Public

Case No. 20220889-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellant,

v.

KYLI JENAE LABRUM,
Defendant/Appellee.

Brief of Appellant

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. Fonnesbeck presiding

KAREN A. KLUCZNIK (7912)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: kklucznik@agutah.gov

GRIFFIN HAZARD
Deputy Cache County Atty

Counsel for Appellant

GREGORY G. SKORDAS
SKORDAS & CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Email: gskordas@schhlaw.com

Counsel for Appellee

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INTRODUCTION

When prosecutors prosecute defendants, they represent not only the State as a political entity, with all its might and compelling interest in protecting communities. They also represent the people of the State who have an interest in being protected from crime. And they very often speak for victims who have been violated and have an interest in holding their perpetrators accountable, in seeing justice done. There's a lot of weight on prosecutors' shoulders, and in the vast majority of cases, they do noble work.

But prosecutors, like everybody else, make mistakes. They miscalculate the amount of preliminary-hearing evidence needed to convince a magistrate to bind a defendant over. They miscalculate the strongest theory to present to that magistrate. There is nothing malicious about such mistakes. It just is.

Similarly, prosecutors don't always agree amongst themselves on the strength of a case, what charges to file, or what theories to pursue at a preliminary hearing. And there is nothing malicious in the fact that one prosecutor's decisions differ from an earlier prosecutor's decisions. It just is.

Yet, a magistrate does not have to reconsider a preliminary-hearing ruling when a prosecutor tries to correct earlier mistakes or present a different theory of guilt than the one originally presented. And as currently interpreted, *State v. Brickey* presumptively bars a prosecutor from refiling charges in such instances as a matter of state due process—even absent malice on the prosecutor's part or real prejudice to the defendant—if the prosecutor cannot prove "innocent" good cause for refiling. The state's due process clause does not require that draconian result. The Court should therefore modify the *Brickey* rule to preclude that draconian result.

Here, a stand-in prosecutor at Labrum's first preliminary hearing argued only one of two previously-identified theories supporting the non-consent element of Defendant's ten rape charges. The magistrate ruled the evidence was insufficient to bind Labrum over on that theory and granted the stand-in prosecutor's motion to reduce the charges. Twenty days later, the assigned prosecutor moved the magistrate to reconsider her ruling, arguing the preliminary-hearing evidence was sufficient both on the argued

theory and on the second theory the stand-in prosecutor dropped. The magistrate granted Labrum's motion to dismiss the rape charges under criminal rule 7B, denied the State's reconsideration motion, and granted the State's motion to dismiss the one remaining non-rape charge.

The State refiled the original charges, and the case was assigned to a different judge. Labrum moved to dismiss the refiled charges as a violation of due process under *Brickey.* The assigned judge transferred the case to the magistrate who presided over the first case. The magistrate dismissed the charges, ruling that *Brickey* barred their refiling because the assigned prosecutor engaged in abusive prosecutorial practices.

The question on appeal is whether the assigned prosecutor's unsuccessful non-malicious attempts to secure bindover of the rape charges in a first case through a reconsideration motion required dismissal of the refiled charges as a matter of "fundamental fairness" under the state due process clause and *Brickey*—thereby subverting the interests of the State, its people, and the victim to the interests of Labrum, giving Labrum a windfall by allowing her to escape prosecution for her alleged crimes despite the lack of malice and prejudice.

STATEMENT OF THE ISSUE

Do Utah's due process clause and *Brickey* require dismissal of a refiled information based on non-malicious prosecutorial missteps or mistakes made in the first proceedings?

Standard of Review. Whether due process precludes refiling is a question of law reviewed for correctness. *State v. Drommond*, 2020 UT 50, ¶48, 469 P.3d 1056. Similarly, the interpretation of *Brickey* "presents a question of law reviewed for correctness." *State v. Morgan*, 2001 UT 87, ¶1, 34 P.3d 747.

Preservation Below: The State preserved this issue in its opposition to Defendant's motion to dismiss the refiled charges. R0561:52-64,236-43.

STATEMENT OF THE CASE

A. Summary of relevant facts.[1]

[redacted] first met Labrum when [redacted] was 6, 7, or 8 years old. R0561:81. Labrum was dating one of [redacted] cousins and was often at family gatherings. R0561:81,84. At the time, [redacted] younger brother [redacted] was about 2, his sister

[1] The facts, presented in the light most favorable to the State, are taken from the evidence presented at the preliminary hearing in the First Case—Detective Downey's testimony, [redacted] and Mother's written declarations, and DNA evidence showing [redacted] fathered a child with Labrum when [redacted] was 17. Copies of the preliminary hearing transcript, the witness declarations, and the magistrate's bindover ruling are attached at Addendum B.

[redacted] was about 4, and his older brother [redacted] was about 10. R0561:84. And Labrum took a special interest in [redacted] R0561:84.

When Labrum and the cousin broke up after six years, Labrum and [redacted] mother (Mother) stayed close. R0561:81,84. In fact, Mother and Labrum became like sisters, and Mother trusted Labrum with her children. R0561:81,84,91. Labrum was often at Mother's house and often made candy apples for the kids while there. R0561:81,84,90. She "spoil[ed]" the kids on their birthdays. R0561:90. She took photos with [redacted]. at a rodeo when they wore similar boots. R0561:84. And she would tell [redacted] that "he was the coolest kid and make him feel special all the time." R0561:85.

In 2013, Labrum started going to [redacted] soccer games, including a tournament in Park City. R0561:82,84. And in 2017, Labrum started spending even more time with [redacted].—hanging out, doing her nails, going to her soccer games, taking her to a pool or for something to eat, having sleepovers at Labrum's house. R0561:86-88. Labrum also started going to [redacted] and [redacted] high school football and lacrosse games. R0561:81,82,84,87,89.

On September 28, 2017, Labrum went to [redacted] football game as usual. R0561:67,72. [redacted] was then a 16-year-old junior in high school; Labrum was a

married 26-year-old. R0561:82;R0567:210.[2] wasn't playing because he was injured. R0561:67. But noticed Labrum watching him when, during the game, he threw the ball with a teammate. *Id.*

After the game, saw that Labrum had parked close to Mother's car, and stopped to talk with her while she put her young son into her car. *Id.* While they were talking, Labrum told that "if Chris and I ever get divorced you and I are gonna get married." *Id.* laughed and said, "Yeah, that's fine with me." *Id.*

Later, as was driving home with his parents, Labrum texted him and said, "I hope I didn't weird you out with what I said." *Id.* replied, "No, not at all we were just joking, right?" *Id.* Labrum texted, "Yeah. Is it weird that I find you so attractive?" *Id.* was surprised, but texted back, "No, I think you are attractive too." *Id.* And for the next week, Labrum and "talked" about wanting to kiss each other. *Id.*

Labrum then picked up at his house and took him to an unfinished subdivision nearby. *Id.* heart was racing because he was "scared and nervous" to kiss Labrum. R0561:68. After about 30 minutes, Labrum said, "If you're gonna kiss me you gotta hurry because I need to go home." R0561:67-

[2] was born on ; Labrum was born on R0567:210.

68. [redacted] leaned toward Labrum but stopped halfway and said, "Alright you gotta meet me in the middle." R0561:68. Labrum said, "No, you gotta lean into me if you want to kiss." *Id.* When [redacted] then leaned closer to Labrum, Labrum leaned into him, and they kissed for several minutes before Labrum dropped [redacted] back off at his house. *Id.*

Later that night, Labrum texted [redacted] and said, "You can't tell anyone we kissed." *Id.* [redacted] promised not to. *Id.*

After another week of "talking," Labrum took [redacted] up a canyon and pulled over "into a little alley way behind some trees." *Id.* After talking for a bit, they started kissing. *Id.*

Labrum then started caressing [redacted] penis over his clothes and asked if it was okay. *Id.* [redacted] said yes and started caressing Labrum's breasts. *Id.*

Labrum then asked if she could "go inside" [redacted] pants. *Id.* When [redacted] then got an erection, he slid his pants down to make it "more comfortable for" both of them. R0561:68-69. As Labrum continued rubbing [redacted] penis, [redacted] asked if he could touch Labrum's breasts under her clothing. R0561:69. They then continued "caressing" each other until [redacted] ejaculated. *Id.* They agreed that they had enjoyed themselves and wanted to do it again. *Id.*

Labrum and [redacted] soon began sexting each other, not just talking and texting. *Id.* And the next week, they went up the canyon again and repeated their sexual conduct. *Id.*

A week later, Labrum decided she didn't want to go up the canyon anymore, so [redacted] met Labrum at Labrum's house. *Id.* [redacted] asked where Labrum's husband was. *Id.* Labrum said that he worked late and that they "will be fine." *Id.* Soon, they started kissing and fondling each other. R0561:70.

Labrum then climbed on top of [redacted] and started "grinding" on his penis. *Id.* When [redacted]. reached under Labrum's clothes and started caressing her breasts, Labrum took her shirt off. *Id.* And as Labrum continued grinding on him, [redacted] unlatched her bra and started sucking her nipples. *Id.*

Labrum then asked [redacted] if they could take his pants off. *Id.* When [redacted] said yes, they both took their pants off, leaving only their underwear on. *Id.* Labrum resumed grinding on [redacted], and [redacted] resumed sucking Labrum's breasts. *Id.*

Labrum then asked if she could grind on [redacted] naked. *Id.* When [redacted] said yes, they both got naked and resumed their grinding and sucking. *Id.* Soon, Labrum said, "Okay, no sex," and she climbed off [redacted], sat next to him, and

masturbated him until he ejaculated. *Id.* [redacted] then left so that Labrum's "husband wouldn't catch us." *Id.*

On the fourth rendezvous at Labrum's house, [redacted] penis went into Labrum's vagina as she was grinding on top of him. R0561:71. Labrum stopped grinding and, with [redacted] penis still inside her, asked if "this" was okay. *Id.* [redacted] said, "Yes is it okay with you?" *Id.* Labrum said, "Yes, just don't finish inside me." *Id.* When [redacted]. got close to climaxing, Labrum got off him and masturbated him until he ejaculated. *Id.*

During intercourse a few days later, [redacted] said he was getting close to climaxing, and Labrum said, "Just cum." *Id.* Concerned about Labrum getting pregnant, [redacted] asked if she was sure. *Id.* Labrum said yes. *Id.* When they were done, [redacted] asked Labrum "why she had [him] climax inside her." R0561:72. Labrum said, "because I was close to cumming and I didn't want to stop." *Id.* When [redacted] asked what if she got pregnant, Labrum replied, "I won't." *Id.*

From then on, [redacted] ejaculated inside of Labrum whenever they had sex. *Id.* The two also started having oral sex. R0561:72-73. And when Labrum decided she didn't want to have sex in her living room anymore, she took [redacted] to her bedroom. R0561:72.

For months, these sexual encounters happened "almost every night." R0561:73. Most of the time, Labrum and [redacted] had sex at Labrum's house.

R0561:72-73. But sometimes they drove around until they found an isolated spot and had sex in the car. R0561:72.

Eventually, [redacted] started "bail[ing] out" on Labrum to hang out with a co-ed group of school friends. R0561:74-75. When [redacted] later admitted he had kissed two of the girls in the group, Labrum got upset and told [redacted] that he "was a bad person for cheating on her" and that they "were done having sex and talking anymore." R0561:75. [redacted] apologized and "begg[ed]" Labrum "to forgive" him. *Id.* But to be forgiven, [redacted] "promised" not to talk to the girls "or other girls [his] age anymore." *Id.* [redacted] was still just 16 years old. *Id.*

Throughout her sexual relationship with [redacted], Labrum continued spending time with [redacted] family and going to [redacted] football games and [redacted] soccer games. R0561:72,78. When [redacted] and her parents headed to a soccer tournament in St. George in February 2018, Labrum decided she should go too. R0561:73,87. Because [redacted] parents hadn't planned on [redacted] joining them, Labrum offered to let [redacted] and [redacted] stay with her at her aunt's house nearby. R0561:73,87. At the aunt's house, Labrum told [redacted] that she could sleep in her own room. R0561:73. Labrum then slept and had oral sex with [redacted] in a different room. *Id.* The next day, [redacted] decided to stay at the hotel with her parents. *Id.*

A few weeks later, after [redacted] turned 17, Labrum moved their rendezvous to her work office because her husband was now home at night. R0561:75-76. They met less frequently—once or twice a week instead of every night. R0561:76. At least once, they started out by watching pornography. R0561:77. A few times, they videotaped themselves having oral sex. R0561:76.

In August 2018, when [redacted] was still 17, Labrum told him that she had stopped having sex with her husband. R0561:77. Labrum also announced that she was pregnant but said it was her husband's baby—that she got pregnant on the last day they had sex. *Id.* The baby born the following May, however, was [redacted]. R0561:89-90;R0567:210-12.

In July 2020, [redacted] left on a mission for his church. R0561:91-93. A few months later, he was sent home after his mission president learned what Labrum had been doing with him. R0561:94. Having gotten "several anonymous complaints about a case where [redacted] was likely the victim," police officers had already contacted Labrum. R0561:94-95;R0567:205.

B. Summary of proceedings.

1. The First Case.

In May 2021, Defendant was charged in District Court Case No. 211100567 with ten counts of rape, a first degree felony, and one count of forcible sexual abuse, a second degree felony. R0567:1-3. An actor commits

rape if she has sexual intercourse with another person without that person's consent. Utah Code Ann. § 76-5-402(2) (2023).[3] An actor commits forcible sexual abuse if, without consent, she "touches" a person's "anus, buttocks, public area, or any part of the genitals" or "otherwise takes indecent liberties with" the person with the intent to "arouse or gratify the sexual desires of any individual." *Id.* § 76-5-404 (2023). For both crimes, the 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 or participate." *Id.* § 76-5-406(2)(j), (k) (2023). A person occupying a "position of special trust" includes "any individual" who is "in a position of authority, … which enables the individual to exercise undue influence over the child." *Id.* § 76-5-404.1(1)(a)(iv)(W) (2023).

Judge Fonnesbeck (the "magistrate" or "First Magistrate") presided over the preliminary hearing on October 19, 2021. R0567:200. The assigned prosecutor couldn't attend because he was preparing for a trial that started

[3] Because the relevant terms of the cited statutes have not changed since Labrum's alleged crimes, the State cites to the current statutes. All relevant statutes, court rules, and constitutional provisions are attached at Addendum A.

the next day. R0567:94. A stand-in prosecutor attended in his place. R0567:94,201.

Before the hearing, the assigned prosecutor asked the stand-in prosecutor to argue two theories of non-consent: position of special trust and enticement. R0561:44-45,48;R0567:94. But the stand-in prosecutor argued only the special-trust theory. R0561:44-45,48;R0567:95,216-17.

The magistrate found sufficient evidence to bind Labrum over on the forcible sexual abuse charge. R0567:219. But the magistrate found insufficient evidence on the State's special-trust theory of non-consent to bind Labrum over on the rape charges. R0567:220. The magistrate ruled that although the evidence showed "a close friendship between" Labrum and [redacted] family, that friendship did not "in and of itself create a position of special trust between" Labrum and [redacted] R0567:220.

The stand-in prosecutor did not ask the magistrate to consider an enticement theory of non-consent. *Id.* Rather, he moved to reduce the rape charges to third-degree felonies not requiring proof of non-consent. R0567:220; Utah Code Ann. § 76-5-401.2(2)(a)(ii) (2023). The magistrate granted the motion and bound Labrum over on the reduced charges and the forcible sexual abuse charge. R0567:51,220-21. The magistrate entered a signed minute entry reflecting her rulings on November 2, 2021. R0567:50-52.

On November 9, 2021—20 days after the preliminary hearing—the assigned prosecutor moved the magistrate to reconsider its ruling on the rape charges, arguing that the preliminary-hearing evidence supported both the State's argued special-trust theory of non-consent and its mistakenly-omitted enticement theory. R0567:58-75.

Labrum moved to dismiss the rape charges under criminal rule 7B and the forcible sexual abuse charge as inconsistent with the magistrate's non-consent finding as to the rapes. R0567:85-92,107-14; Utah R. Crim. P. 7B(c) (if magistrate does not find probable cause to bind defendant over on charged crime, "magistrate must dismiss the information").

Labrum moved to strike and otherwise opposed the State's reconsideration motion as untimely and because such motions are disfavored. R0567:89-90,110-12,155-56. Also, though Labrum did not dispute that the State wasn't forum shopping, she asserted the State *was* "harassing her and engaging in hiding the ball." R0567:162. She also argued the State was improperly trying to relitigate its special-trust theory. R0567:155-59. She argued the State's failure to argue enticement at the preliminary hearing was "the State's own error" and that the magistrate "should not ignore" her "rights" and "force her to face first degree felony charges" simply "because the State made an error." R0567:159-60. She argued that if the State didn't like

the magistrate's bindover ruling, it could appeal or dismiss the charges and refile them subject to *Brickey*. R0567:109; *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986) (prosecutor may refiling charges earlier dismissed for insufficient evidence only if prosecutor "can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling"). And she argued the evidence didn't support enticement in any event. R0567:160-62.

The prosecutor opposed Labrum's dismissal motion, arguing the State could amend the charges under criminal rule 4(d). R0567:103-04; Utah R. Crim. P. 4(d) ("court may permit an information to be amended at any time before trial … so long as the substantial rights of the defendant are not prejudiced").

As to the timeliness of his reconsideration motion, the prosecutor explained that in the 20 days between the preliminary hearing and his reconsideration motion, he talked with the stand-in prosecutor (who left the prosecutor's office the next week); was in a jury trial for two days; met with [redacted] the next week; drafted the reconsideration motion; "spent significant time in court" on two more days; twice ordered a recording of the preliminary hearing; received the recording on the day he filed his motion; and listened to the recording before filing his motion. R0567:94-96.

As to the merits of his motion, the prosecutor asserted that by not arguing enticement even though the preliminary-hearing evidence supported it, the stand-in prosecutor "innocently miscalculated the quantum of evidence necessary" to support bindover on the rape charges. R0567:98**.** The prosecutor also argued that he had not engaged "in any of the potentially abusive practices" under *Brickey* and that the magistrate reconsidering its ruling "would serve the interest of justice and judicial economy without compromising either party's substantial rights to due process." R0567:98-102.

The magistrate dismissed the rape charges without prejudice but declined to dismiss the forcible sexual abuse charge. R0567:142-44. The magistrate then denied the State's reconsideration motion. R0567:172-73.

Five weeks later, the magistrate granted the State's motion to dismiss the forcible sexual abuse charge without prejudice. R0567:187-88.

2. This case.

About three months after the First Case was dismissed, the assigned prosecutor refiled the rape and forcible sexual abuse charges against Labrum. R0561:6-8. The case was assigned to a different judge. R0561:9-11. Neither party sought to transfer the case to the First Magistrate.

Labrum moved to dismiss the charges under *Brickey*. R0561:25-35. Labrum argued that the "lack of abusive practice does not mean that *Brickey*

is not a bar to refile, it simply means that 'there is no presumptive bar to refiling.'" R0561:31 (quoting *State v. Morgan*, 2001 UT 87, ¶16, 34 P.3d 767). In any event, Labrum asserted, there was abusive conduct here. First, although the State wasn't forum shopping, it was "harassing her and engaging in hiding the ball" because its enticement theory "was only brought to" her attention in the State's reconsideration motion filed three weeks after the preliminary hearing in the First Case. R0561:30-31. Also, unlike the prosecutor in *Morgan*, who innocently miscalculated the evidence needed for bindover and immediately sought to reopen the preliminary hearing when the magistrate ruled the evidence was insufficient, the State did not immediately seek to reopen the preliminary hearing here to argue enticement; rather, it "immediately" moved to reduce the rape charges and then waited "a full 20 days" before filing its reconsideration motion. R0561:31-33,182. Thus, "it is incredibly improbable that the State can claim an innocent miscalculation." R0561:33. In any event, Labrum argued, although *Morgan* recognized an innocent miscalculation of the evidence needed was good cause for refiling, "rearguing the same evidence under a new theory is not the same as presenting new evidence." R0561:31. Thus, "*Brickey* necessitates" dismissal of the refiled charges. R0561:34.

The assigned prosecutor argued that refiling was allowed under criminal rule 7B and that *Brickey* only protected defendants from a prosecutor's "potentially abusive practices" that implicate a defendant's due process rights—like forum shopping, repeated filings of groundless charges for the purpose to harass, withholding evidence, and refiling charges after presenting *no* evidence of an essential element of the crime. R0561:52 (citing Utah R. Crim. P. 7B(c) (dismissal of charge for lack of probable cause after preliminary hearing does "not preclude the state from instituting a subsequent prosecution for the same offense"); *State v. Redd*, 2001 UT 113, ¶20, 37 P.3d 1160 (listing potentially abusive practices that may preclude refiling under *Brickey*)).

The prosecutor argued that the State was not trying to forum shop—indeed, it had tried to present its enticement theory in the First Case. R0561:60-61. The prosecutor argued that the State was not trying to refile groundless charges because the State believed the preliminary-hearing evidence in the First Case supported both the special-trust theory presented at the hearing and the enticement theory the State tried to argue afterwards. R0561:61-64. Also, although the magistrate found insufficient evidence to support special-trust, this was not a case where the State presented "no evidence" on that theory. R0561:62-64. And the State had not "maliciously"

tried to hide "the ball" on its enticement theory because the State was not required to present "every legal theory at a preliminary hearing" and because the special-trust theory was a "colorable" one made "in good faith" based on the evidence. R0561:54-58,61-64 (citing *State v. Dykes*, 2012 UT App 212, ¶10, 283 P.3d 1048 (mistake of law on one theory—which leads to insufficient evidence—is good cause to refile charges under second theory and present additional evidence)). Thus, the prosecutor concluded, the State had "good cause" to refile the charges. R0561:64.

For the first time in her reply, Labrum argued the State was forum-shopping—because it had not sought to have the refiled charges heard by the First Magistrate. R0561:176-77. Also, Labrum asserted, the State disclosed the enticement theory only *after* the preliminary hearing. R0561:179. And, Labrum argued, the "rationale" for prohibiting the withholding of evidence "similarly applies to withholding key legal theories," because withholding theories also "impairs the defense" and "allows a prosecutor to gain an unfair advantage by surprising the defense with an entirely new legal theory" after the defense "has exhaustively prepared for another theory." R0561:177-80 (citing *Redd*, 2001 UT 113, ¶13; *State v. Rogers*, 2006 UT 85, ¶15, 151 P.3d 171). Labrum also argued that *Dykes* didn't govern, because the prosecutor there refiled before the same magistrate and admitted he had made a mistake of

law, while the prosecutor here did neither of those things. R0561:181. Finally, Labrum argued that the different positions taken by the stand-in and the assigned prosecutors did not justify refiling under *Brickey* because they both represented the State, and thus both of their actions must be "attributed" to the prosecuting entity "as a whole." R0561:182-83.

After receiving Labrum's reply, the assigned judge transferred the case to the First Magistrate, who scheduled Labrum's motion for argument. R0561:186-87,188-89.

At argument, defense counsel alluded to an alleged off-the-record "dialogue that occurred" in the First Magistrate's chambers after the State presented its preliminary-hearing evidence in the First Case. R0561:227. There, counsel asserted, the stand-in prosecutor said he "would have never filed this case," showing that "at least in that prosecutor's opinion on that day, … there wasn't a case." R0561:228. And only after the stand-in prosecutor tried to "salvage something" by reducing the rape charges did the assigned prosecutor decide there was a "new theory" to present. *Id.* But "that's not a fact that wasn't available to them" at the first preliminary hearing. *Id.* Finally, Labrum argued that when the magistrate declined to consider the new theory in the First Case, the State refiled the charges and tried to forum-shop. R0561:229.

The assigned prosecutor challenged Labrum's forum-shopping contention, arguing the State did "everything in their power to keep" the case before the magistrate in the First Case. R0561:230-31. As to the stand-in prosecutor's statements, the prosecutor proffered that as the assigned prosecutor, he "was vastly more familiar with the case" than the stand-in prosecutor. R0561:234. But also, the State had a good faith belief that the preliminary-hearing evidence supported its special-trust theory. R0561:233-35. And the State had good cause to refile because it was seeking only to add a new theory of the case based on the evidence already presented, not new evidence supporting its original theory. R0561:236-39. The prosecutor noted that he believed he had disclosed both theories to the defense before the preliminary hearing. R0561:240-41. In any event, counsel was familiar with the charges and thus the State's possible theories. R0561:241. And the State does not "have to disclose their entire strategy," particularly where preliminary hearings are no longer discovery tools. R0561:241-42. Finally, the prosecutor argued, the State had good cause to refile because, instead of immediately appealing the First Magistrate's decision, the prosecutor tried to resolve the matter in the original case. R0561:58-60,237.

Before recessing, the First Magistrate noted that "there is nothing before the Court today that makes me think that the State is forum shopping."

R0561:246. The "preferable and perhaps best course of action would have been for everyone to immediately raise" the issue with the assigned judge so that the case could be reassigned. *Id.* But the court's own "e-filing system" was "'required' to assign" the new case "to the same Judge" as the prior case. *Id.* "So I don't think that there was anything nefarious on the part of the State there in refiling." R0561:247.

A month later, the First Magistrate granted Labrum's dismissal motion under *Brickey*. R0561:197-212. First, although the State "attempted" to show a special-trust relationship between the victim and Labrum, it failed and thus "presented no evidence" on rape's non-consent element. R0561:206,207. Second, "[c]ompeting in-office theories of a case … do not constitute an innocent" mistake of law. R0561:206. Third, while the stand-in prosecutor may have made "a good faith argument" at the preliminary hearing and a good faith decision "to amend the charges based on the evidence," it "does not necessarily follow that the assigned prosecutor who ultimately dismissed the case to refile did so in good faith." *Id.* Fourth, the State did not make sure the refiled charges were assigned to the First Judge. R0561:207-08. Fifth, the State withheld "key legal theories," which was "akin to withholding evidence" because it "impairs" Labrum's defense and "allows" the State "to gain an unfair advantage by surprising the defense with an entirely new legal

theory, especially after defense counsel has exhaustively prepared for another theory." R0561:208-09. Finally, the State's decision to forgo an appeal in the First Case in favor of a reconsideration motion did not constitute a mistake of law or other "good cause" for refiling R0561:209-11.

The State timely appealed. R0561:215-16.

SUMMARY OF ARGUMENT

The magistrate erred when it dismissed Labrum's refiled charges under *State v. Brickey.*

Brickey adopted a minority rule that as a matter of "fundamental fairness" under the state's due process clause, (1) a prosecutor is prohibited "from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling"; and (2) "when a charge is refiled, the prosecutor must, whenever possible, refile the charges before the same magistrate who does not consider the matter de novo, but looks at the facts to determine whether the new evidence or changed circumstances are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges." 714 P.2d 644, 647 (Utah 1986).

But in reaching that conclusion, the Court did not conduct any of the analysis the Court requires to construe the constitution. The Court did not

begin with the meaning of the state's due process clause when it was adopted—when due process placed no restriction on a prosecutor's ability to refile charges. Nor did the Court recognize that determining "fundamental fairness" under the due process clause requires a balancing of all the interests at stake. Rather, in the apparent drive to stop prosecutors from engaging in the unquestionably improper conduct Brickey's prosecutor engaged in, the Court adopted an overly strict refiling rule that not only absolved the defendant of showing actual prejudice but ignored compelling interests of the State, the people, and victims that support giving prosecutors broader discretion to refile.

Brickey opined that "[i]mposing this requirement on prosecutors places a relatively small burden on them, yet adequately protects the due process interests of an accused." *Brickey*, 714 P.2d at 647-68. But the Court soon acknowledged that *Brickey* in fact imposed "strict requirements" and placed "a high burden on the State" before it could refile charges previously dismissed for lack of probable cause. *State v. Jaeger*, 886 P.2d 53, 55 (Utah 1994); *id.* at 56 n.1 (Durham, J., dissenting).

The Court tried to moderate the severity of the *Brickey* rule in *State v. Morgan*, 2001 UT 87, 34 P.3 767. The Court recognized that the "loadstar of *Brickey*" is "fundamental fairness," which "precludes, without limitation, a

prosecutor from seeking an *unfair advantage* over a defendant through forum shopping by *harassing* a defendant through *repeated filings* of *groundless* and improvident charges, or from withholding evidence." *Id.* ¶15 (emphasis added). Thus, the Court clarified, "when potential abusive practices are involved, the presumption is that due process will bar refiling." *Id.* at ¶16. But when "potential abusive practices are not involved, we hold that there is no presumptive bar to refiling." *Id.* at ¶16.

But by still requiring the State to prove "good cause" for refiling *and* by holding that "good cause" requires the prosecutor's conduct to be "innocent," the Court kept the *Brickey* rule largely intact. Still, then, the *Brickey* rule absolves the defendant of showing actual prejudice and ignores compelling interests of the State, the people, and victims that support giving prosecutors broader discretion to refile.

The result, as this case shows, is that *Brickey* precludes even one refiling of charges despite the absence of evidence of malicious conduct by the prosecutor or actual prejudice to the defendant. The historical understanding of the state's due process clause does not require that result. Thus, in light of the interests involved, the Court should modify the *Brickey* rule to preclude it.

In any event, the prosecutor's attempt to correct prior prosecutorial missteps here was not malicious abusive prosecutorial misconduct that *Brickey* sought to prohibit. Thus, even under *Brickey* as it now stands, the magistrate erred when it dismissed the refiled charges under *Brickey.*

ARGUMENT

The magistrate improperly dismissed the refiled charges because, though there were arguable missteps by the prosecution, there was no bad faith or intentionally abusive misconduct that violated Labrum's state due process rights.

The Court should reverse the magistrate's dismissal of Labrum's refiled charges because the prosecutor's conduct did not violate Labrum's state due process rights. To the extent *Brickey* supports the magistrate's ruling, the Court should clarify that (1) the state's due process clause allows at least one refiling absent evidence of prejudicial abusive prosecutorial misconduct done with the intent to prejudice or harass the defendant; and (2) "good cause" thus includes adjustments in the prosecution's case as well as one prosecutor's attempts to clean up missteps—or even intentional errors--made by a prior prosecutor. Absent such clarifications, the *Brickey* rule does not properly balance the interests of the State, the people, and victims against the interests of the defendant. And without that proper balancing, *Brickey* gives defendants much more than fundamental fairness. As this case shows,

it gives them a windfall—the ability to evade prosecution even when they have suffered no cognizable injury under the due process clause.

When interpreting a provision of the state's constitution, the Court begins "with the meaning of the text as understood when it was adopted." *South Salt Lake City v. Maese*, 2019 UT 58, ¶18, 450 P.3d 1092. To discern a provision's meaning, the Court considers "all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy." *Id.* at ¶23 (cleaned up). The Court also considers how other jurisdictions have interpreted similar provisions. *Id.* at ¶¶59,68. "There is no magic formula for this analysis—different sources will be more or less persuasive depending on the constitutional question and the content of those sources." *Id.* at ¶19.

A. At the time of Utah's founding, due process did not limit prosecutors' ability to refile criminal charges.

Like the federal constitution and other states' constitutions, Article I, § 7 of the Utah Constitution, adopted in 1895, provides that "[n]o person shall be deprived of life, liberty or property, without due process of law."

In 1895, the primary purpose of due process was to protect people from "the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." *Leeper v. Texas*, 139 U.S. 462, 468 (1891); *State v. Bates*, 47 P. 78, 79 (Utah 1896); *Duncan v.*

Missouri, 152 U.S. 377, 382 (1894); *People v. Adirondack Ry. Co.*, 54 N.E. 689, 693 (N.Y. 1899); *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 958 (Tenn. 1899). But "[t]raditionally," due process "required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused [was] left to the legislative branch." *Medina v. California*, 505 U.S. 437, 453 (1992).

In criminal cases, then, due process required only adequate notice and a fair hearing. The "liberty of a citizen" could not "be so far disregarded and trifled with that any policeman or jailer may, at his own volition, commit, and hold him in custody … until it suits their convenience to release him." *Royce v. Salt Lake City*, 49 P. 290, 292 (Utah 1897). Rather, due process required that the offense "be described in an accusation"; the defendant "be given his day in court"; the trial "proceed according to established procedure"; the evidence be admitted "according to established rules"; the defendant "be convicted by the judgment of competent court, and the punishment authorized by law." *Bates*, 47 P. at 79.

Thus, due process placed no limits on a prosecutor's authority to refile charges against a defendant. *See United States v. Thompson*, 251 U.S. 407, 412-15 (1920); *State v. Shaw*, 227 A.3d 279, 288 (N.J. 2020) ("The common law imposed no restrictions on a prosecutor's discretion to submit a case to the

same or another grand jury."); *Commonwealth v. McCravy*, 723 N.E.2d 517, 521 (Mass. 2000) (At "common law, a prosecutor retained the discretion to resubmit a charge to a grand jury after having been dismissed by a previous grand jury."); *United States v. Martin*, 50 F. 918, 918 (W.D. Va. 1892) ("The doctrine in this state and the other American states is that the ignoring of an indictment by one grand jury is no bar to a subsequent grand jury investigating the charge and finding an indictment for the same offense.").

If a defendant believed he had been prosecuted unjustly, then, due process provided him no remedy. His remedy was a civil claim for malicious prosecution, which required proof: "(1) That the proceeding complained of … was without probable cause; (2) that the proceeding was malicious; and (3) that the proceeding was finally terminated in favor of the plaintiff," *Kennedy v. Burbidge*, 183 P. 325, 325-26 (Utah 1919); *Thompson v. Clark*, 142 S.Ct. 1332, 1338 (2022); *State v. Rubek*, 371 N.W.2d 115, 118 (Neb. 1985).

Some jurisdictions deviated from these common law rules. The Idaho constitution, adopted in 1889, included a provision that "after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of public prosecutor." Idaho Const. art. I, § 8. And in 1864, Oregon enacted a statute providing that once a grand jury returned a "not true bill" on a charge, that charge could not be "again submitted to or

inquired of by the grand jury unless the court so orders." *State v. Stokes*, 248 P.3d 953, 956-57 (Or. 2011) (cleaned up); *see also State v. Collis*, 35 N.W. 625, 625-26 (Iowa 1887) (by statute, court approval required to resubmit charge to grand jury, but charge could be resubmitted "as often as the court may direct"); *Sutton v. Commonwealth*, 30 S.W. 661, 662 (Ky. 1895) (same).

But Utah did not follow Idaho's lead and include a constitutional provision precluding trials on charges ignored by a grand jury. Nor has the State found any evidence that in its youth, Utah followed Oregon's lead and enacted a statute limiting charges from being resubmitted to a grand jury. And even in states that enacted Oregon-like statutes, some courts held that because they prohibited only resubmitting charges to a grand jury, they had "no application to offenses prosecuted by information." *Rea v. State*, 105 P. 381, 381-82 (Okla. Crim. 1909), *overruled on other grounds by Cole v. State*, 195 P. 901 (Okla. Crim. 1921).

Not surprisingly, then, it was an issue of first impression when *State v. Brickey* addressed whether Utah's due process clause placed "limits on the State's ability to refile criminal charges when those charges have been previously dismissed for insufficient evidence." 714 P.2d 644, 646 (Utah 1986).

B. With little constitutional analysis, *Brickey* imposed strict limitations on the State's right to refile charges.

As a matter of first impression, *Brickey* held that the State's due process clause prohibits "a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." *Brickey*, 714 P.2d at 647.

But in reaching that conclusion, the Court did not conduct any of the analysis the Court requires to construe the constitution. The Court did not begin "with the meaning of the text as understood when it was adopted." *South Salt Lake City v. Maese*, 2019 UT 58, ¶18, 450 P.3d 1092. Nor did the Court "consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy." *Id.* at ¶23 (quotation simplified). Nor did the Court recognize that defining due process is "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Dept. of Social Services of Durham County, N.C.*, 452 U.S. 18, 24-25 (1981). *Cf. State v. Chadwick*, 2023 UT 12, ¶¶,37,40-50, ___ P.3d ___ (once trial court seals victim's therapy records, defendant may not access those records on appeal, because victim's privacy interest in her therapy records as

supported by Utah's Victims' Rights Amendment and state's interest in protecting therapist-patient privilege outweigh defendant's constitutional right to appeal and due process right to fundamental fairness); *Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶74, 250 P.3d 465 (parent's fundamental due process right to make medical decisions for her children "must be balanced against the state's important interest in protecting children from harm").

Rather, the Court's decision seems to have been largely driven by the prosecutor's "candid[]" admissions "that he was forum-shopping simply because he disagreed with the decision of the judge who presided at the first preliminary hearing" and that he planned to keep refiling the charges until a magistrate bound Brickey over on them. *Brickey*, 714 P.2d at 646, 647. And in the apparent drive to stop prosecutors from engaging in such unquestionably improper conduct, the Court adopted an overly strict refiling rule that not only absolved the defendant of showing actual prejudice but ignored compelling interests of the State, the people, and victims that support giving prosecutors broader discretion to refile.

The Court correctly recognize that the preliminary hearing "acts as a screening device to ferret out groundless and improvident prosecutions," which "relieves the accused of the substantial degradation and expense

attendant to a criminal trial," "helps conserve judicial resources and promotes confidence in the judicial system." *Id.* at 646 (cleaned up).

But with little analysis, the Court then cast aside a statute allowing the State to refile charges as merely reflecting "the well-established principle" that jeopardy did not attach to preliminary hearings and, thus, "the double jeopardy provisions of the federal and state constitutions do not apply." *Id.* Thus, the Court did not consider what broader interests the statute might serve—like the State's compelling interest in prosecuting crimes, the people's interest in living in safe communities, and victims' interest in seeing their perpetrators being held accountable—all of which support refiling not only when the first case fails because of innocent prosecutorial errors, but when it fails because of bad prosecuting by a now-fired prosecutor.

Similarly, the Court correctly recognized that if the State could refile charges "under all circumstances," "the State could easily harass defendants by refiling criminal charges which had previously been dismissed for insufficient evidence." *Id.* at 647. And the Court correctly concluded that "[c]onsiderations of fundamental fairness preclude vesting the State with such unbridled discretion." *Id.* But the Court did not then consider whether it was possible that magistrates might err in not finding probable cause. Nor

did the Court consider how many times a case could be refiled before a defendant could legitimately claim harassment or prejudice.

Instead, the Court concluded that a prosecutor's good faith was "a fragile protection for the accused" and that a prosecution "'must not be shuttled from one magistrate to another simply because a county attorney is not satisfied with the action of the magistrate in the precinct whose jurisdiction was first invoked.'" *Id.* (quoting *Wilson v. Garrett*, 448 P.2d 857, 859 (Ariz. 1969) (per curiam)).[4] Then, adopting a minority rule, the Court held that "due process considerations prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." *Id.* Further, "when a charge is refiled, the prosecutor must, whenever possible, refile the charges before the same magistrate who does not consider the matter de novo, but looks at the facts to determine whether the new evidence or changed circumstances are

[4] Interestingly, *Wilson* held only that by statute, a prosecutor was prohibited from refiling charges in a different *court* (justice court or superior court) or different *precinct* than he had the original charges. 448 P.2d at 858-59. The *Wilson* court expressly noted that "the prosecuting attorney is not foreclosed from proceeding in the same justice precinct if it appears that a different decision would be justified"; nor, "of course, is the state foreclosed from presenting the matter to a grand jury." *Id.* at 859.

sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges." *Id.*

Brickey closed by saying that "[i]mposing this requirement on prosecutors places a relatively small burden on them, yet adequately protects the due process interests of an accused." *Id.* at 647-68. But just eight years later, the Court recognized that *Brickey* in fact imposed "strict requirements" on the State before it could refile charges previously dismissed for lack of probable cause. *State v. Jaeger*, 886 P.2d 53, 55 (Utah 1994); *id.* at 56 n.1 (Durham, J., dissenting) ("*Brickey* places a high burden on the State."). In fact, it was in part *Brickey*'s "strict requirements" that led the *Jaeger* court to conclude the State had the right to appeal a magistrate's dismissal order. *Id.* at 55. Otherwise, as noted by the dissent, case law could "effectively preclude review" of a magistrate's refusal to bind a defendant over even though, if the magistrate bound the defendant over, he would have *two* chances to challenge that decision—through a motion to quash in the district court *and* through an appeal if the district court denied his motion. *Id.* at 57; *see also id.* at 55 & n.3 (majority also recognizing this "anomal[y]").

C. *Morgan* did not adequately modify the *Brickey* rule; the Court should now.

The Court implicitly acknowledged the severity of the *Brickey* rule in *State v. Morgan*, 2001 UT 87, 34 P.3 767.

There, the Court recognized that criminal rule 7 (now 7B) "permits refiling as a general proposition." *Id.* at ¶10. But "one important purpose" of the *Brickey* rule "is to protect defendants from intentional prosecutorial harassment arising from repeated filings of groundless claims before different magistrates in the hope that some magistrate will eventually bind the defendants over for trial." *Id.* at ¶13. An additional purpose is to prevent "the State from intentionally holding back crucial evidence to impair a defendant's pretrial discovery rights and to ambush her at trial with the withheld evidence." *Id.* at ¶14.

The "loadstar of *Brickey*, then, is fundamental fairness," the Court concluded. *Id.* ¶15. And "'fundamental fairness,' the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through forum shopping by harassing a defendant through repeated filings of groundless and improvident charges, or from withholding evidence." *Id.* To "the extent that these overzealous practices may infringe on a defendant's right to due process, *Brickey* limits the State's ability to refile charges that have been dismissed for insufficient evidence." *Id.*

In other words, "[o]verreaching by the State, in any of its forms, is the chief evil we sought to prevent in *Brickey*." *Id.* Thus, "when potential abusive

practices are involved, the presumption is that due process will bar refiling." *Id.* at ¶16. But *Brickey* does not "indicate any intent to forbid refiling generally or preclude refiling where a defendant's due process rights are not implicated." *Id.* at ¶15. Thus, when "potential abusive practices are not involved, we hold that there is no presumptive bar to refiling." *Id.* at ¶16.

Despite this explanation, though, the *Morgan* court did not shift the burden to the defendant to prove actual "intentional prosecutorial harassment" or "overzealous practices" that prejudiced his due process rights. Instead, the Court still adhered to *Brickey*'s articulation of the rule for refiling—that "state due process forbids refiling the same charge *unless the State can show* that new or previously unavailable evidence has surfaced, or that other good cause justifies refiling." *Id.* at ¶11 (cleaned up) (emphasis added). And by keeping the burden on the State to show "good cause," the Court necessarily maintained a "presumptive bar to refiling" even absent "potential abusive practices." *See id.* at ¶¶11,16.

Also, the *Morgan* court failed to recognize that one of *Brickey*'s purposes—to prevent "the State from intentionally holding back crucial evidence to impair a defendant's pretrial discovery rights and to ambush her at trial with the withheld evidence," *id.* at ¶14—was no longer valid because of changes in the law since *Brickey*. When *Brickey* was decided in 1986, an

"ancillary" purpose of a preliminary hearing was to "provide[] a discovery device in which the defendant is not only informed of the nature of the State's case against him, but is provided a means by which he can discover and preserve favorable evidence." *State v. Anderson*, 612 P.2d 778, 784 (Utah 1980), *superseded by constitutional amendment as stated in State v. Lopez*, 2020 UT 61, 474 P.3d 949. The State's withholding "crucial evidence" at a preliminary hearing subverted that ancillary purpose. And presumably that is why *Brickey* identified withholding evidence as abusive prosecutorial misconduct that violated a defendant's state due process rights and thus barred the refiling of charges.

But the 1995 Victims' Rights Amendment to the Utah Constitution amended Article I, section 12 to provide that where "the defendant is otherwise entitled to a preliminary examination, the function of that examination *is limited to determining whether probable cause exists* unless otherwise provided by statute … if appropriate discovery is allowed as defined by statute or rule." Utah Const. art. I, § 12 (emphasis added). The 1995 amendment thus "eliminated the ancillary discovery purpose of the preliminary hearing and limited that proceeding to the determination of probable cause." *State v. Lopez*, 2020 UT 61, ¶44, 474 P.3d 949. Also, since *Brickey*, the Court has made clear that the State's burden at a preliminary

hearing "is light" and that the State need only present "evidence sufficient to support a reasonable belief that an offense has been committed and that the defendant committed it." *Id.* at ¶46 (cleaned up); *State v. Schmidt*, 2015 UT 65, ¶17, 356 P.3d 1204 ("For more than a decade, we have recognized that the state's burden at a preliminary hearing is probable cause" and that the State's burden is thus "relatively low") (cleaned up).

Given these changes in the law since *Brickey*, withholding even "crucial evidence" may no longer be considered abusive prosecutorial misconduct that violates a defendant's state due process rights if that evidence is unnecessary to establishing probable cause. But the *Morgan* court failed to realize this.

Finally, the *Morgan* court held that "'other good cause' represents a broad category with 'new or previously unavailable evidence' as but two examples of subcategories that come within its definition." *Id.* at ¶19 (citation omitted). But at the same time, the Court held that any prosecutorial mistakes supporting "good cause" must "be *innocent*." *Id.* (emphasis in original). As this case suggests, that creates a pretty high bar when "*potential* abusive practices" that "*may* infringe on a defendant's right to due process" are enough to preclude refiling. *Id.* at ¶¶15-16 (emphasis added).

For one thing, whose conduct must be innocent? In an extreme example, is it the first prosecutor's conduct, when that prosecutor didn't care enough about a case to present evidence on a crucial element and got fired the next day? Or is it the second prosecutor's conduct as he conscientiously tries to save the case so that the victims see justice?

And what constitutes innocent conduct? Is the stand-in prosecutor's conduct here "not innocent" when he fails to argue one of the two non-consent theories the assigned prosecutor asked him to argue? Is the assigned prosecutor's conduct "not innocent" when he then tries to save the now-dismissed rape charges because he knows the case better than the stand-in prosecutor, but he files his reconsideration motion 20 days, instead of 14 days, after the preliminary hearing?

Also, how is not presenting "crucial" evidence "not innocent" when, as stated, the prosecutor only has to prove probable cause, Utah Const. art. I, § 12; the State's burden of proof is thus "low," *Lopez*, 2020 UT 61, ¶48; preliminary hearings are no longer a discovery tool, *id.* at ¶44; the defendant is probably going to get that evidence through discovery anyhow, Utah R. Crim. P. 16; and if he doesn't get the evidence through discovery, he has a remedy at trial if he can show prejudice, *id.*?

