1997

State of Utah v. Michael James Fisk, III : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 970462-CA
v.	:	
MICHAEL JAMES FISK, III,	:	Priority No. 10
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM AN INTERLOCUTORY ORDER DENYING DEFENDANT'S MOTION TO DISMISS ONE COUNT OF CHILD ABUSE, A SECOND DEGREE FELONY IN VIOLATION OF UTAH CODE ANN. § 76-5-109(2)(a) (1995), ENTERED BY THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE STEPHEN HENROID, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 970462-CA
v.	:	
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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals the magistrate's interlocutory order denying his motion to dismiss one count of child abuse, a second degree felony in violation of Utah Code Ann. § 76-5-109(2)(a) (1995). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(d) (1996).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Did the State's proffer of new evidence and the magistrate's finding that the prosecutor acted in good faith when she failed to present that evidence at the original preliminary hearing satisfy the State v. Brickey requirements for refiling the charge previously dismissed for insufficient evidence?

Defendant's claim raises an issue of the proper legal interpretation of the Brickey rule. Therefore, the issue is a question of law reviewed for correctness. See State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

2. Is defendant's appellate argument that the magistrate

clearly erred by finding that the prosecutor acted in good faith properly before this Court when defendant did not make that argument to the magistrate?

Defendant's appellate argument is not properly before the Court because he did not present it to the lower court. See State v. Bywater, 748 P.2d 568, 569 (Utah 1987).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains the texts of Utah Code Ann. § 76-5-109 (1995); rule 7, Utah Rules of Criminal Procedure; and rule 59, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

By information filed in March 1995, the State, through the Salt Lake District Attorney's Office, charged defendant and his wife, Melissa Fisk, with one count each of second-degree felony child abuse, in violation of Utah Code Ann. § 76-5-109(2)(a) (1995) (R. 13-14, 139). At the conclusion of the preliminary hearing, the magistrate refused to bind defendant and his wife over for trial (R. 14; Tr. July 18, 1995 at 113). The magistrate found that the State had established probable cause to believe that the two-year-old victim, D.S., had suffered non-accidental injuries, but had not established probable cause to believe that either defendant or his wife inflicted those injuries (id.).

By information dated January 29, 1997, the State, through the Utah Attorney General's Office, recharged defendant with child abuse (R. 8). Defendant moved to dismiss the information, contending that State v. Brickey, 714 P.2d 644 (Utah 1986) barred

recharging him with child abuse (R. 99). The magistrate denied his motion (R. 361).[1]

This Court granted defendant's petition for interlocutory review of that order (R. 374). There has been no preliminary hearing on the refiled charge; the only issue on this appeal is whether the magistrate properly denied the motion to dismiss.

STATEMENT OF FACTS

The State has charged defendant with shaking two-year-old D.S. so severely that the resulting brain damage has left D.S. in a vegetative state.

Introduction

D.S.'s mother and defendant's wife, Melissa Fisk, have known each other since they were teenagers (R. 124; Juv. Ct. Hearing at 141).[2] According to Ms. Fisk, D.S.'s mother had difficulty

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[1]The January 29, 1997 information recharged both defendant and his wife (R. 8). The State charged defendant with two counts of second-degree felony child abuse, in violation of Utah Code Ann. § 76-5-109(2)(a) (1995), and one count of class A misdemeanor child abuse, in violation of Utah Code Ann. § 76-5-109(3)(a) (1995) (R. 9-10). The State charged Ms. Fisk with one count of second-degree felony child abuse, in violation of Utah Code Ann. § 76-5-109(2)(a) (1995), and one count of class A misdemeanor child abuse, in violation of Utah Code Ann. § 76-5-109(3)(a) (1995) (R. 10-11).

Both defendants filed motions to dismiss the information (R. 99, 191). The magistrate granted Ms. Fisk's motion (R. 361). The magistrate also dismissed two of the counts charged against defendant (id.). The magistrate allowed the State to proceed against defendant on one count only (id.).

[2]Portions of the juvenile court proceedings have been included in the record as exhibits to Ms. Fisk's motion to dismiss. However, those pages do not have separate record numbers. The State will refer to those pages as "Juv Ct Hearing." The transcript pages are in volume 2 of the pleadings files.

caring for D.S. and his two older siblings (Juv. Ct. Hearing 141-42). Consequently, in October and November 1994, defendant and his wife began taking D.S. and his two siblings to stay with them and their three children for two to three day periods (juv. ct. hearing 146).

In early December 1994, D.S. and his siblings moved in with defendant and his family (id. at 55). On February 1, 1995, defendant and his wife undertook legal guardianship of D.S. and his two siblings (id.).

Ms. Fisk began reporting problems with D.S. in early March 1995. She reported to various health care professionals that D.S. head-banged, exhibited seizure-like activity where he would fall to the floor, screamed, and forced himself to lose consciousness (Juv. Ct. Hearing at 60-68, 92, 97, 99, 106-107, 110-11, 114, 140, 156-57, 166).

Facts available prior to the 1995 preliminary hearing.

At approximately 4:00 p.m. on March 19, 1995, defendant and his wife brought D.S. to the Primary Children's Medical Center emergency room in cardiorespiratory arrest; doctors successfully resuscitated him (Tr. July 18, 1995 at 11). A CT scan revealed bleeding over the surface of D.S.'s brain and substantial retinal bleeding (id. at 25, 27-28). D.S.'s brain swelled so much that the swelling separated the sutures in his skull (id. at 25-26). These injuries indicated that D.S. had suffered a violent shaking within the last week (id. at 35-36, 57-58).

D.S. had additional injuries of varying ages. D.S. had

other retinal hemorrhages that appeared older than the fresh hemorrhages observed on March 19th (Tr. July 18, 1995 at 66). D.S. had linear bruises of different ages spanning his forehead (Tr. July 18, 1995 at 15-16, 39). These bruises resulted from having his head forcefully pressed against a linear grid and not from head-banging (id. at 16).

D.S. had a pinching bruise on both the inside and outside of his left ear lobe (id. at 17). The bruise could not have resulted from a blow, unless D.S. had received a blow on the outside of the earlobe, then a blow in the same place with the ear folded over (id. at 62).

D.S. had several bruises of varying ages indicating that he had been grabbed forcefully. Those included bruises on his right forearm, a bruise above the right elbow, three circular bruises on his right leg, circular bruises on his left and right elbows, and circular bruises on the lateral aspect of his left knee (id. at 18-24, 62-64).

D.S. had bruises over the bony prominences of back caused by having his back pushed against a hard surface (id. at 20).

A CT scan of D.S.'s abdomen revealed calcified tissue in front of the vertebrae (id. at 26-27). The calcified tissue was scarring from a prior severe extension or compression of the spine, as in shaking D.S. or folding his body, which causes the tissue to tear and bleed (R. 27, 36-37).

Finally, D.S. appeared unusually small for a two-year-old (id. at 24).

