

IN THE  
UTAH SUPREME COURT

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STATE OF UTAH,  
*Plaintiff/Appellant,*

v.

KYLI JENAE LABRUM  
*Defendant/Appellee.*

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Brief of Appellee

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On appeal from dismissal of information charging ten counts of rape, a first-degree felony, and one count of forcible sexual abuse, a second-degree felony, in the First Judicial District, Cache County, the Honorable Angela F. Fonnebeck presiding.

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FILED  
UTAH APPELLATE COURTS

FEB 16 2024

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## INTRODUCTION

When the State refiles a charge previously dismissed after a preliminary hearing for insufficient evidence, absent new or previously unavailable evidence, the State must demonstrate good cause for refiling. Contrary to the State's contentions, Ms. Labrum's ten felony counts of rape were quashed because the State failed to present enough evidence to establish each element of rape. When the magistrate decided not to bind over the charges, the State did not ask to reopen to present additional evidence and argument. Rather, the State persisted in playing a game of procedural hopscotch, wherein it moved to amend, reconsider, dismiss, and eventually refile the original rape charges against Ms. Labrum.

Instead of proceeding on the amended charges, the State sought to make a hindsight argument, using the same evidence under a new theory, and placed blame on the actions of a colleague. Because the State has not demonstrated new or additional evidence or good cause to refile, due process bars refiling. Placing limitations on the refiling of criminal charges is

essential to protecting the due process rights of criminal defendants. The State seeks to have its deficient performance excused through the expansion of the “good cause” exception. The remedy created by the Court in *State v. Brickey* appropriately placed limitations on the broad discretion afforded to prosecutors. Without it, those accused of crimes would be vulnerable to the fragile protection of the State’s “good faith.” Malicious or not, the failure to bind Ms. Labrum over on the first-degree rape charges does not justify expanding refiling exceptions. Doing so would encourage a lack of preparation on the part of the State and substantially undermine the interests of justice.

## **STATEMENT OF THE ISSUE**

Whether the trial court properly acted within its discretion when, after finding that the State did not show “good cause” in refiling the case in disregard of applicable refiling requirements, it dismissed the case with prejudice pursuant to a narrow due process exception of the *Brickey* line of cases?

*Standard of Review:* "Absent a clear abuse of that discretion, the decision will not be reversed by this Court." *State v. Rogers*, 2006 UT 85, P 16, 151 P.3d 171. "Interpretation of case law presents a question of law which is reviewed for correctness." *State v. Morgan*, 2001 UT 87, P7, 34 P.3d 767.

*Preservation:* If this Court decides to reach this issue, Appellee does not dispute that the State preserved it.

## **STATEMENT OF THE FACTS**

To the extent that a factual recitation is pertinent, the Statement of the Facts is contained in the State's Brief and will not be reiterated again in Ms. Labrum's brief, except for relevant clarifications, distinctions, or elaborations in the body of her brief.

## **SUMMARY OF ARGUMENT**

The magistrate properly dismissed the refiled charges against Ms. Labrum. The magistrate conducted a thorough review of each of the reasons for dismissal, both analogizing to and distinguishing from precedential case law. Placing limitations on the refiling of criminal charges is essential to protecting due process and preserving judicial resources. The magistrate appropriately balanced the several interests at stake, determining that the State's missteps undermined the fairness required to protect the defendant's due process rights. Accordingly, the State has failed to show that the magistrate's decision does not withstand constitutional scrutiny. And, more importantly, this Court should decline to modify the *Brikey* rule. Doing so would diminish the fragile protections for accused defendants and severely compromise the purposes the rule intended to serve.

## **ARGUMENT**

### **I. THIS COURT SHOULD AFFIRM THE MAGISTRATE'S DISMISSAL OF LABRUM'S REFILED CHARGES BECAUSE THE STATE ENGAGED IN POTENTIALLY ABUSIVE PRACTICES AND LACKED GOOD CAUSE**

Under Utah Rule of Criminal Procedure 7B(c), if at the preliminary hearing, the magistrate does not find that there is probable cause to believe that the charged crimes were committed and that the defendant committed them, the charges must be dismissed. This dismissal does not preclude the State from filing a new prosecution for the same offense; however, our courts have considered what limits the due process clause of the Utah Constitution places on the State's ability to refile charges against the defendant. In *State v. Brickey*, the Court narrowed the circumstances where the charges may be refiled to those where the State can show that "new or previously unavailable evidence has surfaced or that other good cause justified the refiling." *Id.*, 714 P.2d 644, 647 (1986).

