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**IN THE FIFTH DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH**

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STATE OF UTAH,

Plaintiff,

vs.

WARREN STEED JEFFS,

Defendant.

**DEFENDANT’S MEMORANDUM IN  
SUPPORT OF MOTION TO  
QUASH BINDOVER**

**Case No. 061500526**

**Judge James L. Shumate**

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**INTRODUCTION**

The “fundamental purpose served by the preliminary examination is the ferreting out of groundless and improvident prosecutions.” *State v. Anderson*, 612 P.2d 778, 783-84 (Utah 1980). During a preliminary hearing, although the “evidence does not need to be ‘capable of supporting a finding of guilt beyond a reasonable doubt,’ ... “[u]nder the

probable cause standard, the prosecution has the burden of producing 'believable evidence of all the elements of the crime charged.'" *State v. Virgin*, 137 P.3d 787, 792 (Utah 2006)(quoting *State v. Clark*, 20 P.3d 300, 305 (Utah 2001)). Thus, "[t]his 'relieves the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient.'" *Id.* at 792 (quoting *Anderson*, 612 P.2d at 784). In this case, the magistrate erred in binding over the Defendant Warren Jeffs for trial on Counts 1 and 2<sup>1</sup> under Subsection 1 of Utah Code Annotated, § 76-5-406, that the alleged victim expressed a lack of consent through words or conduct, because the prosecution did not produce believable evidence to infer that the Defendant was on notice of the alleged victim's non-consent to sexual intercourse. See Utah Code Ann. § 76-5-406 (2005). The magistrate further erred in binding over the Defendant for trial on Counts 1 and 2 under Subsection 10<sup>2</sup> of Utah Code Annotated, § 76-5-406, because the prosecution did not produce believable evidence to find that the alleged victim's husband held a special position of trust.

**I. THE DEFENDANT'S POSITION AS A RELIGIOUS LEADER WHO PERFORMED THE MARRIAGE AND PROVIDED ADVICE DOES NOT PROVIDE SUFFICIENT PROBABLE CAUSE TO INFER THAT THE DEFENDANT WAS ON NOTICE THAT THE ALLEGED VICTIM EXPRESSED LACK OF CONSENT TO SEXUAL INTERCOURSE THROUGH WORDS AND CONDUCT**

The magistrate bound the Defendant over for trial on Count 1 based upon the Defendant's conduct in performing the marriage ceremony and on Count 2, because the

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<sup>1</sup> Count 1 alleges the criminal conduct occurred between April 14, 2001 and July 7, 2001, and Count 2 between April 14, 2001 and September 30, 2003.

<sup>2</sup> U.C.A. § 76-5-406 and § 76-5-404.1(4)(h) are attached hereto as **Exhibit A**.

Defendant advised the alleged victim to remain in her marriage. R. at 144-47.<sup>3</sup> The court noted that the Defendant's conduct was "at a minimum reckless as to the commission of rape and may, in fact,...include intentional and knowing conduct." R. at 147. Under the Utah Criminal Code, a defendant acts "recklessly ... when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur." Utah Code Ann. § 76-2-103(3)(2005). Thus, the magistrate concluded that for Count 1,<sup>4</sup> the Defendant acted with a reckless state of mind as to the victim's non-consent to sexual intercourse because the Defendant performed a marriage ceremony between the alleged victim and the principal even though the victim was reluctant to get married. For Count 2, the Court determined that the Defendant acted with a reckless state of mind because the Defendant met with the alleged victim after her marriage and she expressed "her disdain, reluctance, opposition, and total dislike of sexual relations with [the principal] using the language of the community." R. at 146. Because the Defendant counseled the alleged victim to "multiply and replenish the earth," the court determined that "absent medical intervention, that implies sexual intercourse," and therefore, the Defendant's conduct was reckless as to the commission of rape. R. at 146-47.

The magistrate's determination that the Defendant acted recklessly as to Count 1 is erroneous because it relies on the inference that the Defendant, in performing a marital union between the alleged victim and the principal, was aware of, but

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<sup>3</sup> The magistrate's reasoning explaining the bind over under § 76-5-406(1) is attached hereto as **Exhibit B.**

<sup>4</sup> The magistrate seemed to identify Count 1 as corresponding to the timeframe before Elissa Walls had her first post-marriage counseling session with the Defendant and Count 2 corresponding to the time frame after the first post-marriage counseling session.

consciously disregarded the alleged victim's non-consent to sexual intercourse with the principal.

