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LAURA B. DUPAIX - #5195
Assistant Attorney General
MARK L. SHURTLEFF - #4666
Utah Attorney General
160 E. 300 S., 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180
Attorneys for Plaintiff/Appellee

IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL
v.	:	
WARREN STEED JEFFS,	:	Case No. 20070317-SC Dist. Ct. No. 061500526
Defendant/Petitioner.	:	

Defendant is charged with two counts of rape, as an accomplice. He seeks interlocutory review of three district court orders denying his motions to (1) change venue, (2) quash the bindover, and (3) declare unconstitutional Utah Code Ann. § 76-5-406(11), which defines lack of consent for certain sex crimes against minors to include enticement.

This Court should deny the petition with respect to the change of venue motion because defendant has not shown that there is "a reasonable likelihood that a fair trial cannot be had [in Washington County] unless the motion is granted." *State v. James*, 767 P.2d 549,

552 (Utah 1989). Indeed, defendant's own poll shows that the same percentage of persons in both Washington and Salt Lake County have yet to form an opinion on defendant's guilt.

This Court should deny the petition with respect to the motion to quash the bindover because the evidence at preliminary hearing was more than sufficient to demonstrate a reasonable belief that defendant solicited, requested, commanded, encouraged or intentionally aided another to have non-consensual sex with the 14-year-old victim in this case. Defendant's alternative claim that the principal actor in this case was not in position of special trust in relation to the victim is irrelevant to defendant's liability as an accomplice. Defendant does not dispute that he occupied a position of special trust. In any event, the principal was in a position of special trust.

Finally, this Court should deny the petition with respect to the constitutionality of Utah's consent statute because the issue is not yet ripe. The statute defendant attacks concerns only one of the State's three theories of lack of consent. Unless and until defendant is convicted under that theory, there is no need for this Court to address its constitutionality. The State's position is set out more fully below.

FACTUAL BACKGROUND[1]

Ninth grader Elissa Wall was only 14 years old when she was told that the prophet of her church had received a revelation from God that she was to marry her 19-year-old first cousin. PH1:112-15, 119-20. A week later, Elissa found herself an unwilling participant in an unlicensed wedding ceremony at which defendant Warren Jeffs declared the two husband and wife and admonished them to "[g]o forth and multiply and replenish the earth with good priesthood children." PH1:130-36. The following facts, with their reasonable inferences, are recited in the light most favorable to the prosecution's case. *See State v. Clark*, 2001 UT 9, ¶ 10, 20 P.3d 300.

"Are you sure it's me? Because I'm only 14 years old."

Elissa grew up in an FLDS family in Salt Lake City.[2] PH1:106-07. From kindergarten through sixth grade, Elissa attended Alta Academy, a private FLDS school in

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[1]Unless otherwise stated, the following factual and procedural background is taken from the preliminary hearing transcript (designated as PH, followed by the volume number, and the page number: PH1:35); and the motion hearing transcript (attached as **Addendum A**, and designated as T, followed by the page number: T:29).

[2]The FLDS Church is one of several "small religious communities in Utah that continue to interpret the early doctrine of the Church of Jesus Christ of Latter-day Saints (the 'LDS Church' or 'Mormon Church') as supporting the practice of 'plural marriage,' or polygamy. Though often referred to as 'fundamentalist Mormons,' these groups have no connection to the LDS Church, which renounced the practice of polygamy in 1890." State v. Holm, 2006 UT 31, ¶ 2 n.1, 137 P.3d 726. The FLDS Church community has been concentrated in the twin communities of Hildale, Utah and Colorado City, Arizona, which straddle the Utah/Arizona border.

the Salt Lake area. *Id.* at 11-13. Warren Jeffs, the son of then-FLDS prophet Rulon Jeffs, was principal of the academy. *Id.* 11-12, 107. As principal, Warren taught the girls child development, which included instruction on "what a good priesthood girl" does. PH1:17. The girls, including Elissa, were taught that "every desire, . . . every tie that they had was foremost to their father, who was their priesthood head, . . . [a]nd then when they were married . . . they were to transfer all of their ties, all of their loyalties to their husband and to submit to him and have perfect obedience to that husband." PH1:18-19, 60-61.

The girls, including Elissa, were also taught that "God would talk to the prophet and tell the prophet who that girl belonged to," or was "appointed to marry." PH1:19, 115. FLDS boys and girls were generally not taught what it means to have sex. PH1:21, 63. Warren taught the girls that when the "time comes [their] husband[s] will teach [them]." PH1:21, 63. Elissa had never been taught by anyone what sex was. PH1:136, 140-46.

