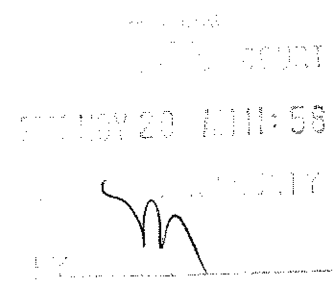

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WASHINGTON COUNTY FIFTH DISTRICT COURT
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. WARREN STEED JEFFS, Defendant.	PRELIMINARY HEARING MEMORANDUM Criminal No. 061500526 Judge James L. Shumate

The State respectfully submits its Preliminary Hearing Memorandum in support of its request that the Court bind the defendant over to stand trial on two counts of rape as an accomplice.

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ACCOMPLICE LIABILITY FOR RAPE

The defendant is guilty of rape as an accomplice because he solicited, requested, commanded, encouraged or intentionally aided in the non-consensual sex between fourteen year old [redacted] and her nineteen year old first cousin.

Utah law provides:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Annotated § 76-2-202 (1953, as amended). Under this section, it is no defense that "the person for whose conduct the actor is criminally responsible ... has not been prosecuted or convicted." Utah Code Ann. § 76-2-203(2) (1953, as amended). Conviction under 76-2-202 requires proof beyond a reasonable doubt that:

1) The defendant had the **required mental state**;

2) The defendant **participated as an accomplice** in one of the ways listed in 76-2-202; and

3) Each element of **rape occurred**.

State v. Lopes, 1999 UT 24, ¶ 11, 980 P.2d 191; State v. Labrum, 959 P.2d 120, 123 (Utah Ct. App. 1998).

This memorandum will address in turn each of the three requirements for accomplice liability rape. The memorandum will close by addressing why the case is timely under the applicable statute of limitations.

I. The Required Mental State for Accomplice Liability Rape is Intentional, Knowing, or Reckless.

The mental state necessary for accomplice liability is the same mental state required for the underlying offense. State v. Chaney, 1999 UT App 309, ¶ 50, 989 P.2d 1091. The underlying offense in Chaney was rape of a child. Because the court concluded that the general mens rea statute applied to rape of a child, the court held:

> [U]nder section 76-2-102, Defendant would be guilty of rape of a child if he intentionally, knowingly, or recklessly solicited, requested, commanded, encouraged, or intentionally aided Beaver to have sexual intercourse with [the child].

Id. at ¶ 51.

In this case, the underlying crime is rape. Because "the rape statute, section 76-5-402, does not require any specific mental state, the crime may be proved by an intentional, knowing, or reckless mental state." State v. Calamity, 735 P.2d 39, 43 (Utah 1987); Utah Code Ann. § 76-2-102 (1953, as amended). Consequently, the mental state necessary to establish accomplice liability for rape is intentional, knowing, or reckless.

According to the Utah Supreme Court, "while [an accomplice] may be criminally responsible for an act committed by [another party], the degree of [the accomplice's] responsibility is determined by his own mental state, not by the mental state of the [other party]." State v. Hansen, 734 P.2d 421, 429 (Utah 1986). Nevertheless, for liability to

attach, the mental state of the accomplice must reach that necessary for a person to be found guilty of committing the underlying crime directly. State v. Telford, 2002 UT 51, ¶ 4, 48 P.3d 228 ("the accomplice liability provision requires the fact finder to determine that the accomplice had the same mental state as the person who directly committed the crime."); State v. Gonzales, 2002 UT App 256, ¶ 12, 56 P.3d 969 ("conviction of accomplice and principal liability do not require proof of different elements or proof of different quality.").

II. The Defendant is Liable as an Accomplice to Rape Because He Participated by Soliciting, Requesting, Commanding, Encouraging, or Intentionally Aiding Another to Commit The Crime.

Because the "required mental state" for accomplice liability rape is "intentional, knowing, or reckless," the State must prove that the defendant intentionally, knowingly, or recklessly participated in one of the ways listed in section 76-2-202. That section requires the defendant to "solicit, request, command, encourage, or intentionally aid" another to commit the crime of rape. Utah Code Ann. § 76-2-202 (1953, as amended).