The record contains three reports of interviews with defendant and Ms. Fisk conducted after they brought D.S. to the emergency room. In those reports, both defendant and Ms. Fisk agreed that Ms. Fisk fed D.S. oatmeal sometime in the afternoon before they brought D.S. to the hospital March 19th (R. 124, 126, 131). However, they gave varying accounts about what happened after D.S. finished eating the oatmeal. They reported to a social worker that, after Ms. Fisk fed D.S., D.S. began throwing himself down, so defendant put D.S. in another room and periodically checked on D.S. (R. 125). On one of these checks, defendant discovered that D.S. had stopped breathing (id.)

Defendant reported to an investigating officer that Ms. Fisk was feeding D.S. oatmeal in the bedroom when D.S. began throwing up and screaming (R. 127). Defendant claimed that he took D.S. out of his high chair and put D.S. on his side so that he would not aspirate the vomit (id.). Defendant was observing D.S.'s breathing when D.S. stopped breathing (id.). The report does not state that defendant was alone in the room with D.S. when D.S. stopped breathing.

Ms. Fisk reported to one of the investigating officers that, after D.S. finished eating, he screamed and passed out (R. 131). D.S. came to, fell over once, then made himself pass out again (id.). According to Ms. Fisk, she told defendant to watch D.S., then left the room (R. 131, 137-38). The next thing she knew, defendant came out of the room with D.S. and told her to get the keys so that they could take D.S. to the hospital (R. 137). She

did not specify how much time passed between the time she left the room and when defendant brought D.S. out.

At the 1995 preliminary hearing, the State relied on D.S.'s old and new injuries to support its child abuse charges against defendant and Ms. Fisk. A medical expert testified about the approximate age of the injuries, and that they could not have resulted from accidental trauma (Tr. July 18, 1995 at 20-22, 26-28, 38-40, 57-58, 66-67). However, she could testify only that the newer injuries occurred within one week prior to March 19th, and the older ones occurred more than one week before that date (id. at 20-22, 26, 57-58). Most importantly, she testified only that the massive brain injury that doctors observed on March 19, 1995, could not be more than one week old (id. at 26).

An investigating officer testified that defendant reported that only he and Ms. Fisk cared for the children (id. at 105). The officer testified that she "assumed" that defendant and Ms. Fisk were D.S.'s primary caregivers (id. at 105-106). However, she could not testify about the number of hours during the day defendant was home with the children, and she acknowledged that she asked no questions on that subject (id. at 106-107).

The magistrate found the evidence sufficient to establish probable cause to believe that D.S.'s injuries were intentionally inflicted rather than accidentally inflicted (id. at 113). However, the magistrate found that the evidence failed to establish that either defendant or his wife caused those injuries (id.). Consequently, the magistrate dismissed the information at

the conclusion of the July 18, 1995 preliminary hearing.

Facts available after the 1995 preliminary hearing.

Approximately four months after the 1995 preliminary hearing dismissal, during November 1995 juvenile court proceedings, Ms. Fisk gave her first sworn testimony about the events of March 19, 1995 (Juv. Ct. Hearing at 54).[3] For the first time, she included a detailed chronology of the critical period before she and defendant took D.S. to the hospital. Ms. Fisk testified that she began feeding D.S. in the bedroom at approximately 3:15 p.m. while defendant sat in the room (id. at 72-74). She finished feeding D.S. by 3:30 p.m. (id. at 73). After she finished, she began brushing D.S.'s teeth when D.S. screamed until he passed out (id. at 74). She took D.S. out of the high chair, put him on the floor, then left him in the room with defendant (id.). Approximately thirty minutes later, defendant brought D.S. out of the bedroom in cardiac arrest; he and Ms. Fisk took D.S. to the emergency room (id. at 75-77). This is the first evidence in the record establishing the thirty-minute period during which defendant had exclusive control over D.S.

Also sometime after the 1995 preliminary hearing, the Salt Lake District Attorney's office turned the case over to the Utah Attorney General's Child Abuse Unit.[4] The attorney general's

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[3]Defendant also testified; however, defendant has not included his juvenile court testimony in this record (Juv. Ct. Hearing at 195)

[4]The record does not clearly establish when the Utah Attorney General's office received the case.

office developed evidence in addition to that obtained at the juvenile court proceedings. Most importantly, the attorney general's office obtained an expert opinion from Dr. Marion Walker, a neurosurgeon at Primary Children's Medical Center (R. 116). Dr. Walker's May 1, 1997 opinion letter is attached as addendum B. Dr. Walker noted that a CT scan performed on March 3, 1995 showed no evidence of brain damage (id.). However, at the time of his March 19th admission, D.S. had fresh bleeding over the surface of the brain and retinal hemorrhages in the eye grounds (id.). Dr. Walker opined that D.S. could not have sustained this massive brain injury at the time Ms. Fisk claimed that D.S. was awake, alert, eating, and fussing (id.). The injury must have occurred sometime between that time and when defendant came out of the bedroom with D.S. in cardiorespiratory arrest (id.).[5]

Dr. Walker concluded that only a shaking and bashing could have caused these injuries (R. 117). He elaborated that even a prior head trauma could not explain the magnitude of the injury to D.S.'s brain (R. 116).

On the strength of Ms. Fisk's sworn testimony and Dr. Walker's expert opinion, the State refiled child abuse charges against defendant for the March 19, 1995 shaking (R. 8). In response to defendant's Brickey motion, the State proffered this additional evidence to the same magistrate who had previously

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[5]A follow-up MRI study performed November 1995 showed a substantial loss of brain matter caused by the March 19th injury (id.).

dismissed the child abuse charge for insufficient evidence (R. 264-65). The State contended that this evidence now established that defendant had exclusive control over D.S. when D.S. suffered the shaking that destroyed his brain (R. 266-68).

The magistrate stated that the case could have been bound over if the State had presented this additional evidence at the 1995 preliminary hearing (R. 315, 360). The magistrate further found that the State could have discovered the additional evidence prior to the 1995 preliminary hearing (R. 359-361). However, he also found that the State acted in good faith in presenting its case at the 1995 preliminary hearing, and that Dr. Walker's testimony "may" be "new evidence" within the meaning of Brickey (R. 315, 360-61). Consequently, the magistrate ruled that the State could proceed against defendant on the child abuse charge for the March 19, 1995 shaking (R. 361). Copies of the magistrate's oral ruling (R. 315) and his Findings of Fact and Conclusions of Law are attached as addenda C and D respectively.

The argument sections contain additional relevant facts.

SUMMARY OF THE ARGUMENT

1. Magistrate's Brickey ruling. The magistrate correctly interpreted the "other good cause" requirement in State v. Brickey, 714 P.2d 644 (Utah 1986), to include the original prosecutor's innocent underestimation of the necessary evidence to establish probable cause. First, dicta in Brickey clearly anticipates that such an underestimation amounts to "good cause" as the supreme court used that phrase.

