Case No. 20220889-SC

IN THE

# UTAH SUPREME COURT

STATE OF UTAH,
*Plaintiff/Appellant,*

*v.*

KYLI JENAE LABRUM,
*Defendant/Appellee.*

## Reply Brief of Appellant


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The State appeals the magistrate's dismissal of rape charges refiled against Labrum after the magistrate in the original case ruled the preliminary-hearing evidence was insufficient to show the non-consent element of the crimes. The State had filed a motion to reconsider in the prior case, attempting to raise a theory of non-consent mistakenly not raised by the stand-in prosecutor at the preliminary hearing. But the magistrate denied the motion, refusing to consider the omitted theory. The same magistrate then ruled in this case that the refiled charges violated Labrum's due process rights because, according to the magistrate, the State's conduct in the prior case constituted abusive prosecutorial practices under *State v. Brickey*, 714 P.2d 644 (Utah 1986).

In its opening brief, the State argued that the state's due process clause does not require *Brickey*'s strict rule against refiling and that the Court should therefore modify it. Alternatively, the State argued that the prosecutor's conduct in the prior case did not constitute abusive prosecutorial practices requiring dismissal of the refiled charges even under the current *Brickey* rule.

Pursuant to rule 24, Utah R. App. P., the State submits this brief in reply to new matters raised in the appellee's brief.

## ARGUMENT

### I.

### Defendant does not address the historical or legal arguments supporting the State's request to modify the unnecessarily-strict *Brickey* rule.

*State v. Brickey* held that a defendant's right to fundamental fairness under the state's due process clause severely limits the circumstances under which a prosecutor may refile charges previously dismissed at a preliminary hearing. 714 P.2d 644, 645-47 (Utah 1986).

Consistent with the analysis required for state constitutional claims, the State's opening brief included an historical analysis of the state's due process clause, case law from sister jurisdictions contemporaneous with Utah's founding, and contemporary case law from sister jurisdictions to support its primary argument that (1) the State's refiling of charges against Labrum did not violate her right to "fundamental fairness" under the state

due process clause; and (2) to the extent the current *Brickey* rule required the magistrate's dismissal of the refiled charges, therefore, the Court should modify the *Brickey* rule. Aplt.Br.26-44. To do otherwise, the State argued, would be inconsistent with sound principles of constitutional analysis. And it would also sacrifice the interests of the State, its people, and the victim to the interests of Labrum. It would give Labrum a windfall by allowing her to escape prosecution for her alleged crimes despite the lack of malice and prejudice. *Id.* at 25,43-44.

In opposing the State's argument, however, Labrum does not acknowledge or respond to the State's analysis of Utah's due process clause, which includes case law from the time of the state's founding showing that the concept of due process placed no limitations on prosecutors' discretion to refile charges previously dismissed or to seek indictments on charges a grand jury had already rejected (collectively referred to as "refiling charges"). Aple.Br.1-16. Nor does Labrum engage in her own historical analysis of the state's due process clause. *Id.*

In declining to do so, Labrum simply ignores the most important part of constitutional analysis: "the meaning of the text as understood when it was adopted." *State v. Bess,* 2019 UT 70, ¶44, 473 P.3d 157. *Brickey*'s holding was grounded in the due process provisions of Utah's 1895 constitution. *See* Utah

Const. art. I, § 7; *Brickey*, 714 P.2d at 646. And thus, its rule would be sound only if the Court were "convince[d]" that "in 1895, the people of Utah would have understood these provisions to enshrine" a strict rule limiting refiling of charges. *See Bess,* 2019 UT 70, ¶44. But as explained in the State's opening brief, the overwhelming historical evidence appears to be that the people of Utah *did not* understand the due process provisions in this way. *Brickey* identified no evidence to the contrary. Nor, tellingly, has Labrum.

Similarly, Labrum does not acknowledge or respond to the State's analysis of more recent case law from sister jurisdictions declining to impose *Brickey*-like severe restrictions on a prosecutor's ability to refile charges. *Id.* Nor does Labrum engage in her own analysis of other jurisdictions' case law. *Id.*

Labrum's decision not to engage in such analyses undermines her contention that the contours of the current *Brickey* rule are both necessary and correct as a matter of state constitutional law. And that is particularly so because neither *Brickey* nor its progeny engaged in such analyses either.