A. Several Types of Participation Establish Accomplice Liability.

According to the Court of Appeals, "the terms solicits, requests, commands, and encourages carry meaning independent of their context in section 76-2-202. They are not general terms added for the purpose of avoiding inadvertent omission but rather are specific terms selected for their particular meaning." State v. Chaney, 1999 UT App 309 ¶ 48 n 2. In construing unambiguous terms, the Utah Supreme Court "has a long history of relying on dictionary definitions to determine plain meaning." State v. Redd, 1999 UT

108, ¶ 11, 992 P.2d 986, 990 (Utah 1999). The following definitions of the accomplice liability terms are from Merriam-Webster's Online Dictionary[1]:

"Solicit"

1 a : to make petition to : entreat b : to approach with a request or plea <solicited Congress for funding>
2 : to urge (as one's cause) strongly
3 a : to entice or lure especially into evil b : to proposition (someone) especially as or in the character of a prostitute
4 : to try to obtain by usually urgent requests or pleas

"Request"

1 : the act or an instance of asking for something
2 : something asked for <granted her request>
3 : the condition or fact of being requested <available on request>
4 : the state of being sought after : demand

"Command"

transitive verb
1 : to direct authoritatively : order
2 : to exercise a dominating influence over : have command of: as a : to have at one's immediate disposal <commands many resources> b : to demand or receive as one's due <commands a high fee> c : to overlook or dominate from or as if from a strategic position <a hill that commands the city> d : to have military command of as senior officer <command a regiment>
3: *obsolete* : to order or request to be given

"Encourage"

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[1] Source: Merriam-Webster Online Dictionary, Meririam-Webster, Inc.; http://www.m-w.com/dictionary (emphasis omitted).

The Merriam-Webster Online Dictionary is based on the print version of *Merriam-Webster's Collegiate® Dictionary, Eleventh Edition*. The online dictionary includes the main A-Z listing of the Collegiate Dictionary, as well as the Abbreviations, Foreign Words and Phrases, Biographical Names, and Geographical Names sections of that book. It also includes 1,000 illustrations and 25 tables. Selected sections of the print Collegiate Dictionary, notably the Signs and Symbols section, are omitted from the online Collegiate Dictionary because they include special characters and symbols that cannot readily be reproduced in HTML.; http://www.m-w.com/info/faq.htm

1 a : to inspire with courage, spirit, or hope : hearten <she was encouraged to continue by her early success> b : to attempt to persuade : urge <they encouraged him to go back to school>
2 : to spur on : stimulate <warm weather encourages plant growth>
3 : to give help or patronage to : foster <government grants designed to encourage conservation>

"Intentionally Aid"

transitive verb : to provide with what is useful or necessary in achieving an end

B. The Defendant Need Not Be Physically Present to be Guilty of Rape if He Did Something To Instigate, Incite, Embolden or Help Others

A defendant's physical presence is not necessary for accomplice liability. A person "whose conduct makes it possible for [another] to commit the crime of rape of a child" may be held liable even though he was not present during the commission of the rape. State v. Chaney, 1999 UT App 309, ¶¶ 38, 39, 989 P.2d 1091. A person who helps plan a crime "but does not actively participate in the execution of the crime" can be held liable as an accomplice. State v. Peterson, 881 P.2d 965, 971 n. 7 (Utah Ct. App. 1994). *See also* State v. Beltran-Felix, 922 P.2d 30, 36 (Utah Ct. App. 1996) (rejecting defendant's argument that because he was not present during a companion's sexual assault of the victim, he could not be held liable as accomplice); State v. Cayer, 814 P.2d 604 (Utah Ct. App. 1991) (upholding conviction for beating death by partner even though defendant was not physically present).

In assessing the level of participation that gives rise to accomplice liability, "it is the quality of one's actions, not the quantity, that might make one an accomplice." State v. V.T., 2000 UT App 189, ¶ 10, 5 P.3d 1234. For example, the Court of Appeals noted:

> the plain meaning of the word ['encourage'] confirms that to encourage others to take criminal action requires some form of active behavior, or at least verbalization, by a defendant. Passive behavior, such as mere presence—even continuous presence—absent evidence that the defendant affirmatively did something to instigate, incite, embolden, or help others in committing a crime is not enough to qualify as "encouragement" as that term is commonly used.