Second, the magistrate's interpretation furthers the purposes of Brickey without permitting defendant to escape prosecution for a well-grounded claim. Brickey merely protects a defendant against State abuses such as refiling groundless claims in the hope that some magistrate will eventually bind a defendant over for trial, or presenting a minimal case at the preliminary hearing with the purpose of inappropriately hiding evidence from a defendant. However, when a prosecutor fails to discover or present evidence because she has underestimated the evidence necessary to establish probable cause, the abuses against which Brickey protects are not implicated.

Moreover, the magistrate correctly interpreted the "new evidence" requirement in Brickey to include the additional evidence that the State proffered in this case. The most logical definition of "new evidence" as Brickey uses that phrase is evidence not presented at a prior preliminary hearing that the State did not hold back in order to deceive defendant about its existence. The additional evidence proffered in this case meets that criteria.

2. Magistrate's finding of good faith. For the first time on appeal, defendant contends that there is no basis in the evidence to support the magistrate's finding that the prosecutor acted in good faith. Defendant waived this argument because he failed to present it to the magistrate.

Alternatively, the record contains sufficient evidence to support that finding. Therefore, the magistrate did not clearly

err in making it.

ARGUMENT

POINT I

THE MAGISTRATE PROPERLY PERMITTED THE STATE TO RECHARGE DEFENDANT FOR CAUSING D.S.'S MASSIVE BRAIN INJURIES BECAUSE THE STATE INNOCENTLY UNDERESTIMATED THE PROOF NECESSARY TO ESTABLISH PROBABLE CAUSE AT THE 1995 PRELIMINARY HEARING, AND BECAUSE THE STATE PROFFERED NEW EVIDENCE ESTABLISHING PROBABLE CAUSE TO BELIEVE THAT DEFENDANT CAUSED THOSE INJURIES

A preliminary hearing magistrate must dismiss an information and discharge a defendant if the State's evidence fails to establish probable cause to believe that a defendant committed the charged crime. Utah R. Crim. P. 7(h)(3). However, "[t]he dismissal and discharge do not preclude the State from instituting a subsequent prosecution for the same offense." Id.

Although the rule's plain language places no restrictions on the State's ability to refile a dismissed charge, the Utah Supreme Court has held that state due process does. In State v. Brickey, 714 P.2d 644 (Utah 1986), the supreme court held that, after a magistrate has dismissed a charge for insufficient evidence, state due process precludes refiling the same charge unless the State shows that it has new or previously unavailable evidence, or that other good cause exists for refiling. Id. at 647.

In this case, the State proffered the following evidence in addition to that presented at the 1995 preliminary hearing: 1) Ms. Fisk's sworn testimony that finally detailed the events that occurred between 3:00 p.m. and 4:00 p.m. on March 19, 1995; and

2) Dr. Walker's opinion that D.S. could not have been alert, eating, and fussing at 3:00 p.m. if he had already been shaken (R. 116, 264-66, Juv. Ct. Hearing at 72-77). Based on that evidence, the State contended that it could now establish that defendant had exclusive control over D.S. at the time that D.S. suffered the shaking that destroyed his brain (R. 266-68).

The same magistrate who previously refused to bind defendant over at the conclusion of the 1995 preliminary hearing permitted the State to proceed on the new child abuse charge. The magistrate found that the State could have discovered evidence establishing defendant's exclusive control over D.S. when D.S. was shaken and that the evidence would have resulted in a bindover at the 1995 preliminary hearing (R. 360-61). However, the magistrate found that the State acted in good faith in its presentation at the 1995 preliminary hearing and without any intent to deceive either the court or defendant (R. 360-61). The magistrate also concluded that Dr. Walker's testimony "may" amount to new evidence (R. 361).

Defendant contends that acting in good faith cannot, as a matter of law, satisfy the Brickey "good cause" prerequisite to refiling a previously dismissed charge. Appellant's Brief at 9-11. Defendant also contends that the magistrate incorrectly interpreted "new evidence" to include Dr. Walker's opinion testimony. Appellant's Brief at 5 n.3.

Normally, the appellate courts review a lower court's good cause determination for an abuse of discretion. See, e.g. State

v. Thorup, 841 P.2d 746, 747 (Utah App 1992) (trial court's determination whether good cause exists for withdrawing guilty plea reviewed for abuse of discretion), cert. denied, 853 P.2d 897 (Utah 1993); State v. Pursifell, 746 P.2d 270, 272 (Utah App. 1987) (indigent defendant must show good cause for appointment of substitute counsel; decision whether to appoint substitute counsel review for abuse of discretion). However, this case does not raise issues about whether the specific facts of this case satisfy the legal standards articulated in Brickey. Rather, defendant challenges only the magistrate's legal interpretations of "other good cause" and "new evidence." Therefore, defendant's claim presents a legal question reviewed for correctness. See State v. Pena, 869 P.2d 932, 935-36 (Utah 1994) ("legal determinations" are rules applied uniformly to similarly situated persons and are reviewed for correctness).

The magistrate correctly interpreted "other good cause" and "new evidence," as Brickey uses those phrases, and properly ruled that "other good cause" and "new evidence" justified refiling the child abuse charge against defendant. Brickey admittedly provides little detail on the meanings of "new evidence," "previously unavailable evidence," or "other good cause." Similarly, no additional cases from either the supreme court or this Court have clarified the circumstances that satisfy the Brickey restrictions.

Brickey does state in dicta, however, that "other good cause" can mean an innocent miscalculation of the necessary

quantum of evidence to obtain a bindover. Id. at 647-48 n. 5. That dicta applies to this case. In the context of Brickey, this dicta specifically refers to a prosecutor who has additional evidence, but does not present it because she has miscalculated how much evidence is necessary to establish probable cause. The Brickey court cited to Harper which referred to a prosecutor's innocent decision not to put on some of its evidence:

> It was not intended, nor is it expected, in order to show probable cause, that in all cases the prosecution must present its entire case before the examining magistrate. That is a decision to be reached by the district attorney . . . in the event the prosecutor miscalculates and fails to present sufficient evidence to show probable cause to bind over the accused, but possesses other witnesses whose testimony would strengthen his showing, it is clearly within the discretion of the examining magistrate to grant the state a continuance for that purpose.

Harper v. District Court, 484 P.2d at 897 (emphasis added).

In this case, the original prosecutor's insufficient investigation led to the dismissal of the first information. The magistrate found that the original prosecutor could have discovered the evidence that established that defendant shook D.S. through the exercise of ordinary diligence, and that that evidence would have resulted in a bindover at the conclusion of the 1995 preliminary hearing (R. 359-60). However, the magistrate also found that the prosecutor's "failure to discover the evidence and the failure to present more compelling evidence regarding the timing of the injury and the exclusivity of control over the victim by Michael Fisk was done innocently and in good faith" (id.) (emphasis added). Regardless of whether the

innocent miscalculation results from insufficient investigation or failure to produce evidence that the prosecutor has already obtained, it is the prosecutor's innocent underestimation of the critical evidence necessary to establish probable cause that creates the "good cause" anticipated by the Brickey and Harper dicta.