Or, at issue here, how is not presenting all theories of the case "not innocent" when the prosecutor only has to prove probable cause, Utah const. art. I, § 12; the State's burden of proof is "low," *Lopez*, 2020 UT 61, ¶48; the State may amend its theory of the crime even on the last day of trial, *State v. Peterson*, 681 P.2d 1210, 1220-21 (Utah 1984); "a reasonable person aware of the alleged facts and charged offenses" is unlikely to be surprised by the undisclosed theory, *State v. Reigelsperger*, 2017 UT App 101, ¶69, 400 P.3d 1127 (cleaned up); and the defendant has a remedy at trial if he can show prejudice, Utah R. Crim. P. 4(d)?

Lastly, even when there is arguable prosecutorial misconduct, why—absent actual prejudice to the defendant—is letting the prosecutor refile charges at least once "so extremely unfair" that it "violates those fundamental concepts of justice which lie at the base of our civil and political institutions" and "define the community's sense of fair play and decency." *Dowling v. United States*, 493 U.S. 342, 352-53 (1990) (cleaned up).

In fact, many jurisdictions have decided that letting prosecutors refile charges at least once is not unfair at all. *See*, *e.g.*, CA PENAL §§ 1387, § 1387.1 (2023) (prosecutors may refile felonies once as a matter of right and more than once in some circumstances); Ga. Code Ann. § 17-7-53 (2023) (two grand jury "no bills" on same charge bars future prosecutions absent fraud or new

evidence); *Stockwell v. State*, 573 P.2d 116, 125-26 (Idaho 1977) (prosecutor may refile charges, even with different magistrate, if he "believes in good faith that the magistrate committed error") (cleaned up); *People v. Overstreet*, 381 N.E.2d 305, 307 (Ill. App. Ct. 1978) ("Absent a showing of harassment, bad faith, or fundamental unfairness the State must be allowed an opportunity to refile" and "proceed to a second preliminary hearing."); *State v. Maki*, 192 N.W.2d 811, 812 (Minn. 1971) (upon magistrate's dismissal, prosecutor may either present matter "to another magistrate" or present facts "to a grand jury for indictment"); *State v. Rubek*, 371 N.W.2d 115, 117 (Neb. 1985) (longstanding rule in Nebraska is that discharge of accused by magistrate following preliminary hearing "does not bar the refiling of the same or different charges before another magistrate"); *State v. Shaw*, 227 A.3d 279, 290 (N.J. 2020) ("due process concerns are more likely to surface only in limited situations, such as a third or fourth presentation of similar facts" in support of an indictment; thus, only after grand juries twice decline to indict must State get court approval to submit case to third grand jury); *Rathbun v. State*, 257 P.3d 29, 35–37 (Wyo. 2011) (rejecting minority view limiting refiling after dismissal for lack of probable cause; most courts permit refiling at will, including refiling on same evidence before different magistrate, absent proof the prosecutor's purpose was to harass defendant).

This Court should follow suit. Under the Victims' Rights Amendment, victims have a right "to justice and due process" just like defendants do—which includes being "treated with fairness, respect, and dignity." Utah Const. art. I, § 28. *See Lopez*, 2020 UT 61, ¶41 (limited purpose of preliminary hearings, low burden of proof, "*and victims' rights under the Utah Constitution*" limit when defendant may successfully subpoena victim at preliminary hearing) (emphasis added). The State, the public, and victims have a strong "interest in bringing guilty persons to justice," *see Commonwealth v. Cronk*, 484 N.E.2d 1330, 1334 (Mass. 1985), and "there is a heightened societal interest in the prosecution of more serious crimes," *Burris v. Superior Court*, 103 P.3d 276, 280 (Cal. 2005). And as it currently stands, *Brickey*'s remedy for perceived misconduct—"the dismissal of a prosecution—is a serious consequence" that "means a defendant who may be guilty of a serious crime is freed without being tried" despite the lack of harm. *See State v. Papizan*, 256 So.3d 1091, 1096 (La. Ct. App. 2017) (cleaned up); *Morgan*, 2001 UT 87: ¶22 ("due process is not concerned with ordinary levels of inconvenience because the nature of the criminal justice system necessarily inconveniences those individuals who have been accused of crimes") (cleaned up).

As courts have held, deterring harmless prosecutorial misconduct is "an inappropriate basis" to dismiss charges "where means more narrowly

tailored to deter objectional prosecutorial conduct are available." *Bank of Nova Scotia v. United States,* 487 U.S. 250, 255 (1988) (discussing remedies for harmless prosecutorial misconduct during grand jury investigation) (cleaned up). More narrow remedies may include a bar complaint, sanctions, and "chastis[ing] the prosecutor in a published opinion." *See id.* at 263; *State v. Pacheco-Ortega*, 2011 UT App 186, ¶27, 257 P.3d 498 (discussing alternatives to dismissal when prosecutor unable to proceed in first case). And of course, a reviewing magistrate may always deny bindover in the second case if she decides the refiled charges remain inadequately supported by the evidence.

Such alternative remedies "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant." *Bank of Nova Scotia*, 487 U.S. at 263. "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice." *Cronk*, 484 N.E.2d at 1334 (addressing dismissal of charges due to prosecutorial noncompliance with discovery orders) (cleaned up). Thus, "public interest in the safety of our citizens requires" that, as "general rule," the state "must be free to present its case again even after it has failed to convince a neutral magistrate that it has a prima facie case." *Commonwealth v. Thorpe*, 701 A.2d 488, 490 (Pa. 1997).

D. Even under *Brickey* as it stands, the magistrate erred by dismissing Labrum's charges.

The magistrate basically gave four reasons for dismissing the refiled charges under *Brickey*: (1) although the State "attempted" to show a special-trust relationship between the victim and Labrum, it failed and thus "presented no evidence" on rape's non-consent element; (2) "[c]ompeting in-office theories of a case … do not constitute an innocent" mistake of law; while the stand-in prosecutor may have made "a good faith argument" at the preliminary hearing and a good faith decision "to amend the charges based on the evidence," it "does not necessarily follow that the assigned prosecutor who ultimately dismissed the case to refile did so in good faith"; the State withheld the enticement theory, which was "akin to withholding evidence" because it "impairs" Labrum's defense and could give the State "an unfair advantage" at trial, "especially after defense counsel has exhaustively prepared for another theory"; (3) the State did not make sure the refiled charges were assigned to the magistrate; and (4) the State's decision to forgo an appeal in the First Case in favor of a reconsideration motion did not constitute a mistake of law or other "good cause" for refiling. R0561:202-11 & n.18. Under the facts of this case, none of the magistrate's reasons withstand scrutiny.

1. The State presented evidence on rape's non-consent element.

In *State v. Redd*, the Court concluded that because the State "failed to provide a scintilla of evidence" on a "clear element of the relevant criminal statute," the State was barred from refiling the charge after the magistrate dismissed it for insufficient evidence at the preliminary hearing. 2001 UT 113, ¶17, 37 P.3d 1160. The Court concluded that "the State's experienced legal counsel should have been able to extrapolate these three simple elements and provide evidence sufficient for a bindover." *Id.* at ¶14. The State, therefore, did not "innocently miscalculate[] the quantum of evidence necessary for a bindover." *Id.* at ¶17. Thus, *Brickey* barred the State from refiling that charge. *Id.*

Here, the State presented evidence supporting its special-trust theory at the first preliminary hearing. Specifically, the witness declarations from [redacted] and Mother showed that [redacted] had known Labrum since he was about six; over the next 10 years, Mother and Labrum were like sisters; Labrum was often at Mother's house; Labrum bought presents and often made candy apples for [redacted] and his siblings; Labrum became particularly close with and often supervised [redacted] younger sister; and Labrum also spent time with [redacted] and the other children, including going to their sports events. R0561:67-82,84-96. Although the State may have miscalculated the quantum of evidence

needed to support its special-trust theory, the State *did not* fail "to provide a scintilla of evidence" on a "clear element of the relevant criminal statute." *See Redd*, 2001 UT 113, ¶17. The magistrate recognized as much when it ruled that the State "attempted" to show a special-trust relationship between [redacted] and Labrum. R0561:206,207. Perhaps reasonable minds could disagree about whether the State's evidence established that element, but no one could say that the prosecutor drove past it without a thought.

Thus, the magistrate erred when it dismissed the refiled charges on this ground.

2. The assigned prosecutor did not impermissibly withhold theories.

In *State v. Morgan*, the Court held that one purpose for the *Brickey* rule was to prevent "the State from intentionally holding back crucial evidence to impair a defendant's pretrial discovery rights and to ambush her at trial with the withheld evidence." 2001 UT 87, ¶14, 34 P.3d 767. As shown, though, that purpose arose at a time when discovery was an ancillary purpose of preliminary hearings. *See State v. Anderson*, 612 P.2d 778, 784 (Utah 1980), *superseded by constitutional amendment as stated in State v. Lopez*, 2020 UT 61, 474 P.3d 949. The 1995 amendment to Article I, section 12 of the Utah Constitution "eliminated the ancillary discovery purpose of the preliminary hearing and limited that proceeding to the determination of probable cause."

Lopez, 2020 UT 61, ¶44. Withholding evidence unnecessary to establishing probable cause, therefore, may no longer be considered abusive prosecutorial misconduct that violates a defendant's state due process rights.

Also, in *State v. Dykes*, the court of appeals held that when the State presents evidence at a preliminary hearing with the good faith belief that it supports one theory of the charged offense, the State may refile the charge on a different theory without violating *Brickey*. 2012 UT App 212, ¶¶11-12, 283 P.3d 1048. The court explained that, like when a prosecutor innocently miscalculates the evidence required for bindover, "when a prosecutor makes an innocent mistake about the state of the law, the potentially abusive practices the *Brickey* rule is intended to curb are not necessarily implicated." *Id.* at ¶11. But to qualify as an innocent mistake under *Brickey*, the mistake has to 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")." *Id.*

Here, the assigned prosecutor intended to argue two theories of non-consent in support of Labrum's rape charges: a position-of-special-trust theory and an enticement theory. R0567:61-75; *see* Utah Code Ann. § 76-5-406(2)(j), (k) (2023). As stated, the assigned prosecutor believed the evidence supported the special-trust theory because of Labrum's close relationship

with Mother over some 10 years, Labrum's frequent visits and interactions with Mother's family, and Labrum's frequent supervision of younger sister. R0561:62-63,67-82,84-96. The assigned prosecutor believed the evidence supported the enticement theory because witness declaration showed that Labrum initiated most, if not all, of her sexual relationship with R0561:63-64,67-82.

But the assigned prosecutor couldn't attend the preliminary hearing because another trial started the next day, and the stand-in prosecutor argued only the special-trust theory. R0561:48;0567:216-17. Further, when the magistrate ruled the evidence was insufficient to support that theory, the stand-in prosecutor did not argue the alternative enticement theory. R0561:48;R0567:220. Instead, after allegedly telling the magistrate and defense counsel moments before that he would not have filed the case, the stand-in prosecutor moved to reduce the charges to crimes that didn't require proof of non-consent. R0561:48;R0567:220.

Upon hearing what happened at the preliminary hearing, the assigned prosecutor immediately began preparing a motion asking the magistrate to reconsider its special-trust ruling and to consider the evidence under the previously-not-argued enticement theory; he filed the motion 20 twenty days after the hearing. R0561:48-49;R0567:95-96. When Labrum objected to the

motion, the magistrate dismissed the rape charges and denied the motion. R0567:85-92,107-14,142-43,148-65,172-73.

After the State refiled the charges, the magistrate granted Labrum's motion to dismiss, ruling in part that (a) "[c]ompeting in-office theories of a case … do not constitute an innocent" mistake of law; (b) while the stand-in prosecutor may have been acting in good faith when making the choices he did, the assigned prosecutor was not when he decided to dismiss and refile the charges; and (c) the State's withholding the enticement theory was "akin to withholding evidence" because it impaired Labrum's defense and could have given the State "an unfair advantage" at trial. R0561:206,208-09.

The stand-in prosecutor's decision to argue only the special-trust theory at the preliminary hearing and then to seek reduction of the rape charges because he believed the State's evidence on the rape charges was weak does not mean that the assigned prosecutor's subsequent actions—his attempt to have the magistrate consider the enticement theory and, once the magistrate declined, his decision to dismiss the remaining charge and refile all the charges—were taken in bad faith. "The determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions." *United States v. Lovasco*, 431 U.S. 783, 793 (1977). That the two

prosecutors may have disagreed about the strength of the case, then, was unremarkable.

Also, an actor's sexual conduct with a victim is non-consensual if "the victim is younger than 18 years of age and at the time of the offense the actor … occupied a position of special trust in relation to the victim," including "any individual" who is "in a position of authority, … which enables the individual to exercise undue influence over the child." *Id.* §§ 76-5-404.1(1)(a)(iv); 76-5-406(2)(j). [redacted] and Mother's witness declarations described Labrum's long-time friendship with Mother, her frequent presence around Mother's children, and her exercising significant authority over [redacted] sister. R0561:67-82;R84-96. As stated, based on those declarations, the assigned prosecutor's belief that the evidence supported a special-trust theory was reasonable. This is particularly so if, as he stated, he knew more about the case than the stand-in prosecutor and if his perception of the declarations' strength was colored by other evidence that gave him a better understanding of Labrum's authority over [redacted] than the stand-in prosecutor had. On this record, then, it is difficult to conclude that the assigned prosecutor's pursuit of a special-trust theory was not "made in good faith (i.e., with a genuine belief in its validity)" and did not have "a colorable basis (i.e., is "apparently correct or justified." *Dykes*, 2012 UT App 212, ¶11.

On this evidence, the assigned prosecutor's belief that [redacted] declaration supported an enticement theory was also reasonable. An actor's sexual conduct with a victim is non-consensual if the victim is over 13 years of age but under 18, the actor is more than three years older, and the actor "entices or coerces the victim to submit or participate." Utah Code Ann. § 76-5-406(2)(k). [redacted] was 16 and Labrum was 26 when Labrum told [redacted] that if she ever divorced, she would marry him. R0561:67;R0567:210. Shortly after [redacted] laughed it off, Labrum texted him and again brought up her attraction. R0561:67. A week later, Labrum picked [redacted] up, took him to a nearby unfinished subdivision, and essentially invited [redacted] to kiss her. R0561:67-68. When they were kissing the next week, Labrum started caressing [redacted] penis and asked if it was okay. R0567:68. She then asked if she could "go inside" [redacted] pants. *Id.* Labrum arranged the next visit to be at her house. R0561:69. When they started kissing, Labrum climbed on top of [redacted] and started "grinding" on him. R0561:70. When he started touching her breasts, she took her shirt off. *Id.* Then, she asked [redacted] if they could take his pants off. *Id.* Then, she asked if she could grind on him naked. *Id.* On their next visit, when [redacted] penis sent inside Labrum's vagina, she asked him if it was okay. R0561:71. A few days later, she told him to ejaculate in her. *Id.*

Based on [redacted] declaration, the assigned prosecutor's belief that the evidence supported an enticement theory was reasonable. On this record, then, the assigned prosecutor's pursuit of an enticement theory in both the First Case and this case was also "made in good faith" and had "a colorable basis" *See Dykes*, 2012 UT App 212, ¶11.

Finally, the assigned prosecutor recalled telling defense counsel about both the special-trust and enticement theories before the preliminary hearing. R0561:240-41. In any event, the State has found no case law requiring a defendant to disclose all theories of his case at a preliminary hearing. Nor does other the law support that contention where, as stated, the prosecutor only has to prove probable cause, Utah Const. art. I, § 12; the State's burden of proof is "low," *Lopez*, 2020 UT 61, ¶48; the State may amend its theory of the crime even on the last day of trial, *State v. Peterson*, 681 P.2d 1210, 1220-21 (Utah 1984); "a reasonable person aware of the alleged facts and charged offenses" is unlikely to be surprised by the undisclosed theory, *State v. Reigelsperger*, 2017 UT App 101, ¶69, 400 P.3d 1127; and the defendant has a remedy at trial if he can show prejudice, Utah R. Crim. P. 4(d).

Also, the prosecutor intended to argue both non-consent theories at the preliminary hearing. R0567:94-95. And when he found out stand-in counsel did not argue the enticement theory, he filed a motion to reconsider

that disclosed his intent to rely on that theory as well as the special-trust theory. R0567:61-75,94-95. Thus, there is no indication that the assigned prosecutor intended to withhold the enticement theory and to 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.

Thus, the magistrate erred when it dismissed the refiled charges on these grounds.

3. There is no evidence of forum-shopping.

State v. Brickey held that "a criminal prosecution must not be shuttled from one magistrate to another simply because a county attorney is not satisfied with the action of the magistrate" in the first case. 714 P.2d 644, 647 (Utah 1986) (cleaned up). Thus, when refiling charges previously dismissed for insufficient evidence after a preliminary hearing, "the prosecutor must, whenever possible, refile the charges before the same magistrate who does not consider the matter de novo, but looks at the facts to determine whether the new evidence or changed circumstances are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges." *Id.* at 648. Forum shopping presumptively bars a refiling of charges. *Morgan*, 2001 UT 87, ¶15.

The State did not make sure that the refiled charges were assigned to the First Magistrate. But no evidence shows that the prosecutor intentionally tried to have a different magistrate review the refiled charges. Indeed, the State tried unsuccessfully to get his non-consent theories before the First Magistrate in the First Case through a reconsideration motion. R0567:58-75,94-106. Thus, there is no evidence in the record that he wanted someone other than the First Magistrate to decide whether the evidence was sufficient to support bindover in light of that motion.

Also, after argument on Labrum's motion to dismiss in this case, the First Magistrate expressly stated that "there is nothing before the Court today that makes me think that the State is forum shopping." R0561:246. The "preferable and perhaps best course of action would have been for everyone to immediately raise" the issue with the assigned judge so that the case could be reassigned. *Id.* But the court's own "e-filing system" was "'required' to assign" the new case "to the same judge" as the prior case. *Id.* "So I don't think that there was anything nefarious on the part of the State there in refiling." R0561:247. Indeed, given that the court's filing system should have automatically assigned the refiled case to the First Magistrate, the prosecutor may have assumed the case was assigned to a different judge because the

First Magistrate wasn't available. Again, then, there is no evidence that the prosecutor was trying to forum-shop when he refiled Labrum's charges.

Thus, the magistrate erred when it dismissed the refiled charges on these grounds.

4. The prosecutor had good reason to move for reconsideration instead of appealing.

That the State decided to forego an appeal in the First Case in favor of a motion to reconsider is not, without more, good cause to refile Labrum's charges. But the unlikelihood that an appellate court would have considered the enticement theory the prosecutor tried to raise in his reconsideration motion is.

To preserve an issue for appeal, "the issue must be presented to the district court in such a way that the district court has an opportunity to rule on that issue." *State v. Moa*, 2012 UT 28, ¶23, 282 P.3d 985 (cleaned up). To meet this requirement, the specific issue "must be sufficiently raised to a level of consciousness before the trial court and must be supported by evidence or relevant authority." *State v. Dean*, 2004 UT 63, ¶13, 95 P.3d 276 (cleaned up). "When a party raises an issue on appeal without having properly preserved the issue below, ... the party must argue either 'plain error' or 'exceptional circumstances.'" *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171.

Here, if the State had appealed from the magistrate's dismissal of the rape charges, the only issue that would have been preserved for appeal was whether the magistrate erred by not binding Labrum over on the State's special-trust theory of non-consent on the rape charges. The State did not argue enticement at the preliminary hearing and when the magistrate dismissed the rape charges, the magistrate had not yet ruled on the State's reconsideration motion. Thus, whether the evidence was sufficient to bind Labrum over on the enticement theory would not have been preserved.

The prosecutor's decision to pursue the matter through his reconsideration motion, therefore, was not unreasonable. Arguably, then, the magistrate erred by not weighing that point in the prosecutor's favor when considering Labrum's dismissal motion.

CONCLUSION

For the reasons stated, the Court should modify the *Brickey* rule to make it easier for prosecutors to at least once refile charges. In any event, the magistrate erred by dismissing the refiled charges under *Brickey*. The Court should therefore reverse the magistrate's decision. Alternatively, the Court should make clear that the State may file a new Information charging Defendant with the crimes the magistrate found supported at the preliminary hearing in the First Case.

Dated October 16, 2023.

SEAN D. REYES
Utah Attorney General

/s/ *Karen A. Klucznik*
KAREN A. KLUCZNIK
Assistant Solicitor General
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Page/Word Certification. I certify that in compliance with rule 24, Utah R. App. P., this brief contains 12,510 words, excluding tables, addenda, and certificates of counsel.

Public/Protected Records Certification. I also certify that in compliance with rule 21, Utah R. App. P., this brief, including any addenda:

☐ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

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/s/ *Karen A. Klucznik*
KAREN A. KLUCZNIK
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 16, 2023, the Brief of Appellant, including any addenda, was filed with the Court by email in a searchable PDF attachment and served upon appellee Kyli Jenae Labrum's counsel of record at:

Gregory G. Skordas
SKORDAS & CASTON, LLC
gskordas@schhlaw.com

/s/ *Melanie Kendrick*

* No more than 7 days after filing by email, the State will file with this Court the required number of paper copies of the brief and any addenda (six to Court of Appeals or 8 to Supreme Court). Upon request, the State will serve two paper copies thereof to the appellee's counsel of record. *See* Utah R. App. P. 26(b).

Addenda

Addendum A

Utah Constitution. Art. 1 § 7

No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. art. 1, § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation, to have a copy thereof, to testify in the accused's own behalf, to be confronted by the witnesses against the accused, to have compulsory process to compel the attendance of witnesses in the accused's own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself or herself; a person shall not be compelled to testify against the person's spouse, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Constitution art. I, § 28.

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.

Utah Code Ann. § 76-5-402 (2023) Rape--Penalties

(1) Terms defined in Section 76-1-101.5 apply to this section.

(2) (a) An actor commits rape if the actor has sexual intercourse with another individual without the individual's consent.
(b) Any sexual penetration, however slight, is sufficient to constitute the relevant element of a violation of Subsection (2)(a).
(c) This section applies whether or not the actor is married to the individual.

(3) A violation of Subsection (2) is a felony of the first degree, punishable by a term of imprisonment of:
(a) except as provided in Subsection (3)(b) or (c), not less than five years and which may be for life;
(b) except as provided in Subsection (3)(c) or (4), 15 years and which may be for life, if the trier of fact finds that:
(i) during the course of the commission of the rape the defendant caused serious bodily injury to the victim; or
(ii) at the time of the commission of the rape, the defendant was younger than 18 years old and was previously convicted of a grievous sexual offense; or
(c) life without parole, if the trier of fact finds that at the time of the commission of the rape the defendant was previously convicted of a grievous sexual offense.

(4) If, when imposing a sentence under Subsection (3)(b), a court finds that a lesser term than the term described in Subsection (3)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(a) 10 years and which may be for life; or
(b) six years and which may be for life.

(5) The provisions of Subsection (4) do not apply when a defendant is sentenced under Subsection (3)(a) or (c).

(6) Imprisonment under Subsection (3)(b), (3)(c), or (4) is mandatory in accordance with Section 76-3-406.

Utah Code Annotated § 76-5-404 (2023) Forcible sexual abuse--Penalties--Limitations

(1) (a) As used in this section, "indecent liberties" means the same as that term is defined in Section 76-5-401.1.
(b) Terms defined in Section 76-1-101.5 apply to this section.

(2) (a) Under circumstances not amounting to an offense listed in Subsection (4), an actor commits forcible sexual abuse if:
(i) without the consent of the individual, the actor:
(A) touches the anus, buttocks, pubic area, or any part of the genitals of another individual;
(B) touches the breast of another individual who is female; or
(C) otherwise takes indecent liberties with another individual;
(ii) the actor intends to:
(A) cause substantial emotional or bodily pain to any individual; or
(B) arouse or gratify the sexual desire of any individual; and
(iii) the individual described in Subsection (2)(a)(i)(A), (B), or (C) is 14 years old or older.
(b) Any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of a violation of Subsection (2)(a).

(3) (a) A violation of Subsection (2) is a felony of the second degree, punishable by a term of imprisonment of not less than one year nor more than 15 years.
(b) (i) Notwithstanding Subsection (3)(a) and except as provided in Subsection (3)(b)(ii), a violation of Subsection (2) is a felony of the first degree, punishable by a term of imprisonment for 15 years and which may be for life, if the trier of fact finds that during the course of the commission of the forcible sexual abuse the defendant caused serious bodily injury to the victim.
(ii) If, when imposing a sentence under Subsection (3)(b)(i), a court finds that a lesser term than the term described in Subsection (3)(b)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(A) 10 years and which may be for life; or
(B) six years and which may be for life.

(4) The offenses referred to in Subsection (2)(a) are:
(a) rape, in violation of Section 76-5-402;
(b) object rape, in violation of Section 76-5-402.2;

(c) forcible sodomy, in violation of Section 76-5-403; or
(d) an attempt to commit an offense listed in Subsections (4)(a) through (4)(c).

(5) Imprisonment under Subsection (3)(b) or (4) is mandatory in accordance with Section 76-3-406.

Utah Code Ann. § 76-5-404.1 (2023) Sexual abuse of a child--Penalties--Limitations

(1) (a) As used in this section:

(i) "Adult" means an individual 18 years old or older.

(ii) "Child" means an individual younger than 14 years old.

(iii) "Indecent liberties" means the same as that term is defined in Section 76-5-401.1.

(iv) "Position of special trust" means:

(A) an adoptive parent;

(B) an athletic manager who is an adult;

(C) an aunt;

(D) a babysitter;

(E) a coach;

(F) a cohabitant of a parent if the cohabitant is an adult;

(G) a counselor;

(H) a doctor or physician;

(I) an employer;

(J) a foster parent;

(K) a grandparent;

(L) a legal guardian;

(M) a natural parent;

(N) a recreational leader who is an adult;

(O) a religious leader;

(P) a sibling or a stepsibling who is an adult;

(Q) a scout leader who is an adult;

(R) a stepparent;

(S) a teacher or any other individual employed by or volunteering at a public or private elementary school or secondary school, and who is 18 years old or older;

(T) an instructor, professor, or teaching assistant at a public or private institution of higher education;

(U) an uncle;

(V) a youth leader who is an adult; or

(W) any individual in a position of authority, other than those individuals listed in Subsections (1)(a)(iv)(A) through (V), which enables the individual to exercise undue influence over the child.

(b) Terms defined in Section 76-1-101.5 apply to this section.

(2) (a) Under circumstances not amounting to an offense listed in Subsection (4), an actor commits sexual abuse of a child if the actor:

(i) (A) touches the anus, buttocks, pubic area, or genitalia of any child;
(B) touches the breast of a female child; or
(C) otherwise takes indecent liberties with a child; and

(ii) the actor's conduct is with intent to:
(A) cause substantial emotional or bodily pain to any individual; or
(B) to arouse or gratify the sexual desire of any individual.

(b) Any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of a violation of Subsection (2)(a).

(3) A violation of Subsection (2) is a second degree felony.

(4) The offenses referred to in Subsection (2)(a) are:

(a) rape of a child, in violation of Section 76-5-402.1;
(b) object rape of a child, in violation of Section 76-5-402.3;
(c) sodomy on a child, in violation of Section 76-5-403.1; or
(d) an attempt to commit an offense listed in Subsections (4)(a) through (4)(c).

(5) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Utah Code Annotated § 76-5-406 (2023) Sexual offenses against the victim without consent of victim--Circumstances

(1) As used in this section:

(a) "Health professional" means an individual who is licensed or who holds the individual out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling, including an athletic trainer, physician, osteopathic physician, physician assistant, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor.

(b) "Religious counselor" means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

(c) "To retaliate" includes threats of physical force, kidnapping, or extortion.

(2) An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, forcible sodomy, attempted forcible sodomy, sodomy on a child, attempted sodomy on a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

(a) the victim expresses lack of consent through words or conduct;

(b) the actor overcomes the victim through the actual application of physical force or violence;

(c) the actor is able to overcome the victim through concealment or by the element of surprise;

(d) (i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or

(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;

(e) the actor knows the victim is unconscious, unaware that the act is occurring, or is physically unable to resist;

(f) the actor knows or reasonably should know that the victim has a mental disease or defect, which renders the victim unable to:

(i) appraise the nature of the act;
(ii) resist the act;
(iii) understand the possible consequences to the victim's health or safety; or
(iv) appraise the nature of the relationship between the actor and the victim;

(g) the actor knows that the victim participates because the victim erroneously believes that the actor is someone else;

(h) the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim's knowledge;

(i) the victim is younger than 14 years of age;

(j) the victim is younger than 18 years of age and at the time of the offense the actor was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Section 76-5-404.1;

(k) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2)(b) or (d); or

(l) the actor is a health professional or religious counselor, the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.

(3) Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any time prior to or during sexual activity.

Utah R. Crim. P. 7B (2023) Preliminary Examinations

(a) Burden of Proof. At the preliminary examination, the state has the burden of proof and proceeds 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.

(b) Probable Cause Determination. If from the evidence the magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate must order that the defendant be bound over for trial. The findings of probable cause may be based on hearsay, but may not be based solely on hearsay evidence admitted under Rule 1102(b)(8) of the Utah Rules of Evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.

(c) If No Probable Cause. If the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the magistrate must 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.

(d) Witnesses. 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.

(e) Written Findings. If the magistrate orders the defendant bound over for trial, the magistrate must execute a bind-over order and include any written findings in the case record.

(f) Assignment on Motion to Quash. If a defendant files a motion to quash a bind-over order, the motion shall be decided by the judge assigned to the case after bind-over, regardless of whether the judge conducted the preliminary examination in the judge's role as a magistrate.

Utah R. Crim. P. 16 (2023) Discovery

(a) Disclosures by Prosecutor.

(1) *Mandatory Disclosures.* The prosecutor must disclose to the defendant the following material or information directly related to the case of which the prosecution team has knowledge and control:

(A) written or recorded statements of the defendant and any codefendants, and the substance of any unrecorded oral statements made by the defendant and any codefendants to law enforcement officials;

(B) reports and results of any physical or mental examination, of any identification procedure, and of any scientific test or experiment;

(C) physical and electronic evidence, including any warrants, warrant affidavits, books, papers, documents, photographs, and digital media recordings;

(D) written or recorded statements of witnesses;

(E) reports prepared by law enforcement officials and any notes that are not incorporated into such a report; and

(F) evidence that must be disclosed under the United States and Utah constitutions, including all evidence favorable to the defendant that is material to guilt or punishment.

(2) *Timing of Mandatory Disclosures.* The prosecutor's duty to disclose under paragraph (a)(1) is a continuing duty as the material or information becomes known to the prosecutor. The prosecutor's disclosures must be made as soon as practicable following the filing of an information, except that a prosecutor must disclose all evidence that the prosecutor relied upon to file the information within five days after the day on which the prosecutor receives a request for discovery from the defendant. In every case, all material or information listed under paragraph (a)(1) that is presently and reasonably available to the prosecutor must be disclosed before the preliminary examination, if applicable, or before the defendant enters a plea of guilty or no contest or goes to trial, unless otherwise waived by the defendant.

(3) *Disclosures upon Request.*

(A) Upon request, the prosecutor must obtain and disclose to the defendant any of the material or information listed in paragraph (a)(1) which is in a record possessed by another governmental agency and may be shared with the prosecutor under Title 63G, Chapter 2, Government Records Access and Management Act. The request must identify with particularity the record sought and the agency that possesses it, and must demonstrate that the information in the record is directly related to the case.

(B) If the government agency refuses to share with the prosecutor the record containing the requested material or information under paragraph (a)(3)(A), or if the prosecution determines that it is prohibited by law from disclosing to the defense the record shared by the governmental agency, the prosecutor must promptly file notice stating the reasons for noncompliance. The defense may thereafter file an appropriate motion seeking a subpoena or other order requiring the disclosure of the requested record.

(4) *Good Cause Disclosures.* The prosecutor must disclose any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.

(5) *Trial Disclosures.* The prosecutor must also disclose to the defendant the following information and material no later than 14 days, or as soon as practicable, before trial:

(A) Unless otherwise prohibited by law, a written list of the names and current contact information of all persons whom the prosecution intends to call as witnesses at trial; and

(B) Any exhibits that the prosecution intends to introduce at trial.

(C) Upon order of the court, the criminal records, if any, of all persons whom the prosecution intends to call as a witness at trial.

(6) *Information not Subject to Disclosure.* Unless otherwise required by law, the prosecution's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(6) of the Utah Rules of Civil Procedure.

(b) Disclosures by Defense.

(1) *Good Cause Disclosures.* The defense must disclose to the prosecutor any item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare the prosecutor's case for trial.

(2) *Other Disclosures Required by Statute.* The defense must disclose to the prosecutor such information as required by statute relating to alibi or insanity.

(3) *Trial Disclosures.* The defense must also disclose to the prosecutor the following information and material no later than 14 days, or as soon as practicable, before trial:

(A) A written list of the names and current contact information of all persons, except for the defendant, whom the defense intends to call as witnesses at trial; and

(B) Any exhibits that the defense intends to introduce at trial.

(4) *Information not Subject to Disclosure.* The defendant's disclosure obligations do not include information or material that is privileged or attorney work product. Attorney work product protection is not subject to the exception in Rule 26(b)(6) of the Utah Rules of Civil Procedure.

(c) Methods of Disclosure.

(1) The prosecutor or defendant may make disclosure by notifying the opposing party that material and information may be inspected, tested, or copied at specified reasonable times and places.

(2) If the prosecutor concludes any disclosure required under this rule is prohibited by law, or believes disclosure would endanger any person or interfere with an ongoing investigation, the prosecutor must file notice identifying the nature of the material or information withheld and the basis for non-disclosure. If disclosure is then requested by the defendant, the court must hold an in camera review to decide whether disclosure is required and whether any limitations or restrictions will apply to disclosure as provided in paragraph (d).

(d) Disclosure Limitations and Restrictions.

(1) The prosecutor or defendant may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of recorded interviews, photographs, or psychological or medical reports.

(2) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(e) Relief and Sanctions for Failing to Disclose.

(1) When a party fails to comply with the disclosure requirements of this rule, the court may, subject to constitutional limitations and the rules of evidence, take the measures or impose the sanctions provided in this paragraph that it deems appropriate under the circumstances. If a party has failed to comply with this rule, the court may take one or more of the following actions:

(A) order such party to permit the discovery or inspection, of the undisclosed material or information;

(B) grant a continuance of the proceedings;

(C) prohibit the party from introducing evidence not disclosed; or

(D) order such other relief as the court deems just under the circumstances.

(2) If after a hearing the court finds that a party has knowingly and willfully failed to comply with an order of the court compelling disclosure under this rule, the nondisclosing party or attorney may be held in contempt of court and subject to the penalties thereof.

(f) Identification Evidence.

(1) Subject to constitutional limitations and upon good cause shown, the trial court may order the defendant to: appear in a lineup; speak for identification; submit to fingerprinting or the making of other bodily impressions; pose for photographs not involving reenactment of the crime; try on articles of clothing or other items of disguise; permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion; provide specimens of handwriting; submit to reasonable physical or medical inspection of the accused's body; and cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and the accused's counsel.

(3) Unless relieved by court order, failure of the accused to appear or to comply with the requirements of this paragraph without reasonable excuse shall be grounds for revocation of pre-trial release and will subject the defendant to such further consequences or sanctions as the court may deem appropriate, including allowing the prosecutor to offer as evidence at trial the defendant's failure to comply with this paragraph.

Addendum B

IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff, Case No. 211100567

vs.

KYLI JENAE LABRUM,

Defendant.

~~~~~~

PRELIMINARY HEARING

~~~~~~

BEFORE JUDGE ANGELA FONNESBECK

OCTOBER 19, 2021

APPEARANCES:

FOR THE PLAINTIFF:

Clark A. Harms

WEBER COUNTY ATTORNEY

2380 Washington Boulevard, Suite 230

Ogden, Utah 84401

FOR THE DEFENDANT:

Gregory G. Skordas

SKORDAS AND CASTON

124 South 400 East, Suite 220

Salt Lake City, Utah 84111

WITNESS:

BAILIFF: -- is now in session. The Honorable Angela Fonnesbeck is presiding. You may be seated.

THE COURT: All right. Good morning. We're here in case number 211100567. This is the matter of the State of Utah vs. Kyli Labrum.

Counsel, will you please make your appearances for the record?

MR. HARMS: Clark Harms for the State.

MR. SKORDAS: Your Honor, I'm Greg Skordas appearing with Kyli, who is seated to my right.

THE COURT: Very good. Thank you. As I indicated, this is the time set for a preliminary hearing. Counsel, are we ready to move forward?

MR. HARMS: Yes, Your Honor.

THE COURT: All right. Mr. Harms, do you wish to make an opening statement on behalf of the State?

MR. HARMS: No, Your Honor. I'll defer.

THE COURT: Mr. Skordas?

MR. SKORDAS: No, none from me, Your Honor. Thank you.

THE COURT: All right. Mr. Harms, your first witness, sir.

MR. HARMS: Detective Steve Downey, please.

THE COURT: I'm sorry. Steve what?

MR. HARMS: Detective Steve Downey.

THE COURT: Okay.

MR. HARMS: And if you don’t mind, while I'm here and Scott is at the pulpit, can I --

THE COURT: Yes. In fact, I was just going to say because we won't have anyone else seated at the tables or anything during these proceedings, if you wish to take your mask off, I'm comfortable with that. If you wish to leave them on, that's up to you as well.

So, Detective, if you'll come forward, please. Just come through the bar and through the tables here and just come stand in front of the clerk. I'm going to have you raise your right hand and be sworn in, sir.

DETECTIVE STEVEN DOWNEY,
called as a witness, having
been duly sworn, was examined
and testified as follows:

THE COURT: All right. Very good, sir. If you'll go ahead and step up into the podium -- I'm sorry -- not the podium, the witness box. And then just if you'll make sure the microphone is directly in front of you while you're speaking, that would be helpful.

THE WITNESS: Yes, ma'am.

THE COURT: All right. Go ahead, sir.

MR. HARMS: Thank you.

DIRECT EXAMINATION

BY MR. HARMS:

Q. Detective, would you state your name and spell your last name just for the record?

A. My name is Detective Steven Downey. The spelling of my last name is D-o-w-n-e-y.

Q. And by whom are you currently employed?

A. The Smithfield City Police Department.

Q. Are you a detective?

A. Yes, sir.

Q. And how long have you been a detective?

A. About two years.

Q. How long have you been a police officer?

A. For seven years.

Q. And you're certified in the state of Utah?

A. Yes, sir.

Q. As a category one -- or I guess now they call them law enforcement officers?

A. Yes, sir.

Q. The old category one?

A. Yes, sir.

Q. All right. In your course of employment as a detective for Smithfield City, did you come in contact with a person named [redacted]?

A. Yes, sir.

Q. Could you tell me how that happened?

A. I received several anonymous complaints about a case where [redacted] was likely the victim. I then went to [redacted] home and spoke to him and his family about the case and invited them to come to my office for an interview.

Q. And in the course of that investigation, did you make a determination that [redacted] was in fact a victim of an alleged crime?

A. Yes, sir.

Q. And in the course of that investigation, have you spoken to Nate Argyle of the Cache County Attorney's Office?

A. Yes, sir, I have.

Q. Do you know who Nate Argyle is?

A. Yes, sir.

Q. Tell the Court who he is, please.

A. Nate Argyle is the Special Investigator for the Cache County Attorney's Office.

Q. And he's a certified police officer for the state of Utah?

A. Yes, sir.

Q. Is your -- are you aware that Mr. Argyle obtained what, colloquially, we call an 1102 statement for [redacted]?

A. I am. Yes, sir.

MR. HARMS: May I approach, Your Honor?

THE COURT: You may.

BY MR. HARMS:

Q. I'm going to hand you what's been marked as State's Exhibit No. 1. Would you take a moment and examine that document, please? Are you familiar with that document?

A. Yes, sir.

Q. Tell me -- tell the Court what that is, please.

A. This is a written statement from [redacted] on an 1102 form.

Q. And was that document prepared by Investigator Argyle?

A. Yes, sir.

Q. And does it have the 1102 or the Rule 1102 warning at the top?

A. Yes, sir, it does.

MR. HARMS: The State would move to admit State's 1.

THE COURT: Any objection, sir?

MR. SKORDAS: No, Your Honor. Just for the purpose of this hearing only.

THE COURT: Very good. I will admit Exhibit 1 into evidence. Are you going to have the witness refer to it further?

MR. HARMS: I'm not. What I'm going to do and with the Court's indulgence and Mr. Skordas's advice, what I anticipate doing is laying the foundation, getting the evidence in that I wanted and allowing the Court then time to review the 1102 statements at the Court's leisure, maybe we take a recess and then come back.

THE COURT: Okay. Very good.

MR. HARMS: May I publish the Exhibit 1?

THE COURT: Yeah, please. Let's do. Thank you, sir.

BY MR. HARMS:

Q. Detective Downey, as part of your investigation, are you aware that Investigator Argyle also obtained an 1102 statement from [redacted] or [redacted] [redacted]?

A. Yes, sir.

Q. And who's [redacted] [redacted]?

A. [redacted] [redacted] mother.

Q. All right. Did you speak to Investigator Argyle about that 1102 statement?

A. Yes, sir, I did.

MR. HARMS: May I approach, Your Honor?

THE COURT: You may.

MR. HARMS: I'm going to hand Detective Downey what's been marked as State's Exhibit No. 2.

BY MR. HARMS:

Q. Would you review that document and familiarize yourself with it so we can discuss it? Detective Downey, what document is Exhibit 2 then?

A. This is an 1102 document prepared by [redacted] [redacted].

Q. And her signature appears on the last page or the first page then?

A. On both pages, sir.

Q. And this is the document that Investigator Argyle obtained and then provided to you?

A. Yes, sir.

MR. HARMS: The State would move to admit State's Exhibit No. 2 for purposes of the preliminary only.

THE COURT: Any objections, Mr. Skordas?

MR. SKORDAS: No, Your Honor.

THE COURT: All right. Very good.

MR. SKORDAS: Just for the purposes of this hearing of course.

THE COURT: Yes. Thank you, sir. All right. Exhibit 2 will be admitted. Thank you.

BY MR. HARMS:

Q. In the course of your investigation, did you determine the date of birth of [redacted] [redacted]?

A. Yes, sir.

Q. What's [redacted] date of birth?

A. I need to look at my police report to accurately provide the date of birth.

MR. SKORDAS: No objection.

THE COURT: All right. Go ahead.

THE WITNESS: I have my own police report. Is that okay?

THE COURT: That's fine. Go ahead.

BY MR. HARMS:

Q. And I believe it's on page 14 of 14.
A. [redacted] birthday is [redacted].
Q. And did you determine the birth date of Ms. Labrum?
A. Yes, sir.
Q. What's her birthday?
A. Ms. Labrum's birthday is [redacted]
Q. And did you -- during the course of your investigation, did you determine that Ms. Labrum had a baby in 2019?
A. Yes, sir.
Q. And what's the date of the baby's birth?
A. [redacted]
Q. And for purposes of clarity for the preliminary hearing, we'll refer to the baby as [redacted] Did you obtain any evidence with relationship to the birth or parentage or DNA of baby [redacted]?
A. Yes, sir.
Q. Tell me what you obtained.
A. I obtained two sets of buccal cheek swabs from baby [redacted]
Q. And did you obtain other DNA evidence from anybody else?
A. Yes, sir.
Q. Who else did you obtain evidence from?
A. I collected buccal cheek swabs from [redacted], as well as Kyli Labrum.

Q. And in the course of your investigation, what did you do with those buccal swabs after you obtained those?

A. I provided them to the Utah Attorney General's Office for testing.

Q. And did -- to your knowledge, did the Utah Attorney General's Office conduct testing on those swabs?

A. Yes, sir.

Q. Did they give you a report indicating the results of that testing?

A. Yes, sir, they did.

MR. HARMS: Your Honor, may I approach?

THE COURT: You may.

MR. HARMS: State's 3.

Your Honor, I've handed Detective Downey State's Exhibit No. 3.

BY MR. HARMS:

Q. Detective Downey, would you look at that? This is an excerpt from the entire AG report, rather than provide all of the analyses that they did in the major report. Would you just tell me what that excerpt of that report is?

A. So this is the -- without being an expert, this is all the DNA findings. And then at the end, there's probabilities of each of these reports.

Q. And did that testing result reflect the percentage likelihood that [redacted] [redacted] is the father of baby [redacted]?

A. Yes, sir.
Q. And what's that percentage?
A. 99.9 percent.
Q. And did that testing determine or give analysis regarding the likelihood that Kyli Labrum is baby [redacted] mother?
A. Yes, sir.
Q. And what was that percentage?
A. 99.9 percent.
MR. HARMS: Your Honor, the State moves to admit Exhibit No. 3 for the purposes of the preliminary hearing only.
THE COURT: Any objections?
MR. SKORDAS: No, Your Honor.
THE COURT: All right. Very good.
MR. HARMS: May I publish the report?
THE COURT: Yes. Thank you. It will be admitted then. Thank you.
BY MR. HARMS:
Q. Based on your investigation, Detective Downey, how old was [redacted] when baby [redacted] was born?
A. When she was actually physically born, he was 18 years old.
Q. And how old would he have been approximately eight to nine months before that birthday?
A. Seventeen.
Q. All right.

MR. HARMS: No further questions, Your Honor.
THE COURT: Thank you. Mr. Skordas?
MR. SKORDAS: I have no questions of this witness, Your Honor.
THE COURT: Very good. Thank you, sir. You can go ahead and step down.
Are we okay excusing this witness?
MR. HARMS: Yes, Your Honor, if that's okay.
MR. SKORDAS: No objection.
THE COURT: All right. So, sir, you can be excused. You're welcome to stay if you'd like. Thank you.
THE WITNESS: Thank you.
MR. HARMS: Your Honor, my anticipation is now the State would rest and invite the Court to review State's Exhibits 1 through 3. And then we'll come back and then after that, the State will rest, and then we can proceed from there.
THE COURT: All right. Very good.
Mr. Skordas, are you comfortable proceeding that way?
MR. SKORDAS: Yes.
THE COURT: All right.
MR. SKORDAS: Clark and I spoke beforehand, and we agreed on that.
THE COURT: Okay. Very good. What I'm going to do then is I'm going to take a recess at this time to give me an opportunity to review these three exhibits that the Court has

received. And we'll be back on the record in just a moment. Thank you. The Court is in recess.

(Recess)

THE COURT: All right. We're going back on the record then in the Labrum matter. That took a little longer to read than I was expecting, but they were quite lengthy, and I wanted to make sure to read them carefully. So I appreciate your patience while I did that.

All right. Mr. Harms, any further evidence or witnesses from the State?

MR. HARMS: No, Your Honor. The State would rest.

THE COURT: Thank you.

Mr. Skordas, any witnesses or evidence that you intend to call today, sir?