Id. Conversely, evidence that the defendant did something "to instigate, incite, embolden or help others" may provide a basis for accomplice liability. A defendant's "conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred." State v. Bloomfield, 2003 UT App 3, ¶ 15, 63 P.3d 110. Preventing someone from aiding a victim constitutes evidence to support accomplice liability. State v. Cayer, 814 P.2d 604, 612 (Utah Ct. App. 1991). Together with other evidence, a jury may even infer the required level of participation when a defendant "made no attempt to aid the victim either by seeking help ... or by intervening on the victim's behalf." Id.

"[A] finding of accomplice liability can be properly based on circumstantial evidence." State v. V.T., 2000 UT App 189 ¶ 18 n. 8, 5 P.3d 1234. However, "there must be evidence showing that the defendant engaged in some active behavior, or at least speech or other expression, that served to assist or encourage the primary perpetrators in committing the crime." Id., at ¶ 16. For example, the Utah Supreme Court upheld the trial court's finding that had a child's father consented to an underage marriage, "he would have been criminally liable as a party" to rape of a child under the accomplice liability statute. State v. Green, 2005 UT 9, ¶ 45, 108 P.3d 710.

In this case, the State intends to introduce both direct and circumstantial evidence that the defendant intentionally, knowingly, or recklessly solicited, requested, commanded, encouraged, or intentionally aided another to have non-consensual sexual intercourse with [redacted] i.e. rape—even though he was not physically present at the time the sexual intercourse occurred.

III. [redacted] was Raped Because She Submitted to Sexual Intercourse With Her Purported Husband Without Her Consent

Despite the emotionally laden imagery carried by the term "rape," there are only two elements to the crime: 1) sexual intercourse 2) without consent. According to the Utah code:

> A person commits rape when the actor has sexual intercourse with another person without the victim's consent.

Utah Code Ann. § 76-5-402(1) (1953, as amended). This memo will address both elements: 1) sexual intercourse and 2) lack of consent.

A. Sexual Intercourse

To prove rape, the State must prove an act of sexual intercourse. "[A]ny sexual penetration, however slight, is sufficient to constitute [sexual intercourse]" under the rape statute. Utah Code Ann. § 76-5-407 (1953, as amended). Moreover, a victim's testimony is sufficient to support a finding that sexual intercourse occurred. State in the interest of J.F.S., 803 P.2d 1254, 1259 (Utah Ct. App. 1990).

B. **Lack of Consent: [redacted] Did Not Consent To Sexual Intercourse as a Matter of Fact and Law**

The second element the State must prove is lack of consent. "Intercourse without consent is all that is required for rape pursuant to section 76-5-402; no force is required." State v. Hammond, 2001 UT 92, ¶ 16, 34 P.3d 773.

Utah Code 76-5-406 "sets out a list of circumstances under which there is deemed to be no consent to sexual activity as a matter of law." State v. Salazar, 2005 UT App 241, ¶ 8, 114 P.3d 1170. However, fact finders are not "precluded from determining that circumstances outside those defined in section 76-5-406 may still amount to lack of consent in any particular case." Id. at ¶ 9. The State intends to prove that [redacted] did not consent to sexual intercourse both as a matter of law under section 76-5-406 and as a matter of fact.

1. **[redacted] Did Not Legally Consent Because She Was Enticed or Coerced Under Section 76-5-406(11)**

Section 76-5-406(11) of the Utah Code provides:

> An act of sexual intercourse [or] rape ... is without consent of the victim under any of the following circumstances:
>
> (11) 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)....

Utah Code Ann. § 76-5-406(11) (1953, as amended).

This section creates a "statutory crime" that protects teenage children "from sexual exploitation by older, more experienced persons." State v. Scieszka, 897 P.2d

1224, 1127 (Utah Ct. App. 1995). "It is precisely because young teenagers have difficulty protesting the wrongful sexual attention of adults that they need the special protections of section 76-5-406(11). This statute says 'No' for [them]... when they are wrongfully placed in situations where they cannot be expected to do so for themselves." State v. Gibson, 908 P.2d 352, 357 (Utah Ct. App. 1995).

Thus, a teenager who is ***"enticed"*** or ***"coerced"*** into submitting to sexual intercourse by an older adult does not legally consent.

a. *"Entice"* includes words or actions that cause a person to do something she would not otherwise do.