The policies and protections underlying the *Brickey* rule provide guidance in understanding the rule and properly defining its intended ambit. One important purpose is "to ensure that the defendant is not harassed by repeated charges on tenuous grounds." See *State v. Morgan*, 2001 UT 87, P13, quoting *State v. Fisk*, 966 P.2d 860, 864 (Utah Ct. App. 1998). In refining the *Brickey* rule, the court has described a number of overzealous actions that may infringe on a defendant's right to due process and justify the presumptive bar to refiling. In *Morgan*, the Utah Supreme Court provided a working list of potentially abusive practices to which the *Brickey* rule is applicable, which included "forum shopping, repeated filings of groundless and improvident charges for the purpose to harass, or withholding evidence. *Id.* at ¶15. In *State v. Redd*, the court added another presumptively abusive practice

to the list, "when a prosecutor refiles a charge after providing no evidence for an essential and clear element of a crime at a preliminary hearing." *Id.*, 2001 UT 113, P20.

In the present case, the State has engaged in presumptively abusive practices which implicate Ms. Labrum's due process rights. First, the State did not present evidence of an essential element of the crime, failing to meet its burden necessary for a bindover on the rape charges. Instead, the State moved to amend the charges. Next, three weeks later, the State asked the Court to reconsider the evidence under an alternative theory of lack of consent. The State admitted that it had no new or additional evidence. The Court heard arguments on the State's motion and declined to reconsider. A few weeks later, the State then moved to dismiss the entire case without prejudice. Three months later, with no new or additional evidence, the State refiled the rape charges against Ms. Labrum. The State's procedural hopscotch has prejudiced Ms. Labrum and is akin to harassment. Additionally, the failure to present the legal theory the State seeks to prosecute is equivalent to withholding evidence. Allowing the state repeated opportunities to sustain its burden of proof interferes with the orderly administration of justice, encourages a lack of preparation on the part of prosecutors, and subjects defendants to much lengthier pretrial delay. Accordingly, the magistrate's dismissal was proper and should not be disturbed.

**A. The State Failed to Meet its Burden at the Preliminary Hearing, and No Good Cause Exists to Justify Refiling.**

The threshold standard for obtaining a bindover is well-established: "To bind a defendant over for trial, the State must show 'probable cause' at a preliminary hearing by 'presenting[] sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it.'" *State v. Clark*, 2001 UT 9, K 10, 20 P.3d 300

(additional internal quotation marks and citations omitted). Thus, "to prevail at a preliminary hearing, the prosecution must. . . produce believable evidence of all the elements of the crime charged." *Id.* at ¶15 (internal quotation marks and citations omitted).

In Utah, an actor commits rape if she has sexual intercourse with another person without that person's consent. Utah Code Ann. 76-5-402(2). Sex acts are without consent if, among other things, (1) "the victim is younger than 18" and the actor "occupied a position of special trust" or if (2) the victim is older than 13 but younger than 18, the actor is more than three years older, and the actor "entices or coerces the victim to submit to participate." 76-5-406(2)(j),(k). To sustain a bindover, the State must present evidence of all of the elements of the crime charged. In the present case, the prosecutor argued only the special trust theory of non-consent. The magistrate found insufficient evidence to support a finding that Ms. Labrum occupied a position of special trust with the victim and declined to bind her over on the ten (10) counts of rape. The prosecutor then moved to reduce the rape charges to ten (10) counts of unlawful sexual activity with a 16 or 17-year-old, third-degree felonies. The reduced charges did not require proof of non-consent, and the magistrate bound Ms. Labrum over.

When a charge is dismissed for insufficient evidence, the prosecutor is prohibited from refiling the charge unless new or previously unavailable evidence has surfaced or that other good cause justifies refiling. *Brickey*, 714 P.2d at 647. In this case, the State concedes that they do not have any new or previously unavailable evidence and instead relies on the good cause exception. *Brickey* and its progeny have explored the meaning of "good cause,"

and the Court has explained that innocent mistakes of law fall under the exception. See *State v. Dykes*, 2012 UT App 212.

i. *The State's Failure to Meet a Burden Related to All Elements of the Offense Cannot be Seen as an Innocent Mistake of Law.*

“An innocent mistake of law would be one that both is made in good faith (i.e., with a genuine belief in its validity) and has a colorable basis (i.e., is ‘apparently correct or justified’).” *Dykes* at ¶11. In *Dykes*, the State admitted that it had made a mistake in the law because the prosecutor genuinely believed that an ATV fit within the scope of an “operable motor vehicle” under the theft by receiving statute. By asserting that the ATV was an operable motor vehicle, the State had failed to present evidence of value and thus innocently miscalculated the quantum of evidence needed to withstand a bindover on a felony charge. On appeal, the Court found that the State’s argument was made in good faith because there were multiple and contradictory definitions of an “operable motor vehicle,” and therefore, the mistake was innocent.