MR. SKORDAS: No, but if I could just have benefit of the record for just a minute.

THE COURT: Go ahead.

MR. SKORDAS: Kyli, you and I spoke before this hearing today about what the preliminary hearing was and that you could testify today. I have advised you not to testify. Are you willing to follow that advice?

THE DEFENDANT: Yes.

MR. SKORDAS: With that, we don’t have any witnesses, Your Honor.

THE COURT: All right. Very good. Thank you, sir.

All right.

Mr. Harms, do you wish to make a closing statement at this time?

MR. HARMS: Briefly, Your Honor, if I could.

THE COURT: Go ahead.

MR. HARMS: Your Honor, after reading the 1102 statements from [redacted] and his mother, the elements of the sexual interaction between [redacted] and Ms. Labrum over the course of time when he was 16 and 17, I think it's pretty well documented.

The State has filed 11 counts. Ten of which allege rape, a first-degree felony and 1 count alleging forcible sex abuse. You'll recall on pages two through four of [redacted] statement that describes the interactions, which form the basis of Count 11, the forcible sex abuse. Pages five and six describe multiple sexual interactions, which meet the statutory definition of intercourse and rape.

We'll get to the rape in a minute, but at least the statutory definition of intercourse multiple times per week over multiple months, all of which was when he was 16. That relationship continued even after he was 17.

And State's Exhibit 3, I think you can infer from that based on the birth dates that the interaction, which led to the conception of [redacted], occurred when he was 17. So I don't think there's any question about the unlawful sexual conduct of a 16-

or 17-year-old.

The unique part of this case, Your Honor, is the State is alleging a theory of rape based upon the definitions of the possession of special trust under 76-5-404.1(1)(c)(xxiii), which alleges that any individual in a position of authority other than those individuals listed in subsections (1)(c)(i) through (xxiiii), which enables an individual to exercise undue influence over the child.

For the purposes of the preliminary hearing and given the low standard of proof and the Court's burden to find some evidence, I think the 1102 statement from [redacted] mother clearly sets out an interaction and an insinuation by Ms. Labrum into the family that certainly meets the standard for preliminary hearing of position of special trust.

And it's going to be a jury question. The jury is going to decide whether or not, after hearing the evidence, that actually existed and that's a jury question.

I think for purpose of the prelim, there is some evidence that her relationship with this family was beyond acquaintance, beyond incidental, and in fact, there were sometimes when she was actually giving the care of the children, including [redacted]. And so I think for purposes of the prelim, that position of special trust is met.

Given that, instead of third-degree felonies, I think that they meet the definition because then consent is not

considered. [redacted] is legally deemed under the statute not to be able to consent and so that makes it the first-degree felony.

With that, Your Honor, unless you have questions, that's all I have at this time.

THE COURT: I don't, sir. Thank you.

Mr. Skordas?

MR. SKORDAS: Your Honor, I understand at the preliminary hearing stage that the Court is to consider the evidence in the light most favorable to the State and give deference to the State, but this is a case where they've established very clearly that there were numerous sexual contacts between the alleged victim and Kyli. He would have been 16 or it sounds like 17 at the time. And that's unlawful sexual contact with a 16- or 17-year-old.

That's not what we're here for. We're here dealing with the charge of rape. And the State's theory, although it seems to be a bit of a moving target, seems to be that there's a position of trust. And at first, I think the position that they were arguing was that she had some sort of a babysitter relationship. Now it appears that they've shifted that a little bit to sort of worked her way into the family or something like that.

I would submit, Your Honor, that the position of trust requires more than that. And your role as a -- at the preliminary hearing is really a gatekeeper so that we don't take

what's fairly obvious third-degree felonies and make them into first-degree felonies just because.

Neither [redacted] nor his mother testified, and we agree that they didn't have to because they submitted the 1102s but reading those statements and the statement that the officer testified about today doesn't establish a position of trust. It doesn't establish a relationship that would constitute something more than just two people that started liking each other and engaged in entirely inappropriate contact.

And I don't pretend to say that Kyli's conduct was smart or right or even noncriminal. She's committed numerous third-degree felonies under their theory, but I don't see how anyone can say based on the evidence that you have before you -- including those lengthy, lengthy, lengthy 1102s, I've never seen anything like that -- that establish a position of trust, even something that could be argued to the jury. And so I would ask the Court to not bind the case over based on that.

THE COURT: All right. Thank you.

Counsel, I'd like a moment in chambers if we could, please.

MR. HARMS: Very well.

BAILIFF: The Court is in recess.

(Recess)

THE COURT: All right. We're back on the record in the Labrum matter, case 211100567. I did take a moment to chat

with Counsel in chambers. I wanted to review in particular 76-5-404.1 as it relates to the definition of position of special trust as that was the theory presented to the Court today.

Now, Ms. Labrum, I believe your attorney has reviewed this information with you, but it's important that you understand that a probable cause hearing is a -- it's a reasonableness hearing. And everything that I heard today I must view in a light most favorable to the prosecution.

Now, this idea of reasonableness or probable cause, this is a really low burden under the law. It means something more than suspicion but not absolute certainty.

With that being said, I'm going to start backward on the information starting with Count 11, forcible sex abuse, a second-degree felony. The 1102 statements that were admitted into the record today indicate multiple situations where there was touching of the pubic areas, genitals, or breasts, or other touching with the intent to arouse or gratify the sexual desires of any individual. This is set forth in quite a bit of detail in [redacted] [redacted] 1102 statement, which was admitted as State's Exhibit 1. Therefore, I am finding that there is probable cause to bind the defendant over on Count 11.

Counts 1 through 10 are rape, a first-degree felony. It requires sexual intercourse with another person without the victim's consent. The State is proceeding on the theory of

special trust. As the Court has reviewed the evidence, including the statements that were received, there certainly was a close friendship between this defendant and the family. However, that friendship between the family does not in and of itself create a position of special trust between the defendant and the alleged victim in this case.

As I reviewed the definitions of position of special trust, I cannot find that the defendant falls into any of those categories, including the category, the catch-all provision of an individual who exercises undue influence over a child. The information received by the Court today simply does not rise to that level and therefore, I will not be binding the defendant over on first-degree felony 1 through 10.

Mr. Harms?

MR. HARMS: Your Honor, based on that finding, the State would move to amend Counts 1 through 10 to unlawful sexual conduct with a 16- or 17-year-old in violation of Utah code section 76-5-401.2, third-degree felonies.

THE COURT: I'm going to ask that you prepare a written amended information, sir. We will have that noted on the record today.

Mr. Skordas, is it your desire to move forward with arraignment at this time or wait until after filing of an amended information?

MR. SKORDAS: If it please the Court, could we wait

until the filing of the amended information? We can sort of treat the next hearing as both an arraignment and pretrial so that we're not wasting your time.

THE COURT: Okay, all right. Then with that finding today, let's go ahead and just set this case for arraignment/pretrial.

MR. HARMS: And, Your Honor, for the benefit of the record, would the Court mind making the order finding the bindover on Counts 1 through 10 as amended?

THE COURT: Yes. Thank you for that. Based on what I discussed earlier, there is multiple incidences that are outlined in the 1102 statements of sexual intercourse. And when I view that light most favorable to the prosecution, it is appropriate, and I do bind the defendant over on amended Counts 1 through 10, unlawful sexual contact with a minor age 16 to 17, third-degree felonies. So I will bind the defendant over on those.

We'll set the next matter then for arraignment/pretrial. Let's see here. Do you want to go two to three weeks?

MR. SKORDAS: Yeah, at least, if that's okay.

THE COURT: We could go to -- we can do November 8 or November 15 in the afternoon.

Mr. Skordas, is one or the other of those better for you? And it would be via Webex.

MR. SKORDAS: They're both fine, actually. Whichever your calendar looks better.

THE COURT: Why don't we do November 15 at 3:00? Does that work?

MR. SKORDAS: Yes.

THE COURT: All right.

MR. HARMS: That'd be fine with the State.

THE COURT: Ms. Labrum, does that date work for you, ma'am?

THE DEFENDANT: Yes, ma'am.

THE COURT: Mr. Harms, is that okay with the State?

MR. HARMS: Yes.

THE COURT: All right. I'm going to return these exhibits to the State, please. Whoever can come get them, that's just fine. We'll set this for arraignment/pretrial on that date and time. It will be via Webex.

Ma'am, please stay in contact with your attorney.

And we'll see you all then. Thank you very much.

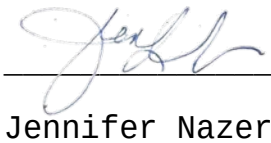
MR. SKORDAS: Thank you, Your Honor.

C E R T I F I C A T E

I, Anne Pickup, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability.

Anne Pickup

I, Jennifer Nazer Braun, do certify this transcription was prepared under my supervision and direction.



Jennifer Nazer Braun

REDACTED
*** witness declaration, RR0561:67-82

REDACTED
Mother's witness declaration, RR0561:84-96

The Order of the Court is stated below:
Dated: November 02, 2021 01:40:38 PM **/s/** ANGELA FONNESBECK District Court Judge

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KYLI JENAE LABRUM, Defendant.	MINUTES PRELIMINARY HEARING Case No: 211100567 FS Judge: ANGELA FONNESBECK Date: October 19, 2021

PRESENT

Clerk: andreaj
Prosecutor: HARMS, CLARK
Defendant Present
The defendant is not in custody
Defendant's Attorney(s): SKORDAS, GREGORY

DEFENDANT INFORMATION

Date of birth:
Audio
Tape Number: Courtroom 1 Tape Count: 10:14-11:13

CHARGES

1. RAPE - 1st Degree Felony
2. RAPE - 1st Degree Felony
3. RAPE - 1st Degree Felony
4. RAPE - 1st Degree Felony
5. RAPE - 1st Degree Felony
6. RAPE - 1st Degree Felony
7. RAPE - 1st Degree Felony
8. RAPE - 1st Degree Felony
9. RAPE - 1st Degree Felony
10. RAPE - 1st Degree Felony
11. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony

HEARING

All parties are present and in person at the courthouse.

Both Counsel waive opening statements.

10:14: The State calls it's first witness, Detective Steve Downey, and he is sworn in.

10:17: Mr. Harms moves to admit State's Exhibit #1.
Mr. Skordas has no objection for this hearing only.
The Court receives and admits State's Exhibit #1.
10:18: Mr. Harms moves to publish State's Exhibit #1 and the Court admits it.

10:20: Mr. Harms moves to admit State's Exhibit #2 for purposes of the preliminary hearing only.
Mr. Skordas has no objection for this hearing only.
The Court accepts and admits State's Exhibit #2.

10:24: Mr. Harms moves to admit State's Exhibit #3 for the preliminary hearing only.
Mr. Skordas has no objection.
The Court accepts and admits State's Exhibit #3.

10:25: Mr. Harms has no further questions for witness #1. Mr. Skordas states he has no questions for this witness. The Court excuses State's witness #1.

10:25: The state rests and the Court takes a recess.

10:52: The Court is back on the record. The State reports they will rest and Mr. Skordas informs the Court the defendant will not testify and they have no witnesses to call.

10:53: Mr. Harms gives a closing statement and says they have met the standard for a position of special trust.

10:56: Mr. Skordas gives a closing statement and requests the case not be bound over.

10:58: The Court takes a recess to meet with Counsel in chambers.

11:07: The Court is back on the record. The Court acknowledges it reviewed and discussed position of special trust with Counsel.

11:08: The Court references the Information and finds probable cause to bind the defendant over on count 11. In counts 1-10, the Court does not find these counts to be in the category of special trust and does not bind the defendant over on these counts.

11:10: Mr. Harms moves to amend counts 1-10 to Unlawful Sexual Conduct of a 16/17 year old, Utah Code, section 76-5-401.2.

The Court asks the State to prepare a written amended information.

Mr. Skordas requests to wait on the defendant being arraigned until after the amended information has been filed.

The Court also binds the defendant over on amended counts 1-10 Unlawful Sexual Contact With a Minor age 16-17 as 3rd degree felonies.

The Court sets the case for Arraignment/Pretrial on November 15 @ 3:00 pm.

11:13: The Court returns exhibits 1-3 to the State.

ARRAIGNMENT/PRETRIAL is scheduled.

Date: 11/15/2021

Time: 03:00 p.m.

Before Judge: ANGELA FONNESBECK

This hearing will not take place at the courthouse. It will be conducted remotely.

Contact the court to provide your current email address.

If you do not have access to a phone or other electronic device to appear remotely, notify the court.

For up-to-date information on court operations during the COVID-19 pandemic, please visit: https://www.utcourts.gov/alerts/

Individuals needing special accommodations (including auxiliary communicative aids and services) should call First District Court - Logan at 435-750-1300 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is 435-750-1300.

End Of Order - Signature at the Top of the First Page

Addendum C

John D. Luthy 8880
Cache County Attorney
Griffin Hazard, 15415
Deputy County Attorney
199 North Main Street
Logan, Utah 84321
(435) 755-1860

IN THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH

STATE OF UTAH, Plaintiff, Vs KYLI JENAE LABRUM, DOB: [redacted] Defendant.	MOTION TO RECONSIDER BINDOVER DECISION Case No. 211100567

TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT:

COMES NOW, Griffin Hazard, Deputy County Attorney, and hereby moves the Court to reconsider the bindover decision from the preliminary hearing held on October 19, 2021, and in support thereof, would show the Court as follows, to wit:

STATEMENT OF FACTS

The Defendant was charged with 10 counts of Rape, first degree felonies, and one count of Forcible Sexual Abuse, a second degree felony.

A preliminary hearing was held on October 19, 2021, during which, Detective Steven Downey, from the Smithfield Police Department testified. During Detective Downey's testimony, exhibits were admitted into evidence, including an 1102 statement from the alleged victim [redacted] attached hereto as *Exhibit 1*; an 1102 statement from [redacted] mother, [redacted],

attached hereto as *Exhibit 2*; and a DNA analysis attached hereto as *Exhibit 3*.

In their closing, Mr. Harms, representing the State, argued that [redacted] could not consent because there was a special position of trust between [redacted] and the Defendant under U.C.A. §76-5-406(2)(j). Mr. Harms failed to argue a lack of consent under U.C.A. §76-5-406(2)(k).

The Court, focusing on the position of trust, bound the Defendant over on count 11, forcible sex abuse, but found insufficient evidence to show a lack of consent in relation to the 10 counts of rape, instead binding the Defendant over on 10 counts of unlawful sexual activity with a 16 or 17-year-old under U.C.A. §76-5-401.2.

ARGUMENT

1. The Purpose of, and Burden at a Preliminary Hearing

The sole purpose of the preliminary hearing is to determine whether the State can establish probable cause to bind the defendant over for trial. *See State v. Aleh,* 2015 UT App 195, ¶14; *Utah Const. art. I, §12*. The probable cause burden is "light". *See State v. Lopez/Nielsen*, 2020 UT 6, ¶46. The supreme court has explained that "to make this showing, the prosecution need not produce evidence sufficient to support a finding of guilt at trial or even to eliminate alternative inferences that could be drawn from the evidence in favor of the defense". *Id*. citing *State v. Schmidt*, 2015 UT 65, ¶18. In making this determination, the magistrate should draw all reasonable inference in the prosecution's favor. *Schmidt* ¶18. "Accordingly, it is generally 'inappropriate for a magistrate to weigh credible but conflicting evidence at a preliminary hearing . . .'". *Lopez* ¶47, citing *State v. Virgin*, 2006 UT 29, ¶24, 137 P.3d 787. A preliminary hearing is not a trial on the merits. *Id*. Thus, the Supreme Court has stated, it "is therefore not appropriate

for a magistrate to evaluate "the totality of the evidence in search of the most reasonable inference" at a preliminary hearing. Our justice system entrusts that task to the fact-finder at trial." *Schmidt* ¶18. The Lopez court specified, particularly in light of reliable hearsay evidence presented under Rule 1102:

> under this low bar, it may be difficult for the defense to overcome a *prima facie* showing of probable cause. Even an alleged victim's recantation may sometimes be insufficient, given that the magistrate "must view all evidence in the light most favorable to the prosecution and draw all reasonable inferences in favor of the prosecution. . . .The governing standard is the one we articulated in Schmidt: The magistrate is not "to evaluate the totality of the evidence in search of the most reasonable inference at a preliminary hearing"; instead, the "magistrate has discretion to decline bindover only where the facts presented by the prosecution provide no more than a basis for speculation.

Lopez, ¶48, citing *Schmidt* ¶18. If probable cause is established that the crime charged has been committed and that the defendant has committed it, the magistrate must order that the defendant be bound over for trial. *See* U.R Crim. Pro. 7B(b).

At a preliminary hearing, the State is required to present evidence sufficient to meet their burden during their case in chief. Closing arguments may help the Court view the evidence in a particular light, but such arguments are not considered evidence. The State's choice to forego closing arguments, or their failure to address all possible legal theories as part of closing arguments, are not factors in determining whether the State met their burden at preliminary hearing.

In the instant case, the Defendant was charged with 10 counts of rape which the court declined to bind over. In order to meet their burden regarding the 10 counts of rape, the State needed to present evidence that the Defendant had sex with the alleged victim, [redacted], on at least

10 separate occasions, and that the alleged sexual encounters were without consent.

The Statement of [redacted], marked as *Exhibit 1*, and admitted into evidence during the preliminary hearing, detailed many more than 10 incidents of sexual encounters where [redacted] penis penetrated the Defendant's vagina. Moreover, the State presented DNA evidence, attached as *Exhibit 3*, establishing that the Defendant conceived and birthed a child that belonged to [redacted] The primary issue for the Court's consideration was whether the encounters were consensual or not.

Mr. Harms, representing the State, made closing arguments at preliminary hearing focusing on a theory that [redacted] could not consent because the Defendant occupied a position of special trust under U.C.A. § 76-5-406(2)(j). While the State believes sufficient evidence was presented to establish such a relationship through the 1102 statements of [redacted]. and [redacted] mother, the Court disagreed, and focusing on the arguments presented by Mr. Harms, refused to bind the Defendant over on the 10 counts of rape.

The State now moves the Court to reconsider its bindover decision in light of U.C.A. §76-5-406(2)(j) and (k).

2. ***The State reasserts it's argument that the sexual activity between Defendant and [redacted]. was not consensual under U.C.A. §76-5-406(2)(j), because the Defendant occupied a position of special in relation to [redacted]***

Pursuant to U.C.A. §76-5-406(2)(j), 16-year-old [redacted]. could not consent if the 26-year-old Defendant occupied a position of special trust in relation to [redacted]. as defined in U.C.A. § 76-5-404.1. That section includes in the definition of "position of special trust" individuals such as babysitters; cohabitants of a parent, if the cohabitant is an adult; recreational leaders; youth

leaders, and etc. *See* §76-5-404.1(1)(c)(iv),(vi),(xiv)(xxii). This section is not an all-inclusive list of positions involving special trust. The code makes this clear by including in the definition, "any individual in a position of authority, other than those individuals listed in Subsection (1)(c)(i) through (xxii), which enables the individual to exercise undue influence over the child." See §76-5-404.1(1)(c)(xxiii).

Here, [redacted] mother indicates that the Defendant had occasion to stay at the home of [redacted] for several nights after a fight with her husband. *See Exhibit 2*, p.6 During that time, the Defendant would have been a cohabitant of [redacted] parent, and she was an adult. Creating a position of special trust. [redacted]. details an occasion where the Defendant took him and his sister to St. George for a soccer tournament, where they stayed with the Defendant at her grandparent's house. *See Exhibit 1*, p.7. [redacted]. also details an incident where [redacted] parents were out of town and the Defendant stayed with [redacted] and his younger siblings to watch them while their parents were away. *Id*. p.12. These incidents would have given her, at the very least a babysitter position of special trust. Arguably, these particular incidents arose after the sexual relationship between the Defendant and [redacted]. had already begun. However, they are informative as to the nature of the trust placed in the Defendant based on her close personal relationship with [redacted]. and his family since 2008.

[redacted]. states that the Defendant's relationship with him and his family started when [redacted]. was between the ages of 6-8 years old. *See Exhibit 1*, p.15. [redacted] explains that the Defendant dated [redacted] family member for 6 years and became extremely close to his family and extended family during that time. *Id*. He explained that after the Defendant broke up with his cousin, [redacted]

mother remained close friends with the Defendant and that the Defendant was frequently in [redacted] home, cooking, entertaining the kids, engaging in activities with the kids, and generally supporting the family. *Id. Exhibits 1 and 2* are replete with examples of Defendant's involvement in the family and home of [redacted]. It seems apparent that the Defendant spent particular time with [redacted] younger sister, but *Exhibit's 1* and *2* make it clear she spent considerable time as an adult figure in the home interacting with [redacted]. and the other children as well. [redacted] indicates that "my mom trusted Kyli like her own sister." *Id*. [redacted] mother also stated, "I don't call my own blood relatives that often or see them as often as I saw [Defendant]." *See Exhibit 2*, p.8. She went on to say, "I looked at Kyli as blood! I trusted her with my children, my house and my dog." *Id*. She also detailed how the Defendant was frequently in their home and attending the children's, including [redacted], extra-curricular activities. *See Exhibit 1 and 2.* These circumstances pre-dated the sexual relationship between the Defendant and [redacted].

This evidence, as a whole, suggests a potentially more influential relationship than many of the positions specifically enumerated in U.C.A. §76-5-404.1. It certainly seems she had a stronger position of trust than the typical babysitter or recreational leader regardless of whether she actually babysat the kids or not. In fact, according to [redacted] mother, the Defendant spent more time in [redacted] home and more time supporting [redacted] and his family than many of [redacted] blood relatives. Though the Defendant was not related by blood, she was more than a mere friend, and lived like a part of [redacted] family.

As stated above, "The magistrate is not "to evaluate the totality of the evidence in search of the most reasonable inference at a preliminary hearing"; instead, the "magistrate has discretion

to decline bindover *only* where the facts presented by the prosecution provide no more than a basis for speculation." That is not the case here. In the present case, the prosecution has presented evidence that would allow a jury, the ultimate finder of fact, to conclude that the 26-year-old Defendant was in a position to exercise undue influence over [redacted] based on her regular presence in the home and almost familial relationship with everyone in [redacted] family. Taken in the light most favorable to the State, this evidence is enough for the Court to determine that such a finding could be made by a Jury without relying on mere speculation. It would be inappropriate for the Court, based on its own analysis of the totality of the circumstances, to impose its view of the most reasonable inference that can be drawn from such evidence. That is a question of fact that should be reserved for the ultimate trier of fact.

The Court should reconsider its bindover decision in relation to the 10 counts of rape originally charged because the State has put on evidence where a jury could determine that the Defendant occupied a position of special trust as it relates to [redacted]. under 76-5-406(2)(j).

3. ***The sexual activity between Defendant and [redacted] was not consensual because [redacted] was under the age of 17, defendant was 10 years older than [redacted], and defendant enticed and coerced [redacted] to submit or participate in the sexual activity.***

U.C.A. 76-5-406(2)(k) states that rape is without consent of the victim when "the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2) or (4)."

While the State failed to present this argument during their closing argument, they did not fail to present evidence in support of this theory during the preliminary hearing. The State's failure to address this argument during their closing argument, (a stage of preliminary hearing that is not considered evidence), does not preclude the Court from reconsidering its bindover decision evidence in light of the evidence that was presented during the preliminary hearing, and the argument now being presented to the Court.

A. The Utah Court of Appeals in *State v. Gibson* determined that under 76-5-406(11), enticement occurs when an adult participant 3 years older than a minor takes the lead in bringing about a sexual encounter with the minor.

The Utah Court of Appeals has stated that "[w]hen interpreting part of a statute, it should be construed in light of the purpose of the statute as a whole." *See State v. Gibson*, 908 P.2d 352, 356 (UT App. 1995). The purpose of U.C.A. 76-5-406(2)(k), in combination with the statutory section defining the crime, "is to prevent 'mature adults from preying on younger and inexperienced persons." *Id*. "[T]he specific intent of subsection (11), [now subsection (2)(k)], is to create a legal definition of consent for teenagers which is different from the more lenient consent required between adults." *Id*.

The Court of Appeals pointed out that "Black's Law Dictionary defines 'entice' as 'to wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax or seduce. To lure, induce, tempt, incite, or persuade a person to do a thing." *Id*. The Court noted that "[t]his definition is consistent with the statutory purpose in that it describes the use of improper psychological manipulation to influence the will of another. In other words, the 'enticement' of a

teenager by an adult occurs when the adult uses psychological manipulation to instill improper sexual desires which would not otherwise have occurred." *Id*.

In *State v. Gibson*, defendant appealed his conviction for rape. At trial, the evidence showed that defendant developed a close relationship with his daughter's 14 year old friend, A.A. For a period of one to two months, A.A. spent a considerable amount of time with defendant's daughter and defendant. During this time, A.A. made some sexual remarks about the defendant to the defendant's daughter and the defendant himself. One night A.A. slept over at the defendant's house, and in fact slept in the same bed as the defendant and defendant's daughter. At some point that night, Defendant asked A.A. if she wanted to cuddle and A.A. responded "yeah." At trial, A.A. testified that defendant fondled her breasts, touched her vagina, inserted his finger in her vagina, and penetrated her vagina with his penis and his tongue. *Id*. at 354.

After viewing the totality of the facts and circumstances, including the age of the victim, the Court of Appeals held that the "defendant's course of conduct…exploited the naïve sexual awakenings of a teenage girl for his own improper sexual gratification. This is precisely the type of conduct proscribed by subsection (11), [now (2)(k)]." *Id*. at 357.

The defendant in *Gibson* argued that "if A.A. did not consent, she should have affirmatively demonstrated her lack of consent to [the defendant]" and that "she could have, at the very least, easily awakened [defendant's daughter] if she had truly objected to defendant's actions." *Id*.

The Court of Appeals, however, was not persuaded by this reasoning. The Court noted that "Adopting defendant's interpretation would place a great burden squarely on the victim's

shoulders, whereas the legislature intended the opposite result. In fact, it is precisely because young teenagers have difficulty protesting the wrongful sexual attentions of adults that they need the special protections of *section 76-5-406(11)*. This statute says "no" for A.A., and others like her, when they are wrongfully placed in situations where they cannot be expected to do so for themselves." *Id*. The Court ultimately held that the trial court's record "support[ed] a finding that defendant 'enticed' A.A., within the meaning of subsection (11), [now (2)(k)]" and thus his "sexual contact with A.A. was legally non-consensual." *Id*. at 357.

In *Gibson*, Presiding Judge Gregory K. Orme wrote a concurring opinion to emphasize that the Court's decision went well beyond the Court's previous approach to the meaning of enticement as found in *State v. Scieszka*. *Id*. In *Scieszka,* the Court of Appeals "seemed to assume that 'entice,' as used in the statute, required a pattern of ongoing, systematic, purposeful conduct with at least an implicit offer of some kind of reward." *Id*. Judge Orme highlighted the fact that in its decision in *Gibson*, the Court of Appeals now "equated the word entice…to include any situation in which the adult participant takes the lead in bringing about the sexual encounter complained of." *Id*.

In fact, Judge Orme noted that "about the only circumstance in which an adult more than three years older than a child under 18 (but older than 14) could conceivably have sexual relations with that child and escape the reach of 76-5-406(11), [now (2)(k)] would be in situations in which the *child* took the lead in instigating the encounter, i.e., when the adult is seduced." *Id*. (See footnote 1).

Judge Orme sums up the facts in *Gibson* and the Court's reasoning by stating that "[w]hen the smoke clears in this case, all we really have is an adult who instigates a sexual encounter with a teenage visitor, without force or cajoling on his part or resistance or protest on her part. If she were older than seventeen, we would regard the encounter as consensual. Because she was only fourteen, she is deemed not to have consented if defendant enticed her. Defendant enticed her simply because he was the instigator. Nothing more is required under the statute." *Id*. at 358.

B. Applying the Court of Appeals' Statutory Interpretation of Enticement under 76-5-406(11) to the Case before the Court.

As in *Gibson*, the defendant in the case before the Court enticed a minor to engage in sexual activity. In *Gibson*, the defendant developed a close relationship to his daughter's 14 year old friend, A.A. The Court of Appeals ultimately held that the "defendant's course of conduct…exploited the naïve sexual awakenings of a teenage girl for his own improper sexual gratification" and thus the sexual activity was not consensual. *Id*. at 357.

In the present case, The Defendant developed a close relationship with her friend's 16-year-old son [redacted], when she was 26-years-old. The 10-year age difference between [redacted] and the Defendant is well over the 3-year age difference the State is required to establish. Moreover, the State presented evidence, particularly when taken in the light most favorable to the State, and with all reasonable inference drawn in the State's favor, that the Defendant enticed and coerced [redacted] to engage in the sexual activity and that such enticement exploited the naïve sexual awakenings of a teenage boy, and resulted in many more than 10 instances where [redacted] penetrated

the Defendant's vagina with his penis. *See Exhibit 1.*

At preliminary hearing, *Exhibit 1* alone presented *substantial* evidence that the 26-year-old Defendant enticed the 16-year-old [redacted] to engage in sexual activity. The State will reference some of that evidence below.

The Defendant first enticed [redacted]. after one of [redacted] high school football games, by saying, [redacted] if Chris and I ever get divorced you and I are gonna get married." *See Exhibit 1*, p.1. In an acknowledgment of the inappropriateness of her comments after the football game, the Defendant texted [redacted] later that night saying, "I hope I didn't weird you out with what I said". [redacted]. responded by saying, "no, not at all. We were just joking right?". *Id*. The Defendant then stated, "yeah, is it weird that I find you so attractive?" *Id*. [redacted]. stated he was "really surprised" at the Defendant's response, but replied, "no, I think you are attractive too." *Id*. Thereafter, a conversation took place about wanting to kiss. *Id*. [redacted]. indicates that later that week, the Defendant picked him up *in her car* at his house and drove him to an unfinished sub division where they talked for about 30 minutes before the 26-year-old Defendant took the lead by saying, "if you're gonna kiss me, you gotta hurry because I need to go home." *Id*. The 16-year-old [redacted] indicated "I had sat there the whole time heart racing scared and nervous to kiss her or her kiss me. She said this and finally I leaned in about halfway over her center console and said, 'alright, you got meet me in the middle', at which point the Defendant said, 'no, you gotta lean into me if you want to kiss." *Id*. p.2. [redacted] indicates they then made out for a few minutes. *Id*. After the Defendant drove [redacted]. home, she texted him saying, "you can't tell anyone we kissed". *Id*.

This evidence makes it clear that the Defendant instigated the conversation that first

suggested a romantic relationship between herself and [redacted] Her text to [redacted] stating, "I hope I didn't weird you out with what I said", is an acknowledgment from Defendant that her comments were inappropriate and changed the pre-existing nature of the relationship. However, when [redacted] tried to classify the Defendant's comment as a joke, the Defendant doubled down by telling [redacted] how attracted she was to [redacted] These comments invited [redacted]. to let his guard down and say things he likely would not have said otherwise. After creating this environment, and initiating, and subsequently encouraging ongoing conversations about mutual attraction and kissing, the Defendant picked [redacted]. up *in her car* and drove him to a remote location, where [redacted]. describes feeling nervous and having his heart race until the Defendant told him he needed to hurry and kiss her if he wanted to, because she had to get home. She then encouraged him to lean in all the way in order to accomplish the kiss. Later, the Defendant told [redacted]. not to tell anyone what they had done. Again, it seems clear from the evidence that the Defendant said and did things that enticed [redacted]. to act in ways he would not have ordinarily acted, (even if he had wanted to), without the Defendant's encouragement.

This information is contained in just over the first page of [redacted] 17 page 1102 statement. However, in that statement, [redacted]. goes on to explain that about a week after this initial kissing incident, the *Defendant picked up* [redacted] again and drove [redacted], *again in her car,* up Smithfield Canyon, where she pulled over into a little alley way behind some trees. *Id.* [redacted] indicates they talked, then started kissing. *Id*. As explained above, this level of physical intimacy had already been established through the Defendant's enticement and encouragement after the football game and later in the Defendant's car at the unfinished development. [redacted] then states that after a

minute or two of kissing, the Defendant again took the lead by, "reach[ing] over and caress[ing] [redacted] penis on the outside of [his] pants and ask[ing] if it was okay." *Id*. [redacted] responded that it was, and only at that point did he also feel comfortable enough to begin to touch her breasts on the outside of her clothes. *Id*. The Defendant then took the lead to further advance the physical intimacy again, by "ask[ing] if she could go inside [redacted] pants". *Id*. Again, it was only after the Defendant asked and did these things, that [redacted] also asked to reach up the Defendant's shirt to touch her bare breasts. *Id*. p.3. This continued until the Defendant brought [redacted] to climax. *Id*.

The Defendant and [redacted] met up the canyon again the next week to do the same thing. *Id*. The week after that the Defendant again took the lead and advanced the nature of these encounters by indicating she did not want to do these things in the canyon anymore, and persuaded [redacted] to go to her house in North Logan. *Id*. While at the Defendant's house, [redacted] asked where Defendant's husband was and she stated, "he works from 2-10 p.m. we will be fine." *Id*. The Defendant and [redacted] turned on a show and began to kiss and touch each other. *Id*. Again, this level of physical intimacy had previously been established through the Defendant's encouragement and enticement of [redacted] after the football game, at the unfinished subdivision and up Smithfield Canyon. Now, during this first incident in the Defendant's home, and while making-out, the Defendant further escalated the physical intimacy by "climb[ing] on top of [redacted] straddling [redacted] [as they] continued kissing" *Id*. p.4. [redacted] indicates the Defendant then "started grinding on my penis on the outside of my clothes." *Id*. [redacted] says at that point he reached under her shirt to touch the Defendant's breasts, something the Defendant had previously encouraged. At that point the Defendant, on her own, "took her shirt off", once again taking the

lead to further the physical nature of the relationship. *Id*. They continued until the Defendant further amplified the encounter by asking if they could take [redacted] pants off. *Id*. Responding to the Defendant's question encouraging such behavior, [redacted] indicated it was okay, and they both took their pants off and left their underwear on. *Id*. After continuing in that state for a minute, the Defendant, yet again intensified the encounter, by "ask[ing] if she could grind on [redacted] penis naked." *Id*. [redacted] said yes, and both [redacted] and the Defendant got naked and continued to grind. *Id*. Soon after, the Defendant said, "no sex" and "climbed off" of [redacted] and "stroked [redacted] penis until [he] climaxed". *Id*. Later, these encounters moved to the Defendant's place of employment at night. *Id*. p.10. This was a dentist office in Logan. *Id*. p.11.

Additionally, the State presented evidence that shows the Defendant demonstrated the use of "improper psychological manipulation"[1] to influence [redacted] behavior. [redacted] said that "[the Defendant] would sometimes get upset with me and say my friends were more important to me than she was" *Id*. p.9. [redacted] talks about how he started hanging out with a couple girls his age, and:

> she got extremely mad at me told me I was a bad person for cheating on her and that we were done having sex and talking anymore. She took me back to my car and I got out. I sat in my car angry and crying feeling terrible. I messaged her and said sorry begging her to forgive me. Where I finally realized how hypocritical it was because she was still having sex with her husband. Finally I got her to talk to me again but I had to promise her I wouldn't talk to them or other girls my age anymore.

Id. [redacted] also confirmed at this time that he was 16-years-old during the above referenced incidents. *Id*. Later, [redacted] states that:

[1] *Gibson* at 356.

> Almost all of these times at her office (a dentist office in Logan) we would have to start with her picking the zits on my face. She enjoyed doing it and I hated it. Many times I would say I don't want to do this but she would usually say, 'alright, then no sex'. So I would usually allow her to pick my face because I knew she wanted to have sex as much as I did.

Id. p.11. These incidents not only demonstrate additional instances where that the 26-year-old Defendant encouraged and enticed [redacted] to engage in the sexual encounters, but also shows an improper psychological manipulation and coercion to pressure [redacted] to remain in the relationship, or to do things he was not comfortable with within the relationship for the Defendant's sexual gratification.

Again, as stated in *Gibson*, the purpose of U.C.A. 76-5-406(2)(k), in combination with the statutory section defining the crime, "is to prevent 'mature adults from preying on younger and inexperienced persons. . . [T]he specific intent of subsection (11), [now subsection (2)(k)], is to create a legal definition of consent for teenagers which is different from the more lenient consent required between adults." As stated in Gibson, the legislature intended the burden to be on the adult defendant who is enticing the teenage victim, not the other way around. As stated in *Gibson*, the Court of Appeals "equate[s] the word entice…to include any situation in which the adult participant takes the lead in bringing about the sexual encounter complained of." Here, the State has presented ample evidence to demonstrate that there was more than a three-year age gap between the 26-year-old Defendant and the 16-year-old alleged victim, and that the Defendant enticed [redacted]. by taking the lead in advancing the nature of their relationship from talking about marriage, to talking about kissing, to actually kissing, to touching, to grinding, to removal of clothes and grinding naked, and eventually to sex; as well as the location of the encounters from

phone conversations, to the Defendant's car, to the Defendant's home, to the Defendant's professional office. Each of these advancements in the relationship were at the 26-year-old Defendant's suggestion or request, and paved the way for the Defendant, as in *Gibson*, to continue to take advantage of the "naïve sexual awakenings of a teenage [boy] for [her] own improper sexual gratification".

CONCLUSION

As set out above, this was a preliminary hearing where the prosecution need not produce evidence sufficient to support a finding of guilt at trial, or even to eliminate alternative inferences that *could* be drawn from the evidence in favor of the defense. Moreover, the magistrate is to view all evidence in the light most favorable to the State, and is to draw all reasonable inferences in the prosecution's favor. Consequently, the magistrate should not weigh credible but conflicting evidence at a preliminary hearing. Our justice system entrusts that task to the fact-finder at trial.

Here, the State has presented evidence which *could* convince a jury of the Defendant's guilt under multiple theories. Based on the evidence presented at preliminary hearing, taken in the light most favorable to the State and having all reasonable inferences drawn in the prosecution's favor, the Defendant should be bound over on the 10 counts of first degree felony rape, along with the second degree felony for forcible sex abuse. A jury should be tasked with weighing any conflicting evidence or theories at a trial on the merits.

DATED this 8th day of November 2021

/s/ Griffin Hazard
Griffin Hazard
Cache County Attorney's Office

CERTIFICATE OF DELIVERY

I hereby certify that I e-filed a true and correct copy of the Motion with the court as means of notification to: Gregory G Skordas

DATED this 8th day of November 2021

_/s/ Cherice Moser_____
Cherice Moser
Legal Assistant

Gregory G. Skordas (#3865)
Gabriela Mena (#17087)
Benjamin Gabbert (#17995)
SKORDAS & CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 665-0128
Attorneys for Defendant
gskordas@schhlaw.com
gmena@schhlaw.com
bgabbert@schhlaw.com

IN THE FIRST DISTRICT COURT-CACHE

IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. KYLI JENAE LABRUM, Defendant.	**MOTION TO STRIKE STATE'S MOTION TO RECONSIDER BINDOVER AND MOTION TO DISMISS** Case No. 211100567 Judge Angela Fonnesbeck

Kyli Jenae Labrum, the Defendant herein, by and through the undersigned attorney, Gregory G. Skordas, hereby files this Motion to Strike State's Motion to Reconsider Bindover and Motion to Dismiss on the grounds that the motion is moot. Utah law requires that the Magistrate dismiss the charges in the Information once bindover is denied. As such, the State should not have been allowed to amend the charges after bindover was denied and the charges should have been dismissed. Further, because the Magistrate did not find probable cause that the alleged sexual encounters were without consent the Magistrate should quash the bindover for Count 11 and dismiss that charge as well.

FACTS

From 2017 until 2020 Ms. Labrum allegedly engaged in sexual activity with [redacted] who was sixteen years-old at the time the relationship began. On May 5, 2021, the Cache County Attorney filed an Information alleging that Ms. Labrum engaged in sexual activity with the alleged victim without consent. On October 19, 2021, a preliminary hearing was held; the prosecutor alleged that the lack of consent was based on the victim's inability to consent pursuant to 76-5-406(2)(j). Specifically, the State alleged that Ms. Labrum was in a position of special trust. The State presented testimony from the investigating detective and two 1102 statements: one from [redacted] and one from his mother, [redacted] In [redacted]s statement he described, in incredible detail, the progression of the couple's romantic and physical relationship. [redacted] then describes the relationship Ms. Labrum had with the rest of his family, which started when Ms. Labrum began dating [redacted] cousin. Although Ms. Labrum eventually broke up with [redacted] cousin, she maintained a close friendship with [redacted] mother, [redacted], and younger sister, [redacted] The 1102 from [redacted] established that before the relationship began Ms. Labrum was a close friend of the family but was not especially close with him.

The 1102 from [redacted] began by explaining how Ms. Labrum became a close family friend. The statement corroborated most of what [redacted] stated and added several other details as well. Specifically, [redacted] describes a strong relationship between Ms. Labrum and [redacted]. [redacted] also described situations where Ms. Labrum attended a rodeo with the family and took a photo with [redacted]. due to them both having the same boots, attending [redacted] soccer games and tournaments, and being a support for [redacted]. During Ms. Labrum's LDS mission she stayed in contact with [redacted]. [redacted], [redacted] and [redacted] were even invited to Ms. Labrum's homecoming; they even made her a sign. The [redacted] family was invited to Ms. Labrum's wedding, [redacted] and

[redacted] attended her baby shower, and [redacted] was at the hospital when Ms. Labrum's first child was born.

The relationship between Ms. Labrum and [redacted] continued to get stronger in the Summer of 2017 when Ms. Labrum began taking [redacted] to the local pool, taking her to lunch, and having sleepovers at Ms. Labrum's house. Even after the relationship with [redacted] began Ms. Labrum would continue to spend a lot of time with [redacted]. and [redacted]. Ms. Labrum would spoil all of the kids for their birthdays, and also bought [redacted] and [redacted] Christmas gifts. [redacted] also said that Ms. Labrum was like a sister to her, and that she trusted her. When Ms. Labrum and her husband got into a fight that lasted several days Ms. Labrum stayed with the [redacted] family for a couple of days. [redacted] stated that she trusted Ms. Labrum with her children, her home, and even her dog; but then went on to clarify that she has never needed Ms. Labrum to watch her kids when she went on a trip. [redacted] statement made it clear that prior to the sexual relationship Ms. Labrum was close with the family, but was especially close with [redacted] and [redacted] [redacted] did not state that Ms. Labrum was especially close with [redacted]

After evidence, the State argued that as a matter of law [redacted]. could not have consented to the sexual activity because Ms. Labrum held a position of special trust. The State directed the Court to [redacted] 1102 statement and emphasized that it provided at least some evidence of a relationship between Ms. Labrum and the [redacted] family, including times when Ms. Labrum was asked to watch over the children, including [redacted] Defense counsel argued that the State had not met their burden of showing that the position of special trust existed. Defense counsel pointed out that the State's theory was more of a moving target, that the initial claim related to Ms. Labrum as a babysitter, and that no evidence had been presented in the 1102s which established

anything more than two people who were attracted to each other. No position of special trust had even been alleged in the 1102s.

The Court then held that the State had not met its burden of proving that the position of special trust was present and declined to bind over Ms. Labrum. The Court explained that although there was evidence of a close relationship between Ms. Labrum and the [redacted] family, that relationship does not in and of itself create a position of special trust between Ms. Labrum and [redacted] After the Court declined to bind over Ms. Labrum for rape, the State moved to amend the charges to Unlawful Sexual Activity with a 16 or 17 Year-Old, a violation of U.C.A. § 76-5-401.2 as Third Degree Felonies. The Court granted the motion and bound Ms. Labrum over on the amended counts. On November 2, 2021, the Court entered the order binding Ms. Labrum over on the amended charges. The State then filed the present motion asking the Court to reconsider its bindover decision.

ARGUMENT

The Court should strike the State's motion as moot because Counts 1-10 as charged in the Information should have been dismissed. Utah R. Crim. P. 7B(c) states that once a Magistrate finds that there is no probable cause to believe that the charged crime was committed "the Magistrate must dismiss the information and discharge the defendant." The Magistrate then has the option to file findings of fact, conclusions of law, and an order of dismissal but is not required to do so. *Id.* In the present case the Court read the proffered 1102s and determined that there was insufficient evidence to support the claim of a position of special trust between Ms. Labrum and [redacted] However, rather than dismissing the Information the Court allowed an amendment to lesser charges. While it is true that the Court has substantial discretion in many matters, the Court lacks jurisdiction to reconsider bindover because the Rules of Criminal

Procedure requires that the charges be dismissed. As such, the motion to reconsider is moot because the charges must be dismissed and the amendment by the State was invalid.

Utah R. Crim. P. 4(c) states that a court may allow an information to be amended at any time before trial, but only if "the substantial rights of the defendant are not prejudiced." The Court declined to bindover Counts 1-10 and made specific findings on the record. Because the Court, acting in the capacity as a Magistrate, did not find that there was probable cause to believe that the crime of rape was committed Counts 1-10 were required to be dismissed and the Court lacked jurisdiction to amend the charges. Allowing the amendment to the Information after the charges must have been dismissed has affected Ms. Labrum's rights. As soon as the Court made the finding that there was not probable cause to believe that the crime of rape had occurred Ms. Labrum had the right to have her charges dismissed and to be discharged. By not allowing her to be discharged Ms. Labrum's rights were prejudiced and Counts 1-10 should be dismissed.

Even if the State's motion is not moot, it should be stricken as it was untimely. A motion to reconsider a bindover is treated as a motion for a new trial under Utah R. Crim. P. 24. *State v. Kinne*, 2001 UT App 373. As such, a motion to reconsider bindover must comply with the timing requirements of Rule 24. *State v. Bozung*, 2011 UT 2, ¶ 10. Rule 24 requires a motion for a new trial to be filed within 14 days. The entry of the Court's order to dismiss the rape charges was entered in open court on October 19, 2021. An order of dismissal with specific findings is not required by Rule 7B, so an oral dismissal is still effective. Although the Court entered an order on November 2, 2021, that order was an order of bindover on the amended charges and not a dismissal of the initial charges. The effect of declining to bindover the rape charges is that they were dismissed. Utah R. Crim. P. 7B(c). Because the rape charges were dismissed on October 19, 2021, the deadline to file a motion under Rule 24 was November 2, 2021. The State filed its

Motion to Reconsider on November 9, 2021. As such, the State's motion is untimely and should be stricken.