According to the Utah Court of Appeals, "to entice" includes "the use of improper psychological manipulation to influence the will of another." State v. Gibson, 908 P.2d 352, 356 (Utah App. 1995). The term includes:

> some acts or words intended to cause a person to do something the other person would not otherwise do. Considerations of age, development, relationship to each other, sophistication or lack thereof and all other facts and circumstances shown by the evidence enter into a determination of whether a child was enticed.

Id. at 356 n. 3. (citations omitted). Entice also includes actions or words "to persuade against one's will or better judgment...." Id. (citations omitted).

In State v. Scieszka, 897 P.2d 1224, 1228 (Utah Ct. App. 1995), the Court found that a defendant had enticed a young girl when he "used his faith and his religious position to eventually overcome the victim—who was also a religious person and who sought the approval of God in her daily life." According to the court, "the offer of God's approval to a young religious girl can certainly be classified as an offer of a reward"

sufficient to support a finding of enticement. Id. at n. 12. In this case, the State intends to prove that the defendant enticed [redacted] into submitting to sexual intercourse with Alan Steed.

b. "*Coerce*" includes undue influence or pressure to compel an action short of physical force, violence or threat of retaliation

While the meaning of "entice" has been judicially examined in Utah, there is very little discussion of the term "coerce" under 76-5-406(11). However, the statute itself makes clear that the threat or force necessary to constitute coercion of a teenage child is less than that "amounting to the threat or force required" for adults under subsection (2) (physical force or violence) or subsection (4) (threatening to retaliate immediately or in the future). Utah Code Ann. § 76-5-406 (1953, as amended).

The New Hampshire Supreme Court addressed the meaning of "coerce" in the context of a sex crime against a minor as follows:

> We have ascribed a broad meaning to the term [coerce], relying on the dictionary definition which 'defines the term 'coerce' to mean 1: to restrain, control or dominate, nullifying individual will or desire... 2: to compel an act or choice by force, threat, *or other pressure* ... 3: to effect, bring about, establish, or enforce by force, threat, *or other pressure*.' We have specifically held that '[a] person in a position of authority who uses such authority in any way to coerce the child's submission to sexual activity is subject to prosecution ... whether the coercion involves undue influence, physical force, threats, or any combination thereof.

State v. Fortier, 780 A.2d 1243, 1254 (N.H. 2001) (citations omitted in original; ellipsis and emphasis in original).

In light of the Utah statute and the plain meaning of the term, "coercion" occurs within the meaning of the statute when a person uses undue influence to pressure or compel a teenage child lik[redacted] to submit to unwanted sexual intercourse.

2. [redacted] Did Not Legally Consent Because She Expressed Her Opposition Through Words or Conduct Under Section 76-5-406(1).

There is no consent as a matter of law when "the victim expresses lack of consent through words or conduct." Utah Code Ann. § 76-5-406(1) (1953, as amended). Under Utah law, "ignoring a victim's 'no,' standing alone, may be sufficient for a conviction for rape, even without the use of threat or force." State v. Hammond, 2001 UT 92, ¶ 17, 34 P.3d 773. Because [redacted] expressed her lack of consent to the defendant and to her purported husband both through words and conduct, she did not consent to sexual intercourse as a matter of law.

3. [redacted] Did Not Legally Consent Because of the Undue Influence of a Religious Leader Who Held a Position of Special Trust Under Section 76-5-406(10).

Utah Code Section 76-5-406(10) provides that sexual intercourse is without consent when:

> 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 as defined in Subsection 76-5-404.1(4)(h).

"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 … a …religious leader….” Utah Code Ann. § 76-5-404.1(4)(h) (1953, as amended).

In this case, the defendant did not have sex with [redacted]. However, [redacted] submitted to sex with her purported husband because of the undue influence and religious authority of the defendant. Although the defendant was not the actor in the sense that he had sex with [redacted] accomplices are “actors” under the law. *See* Utah Code Ann. § 76-2-203(2) (“… the person for whose conduct the *actor* is criminally responsible…”) (emphasis added). Under Utah law “conviction of accomplice and principal liability do not require proof of different elements or proof of different quality.” State v. Gonzales, 2002 UT App 256, ¶ 12, 56 P.3d 969. Thus, even though the defendant did not have sex with [redacted] he was the “actor” who made it possible.

