standing against a wall. The top of the gun was concealed under a coat. The bottom part was concealed under the black pants. The gun and the pants were visible from the common storage area of the basement.

10. Your affiant interviewed Erin Stovall who stated that Russell had been wearing black pants and two t-shirts the night before. She stated that one was long-sleeved and one was short sleeved. She said that she thought both the shirts were blue. She said that she thought

Russell was wearing a beanie type hat. She also identified the area where the gun rack was observed as Russell's bedroom. She stated that the area where the black pants were seen is an area that Russell uses for his closet.

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items:

in the daytime.

SUSAN HUNT REVIEWED & PREPARED THIS DOCUMENT MS

Mark Soper
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 6 day of January, 1999.

MAGISTRATE

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah:

Proof by Affidavit under oath having been made this day before me by Mark Soper, I am satisfied that there is probable cause to believe

That on the premises known as A house located at 9118 South Shad Circle

In the City of Sandy, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

1. Any firearms.
2. Any ammunition including bullets, shotgun shells, centerfire cartridges.
3. Black sweat pants or polar fleece pants.
4. A navy t-shirt.
5. A long sleeved t-shirt and/or short sleeved t-shirt.
6. A beanie type hat.
7. Any documents related to Russell Bisner's residence at 9118 Shad Circle in Sandy.
8. Any documents related to Russell Bisner's ownership interest in any weapons or ammunition.
9. Any documents related to Russell Bisner's ownership interest of any property described above or any property seized as evidence of the crime of homicide.
10. Any spent shell casings.
11. Any other fruits or instrumentalities that are evidence of the crime of criminal homicide.

and that said property or evidence:

has been used to commit or conceal a public offense, or

is being possessed with the purpose to use it as a means of committing or concealing a public offense, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct.

Affiant believes the property and evidence described above is evidence of the crime or crimes of homicide.

and that said property or evidence:

has been used to commit or conceal a public offense, or

is being possessed with the purpose to use it as a means of committing or concealing a public offense, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct.

You are therefore commanded

in the daytime

to make a search of the above-named or described premises known as A house located at 9118 South Shad Circle for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Third Circuit Court, Salt Lake Department, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this 6 day of January, 1999.

MAGISTRATE

Addendum E

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- RUSSELL EUGENE BISNER, Defendant.	FINDING OF FACTS AND CONCLUSIONS OF LAW Case No. 991900723FS Hon. J. Dennis Frederick

The defendant's Motion To Suppress came before the court on May 17, 1999, and the Court, having heard testimony and argument and having read the Motion and Response, makes the following Findings and Conclusions:

FINDINGS OF FACT

1. At approximately 2:40 A.M. on January 6, 1999, Officer Severson of the Sandy City Police Department responded to a mall parking lot at 20th East and 9400 South in Sandy, Utah pursuant to a shots fired call.

2. At the scene he found a crashed truck containing the body of Darby Golub who had been shot in the back of his head.

3. Michelle Koontz, an employee of a 7-11 Store across the street, told Officer Severson that just before the shooting, her son, Justin Koontz, and three other young males, including a Russell, who's last name started with "Bis", had stopped at the store just before the shooting.

4. Ms. Koontz heard the young men talking about going to the parking lot to fight someone. The men left in a truck and went to the parking lot across the street and stopped near another truck.

5. Ms. Koontz heard arguing, and as the second truck pulled away, heard shots and saw the second truck crash.

6. Ms. Koontz told Officer Severson that Russell "Bis" was wearing black sweatpants with a silver chain hanging from his pocket.

7. Officer Severson went to Ms. Koontz' home where he talked with her husband. Mr. Koontz told Officer Severson that Russell Bisner had just called asking to talk with his son, Justin. Ms. Koontz gave the officers the number from which Russell had called. From that information, the officers were able to determine that he had called from 9118 South Shad Circle in Sandy.

8. Two of the four suspects were arrested at the Koontz residence.

9. Officer Severson, another Sandy officer, Cole, and three county deputies responded to the Shad Circle address.

10. Outside the residence, Officer Severson called, on a phone, into the residence and spoke to Russell Bisner. He asked Bisner to come outside. When Bisner did, he was taken into custody.

11. Officer Severson then spoke to Erin Stovall who identified herself as the home owner. At that time Severson knew that three of the four suspects were in custody, leaving one at large. Severson told Ms. Stovall that her son had possibly been involved in a shooting and that he wanted to make a cursory search of her home to determine if any other suspects were inside. Ms. Stowell gave her permission. During that time, the officers guns were holstered.