Finally, the Court should dismiss Count 11 because it was bound over without the required finding that all elements of the charged crime were proven to the probable cause standard. Ms. Labrum was charged in Count 11 with Forcible Sex Abuse, a violation of U.C.A. § 76-5-404. The elements of Forcible Sex Abuse require a finding that the defendant did "touch the anus, buttocks, pubic area, or any part of the genitals of another, or touch the breast of a female, or otherwise took indecent liberties with another, with intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual, *without the consent of the other*…" (emphasis added). The Court made specific findings that Ms. Labrum was not in a position of special trust, and the evidence from [redacted] 1102 statement made it clear that he consented to the sexual activity. Thus, the State did not meet its burden of proving that there was probable cause to believe that all elements of the charged offense had been established. As such, Count 11 was bound over without the necessary probable cause and the Court should dismiss that charge as well.

CONCLUSION

For the foregoing reasons the Court should dismiss the case in its entirety. The Court lacked jurisdiction to bind over the amended charges, and allowing the charges to be amended prejudiced Ms. Labrum's rights. The Motion to Reconsider Bindover is moot as the Court lacks the jurisdiction to do anything but dismiss the charges. Even if the motion is not moot it was untimely as the order to dismiss the rape charges was entered on October 19, 2021, and the State's motion was filed more than 14 days after the order was entered. Further, Count 11 should be dismissed because the required probable cause was not established at the preliminary hearing

and Count 11 was boundover in error. Finally, Ms. Labrum does not waive her right to reply to the State's Motion to Reconsider Bindover and requests that should the Court not grant this motion that the Court grant her fourteen days after denial of this motion to file her reply to the State's motion.

DATED this the 22nd day of November 2021.

SKORDAS & CASTON, LLC

/**s**/*Gregory G. Skordas*_____
Gregory G. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on November 22nd, 2021 I electronically filed a true and correct copy of the foregoing DEFENDANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO RECONSIDER BINDOVER with the Clerk of the Court using ECF system, which sent notification of such filing to the following:

Griffin Hazard
Cache County Attorney's Office
199 N Main
Logan, UT 84321

/s/ Quinn Vlacich-Legal Assistant
SKORDAS & CASTON, LLC

John D. Luthy 8880
Cache County Attorney
Griffin Hazard, 15415
Deputy County Attorney
199 North Main Street
Logan, Utah 84321
(435) 755-1860

IN THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH

STATE OF UTAH, Plaintiff, Vs Kyli Jenae Labrum, DOB: [redacted] Defendant.	REPLY TO DEFENDANT'S MOTION TO STRIKE STATE'S MOTION TO RECONSIDER BINDOVER AND TO DISMISS Case No. 211100567 Judge: Angela F. Fonnesbeck

TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT:

COMES NOW, Griffin Hazard, Deputy County Attorney, and hereby moves the Court to deny the Defendant's Motion to Strike State's Motion to Reconsider Bindover and to Dismiss.

STATEMENT OF FACTS

On October 19, 2021, a preliminary hearing was held in the above styled case. On that day, prosecutor Clark Harms covered the preliminary hearing for prosecutor Griffin Hazard, (the assigned prosecutor). Mr. Hazard was preparing for a jury trial beginning the next day, October 20 and proceeding to October 22, 2021. The State intended to argue a lack of consent under both U.C.A. § 76-5-406(2)(j) and (2)(k). During the preliminary hearing Mr. Harms waived his opening statement. The Court admitted evidence the State

intended to rely on for their arguments for purposes of preliminary hearing, including a 17 page 1102 statement from the alleged victim, a 15 page 1102 statement from the alleged victim's mother, and a DNA test. In his closing, Mr. Harms, argued a theory of non-consent under U.C.A. § 76-5-406(2)(j). He neglected to make arguments for non-consent under U.C.A. §76-5-406(2)(k) despite having introduced evidence in support of that theory. The Court addressed the theory presented by the State and declined to bind the Defendant over on counts 1-10 for Rape. Based on the failed bindover on counts 1-10, Mr. Harms moved to amend those counts to unlawful sexual activity with a 16 or 17-year-old. The Court, having just heard the State's evidence, granted the motion to amend and bound the Defendant over on those counts.

Prosecutor Harms advised Prosecutor Hazard of the Court's decision after the preliminary hearing on October 19, 2021.[1] However, Mr. Hazard was in trial from October 20th through October 22nd, and spent significant time in court on October 25th and 26th. Mr. Hazard met with the alleged victim the week following the preliminary hearing and began working on a motion to reconsider the bindover decision. Because Mr. Hazard was not part of the preliminary hearing and because Prosecutor Harms was no longer working at the prosecutor's office, the State requested the audio recording of the preliminary hearing on November 2, 2021. On November 4, 2021, the State again requested the audio recordings from the Preliminary hearing. The State didn't receive the

[1] Prosecutor Harms left the County Attorney's Office the following week in order to take a different job.

recording of the preliminary hearing until November 9, 2021. On November 9, 2021, after listening to the recording of the preliminary hearing, the State filed their Motion to Reconsider. Approximately 21 days after the preliminary hearing.

The State's Motion argued that the State submitted sufficient evidence during the preliminary hearing to justify a bindover under multiple theories.

On November 22, 2021, the Defendant filed a Motion to Strike State's Motion to Reconsider Bindover and Motion to Dismiss. In their motion, the Defendant argued 1) The State's Motion is moot as the Court lacks the jurisdiction to do anything but dismiss the charges at preliminary hearing; 2) the Court lacked jurisdiction to bind over the amended charges, and doing so prejudiced the Defendant's rights; 3) the State's Motion was untimely; and 4) Count 11 should be dismissed because the required probable cause was not established at the preliminary hearing and was bound over in error.

ARGUMENT

The Court Should Not Strike the State's Motion to Reconsider Bindover

Rule 7B(c) of the Utah Rules of Criminal Procedure reads as follows:

> (c) **If no probable cause**. If the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the **magistrate must 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**.

See Utah R. Crim. P. 7B(c).

Pursuant to the last sentence of Rule 7B(c), a magistrate's failure to bind a defendant over for trial does not preclude the State from instituting a subsequent prosecution for the same offense. Utah law does, however, limit the refiling of an information **unless** the prosecutor can show that new or previously unavailable evidence has surfaced **or** that other good cause justifies refiling." *See State v. Brickey*, 714 P.2d at 647 (Utah 1986). This rule protects criminal defendants from "the potential for abuse inherent in the power to refile criminal charges." *Id*. In *Morgan*, the Utah Supreme Court found that the State's innocent miscalculation regarding the quantum of evidence required at preliminary hearing *did* constitute "other good cause" justifying the refiling of charges dismissed after a failed bindover. The *Morgan* court held:

> *Brickey's* analysis indicates that "other good cause" represents a broad category with "new or previously unavailable evidence" as but two examples of subcategories that come within its definition. "Other good cause", then, on its face, simply means additional subcategories, other than "new evidence" or "previously unavailable evidence," that justify refiling. While we noted but did not specifically adopt innocent miscalculation [of the quantum of evidence necessary for a bindover] as a subsection of other good cause in *Brickey*, we do so today.

See Morgan, ¶¶17-19.

In *State v. Morgan*, the Utah Supreme Court elaborated on the *Brickey* rule, finding that "when potential abusive practices are involved, the presumption is that due process will bar refilling." *See State v. Morgan*, 2001 UT 87, 43 P.3d 767, ¶16. However, *Brickey* does not . . . preclude refiling where a defendant's due process rights are not implicated". *Id*. ¶15. In *State v. Redd*, 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, . . . withholding evidence [,] . . . [and] refil[ing] a charge after providing **no** evidence of an essential and clear element of a crime." *See State v. Redd*, 2001 UT 113, 37 P.3d 1160 ¶20; *See also Morgan* ¶¶13-15.

Analysis of Rule 7B(c) and the *Brickey* Rule

Here, the Court declined to bind the defendant over on ten counts of Rape, finding that the Defendant did not occupy a position of special trust establishing the element of non-consent. The State believes the Court failed to properly analyze the evidence presented during the preliminary hearing, and failed to view such evidence in the light most favorable to the State. Additionally, the State innocently miscalculated the quantum of evidence necessary for the bindover decision by failing to argue a lack of consent under U.C.A. §76-5-406(2)(k) despite evidence of such being presented during the preliminary hearing. The State believes there is good cause to dismiss this case and to refile the charges under Rule of Criminal Procedure 7B and *Brickey*. However, the State at this time, has moved the Court to reconsider its bindover decision in light of these arguments and believes that doing so would serve the interest of justice and judicial economy without compromising either party's substantial rights to due process.

The State respectfully asserts that the Court erred in failing to bind the Defendant over based on the evidence that was presented during the preliminary hearing. The State's

Motion is for the Court to re-examine *the same* evidence presented during the preliminary hearing and to apply that evidence to all relevant theories establishing a lack of consent, (which was the element the Court found was not met by the State in regards to the 10 counts of Rape). The State has the right to have the Court evaluate the evidence under all applicable theories and to view such evidence in the light most favorable to the State giving all reasonable inferences to the prosecution. Moreover, extensive rights extend to crime victims under the 1995 amendments to the Utah Constitution establishing a right of crime victims "[t]o be treated with fairness, respect, and dignity," and a right to "be free from harassment and abuse throughout the criminal justice process." Utah Const. art I, §28(1)(a). A failure to reconsider the evidence under all relevant theories of non-consent potentially deprives the State, and the alleged victims of a just result.

The State's Motion is not for the purpose of abusing the State's discretion or to harass the Defendant. Rather, the State's respectfully asserts that the Court erred in failing to bind the Defendant over on the rape charges, and the State's Motion to Reconsider is to allow the Court an opportunity to have more time to review the evidence set out in the lengthy 1102 statements admitted during the preliminary hearing, and to analyze that evidence in light of all relevant theories of non-consent which seem to have been excluded from the Court's analysis on the date of the preliminary hearing.

Additionally, the State is not attempting to engage in any of the potentially abusive practices to which the *Brickey* rule is applicable.

The State is not attempting to forum shop. The State's Motion is not an effort to refile charges in a different forum after a dismissal of the case. Here, the Court gave leave to amend the charges and the State is simply motioning the Court to reconsider the bindover decision. The State's Motion to Reconsider is before the same Court who took the evidence at the preliminary hearing, and, if the Motion were to be granted, the case would remain in the same forum. This could not be interpreted as an attempt by the State to forum shop.

The State is not attempting to engage in repeat filings of groundless and improvident charges for the purpose of harassing the Defendant. The very nature of the State's Motion to Reconsider is to argue that the original counts 1-10 for Rape were NOT groundless and were supported by substantial evidence, so much so that it appears to the State that the Court may have committed plain error in failing to bind the Defendant over. The State's Motion shows that such evidence was admitted during the preliminary hearing and was before the Court at the time the Court made its decision. The State believes that because the stand-in prosecutor innocently failed to set all relevant theories of non-consent before the Court, thereby underestimating the quantum of evidence expected by the Court during the State's closing arguments, the Court failed to consider the alternative theory that could have justified a bindover in the case. It is the State's position that the State's claims are not groundless, and that if the Court were to deny the State's Motion to Reconsider, the State's interests, the alleged victim's rights and the

interests of justice would not be served.

Next, the State is not attempting to withhold evidence. Such a claim has not been made by the Defendant, and the evidence presented at the preliminary hearing is the same evidence the State relies on in support of its Motion to Reconsider. Because the State is entitled to have that evidence viewed in the light most favorable to the State and all reasonable inferences are to be drawn in the State's favor, the State respectfully believes the Court erred in failing to bind the Defendant over for trial on both of the State's theories of the case.

The State is not attempting to refile charges after providing **no** evidence of an essential and clear element of a crime. The Court declined to bind the Defendant over on counts 1-10, after finding that the State failed to meet its burden regarding the element of non-consent. The State's frustration, captured in its Motion to Reconsider, is that the Court's finding was made in the face of significant evidence that had been admitted in support of 1) the existence of a position of special trust under U.C.A. §76-5-406(2)(j), and 2) the existence of a greater than three-year age gap between the 16-year-old alleged victim and the 26-year-old Defendant accompanied by a showing that the Defendant enticed the victim to engage in sexual acts establishing a lack of consent under U.C.A. §76-5-406(2)(k). The stand-in prosecutor innocently failed to argue the second theory of non-consent under subsection (2)(k), but the evidence supporting such a theory was before the Court. The present case is not one where the State failed to present evidence in

support of their case. Rather, it was one involving an innocent failure on the part of both the prosecutor and the Court to adequately analyze the evidence admitted during the preliminary hearing and to apply that evidence to all of the relevant theories.

Because the State has shown "good cause", both in their Motion to Reconsider and in this Reply, that the Court's reconsideration of evidence is in the interest of justice, and because there is no evidence that such a motion is an attempt by the State to engage in abusive practices such as forum shopping, repeat filings of groundless claims, hiding evidence, or etc., the Court should grant the State's Motion to reconsider.

The State believes the Court has discretion to grant such a motion under Utah Rule of Criminal Procedure 24 regardless of the State's alleged failure to file their Motion within 14 days of the failed bindover. The State further believes that granting the State's Motion would serve both the interest of justice as well as the judicial economy as it would allow the State to forego dismissing and refiling these charges under Rule of Criminal Procedure 7B and *Brickey*. The State has no interest in forum shopping and granting the State's Motion would assist the State in avoiding the very appearance of making such an attempt.

Rule 24 states that "[t]he court may, upon motion of a party **or upon its own initiative**, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party". *See* Utah R. Crim. P. 24(a). Rule 24 further allows the Court to extend the time period for such time as it

deems reasonable. Id. at 24(b). As set out in the State's Motion to reconsider, the State believes it has demonstrated that the Court erred in failing to bind the Defendant over on the rape counts, and that said error had a substantial adverse effect upon the State's rights and upon the victim's rights in this case.

The Court Should Deny the Defendant's Motion to Dismiss

Contrary to the Defendant's Motion to Dismiss, the State would argue that pursuant to Utah Rule of Criminal Procedure 4(d), the Court has jurisdiction to "permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced." Utah R. Crim. P. 4(d).

Here, after hearing evidence at preliminary hearing, and determining that the State failed to meet thir burden of probable cause, the court dismissed charges 1-10 in keeping with Utah Rule of Criminal Procedure 7B(c). At that time, the Court simultaneously granted the State's motion to amend their information under Rule 4(d), an act certainly within the Court's discretion, and one that did not run afoul of 7B as the rape charges had already been dismissed. Having just heard the evidence in the case, the Court further bound the Defendant over on the amended charges. ALL of these things were properly within the discretion of the Court and did not run afoul of any of the above mentioned rules. Moreover, the Defendant's sole argument regarding any substantial prejudice to her rights, seems to be the inconvenience of facing amended criminal charges after the ten counts of rape were dismissed. That is an insufficient basis on which to demonstrate

substantial prejudice. The Court should deny the Defendant's Motion to Dismiss on this basis.

CONCLUSION

Under Utah Rule of Criminal Procedure 7B(c) A Court's dismissal and discharge after a failed bindover attempt at preliminary hearing does not preclude the State from instituting a subsequent prosecution for the same offense, as long as the State has good cause to do so and is not attempting to engage in any of the potentially abusive practices to which the *Brickey* rule is applicable. The State believes it has shown good cause, and that any future attempt to refile charges would not be for a potentially abusive purpose under *Brickey*. However, the State would prefer the Court to simply reconsider the bindover decision in the interest of justice and judicial economy. The Court's reconsideration of the *same evidence* presented during the preliminary hearing, would not place either party in a better, or worse, position than they were in at the time of the Court's initial bindover decision. The Defendant's rights would not be substantially prejudiced. However, allowing the Court to reconsider such evidence provides an opportunity to the Court to consider such evidence in light of arguments that were not made or analyzed at the time of the initial bindover decision and that the State feels are critical to the Court reaching a just result.

The State further believes the Court has the discretion to entertain the State's Motion.

Wherefore, the State respectfully requests that the Court deny the Defendant's Motion to Strike the State's Motion to Reconsider, along with their request to dismiss the State's case and allow oral arguments to proceed on the State's Motion to Reconsider.

DATED this 1st day of December, 2021

/s/ Griffin Hazard
Griffin Hazard
Cache County Attorney's Office

CERTIFICATE OF DELIVERY

I hereby certify that I e-filed a true and correct copy of the Motion with the court as means of notification to: Gregory G Skordas

DATED this 1st day of December, 2021

_/s/Cherice Moser_____
Cherice Moser
Legal Assistant

Gregory G. Skordas (#3865)
Gabriela Mena (#17087)
Benjamin Gabbert (#17995)
SKORDAS & CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 665-0128
Attorneys for Defendant
gskordas@schhlaw.com
gmena@schhlaw.com
bgabbert@schhlaw.com

IN THE FIRST DISTRICT COURT-CACHE

IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. KYLI JENAE LABRUM, Defendant.	**REPLY TO STATE'S REPLY TO DEFENDANT'S MOTION TO STRIKE AND MOTION TO DISMISS** Case No. 211100567 Judge Angela Fonnesbeck

Kyli Jenae Labrum, the Defendant herein, by and through the undersigned attorney, Gregory G. Skordas, hereby files this Reply to State's Reply to Defendant's Motion to Strike and Motion to Dismiss. The law of this state requires that the Magistrate dismiss charges once bindover is denied and failure to dismiss the charges violates Ms. Labrum's rights. The State makes several claims to support their position that the Court has plenary power and discretion, but fails to provide any authority to support the claims. Further, the Magistrate's bind over of Count 11 is inconsistent with the finding that there was no probable cause to support the element of no consent. As such, the case should be dismissed.

The State attempts to correct course by arguing that because the case could be refiled anyway the Court should exercise jurisdiction it no longer has. The State does this by introducing caselaw and arguments which are not relevant to the issues before the Court, including whether the State can refile under *State v. Brickey*. Ms. Labrum does not agree that there is good cause to refile the rape charges, nor does she agree that the Court made an error. However, Ms. Labrum will address those issues at the appropriate time. What is before the Court, and what Ms. Labrum will limit her argument to, is whether it was appropriate to amend the charges, was the State's motion to reconsider timely, and if the case should be dismissed. The remaining issues are not ripe for argument at this time and will be addressed with the Court's permission should the Motion to Strike be denied.

The State has argued that reconsidering bindover at this time "would serve the interest of justice and judicial economy without compromising either party's substantial rights to due process." The State is mistaken. The defendant has a right to have the charges against her dismissed after the State failed to present sufficient evidence to support a finding of probable cause. By allowing the charges to be amended after the Court declined bindover Ms. Labrum's rights were violated. While this process may create additional work for the State the law is the law. We cannot bypass the law because following it would be hard. This violation of her right to a dismissal of the charges is more than an inconvenience. It would be the same as the defendant asking for a trial at their first appearance. No court would grant that motion as there are other steps that need to be met first. There are procedures that need to be followed in order to protect the rights of the victim and the defendant. It would be extremely efficient to go from first appearance to trial, but the Courts could not do it because of the rules of procedure. As such, the rules of procedure cannot be ignored here, even in the interest of judicial economy.

The State further argues that striking the motion to reconsider would infringe on the State's interests and the alleged victim's rights, yet fails to provide any argument or legal authority to refute Ms. Labrum's claim that the Court no longer has jurisdiction over the case. The State is essentially asking the Court to disregard the rules of procedure in order to make things easy. The State chose to file a motion to reconsider despite the availability of remedies that are recognized by the rules of procedure. A motion to reconsider is not a mechanism that is favored by the courts. "'Motions to reconsider are not recognized by the Utah Rules of Civil Procedure,' and 'trial courts are under no obligation to consider [them].'" Nakkina v. Mahanthi, 2021 UT App 111, ¶ 36 (citing Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶ 15, 163 P.3d 615). The Utah Supreme Court ". . . ha[s] discouraged the use of motions to reconsider in the past." *Gillett v. Price*, 2006 UT 24, ¶ 9. Motions to reconsider are also not recognized by the Utah Rules of Criminal Procedure. *State v. Johnson*, 782 P.2d 533 (Utah Ct. App. 1989).

There are at least two remedies to correct the alleged error that are provided by the law. First, the State correctly points out that Utah R. Crim. P. 7B(c) allows the State to refile charges that are dismissed at the preliminary hearing. Even though this may trigger a *Brickey* motion, the State has already stated that they believe that refiling is appropriate. As such, they had this appropriate remedy at their disposal. Second, the State has the right to appeal the decision to decline bindover. U.C.A. § 77-18a-1(3)(a). However, rather than exercise one of those two legitimate remedies they instead turned to a mechanism which has been discouraged by the Utah Supreme Court, and have argued that the court should not comply with the law because it may inconvenience the alleged victim and the State's interests. Victims do have rights, but those rights do not include the ability to disregard the rules of procedure. Further, the State's interests cannot be placed above the rights and interests of the defendant. As such, the rules which require

dismissal of a charge cannot be ignored simply because it may inconvenience the State or the alleged victim.

Nor does the State address the threshold question of whether the Court even can amend a charge after declining bindover, other than to make a conclusory statement that the court has discretion to do so. Ms. Labrum is aware that the Court has discretion over several aspects of its docket. This discretion includes the admissibility of evidence, *State v. Richins*, 2021 UT 50, ¶ 39; the weight given to admitted evidence, *SA Grp. Props. v. Highland Marketplace LC*, 2017 UT App 160, ¶ 24; the determination of reasonable attorney's fees, *Clarke v. Clarke*, 2012 UT App 328, ¶ 31; and even granting a continuance to allow the State to prepare and present additional evidence at a preliminary hearing, *State v. Rogers*, 2006 UT 85, ¶ 22. However, the Court does not have discretion to disregard the rules of procedure, as the State has asked it to do. The State has failed to present, and defense counsel has been unable to locate, any legal authority to support the claim that the Court can disregard the rules of procedure and bind over a defendant on lesser charges after not finding probable cause.

The State is correct that Utah R. Crim. P. 7B allows an Information to be refiled, and that *State v. Brickey* provides limitations on that. However, the fact that the State believes the Magistrate made a mistake and there is good cause to refile the rape charges does not create jurisdiction that is not there. Rule 7B is not ambiguous. The Court made a finding that there was no probable cause to prove all of the elements of the charge of rape. As the result of that finding the Magistrate was required by law to dismiss the information and discharge the defendant. Allowing the State to amend the charges is not consistent with the procedural rules.

The State further argues that the Motion to Reconsider Bindover was timely because the State had good cause for not filing within the statutory time period. Further, the State argues that

the Court can grant additional time to file a Rule 24 motion. The State is correct that Utah R. Crim P. 24 allows a court to extend the time to file a Rule 24 motion. However, there is no mechanism in Rule 24 for a Court to retroactively approve a motion to extend time. The State has failed to provide, and defense counsel has been unable to locate, any legal authority to support the assertion that a court can retroactively grant a motion to extend the time to file a motion under Rule 24. There is a mechanism in Utah R. App. P. 4(e) for a court to retroactively grant a motion to extend time to file an appeal, but because this provision is absent in Rule 24 the State cannot rely on it.

Further, the State misrepresents the text of Rule 24(b). Utah R. Crim. P. 24(b) states that a motion for a new trial must be in writing and accompanied by affidavits or evidence of the essential facts supporting the motion. The Rule then states that "*[i]f additional time is required to procure affidavits or evidence* the court may postpone the *hearing* on the motion for such time as it deems reasonable." The Rule clearly states that as a condition of extending time as the court deems reasonable the moving party must require additional time to procure affidavits and evidence, and the time the court can extend is the time for a hearing; not the time to file the motion. In fact, Rule 24(c) states that the motion for a new trial has to be filed within 14 days after entry of the sentence, "or within such further time as the court may fix before expiration of the time for filing a motion for new trial." The Rule itself states that a request to extend the time for filing must be requested, and granted, before the time to file the motion expires. As such, the State is incorrect that the Rule allows for a retroactive extension.

Even if the Court could grant a retroactive motion to extend the time to file a motion for new trial, the State has failed to present good cause or excusable neglect. If the State needed more time to file their Motion to Reconsider it should have requested that from the Court before

the day it was due. The State did not even request the audio of the preliminary hearing until the day its motion was due. The situation is admittedly difficult given that the prosecutor who appeared for the preliminary hearing subsequently left the office, and the assigned attorney had a heavy calendar. However, these are all reasons that defense counsel would have stipulated to a request to extend the time to file a motion to reconsider. They are not reasons why the court should retroactively grant a motion to extend the time to file. This is especially true when the State presented the argument to allow more time after it was pointed out that the motion was untimely. As such, the motion should be stricken as it was untimely.

Finally, Count 11 must be dismissed as the bindover is inconsistent with the findings of the Magistrate. The State alleges that the bindover of Count 11 did not run afoul of any rules. However, the Court made specific findings concerning Counts 1-10 that there was no probable cause to support a finding of a position of special trust. As such, there was no basis for the essential element of lack of consent, and thus the Court declined to bindover the charge of rape. Because the Court made these specific findings, the Court cannot then state that there was sufficient evidence to support the claim that Ms. Labrum "touch[ed] the anus, buttocks, pubic area, or any part of the genitals of another, or touch the breast of a female, or otherwise took indecent liberties with another, with intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual, without the consent of the other…" The Court's own findings that there was no position of special trust prevents the Court from binding over Count 11 as there was not sufficient evidence of all essential elements of the offense. As such, the bindover was inconsistent and must be dismissed to align with the findings of the Court.

CONCLUSION

For the foregoing reasons the Court should dismiss the case in its entirety. The Court lacked jurisdiction to bind over the amended charges, and allowing the charges to be amended prejudiced Ms. Labrum's rights. The Motion to Reconsider Bindover is moot as the Court lacks the jurisdiction to do anything but dismiss the charges. Even if the motion is not moot it was untimely as the State's motion was filed more than 14 days after the order was entered. Further, Count 11 should be dismissed because the required probable cause was not established at the preliminary hearing and Count 11 was boundover in error. Finally, Ms. Labrum does not waive her right to reply to the State's Motion to Reconsider Bindover and requests that should the Court not grant this motion that the Court grant her fourteen days after denial of this motion to file her reply to the State's motion. On Monday, December 6, 2021, it is defense counsel's intent to argue the merits of its Motion to Strike and Motion to Dismiss, not the State's Motion to Reconsider. Should the Court deny Ms. Labrum's motion she respectfully requests that the Court grant her leave to respond to the State's Motion to Reconsider.

DATED this the 2nd day of December 2021.

SKORDAS & CASTON, LLC

/**s**/*Gregory G. Skordas*____
Gregory G. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on Decemebr 2nd, 2021 I electronically filed a true and correct copy of the foregoing DEFENDANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO RECONSIDER BINDOVER with the Clerk of the Court using ECF system, which sent notification of such filing to the following:

Griffin Hazard
Cache County Attorney's Office
199 N Main
Logan, UT 84321

/s/ Benjamin Gabbert
SKORDAS & CASTON, LLC

IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff, Case No. 211100567

vs.

KYLI JENAE LABRUM,

Defendant.

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ORAL ARGUMENTS/MOTION TO SET ASIDE

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BEFORE JUDGE ANGELA FONNESBECK

DECEMBER 6, 2021

APPEARANCES:

FOR THE PLAINTIFF:

Griffin McKay Hazard

CACHE COUNTY ATTORNEY'S OFFICE

199 North Main

Logan, Utah 84321

FOR THE DEFENDANT:

Benjamin Michael Gabbert

WEBER COUNTY ATTORNEY'S OFFICE

2380 Washington Boulevard, Suite 230

Ogden, Utah 84401

Gregory G. Skordas

SKORDAS AND CASTON

124 South 400 East, Suite 220

Salt Lake City, Utah 84111

MR. SKORDAS: Your Honor?

THE COURT: Yes, sir?

MR. SKORDAS: My associate, Ben Gabbert, is on the call. And he'll be handling the argument part of the hearing today if there is.

THE COURT: All right. Very good.

Mr. Gabbert, thank you for joining us. I see you've clicked on your video.

And, again, I have Mr. Hazard present here in the courtroom today.

Is Kyli Labrum online with us?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Very good. This is case number 211100567. Today is the time for argument on a motion to set aside. There was a preliminary hearing in this case back on October 19. At that time, the Court bound the defendant over, I believe, on one count. The other charges, the Court declined, finding that the State had not met its burden of proof. At that time, the State moved to amend its information, which I allowed.

Subsequent to that, a motion for reconsideration of bindover was filed on November 9. There has also been a motion to strike that has been filed related to that motion for bindover. There has been a reply to the motion to strike and a response of pleading to that reply. So give me just a moment here to pull these up.

I asked that we set the motion today to argue these matters before the Court, and I'm prepared to hear argument from Counsel.

I'm going to just let everyone know that it is not this Court's policy to reconsider decisions it has made. In this case, the Court has -- cannot see from the pleadings presented that any new information has been presented to the Court such that would justify the Court reconsidering its bindover decision. I recognize that sometimes individuals and attorneys are unhappy with the Court's decisions, but that does not necessarily mean that the Court is going to second guess every decision or actions that it takes.

So with that, I guess, preamble and introduction to the Court's thoughts about the viability of the motion to reconsider and its appropriateness, I'm going to give each party a few moments to make its arguments on the record at this time as to why the Court should either reconsider its bindover decision or strike the bindover and subsequently dismiss.

Mr. Hazard, you filed the motion to reconsider the bindover decision. So I'm going to give you a few moments to make your arguments before the Court. Go ahead, sir.

MR. HAZARD: Thank you, Your Honor. And, Your Honor, I guess from a procedural standpoint here, the motion to reconsider was filed, Defense Counsel filed their motion to strike the State's motion. And it seemed to the State that

Defense Counsel set out some procedural arguments that there were some procedural violations and also asked for if the Court were to deny their motion to strike and allow the motion to reconsider to move forward, that the Court allow them time to reply to the State's motion to reconsider substantively.

So would the Court want us to argue procedurally today whether or not the Court is going to consider the State's motion? And if so, give Defense Counsel time to respond substantively to that or just --

THE COURT: Yeah, no, and that's a good point. And the motion to strike, Counsel, was filed after the time of our last hearing.

MR. HAZARD: And the State is fine with giving Defense Counsel time to do that. I think --

THE COURT: Well, let's do this. Let's go ahead and address the motion to strike, the State's motion to reconsider, and the motion to dismiss since the Court's decision on that will impact whether we move forward on the motion to reconsider.

MR. HAZARD: Right.

THE COURT: Let's go ahead and address that motion because it does look like we had both a reply response and a reply to that motion.

So with that then, Mr. Gabbert, let me have you address the Court on the motion to strike.

MR. GABBERT: Thank you, Your Honor. As Mr. Hazard

stated, there are procedural concerns that we do have. Specifically, Rule 7B states that if there is not a finding of probable cause that the defendant has a right to have the charges dismissed. And it used the word must, which everyone involved here knows that must is -- it's used in a situation where there is no discretion. The rule states that the charges must be dismissed and defendant must be discharged.

Because that finding was made by the Court, we feel that the appropriate step is to have the case dismissed. At that point, if the State wishes to refile, they can have that right under the rule to refile. We will be filing (inaudible) motion because we do feel that refiling the rape charges would not be appropriate, but that's an argument we can have at a different time, and procedurally, that would be appropriate.

Contrary to what the State has asked me, we can't just ignore procedure for convenience. It's true that it would be a lot more convenient if we were just to go forward today, but it doesn’t make sense, procedurally, to ignore the rules. Courts do have a lot of discretion. Your Honor has plenty of discretion to make decisions, but not when the rule or the statute says must.

And probably the most concerning issue is that the State makes a lot of claims in their response that doesn’t ever provide any authorities for the claims. I couldn’t find any either. So for those reasons, we would ask that the motion to

reconsider be stricken.

In addition, the motion was not timely. The order of dismissal of the rape charges was filed on -- or was issued on October 19 in open court. Under State v. Johnson, a motion to reconsider a bindover is actually the same as a motion for a new trial under Rule 24 of the Rules of Criminal Procedure, which requires that the motion be filed within 14 days.

The State mentioned, in their response, that they couldn't ask for or that the Judge could retroactively grant more time to file that motion, and that's just not accurate. There is no mechanism in Rule 4 or in Rule 24 to be able to retroactively ask for more time.

In fact, the rule specifically says that the Judge can extend time if the request was made before the 14 days. So even under Rule 24, you can't ask for more time once that time has expired. Because it's not timely, we should also just dismiss or deny the motion to reconsider.

And the final issue we brought up in that motion is the motion to dismiss Count 11. In addition to all 10 charges being dismissed, Count 11 was bound over with inconsistent findings.

One of the essential elements of forcible sex abuse is that the sexual contact or indecent liberties were taken without consent, but Your Honor made a finding that there was no probable cause to believe that there was a lack of consent. As

such, the forcible sex abuse cannot be bound over based on this Court's finding and that should be dismissed as well.

And with that, I'll submit with request for rebuttal.

THE COURT: So, Mr. Gabbert, let me ask this question of you. And I'm obviously going to have to go back and listen to the preliminary hearing findings and the order of which things transpired as the Court made its finding.

But once the Court made its findings and the State made its request to amend, why was an objection not entered by Defense Counsel at that time? Because at that time, as I recall, Defense Counsel went ahead and asked that we set it out for further pretrial. Why wasn’t an objection made at that point if the defense's position is that it must be dismissed, and the State must actually go through the process of filing a piece of paper?

MR. GABBERT: And that is a very good question. The reason that Mr. Skordas made the decision to set it out and push out the arraignment was because he wasn’t sure what the procedure was. He came back to the office and noted to us that didn’t seem appropriate, but he didn’t necessarily have that understanding. So it was then that we did the research, found the rule, and that's why it was set out for further arraignment not as a pretrial.

THE COURT: Okay.

MR. GABBERT: Again, because he didn’t know exactly

how it worked, what was wrong, but he felt that --

THE COURT: And I don't see that I actually have an amended information in the file as of yet. Is that your understanding as well, Mr. Gabbert?

MR. GABBERT: It is, but the Court did file, on November 2, I believe, an order binding over the lesser charges of unlawful sexual contact. So I'm not sure procedurally amended information is required. We would consider it an amended by (inaudible).

MR. HAZARD: And, Your Honor, the State did make a motion to --

THE COURT: Okay. Just hold on.

MR. HAZARD: Okay.

THE COURT: Hold on.

All right. Mr. Gabbert, anything else, sir?

MR. GABBERT: Nothing except, again, opportunity for rebuttal, Your Honor.

THE COURT: Of course.

Mr. Hazard, go ahead, sir.

MR. HAZARD: Your Honor, I guess I'll start where the Court just left off. I wasn't here for the preliminary hearing. Another prosecutor, a stand-in prosecutor, was here for me that day. I was preparing for a jury trial starting the next day.

But I did have a chance, ultimately, to hear the preliminary hearing, and the prosecutor did make a motion to

amend the charges. The Court granted that, and the prosecutor indicated they would file an amended information. So I think whether the Court has -- and the State hasn't filed one yet because of these motions that have been placed before the Court, but procedurally, I think those charges were moved to be amended. The Court granted that motion. So I think as the charges stand today, they would be unlawful sexual activity with a 16- or 17-year-old as amended counts.

Your Honor, the State has filed a motion to reconsider. As was mentioned by the Court, Defense Counsel has filed a motion to strike that. They set out some of their arguments in their written response, as well as in their oral arguments just now. I'll respond briefly to those.

First of all, under Rule -- well, I'll kind of just go through the arguments that I saw made in the motion, the defendant's motion. Which was, number 1, that the State's motion is moot because the Court lacks jurisdiction to do anything but dismiss the charges at preliminary hearing under Rule 7B. And Defense Counsel has made that argument here today again.

The State disagrees with that to a degree. If the Court finds that there is not probable cause to support a bindover decision, the Court must dismiss the charges. That is what happened at this preliminary hearing. The Court found that there was insufficient evidence to support a bindover on the ten

counts of rape and the Court dismissed those charges. That's Rule 7B.

Rule 4(d) allows the Court to grant a party's motion to amend charges and liberally so anytime pretrial. Under 4(d), the State motioned the Court to amend the charges. And the Court having just heard evidence during the preliminary hearing, granted the State's motion.

In doing so, the Court did not violate Rule 7B. The Court had dismissed Counts 1 through 10 for rape and allowed the State to amend the charges under Rule 4(d) to be counts of unlawful sexual activity with a 16- or 17-year-old. The Court did not abuse its discretion in doing so, nor did it abuse or violate any of the Rules of Criminal Procedure.

Defense Counsel argues that under Rule 24, there is some discretion granted to a court that discretion is essentially eliminated when we're looking at the word must under Rule 7B. Again, the Court -- or the State disagrees with that. I think the Court has discretion to grant motions by either party depending on the circumstances and the interest of justice.

Those rules are certainly guidelines, and they're typically followed. And they should be. There's a reason for having rules. Courts have discretion for a reason as well.

And so the State is acknowledging that perhaps the defendant's strongest argument here is that the State failed to

timely file their motion within 14 days under Rule 24.

The State is asking the Court to use its discretion to go ahead and allow these arguments to be made under the motion to reconsider and any response that Defense Counsel may file in the interest of justice.

The State has no interest in forum shopping. The States wants to keep these charges before the Court. Respectfully, the State believes that they put on sufficient evidence for a bindover decision under a legal theory that wasn't really argued to the Court at the time. However, the State believes that there was more than sufficient evidence to bind over under that theory. It's just something that the Court didn't consider at the time.

So I understand that the Court is not in a habit of second guessing its decisions, changing those decisions, I understand that. And the State, frankly, is not purporting or attempting to put any new evidence before the Court.

The State's argument and what the State believes to be a good argument is that the State -- or that the State did present evidence of a theory but failed to argue that theory. And that under the rules of Brickey, which would be a motion that we would file if we were dismissing and refiling charges, which the State is hopeful not to have to do, the State believes that would be a waste of -- first of all, the State believes that would be a waste of judicial resources when we can address

those same arguments here today, but also, that it would be a waste of time. And, again, the State is not attempting to have the Court consider anything new.

Under Brickey, the State can't -- or the Court can reconsider charges if the State puts on either new evidence or previously unavailable evidence has surfaced or if there's other good cause to justify the refiling. In its various motions, the State believes that we've put on good cause for the Court to reconsider the same evidence that was presented at preliminary hearing. That rule protects criminal defendants from the potential for abuse inherent in the power to refile criminal charges. However, the Supreme Court of Utah has found that the State's innocent miscalculation regarding the quantum of evidence required at preliminary hearing does constitute other good cause.

In addition to that, acting in the interest of justice, to reconsider evidence in the light of a theory that perhaps wasn’t argued at preliminary hearing, in the interest of justice should necessarily be considered other good cause under Brickey.

The Morgan Court specifically talked about how other good cause, on its face, simply means additional subcategories other than new evidence or previously unavailable evidence that justified refiling. So while that Court had noted, in the past, that they had referenced, in the past, the innocent

miscalculation of the quantum of evidence necessary for a bindover, but they hadn't adopted it necessarily as a specific category, they did so in the Morgan case. The Utah Supreme Court adopted that as a specific basis to refile charges.

The State does believe that we have shown that, at the very least, the State innocently miscalculated the quantum of evidence by failing to argue a lack -- a theory of no consent, non-consent, under, I believe it's 76-5-406(2)(k). I believe the State argued 2(j), but not 2(k). Any theory under (2) in that statutory subdivision would allow the State and the Court to bind over, assuming that evidence had been presented during the preliminary hearing.

The State certainly believes that the 17-page 1102 statement from the victim alone, the alleged victim, presented substantial evidence that the 26-year-old defendant in this case had more than a three-year age gap between herself and the 16-year-old alleged victim. And that she enticed the defendant when she, absent any contact, any initiation from the victim, told the victim that if she weren't married to her husband, that she would want to be with him.

When she told the victim how attracted she was to him. Even after he tried to categorize her prior statements as being a joke, she doubled down on her statement and indicated that she was very attracted, physically, to the alleged victim.

She is the one that, along with the victim, engaged in

discussions about kissing. She's the one that picked the alleged victim up in her car and brought him to a subdivision, an unfinished subdivision, where she told him that if she were going to -- if he wanted to kiss her, he needed to do that quickly because she needed to go home.

She's the one that subsequently picked him up in her car and brought the alleged victim up Smithfield Canyon, where she parked and where she touched the alleged victim. This is evidence that's set out in the 1102 statement, and then asked the victim if that was okay. Only after that time, did the alleged victim touch the defendant.

This behavior is set out over and over and over again in the 1102 statement from the alleged victim. This evidence was before the Court at the time that the Court made its bindover decision, but the State failed to make the argument under sub (2)(k).

And the State is simply asking the Court to reconsider, in light of this theory, this same evidence that was before the Court. In the interest of justice and for the sake of judicial economy, to do that now as opposed to requiring the State to dismiss charges and to refile in order to give the Court a second opportunity to look at the same evidence in light of a different legal theory because the State innocently miscalculated the quantum of evidence required by the Court. And the Court certainly has -- the State believes the Court

certainly has the discretion to do that.

Despite the State's failure to meet the 14-day timeline, Rule 24 allows the Court to grant such a motion on the Court's own motion or on the party's motion. I'm simply asking the Court to use their discretion to do that today.

And in response, I guess, to Count 11, that would be more of a substantive argument. And the State would address it more fully if we're going to make oral arguments on the actual motion to reconsider. It sounds like both the State and Defense Counsel want the Court to reconsider certain aspects of the preliminary hearing bindover decision, but the State does believe that there was sufficient evidence for Count 11.

Those were individual instances, so the Court was able to find that there was non-consent under -- what the Court's analysis was on the day of was under subparagraph (2)(j), involving a position of special trust. And the Court found that there was not a position of special trust and failed to bind over.

However, I believe the Court was looking at perhaps a different theory and a different incident when it bound over on Count 11. So we'd ask that be in place.

THE COURT: All right. Thank you.

So, Mr. Gabbert, I think we got a little bit into the motion to reconsider, but I want to focus on the motion to strike. Is there anything else that you wish to comment or make

argument about at this time?

MR. GABBERT: I guess, Your Honor, that I will limit it to the motion to strike. The rule states that, again, the Court must admit and discharge the defendant, but it makes no procedural sense to amend a charge once it's been dismissed. Once a charge has been dismissed, you cannot amend it. It needs to be refiled. Procedurally, you cannot amend something that has been dismissed.

In terms of discretion, the word "may" grants the Court discretion. "Must" is direction. There is no discretion when the word "must" is used. The State is incorrect.

Further, the motion to reconsider presents new argument -- oh wait. Sorry. That's (inaudible). Never mind.

It's just those couple things, just that I guess the State has presented no authority, no statute, no rule, no case law to suggest the Court has the discretion that it does, and I can't find any. It's blackletter law that "must" gives direction; "May" provides discretion. And so based on that, we'd still ask that the whole case be dismissed.

It might be easier, but again, you cannot ignore procedure, and we cannot just throw the rules out because it would be more convenient to a party. We have to follow the rules. The rules are there for a place -- or the rules are in place for a reason. And convenience doesn’t just create jurisdiction, which is probably our biggest concern.

Once the charges are dismissed, the Court lacks jurisdiction. It's not an issue of procedure, it's legal. And jurisdiction is a big issue, especially when you get up to the Court of Appeals. If the Court has no jurisdiction to do something that it did, that's an automatic overturning and taking that process, which it complicates the situation even more.

It's easier for the State to refile or to appeal, which they can still do. The motion for a new trial would (inaudible) the time for appeal. So they still have the option to appeal the decision. It's not necessary that it be done today, and it's not procedurally correct.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Counsel, let me just say this. I believe I'm prepared to rule on the issue, but before doing so, I want to carefully listen to the findings that the Court made at the time of the preliminary hearing, which I have not done at this point. I'm going to need just a little bit of time to do that.

Now, having said that, I don’t have another calendar setting this morning until 11:00. If you want to bear with me and stay online right now and just let me take a brief recess, I'm going to go listen to the findings of the prelim. Alternatively, I can just put it back on the calendar in a week or so.

MR. HAZARD: The State is fine either way, Your Honor, but the findings didn't take very much time. I think the Court will be able to listen to those today.

THE COURT: Mr. Gabbert, are you comfortable just staying online and letting the Court take a brief recess?

MR. GABBERT: I am. We're (inaudible) either way works for us.

THE COURT: All right. Let's do this. If you'll all just hang tight, let me take a brief recess. I just want to go listen to the last few minutes of the preliminary hearing to make sure that I have a fresh recollection of what was said at that time. Give me just a moment, please. We'll take a brief recess. Thank you.

(Recess)

THE COURT: All right. Mr. Gabbert, are you still online, sir?

MR. GABBERT: Yes, Your Honor.

THE COURT: All right. And, Ms. Labrum, are you still online, ma'am?

THE DEFENDANT: Yes, I'm here.

THE COURT: All right. And I do still have Mr. Hazard present in the courtroom as well.

Counsel, thank you for being patient when I took a few minutes. I wanted to listen carefully to the findings that the Court had made at the time of the preliminary hearing.

And I apologize. I believe, earlier, I said that the preliminary hearing was in November. If I said that on the record, I apologize. It was actually in October.

But again, I did want to take a few minutes to carefully review the specific findings that the Court had made at that time, particularly as it related to the issue of consent.

Now, today, let me be clear. I'm going to be addressing the defendant's motion -- hold on. I apologize -- the motion to strike, the State's motion to reconsider bindover and motion to dismiss. So let me tell you where we're at.

I think this is clearly a case that sometimes timing is everything. And I never like to say we exercise form over function, but sometimes the rules of procedure do require us to be very careful about the form of our actions. This Court is bound by the rules just like Counsel and the parties are bound by the rules. And that means this Court must also follow the procedures of law.

Rule 7 requires that if this Court fails to find that there is evidence sufficient to support a bindover that I must dismiss the counts. In this particular case, the Court found that Counts 1 through 10 were not supported by the evidence that was presented at trial.

Now, again, I want to make sure everyone understands I'm not making a determination on the State's motion to

reconsider today, but at the time of the Court's ruling at the preliminary hearing, the Court determined that there was insufficient evidence to proceed on Counts 1 through 10 such that the Court could not bind Ms. Labrum over based on the facts that were presented to the Court.

The Court specifically found that it could not determine from the evidence that was presented that there was undue influence exercised by a position of special trust between the defendant and the alleged victim. If the Court had found such a position, the issue of consent itself would almost have been an irrelevant determination, but when the Court made its determination that it could not find a special position of trust, I made -- the Court made no such findings about consent.

The Court made no finding on the record as to whether there was or was not consent, simply made a finding that the evidence was insufficient such that it could not proceed on the counts of first-degree rape under the position set forth by the prosecutor's office and the State.

Now, at that time, I did allow Mr. Harms, who was the acting prosecutor at that time to amend the information. I will note that there was no objection to that procedurally happening at that time. Having carefully considered Rule 7B however, it would be inappropriate as the Court had already made the bindover determination to allow the State to make that amendment, even though Rule 4 does allow me to freely do so.