In this case, initially, the State did not present evidence related to the “without consent” element and failed to present the court with enough evidence to support that Ms. Labrum occupied a “position of special trust” to negate the consent element. R.0561:206,207. When the State moved the court to reconsider its special trust ruling, it also introduced the alternative “enticement theory” of nonconsent not previously argued. In *Dykes*, the State had only failed to present evidence related to the degree of the offense. Here, the State simply did not marshal enough evidence to prove probable cause for each of the elements of the first-degree felony offense charged. Presenting a new legal theory after failing to meet a burden related to the elements of the offense cannot be seen as a good faith

mistake of law. If such action is determined to be an “innocent mistake,” there would be no need for a preliminary hearing. Instead, the State would have repeated opportunities to sustain its burden of proof, frustrating the very principles of fundamental fairness that due process requires.

*ii. The State’s Claims are Not Colorable*

Even if there was an innocent mistake of law, and the arguments were made in good faith, the claim must be colorable. See *Dykes* at ¶12. There is no indication that the prosecutor’s decision to amend Ms. Labrum’s charges was unjustified or made in bad faith. Unlike *Dykes*, the law was not confusing, and there were no contradictory definitions. Instead, the prosecutor moved to amend the charges to reflect the evidence that was presented and proceed on third-degree felony offenses. The amended charges do not require proof of non-consent, the very element the State failed to establish.

Throughout its argument, the State distinguishes between the actions of the “stand-in” prosecutor and the “assigned prosecutor.” The “assigned” prosecutor apparently intended to argue both theories of non-consent in support of Ms. Labrum’s rape charges. When the “stand-in” prosecutor proceeded on an approach that the “assigned” prosecutor disagreed with, that alone does not make the issue colorable. Conversely when a Defendant’s co-counsel fails to raise an argument or defense, there is no “do over.” The Brickey rule is concerned with fundamental fairness. Extending the mistake of law exception to include competing in-office theories or prosecutorial procedural choices is unjustified. Doing so would encourage a lack of preparation on the part of prosecutors and give the State an advantage not afforded to defendants.

## B. The State's Burden of Proof is Low, But Not Nonexistent.

Because the Brickey rule is concerned with fundamental fairness, its major focus has been on curbing potentially abusive practices by the State that unfairly impair the defense, including withholding critical information and the failure to exercise reasonable diligence in presenting evidence of the elements of the crime. See *Dykes* at ¶11. The rationales enumerated in Brickey for prohibitions on withholding evidence similarly apply to withholding key legal theories from the defense. This impairs Ms. Labrum by wasting time and resources to address arguments the State either failed to disclose or make at the preliminary hearing. The State delayed disclosing its enticement theory to Ms. Labrum nearly three weeks after the preliminary hearing in an attempt to have the magistrate revisit the issue of rape.

Although the State concedes that there were arguable missteps by the prosecution, it contends that these missteps do not rise to the level of abusive practices that Brickey was intended to curb. Specifically, the State argues that because the prosecutor only has to prove probable cause at the preliminary hearing and “the defendant is probably going to get that evidence through discovery anyhow,” that withholding evidence unnecessary to establish probable cause, therefore, “may no longer be considered abusive prosecutorial misconduct.” State’s Brief at 40; 48. However, the State’s reasoning does not follow:

[T]he prosecutor intended to argue both non-consent theories at the preliminary hearing....There is no indication that the assigned prosecutor intended to withhold the enticement theory and spring it on Labrum at trial. In any event, because Labrum learned of the theory just 20 days after the preliminary hearing, Labrum had plenty of time to prepare to defend against both theories at trial.

State’s Brief at 53-54.

The legal theory that was withheld was necessary to establish an essential element of the offense with which Ms. Labrum was charged. Although the State's burden of proof is low at the preliminary hearing, it is not the magistrate's job to make the State's case for it, nor is it to pick which theory is going to be best for the prosecutor at some future date. Procedural fairness demands that the State present the legal theory upon which they seek to prosecute a defendant.

C. The State's Calculated Decision to Pursue a Procedural Path Cannot Be Seen as an Innocent Mistake of Law.

The State had a variety of options to procedurally pursue a review of the magistrate's decision. The State could have immediately sought to reopen the preliminary hearing to argue enticement when the magistrate ruled the evidence was insufficient. Alternatively, the State could have filed an appeal under Utah R. Civ. P. 4, after its motion to reconsider was denied. Further, the State could have proceeded on the charge bound over. Instead, the State moved to dismiss the case, and refiled the rape charges against Ms. Labrum nearly three (3) months later with the same evidence.