12. Officer Severson and another officer went down stairs where Ms. Stowell said that Russell Bisner's bedroom was located. No door was on the bedroom entry way and before they entered it, Officer Severson saw a gun rack holding a shotgun and rifle. The officer did not touch any items or seize any items from the bedroom or any other part of the basement, even after they had entered the bedroom to look for the fourth suspect.

13. The officers conducted their basement survey in about five minutes. They then looked upstairs and found no traces of the fourth suspect.

14. Officer Severson obtained a printed "permission to search" form from his vehicle. He explained its contents to Ms. Stovall. She read it, understood it, and signed it. At about 5:30 A.M., her daughter, who was with her, signed it as a witness.

15. The signed "permission to search" form was admitted into evidence. It fully and clearly stated her constitutional right to refuse a search of her residence by the officers. The form also stated that she willingly gave her permission for the police to complete a search of her premises and property and to take any property which they desired as evidence.

16. Officer Severson did not search the Stovall residence, but waited a short time for Detective Soper to arrive.

17. Detective Soper spoke with Mrs. Stovall in private about his desire to search her home for evidence. He confirmed that she had signed the "permission to search" form and additionally gained her verbal consent for the search.

18. Detective Soper also learned from Mrs. Stovall that Russell's bedroom was in the basement and that while he had at some point paid rent, he didn't currently.

19. Officer Soper searched the yard, garage, and the house. Downstairs, from a common living area, he saw the opening to Russell's bedroom. The opening was 8 feet wide, but half of it was covered. From outside the bedroom, through the opening, Soper could see items of

clothing on the bedroom floor. The clothing matched the description of the clothing that Ms. Stovall had told Soper that Bisner was wearing the night before. Soper also saw a gun rack containing a shotgun and rifle inside the bedroom.

20. Detective Soper never entered the bedroom nor seized any item from it during this search.

21. From a common storage area, Detective Soper observed a closet under the stairways. The closet had no door or covering and Soper saw in it black sweatpants with a silver chain attached to it. He also saw the mid, or trigger, section of a rifle standing in the closet.

22. Detective Soper did not entered the closet, reach into it, or remove any item from it.

23. Officer Soper left to obtain a search warrant for the residence. An officer was left at the house to see that the basement was not disturbed.

24. With the assistance of Deputy District Attorney Susan Hunt, Detective Soper prepared a search warrant and affidavit. It was presented to Judge Fuchs of the Third Judicial District Court, who read it and executed the same.

25. Detective Soper returned to the Stovall residence with the warrant and conducted a search pursuant to the warrant of the residence with other officers.

26. From Russell Bisner's downstairs bedroom, the officers seized clothing, papers, and two firearms.

27. From the storage closet under the stairs, the officers seized clothing, a chain, Russell's wallet, and two firearms. One, a rifle, was later determined to be the murder weapon.

28. Erin Stovall was the owner of the residence at 9118 South Shad Circle in Sandy on January 6, 1999. When the officer arrived at her home, she said that she had nothing to hide and wanted to cooperate. She read the "permission to search" form and signed it.

29. Because of the inconsistencies between Ms. Stovall and Ms. Ferrell's testimonies, the highly charged emotional state of mind they were in at the time of the incident, and the fact that they had no notes or recorded statements to assist them, their testimony, as far as it conflicted with Officer Severson and Detective Soper, was not credible.

30. The police did not claim an authority to search prior to obtaining the search warrant.

31. No force, duress, deception, or coercion was employed by the officers during either pre-warrant search.

32. Before Officer Severson made his sweep of the residence he asked Ms. Stovall for permission. She gave her verbal permission knowingly and intelligently.

33. Before Detective Soper went downstairs the first time, he had received verbal and written permission from Ms. Stovall to conduct a search of her residence. She knowingly and intelligently gave her permission to search.

Therefore, pursuant to these findings, the court makes the following:

CONCLUSIONS OF LAW

1. Ms. Stovall had the authority to consent to Officer Severson and Detective Soper's searches of her residence at 9118 South Shad Circle, Sandy, Utah, on Janaury 6, 1999.

2. From the totality of the circumstances, Ms. Stovall's consent to search on both occasions was given voluntarily.

3. Officer Severson possessed articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable, prudent officer in believing that

the area to be swept harbored a murder suspect, who would either escape or who posed a danger to the officers and others if no sweep were made.

4. Both pre-warrant searches conducted by Officer Severson and Detective Soper were valid and lawful. Neither violated any of the defendant's constitutional rights.