After the Court made the decision related to bindover, I was required, by law, to dismiss Counts 1 through 10. Now, had the State moved to amend the information prior to the Court ruling there was insufficient evidence for the bindover, the Court could have freely allowed that amendment pursuant to Rule 4 and that would have been procedurally proper, but in this case, again, timing is everything. And that is not what happened.

Therefore, I must dismiss Counts 1 through 10 and dismiss any requested oral amendments that were made to the information. That does not prevent the State from filing new information or new charges should they choose to do so. But because timing is everything and I must follow those rules of procedure, it was inappropriate at that time for the Court to allow an amendment after a dismissal. It must already have taken place pursuant to Rule 7.

So I am granting, I guess, the request to dismiss Counts 1 through 10 as any amendments that were made at the time of the preliminary hearing were procedurally improper.

As to Count 11, the forcible sex abuse, the Court did make specific findings on the record that were viewed in the light most favorable to the prosecution and all the evidence that was contained in the 1102 statements. The Court did not make any specific finding about there being consent or lack of consent but did find that when everything was viewed in the

light most favorable to the prosecution, that there would be a bindover on Count 11.

I am not going to disrupt that finding here today. No evidence has been presented suggesting otherwise. And I understand that there is a lot of nuances between the law, but the Court did not make findings as had been suggested that there was consent or lack of consent, specifically under special influence. I wouldn't even be required to make that finding.

But I did find, at the time of the preliminary hearing, that there was sufficient evidence, when viewed in the light most favorable to the prosecution, particularly those contained in the 1102 statements, that a bindover would happen on Count 11, felony to forcible sex abuse. And that decision of the Court stands today. So that is going to be the order of the Court as it relates to that.

Now, I understand we still have this motion to reconsider that the State has pending. I recognize that the defendant has not briefed whether or not the Court should reconsider its bindover on Counts 1 through 10. So I'm going to give the defense an opportunity to draft -- or I'm sorry -- to brief that issue if they wish to do so.

Mr. Gabbert, do you wish to brief the issue of the motion to reconsider the bindover?

MR. HAZARD: I'm a little confused. Is the Court saying procedurally --

THE COURT: Procedurally, I should not have allowed an amendment to Counts 1 through 10 on the record at the preliminary hearing. So Counts 1 through 10 should have been dismissed and are dismissed pursuant to the Court's findings at the time of the preliminary hearing. That does not prevent the State from filing other charges if they wish to do so but based on the timing of the way that happened at the preliminary hearing, the Court should not have allowed an amendment to the information after it had already dismissed Counts 1 through 10.

MR. HAZARD: I understand now. Would that render the State's motion to reconsider moot then at that point?

THE COURT: Well --

MR. HAZARD: I don’t know if there's any --

THE COURT: It's up to you whether you want to move forward on it or not. I mean, I dismissed them. Do you want me to reconsider Counts 1 through 10 or not?

MR. HAZARD: Yes, I do.

THE COURT: I mean, you still have a motion asking me to reconsider my decision as to Counts 1 through 10 --

MR. HAZARD: Okay. So you'll --

THE COURT: -- which I dismissed. If you want to move forward on that motion, then I'm going to give the defense time to brief it.

MR. HAZARD: Thank you, Your Honor.

MR. GABBERT: And if the Court wishes for us to

respond, we're happy to. My only concern is the timing issue, which has already been argued this morning that that motion to reconsider was untimely and should not be considered.

THE COURT: Well, I'm not making -- I'm not even entertaining the motion to reconsider today. You can certainly, in your briefing, argue that it was untimely if you wish to do so, and I can consider that as one of the arguments related to the motion to reconsider the bindover. But I'm not going to summarily dismiss it today without giving Mr. Hazard an opportunity to argue it.

But what I'm asking of you, Mr. Gabbert, is do you wish time to file written briefing on the motion to reconsider the bindover, or do you just want --

MR. GABBERT: I would ask for -- sorry, Your Honor. We would ask for 14 days.

THE COURT: Okay. So what I'm going to do is I'm going to give you 14 days to file your responsive documents to the motion to reconsider bindover decision. I'll give Mr. Hazard then seven days for any final reply.

I'd like to put that back on the record for arguments as well, Counsel. So let's look and see where we're at in about 21 days from now.

Can we set this for argument on the State's motion to reconsider the bindover as it relates to Counts 1 through 10 on January 3 at 9:00 a.m.?

MR. GABBERT: That would work for the defense, Your Honor.

THE COURT: Will that work for you, Mr. Hazard?

MR. HAZARD: It will.

THE COURT: All right. Now, again, I recognize, folks, that this is a little bit of a confusing issue, procedurally. And, again, you know, had Mr. Harms made his statements before I made my bindover decision, that would be different, but as it stands now, the Court should not have accepted the request to amend the information.

As procedurally inappropriate, Counts 1 through 10 are dismissed. That case still does then contain Count 11, which is forcible sex abuse, a second-degree felony.

Pending in that case is the State's motion to reconsider the Court's bindover decision on Counts 1 through 10. We'll have -- get briefing done and we'll argue that motion on January 3 at 9:00 a.m.

Mr. Gabbert, I'm going to ask, sir, that you please prepare an order consistent with the Court's ruling today dismissing Counts 1 through 10 and not allowing the amended information as procedurally improper.

MR. GABBERT: Will do. Thank you, Your Honor.

THE COURT: All right. Thank you, Counsel. We'll see you all on January 3 at 9:00 a.m. And, again, that will be a Webex argument online.

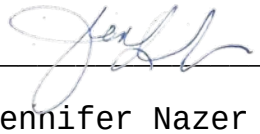
All right. Thank you very much everyone.

C E R T I F I C A T E

I, Anne Pickup, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability.

Anne Pickup

I, Jennifer Nazer Braun, do certify this transcription was prepared under my supervision and direction.



Jennifer Nazer Braun

The Order of the Court is stated below:
Dated: December 20, 2021 09:39:12 AM **/s/** ANGELA FONNESBECK District Court Judge

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KYLI JENAE LABRUM, Defendant.	MINUTES ORAL ARGUMENTS/MOTION TO SET ASIDE Case No: 211100567 FS Judge: ANGELA FONNESBECK Date: December 6, 2021

PRESENT

Clerk: andreaj

Prosecutor: HAZARD, GRIFFIN

Defendant Present

The defendant is not in custody

Defendant's Attorney(s): BENJAMIN GABBERT

DEFENDANT INFORMATION

Date of birth:

Audio

Tape Number: Courtroom 1 Tape Count: 9:27-10:40

CHARGES

11. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony

HEARING

Mr. Hazard is present and in person at the courthouse and all other parties are present via webex. Mr. Skordas states Mr. Gabbert will be handling the arguments for the defense today.

The Court notes today is set for oral arguments on a Motion to Set Aside, a Motion to Reconsider Bindover Decision, a Motion to Strike State's Motion to Reconsider Bindover and a Motion to Dismiss with responsive pleadings to those motions.

9:29: The Court informs counsel that from the pleadings presented, there doesn't appear to be any new information that would justify the Court reconsidering the bindover decision.

9:31: Mr. Gabbert discusses the motion to strike and states there are procedural concerns regarding Rule 7B. He requests the case be dismissed.

9:38: Mr. Hazard states he was not present for the preliminary hearing, but that he has heard the

hearing and that an amended information has not been filed yet, due to the filed motions they are arguing today. Mr. Hazard states the 1102 statement evidence was before the Court at the time the Court made the bindover decision. Mr. Hazard requests the Court reconsider in light of a new legal theory the same evidence already presented.

9:50: Gabbert responds and limits to motion to strike.

9:53: The Court informs counsel about being ready to rule on the issue, but requests time to re-listen to the findings from the preliminary hearing. The Court takes a recess.

10:29: The Court is back on the record.

10:29: The Court again addresses the recess that was taken to review the findings from the preliminary hearing in October and particularly with regard to consent. The Court notes the purpose today is to address the Motion to Strike State's Motion to Reconsider Bindover and the Motion to Dismiss.

10:31: The Court mentions Rule 7 and that it requires that if this Court fails to find that there is evidence sufficient to support a bindover that the Court must dismiss the counts. The Court found in this case that counts 1-10 were not supported by the evidence that was presented at trial and could not bind the defendant over. The Court states it did allow Mr. Harms to amend the information and there was no objection at that time. However, the Court states Rule 7B was carefully considered and it would be inappropriate to allow the State to make that amendment as the Court had already made the bindover determination.

10:34: The Court dismisses counts 1-10 as well as any oral amendments that were made to the information. With regard to count 11, the Court did make specific findings on the record to bind the defendant over and states that decision will remain the same.

The Court notes there is still arguments on the State's Motion to Reconsider Bindover that is pending. The Court recognizes the defendant has not briefed whether or not the Court should reconsider its bindover decision on counts 1-10.

The Court grants Mr. Gabbert 14 days to file his responsive documents to the Motion to Reconsider Bindover Decision and then Mr. Hazard 7 days to respond.

The Court sets Oral Arguments on the State's Motion to Reconsider the Bindover as it relates to counts 1-10 on January 3 @ 9 am.

The Court instructs Mr. Gabbert to prepare an order consistent with the Court's ruling today dismissing counts 1-10 and not allowing the amended information as procedurally improper.

ORAL ARG./MOT. TO RECON. BIND. is scheduled.

Date: 01/03/2022

Time: 09:00 a.m.

Before Judge: ANGELA FONNESBECK

This hearing will not take place at the courthouse. It will be conducted remotely.

Contact the court to provide your current email address.

If you do not have access to a phone or other electronic device to appear remotely, notify the court.

For up-to-date information on court operations during the COVID-19 pandemic, please visit: https://www.utcourts.gov/alerts/

Individuals needing special accommodations (including auxiliary communicative aids and services) should call First District Court - Logan at 435-750-1300 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is 435-750-1300.

End Of Order - Signature at the Top of the First Page

Gregory G. Skordas (#3865)
Gabriela Mena (#17087)
Benjamin Gabbert (#17995)
SKORDAS & CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 665-0128
Attorneys for Defendant
gskordas@schhlaw.com
gmena@schhlaw.com
bgabbert@schhlaw.com

IN THE FIRST DISTRICT COURT-CACHE

IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. KYLI JENAE LABRUM, Defendant.	**DEFENDANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO RECONSIDER BINDOVER** Case No. 211100567 Judge Angela Fonnesbeck

Kyli Jenae Labrum, the Defendant herein, by and through the undersigned attorney, Gregory G. Skordas, hereby files this Defendant's Memorandum in Opposition to State's Motion to Reconsider Bindover and requests that the Court deny the State's motion. Motions to reconsider are not favored by the courts and the State should not get a second bite at the bindover apple.

FACTS

From 2017 until 2020 Ms. Labrum engaged in sexual activity with [redacted] who was sixteen years-old at the time the relationship began.[1] The encounters started after a high school football game in which Ms. Labrum told [redacted] that if she ever divorced her husband that she was going to marry [redacted]. [redacted] laughed and said that he was ok with that arrangement. Later that night, Ms. Labrum sent a text message to [redacted] apologizing if her statement created awkwardness. [redacted] responded that he believed Ms. Labrum was only joking. Ms. Labrum confirmed that she was, but then asked if it was weird that she found [redacted] to be so attractive. [redacted] was surprised but responded that he found Ms. Labrum to be attractive as well. [redacted] and Ms. Labrum continued to send each other text messages, which included a mutual desire to kiss. The exact content of these messages was not presented to the Court.

The next week, Ms. Labrum picked up [redacted] and drove him to an unfinished subdivision where they talked. [redacted] sat in the car talking with his "heart racing scared and nervous to kiss her or her kiss me." Exhibit 1 at 2. Ms. Labrum broke the ice by telling [redacted] that he needed to make his move because she had to leave. [redacted] leaned over the center console and asked Ms. Labrum to meet him halfway. Ms. Labrum stated that he needed to make the first move, which he did. The two then kissed in the car before Ms. Labrum returned [redacted]. to his house. A promise not to reveal their indiscretion was made. The two continued to communicate by text and meet in secret. The physical behaviors continued escalating up to and including sexual intercourse, which eventually led to the birth of a child.

On May 5, 2021, the Cache County Attorney filed an Information alleging that Ms. Labrum engaged in sexual activity with the alleged victim without consent. At the preliminary

[1] Defendant recites the facts as they were presented at the preliminary hearing. Nothing in this memorandum should be construed as an admission of guilt by Ms. Labrum.

hearing the prosecutor alleged that the lack of consent was based on the victim's inability to consent pursuant to 76-5-406(2)(j). Specifically, the State alleged that Ms. Labrum was a babysitter and thus was in a position of special trust. At the preliminary hearing the State presented testimony from the investigating detective and two U.R.E. rule 1102 statements: one from [redacted] and one from his mother, [redacted]. In [redacted] statement he described, in incredible detail, the progression of the couple's romantic and physical relationship. [redacted] then described the relationship Ms. Labrum had with the rest of his family, which started when Ms. Labrum began dating [redacted] cousin. Although Ms. Labrum eventually broke up with [redacted] cousin, she maintained a close friendship with [redacted] mother, [redacted], and younger sister, [redacted] The 1102 from [redacted] established that before the relationship began Ms. Labrum was a close friend of the family but was not especially close with him.

The 1102 from [redacted] began by explaining how Ms. Labrum became a close family friend. The statement corroborated most of what [redacted] stated and added several other details as well. Specifically, [redacted] describes a strong relationship between Ms. Labrum and [redacted] also described situations where Ms. Labrum attended a rodeo with the family and took a photo with [redacted] due to them both having the same boots, attending [redacted] soccer games and tournaments, and being a support for [redacted]. During Ms. Labrum's LDS mission, she stayed in contact with [redacted]. [redacted], [redacted] and [redacted] were even invited to Ms. Labrum's homecoming; they even made her a sign. The [redacted] family was invited to Ms. Labrum's wedding, [redacted] and [redacted] attended her baby shower, and [redacted] was at the hospital when Ms. Labrum's first child was born.

The relationship between Ms. Labrum and [redacted] continued to get stronger in the Summer of 2017 when Ms. Labrum began taking [redacted] to the local pool, taking her to lunch, and having

sleepovers at Ms. Labrum's house. Even after the relationship began with [redacted] Ms. Labrum continued to spend a lot of time with [redacted] and [redacted]. Ms. Labrum would spoil all of the kids for their birthdays, and also bought [redacted] and [redacted] Christmas gifts. [redacted] also said that Ms. Labrum was like a sister to her, and that she trusted her. When Ms. Labrum and her husband got into a fight that lasted several days Ms. Labrum stayed with the [redacted] family for a couple of days. [redacted] stated that she trusted Ms. Labrum with her children, her home, and even her dog; but then went on to clarify that she has never needed Ms. Labrum to watch her kids when she went on a trip. [redacted] statement made it clear that prior to the sexual relationship Ms. Labrum was close with the family, but was especially close with [redacted] and [redacted] did not state that Ms. Labrum was especially close with [redacted]

After evidence, the State argued that as a matter of law [redacted]. could not have consented to the sexual activity because Ms. Labrum held a position of special trust. The State directed the Court to [redacted] 1102 statement and emphasized that it provided at least some evidence of a relationship between Ms. Labrum and the [redacted] family, including times when Ms. Labrum was asked to watch over the children, including [redacted] Defense counsel argued that the State had not met their burden of showing that the position of special trust existed. Defense counsel pointed out that no evidence had been presented in the 1102s which established anything more than two people who were attracted to each other.

After the Court retired to chambers and had a conversation with counsel it held that the State had not met its burden of proving that a position of special trust was present and declined to bind over Ms. Labrum. The Court explained that although there was evidence of a close relationship between Ms. Labrum and the [redacted] family, that relationship did not in and of itself

create a position of special trust between Ms. Labrum and [redacted] and he was capable of consenting to the sexual encounters.

After the Court declined to bind over Ms. Labrum for rape, the State moved to amend the charges to Unlawful Sexual Activity with a 16 or 17 Year-Old, a violation of U.C.A. § 76-5-401.2 as Third Degree Felonies. The Court granted the motion and bound Ms. Labrum over on the amended counts. The State then filed the present motion asking the Court to reconsider its bindover decision.

ARGUMENT

The State's motion should be denied for several reasons. First, the motion should not be considered because it was untimely. Second, a Motion to Reconsider is not provided for in the Utah Rules of Criminal or Civil Procedure and are thus not favored by the courts. Third, the Court has already read the 1102s and determined that there was insufficient evidence to support a position of special trust between Ms. Labrum and [redacted] The State's motion is nothing short of an attempt to relitigate the issues previously litigated at the preliminary hearing. Fourth, the State had every opportunity to present the alternative theory of the case to the Court and failed to do so. Finally, allowing the State to take a second bite at the bindover apple would violate Ms. Labrum's due process rights as established by State v. Brickey, 714 P.2d 644 (Utah 1986). As such, the State's motion should be denied.

The State's motion is untimely

A motion to reconsider a bindover is treated as a motion for a new trial under Utah R. Crim. P. 24. State v. Kinne, 2001 UT App 373. As such, a motion to reconsider bindover must comply with the timing requirements of Rule 24. State v. Bozung, 2011 UT 2, ¶ 10. Rule 24 requires a motion for a new trial to be filed within 14 days. The entry of the Court's order to

dismiss the rape charges was entered in open court on October 19, 2021. An order of dismissal with specific findings is not required by Rule 7B, so an oral dismissal is still effective. Although the Court entered an order on November 2, 2021, that order was an order of bindover on the amended charges and not a dismissal of the initial charges. The effect of declining to bindover the rape charges is that they were dismissed. Utah R. Crim. P. 7B(c). Because the rape charges were dismissed on October 19, 2021, the deadline to file a motion under Rule 24 was November 2, 2021. The State filed its Motion to Reconsider on November 9, 2021.

The State has previously argued that Utah R. Crim P. 24 allows a court to extend the time to file a Rule 24 motion, and that it can be done retroactively. However, there is no mechanism in Rule 24 for a Court to retroactively extend the time to file or approve a motion to extend time. The State has failed to provide, and defense counsel has been unable to locate, any legal authority to support the assertion that a court can retroactively grant a motion to extend the time to file a motion under Rule 24.[2] Defense counsel's research suggests just the opposite. State v. Mitchell, 2007 UT App 216, ¶ 10-11 ("By its own terms, rule 24(c)'s extension provision applies only when the extension is secured prior to the expiration of the initial ten-day filing period."); State v. Sosa-Hurtado, 2019 UT 65, ¶ 57 ("If a party desires an extension to file a motion or supporting evidence, it must seek leave of the court within the ten-day filing period.").

The State has correctly pointed out that the Court has discretion to grant a new trial on its own initiative. Rule 24(1). However, by filing a motion to reconsider bindover the "new trial" would not be granted on the Court's initiative; it would be on the State's motion. Further, Utah R. Crim. P. 2 places limits on when an extension can be given to take action, even action taken by the court sua sponte. Under Rule 2(b)(1)(A) a court may extend the time to take action "with

[2] There is a mechanism in Utah R. App. P. 4(e) for a court to retroactively grant a motion to extend time to file an appeal, but because this provision is absent in Rule 24 the State cannot rely on it.

or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires." And "[a] court must not extend the time for taking any action under the rules applying to a…new trial…unless otherwise provided in these rules." Rule 2(b)(2). As such, the State is incorrect that the Court can just grant a new trial at any time.

Rule 2(b)(1)(B) does permit a court to extend time after missing the deadline "on motion made after the time has expired if the party failed to act because of excusable neglect." The State has not only failed to file a motion to request additional time to file it failed to show excusable neglect. "The equitable nature of the excusable neglect determination requires that a district court be free to consider all facts it deems relevant to its decision and weigh them accordingly." Mathena v. Vanderhorst, 2020 UT App 104, ¶ 10. To show excusable neglect a party must show that they have used due diligence, which is established when the "failure to act was the result of the neglect one would expect from a reasonably prudent person under similar circumstances." Id. Due diligence falls on a spectrum somewhere between no diligence and perfect diligence. While no diligence will never qualify as sufficient, perfect diligence is not required either. Somer v. Somer, 2020 UT App 93.

If the State needed more time to file their Motion to Reconsider it should have requested that from the Court either before the day it was due or soon after. Not only did the State not file a motion for more time at all, it did not even request the audio of the preliminary hearing until the day its motion was due. The situation is admittedly difficult given that the prosecutor who appeared for the preliminary hearing subsequently left the office, and the assigned attorney had a heavy calendar. However, these are all reasons that defense counsel would have stipulated to a request to extend the time to file a motion to reconsider; they are not evidence of due diligence.

This is especially true when the State's first request for more time was made after Ms. Labrum argued that the motion was untimely. As such, the motion should be denied as it was untimely.

The rules of procedure do not provide for a Motion to Reconsider and are thus not favored by the courts

"'Motions to reconsider are not recognized by the Utah Rules of Civil Procedure,' and 'trial courts are under no obligation to consider [them].'" *Nakkina v. Mahanthi*, 2021 UT App 111, ¶ 36 (citing *Tschaggeny v. Milbank Ins. Co.,* 2007 UT 37, ¶ 15, 163 P.3d 615). The Utah Supreme Court ". . . ha[s] discouraged the use of motions to reconsider in the past." *Gillett v. Price*, 2006 UT 24, ¶ 9. Motions to reconsider are also not recognized by the Utah Rules of Criminal Procedure. *State v. Johnson*, 782 P.2d 533, *3 (Utah Ct. App. 1989). As such, the Court should exercise its discretion to not consider the motion. By the State's admission it does not present any new evidence for the Court to consider, it merely points out evidence the Court has already reviewed. Reopening the case under these conditions would open the door to "the very harassment of an accused which was decried in *State v. Brickey*." *Johnson*, 782 P.2d at *6.

The State cannot relitigate the issues at preliminary hearing

A motion to reconsider a bindover is treated as a motion for a new trial under Utah R. Crim. P. 24. State v. Kinne, 2001 UT App 373. As such, the same analysis should apply. A court may order a new trial in the interests of justice, but only if there was an error which had a "substantial adverse effect upon the rights of a party." Rule 24(a). The State alleges the Court erred when it failed to find probable cause based on the evidence in the 1102 statements. The State fails to make a sufficient showing of grounds for a new trial. The State provides no, and Defense counsel has been unable to find any authority to support the claim that the State can file a motion after preliminary hearing that asks the court to consider additional arguments. While

the State is correct that the Magistrate can bind over a defendant based on evidence and not argument, that does not mean that the State can reopen a case to present additional argument after the fact. This makes sense because requests to reconsider a bindover decision are treated as a motion for new trial, and it is unheard of for a court to set a new trial to allow the State to present additional arguments.

Rule 24 motions are appropriate to allow new evidence not reasonably available at the time of trial, *Mitchell*, 2007 UT App 216, ¶16; or in response to juror impropriety, *State v. Courtney*, 2017 UT App 62, ¶ 13. On the other hand, a new trial was not granted to allow a defendant's expert to testify favorably because there was no evidence that there was error or impropriety at trial. *State v. Gehring*, 694 P.2d 599, 601 (Utah 1984). And no case that defense counsel can find has ever approved of a new trial because a lawyer did not like his colleague's argument.

Further, the State mischaracterizes the statements in the 1102s. First, the State is correct that Ms. Labrum stayed at the [redacted] home during an extended argument with her husband. However, that does not make her a cohabitant as was contemplated by the statute. While the Utah Supreme Court has yet to define the term "cohabitant" as it relates to this context, there are a few cases which provide some guidance. In Keene v. Bonser, 2005 UT App 37, the Utah Court of Appeals provided a non-exhaustive list of factors which advise whether a person is a cohabitant. These factors include whether the home is a temporary place of abode or habitation, effort expended in upkeep, whether the person is free to come and go as the person pleases, whether visits are coordinated with the presence of a resident at the home, a sharing of living expenses or financial obligations, the presence of sexual or conjugal association, and whether the person has moved any furniture into the home. Id. at ¶¶ 12-13. In State v. Watkins, the Court of

Appeals approved the use of U.C.A. § 78B-7-102 as the definition of cohabitant in sexual abuse cases. Watkins, 2011 UT App 96.[3] However, that definition does not fit Ms. Labrum's situation. In Watkins, the defendant moved in with his niece and her family on a temporary basis and had his own room, lived in the home, and paid rent. Id. at ¶ 16. The 1102 statement from [redacted] and [redacted] does not provide any facts which "reflect some indicia of cohabitation." Keene, 2005 UT App 37 at ¶ 13. As such, she was not a cohabitant of anyone in the [redacted] family.

[redacted] does state that he took a trip to St. George with Ms. Labrum, but the only reason he stayed at her house was because there was no room for him at the hotel with the rest of the family. [redacted] 1102 at 7 "My parents didn't have room for me to stay in the hotel because they hadn't planned on me going. So my sister and I were gonna stay with Kyli at her aunt's house." Not only did this incident happen after the relationship began, it does not show that there was any obligation or understanding of authority over [redacted]. State v. Peterson, 2015 UT App 129, ¶ 6. Also, while Ms. Labrum would babysit [redacted] younger siblings, she was not there to babysit him. [redacted] 1102 at 12 "So it was Kyli watching my younger sister (14 yrs) and my younger brother (10 yrs) at the time. With me at home as well." By [redacted] own statement Ms. Labrum was there to watch his siblings, he was just there. As such, she was not his babysitter.

It is clear that Ms. Labrum had a good relationship with the [redacted] family. She was looked at as family by [redacted] and [redacted] loved her and their time together. But one party putting trust into another does not show that that position of trust was used, or made her capable of exerting undue influence over [redacted]

Finally, even if the State was correct that the evidence showed that Ms. Labrum held a position of special trust over [redacted] that alone is insufficient. At the preliminary hearing—and in

[3] However, on appeal the Utah Supreme Court stated in dicta that the use of 78B-7-102 was not appropriate. State v. Watkins, 2013 UT 28, ¶ 32, n.2.

their motion to reconsider—the State argued that Ms. Labrum fell under U.C.A. § 76-5-406(2)(j). Under that section, a sexual act is done without consent of the victim if the defendant is more than three years older than the alleged victim and in a position of special trust as defined by U.C.A. § 76-5-404.1. The definition of a position of special trust under U.C.A. § 76-5-404.1 includes "any individual in a position of authority…which enables the individual to exercise undue influence over the child." It is insufficient to prove that a person is in a position of special trust, the statute requires that the defendant be in a position of authority and that the nature of the relationship gives the defendant the ability to exercise undue influence over a child. State v. Peterson, 2015 UT App 129, ¶ 6 (cleaned up); at ¶ 32-33. Simply being in a position of trust is not enough, the evidence must show that the defendant used that position of trust to exert undue influence. State v. Gibson, 2016 UT App 15, ¶ 8. ("Application of the statute must focus on how a particular position is used to exercise undue influence—a very fact-sensitive analysis."). In State v. Cox, 2007 UT App 317, the Court of Appeals held that the defendant was in a position of special trust that was able to exert undue influence because he lived in the home as a part of the family and babysat the children while their mother was at work and on weekends. The 1102 statements do not indicate the same facts.

The 1102 statements do indicate that Ms. Labrum was trusted by [redacted] but fails to indicate that [redacted] had any meaningful relationship with her. The statements show that Ms. Labrum was a good friend of [redacted] and [redacted]. [redacted] would go to the pool and have sleepovers with Ms. Labrum. There is no evidence that [redacted] participated in those activities at all. In fact, [redacted] even stated that the relationship between Ms. Labrum and his mother and sister was separate from his.[redacted] 1102 at 12 "So it was Kyli watching my younger sister (14 yrs) and my younger brother (10 yrs) at the time. With me at home as well;" at 15 "…my mom stayed close…she

loved my little sister and had her spend the night quite often." As such, the motion should be denied.

The State cannot present alternative arguments to the Court after the preliminary hearing

The State has argued that failing to consider all relevant theories of the case would deny both the State and the alleged victim of a just result. However, the State failed to present all relevant theories at the time of the preliminary hearing, and thus it is the State's own error, and not the Court, that has prevented the alleged just result. The State now wishes to reopen the preliminary hearing to present additional argument to support the rape charges. Yet, once again the State presents no authority to support its claims. As stated previously, it is unheard of for a party to request a new trial for the sole purpose of presenting the exact same evidence but with a different argument. It would be inappropriate at the end of a trial, and it is inappropriate now. Additionally, the State appears to argue that the State has rights in a criminal matter. Rule 24 "is an overall expression of the need to rectify any error in the trial process that significantly impacted a defendant's rights." State v. Maestas, 2002 UT 123, ¶ 54; see also, Mitchell, 2007 UT App 216 at ¶14 (Upheld trial court finding that the appellant's motion for new trial and affidavits failed to demonstrate any error or impropriety that had a substantial adverse effect upon appellant's rights.)

The State further argues that the victim's rights affect the analysis, specifically the right to be treated with respect. The State appears to argue that not binding over Counts 1-10 as rape equals disrespect to the alleged victim. If that were the case, the Court would never be able to decline the bindover as it would be a significant blow to victims' rights. The Court should not ignore the rights of the defendant and force her to face first degree felony charges because the State made an error. By failing to present all pertinent theories of the case, the State has erred;

not the Court. And it is not incumbent on the Court to put the defendant's rights aside to correct the State's error. The defendant's rights are equal to those of the alleged victim, and vice versa. Likewise, the alleged victim's rights are not greater than the defendant's. Even if the State was right, which they are not, a new trial can only be granted if there was an error that affected the rights of a party. The alleged victim is not a party to the case. As such, it would be inappropriate to grant a new trial to avoid an alleged affront to the alleged victim's rights.

Further, the State has not made a sufficient showing of a lack of consent through U.C.A. § 76-5-406(2)(k). The State claims that the evidence shows that under State v. Gibson, 908 P.2d 352, Ms. Labrum enticed or coerced the alleged victim to participate. The State argues that Ms. Labrum enticed when she told him she wanted to marry him, said that she found him to be attractive, and while in the car said that if he was going to make his move he needed to make it. The State continues on saying that all the behavior after that fact shows that Ms. Labrum enticed However, the State misreads Gibson.

In Gibson, the defendant argued that he did not entice the victim because she was an active participant the whole time. The Court of Appeals held that the defendant enticed the victim by not correcting her when she referred to him as her boyfriend, did not object when she made inappropriate sexual comments about him, and wrongfully led her to believe that there was a blossoming relationship between them. The State also refers to the concurrence, which states that "Defendant enticed her simply because he was the instigator. Nothing more is required under the statute." Id. at 358, Wilkins, M. and Orme, G. concurring.[4] The majority opinion, on the other hand, held that enticement occurs when "the adult uses psychological manipulation to

[4] It is important to note at the outset that the concurrence has never been endorsed by the Supreme Court, so its language is persuasive at best. State v. Billingsley, 2013 UT 17, ¶ 13 ("We need not decide whether we endorse the concurrence to Gibson.).

instill improper sexual desires which would not otherwise have occurred." Further, to determine if there has been enticement under the statute courts look at five factors: "(1) the nature of the victim's participation (whether the defendant required the victim's active participation), (2) the duration of the defendant's acts, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim." Id. at 356.

There is a clear difference between the current case and Gibson. First, Gibson underwent a longer period of time where he groomed the victim until he was ready to make his move. This began when the victim was much younger than [redacted], with the sexual encounter happening when she was 14 years-old. By not objecting to the victim's inappropriate sexual comments and referring to Gibson as her boyfriend, Gibson manipulated her to believe that there was a relationship between them. Further, the evidence showed that had Gibson not put the sexual thoughts into his victim's head the sexual encounter would not have happened. Finally, the relationship between Gibson and his victim was different as the victim was his daughter's best friend.

In the present case, there was no prolonged psychological manipulation, rather there was a single act of flirting that spiraled out of control. [redacted] response to Ms. Labrum's comment that he was attractive shows that the sexual encounter, without significant grooming, might have otherwise occurred. Ms. Labrum did pick up [redacted] in her car, but absent anything else shows nothing other than she was the one who decided to drive. Further, during the first encounter in Ms. Labrum's car the State argues that by asking [redacted] to lean over it shows that she was enticing [redacted] to do something he would not have done. However, by [redacted] own statement, the whole time he was with her he was "nervous to kiss her or her kiss me." Before Ms. Labrum made the

comment that [redacted] had better make his move, he knew that he wanted to kiss her, and there is no evidence that it was put in his head by Ms. Labrum. As such, the Court should deny the State's motion.

State v. Brickey prevents the State from getting a second bite at the bindover apple

The State has also argued that it can get a second bite at the apple through State v. Brickey. This case does not involve refiling charges which have been previously dismissed, but Ms. Labrum will address these issues briefly. Under State v. Brickey, 714 P.2d 644 (Utah 1986), the State has limits on when it can refile a case that has been dismissed at preliminary hearing. The State argues that the motion to reconsider was functionally the same as refiling charges, and that would be proper because it is not attempting to engage in abusive practices. Ms. Labrum does not disagree that the State is not forum shopping, but affirmatively states that the State is harassing her and engaging in hiding the ball. First, this case is similar to State v. Johnson, 782 P.2d 533. In Johnson, the defendant was charged with vandalizing property, but the State failed to present sufficient evidence. The State then filed a motion to reopen the preliminary hearing in order to present additional evidence stating that it miscalculated the quantum of evidence necessary for bindover. The trial court denied the motion stating that the State's motion was "considered to be a request to reconsider the dismissal order on essentially the same evidence presented at the preliminary hearing. The Court of Appeals upheld the denial stating that "[t]he prosecutor's frank admission that he miscalculated the quantum of evidence required to establish probable cause does not justify a reopening of proceedings that could result in the very harassment of an accused which was decried in State v. Brickey." Johnson, 782 P.2d at *6.

The State relies on *State v. Morgan*, 2001 UT 87 (Utah 2001), for the claim that an innocent miscalculation of the evidence necessary for bindover is not abusive. However, the

Supreme Court also held that while misjudging the evidence is good cause to refile the State does not have carte blanche to refile anytime they fail to get a case boundover. *Id.* at ¶ 19 ("[W]e emphasize that the miscalculation must be innocent, and further investigation must be nondilatory and not otherwise infringe on due process rights of a defendant." The lack of abusive practice does not mean that *Brickey* is not a bar to refile, it simply means that "there is no presumptive bar to refiling." *Morgan*, 2001 UT 87 at ¶ 16.

Further, Morgan can be distinguished from the present case. In Morgan, the prosecutor prepared two witnesses to testify about the possession with intent to distribute controlled substances. The State called the first witness who testified about the incident and why the evidence showed intent to distribute. Feeling that the initial officer's testimony was sufficient, the prosecutor did not call the second officer to testify. After closing, the court held that the initial officer lacked the experience and training to determine that the drugs were of a distributable amount and the defendant was only bound over for possession of a controlled substance. Id. at ¶ 4. The prosecutor asked the court to reopen evidence to allow the second officer to testify, but the court denied the motion. The prosecutor then dismissed and refiled. At the second preliminary hearing both officers testified and the possession with intent to distribute was bound over. The defendant then filed a Brickey motion. The Utah Supreme Court held that having the second officer available but feeling he was not needed to establish probable cause was a good reason to refile charges, but also considered that the State had asked the court to allow it to call the second witness.

In the present case, the State had two theories about the lack of consent, but presented only one. When the Court decided not to bind over the charges, the State did not ask to reopen to present additional arguments. Rather, the State moved to amend the charges. Three weeks later,

the State asked the Court to reconsider the evidence under a brand new theory of a lack of consent. Argument is not new evidence, and rearguing the same evidence under a new theory is not the same as presenting new evidence. As such, the case is closer to Johnson and the Court should deny the State's motion.

CONCLUSION

For the foregoing reasons the Court should deny the State's motion.

DATED this the 20th day of December 2021.

SKORDAS & CASTON, LLC

/**s**/*Gregory G. Skordas*____
Gregory G. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on December 20th, 2021 I electronically filed a true and correct copy of the foregoing DEFENDANT'S MEMORANDUM IN OPPOSITION TO STAQTE'S MOTION TO RECONSIDER BINDOVER with the Clerk of the Court using ECF system, which sent notification of such filing to the following:

Griffin Hazard
Cache County Attorney's Office
199 N Main
Logan, UT 84321

/s/ Benjamin Gabbert
SKORDAS & CASTON, LLC

IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff, Case No. 211100567

vs.

KYLI JENAE LABRUM,

Defendant.

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ORAL ARGUMENTS ON MOTION TO RECONSIDER BINDOVER

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BEFORE JUDGE ANGELA FONNESBECK

JANUARY 3, 2022

APPEARANCES:

FOR THE PLAINTIFF:

Griffin McKay Hazard

CACHE COUNTY ATTORNEY'S OFFICE

199 North Main

Logan, Utah 84321

FOR THE DEFENDANT:

Benjamin Michael Gabbert

WEBER COUNTY ATTORNEY'S OFFICE

2380 Washington Boulevard, Suite 230

Ogden, Utah 84401

FOR THE MINOR:

Heidi M. Nestel

UTAH CRIME VICTIMS LEGAL CLINIC

404 East 4500 South, B24

Salt Lake City, Utah 84107

THE COURT: Is Kyli Labrum online?

THE DEFENDANT: I am, Your Honor.

THE COURT: Very good. And it looks like I have Mr. Gabbert online.

Sir, are you in the Labrum matter?

MR. GABBERT: Yes, Your Honor.

THE COURT: All right. Very good. Thank you, sir.

And, Mr. Hazard, this is your case, correct?

MR. HAZARD: Correct, Your Honor.

THE COURT: Very well. This is case number 211100567. This is the time set for oral arguments on the Court's motion to reconsider the bindover. I have received the motion. There is also a memorandum in opposition to that motion that's been filed.

Mr. Hazard, let me turn the time over to you then for your arguments, sir.

MR. HAZARD: Thank you, Your Honor. Your Honor, I'll try and make this brief but want to work through some of the facts that were presented at the preliminary hearing quite specifically, but I guess I'll begin with some of the Defense Counsel's arguments.

It seems their first argument is that the motion should not be considered because it wasn't timely. We addressed some of these arguments in our prior hearing. I'll be addressing those here today and, obviously, I believe Defense

Counsel will do that as well. And going hand in hand with that, Defense Counsel argues that motions to reconsider aren't really provided for in the Utah Rules of Criminal or Civil Procedure, and so they're not favored.

I guess, to me, that indicates that they may not be favored, they're not provided for under the law, but that they do exist. Motions to reconsider exist. And so I'm going to begin by, I guess, falling on my sword and indicating to the Court that I was aware of motions to reconsider. I was not aware that a motion to reconsider would arguably fall under the same umbrella as a motion for a new trial.

Looking at Rule 24, as Defense Counsel sets it out, one of their arguments is that the State failed to timely file their motion. If the Court agrees that a motion to reconsider is the equivalent of a motion for a new trial, I guess that would be something for the Court to consider.

I believe Rule 24 and many of the rules allow courts discretion to -- obviously, those are guidelines. Obviously, they should be adhered to. I'm going to ask the Court to consider what I'm going to deem to be -- what I do personally deem to be a good faith mistake on the part of the State in failing to recognize that arguably a motion to reconsider has the same 14-day timeline as a motion for a new trial.

I'm not the prosecutor that handled the preliminary hearing. That's set out in some of our arguments. Another

prosecutor was handling the hearing that day. I was in a trial. That trial that I was in went until Friday. On Monday, I reviewed the preliminary hearing briefly with the prosecutor that did handle it and found out what happened. I was in court most of that day.

I believe Tuesday or Wednesday, I met with the alleged victim and began preparing a motion. I finished that motion but had not had a chance yet to review the preliminary hearing, the actual recording from that preliminary hearing, which I felt was appropriate since I was alleging that certain things had occurred during that preliminary hearing that I wanted the Court to consider, but since I wasn't there, I wanted a chance to have that recording.

I should have perhaps, in hindsight, requested that sooner. If there's in fact a 14-day timeline, I was unaware of that timeline. I requested that as soon as I thought about it, and I didn't get that until I believe November 9, which is the same day that I submitted the motion after having a chance to review that.

I would ask for leniency from the Court. I do believe that the Court has discretion to of course encourage all parties to abide by procedural guidelines and procedural timelines. And of course, that is ideal and preferable, but I do believe that Rule 24 does suggest that the Court has discretion to extend those timelines.

Defense Counsel argues that shouldn't be retroactive. Again, ideally, that may be the case, but I do believe the Court has discretion to hear this matter today. I don't believe the Court has lost its discretion to hear arguments. So that would be obviously in relation to defense's arguments, their first and second arguments.

The third argument they make is that the Court has already read the 1102s and determined that there was insufficient evidence. I suppose that's why we're here today because, all due respect to the Court, I believe that there is sufficient evidence for a bindover under the theory that was advanced at preliminary hearing, as well as sufficient evidence supporting alternative theories of non-consent that perhaps were not presented to the Court.

I believe the prosecutor failed at the time, that there was sufficient evidence for a bindover on the theory that was presented and failed to make the secondary argument. That's what we're asking the Court to reconsider. That's why we're here.

So I understand that the Court has reviewed that, and I also understand that those were very lengthy statements for the Court to read through and to process in a short amount of time when the Court had other things going on. So I certainly am not faulting the Court. And the State, perhaps, could have made better arguments that day, but I do believe that the

evidence was before the Court that supported theory of non-consent that was sufficient for a bindover. And so that's what we're asking the Court to reconsider.

Looking at the State's motion to reconsider and talking about preliminary hearings, obviously, the standard of a preliminary hearing is probable cause. There is significant case law talking about how that's a fairly wide burden. The Court is well aware of that.

The prosecution, at a preliminary hearing, is not required to produce evidence sufficient to support a finding of guilt at a trial or even to eliminate alternative inferences that could be drawn from the evidence in favor of the defense.

So the fact that evidence could be seen in two different ways and even that it's credible evidence that weighs against the State's theory, if the State has put on evidence in support of their theory, the Court is still required to bind over because at a preliminary hearing, the Court is to take all evidence in the light most favorable to the State and all reasonable inferences are to be drawn in the State's favor.

The State does believe that there was credible evidence supporting their argument, number one, that there was a position of trust, and number two, that there were alternative -- and this was not presented as an argument at the preliminary hearing, but the State would show the Court today that there was evidence presented to the Court and before the Court in support of other

theories of non-consent that the Court should have bound over on.

It's not appropriate for the Magistrate to evaluate the totality of the evidence in search of the most reasonable inference at a preliminary hearing. That's set out in the Schmidt case along with several other of these, this language regarding the standards of preliminary hearing.

If probable cause is established that the crime charged has been committed and that the defendant has committed it, the Magistrate must order that the defendant be bound over. Again, it's not appropriate for the Judge to waive the credibility of alternative theories. If the State presents enough evidence to support their theory, the Court must bind over.

It's not appropriate to evaluate alternative theories or arguments. The State's strong contention, I believe, is that there was sufficient evidence supporting a bindover in support of the State's theory, even if we're going to exclude that simply to the argument that was before the Court.

So in the (inaudible) case -- and what we're talking about here today is ten counts of rape. That was Counts -- original Counts 1 through 10. The Court did bind over on Count 11, so we're just addressing Counts 1 through 10. All ten of those counts were alleged first-degree felony rape charges. In order to support or to meet their burden, the State would have

to show that defendant had sex with the alleged victim, [redacted], in this case, on at least ten separate occasions and that the alleged sexual encounters were without consent.

The State introduced Exhibit 1, which was a statement from the alleged victim, 16-year-old victim, [redacted] Also, Exhibit 2, I believe, was a written statement, 1102 statement, from the mother of [redacted] And the State also introduced an exhibit involving DNA results for a child that was conceived as the result of these criminal allegations.

At preliminary hearing, Mr. Harms, who was the prosecutor at the time, argued that there was a position of trust. He did not argue that there was a three-year age gap, although that evidence was before the Court. And he didn't argue that the 26-year-old defendant enticed the 16-year-old alleged victim in this case, also establishing non-consent. He simply argued that there was a position of special trust.

We are today reasserting that there was sufficient evidence for a bindover regarding a position of special trust. And I know that the Court doesn't make a habit of reconsidering a bindover decision after the Court has made it. I do think that it's appropriate at times to take a second look at evidence, particularly when we're talking about 17-page 1102 statements, 15-page 1102 statements that were processed very quickly.

And I think it's appropriate for the Court to perhaps

take a step back and have an opportunity, at the very least, to consider that more closely and to be able to evaluate that.

In this case -- and the Court -- or the State has set out case law in their motion. And I'm just going to skip straight to some of the statements that were before the Court, again, establish probable cause in support of the State's theory and without considering other alternative theories that perhaps may be considered at trial by the ultimate trier of fact.

The State would argue that [redacted], in his statement, talks about how the defendant had occasioned to stay at the home of [redacted] for several nights. And in fact -- I'm going to skip this section because there are some things that fairly specifically fit into -- and I think were considered by the Court at the time. Some of the categories of non-consent or a position of trust such as being a babysitter that the Court would specifically consider.

Some of those things, though, had arisen after the sexual relationship had already occurred. I think that was something maybe that the Court had considered is that we have some of these things maybe fit, but at the time that they fit, the sexual relationship between the alleged victim and the defendant had already begun.

And because it had already begun, we're not going to consider the special relationship of trust in the context of it giving rise to or being one of the things that allowed the defendant to exercise undue influence over the victim, the

alleged victim. So I'll skip that section. Although, I do think that it's pertinent to show what the nature of this relationship was for years leading up to those specific instances.

In the alleged victim's 1102 statement that was before the Court, he indicated that he was between the ages of six and eight years old when he first met the defendant. The defendant was meeting or was dating a family member and dated that family member for six years. And he indicates, in his statement before the Court, that she became extremely close to his family and extended family during that time.

He explained that after the defendant broke up with his cousin, who she was dating at the time, that his mother remained very close friends with the defendant, that the defendant was frequently in his home cooking, entertaining the kids, engaging in activities with the kids, and generally, supporting and being with the family.

In Exhibits 1 and 2 that were before the Court, there are examples. In fact, those statements are replete with examples of the defendant's involvement in the family home of [redacted], the alleged victim. And it seems apparent that the defendant spent particular time with one of [redacted] younger sisters.

But Exhibits 1 and 2 make it quite clear that she spent considerable time as an adult figure in the home

interacting with [redacted], as well as the other kids that were in the home. And in that statement, [redacted] -- in his statement, [redacted] specifically says, "My mom trusted Kyli like her own sister."

[redacted] mother also stated in her statement, "I don't call my own blood relatives that often or see them as often as I saw the defendant." [redacted] mother goes on to say that, "I looked at Kyli as blood. I trusted her with my children, my house, and my dog."