There is no substantive difference between the Brickey dicta and prosecutor's good faith actions in this case. Consequently, the magistrate correctly ruled that "other good cause" within the meaning of Brickey includes the prosecutor's innocent underestimation of the necessary evidence to bindover a defendant, and that "good cause" for refiling the charges existed in this case (R. 360-61). State v. Brickey, 714 P.2d at 647 n.5 (dicta) (innocent miscalculation establishes other good cause justifying a continuance) (citing Harper v. District Court, 484 P.2d 891, 897 (Okla. Crim. App. 1971) (dicta)); State v. Rivera, 871 P.2d 1023, 1026 n.4 (Utah App. 1994) (dicta) (an innocent miscalculation of the necessary quantum of evidence justifies refiling), rev'd on other grounds, 906 P.2d 311 (Utah 1995).

Moreover, the circumstances in Brickey and the basis for the supreme court's decision also establish that the magistrate correctly interpreted "other good cause" to include an innocent underestimation of the evidence necessary to establish probable cause. The supreme court began its analysis in Brickey by restating the purpose of a preliminary hearing: to ferret out groundless and improvident prosecutions. Id. at 646. The court

noted the importance of this function to protect a defendant from the degradation and expense of trial, to conserve judicial resources, and to promote confidence in the judicial system. The supreme court further reasoned that granting the State unlimited discretion in determining whether to refile charges raised the intolerable specter of the State harassing a defendant who had previously had the charges dismissed for insufficient evidence. Id. at 646-47. Moreover, the dicta interpreting "good cause" to include an innocent miscalculation of the necessary evidence to establish probable cause negatively infers that the State cannot purposefully hold back crucial evidence in an effort to ambush a defendant with it at trial. Id. at 647 n.5.[6]

This reasoning, taken as a whole, establishes that the supreme court fashioned the Brickey rule to protect against two potential abuses: 1) the State harassing a defendant by continually refiling groundless claims; and 2) the State purposefully withholding critical evidence in order to improperly impair a defendant's pre-trial discovery rights.

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[6]Defendant attempts to distinguish the Brickey dicta by contending that it permits only a continuance, not a refiling. Appellant's Brief at 8-9. His analysis ignores this Court's recognition in Rivera that the innocent miscalculation also justifies refiling. It also ignores the context of the dicta. As established in the text, the dicta specifically refers to a prosecutor's innocent failure to produce some of the evidence that it already has. In that circumstance, a continuance provides a sufficient remedy. However, when the State has innocently failed to discover or develop the evidence necessary for a bindover, refiling provides the only sufficient remedy. Contrary to defendant's argument, the "other good cause" anticipated by those cases is the innocent miscalculation, not the remedy for it.

When considered in light of these policy considerations, the magistrate correctly interpreted "other good cause" to include the prosecutor's innocent underestimation of the evidence necessary to establish probable cause. Defendant does not face harassment by the second filing of a groundless claim. To the contrary, the magistrate found that it would have bound the case over if the State had presented the additional evidence at the 1995 preliminary hearing (R. 360). Unlike the prosecutor in Brickey, the State did not present the same evidence to a different magistrate to obtain a bindover; it presented additional evidence to the same magistrate to establish that the claim was not groundless.[7]

Similarly, the magistrate found that the prosecutor did not act maliciously, in bad faith, or with intent to deceive either defendant or the court, and defendant does not contend to the contrary. This case does not present the problem of a prosecutor trying to improperly hide evidence from defendant. Because a

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[7]The magistrate also acknowledged that, based on this evidence, it appeared that defendant had committed a very serious crime (R. 315). Defendant complains that "the fact that this statement was made is unsettling at the least, and perhaps indicative of extraneous considerations influencing the District Court's deliberative process at worst." Appellant's Brief at 13 n.5. Defendant fails to explain how this consideration is extraneous. To the contrary, given the purpose of ferreting out groundless claims, it seems that the magistrate's belief that the claim is well-grounded was important to its Brickey analysis.

Additionally, the magistrate gave defendant the option to have a different magistrate preside at the second preliminary hearing (R. 362). Defendant has exercised that option (R. 366). Therefore, the comment raises no concerns about this magistrate's ability to make an impartial probable cause determination at any subsequent preliminary hearing.

good faith underestimation of the evidence does not implicate the abuses against which Brickey protects, the magistrate correctly concluded that it constitutes "other good cause" within the meaning of Brickey.

Other cases also support the magistrate's ruling. For example, in Chase v. State, 517 P.2d 1142 (Okla. Crim. App. 1973), the prosecutor charged Chase with escape. Id. at 1143. At the initial preliminary hearing, a records officer from the penitentiary testified that Chase was being held for "safekeeping" rather than on a judgment. Id. Consequently, the magistrate dismissed the case. Id. Subsequently, the State discovered that the records officer had made a mistake, and that Chase was being held on a valid judgment. Id. In Chase, as in this case, the prosecutor technically had available to it evidence that would have justified binding Chase over at the original preliminary hearing. However, the Oklahoma Court of Criminal Appeals held that the state could proceed with the second prosecution on the basis of the corrected evidence. Id. at 1143-44.

The Michigan Court of Appeals has gone so far as to permit refilings based on prosecutorial neglect or ineptitude. In People v. Laslo, 259 N.W.2d 448 (Mich. App. 1977), the prosecutor failed at two preliminary hearings to produce witnesses with evidence critical to the probable cause determination. Id. at 450-51. The Michigan court rejected Laslo's argument that it violated due process to permit the third preliminary hearing and

resulting bindover. The Michigan court reasoned that the prosecutor had not engaged in forum shopping and had not failed to produce additional evidence at the final, successful preliminary hearing. Id. at 451. Rather, the court found that the prior failures resulted from nothing more than prosecutorial "ineptness." Id.

Moreover, to support its holding, the Michigan court relied on Jones v. State, 481 P.2d 169 (Okla. Crim. App. 1971): the same case on which the Brickey court relied to limit the State's right to refile charges. Therefore, the Michigan court has interpreted the same rule on which the Brickey court relied to permit refilings when the first dismissal resulted from a prosecutor's mistake. See State v. Vargo, 362 N.W.2d 840, 843-44 (Mich. App. 1984) (no due process bar where prosecutor presented evidence that he did not, but could have presented at first preliminary hearing where failure to present it resulted from neglect rather than deliberate attempt to harass defendant). See also State v. Bacon, 791 P.2d 429, 434-35 (Idaho 1990) (barring the State from refiling requires an affirmative showing of bad faith).

Conversely, defendant cites no case, and the State is aware of none, where a court has rejected a refiling based on an innocent underestimation of the evidence. Furthermore, the cases holding that a prosecutor could not refile charges involve clear prosecutorial abuses. The prosecutors in Brickey and Jones clearly engaged in forum-shopping by presenting the same evidence at the subsequent preliminary hearings before different

magistrates. State v. Brickey, 714 P.2d at 646-48; Jones v. State, 481 P.2d at 171-72. See also People v. Walls, 324 N.W.2d 136, 137-39 (Mich. App. 1982) (State improperly filed new complaint and proceeded before new magistrate based on hearsay evidence ruled inadmissible by first magistrate). The magistrate found that no such abuse occurred in this case.