The State indicated that the decision to pursue a motion to reconsider in lieu of other procedural remedies was "calculated." However, the State had untimely filed its motion under Utah R. of Crim P. 24. If the State was concerned about the appeals window closing, it could have withdrawn its motion to reconsider and filed an appeal. Just because the State made a calculated choice to pursue relief under one procedure that did not result in a favorable outcome does not constitute an innocent mistake of law justifying exception. Allowing the State to refile charges on this reasoning would effectively provide a second bite

at the bindover apple in defiance of due process. Placing blame upon one prosecutor or another acting on behalf of the State is inappropriate; however, it cannot be said that every mistake was innocent or that every argument or procedural path was taken in good faith, meriting another attempt to bind Ms. Labrum over.

II. **THE BRICKEY RULE APPROPRIATELY PROTECTS CONSTITUTIONAL MANDATES AND THIS COURT SHOULD NOT MODIFY IT.**

Prosecutors are entrusted with a tremendous amount of discretion in deciding whom to prosecute and how the prosecution is to be conducted. "This imposes upon the prosecutor a corresponding duty to exercise this power with the utmost good faith. When it is not, the courts should not hesitate calling the State to account." See *State v. Ossana*, 739 P.2d 628, 633 (Zimmerman, J., Concurring). Scrutiny has revealed that "the prosecutor's good faith is a fragile protection for the accused." *State v. Morgan*, 2001 UT 87, P12, quoting *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986).

Dismissing a case based on prosecutorial bad faith or abusive filing practices is a remedy akin to the dismissal of a case based on the bad faith misconduct of a police officer. Regardless of the overall strength of a case, an officer's improper action may doom an otherwise legitimate prosecutorial filing. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Rea v. United States*, 350 U.S. 214 (1956). Pursuant to its plain language, the "good faith" exception to the exclusionary rule would not be able to save such isolated instances of police bad faith misconduct. Prosecutorial bad faith should not be afforded any lesser standard.

A. The Brickey Rule Embodies the Principles of Fundamental Fairness that Due Process Requires.

The preliminary hearing requires that the State establish a factual and legal basis for binding the defendant over for trial. See *Brickey* at 645. “This function is important because it not only relieves the accused of the substantial degradation and expense attendant to a criminal trial but also because it helps conserve judicial resources and promotes confidence in the judicial system.” *Id.* At its core, the *Brickey* rule embodies the principles of fundamental fairness that due process requires. By limiting the State’s ability to refile charges, the court sought to prevent overreaching by the State in any of its forms. See *Morgan* at ¶15.

The primary justification for the *Brickey* rule is deterrence of due process violations. Limiting the prosecutorial discretion to refile charges is an appropriate remedy to curb potential abusive practices. When a prosecutor fails to present the evidence under the legal theory upon which they seek to prosecute a defendant, the State is barred from refiling. Considerations of fundamental fairness preclude vesting the State with such unbridled discretion. See *Brickey* at 647.

B. Extending “Good Cause” Would be Dangerous and Have Critical Implications on the Rights of the Accused.

Articulating a new subcategory of “other good cause” would be in error. Doing so would effectively create a general exception, virtually empowering prosecutors to challenge a magistrate’s refusal to bind over in every case. Further modifications would swallow the *Brickey* rule. Allowing the State repeated opportunities to sustain its burden of proof interferes with the orderly administration of justice, encourages a lack of preparation on the part of prosecutors, and subjects defendants to much lengthier pretrial delay.

Allowing the State to refile charges against Ms. Labrum would set a dangerous precedent, opening the door for future abuse of prosecutorial discretion. In theory, if a prosecutor negligently omits an argument or legal theory in a preliminary hearing and fails to bind over a defendant, what will stop them from reassigning the case to a new prosecutor in order to refile charges? Prosecutors may then be empowered to use the exception to bind over defendants based on hindsight arguments with the same evidence. Such a departure from the current *Brickey* precedent would not deter future mistakes, instead, it opens the door for future abuse of prosecutorial discretion.

## **CONCLUSION**

For the reasons stated, the Court should decline to modify the *Brickey* rule. Permitting the State's request would run afoul of decades of guidance by Utah Courts. This Court should find that there was no good cause for refiling charges against Ms. Labrum. Accordingly, the magistrate's dismissal was proper and should not be disturbed.

Dated 16th of February 2024.

/s/*Gregory G. Skordas*  
Counsel for the Appellee

## **CERTIFICATE OF COMPLIANCE**

*Page/Word Certification.* I certify that in compliance with Rule 24, Utah R. App. P., this brief contains 3398 words, excluding tables and certificates of counsel.

*Public/Protected Records Certification.* I also certify that in compliance with Rule 21, Utah R. App. P., this brief complies with the non-public information requirements.

/s/ *Angela McGuire*  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 16, 2024, a true, correct, and complete copy of the foregoing BRIEF OF APPELLEE was filed with the Court and served on the following via electronic mail:

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