The court based the inference not on the actual words or conduct of the alleged victim in the instant case, but on "hundreds of years of Anglo-American law to find that the concept of marriage...includes...the social sanction of sexual intercourse." R. at 144. Further, the court noted that under common law, "marriage can be annulled if the marriage is not sexually consummated. The reverse proposition...is capable of reasoned understanding to find that marriage implies sexual consummation." R. at 145. From these general statements about the nation's historic concept of marriage, the court inferred that the alleged victim's reluctance and opposition to the marriage was sufficient to establish probable cause for lack of consent to sexual intercourse through words and conduct.

However, this inference is too attenuated. As the Utah Supreme Court held in *State v. Virgin*, "magistrates are free to decline bind over where the facts presented by the prosecution provide no more than a basis for speculation-as opposed to providing a basis for a reasonable belief." *Virgin*, 137 P.3d at 792. Here the State must establish not only that intercourse was occurring, but also that the victim expressed non-consent through words and conduct **and** that the Defendant was aware that unconsented intercourse was happening. In this case, the inference that marriage necessarily implies sexual consummation, and that the alleged victim's reluctance to marry was a prospective declaration meant that she was expressing her non-consent to sexual intercourse at some unspecified time in the future through words and conduct is speculation.

In fact, marriage is defined by a number of factors, and reluctance to marry can include opposition to any one of those factors. In a case in which the defendant was charged with polygamy, the Utah Supreme Court considered whether a couple who engaged in a “ceremony officiated by a religious leader and involved vows typical of a traditional marriage ceremony,” lived together, had sexual intercourse, and considered themselves husband and wife, were married. *See State v. Holm*, 137 P.3d 726, 736-37 (Utah 2006). The Court noted that “[a]lthough no one of these factors is itself indicative of marriage, looking at the cumulative effect of the factors present in this case it is clear that the relationship...was a marriage.” *Id.* at 737.

The instant case presents a similar factual situation, and, unlike the magistrate’s inference, there are many factors, including sexual intercourse, that establish a marital relationship. In this case, the alleged victim and the principal participated in a commitment ceremony, exchanged traditional vows in front of their religious leader, the Defendant, lived together and had sexual intercourse. As the Utah Supreme Court noted, any of these factors, including, but not solely, sexual intercourse, may be determinative of a marital relationship. In other words, the “crux of marriage in our society, perhaps especially a religious marriage, is...the solemnization, viewed in its broadest terms as the steps, whether ritualistic or not, by which two individuals commit themselves to undertake a marital relationship.” *Holm*, 137 P.3d at 737.

Thus, although the alleged victim was reluctant to marry the principal, and expressed her concerns about “commitment” to the Defendant, this did not put him on notice, through her words and conduct, that she did not consent to sexual intercourse with the principal; instead, the fair import of her words merely put him on notice that she

had some concerns about one of the many factors that create a marital relationship. In addition, by performing the marriage ceremony, which included the traditional religious language that the individuals should “multiply and replenish the earth,” the Defendant was not acting recklessly with respect to unconsented sexual intercourse. This language from the Old Testament of the Bible is not a command for a married couple to have relations at any particular time and is not a command for the couple to do anything against their wishes. To the contrary, he was performing his job as a religious leader under Utah law, which empowers “religious officials who are older than eighteen and ‘in regular communion with any religious society’...to solemnize a marriage.” *Id.* (citing Utah Code Ann. § 30-1-6(1) (Supp.2004)).

Thus, although the alleged victim asserted reluctance about marrying the principal, it is speculation that, by performing the marriage and including traditional religious language in the vows, the Defendant was put on notice that the alleged victim did not consent to sexual intercourse in the future through her words and conduct. The magistrate’s inference is too attenuated and speculative to establish probable cause for Count I, and the magistrate erred in binding the Defendant over for trial under subsection 1 of Utah Code Ann. § 76-5-406.

Moreover, the magistrate’s determination under Count 2 that the Defendant acted recklessly as to the commission of rape because the Defendant counseled the alleged victim to remain in her marriage is also too attenuated. Under *Franco v. The Church of Jesus Christ of Latter-day Saints*, the Utah Supreme Court declined to find a cause of action against a religious counselor who advised the plaintiff to “forgive, forget, and seek Atonement” for her claims that she had been sexually abused. 21 P.3d 198,

205 (Utah 2001). The Court noted that the plaintiff's claims were essentially that "the LDS Church Defendants generally mishandled the pastoral counseling relationship by giving bad advice—claims necessarily directed at the LDS Church Defendants' performance of their ecclesiastical counseling duties." *Id.* The Court declined to find a cause of action against the defendants, noting that it would require a court to express a standard of care to be followed by all reasonable clerics and would "embroil the courts in establishing the training, skill, and standards for members of the clergy in this state in a diversity of religions professing widely varying beliefs." *Id.* at 206. The instant case presents the same problem, because Count 2 relies on the determination that the Defendant gave her "bad advice" to remain in her marriage after fleeing Mr. Steed and protesting about the marriage continually, try to make the relationship work, and abide by the tenets of her faith. Although the advice may have been bad, it is insufficient to establish probable cause that the Defendant was on notice that the victim did not consent to sexual intercourse. Thus, it was erroneous for the magistrate to bind the Defendant over on Count 2 under subsection 1 of Utah Code Ann. § 76-5-406.