Nevertheless, defendant argues that "other good cause" cannot mean a prosecutor's good faith underestimation of the evidence. Appellant's Brief at 6-11. According to defendant, "other good cause" exists only when the State produces additional evidence that it could not have discovered at the time of the preliminary hearing through the exercise of ordinary diligence.

Brickey's plain language contradicts defendant's contention that "other good cause" can only mean the discovery of previously undiscoverable evidence. Brickey explicitly permits refiling charges for "other good cause" as an alternative to permitting refiling based on the introduction of new or previously unavailable evidence; it does not define "other good cause" to mean only the reliance on new or previously unavailable evidence. State v. Brickey, 714 P.2d at 647.

More importantly, defendant's interpretation that "good cause" can mean only the discovery of previously undiscoverable evidence divorces Brickey from its intended purpose. Defendant asks for an interpretation of the Brickey rule that seeks no protection against prosecutorial abuse, and defendant had identified no abuse in this case. Instead, defendant seeks to

use Brickey as a sword to obtain a windfall because he had the good fortune to have his case assigned to a prosecutor who, in good faith, underestimated the evidence necessary to obtain a bindover. Contrary to the purpose of the Brickey rule, defendant's interpretation would undermine confidence in the judicial system by allowing him to rely on a technicality to escape prosecution on a charge for which the State has now developed solid evidence. See State v. Brickey, 714 P.2d at 646 (identifying the promotion of confidence in the judicial system as one of reasons a preliminary hearing ferrets out groundless prosecutions).[8]

The magistrate also correctly concluded that the State's additional evidence proffered in support of the new charge constitutes "new evidence" within the meaning of Brickey.[9]

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[8]Defendant also argues that the supreme court rejected relying on the prosecutors' good faith to protect a defendant's due process rights. Appellant's Brief at 10-11 citing State v. Brickey, 714 P.2d at 647. To the extent defendant implies that Brickey has already rejected relying on a prosecutor's good faith underestimation of the evidence, that implication misstates Brickey. The cited portion of Brickey only rejected the State's argument that a prosecutor's good faith exercise of her unfettered discretion in refiling provided sufficient protection for an accused. The supreme court did not hold that the prosecutor's good faith underestimation in presenting the case at a preliminary hearing would not constitute good cause for refiling the same charges.

[9]The magistrate ruled the Dr. Walker's testimony "may" constitute "new evidence" (R. 361). The magistrate did not expressly rule whether the Ms. Fisk's sworn juvenile court testimony detailing the events of the 3:00 p.m. to 4:00 p.m. period constituted new evidence; however, that is the most logical inference from the magistrate's rulings. The magistrate found that the State was proffering evidence that established with more precision the timing of D.S.'s injuries and exclusivity of defendant's control; evidence that would have resulted in a

Defendant argued below that the "new evidence" standard applicable to obtaining a new trial should define what constitutes "new evidence" under Brickey (R. 306-307). Utah R. Civ. P. 59(a)(4). That standard would require the State to prove that the prosecutor could not have discovered the additional evidence proffered to support recharging defendant through the exercise of ordinary diligence. Id.

Brickey contradicts defendant's argument. As defendant conceded below, the standard he advocates applies in the context of a motion for new trial (R. 306-307). However, Brickey recognized that a preliminary hearing, unlike a trial, does not amount to "a full-blown determination of an accused's guilt or innocence," and that, at the preliminary hearing, the State need only present sufficient evidence to establish probable cause that defendant committed the charged crime. State v. Brickey, 714 P.2d at 646. Furthermore, if it innocently fails to present enough of its case, that failure does not preclude refiling the charges. State v. Brickey, 714 P.2d at 647 n.5 (dicta); State v. Rivera, 871 P.2d at 1026 n.4 (dicta).

Brickey only prohibits the State from refiling charges on

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bindover if the State had presented it at the 1995 preliminary hearing (R. 359-61). In any event, Ms. Fisk's sworn testimony, *under any definition, was "new evidence" because it did not exist* at the time of the 1995 preliminary hearing.

However, even if this Court disagrees that the magistrate determined that the State had "new evidence" within the meaning of Brickey, this Court may nevertheless affirm on that basis. See, e.g., State v. South, 924 P.2d 354, 356-57 (Utah 1996) (the appellate courts may affirm the outcome in the trial court on any legitimate basis).

the same evidence or on the basis of evidence that the State improperly held back for reasons other than an innocent miscalculation of the necessary quantum. Therefore, "new evidence" within the meaning of Brickey means nothing more than evidence additional to that presented at the original preliminary hearing that the State did not hold back for some bad faith purpose such as improperly hiding evidence from defendant.[10]

Under this criteria, Ms. Fisk's testimony and Dr. Walker's opinion testimony constitute "new evidence." The evidence is additional to that presented to the same magistrate that previously dismissed the information (Tr. July 18, 1995). The State did not hold back the additional evidence for some unacceptable purpose (R. 360-61). The proffer of this new evidence justifies allowing the State to reprosecute defendant for shaking D.S.

In sum, the magistrate correctly interpreted "good cause" to refile a previously dismissed charge to include a prosecutor's innocent underestimation at the first preliminary hearing of the

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[10]The procedural exigencies of a preliminary hearing also support this definition of "new evidence." Generally, a preliminary hearing must be held within ten days after charging for an incarcerated defendant, and within thirty days after charging for a defendant who it not incarcerated. Utah R. Crim. P. 7(g)(2). This is often insufficient time for the State to complete its entire investigation; the courts have implicitly recognized this by not requiring the State to present its entire case at the preliminary hearing. If, as in this case, the pre-preliminary hearing investigation fails to provide sufficient evidence for a bindover, the State should have the opportunity to refile the charges if further investigation reveals additional evidence. Any other rule would be unworkable under the short period.

evidence necessary to establish probable cause.[11]

POINT II

DEFENDANT WAIVED HIS APPELLATE CLAIM THAT THE MAGISTRATE INCORRECTLY FOUND THAT THE ORIGINAL PROSECUTOR ACTED IN GOOD FAITH BECAUSE DEFENDANT FAILED TO PRESENT THAT CLAIM TO THE MAGISTRATE

Defendant also contends that the magistrate had no evidentiary basis for finding that the original prosecutor acted in good faith in presenting the State's case at the first preliminary hearing. Defendant waived this argument because he never made it to the magistrate.

In his motion to dismiss, defendant argued that the State had not satisfied the Brickey prerequisites to refiling the charges against him because the State's additional evidence did not constitute "new evidence" (R. 99-111). In the course of that argument, defendant contended that the prosecutor's failure to introduce that evidence "indicate[d] that the State misunderstood the best factual way to isolate when the brain injury occurred in relationship to the retinal hemorrhaging, subdermal hematomas, and separating of the sutures" (R. 106). Defendant also argued that the State "may have misunderstood the significance of D.S.'s ability to eat oatmeal, but this is not tantamount to these facts being new or previously unavailable to the State" (R. 108).