One factor that "distinguishes between weighty precedents and less weighty ones" is "the persuasiveness of the authority and reasoning on which the precedent was originally based." *Eldridge v. Johndrow*, 2015 UT 21, ¶22, 345 P.3d 553. And as shown in the State's opening brief, Aplt.Br.26-31,

neither *Brickey* nor its progeny has engaged in an historical analysis of Utah's due process clause and the historical application of due process to refiling charges, *see, e.g.*, *Brickey*, 714 P.2d at 645-47; *State v. Redd*, 2001 UT 113, ¶¶13-21, 37 P.3d 1160; *State v . Morgan*, 2001 UT 87, ¶¶10-25, 34 P.3d 767—even though "interpret[ing] constitutional language … start[s] 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. As also shown in the State's opening brief, Aplt.Br.27-30,41,42, many sister states have rejected the notion that due process requires the restrictive minority rule adopted in *Brickey*, and neither *Brickey* nor its progeny has explained why those courts' due-process determinations are inconsistent with Utah's due process clause, *Brickey*, 714 P.2d at 645-47 n.3; *Redd*, 2001 UT 113, ¶¶13-21; *Morgan*, 2001 UT 87, ¶¶10-25—even though when "interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting," *Maese*, 2019 UT 58, ¶18.

Thus, neither *Brickey* nor its progeny is "the most weighty of precedents" when it comes to defining what restrictions the state's due process clause place on a prosecutor's discretion to refile charges. *See State v. Menzies*, 889 P.2d 393, 399-400 (Utah 1994) (overturning precedent that was

established with "little analysis"), *superseded by constitutional amendment as stated in State v. Legg*, 2018 UT 12, 417 P.3d 592. *Cf. In re Gestational Agreement*, 2019 UT 40, ¶162 n.111, 449 P.3d 69 (Lee, A.C.J., concurring) (Stare decisis is "at its strongest when a constitutional decision is backed by persuasive legal reasoning and correct as a matter of original meaning.").

Finally, to the extent Labrum presents any constitutional argument at all, it appears to be simply that the current *Brickey* rule is good policy. Aple.Br.1-16. But the goal of constitutional analysis is "to ascertain and give power to the meaning of the constitutional text as it was understood by the people who validly enacted it as constitutional law." *Randolph v. State*, 2022 UT 34, ¶57, 515 P.3d 444. And while it is true that the Court "discern[s] that meaning by considering all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy," *id.* (cleaned up), the Court has also made clear that "[p]olicy arguments are relevant only to the extent they bear upon the discernment of" the provision's original intent, *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶12 n.3, 140 P.3d 1235. Thus, when evaluating policy arguments in the constitutional context, this Court is "not simply shopping for interpretations that [it] might like." *Randolph*, 2022 UT 34, ¶69. "As is the case with statutory interpretation," the Court's "duty is not to judge the

wisdom of the people of Utah in granting or withholding constitutional protections but, rather, is confined to accurately discerning their intent." *Amer. Bush*, 2006 UT 40, ¶12 n.3.

Labrum's failure to respond to the State's constitutional arguments or engage in its own rigorous constitutional analysis, therefore, undermines his argument that the current *Brickey* rule is the only one that satisfies the state's due process clause.

**II.**

**The principles cited by Labrum as underlying the current *Brickey* rule do not foreclose the State's requested modifications to the *Brickey* rule.**

Instead of challenging the State's arguments by engaging in rigorous constitutional analysis, Labrum relies almost exclusively on general statements in *Brickey* and its progeny to argue that only the *Brickey* rule as currently articulated adequately protects a defendant's state due process rights. Aple.Br.1-16.

But the principles Labrum pulls from *Brickey* and its progeny are consistent with the State's requested modifications to the *Brickey* rule. For example, Labrum notes that one important purpose of the *Brickey* rule is to "'ensure that the defendant is not harassed by repeated charges on tenuous grounds.'" Aple.Br.7 (quoting *Morgan*, 2001 UT 87, ¶13). But except for pointing to the magistrate's finding insufficient evidence on the special-trust

non-consent theory in the First Case, Labrum makes no attempt to show that the rape charges here were in fact "tenuous." *Id.* at 1-16. Indeed, she does not even acknowledge, let alone address, the State's evidence on the enticement theory of non-consent. *Id.*

More importantly, though, the State's argument in this case is not that Utah's due process clause doesn't protect a defendant against harassment "by repeated charges on tenuous grounds." Rather, the State's argument is that the prosecutor's reasonable attempt to save the original charges in this case does not amount to harassment, let alone harassment constituting a due process violation. Aplt.Br.26-57. Thus, the State argues, to the extent the current *Brickey* rule protects a defendant against the prosecutor's reasonable conduct here, the current *Brickey* rule goes well beyond deterring "due process violations," *see* Aple.Br.15, and protecting a defendant from harassment, Aplt.Br.26-57. Indeed, as this case shows, the current *Brickey* rule unnecessarily risks giving the defendant a windfall by absolving her of her crimes even though due process does not require that result. *Id.*

The *Brickey* modifications the State seeks thus do not in any way undermine *Brickey*'s purpose to deter due process violations and "ensure that the defendant is not harassed by repeated charges on tenuous grounds." *Morgan*, 2001 UT 87, ¶13. Nor do the State's requested modifications

undermine *Brickey*'s goal of preventing "overreaching by the State," Aple.Br.15, when that overreaching rises to the level of a due process violation.