She also detailed how the defendant was frequently in their home and tending the children, including [redacted] extracurricular activities. And these -- this relationship that we're talking about now, that pre-existed any sexual relationship that occurred with [redacted]

In [redacted] mother's statement, she also indicates that the only reason that she would have called on the defendant to come and babysit but that she has grandparents and other people who are usually available to do that if needed, so she's never had the need, but that she would feel completely comfortable and would actually go to her first if she needed that to happen.

The question is -- and the State is not going to sit today and make arguments that the defendant was a babysitter, that she was recreationally their coach, teacher, or any of these other delineator positions of special trust.

However, the code makes it quite clear that that's not an all-inclusive list, that any individual in a position of

authority other than those individuals listed in subsection 1(c)(i) through 22(xxii), which enables the individual to exercise undue influence over a child.

The State certainly believes, Your Honor, strongly believes that this evidence is much stronger evidence of a position of special trust that would put the defendant in a position of exercising undue influence over any of the children that were in this home more so than a babysitter that was perhaps called for the first time and came to the home and babysat the children, more so than a coach, who is coaching a kid for a couple hours a day after school during a certain athletic season, more so than many of the positions of trust that are put in, and perhaps, even more so than some of the blood relatives that are set out in there.

The statement clearly indicates that she was like blood, that she was in the home more often than many of the blood relatives, and that she was trusted with the children.

This is a preliminary hearing, Your Honor. This is in the light most favorable to the State. This is all reasonable inferences being drawn in the State's favor. This is not the time for argument for alternative theories. That is not appropriate for the Court to consider those things. Those are questions for the ultimate trier of fact.

And, frankly, the State believes that there is ample evidence for a bindover on that theory. And I understand that

the Court is not in the habit of reconsidering its decisions, but I do believe it's appropriate under certain circumstances. And I do believe that this is one of those times that I would plead with the Court to consider the evidence that was before the Court on that day, to reconsider that.

Alternatively, the State failed to make an argument regarding alternative theories of non-consent. However, that evidence was before the Court. It is -- there's no question that the Court had evidence that day that the 26-year-old defendant had a greater than three-year age gap between herself and the 16-year-old alleged victim. There's no question that evidence was before the Court.

And I submit to the Court that there was ample evidence of enticement that was submitted in the 1102 statement of [redacted] Without going through everything line by line, [redacted] indicates in his statement that after a football game, the defendant came to him and told him that if she was not married to her husband, she would be married to him. That changed the nature of the relationship.

And let me go back just briefly so that we know what we're -- some of the legal standards that we're -- definitions that we're looking at. So under 76-5-406(2)(k), we're looking at, again, a three-year age gap and whether or not the defendant enticed a victim who's between the ages of 14, but less than 18.

In State vs. Gibson, the Court pointed out that

particular co-section in combination with the statutory section defining the crime is to prevent mature adults from preying on younger and inexperienced persons.

The specific intent of subsection 11 at the time, now, it's subsection (2)(k), is to create a legal definition of consent for teenagers, which is different from the more lenient consent requirement between adults. When they're talking about enticement, they look at -- the State has referenced the Black's Law Dictionary, which defines entice as to wrongfully solicit, to persuade, to procure, to allure, to attract, to draw by blandishment, to coax or seduce, to lure, induce, tempt, insight, or persuade a person to do a thing.

The Court noted -- the Gibson Court noted that this definition is consistent with the statutory purpose in that it describes the use of improper psychological manipulation, which is something that I think Defense Counsel argues. That case really -- what we're looking at for definition of enticement is improper psychological manipulation.

The State would argue that looking at improper psychological manipulation, looking at the definition of entice, that certainly includes flirtation, which falls under coaxing, attracting, alluring, seducing. For a 26-year-old woman to go to a 16-year-old and to tell him that she would be married to him if she were not with her husband, that is enticement.

Later, in the statement that was before the Court,

[redacted] indicates that as he was driving home, he got a text from the defendant. And in the text, the defendant indicated to him that she -- and I'll just read this -- she said, "I hope I didn't weird you out with what I said." [redacted] responded by saying, "No, not at all. We were just joking, right?" And the defendant responded to that by saying, "Yeah. Is it weird that I find you so attractive?" That is enticement.

For her to first shift this relationship from being a family friend, somebody who's in the home all the time, somebody who's closer than most blood relatives, somebody who's attending the football game in support of [redacted] and going to other extracurriculars for other family members and helping transport kids and doing other things as set out in the 1102 statement, for her to sit, a 26-year-old defendant, and say to the 16-year-old alleged victim, If I weren't married to my husband, I would be married to you, and then later say, acknowledging the inappropriateness of her conversation, I hope I didn't weird you out by what I said.

And having the alleged victim respond by saying and trying to kind of laugh that off and classify that as a joke, You were just joking, right? It's okay. And rather than just move on from there and allow that to be a joke, she doubles down, No, not at all. We were just joking, right? She doubles down, Yeah. Is it weird that I find you so attractive? She's opening that door, and she's leaving it open.

[redacted] says in his statement, "That really surprised me." He was really surprised at the defendant's response, but then he replied, "No, I think you're attractive too." He took the bait.

I've got a 16-year-old kid who's being enticed by a 26-year-old adult and the very intent of this legislative session is to prevent adults from preying on the naive sexual awakenings of a teenage kid. He says, "I was really surprised," but then I replied, "No, you're attractive too."

Then there's a conversation about kissing. Then the defendant picks him up in her car and drives him to an undeveloped subdivision where they sit and talk. And while they're talking, the 16-year-old alleged victim says, "I sat there the whole time, heart racing, scared, and nervous to kiss her or her kiss me." And she said this, what she said was, "If you're going to kiss me, you've got to hurry because I need to go home."

THE COURT: Mr. Hazard, you've got two more minutes.

MR. HAZARD: Thank you, Your Honor.

"If you're going to kiss me, you need to hurry up because I need to go home." That's enticement. He was not inclined to do that. He's sitting there, heart racing, nervous, scared, and then she says that. And so then he leans in, he does something that he wasn't inclined to do on his own. He does it only after she entices him. He leans over and then she

says, "No, you've got to lean all the way."

A week after that, she's picking him up in his car and taking him up Smithfield Canyon, where she's the first to touch him. She touches him before she asks if it's okay, but then after touching him, she says, Is this okay? And then he says, Yes. And then he does that to her.

Later, she tries to shift it from Smithfield Canyon and tries to convince him to come to the house because it's more convenient. So now, he's going to her house. At the house, she straddles him and then she asks if it's okay if they take their pants off. And then she asks if it's okay to grind naked on him.

And, yes, the 16-year-old alleged victim says, Yeah, that's okay. And after she does these things, he does the same similar things to her. After she touches him, then he touches her. After she straddles him, he says, Yeah, that's okay. After she takes her shirt off without asking or anything, then it's okay for other clothes to come off. And on and on and on, she leads him down this path until they're having sex almost every night. She shifts it from the house to her place of employment in Logan, a dentist office, where they're now having sex.

Your Honor, there is sufficient evidence for both of these theories. If the Court is going to find that the State can't -- is prohibited from presenting an alternative theory,

the State still feels like the Court should reconsider here because the State certainly believes that there was sufficient evidence for a bindover regarding position of trust.

That being said, I believe that there was sufficient evidence before the Court to support multiple theories of non-consent. It is the State's argument that closing arguments -- in fact, very frequently, the State doesn't even make closing arguments. The Court is well aware of that. We present evidence to the Court and then we rest, and we rely on the Court to consider these different theories and the evidence that's been presented.

Should the Court -- should the State have made that alternative argument? Yes. And probably the Court didn't consider the alternative theory because the State didn't make it, but that evidence was before the Court, and it does support a bindover.

And I would ask the Court to consider both of those theories of non-consent with the evidence that was before it. Thank you, Your Honor.

THE COURT: Thank you, Mr. Hazard.

Mr. Gabbert, go ahead, sir.

MR. GABBERT: Thank you, Your Honor. Just briefly to respond to what the State would argue, motions to consider are not only not favored by the courts, but they are encouraged against these.

The Utah Supreme Court, I believe it's in Gilla v. Pright, but the Supreme Court actually said that since nobody is listening to us, we're going to make an adverse ruling to make it clear to attorneys in the state that motions to reconsider are not what we're supposed to do. We need to follow the rules. Rules provide for an appeal if the State doesn't get the bindover decision they think that they have presented or to dismiss charges and refile.

So by going through with something that is not covered by the rules, the Utah Supreme Court has been clear, this isn't the right remedy. We need to follow the rules, and so there's that.

As for timeliness, we covered this in great detail in our motion. But I just want to point out that attorneys have the obligation to know the law. It's well known that ignorance of the law is not an excuse, but we, as attorneys, have a higher burden. We are required to know the law. We are required to know the rules.

And whether that miscalculation or misunderstanding was innocent doesn't change the fact that the rules state that outside of 14 days, and there's case law we've cited to in our brief as well, which state the Court lacks jurisdiction after the 14 days.

In fact, Rule 2 also removes the discretion of the Court. It removes jurisdiction by stating not only does the

State have to make a motion, which they didn't make, they've never made a motion to give more time. They simply made argument that they should get more time.

But it also says that a court cannot take action outside of the time allowed in the rules and goes on to say that weighing motions for -- or when new trials are considered, the Court cannot make those decisions absent an allowance by the rules. So it's the defendant's position that the Court does not have jurisdiction to consider the motion because it was untimely and the Court lacks jurisdiction.

Either there is a miscalculation of the evidence necessary to get bindover or there's not. The State appears to be making hedging argument saying, First, we should be able to get back in because we just misunderstood the standard. And then said that they made their arguments and believed that they had made sufficient arguments. You don't get to have it both ways.

It's important to note that it's not incumbent on the Court to make the State's case for them. It is the State's job. And as attorneys, it's their responsibility to present evidence and present argument so that the Court can make the best decision possible.

And while it is true that the Court is not required to hear argument, it's not error for the Court to not consider an argument not made by the party.

Our argument -- the State is also correct that all inferences do need to be taken in the light most favorable to the State, but our argument is not based on inference. Our argument is that the evidence was simply not presented, that the evidence doesn't mean what the State wants it to mean.

We aren't asking the Court to consider alternative theories. The argument was not made about inferences. The State simply failed to present evidence that rises to the level of a position of special trust. Especially given that particular statute that they're claiming requires two parts, not just a position of trust, but also that position of trust was given to -- was used to present undue influence on the alleged victim, which in this case, it doesn't show. It doesn't even show that there is a relationship.

Even if we were to assume that the relationship is present, it still doesn't show any evidence of how that relationship was used other than the fact that she was at a football game and initiated conversation. That's the extent of how her alleged position of trust was viewed and that's just insufficient.

The relationship between the alleged victim and Ms. Labrum is based on the statements made by the alleged victim. It is not one of trust. It was one of, She's my mom's friend. That's what the evidence shows. And we're not going to belabor that point too much as we went into great detail in our

brief for that.

The relationship between the mom and his sister is not evidence of a relationship between the alleged victim and Ms. Labrum. The fact that Mom never called and never asked Ms. Labrum to babysit the children, based on State v. Cox, is simply insufficient that there is no expectation that the children have to listen to him (sic), at least that was not what was presented. There was only the expectation that she comes and brings the -- cooks for us, she helps us, she's around, but there isn't that same position of trust as listed by the other types of relationships listed.

Sure, this relationship (inaudible) than that of a coach, but a coach has that expectation you listen to them. And that's the point of this position of special trust is that the expectation that you listen to me, you do what I say, is how the position (inaudible). But in this case, we don't have that same relationship. We don't have that same expectation, which, again, is lack of evidence of that position being used.

In the State's motion to reconsider, they present new argument that there may not be evidence, that if there's something new that was not presented, it could have been (inaudible), which is one of the abusive practices (inaudible) State v. (inaudible) that's happening here. That evidence -- or not evidence -- that argument could have been presented and wasn't.

So when the State didn't get their bindover, they're now asking the Court, well, consider this other option. Well, under Rule 24, that's not appropriate. It would be highly inappropriate, at the end of trial, for a lawyer to file a motion for a new trial claiming, well, I didn't make the right argument, or my colleague didn't make the right argument. And so when using the standards of Rule 24, we have to look at it in that frame.

And the State has presented no evidence that they even have the ability to present additional argument after the fact. So everything they've talked about that is new argument shouldn't be considered because it's just inappropriate in a Rule 24 motion.

To start and getting into more detail, essentially, I've discussed in great detail in the brief, the evidence that was presented that Ms. Labrum was a family friend, (inaudible) house a lot, who babysat the sister, never babysat or watched the alleged victim. And no evidence about what happened after the relationship started is relevant in this matter because at that point, there's -- the position of trust is no longer being used if it exists in the first place, once a relationship has started.

So all we need to look at is what happened prior to the football game and what happened before that first night where they kissed in the car. And there is no evidence that the

position of trust was used to get the alleged victim into that car. There is simply no evidence of lack of consent.

If the Court is inclined to consider the additional theories, well, it is the defendant's position that State vs. Gibson is a very different case. It specifically requires the enticement of a teenager by an adult occurs when the adult uses psychological manipulation to instill improper sexual desires.

The important part being this would not otherwise have occurred. The alleged victim's own statement that he was nervous to kiss her shows that had she not said anything, there was that thought, there was that belief, and that desire to have a sexual relationship. Even if she had not said anything, that desire was already present.

The fact that he responded that -- when she mentioned, Is it weird that I find you so attractive. His response was, No, I find you attractive too. There was that attraction. There was that sexual desire present. It may not have matured, but to say that it would not have occurred is -- the evidence just doesn’t show that.

The evidence shows instead the opposite, that he had those feelings. And the surprise was that she agreed, that she had that attraction to him. That seemed to be what the surprise was, not what (inaudible).

The (inaudible) for defendant's actions (inaudible) enticement. The duration of the defendant's acts, as opposed to

Gibson, in Gibson, the defendant's acts were blatant. There were many months where the alleged victim or the victim in that case was making inappropriate comments such as that, We're in a relationship, we're in love, things of that nature. And the defendant didn't say anything to discourage that, rather, he allowed it to happen. He allowed those thoughts to make up his actions allowing her to think that there was a relationship. And then after months of manipulation, when she spent the night, he made his move.

But in this case, that's not what happened. There is no evidence of conversations or discussions that happened that were inappropriate between Ms. Labrum and the alleged victim. The only evidence that we have is that one night at a football game, she made an offhanded joke and obviously flirted, but there's no long-term psychological manipulation like there was in Gibson.

Further, the defendant's willingness to terminate conduct. The alleged victim never asked her this at all. He never said, Hey, this is inappropriate. We shouldn't be talking like this. So there is simply no evidence on that element.

The relationship between the victim and the defendant, a family friend, okay, but there is no evidence of anything more than just her being a family friend. In fact, his own statements show that his mother and sister remain close with Ms. Labrum, not that he did. He was around a lot, but that

doesn’t mean that he was especially close to her. And there is no evidence that he had any kind of special or intense relationship with her other than just somebody that comes to my house a lot.

And then the age of the victim, in Gibson, the victim was 14 years old when the sexual encounter occurred, but there aren’t enough facts to tell us how long the actual grooming period took. But already at 14, we're two years younger. And two years in adolescence is a significant amount of time.

So I don’t think that Gibson is really appropriate in this case. It's easily distinguished that the totality of the circumstances are very different. So we can't use Gibson as evidence of enticement the way the State is (inaudible).

And, really, at the end of the day, our major point is that this motion is untimely. The Court lacks jurisdiction. If the State had wanted additional time to file the motion, we would have been glad to give them that.

The circumstances are difficult, but when proving a good cause for failing to miss a date, which the Court does have discretion -- I'm sorry -- the Court does have discretion to approve a motion after the fact, but it requires the State to present evidence of due diligence. And there is no evidence of due diligence. There is no evidence. Nothing has been presented which shows other than, I didn’t know that was the rule on (inaudible), and that is not the diligence necessary

under the rule.

So we would submit on that and request that the Court deny the motion.

MS. NESTEL: Judge, good morning. Heidi Nestel. I'm new on this case. I represent the named victim. And I know you've already dedicated a lot of time to this case this morning. I just wonder, because he wanted to exercise his right, if I could make a brief statement on his behalf.

THE COURT: Ma'am, I'm going to allow you to make a very brief statement. I don't see that you've entered a notice of appearance or anything in the case. So I wasn't aware that you were going to be appearing today. So I'll give you about two minutes, but that's about where we're at. So go ahead with your brief statement, ma'am.

MS. NESTEL: Thank you, Judge. And I just had a chance to talk to the prosecutor for the first time this morning.

You know, the alleged victim understands and has been apprised of the issues in this case. And we're pleading with the Court to be judicious and to exercise discretion and re-evaluate the evidence that has been presented in this case.

My client has been very cooperative, prepared this lengthy detailed statement, 1102 statement, that was introduced and used at preliminary hearing. And we recognize, Your Honor, that this is a system, you know, that is comprised of

professionals that even as good as they are make mistakes at times. Whether it's a mistake of the attorneys or occasionally of the Court, you know, sometimes these things happen.

And as I researched and looked into the case just recently and saw that the, you know, rape charges had originally been filed, it is understandable that when sexual assault is alleged, that the consent statute is automatically tied to that, 76-5-406 to be exact.

It's very rare and unusual for prosecutors to go through each of those provisions under 406 and address the consent issues. And I think it's more natural it happened in this case where prosecutors maybe identify what their biggest hurdle is and focus evidence on that or focus argument on that, but I think we've seen today that the State has taken the time to go over the facts and make those arguments. And it does make a difference whether a prosecutor is able to articulate and make those arguments in detail. Nonetheless, Your Honor, that evidence was before the Court. My client cooperated and took the time to explain what happened.

It really hit home for me, Your Honor, this morning when I talked to my client. And he said, You know, 90 percent of my childhood memories are with the defendant. She knew him when he was seven years old and then primed him and got him to the point, where at 16, she could abuse him. Ninety percent of his childhood memories include the defendant.

We ask you to use your discretion and to right some of the mistakes that have been made in this case. And just for judicial economy, just so that the defendant, the State, and the victim do not have to go through lengthy appeals or refiling of the charges, which we believe the State will have the opportunity to do, I think for judicial economy, it makes more sense -- it is more prudent to grant the State's motion to reconsider and to let this case go forward. Thank you.

THE COURT: Thank you.

Mr. Hazard, I'll give you two minutes if you want to have final word on this matter.

MR. HAZARD: Your Honor, I'll focus my arguments then on the evidence that was before the Court and the arguments that were in fact made in the court.

Obviously, it's Defense Counsel's argument that this was just the alleged victim's mom's friend, that this was -- if there was a close relationship with anybody, that it was only with the younger sister. That's fine. That's going to be the argument they present at a trial. That is an alternative theory of this case.

The State's theory of the case is that there was much more than that. Defense Counsel repeatedly said the State put on no evidence. The State strongly disagrees with that. There was ample evidence to the point of the alleged victim and the alleged victim's mother indicating that this was almost -- that

they saw the defendant as blood, that she was in their house regularly, that she was there more than most of their blood relatives, that she was trusted with the children.

This is certainly evidence that is before the Court, and this is a preliminary hearing. So we would ask that the Court give all reasonable inferences to the State, that the Court give -- view that evidence in the light most favorable to the State and reconsider its bindover decision.

And I'll submit on that.

THE COURT: All right. Thank you.

So, Counsel, here's what we're going to do today. Let me do my best here to be succinct in my ruling. I recognize that we've got a lot of issues going on here. I recognize that there are a lot of emotions, and I am certainly not naive to the fact that there are real people's lives that are impacted by the Court's decisions. I believe I made that very statement at the time of our initial preliminary hearing in this case.

I understand that these decisions, in fact, impact the lives of real people. The Court does not make its decisions based on tugged heart strings or the Court cannot make decisions based on that. I decline to do so here.

Now, as to this issue of timeliness, whether this is a case that falls within Rule 24 or not, the Supreme Court made clear in the State vs. Bozon case that Rule 24 applies to posttrial motions or those types of rehearing evidence and

pretrial motions where there wouldn't be a trial. And had this Court dismissed the charges at the time of the preliminary hearing, it would have been very easy to shoehorn this case into that Rule 24 application.

I don't feel like it's quite as easy in this case because the Court didn't make the decision about the dismissal of the charges until we came back to court in the early part of December. At which time, the Court corrected itself and said that it should have dismissed back at the time of the preliminary hearing.

Because of that, I am going to grant some leniency to the State in the filing of its motion, and I'm going to consider the arguments that were presented to the Court today in that regard.

As to motions to reconsider themselves, the defense is right. They are not just a thing not provided for in the rules, but they are in fact disfavored. The Supreme Court has made clear that they disfavor these and that there are proper procedures and processes.

I understand that everyone has tiptoed around this today, but frankly, what's being asked of this Court is for this Court to say that I made a mistake, reconsider my decision, and make a new decision. That's not my job, folks. You don't like my decision, that's unfortunate. I feel like I make decisions based on reason, well thought out reason, reason based on the

evidence that is presented to the Court at the time of the hearing.

If you do not like my decision, there are means and mechanisms for you to take that up on appeal. In this case, refile charges. And those avenues and opportunities are open to you, but it is not this Court's job to correct a perceived mistake -- well, I don't even know, because of some concern of appeal. I don't know.

I recognize that litigation is costly. I recognize that litigation is time consuming, and I just need to make clear to all of you I don't make decisions from this bench lightly. I certainly don't do so flippantly, and I certainly don't do so without thought and my best attempts to apply the law. And if you disagree with that, I encourage you to use the legal process and the rules that are set out when you have those disagreements.

Now, in considering the State's arguments today, here is what I'm going to say. I'm not going to sit here today and reweigh or review the evidence based on new argument that's presented to the Court. It is not this Court's job to make the State's case for it, nor is it this Court's job to pick from the universe of legal theories out there to determine that the State could proceed on a case.

If the Court were to apply that approach to every -- each preliminary hearing --

MR. HAZARD: Judge, I'm sorry to interrupt. Is there an issue with the computer up here? Everyone disappeared.

THE COURT: There might be an issue with the screen, but they're all online still here.

MR. HAZARD: Okay.

THE COURT: So I don’t know what's going on with that screen, but I can still see everyone online. Thank you for pointing that out. I'm going to have to fix that before the next prelim.

But in any event, it is not this Court's job to pick from the universe of potential legal theories or statutory provisions or evidence that might be presented in this universe of prosecutorial discretion or theory or -- there's no way the Court could do that. If that were truly the Court's job, there would be no need for a preliminary hearing ever because everyone would always be bound over.

In this case, it appears, Mr. Hazard, that the prosecutor that argued this case may have been on a different page than you, sir. And that is unfortunate for the State in this case. That is not a reason for this Court to reconsider its bindover.

The attorney that argued this case was a seasoned, well-respected attorney who made an argument to the Court, specifically, frankly, proceeded on the theory of position of special trust, presented the 1102 statement in support of that

argument. And while I recognize of course that argument is not evidence, there's no way for me to second, third, fourth, fifth, sixth, or seventh guess what the prosecutor wants to present or might present in some alternate universe. It's just that spectrum is too large, and it's not the Court's job to guess.

Even though it is the Court's job to weigh those inferences in the light most favorable to the prosecution, I'm not required to put on my magic hat and pick which theory is going to be best for you to prevail on at some future date.

And I recognize that decision impacts a victim. I understand that. I don’t take lightly a decision not to bind over a defendant, but in this case, there is not a basis, there is no new evidence that the Court should consider, there is no new case law for the Court to consider, and I'm not going to reconsider my decision at this time.

The State had its opportunity to present its evidence. It's not my job to guess which theory you're going to, you know, proceed on or may or may not prevail on. So I'm going to deny the request to reconsider on that basis.

If there's a miscalculation on the type of evidence or the theory that should be presented to the Court, that is a miscalculation of the prosecutorial agency, not a miscalculation of the Court.

I appreciate everyone's briefing and time here today. I understand these are difficult cases, but I am going to deny

the motion to reconsider.

Mr. Gabbert, I'm going to ask, sir, you to do your best to put that into a written order for the Court.

I appreciate all of your time here today.

Counsel, we do still have one charge out there. Do we need -- I don't even know at this point because I can't remember if we have another hearing set on this criminal proceeding on that matter or if we need to set this out for a pretrial conference.

Mr. Gabbert?

MR. GABBERT: I don't believe that we have a hearing scheduled, so we would need to set one now.

THE COURT: So why don't I set this out for a pretrial conference on that remaining count that's on the record or still in the file. Let's set this out for a pretrial. Counsel, how is January 31 at 3:00 in the afternoon?

MR. GABBERT: That will work for the defense, Your Honor.

THE COURT: Mr. Hazard, does that work for the State, sir?

MR. HAZARD: That should work, Your Honor.

THE COURT: All right. Very well. That's the order then in the Labrum matter. Thank you, Counsel, for your briefing and argument today.

MR. HAZARD: Thank you, Your Honor.

MR. GABBERT: Thank you, Your Honor. Briefly, I want to let you know, we haven't received the recording -- audio recording for the prior argument on the motion to strike. So we are planning to still file that order. We just haven't gotten the recording yet.

THE COURT: Okay. And I did see that a request for that recording had been submitted. Just to be frank, we were kind of short staffed over the last couple of weeks, so I know attempts are being made to get those to you.

MR. GABBERT: Okay. I appreciate it.

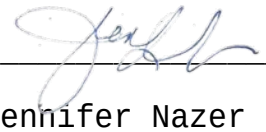
THE COURT: All right. Very well. Thank you very much.

C E R T I F I C A T E

I, Anne Pickup, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability.

Anne Pickup

I, Jennifer Nazer Braun, do certify this transcription was prepared under my supervision and direction.



Jennifer Nazer Braun

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The Order of the Court is stated below:
Dated: January 19, 2022 09:05:06 AM **/s/** ANGELA FONNESBECK
District Court Judge

FIRST DISTRICT - CACHE
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KYLI JENAE LABRUM, Defendant.	MINUTES ORAL ARGUMENTS ON MOTION TO RECONSIDER BINDOVER Case No: 211100567 FS Judge: ANGELA FONNESBECK Date: January 3, 2022

PRESENT

Clerk: andreaj

Prosecutor: HAZARD, GRIFFIN

Defendant Present

The defendant is not in custody

Defendant's Attorney(s): BENJAMIN GABBERT

DEFENDANT INFORMATION

Date of birth: [redacted]

Audio

Tape Number: Courtroom 1 Tape Count: 10:16-11:12

CHARGES

11. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony

HEARING

Mr. Hazard is present and in person at the courthouse.

All other parties are present via webex.

The Court notes the hearing today is for oral arguments on the Court's Motion to Reconsider the Bindover.

10:16: The State begins opening arguments.

10:43: Mr. Hazard says the State believes there is still sufficient evidence for a bindover regarding position of trust and requests the Court reconsider that decision.

10:43: Mr. Gabbert responds and request the Court deny the motion.

10:58: Heidi Nestel, informs the Court she is new to the case and represents the alleged victim in this case and asks to make a brief statement.

The Court informs Ms. Nestel she can make a brief statement, but that the Court does not see she has entered her appearance yet in this case.

10:59: Ms. Nestel makes a statement to the Court on behalf of the defendant and asks the Court to re-evaluate the evidence submitted in this case.

11:02: Mr. Hazard gives closing arguments.

11:03: The Court states some leniency will be granted to the State in the filing of it's motion and consider the arguments that were presented today with that regard. The Court states there won't be a reconsideration of the bindover at this time and denies the State's motion.

The Court instructs Mr. Gabbert to submit that into a written order for the Court.

The Court sets a pretrial conference for January 31 @ 3 pm.

PRETRIAL CONFERENCE is scheduled.

Date: 01/31/2022

Time: 03:00 p.m.

Before Judge: ANGELA FONNESBECK

This hearing will not take place at the courthouse. It will be conducted remotely.

Contact the court to provide your current email address.

If you do not have access to a phone or other electronic device to appear remotely, notify the court.

For up-to-date information on court operations during the COVID-19 pandemic, please visit: https://www.utcourts.gov/alerts/

Individuals needing special accommodations (including auxiliary communicative aids and services) should call First District Court - Logan at 435-750-1300 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is 435-750-1300.

End Of Order - Signature at the Top of the First Page

Addendum D

Gregory G. Skordas (#3865)
Gabriela Mena (#17087)
Benjamin Gabbert (#17995)
SKORDAS & CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 665-0128
Attorneys for Defendant
gskordas@schhlaw.com
gmena@schhlaw.com
bgabbert@schhlaw.com

IN THE FIRST DISTRICT COURT-CACHE

IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. KYLI JENAE LABRUM, Defendant.	**MOTION TO DISMISS** Case No. 221100561 Judge Spencer Walsh

Kyli Jenae Labrum, the Defendant herein, by and through the undersigned attorney, Gregory G. Skordas, brings this Motion to Dismiss and respectfully asks the Court to dismiss the claims asserted against her pursuant to *State v. Brickey*, 714 P.2d 644.

FACTS

1. From 2017 until 2020 Ms. Labrum engaged in sexual activity with [redacted], who was sixteen years-old at the time the relationship began.[1]

[1] Defendant recites the facts as they were presented at the preliminary hearing. Nothing in this memorandum should be construed as an admission of guilt by Ms. Labrum.

2. The encounters started after a high school football game in which Ms. Labrum told [redacted] that if she ever divorced her husband that she was going to marry [redacted]. [redacted] laughed and said that he was okay with that arrangement. Later that night, Ms. Labrum sent a text message to [redacted] apologizing if her statement created awkwardness. [redacted] responded that he believed Ms. Labrum was only joking. Ms. Labrum confirmed that she was, but then asked if it was weird that she found [redacted] to be so attractive. [redacted] expressed surprise, but responded that he found Ms. Labrum to be attractive as well.
3. [redacted] and Ms. Labrum continued to send each other text messages, which included a mutual desire to kiss. The exact content of these messages was not presented to the Court.
4. The next week, Ms. Labrum picked up [redacted] and drove him to an unfinished subdivision where they talked. [redacted] sat in the car talking with his "heart racing scared and nervous to kiss her or her kiss me." Exhibit 1 at 2. Ms. Labrum broke the ice by telling [redacted] that he needed to make his move because she had to leave. [redacted] leaned over the center console and asked Ms. Labrum to meet him halfway. Ms. Labrum stated that he needed to make the first move, which he did. The two then kissed in the car before Ms. Labrum returned [redacted] to his house. A promise not to reveal their indiscretion was made.
5. The two continued to communicate by text and meet in secret. The physical behaviors continued escalating up to and including sexual intercourse, which eventually led to the birth of a child.
6. On May 5, 2021, the Cache County Attorney filed an Information alleging that Ms. Labrum engaged in sexual activity with the alleged victim without consent. At the preliminary hearing the prosecutor alleged that the lack of consent was based on the

victim's inability to consent pursuant to 76-5-406(2)(j). Specifically, the State alleged that Ms. Labrum was a babysitter and thus was in a position of special trust.

7. At the preliminary hearing the State presented testimony from the investigating detective and two U.R.E. rule 1102 statements: one from [redacted] and one from his mother, [redacted].

8. In [redacted] statement he described, in incredible detail, the progression of the couple's romantic and physical relationship. [redacted] then described the relationship Ms. Labrum had with the rest of his family, which started when Ms. Labrum began dating [redacted] cousin. Although Ms. Labrum eventually broke up with [redacted] cousin, she maintained a close friendship with [redacted] mother, [redacted], and younger sister, [redacted]. The 1102 from [redacted] established that before the relationship began Ms. Labrum was a close friend of the family but was not especially close with him.

9. The 1102 from [redacted] began by explaining how Ms. Labrum became a close family friend. The statement corroborated most of what [redacted] stated and added several other details as well. Specifically, [redacted] describes a strong relationship between Ms. Labrum and [redacted]. [redacted] also described situations where Ms. Labrum attended a rodeo with the family and took a photo with [redacted] —another of [redacted] children—due to them both having the same boots, attending [redacted] soccer games and tournaments, and being a support for [redacted]

10. During Ms. Labrum's LDS mission, she stayed in contact with [redacted]. [redacted] and two of her children—[redacted] and [redacted]—were invited to Ms. Labrum's homecoming; they even made her a sign. The [redacted] family was invited to Ms. Labrum's wedding, [redacted] and

attended her baby shower, and a was at the hospital when Ms. Labrum's first child was born.

11. The relationship between Ms. Labrum and continued to get stronger in the Summer of 2017 when Ms. Labrum began taking to the local pool, taking her to lunch, and having sleepovers at Ms. Labrum's house.

12. Even after the relationship began with Ms. Labrum continued to spend a lot of time with and . Ms. Labrum would spoil all of the kids for their birthdays, and also bought and Christmas gifts. also said that Ms. Labrum was like a sister to her, and that she trusted her.

13. When Ms. Labrum and her husband got into a fight that lasted several days Ms. Labrum stayed with the family for a couple of days. stated that she trusted Ms. Labrum with her children, her home, and even her dog; but then went on to clarify that she has never needed Ms. Labrum to watch her kids when she went on a trip.

14. statement made it clear that prior to the sexual relationship Ms. Labrum was close with the family, but was especially close with and . did not state that Ms. Labrum was especially close with

15. The State presented its evidence and defense counsel rebutted the presentation at a preliminary hearing held on October 19, 2021.

16. After evidence, the State argued that as a matter of law could not have consented to the sexual activity because Ms. Labrum held a position of special trust. The State directed the Court to 1102 statement and emphasized that it provided at least some evidence of a relationship between Ms. Labrum and the family, including times when Ms. Labrum was asked to watch over the children, including .

17. Defense counsel argued that the State had not met their burden of showing that the position of special trust existed. Defense counsel pointed out that no evidence had been presented in the 1102s which established anything more than two people who were attracted to each other.
18. After the Court retired to chambers and had a conversation with counsel it held that the State had not met its burden of proving that a position of special trust was present and declined to bind over Ms. Labrum. The Court explained that although there was evidence of a close relationship between Ms. Labrum and the [redacted] family, that relationship did not in and of itself create a position of special trust between Ms. Labrum and [redacted].
19. After the Court declined to bind over Ms. Labrum for rape, the State moved to amend the charges to Unlawful Sexual Activity with a 16 or 17-year old, a violation of U.C.A. § 76-5- 401.2 as Third Degree Felonies. The Court granted the motion and bound Ms. Labrum over on the amended counts.
20. On November 8, 2021, the state filed a motion asking the Court to reconsider its bindover decision regarding the charges of rape.
21. On January 19, 2022, the court heard argument regarding the Motion to Reconsider Bindover Decision. After the State and Defendant presented argument, the Court declined to reconsider bindover at that time and denied the State's motion.
22. On February 17, 2022, State moved to dismiss the case without prejudice. The Court granted the motion.
23. On May 5, 2022, the State refiled rape charges against Defendant.

ARGUMENT

Under Utah R. Crim. P. 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. While the rules of procedure do not prohibit the State from refiling charges after their dismissal at a preliminary hearing, the State is not vested with "unbridled discretion." *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986). Placing limits on the refiling of criminal charges is essential to protecting the due process rights of criminal defendants. *Id* at 645. These rights exist to protect the defendant from potentially abusive practices involved with refiling of dismissed charges. These practices include "forum shopping, repeated filings of groundless and improvident charges for the purpose to harass, withholding evidence, and refiling a charge after providing no evidence of an essential and clear element of a crime." *State v Redd*, 2001 UT 113, ¶ 20. Additionally, the State is barred from refiling charges unless there is either "a showing of new or additional evidence or other good cause." *Id.* Neither standard warrants refiling charges.

In prior filings, the State alleges that it is not engaging in the potentially abusive practices enumerated in *Redd*. Ms. Labrum does not disagree that the State is not forum shopping, but affirmatively states that the State is harassing her and engaging in hiding the ball. First, this case is similar to *State v. Johnson*, 782 P.2d 533. In *State v. Johnson*, the defendant was charged with vandalizing property, but the State failed to present sufficient evidence. The State then filed a motion to reopen the preliminary hearing in order to present additional evidence stating that it miscalculated the quantum of evidence necessary for bindover. The trial court denied the motion stating that the State's motion was "considered to be a request to reconsider the dismissal order

on essentially the same evidence presented at the preliminary hearing. The Court of Appeals upheld the denial stating that "[t]he prosecutor's frank admission that he miscalculated the quantum of evidence required to establish probable cause does not justify a reopening of proceedings that could result in the very harassment of an accused which was decried in *State v. Brickey*." *Johnson*, 782 P.2d at *6.

The State relies on *State v. Morgan*, 2001 UT 87 (Utah 2001), for the claim that an innocent miscalculation of the evidence necessary for bindover is per se not abusive. However, the Supreme Court also held that while misjudging the evidence is good cause to refile the State does not have carte blanche to refile anytime they fail to get a case boundover. *Id.* at ¶ 19 ("[W]e emphasize that the miscalculation must be innocent, and further investigation must be nondilatory and not otherwise infringe on due process rights of a defendant." The lack of abusive practice does not mean that *Brickey* is not a bar to refile, it simply means that "there is no presumptive bar to refiling." *Morgan*, 2001 UT 87 at ¶ 16.

In the present case, the State claims to have had two theories about the lack of consent but presented only one. When the Court decided not to bind over the charges, the State did not ask to reopen to present additional arguments. Rather, the State moved to amend the charges. Three weeks later, the State asked the Court to reconsider the evidence under a brand new theory of a lack of consent. Argument is not new evidence, and rearguing the same evidence under a new theory is not the same as presenting new evidence. The State claims that it was aware of both theories of non-consent at the time of the preliminary hearing, yet failed to present the second; even after the magistrate declined to bindover the charge of rape. As such, the State has engaged in hiding the ball because their second theory was only brought to Defendant's attention after three weeks and in an attempt to get the Court to revisit the issue of rape.

Since *Brickey*, courts have sought to clarify what constitutes "other good cause" under *Brickey*. In *State v. Morgan,* the Court stated that good cause exists where the State made "an innocent miscalculation of the evidence necessary to establish probable cause for a bindover." *State v. Morgan*, 34 P.3d 767, 770 (Utah 2001). However, the Court made a special point to "emphasize that the miscalculation must be innocent." *Id.* at 771 (emphasis added). The facts of *Morgan* are instructive whenever a court seeks to determine whether an innocent miscalculation has occurred.

In *Morgan,* the prosecutor prepared two officers to testify in a trial against a Defendant charged with possession with intent to distribute controlled substances. The State called the first witness, who testified about the incident and why the evidence showed intent to distribute. Feeling that the initial officer's testimony was sufficient, the prosecutor did not call the second officer to testify. After closing, the Court held that the initial officer lacked the experience and training to determine that the drugs were of a distributable amount and the defendant was only bound over for possession of a controlled substance. *Id.* at 768.

Immediately following the bindover decision, the prosecutor asked the court to reopen evidence to allow the second officer to testify, but the court denied the motion. Due to the innocent miscalculation, the prosecutor dismissed and refiled the charges. Consequently, at the second preliminary hearing both officers testified and the possession with intent to distribute was bound over. The bindover decision was upheld by the Utah Supreme Court.

In the present case, the Court heard the arguments from the State and Defendant and declined to bindover the charges of rape. The State had ample opportunity to prepare for the preliminary hearing to meet the burden of proof necessary to bindover the charges of rape against Defendant. Both Defendant and the State made arguments in the preliminary hearing.

The State was given the opportunity to present their case, call witnesses, and present exhibits before resting its case. Following consideration, the Court declined to bindover the charges. Immediately after the Court entered its ruling the State moved to amend the charges to a lesser charge of Unlawful Sexual Conduct of a 16/17-year-old. The court then bound over Defendant on the amended charges. On November 8, 2022, the State filed a motion to reconsider the bindover decision—nearly three weeks from the preliminary hearing.

In *Morgan*, a primary reason for a finding of an "innocent miscalculation" on the part of the state was the immediate attempts by the prosecution to reopen evidence. *Id.* at 772. The *Morgan* Court noted that the trial court had overruled a defense objection to the testifying officer's experience. It was only after hearing all of the evidence and argument that the court determined that the testifying officer lacked the necessary experience to determine the defendant's intent to distribute the drugs. The prosecutor immediately requested to reopen evidence and the court denied the motion. The Court further noted that in *Morgan* the prosecutor did not hide evidence in order to disadvantage Defendant. For these reasons, the Court found that the defendant's due process rights were not violated.

In the present case, the State's actions were completely different. The State immediately moved to amend the charges at the preliminary hearing—rather than seeking reconsideration of the bindover decision, as was done in *Morgan*. In fact, the State did not even attempt to present the second theory of non-consent. The State then waited a full 20 days before filing a motion to reconsider the court's bindover decision. Between their successful attempts to amend the charges against Defendant and the nearly three weeks which elapsed before their motion to reconsider, it is incredibly improbable that the State can claim an innocent miscalculation. Now, the State seeks to refile the exact same charges against Defendant. By its own admission, the State does so

without any new or additional evidence. Instead, they seek to bring entirely new arguments, with no evidence that the arguments would have been presented at the preliminary hearing absent an "innocent miscalculation" by the prosecutor. Due to the lack of new or additional evidence or good cause, *State v. Brickey* necessitates that the charges against Defendant be dismissed.

CONCLUSION

For the foregoing reasons the Court should dismiss the charges of rape against Defendant.

DATED this the 1st day of June.

SKORDAS & CASTON, LLC

/**s**/*Gregory G. Skordas*____
Gregory G. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on June 1st, 2022, I electronically filed a true and correct copy of the foregoing DEFENDANT'S MOTION TO DISMISS with the Clerk of the Court using ECF system, which sent notification of such filing to the following:

Griffin Hazard
Cache County Attorney's Office
199 N Main
Logan, UT 84321

/s/ Benjamin Gabbert
SKORDAS & CASTON, LLC

John D. Luthy, 8880
Cache County Attorney
Griffin Hazard, 15415
Deputy County Attorney
199 North Main Street
Logan, Utah 84321
(435) 755-1860

IN THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH

STATE OF UTAH, Plaintiff, Vs KYLI JENAE LABRUM, DOB: [redacted] Defendant.	STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS Case No. 221100561 JUDGE SPENCER WALSH

TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT:

COMES NOW, the State of Utah, by and through its counsel, Griffin Hazard, Deputy County Attorney, and hereby moves the Court to deny the Defendant's Motion to Dismiss for the following reasons, to wit:

STATEMENT OF FACTS

On May 6, 2021, the State filed an Information in First Judicial District Court case 211100567, charging the Defendant with ten counts of rape and one count of forcible sex abuse.

On October 19, 2021, a Preliminary Hearing was held. Prosecutor Harms covered the Preliminary Hearing for the the State, as the assigned Prosecutor Hazard was preparing for a jury trial the following day. The State's case was based on theories of (1) non-consent including the Defendant holding a position of trust under U.C.A. § 76-5-406(2)(j), and (2) there being more

than a three year age gap and enticement under U.C.A. § 76-5-406(2)(k).

At the Preliminary Hearing Prosecutor Harms waived his opening statement, and the court admitted a sixteen-page 1102 statement ("Statement") from the alleged victim, [redacted] (attached hereto as *Exhibit 1)*, a thirteen-page Rule 1102 statement from the alleged victim's mother, (attached hereto as *Exhibit 2)*, and a DNA test. *See* Court Minutes attached hereto as *Exhibit 3, Oct. 19, 2021.*

In those exhibits, [redacted] states that the Defendant's relationship with him and his family started when he was between the ages of 6 and 8 years-old. *Ex. 1*, at15. The Defendant dated [redacted] family member for 6 years, and became extremely close to his family and extended family during that time. *Id.* After the break-up, the Defendant remained close friends with [redacted] family and was frequently in [redacted] home, cooking, entertaining the children, engaging in activities with the children, and generally supporting the family. *Id.* Both Rule 1102 statements are replete with examples of Defendant's involvement in [redacted] family, his activities and his home. The Defendant spent particular time with [redacted] younger sister, but *Exhibit's 1* and *2* make it clear she spent considerable time as a trusted adult figure in the home interacting with all of the minor children, including [redacted] states, "my mom trusted [Defendat] like her own sister." *Id.* [redacted] mother states, "I don't call my own blood relatives that often or see them as often as I saw [Defendant]." *Ex. 2*, at8. [redacted] mother went on to say, "I looked at [Defendant] as blood! I trusted her with my children, my house and my dog." *Id.* These circumstances pre-dated the sexual relationship between the Defendant and alleged victim.

[redacted] Statement also detailed how the Defendant supported him by attending his high school football games. *Ex. 1*, at1. After one of the games, the 26-year-old Defendant changed the

nature of the pre-existing relationship by telling the 16-year-old [redacted] "if Chris and I ever get divorced you and I are gonna get married." *Id.* Later that night, the Defendant sent [redacted] a message saying, "I hope I didn't weird you out with what I said", and [redacted] responded by saying, "no, not at all. We were just joking right?" *Id.* Rather than allowing the moment to pass as a joke and moving on, the Defendant stated, "yeah, is it weird that I find you so attractive?" *Id.* [redacted] stated he was "really surprised" at the Defendant's response, but replied, "no, I think you are attractive too." *Id.* Thereafter, a conversation took place about wanting to kiss. *Id.* [redacted] indicates that later that week, the Defendant picked him up *in her car* at his house and drove him to an unfinished sub division where they talked for about 30 minutes. Thereafter, the 26-year-old Defendant took the lead by saying, "if you're gonna kiss me, you gotta hurry because I need to go home." *Id.* The 16-year-old [redacted] indicated, "I had sat there the whole time heart racing scared and nervous to kiss her or her kiss me. She said this and finally I leaned in about halfway over her center console and said, 'alright, you gotta meet me in the middle', at which point the Defendant said, 'no, you gotta lean into me if you want to kiss." *Id.* at.2. [redacted] indicates they then made out for a few minutes. *Id.* After the Defendant drove [redacted] home, she texted him saying, "you can't tell anyone we kissed". *Id.* This information is contained in just over the first page of [redacted] Statement. In [redacted] explained that, the next week, the Defendant picked him up and took him up Smithfield Canyon. Again, the Defendant took the lead by"reach[ing] over and caress[ing] [redacted] penis on the outside of [his] pants and ask[ing] if it was okay." *Id.* Thereafter, the Defendant took the lead again by "ask[ing] if she could go inside [redacted] pants". *Id.* [redacted] Statement makes it clear that [redacted] did not instigate the progressions in the relationship. Rather, the Defendant took the lead and enticed [redacted] to engage in, and advance the sexual

relationship, and [redacted] followed the Defendant's lead. [redacted] did not engage in similar activity until after the Defendant took the lead to encourage such behavior. [redacted] Statement explained that, after another similar incident up Smithfield Canyon, the Defendant took the lead and advanced the nature of these encounters by indicating she did not want to do these things in the canyon anymore. *Id.* Instead, Defendant persuaded [redacted] to go to her house in North Logan when her husband was at work. *Id.* At the house, the Defendant advanced the physical intimacy by "climb[ing] on top of [redacted] straddling [redacted] [as they] continued kissing" *Id.* at 4. [redacted] indicates the Defendant then "started grinding on my penis on the outside of my clothes." *Id.* [redacted] explains that the Defendant, on her own, "took her shirt off"; thus, furthering the physical nature of the relationship. *Id.* They continued until the Defendant further amplified the encounter by asking if they could take [redacted] pants off. *Id.* Responding to the Defendant's question encouraging such behavior, [redacted] indicated it was okay, and they both took their pants off and left their underwear on. *Id.* After continuing in that state for a minute, the Defendant, yet again intensified the encounter, by "ask[ing] if she could grind on [redacted] penis naked." *Id.* [redacted] said yes, and both [redacted] and the Defendant got naked and continued to grind. *Id.* These encounters eventually led to the Defendant having sex with [redacted] multiple times *Id.* at .5-17. On the Defendant's suggestion, these encounters moved from the couch and living room floor, to the bedroom, and eventually from the house to the Defendant's place of employment. *Id.* at 5, 10. [redacted] further stated that "[the Defendant] would sometimes get upset with me and say my friends were more important to me than she was" *Id.* at .9. [redacted] explained how he started hanging out with a couple girls his age, and:

> she got extremely mad at me told me I was a bad person for cheating on her and

> that we were done having sex and talking anymore. She took me back to my car and I got out. I sat in my car angry and crying feeling terrible. I messaged her and said sorry begging her to forgive me. Where I finally realized how hypocritical it was because she was still having sex with her husband. Finally I got her to talk to me again but I had to promise her I wouldn't talk to them or other girls my age anymore.