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[11]Defendant also argues that the State's right to appeal creates an alternative to refiling. To the extent that defendant implies that the State's right to appeal precludes refiling, the case law does not support his argument. State v. Jaeger, 886 P.2d 53 (Utah 1994) anticipates that the State will refile if it can satisfy the Brickey standard. Id. at 54 ("a decision not to bind over but rather to dismiss brings the case to an abrupt end if the strict requirements of Brickey cannot be surmounted").

Defendant attributed no nefarious motive to the prosecutor's failure; to the contrary, he accepted that her misunderstanding of the evidence led to the failure.

The State countered that defendant's argument described nothing more than a prosecutor who had innocently miscalculated the evidence (R. 270). The State argued, both in its memorandum and at the oral argument, that the good faith prosecutor's good faith constituted "other good cause" to permit refiling the charges (R. 270-72, 392).

Defendant responded to this argument only by arguing that the prosecutor's good faith was insufficient as a matter of law to satisfy the "other good cause" requirement (R. 309-10, 388-89). However, defendant never argued alternatively that the prosecutor acted in bad faith or that the State had failed to prove that she acted in good faith. Even when the magistrate agreed in open court with the State's representation that the original prosecutor acted in good faith, defendant made no objection to the soundness of that conclusion.

For the first time on appeal, defendant argues in the alternative that the magistrate's conclusion that the prosecutor acted in good faith is unsound. Defendant could have made this argument to the magistrate, but chose not to. Defendant cannot seek reversal of the trial court on the basis of an argument that he did not make to the magistrate. See, e.g., State v. Bywater, 748 P.2d 568, 569 (Utah 1987) (where Bywater accepted without challenge the trial court's reasons for imposing the sentence

that it imposed on him, he could not challenge the sufficiency of the findings to support that sentence); State v. Webb, 790 P.2d 65, 70 (Utah App. 1990) (appellate courts will not consider arguments raised for first time on appeal).

Alternatively, the record rebuts defendant's argument that the magistrate clearly erred in finding that the original prosecutor acted in good faith. First, the State proffered that the prosecutor had acted in good faith, and the magistrate agreed with that proffer (R. 270, 392). Defendant never suggested that the proffer was insufficient. To the contrary, defendant implicitly accepted the State's premise that the original prosecutor innocently underestimated the evidence by arguing that she misunderstood it. The magistrate could legitimately conclude that defendant did not dispute the original prosecutor's good faith.

Second, the magistrate did not need an additional evidentiary basis for his finding that the prosecutor acted in good faith at the preliminary hearing. The same magistrate who made that finding presided over the preliminary hearing. He had already observed the prosecutor's efforts to obtain a bindover and did not need additional testimony from the prosecutor about her motives.

Moreover, the Statement of Facts establishes that the original prosecutor presented the State's case in good faith under the circumstances known to the prosecutor at that time. The medical evidence established a series of injuries of varying

ages. The investigative reports gave conflicting accounts of defendant's activities during the critical period. Indeed, those reports obscure the critical timing of defendant's exclusive control over D.S. (R. 125, 127, 131, 137-38).

Given these conflicting accounts and the evidence of multiple injuries, the magistrate did not clearly err by finding that the original prosecutor acted in good faith when she underestimated the importance of proving defendant's exclusive control over D.S. during a period that the investigative reports had not yet clearly identified. State v. Pena, 869 P.2d 932, 935 (Utah 1994) (questions of fact reviewed for clear error only).

CONCLUSION

For the reasons argued above, the State asks this Court to affirm the magistrate's order denying defendant's motion to dismiss.

RESPECTFULLY SUBMITTED this 26th day of May 1998.

JAN GRAHAM
Attorney General

Thomas Brunker

THOMAS BRUNKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed by first-class mail, postage pre-paid, to the following on this 26th day of May, 1998:

WALTER F. BUGDEN
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Salt Lake City, Utah 84107
ATTORNEYS FOR APPELLANT

Thomas Burnside

ADDENDA

ADDENDUM A

76-5-109. Child abuse.

(1) As used in this section:

(a) "Child" means a human being who is 17 years of age or less.

(b) "Physical injury" means an injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other contusion of the skin;

(ii) a minor laceration or abrasion;

(iii) failure to thrive or malnutrition; or

(iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in this section.

(c) "Serious physical injury" means any physical injury or set of injuries which seriously impairs the child's health, or which involves physical torture or causes serious emotional harm to the child, or which involves a substantial risk of death to the child, including:

(i) fracture of any bone or bones;

(ii) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child's head to impact with an object or surface;

(iii) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child;

(iv) any injury caused by use of a deadly or dangerous weapon;

(v) any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions;

(vi) any damage to internal organs of the body;

(vii) any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function;

(viii) any injury which creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ;

(ix) any conduct which causes a child to cease breathing, even if resuscitation is successful following the conduct; or

(x) any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

(2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

(a) if done intentionally or knowingly, the offense is a felony of the second degree;

(b) if done recklessly, the offense is a felony of the third degree;

(c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:

(a) if done intentionally or knowingly, the offense is a class A misdemeanor;

(b) if done recklessly, the offense is a class B misdemeanor;

(c) if done with criminal negligence, the offense is a class C misdemeanor.

(4) Criminal actions under this section may be prosecuted in the county or district where the offense is alleged to have been committed, where the existence of the offense is discovered, where the victim resides, or where the defendant resides.

UTAH RULES OF CIVIL PROCEDURE

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

UTAH RULES OF CRIMINAL PROCEDURE

Rule 7. Proceedings before magistrate.

(a) When a summons is issued in lieu of a warrant of arrest, the defendant shall appear before the court as directed in the summons.

(b) When any peace officer or other person makes an arrest with or without a warrant, the person arrested shall be taken to the nearest available magistrate for setting of bail. If an information has not been filed, one shall be filed without delay before the magistrate having jurisdiction over the offense.

(c) (1) If a person is arrested in a county other than where the offense was committed the person arrested shall without unnecessary delay be returned to the county where the crime was committed and shall be taken before the proper magistrate under these rules.

(2) If for any reason the person arrested cannot be promptly returned to the county and the charge against the defendant is a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the person arrested may state in writing a desire to forfeit bail, waive trial in the district in which the information is pending, and consent to disposition of the case in the county in which the person was arrested, is held, or is present.

(3) Upon receipt of the defendant's statement, the clerk of the court in which the information is pending shall transmit the papers in the proceeding or copies of them to the clerk of the court for the county in which the defendant is arrested, held, or present. The prosecution shall continue in that county.

(4) Forfeited bail shall be returned to the jurisdiction that issued the warrant.