**II. THE MAGISTRATE ERRED IN BINDING OVER THE DEFENDANT FOR TRIAL ON COUNTS 1 AND 2 UNDER UTAH CODE ANNOTATED SECTION 76-5-406, SUBPARAGRAPH 10**

The magistrate also made an order binding the Defendant over for trial on Counts 1 and 2 under subparagraph 10 of Utah Code Annotated section 76-5-406. That statute deems an act of sexual intercourse with a victim under the age of 18 to be without consent if "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 Subsection 76-5-404.1(4)(h)." Utah Code Ann. § 76-

5-406(10) (2006).<sup>5</sup> The Court correctly noted that “Mr. Steed... [wa]s the actor in the trip wire threshold event that must be found before Mr. Jeffs’ liability could even be considered.” (R. at 148, l. 19-21). Thus, Mr. Jeffs’ status as a religious leader is irrelevant to the question of whether Mr. Steed occupied a position of special trust. If Mr. Steed did not hold a position where he exercised undue influence over Elissa Walls, then a bind over under Subsection 10 cannot be supported. However, the Court erred in finding that Mr. Steed occupied a position of special trust in relation to the victim under Subparagraph 10. Since Mr. Steed did not occupy a position of special trust, the Court erred in binding over the Defendant under Subsection 10.<sup>6</sup>

As the alleged victim’s husband, or purported husband, Mr. Steed did not occupy a position of special trust specifically enumerated by subsection 10. However, under that same subsection, an actor may also hold “a position of special trust in relation to the victim as defined in Subsection 76-5-404.1(4)(h).” Utah Code Ann. § 76-5-406(10). Under that subsection, a person occupies a position of special trust if he holds a position of authority and if “by reason of that position [he] is able to exercise undue influence over the victim.” Utah Code Ann. § 76-5-404.1(4)(h) (2006). So while Mr. Steed did not occupy a position of special trust expressly listed in the statute, he may have nevertheless occupied such a position if he held a position of authority from which he could exercise undue influence over the victim. In a preliminary hearing, the State

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<sup>5</sup> A position of special trust in U.C.A. § 76-5-404.1(4)(h) provides “position of special trust” means that position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the victim, and includes but is not limited to, a youth leader, or recreational leader, who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, baby sitter, adult scout leader, natural parent, step-parent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent.

<sup>6</sup> The magistrate’s ruling for the bind over is attached hereto as **Exhibit C**.



must “produce evidence sufficient to support a reasonable belief that the defendant committed the charged crime.” *Virgin*, 137 P.3d at 791 (citing *Clark*, 2001 UT 9 at P 16). Thus, to bind the Defendant over under subsection 10, the Court must make a finding of fact that supports a reasonable belief that Mr. Steed occupied a position of authority through which he was able to exercise undue influence over the victim.

The pertinent inquiry, then, is whether the State presented sufficient facts to infer that Mr. Steed occupied a position of authority from which he was able to exercise undue influence over the victim. The Court found that Mr. Steed was in such a position “by virtue of the fabric of the community in which Ms. Wall lived, the Lincoln County ceremony, the pre-ceremony interview, and as it applies to Count 2, the post ceremony interview.” (R. at 148, l. 23 – 149, l. 1). The Court further found that, while Mr. Steed “was not lawfully a husband, his status was urged upon Ms. Wall in that fashion and, therefore, he, in her mind, occupies a position of special trust.” (R. at 148, l. 2-5). Essentially the Court seems to have found that the Defendant purported to be Ms. Walls husband, and that by virtue of the FLDS culture in which the couple lived, he thus occupied a position of authority, acting as a husband and holder of the “priesthood,” by which he was able to exercise undue influence.

First, the Defendant notes that, in Utah, individuals under the age of 18 may legally marry older individuals with parental consent. See Utah Code Ann. § 30-1-9 (2006). It would be error to find that Mr. Steed occupied a position of authority merely by virtue of marrying, or purporting to marry, an individual under the age of majority. An adult who marries an individual under the age of 18 does not occupy a position of authority over his spouse merely because of the age difference and marital bond, and to

make such a finding would essentially criminalize sexual intercourse between any married couple, or purportedly married couple, where one spouse is below the age of 18. Accordingly, Mr. Steed did not occupy a position of special trust by virtue of the Lincoln County ceremony.