Id. The Statement details more than ten encounters of sexual intercourse resulting from this relationship. *Id.* at 1-16, 16.

In closing argument, Prosecutor Harms only argued that the alleged victim could not consent because the Defendant held a position of trust under U.C.A. § 76-5-406(2)(j). He did not argue the State's alternative theory of non-consent regarding the three-year age gap and enticement under U.C.A. §76-5-406(2)(k). The Court addressed the theory presented by the State, and declined to bind the Defendant over on counts 1-10 for rape finding that there was no position of trust.

Immediately after the failed bindover and dismissal of counts 1-10, the State moved to amend the Information to include ten counts of unlawful sexual activity with a 16 or 17-year-old. The Defendant did not object. The Court, having just heard the State's evidence, granted the motion and bound the Defendant over on those ten counts, along with the original count for forcible sex abuse. *See Ex. 3*, minutes from Oct 19, 2021.

Prosecutor Harms advised Prosecutor Hazard of the court's decision. Prosecutor Harms left the County Attorney's Office the following week to take a different job. Prosecutor Hazard was in trial from October 20, 2021through October 22, 2021, and spent significant time in court on October 25 - 26, 2021. Prosecutor Hazard met with [redacted] later the following week, and drafted a Motion to Reconsider addressing the bindover decision. Because Prosecutor Hazard was not

part of the Preliminary Hearing and because Prosecutor Harms was no longer working at the prosecutor's office, on November 2, 2021, Prosecutor Hazard requested the audio recording of the Preliminary prior to filing the State's Motion. This was to ensure the State did not to make any misrepresentations to the court regarding the proceedings at Preliminary Hearing. On November 4, 2021, the State again requested the audio recordings from the Preliminary Hearing. The State did not receive the recording of the Preliminary Hearing until November 9, 2021. On November 9, 2021, after listening to the recording, the State filed the Motion to Reconsider Bindover Decision ("Motion to Reconsider"), attached hereto as *Exhibit 4*. At that point, approximately twenty-one days had passed since the Preliminary Hearing.

The State's Motion argued that the evidence admitted at the Preliminary Hearing, when taken in the light most favorable to the State and with all reasonable inferences drawn in the States favor, was sufficient to justify a bindover under both legal theories and that the court erred when it declined to do so. The State also argued that the State's arguments at the Preliminary Hearing were not evidence. The State's Motion urged the court to reconsider its previous decision based on the same evidence admitted during the Preliminary Hearing. *See Ex. 4.*

On November 22, 2021, the Defendant filed a Motion to Strike State's Motion to Reconsider Bindover and Motion to Dismiss, attached hereto as *Exhibit 5*. In that motion, Defendant argued procedural points, including an argument that "the State's Motion is moot as the Court lacks the jurisdiction to do anything but dismiss the charges at preliminary hearing and that the court lacked jurisdiction to bind over the amended charges, and doing so prejudiced the Defendant's rights. *See Ex. 5* at 6. Defendant's Motion to Strike and Dismiss did not respond substantively to the State's Motion to Reconsider, but reserved time to respond substantively if

Defendant was not successful on her procedural arguments.

On December 1, 2021, the State filed a Reply to Defendant's Motion to Strike State's Motion to Reconsider Bindover and to Dismiss, ("State's Reply"), attached hereto as *Exhibit 6.* The State's Reply addressed each of the Defendant's arguments. As part of its reply, the State argued that the court did have jurisdiction to grant the State's Motion to amend its information after the Preliminary Hearing. The State explained that procedurally, the court dismissed counts 1-10 of the State's Information under Utah Rule of Criminal Procedure 7B(c), but bound the Defendant over on count 11; thus, maintaining the viability of the State's Information. The State argued that the court had jurisdiction thereafter to grant the State's Motion to amend its Information under Utah Rule of Criminal Procedure 4, adding ten new counts of a different charge, which the Court had already found were also supported by the evidence.

Oral arguments took place on December 6, 2021, at which time the court held, "that Rule 7 requires that if this court fails to find that there is evidence sufficient to support a bindover that the court must dismiss the counts. The court found in this case that counts 1-10 were not supported by the evidence that was presented at trial and could not bind the defendant over." *See Ex. 3,* Dec. 6, 2021. The court went on to state, "Rule 7B was carefully considered and it would be inappropriate to allow the State to make that amendment as the Court had already made the bindover determination." *Id.* The court then dismissed counts 1-10 of the State's Information. The courts bindover decision in relation to count 11, forcible sex abuse, remained intact, and the court scheduled substantive arguments on the State's Motion to Reconsider for January 3, 2022.

On December 20, 2022, the Defendant filed a Memorandum in Opposition to State's Motion to Reconsider Bindover ("Memorandum in Opposition"), attached hereto as *Exhibit 7.*

Oral arguments on the Motion to Reconsider were held on January 3, 2022, at which time the Court held, "there won't be a reconsideration of the bindover at this time" and denied the State's Motion." *See Ex. 3,* Jan. 3, 2021. At that time, the State's thirty-day time in which to appeal had already expired.

On February 14, 2022, after considering different options, the State moved to dismiss case 211100567 without prejudice and to re-file the charges. *See Ex. 3,* Feb. 14, 2022.

On May 5, 2022, the State refiled an information including the same charges from case 211100567 in the above styled case. Thereafter, on June 2, 2022, the Defendant filed a motion to dismiss under *State v. Brickey.*

ANALYSIS

I. Brickey Does Not Preclude the State from Refiling in the Instant Case

The sole purpose of a preliminary hearing is to determine whether the State can establish probable cause to bind the defendant over for trial. *See State v. Aleh,* 2015 UT App 195, ¶ 14; *Utah Const.* art. I, §12. Notably, the probable cause burden at a preliminary hearing is "light". *See State v. Lopez/Nielsen*, 2020 UT 6, ¶ 46. The Utah Supreme Court has explained that "to make this showing, the prosecution need not produce evidence sufficient to support a finding of guilt at trial or even to eliminate alternative inferences that could be drawn from the evidence in favor of the defense". *Id.* citing *State v. Schmidt*, 2015 UT 65, at ¶ 18. The magistrate should also draw all reasonable inference in the prosecution's favor. *Schmidt,* at ¶ 18. "Accordingly, it is generally 'inappropriate for a magistrate to weigh credible but conflicting evidence at a preliminary hearing . . . .'" *Lopez,* at ¶ 47, citing *State v. Virgin*, 2006 UT 29, ¶ 24,. A

preliminary hearing is not a trial on the merits. *Id.* Thus, the Utah Supreme Court has stated, it "is therefore not appropriate for a magistrate to evaluate 'the totality of the evidence in search of the most reasonable inference' at a preliminary hearing. Our justice system entrusts that task to the fact-finder at trial." *Schmidt,* at ¶ 18 (citations omitted).

Rule 7B(c) of the Utah Rules of Criminal Procedure reads as follows:

> (c) **If no probable cause.** If the magistrate does not find probable cause to believe the crime charged has been committed or the defendant committed it, the **magistrate must 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.**

Utah R. Crim. P. 7B(c).

Pursuant to the last sentence of Rule 7B(c), a magistrate's failure to bind a defendant over for trial at preliminary hearing, does not preclude the State from instituting a subsequent prosecution for the same offense. However, in *State v. Brickey*, the Utah Supreme Court limited the refiling of an information to situations where the prosecutor can show that new or previously unavailable evidence has surfaced **or** that other good cause justifies refiling." *See State v. Brickey*, 714 P.2d at 647 (Utah 1986). This rule protects criminal defendants from "the potential for abuse inherent in the power to refile criminal charges." *Id.*

In *State v. Redd*, 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, . . . withholding evidence [,] . . . [and] refil[ing] a charge after providing **no** evidence of an essential and clear element of a crime." *State v. Redd*, 37 P.3d 1160, 2001 UT 113, ¶ 20; *see also State v. Morgan*

43 P.3d 767, 2001 UT 87, ¶¶ 13-15.

In *State v. Morgan*, the Utah Supreme Court elaborated on the *Brickey* rule, finding that "when potential abusive practices are involved, the presumption is that due process will bar refilling." *Morgan*, 2001 UT at ¶ 16. However, "*Brickey* does not . . . preclude refiling where a defendant's due process rights are not implicated". *Id.* at ¶ 15. The State would emphasize that there is no inherent ban on refiling—the defendant has the burden to show bad faith or abuse by the State. *See Morgan*, 2001 UT 87, ¶¶15-16.

Brickey does not require the State to have new evidence or previously unavailable evidence to justify refiling in every instance. Rather, *Brickey* leaves the door open for the State to refile an information "for other good cause[,]" which can include various alternative categories. For instance, the *Morgan* court found that the State's "innocent miscalculation" regarding the quantum of evidence required at preliminary hearing *did* constitute "other good cause" justifying the refiling of charges dismissed after a failed bindover. The *Morgan* court explained:

> *Brickey's* analysis indicates that "other good cause" represents a broad category with "new or previously unavailable evidence" as but two examples of subcategories that come within its definition. "Other good cause", then, on its face, simply means additional subcategories, other than "new evidence" or "previously unavailable evidence," that justify refiling. While we noted but did not specifically adopt innocent miscalculation [of the quantum of evidence necessary for a bindover] as a subsection of other good cause in *Brickey*, we do so today.

Morgan, ¶¶ 17-19. [1]

[1] The Defendant's Motion to Dismiss cites *State v. Johnson*, 782 P.2d 533. That case is not applicable here and does not involve a *Brickey* analysis. In *Johnson*, the State made an untimely motion to reopen the preliminary hearing after miscalculating the quantum of evidence for some of their charges that were dismissed. When their motion was denied on procedural grounds under an analysis of Rule 24, the State attempted to appeal after the time for appeal had already run. The State did not dismiss and refile their charges under a *Brickey* analysis. The Johnson case is more akin to cases such as *State v. Kinne*, 2001 UT App 373, and *State v. Bozung*, 2011 UT 2, ¶ 10 (indicating that

In *State v. Dykes*, the Utah Court of Appeals expanded the "innocent miscalculation" subcategory of good cause to include mistakes of fact, as in *Morgan*, and to mistakes of law. *State v. Dykes*, 2012 UT App 212, ¶ 10.

In *Dykes*, the State charged Dykes with second-degree felony theft by receiving stolen property, which required proof either that the value of the ATV exceeded $5,000 or that it was an operable motor vehicle. *Id.* at ¶ 3. At preliminary hearing, the state presented evidence that the ATV was an operable motor vehicle and the judge bound Dykes over for trial on that theory. *Id.* The State did not present evidence regarding the value of the ATV. *Id.* Dykes moved to quash the bindover arguing that an ATV was not an operable motor vehicle for purposes of the statute, and that the State failed to present any evidence as to the ATV's value in support of an alternative theory. *Id.* The trial court was convinced and bound Dykes over on a class B misdemeanor as opposed to the felony, and subsequently dismissed the case for lack of jurisdiction. *Id.* The State subsequently refiled the felony theft by receiving charge on the basis of value, and Dykes moved to quash under *Brickey*. *Id.* at ¶ 4. The trial court found other good cause to support the State's refiling and denied Dyke's *Brickey* Motion. Dykes appealed.

On appeal, the Dykes court found that the State failed to produce any evidence as to the ATV's value during the first preliminary hearing, ***and*** failed to advance any kind of argument in support of that theory. Yet, the Utah Court of Appeals extended the "innocent miscalculation" subcategory of good cause to both mistakes of fact, and mistakes of law, explaining:

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a motion to reconsider a bindover is treated as a motion for a new trial and must comply with timing requirements under Utah R. Crim. P. 24). These cases do not involve the dismissal and refiling of the State's information requiring an analysis under *Brickey*. In *State v. Morgan*, the Utah Supreme Court held that there are various subcategories of "other good cause", and that the State's innocent miscalculation as to the quantum of evidence was "good cause" justifying the refiling. *Morgan*, ¶¶ 17-19.

> when a prosecutor makes an innocent mistake about the state of the law, the potentially abusive practices the *Brickey* rule is intended to curb are not necessarily implicated. This is because to constitute a truly innocent mistake of law, just as with an innocent mistake of fact, the prosecutor must exercise some acceptable level of diligence and must not intend to harass the defendant or unfairly impair the defense. For this purpose then, 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")

Id. citing to *Morgan*, ¶ 22.

In the case at hand, the refiling of charges is for "good cause" and is not in violation of any of the potentially abusive practices set out in *Redd*. Thus, the Court should deny the Defendant's Motion to Dismiss under *Brickey*. The sole contention raised in the Defendant's Motion to Dismiss seems to be that, "...the State is harassing [the Defendant] and engaging in hiding the ball." *Def.'s Mot.,* at 6. In support of Defendant's contention, she explains that, "the State was aware of both theories of non-consent at the time of the preliminary hearing, yet failed to present the second; even after the magistrate declined to bindover the charge of rape. As such, the State has engaged in hiding the ball because their second theory was only brought to Defendant's attention after three weeks and in an attempt to get the Court to revisit the issue of rape." *Id.* at 7. The Defendant goes on to say that, "between their successful attempts to amend the charges against Defendant and the nearly three weeks which elapsed before their motion to reconsider, it is incredibly improbable that the State can claim an innocent miscalculation." *Id.*at 9.

The Defendant's assertion that the State maliciously hid the ball by failing to make every potential **argument** at preliminary hearing is illogical. The State's arguments at preliminary hearing were not evidence. Moreover, the argument advanced at the preliminary hearing was in

good faith and was colorable. Consequently, any failure by the State to advance other possible arguments in support of other theories was certainly innocent.

II. The State's Miscalculation, if Any, Was Innocent

Utah courts have acknowledged that the State's innocent miscalculations at preliminary hearing, whether factual or legal, are a subcategory of "other good cause" to refile. Moreover, as explained in *Dykes*, "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")". If the prosecutor's mistake was innocent, it cannot be viewed as being done with the intent to harass the Defendant as alleged in the Defendant's Motion.

Here, the State's argument was made in good faith, (*i.e.*, the State genuinely believed, and still believes, in the validity of its argument), and the argument was colorable, (i.e., the argument was apparently correct or justified). At Preliminary Hearing, the State advanced one theory in support of the ten counts of rape, as opposed to all potential theories. Such a mistake, (if this can be deemed a mistake in a hearing that does not even require arguments), was made in good faith as the State genuinely believed in the validity of the argument that the 26-year-old Defendant held a position of special trust to the 16-year-old alleged victim. Moreover, this argument was "apparently correct or justified", as it was supported by Rule 1102 statements detailing the Defendant's relationship with [redacted] from the time he was 6-8 years old, *see Ex. 1*, at 15, listing many examples of the Defendant's involvement in [redacted] family, his activities, and in his home. [redacted] Statement indicates, "my mom trusted [the Defendant] like her own sister[,]" and [redacted] mother's statement indicated, "I don't call my own blood relatives that often or see them as often as I saw [Defendant]." *See Ex. 1, at 15; and Ex. 2*, at 8. [redacted] mother went on to

say, "I looked at [Defendant] as blood! I trusted her with my children..." *Ex. 2, at 8.*

These circumstances pre-dated the sexual relationship between the Defendant and alleged victim, and certainly gave rise to a "colorable" basis for the argument that the Defendant occupied a special position of trust toward [redacted] or in other words, that she was in a position of authority which enabled her to exercise undue influence over [redacted] *See* U.C.A. § 76-5-404.1(1)(c)(xxiii). This is particularly true when viewing this evidence in a light most favorable to the State, and all reasonable inference drawn in favor of the State.

The Defendant does not argue the evidence at the Preliminary Hearing was insufficient, because it was not. Rather, she attacks the State's failure to make every argument in support of every possible legal theory at the Preliminary Hearing, and assert that any failure by the State to advance every argument should be viewed as malicious because of the State's awareness of other potential arguments. This is Illogical. While the stand-in prosecutor had been made aware of both theories the State intended to rely on for the case, he ultimately advanced only one at the actual hearing. The State is not required to advance every argument in support of every legal theory at a preliminary hearing. In fact, the State is not required to make any argument at all at a preliminary hearing, and frequently waives their right to do so. In fact, fundamental fairness should be understood in the context of the purposes of the preliminary hearing. When *Brickey* was decided, discovery was a central purpose of preliminary hearings. *Anderson*, 612 P.2d 778 (Utah 1980). But the 1994 constitutional amendments changed that. *See* Art. I § 12. Post-1994 *Brickey* cases still talk about not "intentionally holding back crucial evidence to impair a defendant's pretrial discovery rights and to ambush her at trial with the withheld evidence." *Morgan*, 2001 UT 87, ¶14. However, in light of the 1994 constitutional amendments, the State

argues that, given the limited purpose of preliminary hearings, fundamental fairness does not require the prosecution to lay all their cards on the table at the preliminary hearing, whether in the context of *evidence* or *argument*. The State must simply put on sufficient evidence to establish that a crime was more probably than not committed, and that the Defendant more probably than not committed it. In that context, the court is to view all evidence in the light most favorable to the State and to draw all reasonable inferences in the State's favor. Here, the State put on sufficient evidence at the Preliminary Hearing for a bidnover. As stated in *Morgan* and *Dykes*, the State's innocent miscalculations at the preliminary hearing, whether legal or factual, constitutes other good cause to refile.

Next, there is no advantage the State can see, (or even think of), that could result from the stand-in prosecutor's failure to assert both of the State's legal theories as opposed to the singular argument that was raised. It is illogical to suggest that the State maliciously failed to make argument, (resulting in the dismissal of the State's primary charges), in order to somehow harass the Defendant or prejudice her due process rights.

Finally, the State maintains that the previous court erred in failing to bind the Defendant over for trial even based on the singular argument that was presented. Feeling that adequate evidence had been presented to show a special position of trust and having made good faith and colorable arguments in support of that theory, speaks to the innocent nature of the State's miscalculation, if any.

III. Other Subcategories of Good Cause to Refile the Instant Case

As stated in *Morgan*, "[o]ther good cause", on its face, simply means additional subcategories, other than "new evidence" or "previously unavailable evidence," that justify

refiling. This statement sensibly indicates the existence of numerous potential subcategories of "other good cause" which the courts have not yet acknowledged, but which could, and should, be recognized as they arise.

Here, the Court should acknowledge another variation of good cause for the State's innocent legal or factual miscalculations as to their attempts to select the "best" procedural route under the law to review a courts prior decision. This is similar to the innocent mistake of law set out in *Dykes*. After the failed bindover in the present case, the State had the options to: (1) proceed on its destabilized case; (2) appeal the court's decision within 30 days under Rule 4 of the Utah Rules of Appellate Procedure; (3) to file a motion to reconsider subject to time restraints set out in Rule 24 of the Utah Rules of Criminal Procedure, as acknowledged in *State v. Kinne*, 2001 UT App 373; or (4) to dismiss and re-file the charges under Rule 7B(c) of the Utah Rules of Criminal Procedure. While all of these options were available to the State, it makes sense that in any given situation, one route, as opposed to another, may be the "best" route to pursue. In a calculated effort to avoid the time and cost of an appeal for all parties and to preserve judicial economy, the State opted to file a motion asking the previous court to simply reconsider the bindover decision. If that approach was a miscalculation by the State, the State would argue that, like *Morgan* and *Dykes*, the miscalculation was innocent.

Thereafter, the previous court agreed to hear the State's motion despite its untimeliness, but ultimately refused to reconsider the evidence *after* the State's time to appeal had already expired. This left the State with little choice but to dismiss and refile under Rule 7(b), which is specifically enumerated as a remedy under the Utah Rules of Criminal Procedure.

The only obstacle to refiling under Rule 7B(c) is *State v. Brickey*, whose safeguards

remain effective to ensure the State's refiling is not an attempt to forum shop, to withhold evidence, to engage in repeated filings of groundless or improvident charges with the purpose to harass, or to refile charges after providing **no** evidence of an essential and clear element of a crime. None of those activities are present here.

If the Court finds the State's procedural route in the present case was not the "best" route, the Court should find that mistake to have been an innocent miscalculation of law, similar to *Dykes,* giving rise to other good cause to refile.

IV. The State is Not Engaged in Any of the Potentially Abusive Practices Set Out in Redd

In *State v. Redd*, 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, . . . withholding evidence [,] . . . [and] refil[ing] a charge after providing **no** evidence of an essential and clear element of a crime." *See Redd*, 2001 UT at ¶ 20; *see Morgan, at* ¶¶ 13-15.

The only contention made by the Defendant in their Motion to Dismiss, is that the State is harassing the Defendant and maliciously engaged in hiding the ball because their second theory was only brought to the Defendant's attention after three weeks." *See Defendant's Motion*, pp.6-7. The State is not entirely clear which category the Defendant is specifically attempting to allege against the State, however, the State will address each category of procedural misconduct in turn.

A. The State is not forum shopping

Here, the Defendant agrees that the State is not attempting to forum shop. *Def.'s Mot., at* 6. The State's efforts to address these issues through a motion to reconsider further demonstrates that the State never intended to forum shop through this process, and in fact attempted to keep

these issues with the previous court.

B. The charges are not groundless or improvident and were not refiled for the purpose of harassing the defendant

The State's charges are not groundless or improvident, and were not refiled for the purpose of harassing the Defendant. As set out above, the State respectfully maintains that its charges were not groundless or improvident, that the State put on sufficient evidence to justify a bindover of the charges under multiple theories of non-consent, and that the court erred by not binding the Defendant over. That evidence and argument is more thoroughly outlined on pages 2-5 of this Response and in *Exhibit 4*.

Moreover, the refiling was not done with the purpose to harass the Defendant. As explained above, the State's miscalculations, if any, were innocent, as the State's argument at preliminary hearing was made in good faith and was colorable. As explained in *Dykes*, if the State's mistake was innocent, it cannot be viewed as being done with the intent to harass the Defendant as alleged in the Defendant's Motion.

C. The State did not wthhold evidence

The State did not withhold evidence from the Defendant. The State provided all discovery to the Defendant including the evidence admitted during the Preliminary Hearing prior to it occurring. The State continues to rely on that same evidence. The Defendant does not argue that the State withheld evidence. Rather, Defendant argues that the State "hid the ball" by not making *argument* in regard to every possible legal theory supporting its charges at the Preliminary Hearing. Defendant's complaints in regards to the State's legal *arguments* are not the same as the State withholding actual *evidence*.

D. The State is not refiling a charge after providing no evidence of an essential and clear element of a crime

Here, unlike *Redd*, the court admitted evidence at the Preliminary Hearing sufficient to establish each essential element of the 10 counts of rape and the 1 count of forcible sex abuse. This is particularly true considering that, at the Preliminary Hearing, the court was required to view the evidence in the light most favorable to the State, and to draw all reasonable inferences in the State's favor.

In relation to the dismissed counts of rape, the Rule 1102 statements established more than ten incidents where the Defendant and [redacted] engaged in sexual intercourse. Thus, the primary issue at the preliminary hearing was whether the encounters were consensual. The statements admitted at the hearing included evidence that the encounters were non-consensual, because the Defendant held a position of trust under U.C.A. § 76-5-406(2)(j) and because there was more than a three year age gap and enticement under U.C.A. § 76-5-406(2)(k). The State will address each of those theories below:

a. The State Presented Sufficient Evidence at Preliminary Hearing to Show a Lack of Consent Because the Defendant Held a Special Position of Trust under U.C.A. § 76-5-406(2)(j)

Utah Code lists several "positions of special trust", including babysitters, coaches, teachers, aunts, uncles, grandparents, etc. U.C.A. §§ 76-5-404.1(1)(c)(i)-(xxiii). The code makes clear that this list is not all-inclusive, and that a "special positions of trust" is present with "any individual in a position of authority, other than those individuals listed in subsections (1)(c)(i) through (xxiii), which enables the individual to exercise undue influence over the child." *Id. at* (1)(c)(xxiii).

Here, the Defendant was 10 years older than [redacted] She knew [redacted] from the time he was 6-8 years old. The Defendant was viewed as family, and was regularly in [redacted] home. Both Rule 1102 statements clearly demonstrate the high level of involvement the Defendant had in [redacted] home. [redacted] stated, "my mom trusted [the Defendant] like her own sister." *Ex. 1,* at 15. [redacted] mother stated, "I don't call my own blood relatives that often or see them as often as I saw [the Defendant]." *Ex.t 2*, at 8. [redacted] mother went on to say, "I looked at [the Defendant] as blood! I trusted her with my children..." *Id.* These circumstances pre-dated the sexual relationship between the 26-year-old Defendant and the 16-year-old [redacted]

This evidence was before the court at the Preliminary Hearing and this legal theory was argued by the State. This evidence demonstrates that the Defendant was in a position of authority, other than those individuals listed in subsections (1)(c)(i) through (xxiii), which enabled her to exercise undue influence over [redacted] This is particularly more clear in light of the relaxed preliminary hearing standards. The State maintains that the court failed to view this, and other evidence, in the light most favorable to the State, and failed to draw all reasonable inference in the State's favor when it declined to bind the Defendant over for trial.

b. Evidence Was Also Admitted Showing a Lack of Consent Because There Was a Three-Year Age Gap and Enticement Under U.C.A. § 76-5-406(2)(k).

The State did not include this theory in its closing arguments, but relied on its arguments under the "position of trust" theory to secure a bindover. However, the Rule 1102 statements admitted during the preliminary hearing also demonstrate a lack of consent under U.C.A. § 76-5-406(2)(k), because they (1) establish a more than three year age gap between the 26-year-old Defendant and 16-year-old [redacted] and (2) demonstrate that the Defendant enticed [redacted] to engage

in the sexual relationship.

This evidence was before the court at the Preliminary Hearing. The evidence demonstrates that there was a greater than three-year age gap between the Defendant and [redacted] and that the Defendant enticed [redacted] to engage in the sexual relationship. The State maintains that the Court failed to view this, and other evidence, in the light most favorable to the State and failed to draw all reasonable inference in the State's favor, when it declined to bind the Defendant over for trial.

CONCLUSION

Wherefore, because there is "other good cause" to support the filing of the State's Information in the above styled case under *Brickey*, and because the State is not engaged in any of the prohibited practices set out in *Redd*, the Court should deny the Defendant's Motion to Dismiss.

DATED this 30th day of June, 2022.

/s/ Griffin Hazard
Griffin Hazard
Cache County Attorney's Office

CERTIFICATE OF DELIVERY

I hereby certify that I e-filed a true and correct copy of the Motion with the court as means of notification to:

DATED this 30th day of June, 2022

_/s/ Cherice Moser_____
Cherice Moser
Legal Assistant

Gregory G. Skordas (#3865)
Gabriela Mena (#17087)
Benjamin Gabbert (#17995)
SKORDAS & CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 665-0128
Attorneys for Defendant
gskordas@schhlaw.com
gmena@schhlaw.com
bgabbert@schhlaw.com

IN THE FIRST DISTRICT COURT-CACHE

IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. KYLI JENAE LABRUM, Defendant.	**DEFENDANT'S REPLY TO STATE'S RESPONSE TO MOTION TO DISMISS** Case No. 221100561 Judge Spencer Walsh

Kyli Jenae Labrum, the Defendant herein, by and through the undersigned attorney, Gregory G. Skordas, hereby files this Defendant's Reply to State's Response to Motion to Dismiss. Defendant maintains that the State is engaging in abusive practices as set out by *Brickey* and subsequent cases. Accordingly, Defendant requests that the court deny the States' attempts to once again bindover charges against her.

ARGUMENT

The protection of the due process rights of criminal defendants is critical when determining whether a prosecutor may refile charges. For decades, Utah courts have vigorously ensured that prosecutors present "good cause for refiling" charges. *State v. Brickey*, 714 P.2d

644, 648 (Utah 1986). Indeed, "when potential abusive practices are involved, the presumption is that due process will bar refiling." *State v. Morgan*, 2001 UT 87, ¶ 16; *see also State v. Zahn*, 2008 UT App 56, ¶ 4. Courts have recognized that potentially abusive practices include **but are not limited** to "forum shopping…withholding of crucial evidence by the prosecution in order to surprise the defendant at trial…and [failing to] produce evidence for an essential and clear element of a crime at the preliminary hearing." *State v. Dykes*, 2012 UT App 212, ¶ 7 (internal citations omitted).

In the present case, the prosecution has engaged in what amounts to forum shopping under *Brickey*. The prosecution also has withheld crucial legal theories from the defense. Their refiling also does not fit into the narrow exceptions articulated by either *Dykes* or *Morgan.* Accordingly, the court should bar the refiling of charges due to their violation of Defendant's due process rights.

1. Prosecution Engaged in Forum Shopping–In Front of Different Magistrate

As an initial matter, in Defendant's Motion to Dismiss she stated that "Ms. Labrum does not disagree that the state is not forum shopping." *Defendant's Motion to Dismiss*, at 7. At the time, that was true. However, subsequent developments make it clear that State is engaging in forum shopping. In their Response, the State relies heavily on *Dykes* to be able to get a second attempt to bindover charges against Defendant. However, in the time since dismissing and refiling charges, the State has failed to follow *Dykes*' clear guidance about what forum shopping entails. Accordingly, we request that this court consider Defendant's assertion that the State's practices amount to forum shopping.

Brickey's promise of procedural fairness ensures that prosecutors do not engage in forum shopping. Utah courts have broadly defined forum shopping in cases involving refiling of

charges. *Dykes*, 2012 UT App 212, ¶ 7, *citing Brickey*, 714 P.2d at 647. (Forum shopping involves "the "shuttl[ing of charges] from one magistrate to another simply because a county attorney is not satisfied with the action of the [first] magistrate….") This broad definition of forum shopping provides a necessarily high level of procedural fairness for defendants which a prosecutor must honor when seeking to refile charges. Indeed, *Brickey* requires that prosecutors adhere to this definition. *Id.* ("When a charge is refiled, the prosecutor must, whenever possible, refile the charges before the same magistrate who does not consider the matter de novo….")

There are four judges in the First District Court. Accordingly, in refiling the charges, there was a 3/4 (75%) chance that a new judge would be assigned to the case. And, as the substantial odds suggest, when the prosecutor refiled charges the case was assigned to a new magistrate. Despite their heavy reliance on *Dykes*, the prosecution has made no efforts to adhere to it or *Brickey*'s clear guidance that the refiled charges should be heard by the first magistrate to avoid forum shopping. It was certainly possible for them to ensure that the guidance was adhered to. They could have done so when refiling the charges. They did not. They could have done so at the Initial Appearance. They did not. They could have done so in the ensuing weeks in their subsequent filings. They have not.

There was a substantial likelihood that dismissing and refiling charges would result in a new magistrate. Since the time of the assignment, the prosecution has taken no subsequent actions to ensure that the first magistrate would be assigned to this case. Accordingly, the prosecution has engaged in what amounts to forum shopping under *Brickey* and *Dykes.*

2. <u>Prosecution Had an Intent to Hide the Theory of Coercion Until Trial</u>

Principles of procedural fairness further bar the Prosecution from hiding critical information from the Defense for the purpose of gaining an undue advantage. *State v. Redd*, 2001

UT 113 ¶ 13 (internal citations omitted) ("Fundamental fairness…the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant…[by] withholding evidence.") Withholding evidence also allows a prosecutor to impermissibly "save surprise evidence for trial." *State v. Rogers*, 2006 UT 85, ¶ 15. Due to the time-consuming process of preparing an adequate defense for trial, withholding evidence is particularly egregious because it "might impair the defense" by wasting the time and resources of Defense counsel. *Dykes,* 2012 UT App 212, ¶ 11.

Utah Courts have not yet addressed the issue of whether withholding a key legal theory is the same as withholding evidence. However, courts around the country have established precisely that. Accordingly, considering *Brickey*'s purpose of protecting fundamental fairness, this court should consider the prosecution's withholding a legal theory to be the same as withholding evidence. [1]

In Indiana, the Court of Appeals addressed a Plaintiff seeking to bring a case again, citing a new legal theory. The Court firmly rejected that claim, stating that: "Allowing…claims to continue would be allowing…the possibility of endless litigation–so long as [they] withheld some piece of evidence **or** some legal theory…." *Hilliard v. Jacobs*, 957 N.E.2d 1043, 1047-48 (Ind. Ct. App. 2011) (emphasis added).

In California, the 6th District Court of Appeals favorably cited a district court judge who rejected a plaintiff seeking to amend a complaint. The plaintiff failed to provide evidence and failed to provide a key legal theory. The "court observed that a "very substantial part of the argument presented this morning is based on a legal theory that's nowhere in the opposition.

[1] Utah Courts have consistently referred to caselaw from other jurisdictions in explaining and applying Utah law. This court need not look any further than *Brickey* itself, which relied on case law or statutes from 8 states (Oklahoma, Colorado, Arizona, Michigan, Idaho, Wisconsin, California, and Wyoming) and multiple Federal Circuit Courts of Appeal. *Brickey*, 714 P.2d at 646-647.

Defendants haven't heard it before. They haven't had a chance to think about it, to reflect on the facts on which the plaintiffs are relying, many of which were not in the record until today, and the legal authorities that the plaintiffs are presenting now for the first time. So that is not appropriate." *Choi v. Sagemark Consulting,* 18 Cal. App. 5th 308, 321 (2017) (emphasis added).

The rationale enumerated in *Brickey* for prohibitions on withholding evidence similarly applies to withholding key legal theories from the defense. Withholding key legal theories impairs the defense by wasting the time and resource of defense counsel in preparing to address other legal theories. It also allows a prosecutor to gain an unfair advantage by surprising the defense with an entirely new legal theory, especially after defense counsel has exhaustively prepared for another theory. The fundamental fairness required under *Brickey* and its progeny, as well as the case law from other state courts, dictates that prosecutors be barred from introducing entirely new legal theories.

In the present case, the State failed to disclose their theory of coercion at any point in the initial attempts to bindover charges against Defendant. Prior to the preliminary hearing the State only advanced the theory of non-consent based on a position of trust. Even during preliminary negotiations and discussions about the case the State had only advanced the theory of non-consent based on a position of trust. At no time prior to the preliminary hearing did the State discuss enticement as an alternate theory. Rather, the first mention of enticement as a theory was presented in the State's Motion to Reconsider Bindover. At the preliminary hearing, the State did not mention the alternative theory—which the State acknowledges. State's Motion to Reconsider Bindover at 5 (The State acknowledges that the prosecutor at the preliminary hearing did not "advance the state's *theory* of non-consent…." (emphasis added).

The State asserts that it is "illogical" to require that the state be required to present every "potential argument" at the preliminary hearing. *State's Response,* at 12. However, the State misrepresents the position of the Defendant. The State need not assert every potential legal *argument* in a preliminary hearing; however, they should be obligated to present the legal *theory* upon which they seek to prosecute a defendant. As noted above, failing to present a legal theory has many more similarities to withholding evidence than simply failing to present potential argument.

Understanding the State's theory of the case is essential to preparing a legal defense. While it is not the State's responsibility to spell out its case to the defense team, it is the State's responsibility to provide sufficient information for a defendant to properly prepare a defense. Defendant's defense was thus based solely on defeating the allegation that Defendant was in a position of trust over the alleged victim in the case. Had the case been boundover there is reason to believe that the State would have continued to exclusively advance the theory of non-consent based on a position of trust. As such, Defendant would not have had reason to change course and would not have prepared for what would result in an ambush by the State at trial. While it is not specifically evidence which was hidden by the State it is something equally important.

Accordingly, the State's efforts amounted to withholding evidence in direct violation of *Brickey*. By intentionally engaging in conduct which hindered the ability of Ms. Labrum to mount a defense, the State denied constitutional guarantees of procedural fairness. This situation is precisely what *Brickey* provides a remedy for: quashing the attempt of a prosecutor to unlawfully bring charges against a defendant after they were previously stopped from doing so.

3. Despite States' Reliance on *Dykes*, They Differ Heavily on Their Facts

In their response, the State relies heavily on Dykes. The State rightly articulated the facts and holding of *Dykes*; however, the analysis was incomplete. In *Dykes*, a month passed between the filing of the initial charges and the refiling of charges. During that time, the state conducted a substantial investigation to present new evidence regarding the value of the stolen vehicle and then presented that approximate figure to the court when refiling charges. *Dykes*, 2012 UT App., ¶ 4. The Court permitted that evidence because it was made in good faith and had a colorable basis. *Dykes*, 2012 UT App., ¶ 11.

Dykes' application is not universal. Its facts indicate that an exception to the principles of *Brickey* require a prosecutor to clear several hurdles. First, the prosecutors in *Dykes* clearly acknowledged that they had made a mistake in the law. Here, the State explicitly states that they stand by their previous argument. *State's Response* at 13. *Dykes* is also distinguished by the fact that the prosecutors had an exceptionally good basis for their previous argument. The court acknowledged 7 different statutory provisions which supported the State's definition to substantiate a claim of good faith. Here, the State's own argument simply rehashes the same evidence found to be insufficient by the previous magistrate. In *Dykes*, an investigation for relevant, new evidence commenced and was then presented to the same magistrate for bindover consideration. Here, there was no clear investigation nor presentation of new evidence in any of the State's filings. Further, the State is presenting the same facts to a different magistrate. As such, *Dykes* can be distinguished; or at the very least, it would be appropriate to say that the State did not comply with the rules as set out by *Dykes*.

4. <u>The Exception Provided through *Morgan* Is Not Operative in the Present Case</u>

In *State v. Morgan*, the prosecutor had two officers prepared and sworn in to testify for bindover purposes. *State v. Morgan*, 2001 UT 87, ¶ 2-4. Due to an innocent miscalculation that the State had met its burden for bindover, only one of the officers testified. *Id.* Following the testimony of the first officer, the court stated the State had not met its burden for one of the charges brought and declined to bindover those charges. *Id.* Following the refusal to bindover, the prosecution attempted to reopen bindover with the second officer. *Id. Morgan* held that was permissible and not a violation of procedural fairness under *Brickey*. *Id.* ¶ 25.

This case is distinguished from *Morgan* in that the state did not move with immediacy to reopen bindover. Instead, they immediately moved to amend the charges—a motion which was granted—then tried to reverse the amendment by filing a highly disfavored motion to reconsider. They then took over three months between dismissal and refiling. Both *Morgan* and this case involve a court failing to bindover charges and the State seeking to reopen bindover. That is where the similarities end.

The State attempts to present an argument that the delay in taking action on the case was based on different prosecutors being involved in the case. However, the State fails to account for the actuality that the State of Utah is the plaintiff in this case, and the Cache County Attorney represents the plaintiff. The State provides facts that appear to justify the lack of action by explaining that the assigned prosecutor was in trial and thus unable to be at the preliminary hearing or take any action until three weeks later. Further, the State seems to be distancing itself from the decision to amend the charges by stating that the assigned prosecutor was not at the preliminary hearing, and the prosecutor who amended the charges is no longer with the office. It is simply not relevant that the assigned prosecutor would not have asked to amend the charges

because the agent of the prosecuting office took that action. The State of Utah, by and through its counsel, moved to amend the charges. As such, the decision to amend the charges is attributed to the County Attorney's Office as a whole and cannot be ignored. Accordingly, this court should reject any argument by the State that *Morgan* necessitates the court permitting a rehearing to bindover charges against Defendant.

CONCLUSION:

Protecting the due process rights of defendants by barring unfair conduct by prosecutors is the central purpose of *Brickey* and subsequent cases. The case before this Court presents the exact situation which *Brickey* seeks to present. The State seeks a second bite at the proverbial bindover apple, even though permitting the request would run afoul of decades of guidance by Utah Courts. The State has engaged in what amounts to forum shopping by engaging in conduct which causes this case to be brought before a different magistrate. The State also withheld a key legal theory, which has the same effect of withholding evidence from Defense. Further, the State relies heavily on *Dykes* in their attempt to get the court to give them another chance to bindover charges. Finally, the State also refers to *Morgan* to get this court to reconsider bindover, but the facts of the present case are radically different from those in *Morgan* and the State cannot simply ignore that it immediately requested that the charges be amended and did not ask the Court to reopen evidence as the prosecutor in *Morgan* did..

Taken in whole, the State's argument to have a second attempt at bindover fails. Their efforts have created significant issues of procedural fairness, and the cases on which they rely are radically different. This court should find that there was no good cause for refiling charges and

dismiss this case.

DATED this 8th day of July, 2022.

SKORDAS & CASTON, LLC

/s/ Gregory G. Skordas _____
Gregory G. Skordas

CERTIFICATE OF SERVICE

I hereby certify that on July 08, 2022, I electronically filed a true and correct copy of the foregoing REQUEST FOR DISCOVERY, with the Clerk of the Court using ECF system, which sent notification of such filing to the following:

Griffin Hazard
Cache County Attorney's Office
199 North Main Street
Logan, UT 84321

*/s/ Brooke Sloan - Legal Assistant*_____
SKORDAS & CASTON, LLC

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KYLI JENAE LABRUM, Defendant.	Case No. 221100561 FS

Oral Arguments
Electronically Recorded on
August 2, 2022

BEFORE: THE HONORABLE ANGELA FONNESBECK
Second District Court Judge

APPEARANCES

For the State:
Griffin Hazard
CACHE COUNTY ATTORNEY'S OFFICE
199 North Main Street
Logan, Utah 84321
Telephone: (435)755-1869

For the Defendant:
Gregory Skordas
SKORDAS & CASTON
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801)531-7441

Transcribed by: Wendy Haws, CCT

1142 West 1810 South
Orem, Utah 84058
Telephone: (385)384-4947

P R O C E E D I N G S

(Electronically recorded on August 2, 2022)

THE COURT: Case 221100561. We are set today for oral arguments on a motion to dismiss that was filed back on June 2nd. I have had opportunity to review the motion to dismiss the State's response, and then the defendant's reply. So I've had a chance to review each of those documents in anticipation of the hearing today. So with that, Mr. Skordas, why don't I turn the time over to you for your arguments today, sir.

MR. SKORDAS: Thank you, your Honor, and I think both Griffin and I are not the least bit surprised that you read everything and that you are prepared for the hearing today, and we both appreciate that. It's also fortuitous, your Honor, that you were the Judge at the preliminary hearing.

One thing that's missing from the record in this case, and it's irretrievable, is the dialogue that occurred, and it wasn't a meeting that was supposed to be recorded in any way, and in your chambers after the State's presentation of the case, because I do take issue –- well, with a lot of what the State's done, but certainly their characterization of the prosecutor and his handling of the case.

I don't think it's a stretch to say, and maybe it would even be judicial notice to say that the prosecutor that handled this case was a seasoned veteran, probably 35 years as

a –– as an attorney who has a stellar reputation and a stellar record. He went back in chambers and said I would have not filed this case –- I would have never filed this case, after you had expressed some concern about the (inaudible).

It was the State, your Honor, that then took the position that well, we should salvage something here, we should get something, and made the amendments. They're sort of appealing their own decision based in part on you indicating some discomfort with the evidence that had been presented at that time. But the State conceded to all of that concern, and indicated that they –- that at least in that prosecutor's opinion on that day, having read the 1102's that he presented, that there wasn't a case.

So what does the State do? Well, in our estimation, your Honor, they do everything wrong. There is law that allows for a prosecution to sort of have a do over, and there are certain circumstances which I'm sure you're very well aware, there's (inaudible) in the case law that allow that, but none of those occurred here. None of those are in existence here.

The State didn't have evidence that they were just unavailable at the time, that they didn't have availability. They had all that, and they conceded that. They somehow think well, we've now got this new theory that we should have presented, but that's not a fact that wasn't available to them at the time.

This sort of well, just kidding. We weren't really trying this on a –- on a position of trust, but it's based on a coercion theory, but that wasn't there –- that was –- that was known to them, and I think they concede that at the time. They just chose not to do that. I don't know whether they were going to surprise us at trial with that theory or what, but that wasn't part of their case.

They –- and they refiled –- the case gets tossed, so they re-file it, and I mean, again, it's another thing that you could probably take judicial notice of, but there's a one in four chance that they're going to get the same Judge, but they have to get the same Judge. That's clear.

So they forum shop. Maybe they're going to argue today that that's been cured, but it wasn't cured. Not for one minute have they ever conceded that. It wasn't until Judge Walsh said you guys, this isn't in the right place. You need to go back to Judge Fonnesbeck.

It wasn't the State's decision. They didn't take the high road. They didn't follow the law. They did exactly what they were precluded from doing under these circumstances, and re-filed it knowing, as we all do, that there was a 75 percent chance they were going to get a freebie here in front of a different Judge.

So I won't bore you with the details that are in our petition because you've clearly read it. I think that they're

the three cases that –- the Morgan case, the Redd case and the Dykes case, as well as the Brickey case that are cited by both sides, and they speak to what they are, but I –- the law seems to be fairly clear that the way the State has done this is not appropriate, and the remedy for that is for this Court to dismiss it.

They had their chance. They had the ability to proceed with the charges that they themselves had asked this Court to amend the Information to, and instead of doing that they –- they backtracked on their own decision, dismissed the case and refiled it under a theory that well, we get a freebie, and that's just not supported by the law, your Honor.