(5) If the defendant is charged with an offense other than a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the defendant shall be taken without unnecessary delay before a magistrate within the county of arrest for the determination of bail under Section 77-20-1 and released on bail or held without bail under Section 77-20-1.

(6) Bail shall be returned to the magistrate having jurisdiction over the offense, with the record made of the proceedings before the magistrate.

(d) The magistrate having jurisdiction over the offense charged shall, upon the defendant's first appearance, inform the defendant:

(1) of the charge in the information or indictment and furnish a copy;

(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;

(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;

(4) of rights concerning pretrial release, including bail; and

(5) that the defendant is not required to make any statement, and that the statements the defendant does make may be used against the defendant in a court of law.

(e) The magistrate shall, after providing the information under paragraph (d) and before proceeding further, allow the defendant reasonable time and opportunity to consult counsel and shall allow the defendant to contact any attorney by any reasonable means, without delay and without fee.

(f) If the charge against the defendant is a misdemeanor, the magistrate shall call upon the defendant to enter a plea.

(1) If the plea is guilty, the defendant shall be sentenced by the magistrate as provided by law.

(2) If the plea is not guilty, a trial date shall be set. The date may not be extended except for good cause shown. Trial shall be held under these rules and law applicable to criminal cases.

(g) (1) If a defendant is charged with a felony, the defendant may not be called on to enter a plea before the committing magistrate. During the initial appearance before the magistrate, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in the district court.

(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

(h) (1) A preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.

(2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(3) If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.

(i) At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded. On the request of either party, the magistrate may order all spectators to be excluded from the courtroom.

(j) (1) If the magistrate orders the defendant bound over to the district court, the magistrate shall execute in writing a bind-over order and shall transmit to the clerk of the district court all pleadings in and records made of the proceedings before the magistrate, including exhibits, recordings, and any typewritten transcript.

(2) When a magistrate commits a defendant to the custody of the sheriff, the magistrate shall execute the appropriate commitment order.

(k) (1) When a magistrate has good cause to believe that any material witness in a pending case will not appear and testify unless bond is required, the magistrate may fix a bond with or without sureties and in a sum considered adequate for the appearance of the witness.

(2) If the witness fails or refuses to post the bond with the clerk of the court, the magistrate may commit the witness to jail until the witness complies or is otherwise legally discharged.

(3) If the witness does provide bond when required, the witness may be examined and cross-examined before the magistrate in the presence of the defendant and the testimony shall be recorded. The witness shall then be discharged.

(4) If the witness is unavailable or fails to appear at any subsequent hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial in lieu of the personal testimony of the witness.

ADDENDUM B

DIVISION OF PEDIATRIC NEUROSURGERY

PRIMARY CHILDREN'S
MEDICAL CENTER

THE UNIVERSITY OF UTAH
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May 1, 1997

MR. CRAIG BARLOW
ATTORNEY GENERAL'S OFFICE
236 STATE CAPITOL
SALT LAKE CITY, UT 84114

Re: Daniel Alex Shepherd

Dear Mr. Barlow:

As per your request, I have reviewed the medical records regarding Daniel Shepherd. Briefly summarized, Daniel was a two year old male who was brought to the Emergency Room at Primary Children's Medical Center on March 19, 1995 comatose from a severe head injury. As you are aware, there is a pre-existing CT scan from March 3, 1995 which does not show any evidence of brain damage. At the time he was admitted to PCMC on March 19, 1995 he had fresh bleeding over the surface of his brain and retinal hemorrhages seen in his eye grounds. This combination of injuries is highly indicative of a shaking injury.

Information from Daniel's caregivers indicates that in the morning of March 19, 1995 he was noted to be awake, alert and was eating. He was noted to be fussy but there was no other evidence of illness. At approximately 4:00pm on March 19, 1995 his father came from a closed room with Daniel in his arms and Daniel was cyanotic and not breathing. He was brought to PCMC Emergency Room in this condition.

The fact that Daniel was able to be awake, alert and eating on the morning of March 19, 1995 indicates that he had not yet sustained a massive brain injury. That is to say after the injury occurred this child would not have been able to be awake or conscious. The fact that he was noted to be awake and responsive earlier simply means the injury had not yet occurred. Based on the information available to me, Daniel's massive brain injury occurred after he was seen eating and fussing and within hours to minutes of his cyanotic and apneic condition at approximately 4:00pm.

Daniel has no other medical illness and no other injuries which would explain deterioration from a pre-existing condition. Even if he had prior trauma to his head it would not explain the magnitude of injury that was seen at the time of his admission to the hospital. His follow up MRI study November 1995 shows significant loss of brain substance (brain atrophy) secondary to the global injury that he sustained to his brain on March 19, 1995.

111

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DIVISION OF PEDIATRIC NEUROSURGERY

It is very unlikely and almost impossible for the injuries observed on the March 21, 1995 CT scan and November 1995 MRI study to have been sustained by any other mechanism other than shaking and bashing. The nature of the retinal hemorrhages and the location of the bleeding within and on the surface of his brain is so highly consistent with shaking injury that there is essentially no other explanation.

I hope this information is helpful. Please let me know if I can provide any further information to you.

Sincerely yours,

Marion L. Walker, M.D., F.A.C.S., F.A.A.P.
Professor and Head
Division of Pediatric Neurosurgery
University of Utah
Primary Children's Medical Center

dj

ADDENDUM C

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

* * *

ORIGINAL

THE STATE OF UTAH, Plaintiff, -vs- MICHAEL & MELISSA FISK, Defendants.

Case No. 971001743 FS

BENCH DECISION, 6-30-97

BE IT REMEMBERED that on the 30th day of June, 1997, at 9:00 o'clock a.m., this cause came on for hearing before the HONORABLE STEPHEN HENRIOD, District Court, without a jury in the Salt Lake County Courthouse, Salt Lake City, Utah.

APPEARANCES:

For the State: CRAIG BARLOW
Attorney at Law

For the Defendant: CRAIG BARLOW
Attorney at Law

CAT by: CARLTON S. WAY, CSR, RPR

PROCEEDINGS

THE COURT: This is a troubling case. And while this isn't addressed in Brickey, it probably isn't relevant for me to even consider it. And at this point and stage, it appears that Mr. Fisk has committed a serious crime, and that's something that you have to know weighs on any judge that's looking at a situation like this as the Brickey analysis goes forward.

There is no question in my mind but that the facts existed and were discoverable upon which this case could have been bound over after the original preliminary hearing. At the same time, I don't see any bad faith on the part of the State whatsoever.

What I come down to is a combination of things: One is, I don't think what the opinion writer in Brickey meant when the word "unavailable" was used is what we would normally think of as "unavailable" would mean. And as a straight matter of definition, "unavailable" would mean that the evidence couldn't have been ferreted out. I think it could have. I think what they mean is what should the State have known, what ought the State have known?