The magistrate also suggested that Mr. Steed occupied a position of special trust “by virtue of the fabric of the community in which Ms. Wall lived,” (R. at 148, l. 23-24), along with “the pre-ceremony interview, and as it applies to Count 2, the post ceremony interview,” (R. at 148, l. 25 – 149, l. 1). This finding suggests that Mr. Steed occupied a position of special trust as the alleged victim’s purported husband by way of the religious implications generally associated with husbands in the FLDS community, as explained to Mr. Steed and the alleged victim by the Defendant during their interviews. But while an FLDS husband, as a holder of the “priesthood,” may resemble, in some form or another, a religious leader, he is not in a significant position of authority over his spouse. In fact, most husbands who are members of Utah’s predominant religion, that is, the LDS Church, are considered to hold the “priesthood.” Although for individuals who hold the priesthood, this is something valued and honored, the “priesthood” would not generally be considered a position of authority by which a husband can exert undue influence over his wife. The husband or priesthood holder in either the LDS or FLDS communities does not occupy a position of authority similar to the evaluated status and unequal positions of parent and child, adult coach and athlete, teacher and student, or doctor and patient. Further, to find that a husband occupies a position of authority over his wife by way of certain religious beliefs not only criminalizes the sexual acts of many married LDS couples in the State under subsection 10, but also risks running afoul of

the constitutionally protected freedom of religion. The role of priesthood holder in a family is not comparable to the power differential of a parent or a teacher. The magistrate erred in finding that Mr. Steed occupied a position of special trust by way of the fabric of the community and his interviews with the Defendant.

Finally, the Defendant contends that Mr. Steed could not occupy a position of special trust based upon the perceptions of the alleged victim. The magistrate found that, although Mr. Steed “was not lawfully a husband, his status was urged upon Ms. Wall in that fashion and, therefore, he, in her mind, occupies a position of special trust.” (R. at 148, l. 2-5). This position requires a subjective analysis of the alleged victim’s perception that goes beyond the plain language of the statute. Under subsection 10, the issue of whether a perpetrator occupied a position of special trust must be viewed under an objective standard. If an alleged victim subjectively asserts that a perpetrator held a special position of trust, but that assertion is objectively unreasonable, the State should not be allowed to move forward on such capricious grounds. This is especially true in light of the fact that the “fundamental purpose served by the preliminary examination is the ferreting out of groundless and improvident prosecutions,” *State v. Anderson*, 612 P.2d 778, 783-84 (Utah 1980), in order to ““relieve[] the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient,”” *State v. Virgin*, 137 P.3d 787, 792 (Utah 2006) (quoting *Anderson*, 612 P.2d at 784). Moreover, where the legislature provided illustrative examples of positions of special trust in subsection 10, those examples are all objective. Whether the actor was perceived by the victim to have occupied a position of special trust is irrelevant under the statute; instead, the

actor must actually occupy a position of special trust by virtue of which he is able to exercise undue influence. The actor either occupied such a position or did not, and this issue requires an objective inquiry into the nature of the actor's relation to the alleged victim. It does not call for an inquiry into the subjective perception of the alleged victim, and those perceptions have no bearing on whether a defendant meets the statutory requirement of occupying a position of special trust.

The magistrate erred in finding a reasonable belief that Mr. Steed occupied a position of special trust. In a preliminary examination, "the prosecution has not carried its burden if it merely shows belief rather than reasonable belief." *Virgin*, 137 P.3d at 792. The Defendant has shown that Mr. Steed did not occupy a position of authority by which he could exert undue influence over the alleged victim, and the prosecution did not present sufficient facts to create a reasonable belief otherwise. Because Mr. Steed did not occupy a position of special trust, the State failed to show a lack of consent under Subsection 10 of Utah Code Annotated § 76-5-406. Since Mr. Steed was the principle actor for the Defendant's accomplice charges, the Court erred in binding over the Defendant under Subsection 10.

### **CONCLUSION**

The magistrate erred in binding the Defendant over for trial for Counts 1 and 2 under Subsection 1 of Utah Code Annotated, Section 76-5-406. He further erred in binding the Defendant over for trial for Counts 1 and 2 under Subsection 10 of Utah Code Annotated, Section 76-5-406. Accordingly, this motion to quash should be granted under Subsections 1 and 10 of U.C.A. § 76-5-406.

DATED this \_\_\_\_\_ day of March, 2007.

BUGDEN & ISAACSON, L.L.C.

By: \_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

I hereby certify that, on the \_\_\_\_ day of March, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Brock R. Belnap  
Washington County Attorney  
178 North 200 East  
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\_\_\_\_ HAND DELIVERY  
\_\_\_\_ U.S. MAIL  
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\_\_\_\_ FACSIMILE:

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