Finally, Labrum cites *Brickey* for the proposition that due process "[c]onsiderations of fundamental fairness preclude vesting the State" with "unbridled discretion" to repeatedly refile charges against a defendant. Aple.Br. 15 (citing *Brickey*, 717 P.2d at 647). But the State's requested modifications to the current *Brickey* rule will not give prosecutors unbridled discretion to repeatedly refile charges. The State's modifications will simply align the *Brickey* rule with a concept of fundamental fairness that properly balances the defendant's interests against the State's interest in protecting its citizens and enforcing its laws, the people's interest in living in a safer society, and the victims' interest in seeing justice done to their perpetrators.

## III.

## Most of Labrum's other contentions are conclusory and unsupported by the record, the law, or legal analysis.

Otherwise, Labrum's responsive brief consists largely of conclusory statements unsupported by the record, the law, or legal analysis.

For example, in asserting that this case falls under *Redd*'s prohibition against refiling charges "after providing no evidence for an essential and clear element of a crime" at the first preliminary hearing, Labrum asserts that

"the State did not present evidence of an essential element of the crime"—non-consent. Aple.Br.8 (citing *Redd*, 2001 UT 113). But as shown in the State's opening brief, the State presented evidence at the first preliminary hearing of both its special-trust non-consent theory—that Labrum was a longtime friend of Mother's who frequently took care of and exercised authority over at least one of Mother's children—*and* its enticement non-consent theory—that Labrum instigated almost all of the sexual contact between Labrum and her 16-year-old victim. Aplt.Br.46-47,51-53. Thus, the State did present evidence on the non-consent element of Labrum's rape charges at the first preliminary hearing. The State just didn't present *enough* evidence to convince the magistrate on the special-trust theory. *See* Aple.Br.10 (asserting State "failed to present the court with *enough evidence* to support" the position-of-trust theory (emphasis added)). And as discussed, the stand-in prosecutor simply didn't argue the enticement theory, even though the assigned prosecutor intended to.

Also, in asserting that this case falls outside of *State v. Dykes*, which held that good cause under *Brickey* includes innocent mistakes of law, Labrum argues *Dykes* is distinguishable because there, "the State had only failed to present evidence related to the degree of the offense." Aple.Br.10 (citing *State v. Dykes*, 2012 UT App 212, ¶11, 283 P.3d 1048). But the State here

also only failed to present evidence related to the degree of the offense. In *Dykes*, the question was whether the State presented sufficient evidence to support a second-degree felony theft charge—evidence that the theft involved either a vehicle or goods exceeding a certain minimum value—as opposed to misdemeanor theft—which doesn't require such evidence. *Dykes*, 2012 UT App 212, ¶13. Here, the question was whether the State presented sufficient evidence to support a first-degree felony rape charge—evidence of non-consent—as opposed to a different level of offense, third-degree felony unlawful sexual activity with a 16 or 17-year-old—which doesn't require such evidence. *Compare* Utah Code Ann. § 76-5-402(2)(a) (2023) (defining rape), *with id.* § 76-5-401.2(2)(a)(ii) (2023) (defining unlawful sexual activity with a 16 or 17-year-old).

Labrum also asserts that "[w]hen the 'stand-in' prosecutor proceeded on an approach that the 'assigned' prosecutor disagreed with, that alone does not make the issue colorable" as legal mistake under *Dykes*, because "when a Defendant's co-counsel fails to raise an argument or defense, there is no 'do over.'" Aple.Br.11. Thus, Labrum argues, allowing the State to refile charges in such instances would "give the State an advantage not afforded to defendants." *Id.* But defendants do indeed get do-overs if they can prove that their counsel's omissions constituted ineffective assistance. *See Strickland v.*

*Washington*, 446 U.S. 668, 687 (1984). And courts routinely disregard minor mistakes—by both defendants and the State—that do not pose substantial harm to the opposing side. *See* Utah R. Crim. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.").