Clearly, the State at the time of preliminary hearing, didn't have Dr. Walkers' opinion. And for whatever reason -- and I think we are talking about competence here, frankly -- the State didn't seem to know about the facts limiting the period of the injury from the eating of the oatmeal for a short period of time after that and Mr. Fisk's proximity to the child during that time period. In criminal cases, there are appeals raised on ineffectiveness of counsel for the Defendant. I think probably what we have here is ineffective counsel for the State. And I think that amounts to newly discovered evidence on the part of Dr. Walker and/or its cause to a limited extent.

I am going to allow this case to go forward on Count I in the Information against Mr. Fisk, only. I think all the rest of it is precluded by the ruling that was made in the original preliminary hearing.

So that's my ruling.

MR. BARLOW: For clarification, Your Honor: Do we then have a bindover or do we --

MR. BUGDEN: Well, there can't be a bindover from that.

THE COURT: You have to have another

preliminary hearing.

MR. BARLOW: Okay, that's just what I was --

THE COURT: And I'm not sure whether that should be in front of me at this stage or not. Clearly, this hearing had to be in front of me. And I don't know. The case was filed in Murray; wasn't it?

MR. BUGDEN: I don't know.

MR. BRASS: It got sent to Murray, excuse me, the way it works --

THE COURT: It was spun out.

MR. BRASS: -- geographical.

THE COURT: What do you think, Mr. Barlow, where should we schedule it?

MR. BARLOW: Well, I'm certainly comfortable having it in front of you, Your Honor. I don't know that there is -- I guess I am concerned that we not have a legal issue about whether you should hear it or some other judge should hear it.

THE COURT: What's the Defense perspective? What is fairer to Mr. Fisk, to have another hearing in front of me when all this has already gone on or to have a fresh face?

MR. BARLOW: I think that is a fair way

ADDENDUM D

IN THE THIRD DISTRICT COURT, DIVISION II

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff v. MICHAEL JAMES FISK, III MELISSA FISK, Defendants.	: : : : : : :	FINDINGS OF FACT AND CONCLUSIONS OF LAW 971001742FS Case No. 971001742FS Judge Stephen Henroid

A hearing on this case was held June 30, 1997. Michael Fisk was present and represented by Walter F. Bugden, Jr.; Melissa Fisk was present and represented by Edward K. Brass; the State was represented by Craig L. Barlow, Assistant Attorney General. This case was originally filed as a one-count information against both Defendants charging child abuse, a second-degree felony and alleging that on or about between March 1, 1995, and March 19, 1995, the Defendants, having the care and custody of Daniel Shepherd, intentionally or knowingly caused or permitted another to inflict serious physical injury upon said child. The preliminary hearing was held July 18, 1995. At the conclusion of the preliminary hearing, the Court ruled that the injuries to the victim were non-accidental but that there was insufficient evidence to show that the defendants caused the injury and dismissed the information. At the July 18, 1995 preliminary

hearing, the State was represented by the Salt Lake District Attorney's Office. In 1997, the State of Utah, through the Utah Attorney General's Office filed a second information against these Defendants charging various crimes of child abuse during the same time as was alleged in the first information. An initial hearing was held May 5, 1997, to determine if the case warranted further examination by the Court under State v. Brickey, 714 P.2nd 644 (Utah, 1986). The parties have submitted memoranda addressing the filing of new charges. The Court has considered these memoranda and heard arguments from Counsel. Based on the memoranda, the arguments of Counsel, the Court's independent review of the record, and the Court's familiarity with the case, because of the first preliminary hearing, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. There is probable cause to believe that a child, Daniel Shepherd, was injured by non-accidental trauma on or about March 19, 1995.

2. Information about the injuries to the child, the timing of the injuries, and the exclusivity of control of Michael Fisk over the child when the injury likely occurred was available to the State before the preliminary hearing in July, 1995.

3. The evidence presented by the State at the July 18, 1995, preliminary hearing was not sufficient to show probable cause that the injuries were committed by one of the Defendants.

4. Information, by way of proffer, has now been presented to the Court which indicates,

with more precision than was offered at the preliminary hearing, the timing of the injuries to the victim and the exclusivity of control over the victim by Michael Fisk during the period of time when the injuries most likely occurred.

5. Presentation of the evidence by the State at the July 18, 1995, was done in good faith. However, the Court finds that the prosecutor failed to discover facts which through the exercise of ordinary diligence could have been discovered; failed to present critical evidence which could have established when the injury was inflicted and by whom the injury was inflicted.

6. The Court further finds that the facts existed and were discoverable through ordinary diligence upon which this case could have been bound-over after the original preliminary hearing. However, the failure to discover the evidence and the failure to present more compelling evidence regarding the timing of the injury and the exclusivity of control over the victim by Michael Fisk was done innocently and in good faith.

Based on the foregoing Findings of Fact, the Court enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The State failed to present sufficient evidence at the July 18, 1995, preliminary hearing to show probable cause that the injury to the victim was caused by Michael Fisk.

2. The failure to present sufficient evidence of probable cause regarding who

committed the crime was not done in bad faith, maliciously, or with an intent to mislead the Court or defense counsel. Rather, it appears and the court concludes that facts which existed at the time of the first preliminary hearing were discoverable in the exercise of ordinary diligence, but were not presented as evidence at the first preliminary

3. The testimony of Dr. Marion Walker may amount to newly discovered evidence or good cause.

4. The State's good faith failure to present discoverable evidence showing more precise timing of the victim's injuries and the exclusivity of control of the victim by Michael Fisk together with the State's current proffer regarding the timing of the injury and the exclusivity of control by the defendant over the victim constitutes "other good cause" as discussed in State v. Brickey 714 P.2nd 644 (Utah 1986).

5. The Court concludes that Count 1 of the second information charging Michael Fisk with child abuse, a second degree felony, may be presented to a magistrate consistent with State v. Brickey 714 P.2nd 644 (Utah 1986) to determine if that charge should be bound over for trial.

6. The additional charges of the second information, that is, Counts 2, 3, 4, and 5 encompass the same period of time as was charged in the first information. These additional charges could have been separated when the first information was filed and therefore, filing them as separate charges is prohibited by the doctrine of single criminal episode..

7. Counts 2, 3, 4, and 5 are dismissed and the State is barred from refiling them, absent

an appeal by the State and reversal of this decision by the Court of Appeals.

8. The Defendant Michael Fisk, through his counsel, may elect to have evidence in support of count 1 of the second information presented before this Judge or may choose to have another magistrate hear the additional evidence. If the Defendant elects to have another judge or this Judge hear additional evidence regarding count 1, the Defendant must make that election on the record and the Court will make a minute entry stating the election in light of State v. Brickey.

9. This case appears to be a matter of first impression in its application of State v. Brickey. The interests of justice and judicial economy will be served if this matter is reviewed by interlocutory appeal. The Court concludes that no prejudice to either the State or the defendant Michael Fisk will occur if an appeal is taken to the Utah Court of Appeals.

Dated this 22 day of July, 1997.

Judge Stephen Henroid

Approved as to form:

Craig L. Barlow
Assistant Attorney General

Walter F. Bugden, Jr.
Attorney for Michael Fisk