In State v. Sciezka, the appellate court noted that the consent statute should be “looked at in its entirety and in accordance with the purpose which was sought to be accomplished.” 897 P.2d 1224, 1227 (Utah Ct. App. 1995). With regard to subsection (11), the Court of Appeals held that language of the underlying crime “and its relationship to other sections of the criminal code is quite clear. The statutory section defining the charged crime, as well as the section listing the circumstances under which [the sex crime] occurs without the victim’s consent, is aimed at prohibiting mature adults from preying on younger and inexperienced persons.” Id.

Subsection (10) is similarly designed to protect persons younger than eighteen from undue influence by people like the defendant. Consequently, interpreting the statute

as a whole, in combination with the accomplice liability statute, the defendant is an "actor" whose undue influence resulted in [redacted] submitting to unwanted sexual intercourse with her purported husband.

4. [redacted] Did Not Legally Consent to Sexual Intercourse Because She Erroneously Believed Alan Steed to be Her Spouse Under Section 76-5-406(7).

A person does not consent to sexual intercourse as a matter of law if "the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse." Utah Code Ann. § 76-5-406(7) (1953, as amended).

In this case [redacted] knew that no licenses were obtained and that the ceremony was conducted in secret. However, as a result of the defendant's conduct, [redacted] nevertheless believed herself to be married and submitted to intercourse with Alan Steed because she believed it was her responsibility as a wife. [redacted] belief that she was Alan Steed's spouse was erroneous because her purported marriage was void under Utah statutory and common law.

Specifically, incestuous marriages between first cousins are prohibited and void ab initio. Utah Code Ann. § 30-1-1 (1953, as amended) (incestuous marriages void). Also, marriages involving fourteen year-olds are prohibited and void ab initio. Utah Code Ann. §§ 30-1-2; 30-1-9 (1953, as amended) (marriages involving fifteen year-olds must have judicial approval); State v. Chaney, 1999 UT App 309, ¶ 25, 989 P.2d 1091 ("the Utah Supreme Court implicitly recognized that a marriage license issued to a minor younger than the statutory age for marriage was void ab initio.").

Moreover, the common law marriage statute cannot validate marriages where the parties are not "of legal age and capable of giving consent" and the marriage was not "legally capable of being a solemnized marriage..." Utah Code Ann. § 30-1-4.5 (1953, as amended). Thus, [redacted] was never Alan Steed's spouse and when she submitted to sexual intercourse as part of her wifely duties, she did so under the mistaken belief that Alan was her spouse.

In this case, both Alan Steed and the defendant knew that [redacted] submitted or participated because of her erroneous belief that she was Alan Steed's spouse. The defendant created that erroneous belief through his specific actions, and thus is criminally responsible as an accomplice.

5. [redacted] Did Not Consent as a Matter of Fact Under a Totality of the Circumstances

While "satisfying one or more prongs of 76-5-406 establishes lack of consent *as a matter of law*," fact finders are not "precluded from determining that circumstances outside those defined in section 76-5-406 may still amount to lack of consent in any particular case." State v. Salazar, 2005 UT App 241, ¶¶ 8-9, 114 P.3d 1170 (emphasis in original).

In this case, even if any one of the sub-sections briefed above is inapplicable for some reason, the combination of circumstances demonstrates that [redacted] did not willingly consent to sexual intercourse with Alan Steed and did so because of the efforts of the defendant. Whether a victim consents "is a highly fact sensitive issue." State in re J.F.S., 803 P2d 1254, 1257 (Utah Ct. App. 1990). Whether a teenage child consented

depends upon "the totality of the facts and circumstances" including the defendant's "course of conduct." State v. Gibson, 908 P.2d 352, 356 (Utah App. 1995).

The totality of the circumstances in this case shows that [redacted] did not consent but rather submitted to sexual intercourse as a result of the defendant's entire course of conduct.

CONCLUSION

The Court should bind the defendant over to stand trial for rape as an accomplice because he intentionally, knowingly, or recklessly solicited, requested, commanded, encouraged, or intentionally aided another to have non-consensual sexual intercourse with [redacted]. The sexual intercourse was non-consensual both as a matter of fact and law.

Respectfully submitted this 16 day of November, 2006.

Brock Belnap
Washington County Attorney

CERTIFICATE OF DELIVERY

I hereby certify that, on the 16th day of Nov., 2006, I caused a true and correct copy of the foregoing document to be served as follows:

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