THE COURT: Counsel, thank you. Mr. Hazard.

MR. HAZARD: Thank you, your Honor. I'm going to respond to the last comments first and then I'll work my way back to the beginning here, but in regards to forum shopping it's interesting because defendant's initial motion to dismiss actually acknowledges that the State is not attempting to forum shop. The State referred to the defendant's motion to dismiss in their response, and then defendant's reply they're not arguing that we were.

Also, interestingly, the defendant during out original proceedings and the procedural –- I don't know if we want to call it "chaos" or whatever ensued after the preliminary hearing, it was the defendant's argument made more than once that

the State's remedy under those circumstances procedurally was in fact to dismiss and re-file; and of course defense Counsel knows, as we all do, that there was a chance that that would get assigned to any other Judge.

I think it's clear throughout the course of this process that the State has done everything in their power to keep that case alive and well in its original Court, and the only reason that the State dismissed and refiled this case is because we struck out when we tried to make calculated efforts to speed the process up in a way that maybe wasn't procedurally the best way to go.

Ultimately what happened, Judge, to put this in a nutshell, is the State's case went from being eleven counts that involved ten first-degree felonies and a second down to one second-degree felony. Even the State's amended counts down to third-degree felonies were ultimately dismissed, which left the State in a position to pursue one second-degree felony, or pursuant to Rule 7(b), dismiss and re-file the case, and make the arguments that we're going to be making here today.

That –- that's what the State ultimately chose to do, is dismiss and re-file. Now, in order to do that, Rule 7(b) allows the State to do that, but Brickey, the Brickey case puts some hurdles in the State's way to make sure that there's not any malicious prosecution that's taking place.

Those hurdles are that the State has to have either

new evidence or evidence that was previously unavailable that has since become available, or the State has to have other good cause on various different grounds. I don't know if the Court has had an opportunity to review the 22-page motion filed by the State and the numerous exhibits that were attached to that motion.

But ultimately we are arguing that in the Morgan case, the State's innocent miscalculation as to the facts was acknowledged as other good cause to justify re-filing the case. In the Dykes case the Court expanded that to include both mistakes of fact and mistakes of law.

Now, in the Morgan case the State put on one witness, thinking that that witness would be able to present enough evidence to get a bind over. Ultimately the Court indicated that they didn't feel that that witness was actually qualified to establish certain facts that were relevant to the bind over decision and didn't bind over, and the State moved to reopen the preliminary hearing in order to have another witness come and testify that was ready and available at the time, and the Court declined to do that.

In the –- in the Dykes' case the State –- and I don't know if the Court went through and read the entire cases. The State included a quick synopsis of what happened in that case, but essentially an ATV was stolen. The State argued that that was a motor vehicle. Technically under the statute it wasn't.

The State believed that it was. They made arguments that it was.

Under analysis of the Federal rules that gets really convoluted and sticky, but that's where the State hung their hat. The State did not put on any evidence as to the value of that vehicle being over $5000, and ultimately the Judge only bound over on a Class B misdemeanor, and the State dismissed and re-filed.

That triggered Brickey, and the Court found that even though the State presented zero evidence at the preliminary hearing as to the value of the ATV, and made zero argument at the preliminary hearing regarding that theory, that the State's innocence calculation as to the state of the law was other good cause.

In this case yes, the State does believe that –- and it is a little bit distinguishable from both of those cases, because the State believes we did put on sufficient evidence for a bind over, and obviously the Court disagreed with that, which is fine.

But the State had a good faith belief based on the information contained in the 1102 statements, that the theory that was presented by a prosecutor, and the State, I –- I, Griffin Hazard, prosecutor –- I have no intention of throwing Prosecutor Harms under the bus. I appreciate Prosecutor Harms being willing to step up and cover that preliminary hearing for

me on a day that was a difficult day for me to be doing a prelim like that.

In hindsight I wish that I could have undone that because I think that I was vastly more familiar with the case than Mr. Harms was, and I think I would have made different arguments, and I don't know how that would have affected things at the end of the day. But I wholeheartedly agree with defense Counsel that Prosecutor Harms is a very seasoned attorney, much more seasoned than I am. He just may have not been as familiar with this case as –- as I was, having been the assigned prosecutor to it.

Regardless, the argument that was made by the State was –- at preliminary hearing was that there was a position of trust. Based on the comments, and I won't –- I won't try and cite them word-for-word here because I know the Court has read it, but those statements both from the alleged victim as well as the alleged victim's mother go through and indicate that numerous examples of how the defendant was frequently in their home, frequently in their home, interacting with the entire family.

I think that the original friendship, the underlying friendship was with Mother, and I think that she spent a considerable amount of time with daughter, but it makes it very apparent that she was frequently in the home with the whole family, including the alleged victim, and that she had been

from the time that the alleged victim was six to eight years old all the way up until he was sixteen.

The statements indicate that she was, I believe, closer than a lot of blood relatives were, and that she was in the home more frequently than they were, and that she was trusted with the children. I mean, the –- and I can also (inaudible) knowledge that that was –- those were lengthy 1102 statements, and that information was contained in a lot of handwritten texts. But that information was presented to the Court, and the State relied on that information to make an argument that there was a position of trust there.

I do believe that that was a good faith argument, and I believe it was also colorable, particularly when considering the purpose of a preliminary hearing, and that all evidence at a preliminary hearing is to be taken in a light most favorable to the State, all reasonable inferences are to be drawn in the State's favor, and that the Court isn't really to consider alternative arguments even if they're good arguments made by defense. That's not the purpose of a preliminary hearing.

It does kind of seem like that is a little bit of what happened at that preliminary hearing, is that there were –- there were alternative arguments, perhaps alternative good arguments, but the preliminary hearing isn't the time to weigh those arguments. If in the event of a tie, the tie goes to the State.

THE COURT: So, Mr. Hazard, let me ask this.

MR. HAZARD: Sure.

THE COURT: All of that being true, okay?

MR. HAZARD: Right.

THE COURT: Let's say I agree with everything that you've just said, help me understand how we're here under some mistake in fact or mistake of law --

MR. HAZARD: Sure.

THE COURT: -- that gives you the opportunity to then re-file under Dykes and Morgan and Brickey.

MR. HAZARD: Sure. So under Morgan, similar -- similar to actually Dykes with the ATV, the State made one argument and not another, okay? The difference, I guess, between Dykes and Morgan is the -- I think the State put on evidence of both of those theories. We just only argued one, if that makes sense.

The State -- the evidence that the State intends to rely on even now, it's not new evidence. That's the kind of tricky part with Brickey, but I think that actually opens the door into other good cause, or other good cause arguments for the Court to entertain this procedural route to re-file.

This case is a stronger case for good cause than Dykes, in that the State presented evidence of both. The State only made argument in support of one of their legal theories, and that argument was -- failed in that preliminary hearing; but that evidence was still in front of the Court.

What the –- what the State then did was in the interest of trying to preserve some judicial economy as opposed to dismissing and re-filing, or going through an appeals process, we motioned the Court to reconsider.

Now, looking back, again, procedurally, I won't do that again, but that was –- I'm going to argue that was a good faith attempt on the State's part to try and save everybody the time and the cost of an appeal, or the –- the inconvenience of dismissing and re-filing and going through the process that we're going through now from that point forward, because the State did believe that that evidence was in front of the Court and was hopeful we could just reconsider it.

I think, you know, procedurally that got –- that got shot down, and that's –- that's fine. Procedurally I don't think I would do that again. Lesson learned, but I don't think that it was made in –- that it was an effort made in bad faith.

So the question then becomes did we engage in any of the practices that were pointed out in Redd, the Redd case, where we were forum shopping or where we are attempting to re-file improvident charges or meritless charges, or did we fail to put on any evidence in support of one of the crucial elements of the charges, and the State's response to that would be no, we're not.

It's the defendant's burden to show that we're doing that. I don't think they can show that we're forum shopping,

and I've already touched on that. I don't think they can show that they're meritless charges or that they're improvident. Again, the State's argument is that those 1102 statements taken in a light most favorable to the State do justify a bind over.

They show that the defendant, in the light most favorable to the State, held the position where she was as an adult, as a 26 year old, able to exercise undue influence over a 16-year-old child that she interacted with regularly. In fact, this all started because she attended one of his football games to support him, which was something that was seemingly a regular thing to do.

In the alternative there is substantial evidence to suggest that she was 26, that the alleged victim was 16 at the time. That's a ten-year age difference. The State has a burden to show that there's a three-year age difference, and that she enticed the alleged victim to engage in this relationship.

The State has pointed out numerous, numerous instances that really walk the Court through how this relationship went from her being a family friend and being in the home all the time to her telling the alleged victim how attracted she was to him, and if she wasn't married to her husband, that she would want to be married to him. That changes the relationship. That encourages a young 16-year-old naive kid to do things that he wouldn't otherwise do.

Later when she sends a text saying, “I’m so sorry if that made you feel awkward,” and he responds and says, “Haha, no. You were just joking, right?” and she says, “Well, is it weird that I find you so attractive,” even then, as opposed to just, you know, letting –- letting that go as a joke, she actually doubles down.

There’s ongoing conversation. She picks him up in the car. She’s the one that tells him, “If you want to kiss me, you’ve got to do it now because I’ve got to go home,” and then he leans over halfway and she says, “If you’re going to do this, you’ve got to come all the way.” She’s the one that is coaxing him. She’s the one that is giving him permission. She’s the one that’s telling him to take the next step, and he follows. He follows suit, but that is certainly enticement, particularly when taken in the light most favorable to the State.

So the State does believe that there’s good cause here to reopen, and the State does believe that these –- that the State is not forum shopping. The State is not filing meritless charges. The State didn’t fail to present evidence regarding a crucial element of the crimes, and we haven’t done anything that would violate any of the –- the subcategories in Redd that would prohibit the State from pursuing this as the remedy.

In fact, defense Counsel multiple times during our earlier procedural steps indicated that this was in fact the

proper procedural remedy for the State. So it seems a little disingenuous now for them to stand up and say we're trying to forum shop, because they forced us to get to this point.

THE COURT: Okay, let me ask you one more question on kind of a –- let's call it a really narrow issue. So Brickey says under these circumstances you can re-file. Morgan then talks about innocent miscalculations of the facts. Dykes then extends that to innocent miscalculations of the law; and ultimately you then bring it back to Brickey that says –- and I just want to read this language because I don't want to miss something.

It talks about the purpose particularly in relation to maybe not presented legal theories. It talks about withholding of evidence, and I hear you saying that you presented facts that would support this alternate theory; but I'm interested in hearing about whether this alternate legal theory was somehow withheld or not otherwise previously presented to the defense such that they wouldn't have been able to anticipate or argue or be prepared to argue in relation to that –-

MR. HAZARD: Yeah.

THE COURT: –- that –- I guess that issue.

MR. HAZARD: Sure. In response to that I would say I –- I feel like –- I'm not making this as an affirmative representation. It's my recollection that I spoke about both of these theories with defense Counsel. Now, I don't know if

that was with Mr. Demler, who was previously assigned this case, or with Mr. Skordas. I believe that I have discussed this those things with both of them, how we saw this case and the directions that we were going, but I can't say for sure so I won't go so far as to say that that happened for sure.

That being said, I –- my argument would be defense Counsel is trained in the law. They have the Utah State Code, the same as the State. They are familiar with the charges or can look up what the charges are for the State. Not just for the State, but in the code, and they can see what the various theories are.

I think they can anticipate–- and I don't want to say that it's their job to anticipate every –- every theory that the State has, but I also I guess would argue that the State doesn't, in the context of legal theories, have to disclose their entire strategy to defense Counsel.

An important distinction that the State actually put in their motion, and it's on page –- where is this, 12 –- anyway, I won't try and find it right now, but an important distinction is fundamental fairness on page 14, and the State talks about how the State –- I'll just read this.

"The State is not required to make any argument at all at preliminary hearing, and frequently waives their right to do so. In fact, fundamental fairness should be understood in the context of the purposes of the preliminary hearing."

The reason I bring this up is because the Court went back to Brickey, but in fact I think that we need to look at the state of the law now and not what the state of the law was at the time that Brickey went into place, because when Brickey was decided, discovery was the central purpose of the preliminary hearings, and 1994 we have amendments to the Utah Constitution that changed that.

So I don't think that we're looking at apples to apples anymore. So basically the State's argument here is that post 1994 amendments and modifications to what the purpose of a preliminary hearing was, the State is no longer required to put on all of their evidence at a preliminary hearing. A preliminary hearing is not a discovery tool, nor is the State required to make every potential legal argument that they have at preliminary hearing.

As long as the State makes, again, an innocent –- or I shouldn't say innocent. As long as they make a good faith argument, and that argument is colorable, that is what the Court has to find as an innocent mistake, whether it's as to the facts or the law. That's where we are today. That's what the Court looks at today.

Did the Court –- did the State make a good faith and colorable argument, whether or not they won, and now at this point is their attempt to re-file an attempt to forum shop, or an attempt to file meritless charges, or any of the other two

or three things set out in Redd. I think that it's clear in this case that that's not what's going on here.

THE COURT: Thank you very much, Mr. Hazard.

Ms. Skordas, I asked a lot of questions there, and Mr. Hazard spoke, so I suspect you likely want to respond to some of those matters.

MR. SKORDAS: Yeah, and I'll be –- I'll be brief, your Honor. I appreciate your understanding of the law probably better than Griffin and I do. It's interesting that we –- that they continue to talk about mistake of fact and mistake of law, because the State's never acknowledged a mistake of anything. They've never said, "We got it wrong."

The State, if you look at Dykes, fell on their sword. We didn't realize the problem with it being a motor vehicle, and we got that wrong. They didn't get anything wrong, if you ask them. They outlined it perfectly. So they're not saying there was a mistake of fact.

You look at –- you look at –- excuse me –- Morgan, an innocent miscalculation. The State put on one witness. They were wrong. They're like oops, and the Judge says well, you –- and they said well, can reopen it? They didn't try to reopen. They didn't try to establish any new evidence. They didn't take any invitation from the Court or anyone else to fix their problem. They didn't do anything of the sort.

So it wasn't like a miscalculation as to the law.

They don’t acknowledge that today, or a miscalculation as to the facts. They don’t acknowledge that today. They’re saying we got it all right. We did it all right the first time. So that just –- that’s –- so for them to argue these cases is just wrong, because that’s not what happened in this case. That’s not what they did. They’ve never once said, “We did something wrong.” They blame everyone else.

I still –- I still need to –- I mean, I still need to talk about Mr. Harms because he had the opportunity to reopen. He had the opportunity to say time out, let me get Griffin here. He had the opportunity to say well, we miscalculate, but he didn’t. He said, “We got this wrong. We shouldn’t have filed this case.”

Judge, I agree with you he said we shouldn’t do this; and instead of the State coming and saying well, wait a minute, give us –- give us a chance to put on some more evidence, they never did that. They just said we all got it wrong, but that’s not what –- that’s not what these cases stand for.

I mean, there is some –- there is some good faith, but they haven’t argued good faith. They just argued that we all got it wrong. That’s not a good faith mistake on anybody’s part except their own, which they refuse to own.

In terms of the forum shopping, I acknowledge on our initial motion we didn’t argue that. In fact, we said there wasn’t; but they clearly have known that they –- that there was

a chance they were going to get a different Judge, and when we filed our reply brief we said hey, you guys, you should get in front of the same Judge that heard this, that's what the law is, they didn't agree. They didn't stipulate. They didn't say oops. They've never done that.

In the history of this case, they have done nothing wrong, not a –- not a darn thing. So I don't know how we cure that when they say, "We got it all right the first time," because they didn't. They're not coming here today saying well, give us this chance or give us this or –- they're just saying you –- well, everybody got it wrong but us.

That's not what these cases stand for. Innocent mistake, a mistake of law, mistake of fact, we didn't put on our case, we didn't understand the theory the way we should have. Then –- and then they come in and say well, oh, by the way, we like 100 percent on position of trust, but now we're going to say there was a coercion. This is a new theory that we've never disclosed.

I'll take Griffin 100 percent at his word, but I will tell you we have never had a discussion about that theory until the State's re-filing, and that put us at a terrible disadvantage, your Honor, and that was unfair to the defense.

THE COURT: Thank you.

MR. SKORDAS: Thank you.

THE COURT: Counsel, give me just one minute, if you

want. I want to take a brief recess and I'll be right back.

(Recess taken)

THE COURT: Counsel, I apologize for just taking that quick break. Mr. Hazard, did you have any final comments?

MR. HAZARD: You know what, I always have comments, but I'll submit. This case has gone on long enough. I'll submit.

THE COURT: I mean, such is the nature of our jobs. I think we all have another comment to be made, certainly. So, Counsel, let me just say a couple of things here. First, there is nothing before the Court today that makes me think that the State is forum shopping for Judges, and certainly it would have been a preferable course of actions if when the re-filed matter got assigned to Judge Walsh, the preferable and perhaps best course of action would have been for everyone to immediately raise it to the Court's attention so it could properly be re-assigned.

Now, the sad reality of the system is as long as the defendant's name is identical, that case by virtue of the e-filing system, is quote, "required" to assign it to the same Judge. In this case I cannot figure out why on earth that did not happen. Sometimes I wish it wouldn't happen, but that is how the system is designed to work.

I had –- the first thing I did when Judge Walsh recused himself, was go in to look to see how the names might

be different. I don't know if when it was originally put into the system there was a misspelling. I don't know, but it should have been assigned to me from the outset without ever going to Judge Walsh.

So I don't think that there was anything nefarious on the part of the State there in re-filing. Certainly this is an indication of how we cannot always rely on these automated systems that we have that are to help us cure these defects from the outset. So that's, I guess, statement No. 1.

Statement No. 2 I would make is this. I don't think anyone's intent is to disparage Mr. Harms. I certainly do believe based on the arguments I've heard at both the time of the motion to reconsider in a prior case as well as the pleadigs here, that there was perhaps a distinct difference of opinion between attorneys in the same office about how this case should proceed.

That may –- I don't know that it was the driving factor, but it may have influenced how this case was handled post presentation of evidence at the time of the preliminary hearing. But I don't believe anyone's intent is truly to disparage Mr. Harms, who I think we can all agree is a fine attorney.

That being said –- and I know you are all looking for an immediate answer from me –- I feel like I need to take a little closer look at what the case law suggests happens under

that Brickey withholding standard post the 1994 amendments that changed the way prelims are used for discovery purpose versus now where there are procedural mechanism to advance a case.

I need to take just a little closer look at that, because for me, in my mind's eye, just listening to everything we've heard today, there is a real question about whether there was a withholding of this legal theory or the facts in support of that legal theory.

I recognize some statements have been made here today, but before I feel like I can make a good determination on that issue I really do need to –- to dig just a little deeper into this case law. I don't know that Dykes will be particularly instructive, or maybe even Morgan or Redd, but I do want to take just one closer look at those before I make a decision.

Now, having said all of that, I also understand that this has been a long process, and it is not my intent today to delay this any further, but I do need to take it under advisement. Counsel, my thought process is this. I always think it will be faster just to put you back on my calendar than it is to write a written decision, but because of the nature of this case I think you actually might all prefer that I issue a written memorandum decision. So let me ask, do you want to come ack and have me announce my decision from the bench or do you want me to put something in writing?

MR. HAZARD: I have –-

THE COURT: I know that's a bit tricky, and I know what we're really saying there is do you want something in writing for an appeal, and I recognize that.

MR. SKORDAS: We're happy either way. I don't mind coming back.

MR. HAZARD: I'm happy either way. I mean, I --

THE COURT: I mean, at some point something's going to get reduced to writing.

MR. HAZARD: It would be -- it would be good to just get it in writing, I guess.

THE COURT: Okay, so let's do this. Let me put this case back on the calendar for a status hearing in just a couple of weeks. There is a chance that I might issue a written memorandum decision for that time that may determine whether we do or do not need a status hearing, but let's go ahead and put something on the calendar. I think we all work to deadline, so that will keep me on my toes as well, and hopefully prevent us from delaying much further in this case.

Counsel, my thought is is we just put this on one of the Monday afternoon regular law and motion calendars. Now, Mr. Skordas, I have been doing those in person.

MR. SKORDAS: That's fine.

THE COURT: If that's okay, let's just keep that in mind as we get a date. We could put it back on for either August 22nd or August 29th.

MR. SKORDAS: I –- they’re both fine. The 22nd is marginally better if it’s going to be at the same time.

THE COURT: So, yeah, so I’m setting it either 1:30 or 3 o’clock that day. So if August 22nd at 3 o’clock tends to be best for your calendar –-

MR. SKORDAS: Both of those dates are fine.

THE COURT: Okay, Mr. Hazard?

MR. SKORDAS: If you need more time we can do the 29th.

MR. HAZARD: Either one’s fine with me.

THE COURT: Let’s go ahead and put it on the 22nd at 3 o’clock. I’m hopeful that it won’t take me too long to just read those cases again and look at it from a little different angle. Then, like I said, you may actually see something in writing from me before then, but if not, let’s go ahead and we’ll just go back on the calendar. We’ll set it as a status hearing for August 22nd at 3 o’clock. Okay, very good, Counsel. Thank you for your briefing. Thank you for your time and argument today, and we’ll see you in a few weeks.

MR. SKORDAS: Thank you, your Honor.

THE COURT: Thank you very much, everybody.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Kym Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 12th day of October 2022.

My commission expires:
January 12, 2024

Wendy Kym Haws, CCT
NOTARY PUBLIC
Residing in Utah County

Signed:
Beverly Lowe, CCR/CCT

WENDY KYM HAWS
NOTARY PUBLIC • STATE OF UTAH
COMMISSION# 709810
COMM. EXP. 01-12-2024

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THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. KYLI JENAE LABRUM, Defendant.	**MEMORADUM DECISION and ORDER ON MOTION TO DISMISS** Case No. 221100561 Judge Angela F. Fonnesbeck

In May 2021 State charged Kyli Labrum[1] with ten counts of first-degree felony Rape and one count of second-degree felony Forcible Sexual Abuse[2]. Following a preliminary hearing State dismissed its case without prejudice only to refile this case in May 2022. Labrum moves to dismiss arguing her due process rights have been violated. Under Utah Law to avoid implicating Labrum's due process rights State must show (1) new or previously unavailable evidence, or (2) other good cause – an innocent miscalculation of fact or mistake of law. In this case, State is barred from refiling and Labrum's Motion to Dismiss is Granted.[3]

PROCEDURAL SUMMARY

1. On May 6, 2021, in First Case, State filed an Information against Labrum alleging ten counts of Rape, a first-degree felony, in violation of Utah Code Ann. §76-5-402, and one count of Forcible Sexual Abuse, a second-degree felony, in violation of Utah Code Ann. §76-5-404.

2. A preliminary hearing was held in First Case on October 19, 2021. After evidence, State argued that as a matter of law Alleged Victim could not have consented to the sexual activity

[1] Hereinafter "Labrum" or "Defendant"
[2] State of Utah v. Kyle Jenae Labrum, case no. 211100567. Referred to throughout as First Case.
[3] The Court reviewed Labrum's Motion to Dismiss filed June 2, 2022, State's Response filed June 30, 2022, and Labrum's Reply filed July 8, 2022. The Court also held oral argument on August 2, 2022 and reviewed applicable legal authorities.

because Labrum held a position of special trust and thus should be bound over on each of the Counts alleged. State directed the Court to various 1102 Statements and emphasized that it provided at least some evidence of a relationship between Labrum and Alleged Victim's family, including a babysitting relationship to Alleged Victim's younger siblings. Labrum argued that State had not met its burden of showing that the position of special trust existed. Labrum pointed out that no evidence had been presented in the 1102s which established anything more than two people who were attracted to one another.

3. After hearing the evidence, the Court declined to bind over Labrum on the ten counts of Rape. The Court reasoned that although there was evidence of a close relationship between Labrum and Alleged Victim's Family, primarily Alleged Victim's Mother, that relationship did not in and of itself create a position of special trust between Labrum and Alleged Victim, and thus State had not presented probable cause sufficient to support a bindover on the first-degree felony counts. The Court did bind the Defendant over on one count of Forcible Sexual Abuse.

4. After the Court declined to bind over Labrum State moved to amend the charges to Unlawful Sexual Activity with a 16- or 17-year-old, a violation of U.C.A. §76-5-401.2 as third-degree felonies.

5. The Court granted the motion and bound Labrum over on the amended counts.

6. The State did not, at any time, request that the preliminary hearing be reopened to allow State to present additional evidence.

7. On November 8, 2021, State filed a motion asking the Court to reconsider its bindover decision regarding the charges of rape.

8. On January 19, 2022, the Court heard argument regarding the Motion to Reconsider Bindover Decision. After argument the Court declined to reconsider bindover as there was no legal basis to do so and denied State's motion.

9. On February 17, 2022, State moved to dismiss the entire case without prejudice. The Court granted the motion.[4]

10. At no time has State appealed any decision in First Case.

11. On May 5, 2022, State refiled rape charges against Labrum in this case.[5]

CASE LAW AND ARGUMENT

Under Utah R. Crim. P. 7B(c) provides 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 State from filing a new prosecution for the same offense. However, State is not vested with "unbridled discretion."[6] In *Brickey* the Utah Supreme Court limited the refiling of an information to situations where State can show that new or previously unavailable evidence has surfaced or that other good cause justified the refiling.[7] Placing these limitations on the refiling of criminal charges is essential to protecting the due process rights of criminal defendants.[8]

In *State v. Redd*, the Utah Supreme Court provided a working list of potentially abusive practices to which the *Brickey* rule is applicable, which included "forum shopping, repeated

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[4] The request for dismissal by State came as a result of Labrum filing a Motion to dismiss counts one through ten on procedural grounds under Rule 7B of the Utah Rules of Criminal Procedure. Simply put, State moved to amend counts one through ten only after the Court had declined to bindover Labrum which resulted in a dismissal of those charges under Rule 7B, hence an amendment to the information after the fact was not procedurally proper. The Court agreed finding that the Court, as well as counsel, are required to abide by the procedures as set forth by rule as they are designed to protect the due process rights criminal defendants. Rather than proceeding on the remaining count State opted to refile nearly three (3) months later.

[5] Hereinafter "Second Case".

[6] *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986).

[7] *Id.* at 647.

[8] *Id.* at 645.

filings of groundless and improvidence charges for the purpose to harass, ...withholding evidence[,]...[and] refil[ing] a charge after providing no evidence of an essential and clear element of a crime."[9] In *Morgan* the Utah Supreme Court elaborated on *Brickey* finding that "when potentially abusive practices are involved, the presumption is that due process will bar refilling."[10] However, "*Brickey* does not...preclude refiling where a defendant's due process right are not implicated."[11] There is no inherent ban on refiling, and it is the defendant's burden to show bad faith or abuse by the State.[12]

The *Brickey* Court leaves the door open for refiling in those instances where there is either "new or previously unavailable evidence," or upon a showing of "other good cause." In *Morgan* further instruction is provided as to the "other good cause" analysis required. The *Morgan* court states "*Brickey's* analysis indicates that "other good cause" represents a broad category with "new or previously unavailable evidence" as but two examples of subcategories that come within its definition."[13] It goes on to state, "that "other good cause", then, on its face, simply means additional subcategories, other than "new evidence" or "previously unavailable evidence," that justify refiling.[14] The *Morgan* court continues and adopts as an additional subcategory of "other good cause" the innocent miscalculation of the quantum of evidence necessary for a bindover.[15]

Then in 2021 the Utah Court of Appeals in *State v. Dykes* expands the concept of "innocent miscalculation" to not only include mistakes of fact, as in *Morgan,* but also to include mistakes of law.[16] The Court in *Dykes* states, "when a prosecutor makes an innocent mistake

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[9] *State v. Redd*, 37 P.3d 1160, 2001 UT 113, ¶20; see also *State v. Morgan*, 43 P.3d 767, 2001 UT 87, ¶¶13-15.
[10] *Morgan*, 2001 UT at ¶16.
[11] *Id.* at ¶15.
[12] *Id.* at ¶¶15-16.
[13] *Morgan* at ¶17-19.
[14] *Id.*
[15] *Id.*

about the state of the law, the potentially abusive practices the *Brickey* rule is intended to curb are not necessarily implicated...For this purpose then, 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.).[17]

In the present case, Labrum argues that State is harassing her and engaging in hiding the ball. Specifically, Labrum argues, State claims to have had two theories about the lack of consent but presented only one in First Case. When the Court decided not to bindover the charges, State did not ask to reopen to present additional evidence and argument. Rather, State moved to amend the charges. Three weeks later, State asked the Court to reconsider the evidence under a brand-new theory of a lack of consent. Argument is not new evidence and rearguing the same evidence under a new theory is not the same as presenting new evidence. State claims that it was aware of both theories of non-consent at the time of the preliminary hearing yet failed to present the second; even after the court declined to bindover the charge of rape. As such, State has engaged in hiding the ball because their second theory was only brought to Labrum's attention three weeks after the preliminary hearing and in an attempt to get the Court to revisit the issue of rape, and presumably State now wishes to proceed on both legal theories in Second Case.

Labrum also argues that State comes to the Court in Second Case admitting that there is no new or additional evidence, and that they are, in fact, proceeding on the same evidence as in First Case. Labrum then argues that there can be no innocent mistake of fact because in First Case State's actions were completely different than those in *Morgan*. In First Case State immediately moved to amend the charges at the preliminary hearing—rather than seeking

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[16] *State v. Dykes*, 2012 Ut App 212 ¶12.
[17] *Id.*

reconsideration of the bindover decision, as was done in *Morgan*. In fact, here State did not even attempt to present facts supporting its second theory of non-consent. State then waited a full twenty (20) days before filing a motion asking the court to reconsider its bindover decision. Labrum argues that between State's unsuccessful attempts to amend the charges against her and the nearly three weeks which elapsed before the motion to reconsider, it is incredibly improbable that State can claim an innocent miscalculation of the quantum of evidence needed at a preliminary hearing either factually or legally.

State seemingly stipulates that there is no new or additional evidence to present to the Court, but instead argues that the refiling here is justified under a mistake of law, a good cause category allowed by *Brickey*, *Morgan* and *Dykes*. State argues that the evidence and theories presented at the preliminary hearing in First Case were made in good faith and colorable. Consequently, any failure by State to advance other arguments in support of their other theories was innocent, and if innocent, cannot be viewed as intending to harass Labrum in violation of her Constitutional due process rights. Specifically, State claims that its arguments were made in good faith as "State genuinely believed, and still believes, in the validity of its argument." State contends that it made a good faith argument related to a position of special trust between Labrum and Alleged Victim through its Rule 1102 statements. State also claims that its legal theories were colorable as the arguments were apparently correct or justified. State claims that any mistake in failing to make alternative arguments or present additional evidence in support of unarticulated legal theories were an innocent mistake of law, thus, their refiling in Second Case is justified and allowable.[18]

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[18] When framing their argument regarding an innocent mistake of law State declares "there is no advantage the State can see, (or even think of), that could result from the stand-in prosecutor's failure to assert both of the States' legal theories as opposed to the singular argument that was raised." Of note, in its Statement of Facts, the State dedicates four (4) full paragraphs to actions by the stand-in prosecutor, the absence of the assigned prosecutor who was

State next argues, in fact spends a fast majority of it briefing on arguing, that this Court simply erred in failing to bind Labrum over for trial based on the evidence presented at the preliminary hearing in First Case. State in its motion states, "Feeling that adequate evidence had been presented to show a special position of trust and having made good faith and colorable arguments in support of that theory, speaks to the innocent nature of the State's miscalculation, if any." It seems that the State's position is, that because the trial Court erred in its bindover decision, that error constitutes a mistake in law that justifies the State refiling the charges in Second Case.

Lastly, State argues that this Court should articulate a new subcategory of "other good cause" such that regardless of State's innocent legal or factual miscalculation or lack thereof, there was an innocent miscalculation as to the "best" procedural route under the law to review a court's prior decision. State purports that this avenue would not run afoul of the potentially abusive practices that *Brickey* specifically prohibits and thus does not impact the due process rights of the defendant.

LEGAL ANALYSIS

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preparing for a jury trial starting the next day in which he would be sitting second chair, the stand-in prosecutor effectuating his known separation from the Cache County Attorney's Office, and the difficult schedule of the assigned prosecutor following the date of preliminary hearing in First Case. While this Court can certainly understand the difficulties associated with a complex and full trial calendar, as well as the disruption caused by a staff vacancy the Court cannot support the proposition that internal office politics or complicated scheduling rise to the level of, or even warrant, analysis regarding it as a basis for the relief requested herein, if that is what the State intended by its inclusion in the briefing and argument. Simply put, both actors represented the State in their role as prosecuting agency in this County and the State must live with the acts performed by its agents. As such the Court provides no further discuss on this topic (which attorney handled the matter and why) as it relates to the question whether an innocent mistake of law occurred.

In this case, State concedes that they do not have new or previously unavailable evidence and are refiling based on good cause. Utah Courts have acknowledged that State's innocent miscalculations, either in fact or of law, are a subcategory of "good cause" that justifies the refiling of charges without running afoul of a defendant's due process rights. State also seems to concede it is not proceeding under the mistake of fact good cause category. Instead, State relies on *Dykes* arguing that they are not required to present all evidence in support of its legal theories, only enough evidence to support bindover at the preliminary hearing stage - a mistake of law. State suggests that any failure to present enough evidence to support a probable cause finding is an innocent mistake of law because the original argument was made in good faith and a plausible legal claim was presented (i.e. "colorable").[19]

In *Dykes* the State charged Dykes with second-degree felony theft by receiving stolen property, which required proof either that the value of the ATV exceeded $5,000 or that it was an operable vehicle.[20] At the preliminary hearing State presented evidence that the ATV was an operable motor vehicle, but not any evidence related to the value of the ATV. The judge bound Dykes over. Later, Dykes moved to quash the bindover arguing that an ATV was not an operable motor vehicle under the statute, and that no evidence of value had been presented. The trial court was convinced and bound Dykes over on a class B misdemeanor applicable to solen property worth less than $300 and the default degree for the offense, as opposed to the felony, applicable to stolen property worth more than $5,000, and subsequently dismissed the case for lack of jurisdiction.[21] The Court denied motions to bindover on a class A misdemeanor and to reopen the preliminary hearing to present additional evidence. Subsequently, State refiled the felony charge on the basis of value. Dykes again moved to quash, and the request was denied.

[19] *State v. Dykes*,283 P.3d 1048, 2012 UT App 212, ¶10.
[20] *Id.*
[21] *Id.*

At a hearing on the motion the prosecutor readily admitted that value evidence was available at the time of the original preliminary hearing but due to his "mistake" in asserting that an ATV was a motor vehicle under the applicable statute he had no admissible evidence on the ATV's value to present at the hearing. The court agreed concluding that *Brickey* had not been violated because of the prosecutor's innocent miscalculation of the quantum of evidence required to support a bindover on the felony offense. More specifically, because State admitted that it had made a mistake in the law, by asserting the ATV was an operable motor vehicle under the relevant Statute, it had failed to present evidence of value, and thus had innocently miscalculated the quantum of evidence needed to withstand bindover on a felony charge. The Court of Appeals agreed finding that State's mistake was innocent and the arguments made in good faith as there are multiple and contradictory definitions of operable motor vehicle and that the prosecutor genuinely believed that ATV fit within the scope of the definition under this law. The Court of Appeals also found a colorable legal basis as State had presented evidence on every element of the offense (receiving a stolen ATV with the requisite mens rea), and had only failed to presented evidence related to the degree of the offense (value of the ATV).[22] Relying on *Morgan* the Court stated "[w]ith regard to good cause, the Utah Supreme Court has explained that a miscalculation of evidence necessary to establish probable cause must be innocent so as to dissuade the State from intentionally withholding evidence that might impair the defense or from harassing the defendant with repeated filings because of the prosecutors' failure to unreasonably investigate the charges."[23] Thus, even if the mistake of law is innocent, made in good faith and colorable *Brickey* still requires fundamental fairness as its major focus is on curbing potentially abusive practices by the State.

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[22] *Id.* at ¶13.

[23] *Morgan* at ¶13. See also *Redd* at ¶ 17.

This case before the Court, is distinguishable from *Dykes*. First, in *Dykes* State had presented all elements of the crime charged and had only failed to present evidence related to the degree of the offense. In this case, the State failed to present evidence related to the "without consent" element and failed to present the court with enough evidence to find a position of special trust that would negate consent. Failing to meet a burden related to the elements of the offense cannot be seen as an innocent mistake of law. The law was not confusing and there were not contradictory definitions, the State simply did not marshal the evidence to prove probable cause for each of the elements of the first-degree felony offense charged.

Further, unlike in *Dykes* State never moved to reopen the preliminary hearing, but instead moved to amend the charges to reflect the evidence that was presented at the preliminary hearing. The State decided in that moment to proceed on third-degree felony offenses relying on the evidence presented. The assigned prosecutor, not present at the preliminary hearing, disagreed, and chose to dismiss the case. Competing in-office theories of a case or prosecutorial procedural choices do not constitute an innocent misunderstanding or mistake of law.[24]

Even if there was an innocent mistake of law any argument had to be made in good faith to justify refiling under *Brickey*. While the prosecutor conducting the preliminary hearing may have been making a good faith argument at the time of the preliminary hearing it can also be said that the prosecutor then also acted in good faith when he moved to amend the charges based on the evidence. It does not necessarily follow that the assigned prosecutor who ultimately dismissed the case to refile did so in good faith, contrary to the good faith amendment of the other prosecutor, knowing that the evidence presented did not meet the elements of the first-

[24] It should also be noted that in *Dykes* Dykes was initially bound over at the preliminary hearing, with that bindover later quashed when the mistake of law was realized. Here the State did not prevail in obtaining a bindover at the preliminary hearing and the State continues to argue not a mistake a law, but that the Court erred. This issue is more fully discussed below.

degree offenses charged. This Court cannot speak to assigned prosecutor's state of mind or intent, and it should not be inferred that this court believes assigned prosecutor acted in some nefarious or dishonest manner, but it is difficult for this court to infer that both prosecutors acted in perfect good faith when taking contrary positions.

Dykes is also distinguishable as it relates to colorability. Even if there was an innocent mistake of law, and arguments were made in good faith, the cause of action must be colorable to comply with the holding in *Dykes*. In *Dykes* the claim was deemed to be colorable, a valid and viable cause of action. As discussed above, in *Dykes*, State presented enough evidence to establish probable cause under the law as to each element of the offense of theft by receiving stolen property but simply failed to present evidence to enhance the degree of the charge to a felony based on the value of the ATV. Here, State did not present enough evidence to establish each element of rape, in fact they presented no evidence as it related to the "without consent" element. State attempted to present evidence negating that element, because Alleged Victim had consented to the sexual relationship, by showing that a special relationship existed between Alleged Victim and Labrum such that consent could not be given in this circumstance. The State failed to meet its burden and thus the cause of action is not colorable in this instance.

Lastly, even if the mistake of law was innocent and made in good faith, with a cause of action that is colorable under the law, *Brickey r*equires fundamental fairness to curb abusive practices by State and protect the due process rights of the defendant. The *Dykes* Court explained that to ensure the protections afforded by the Constitution "the prosecutor must exercise some acceptable level of diligence and must not intend to harass the defendant or unfairly impair the defense."[25] The refiling cannot be made in bad faith. In *Dykes* the Court determined that because the refiled action was brought before the same magistrate it was not an

[25] *Dykes* at ¶11.

abusive practice. Ironically, in this refiled action the matter was not brought before the same trial judge, and, in fact, it was the Court, not the State, that corrected that error. Additionally, the *Dykes* court found that "where the State has established probable cause that the defendant committed an offense for which he could be prosecuted but the charge has been dismissed due simply to the...misunderstanding of the legal requirement for the...degree of the offense that it originally charged" it cannot be said that due process rights of Dykes were violated.[26] As noted above, that is not the case here. In this case, State had not presented evidence to support the elements of the offense. This was not a mistake in degree.

Additionally, *Brickey* and *Dykes* alike warn against abusive practices that unfairly impair the defense. Following the bindover decision State opted to file a Motion to Reconsider alleging a theory of enticement. Withholding key legal theories impairs Labrum by wasting the time and resources of defense counsel in preparing to address other legal theories. It also allows State to gain an unfair advantage by surprising the defense with an entirely new legal theory, especially after defense counsel has exhaustively prepared for another theory. The fundamental fairness required under *Brickey* dictates that State be barred from introducing entirely new legal theories. In the present case, State failed to disclose their theory of coercion at any point in the initial attempts to bindover charges against Labrum. Prior to the preliminary hearing the State only advanced the theory of non-consent based on a position of trust. Labrum states in briefing that even during preliminary negotiations and discussions about the case the State had only advanced the theory of non-consent based on a position of trust. At no time prior to the preliminary hearing did State discuss enticement as an alternate theory before the Court. Rather, the first mention of enticement as a theory was presented in the State's Motion to Reconsider Bindover. At the preliminary hearing, State did not mention the alternative theory—which the State

[26] *Id.* at ¶13.

acknowledges in its Motion to Reconsider. State asserts that it is "illogical" to require it to present every "potential argument" at the preliminary hearing. While the State need not assert every potential legal argument in a preliminary hearing it should be obligated to present the legal theory upon which they seek to prosecute a defendant as failing to do so is akin to withholding evidence which is clearly prohibited under *Brickey*. While it is not State's responsibility to spell out its case to Labrum it is the State's responsibility to provide sufficient information for Labrum to properly prepare a defense. Of additional note, the Court at a preliminary hearing is required to make reasonable inferences to the benefit of the State. It is not, however, required, nor should it be required, to invent legal theories out of whole cloth for the benefit of State. Thus, the refiling of this case smacks of the due process violations specifically prohibited.

Next, State continues to argue that in First Case this Court erred in its decision at preliminary hearing when it declined to bindover Labrum as the State had not presented probable cause on all elements of the offense, specifically related to the "without consent" element. The Court specifically noted that State had not presented evidence of a position of special trust which would negate the without consent element. No other evidence related to "without consent" was presented. To the contrary, the portions of the 1102 statements not focusing on a position of special trust, point toward a consensual sexual relationship between Alleged Victim and Labrum. While this trial court does not believe it erred in this case, trial courts can make mistakes, despite all efforts to the contrary. In those cases where an error is made there are procedural rules in place to have those decisions reexamined at the appellate level. The State did not seek appellate review here. The State indicates that in the interest of judicial efficiency and cost to the parties a "calculated" decision was made by State to pursue a motion to reconsider, in lieu of other procedural remedies. In any event, the Court making a decision with which the State disagrees,

and the State intentionally declining the opportunity to appeal, does not constitute a mistake of law that justifies a refiling under *Brickey*. To find otherwise would result in every case in which the State fails to meet its burden at a preliminary hearing to be dismissed and refiled, effectively providing the State with a second bite at the apple, in violation of *Brickey* and the due process rights of defendants.

Lastly, this Court declines to articulate a new subcategory of "other good cause" based on State's innocent choice of procedure. State argues that it was an innocent miscalculation on its part to opt for a refiling of charges in lieu of proceeding on the charge bound over or filing an appeal under Rule 4 of the Utah Rules of Civil Procedure, after its motion to reconsider was denied. State admits that all these options were available to it, but it chose to proceed with only a Motion to Reconsider "in a calculated effort to avoid the time and cost of an appeal for all parties and to preserve judicial economy." State takes issue with the fact that the Court heard argument on the Motion to Reconsider and ultimately ruled after the State's time to appeal had already expired, despite the late filing of its Motion by the State.[27] State's sole argument at the time of the Motion to Reconsider was that the court erred in not binding Labrum over on all eleven counts alleged in First Case. First, this Court notes, that simply because State chose to proceed in one procedural fashion, it does not necessarily follow that State is simultaneously or subsequently precluded from taking other action to seek review of a trial court decision in which it disagrees. This is particularly true considering State's position that the procedural choice made was, in fact, "calculated." Second, any missed appeal deadline under Rule 4 of the Utah

[27] The State had untimely filed its Motion to Reconsider under Utah Rules of Criminal Procedure, Rule 24, but the Court determined that the late filing, while untimely, was not prejudicial to Labrum as time for briefing was requested and allowed, and oral arguments held, and thereby found that it was in the interest of justice to hear and rule on the Motion. The Court specifically referenced on the record that some leniency was being afforded to the State considering the difficult trial calendars in the First District and the difficulties between the assigned and stand-in prosecutor resulting in the left hand not knowing what the right hand was doing.

Rules of Appellate Procedure, in this case, falls squarely at the feet of State and not at the feet of this Court.[28] State knows the rules it must follow, and this Court cannot be responsible for the "calculated" decisions it took whether those decisions were as a result of missed deadlines, internal disputes between prosecutors, or fundamental belief that the most efficient avenue was being pursued.[29] Third, State has not shown to the Court how articulating a new "other good cause" subcategory for making a calculated procedural choice would avoid implicating a defendant's due process rights as would be required under *Brickey* and its progeny. In the case before the Court, State, by its own admission, had a variety of options to procedurally pursue a review of the decision of the trial court. Simply because it made a calculate choice to pursue one avenue that did not result in a favorable outcome for State does not justify, in this Court's mind, the creation of a new legal avenue under which charges can be refiled.

ORDER

Under Utah Law to avoid implicating Labrum's due process rights State must show (1) new or previously unavailable evidence, or (2) other good cause – an innocent miscalculation of fact or mistake of law. This court also declines the opportunity to create a new "good cause"

[28] The preliminary hearing took place on October 19, 2021. The State had until November 18 to file an appeal. Instead, the State opted to file a Motion. A motion only comes before the Court upon a Request to Submit, typically at the conclusion of briefing. This Court became aware of the Motion on November 15, 2021, the date set for arraignment following the preliminary hearing. At that time a briefing schedule and oral argument were set. The assigned prosecutor was present on that date. There were still three days remaining within the appeal time frame. Counsel could have opted to withdraw the Motion and file an appeal if there were concerns about the appeals timeframe expiring. Whether counsel for State dropped the ball or made a calculated decision to move ahead with the Motion to Reconsider rather than an appeal is unknown. State must now live with its actions.

[29] The Court takes no pleasure in calling out the State but, as articulated in previous footnotes, any internal office politics or miscommunications should be left behind closed doors and not brought before the Court as grounds for a second bite at an apple. Further, a missed appeal deadline whether unintentional or calculated are also not grounds for a re-do.

exception. Therefore, in this case, State is barred from refiling and Labrum's Motion to Dismiss is Granted. This Decision represents the order of the Court. No further order is necessary to effectuate this decision.

DATED this 15th day of September, 2022.

BY THE COURT:

Angela F. Fonnesbeck

Judge Angela F. Fonnesbeck

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY
USED AT THE DIRECTION OF THE JUDGE