5. Detective Soper's affidavit provided probable cause that evidence of a crime would be found at the residence of 9118 South Shad Circle, Sandy, Utah.

6. Neither of the searches conducted prior to the obtaining of the search warrant, or anything observed during those searches, or any information obtained during these searches tainted the search warrant or affidavit.

7. The only information gained from Officer Severson's sweep is contained in paragraph #10 of the search warrant affidavit. Even if that paragraph were excised from the affidavits, the remaining information establishes probable cause for the search.

Therefore, pursuant to these Findings and Conclusions, defendant's Motion To Suppress is hereby denied.

DATED this ~~21st~~ 28th day of May, 1999.

HONORABLE J. DENNIS FREDERICK
District Court Judge

Approved As To Form

Ralph Dellapiana
Attorney for Defendant

Addendum F

SANDY CITY POLICE DEPARTMENT
PERMISSION TO SEARCH

I, [redacted], have been informed by G. Sea[redacted] #331 and L. Cox #194

who made proper identification as an authorized law enforcement officer(s) of the Sandy City Police Department, Sandy, Utah, of my CONSTITUTIONAL RIGHT not to have a search made of the premises and property owned by me and/or under my care, custody and control, without a search warrant.

Knowing of my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at 9118 S. Stand Off. The above said officer(s) further have my permission to take from my premises and property, any letters, papers, or any other property or things which they desire as evidence for criminal prosecution on the case or cases under investigation.

This written permission to search without a search warrant is given by me to the above officer(s) voluntarily and without any threats or promises of any kind, at 0530 hours, on this 6TH, day of JANUARY, 19 99.

Signed: [redacted]

Witness: Beverly Ferrel

Address: 9118 S Stand off

Phone: (H) 944 6153 (B) _____

Witness: _____

Address: _____

Phone: (H) _____ (B) _____

Addendum G

INSTRUCTION NO. 18

Before you can convict the defendant, Russell Eugene Bisner, of the offense of Murder as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 6th day of January, 1999, in Salt Lake County, State of Utah, the defendant, Russell Eugene Bisner, caused the death of Darby Golub; and

2. That said defendant then and there did so: (a) intentionally or knowingly; or (b) intending to cause serious bodily injury to another, he committed an act clearly dangerous to human life, which act caused the death of Darby Golub; or (c) while in the commission, attempted commission, or immediate flight from the commission or attempted commission of Aggravated Robbery and/or Robbery, causes the death of Darby Golub.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Murder as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

INSTRUCTION NO. 23

You are instructed that Manslaughter is a lesser included offense of Murder. After considering the elements of both offenses, if you find that the prosecution has not proven all of the elements of Murder beyond a reasonable doubt then you should consider whether or not the prosecution has proven all of the elements of manslaughter beyond a reasonable doubt.

In addition, even if you find that the prosecution has proven all of the elements of murder beyond a reasonable doubt, you must then go on to consider whether the defendant acted under the influence of an extreme emotional disturbance for which there is a reasonable explanation or excuse.

INSTRUCTION NO. 24

In making your determination as to whether the defendant caused the death of the victim under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse, the following principles apply:

The reasonableness of an explanation or excuse is determined from the viewpoint of a reasonable person under the circumstances existing at the time of the offense.

If the extreme emotional disturbance was a result of the defendant's own intentional, knowing or reckless acts, then manslaughter would not be a proper verdict.

INSTRUCTION NO. 25

For Manslaughter to apply, the "extreme emotional disturbance" must be triggered by something external to the accused, and his reaction to such external stimulus must be reasonable. The terms used must be given the meaning you would give them in common everyday use. Such disturbance, therefore, cannot have been brought about by the defendant's own peculiar mental processes or by his own knowing or intentional involvement in a crime.

In determining whether or not the defendant acted under the influence of extreme emotional disturbance, you should consider all of the circumstances surrounding the death of Darby Golub. If you find that the defendant caused the death of Darby Golub while under the influence of extreme emotional disturbance, you must next determine whether or not there was a reasonable explanation or excuse for such disturbance. The reasonableness of the explanation or excuse for the extreme mental or emotional disturbance is to be determined from the viewpoint of a reasonable person under the then existing circumstances. Emotional disturbance does not include a condition resulting from a mental illness.

Additionally, the reasonableness of the belief of the defendant that the circumstances provided a legal justification or excuse for the defendant's conduct is to be determined from the viewpoint of a reasonable person under the then existing circumstances.