Labrum also asserts that the State's "procedural hopscotch has prejudiced" her "and is akin to harassment." Aplt.Br.8. But Labrum does not identify any legally cognizable prejudice she suffered. *Id. Cf. State v. Green*, 2023 UT 10, ¶107, 532 P.3d 930 (prejudice must be shown "as a demonstrable reality and not merely as a speculative matter"). Nor can the State identify any. Labrum also does not explain what she means by "procedural hopscotch" or why the State's conduct here constituted harassment. Aplt.Br.8. In the State's opinion—and probably the public's as well, if it were to judge—the prosecutor merely took logical and reasonable steps to try to save Labrum's original charges regarding serious sex crimes against a minor.

Next, after implying that the State intentionally withheld the enticement non-consent theory from her at the first preliminary hearing, Labrum asserts that "the failure to present the legal theory the State seeks to prosecute is equivalent to withholding evidence." Aple.Br.8,12. But Labrum does not cite any legal authority supporting that proposition. *Id.* Moreover,

in its opening brief, the State cited legal authority supporting its argument that *Brickey*'s "withholding evidence" prohibition against refiling did not survive the constitutional amendment removing discovery as a primary purpose of preliminary hearings. Aplt.Br.37-40. The State also cited legal authority supporting its argument that the State is not required to present all of its evidence or theories at a preliminary hearing, because defendants have other remedies for undisclosed evidence or theories at trial if they can show surprise and prejudice. Aplt.Br.41. And Labrum has not engaged with the State's arguments or authority on either of those points. Aple.Br.1-16.

Next, Labrum asserts that "[d]ismissing a case based on prosecutorial bad faith or abusive filing practices is a remedy akin to the dismissal of a case based on the bad faith misconduct of a police officer." Aple.Br.14. But Labrum fails to explain why the prosecutor's conduct here constituted bad-faith misconduct. *Id.* More importantly, neither of Labrum's cited legal authorities hold that bad-faith police misconduct requires the dismissal of criminal charges; they hold only that the evidence related to such misconduct must be suppressed at trial unless it was otherwise discoverable. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *Rea v. United States*, 350 U.S. 214, 214-18 (1956). And as the United States Supreme Court has recognized in the context of Fifth Amendment violations, "Our numerous precedents ordering

the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. *So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book*." *United States v. Blue*, 384 U.S. 251, 255 (1966) (emphasis added). *See also State v. Poteet*, 692 P.2d 760, 764-65 (Utah 1984) (although defendant has constitutional right to preliminary hearing, reversal not warranted for prosecutor's violation of rule establishing time by which hearing must be held unless defendant can show prejudice). *Cf. United States v. Hasting*, 461 U.S. 499, 507 (1983) ("deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of [constitutional law] and where means more narrowly tailored to deter objectionable prosecutorial conduct are available"; court must "give appropriate … weight" to relevant interests—including lack of prejudice and effect of remedy on crime victims—which "cannot be so lightly and casually ignored in order to chastise what the court view[s] as prosecutorial overreaching").

Finally, Labrum makes several unsupported statements about the calamity she believes would follow if the Court modified the *Brickey* rule to allow refiling in circumstances like those existing here. She asserts that

"[a]llowing the state repeated opportunities to sustain its burden of proof" would "interfere[] with the orderly administration of justice, encourage[] a lack of preparation on the part of prosecutors, and subject[] defendants to much lengthier pretrial delay." Aple.Br. 8. She asserts that if presenting a new legal theory constitutes "good cause," "there would be no need for a preliminary hearing" because "the State would have repeated opportunities to sustain its burden of proof, frustrating the very principles of fundamental fairness that due process requires." *Id.* at 10-11. She asserts that "[a]rticulating a new subcategory of 'other good cause'" would "effectively create a general exception, virtually empowering prosecutors to challenge a magistrate's refusal to bind over in every case." *Id.* at 15. And she asserts that "[f]urther modifications" of *Brickey* "would swallow the *Brickey* rule." *Id.*

But Labrum cites no legal authority supporting this parade of horribles. *Id.* at 1-16. Nor does she explain how modifying *Brickey* to allow a single refiling in cases like this—where the State tried to remedy its mistakes in the original proceedings—or even in all cases, would result in a rule so broad as to remove all due process protections against refilings. *Id.*

## CONCLUSION

For the foregoing reasons and those specified in the State's opening brief, this Court should reverse the magistrate's dismissal of Labrum's refiled rape charges.

Dated July 18, 2024.

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## CERTIFICATE OF COMPLIANCE

*Page/Word Certification*. I certify that in compliance with rule 24, Utah R. App. P., this reply brief contains 3,271 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 reply 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*
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## CERTIFICATE OF SERVICE

I certify that on July 18, 2024, the Reply 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:

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