Elissa was also taught "not to want to marry someone." PH1:115. Rather, she was "taught to want to marry whoever the prophet told [her] to marry." PH1:115. Wanting to marry someone else would mean that Elissa's "heart was in the wrong place," that she "wasn't a clean, submissive person." *Id.* It was almost unheard of for a FLDS woman to decline the prophet's choice of a husband. PH1:65, 87-88. To do so would be "a very shameful thing," and "defying the word and counsel of God." PH1:87.

In the fall of 2000, Elissa's father "lost his priesthood." PH1:34. Under Warren's direction, Elissa, her mother, and her siblings were removed from her father and sent to live with Fred Jessop, Rulon Jeffs's second counselor, in Hildale, Utah. PH1:34, 87, 109-10. Two months later, Elissa's mother married Jessop as a plural wife and Jessop became Elissa's "father, [her] priesthood head and . . . [he now] directed [her] life." PH1:34, 109-10. Elissa was told that her father was no longer her father and all contact with him was cut off. PH1:110.

In April 2001, Jessop told Elissa that the prophet had chosen someone for her to marry and that she needed to prepare herself. PH1:112. Elissa was "shocked" and "scared" at this news, because she was "so young." PH1:114. She thought that Jessop must have mistaken her for someone else because there were several older girls whom Elissa assumed would be married first. PH1:114.

Elissa asked Jessop, "Are you sure it's me? Because I'm only 14 years old." PH1:114. Jessop replied, "Yes, I am." PH1:114. Elissa told Jessop that she did not "feel like that's what [she] should be doing because [she was] really young." He told her to pray about it. He would not tell her whom the prophet had chosen for her, but said "that would be revealed to [her] at the right time." *Id.* at 114-15.

"[A] revelation from God . . ."

Elissa prayed about it, but told Jessop, "My heart and my gut just tell me that I need to grow up a little." PH1:116. Jessop told Elissa that since it was "the prophet's calling," she would have to take it up with him. *Id.* Elissa called and talked to Warren Jeffs, who by that time was running the church because his father, Rulon, had suffered a debilitating stroke. PH1:24-26, 28-30, 44. Warren promised to tell the prophet that Elissa felt she was too young to get married. PH1:116. He also admonished Elissa to say her prayers. *Id.*

A few days later, Jessop informed Elissa that Warren told him that "the prophet wanted [her] to go through with this, that this was God's calling and this was [her] mission." PH1:116-17. Elissa repeated that she was not sure if she could get married, "because [she] didn't feel like it was right." *Id.* But she was too "scared to say no to them because that was unheard of." PH1:117.

Elissa soon learned that her intended husband was Allen Steed, her 19-year-old first cousin. PH1:118-120. Allen had bullied Elissa when she was younger and had called her embarrassing names. PH1:108. Elissa told Jessop, "I will not marry that man." PH1:120. Jessop asked Elissa if she was defying the prophet. Elissa replied that she did not want to defy the prophet, she just did not want to marry Allen. Elissa then asked if Jessop knew that Allen was her first cousin. PH1:120. Jessop told her that did not "matter in the affairs of the

Lord." *Id.* When Elissa told Jessop that she could not "bring" herself to marry Allen, he told her to talk to the prophet. *Id.* at 120-21.

Elissa made an appointment to see Rulon Jeffs. PH1:121. She fasted and prayed that he would be inspired because she "truly felt like [she] wasn't supposed to do this." *Id.* Elissa first met alone with Warren. *Id.* at 122. She told him that she needed to grow up and that she did not want to marry her first cousin. *Id.* Warren told Elissa that "the prophet ha[d] directed [her] to do this," and that this was "a revelation from God and . . . an honor to have the prophet place [her] in a good priesthood marriage." *Id.* at 123.

Warren then took Elissa into the dining room where Rulon was eating lunch. *Id.* Warren remained, as well as some of Rulon's wives and brothers. *Id.* Elissa knelt by Rulon's side and begged him not to make her marry now, or least not to make her marry Allen. *Id.* at 123-24. Rulon looked confused and asked Elissa to repeat what she had said. *Id.* at 124. Before she could, Warren "jumped in" and said, "[W]ell this young lady feels like the place that you have found for her to be married is not right. And she doesn't want to be married. She feels like you haven't decided right. And she's here to get your permission not to be in the marriage." PH1:124.

Before returning to his lunch, Rulon patted Elissa's hand and said, "You follow your heart, sweetheart. Just follow your heart." *Id.* at 124. As Warren ushered Elissa out, she told him that her heart told her not to get married now. *Id.* at 125. Warren replied, "Well,

your heart is in the wrong place, because the prophet has revealed this to you. And this is your mission and duty to do." *Id.* Elissa was "devastated" and "confused" because "the prophet had told [her] to follow [her] heart," but "his counselor had told [her] that [her] heart was in the wrong place and that [she] needed to proceed with this marriage." PH1:125.

Two days before the wedding, Elissa's two sisters, Rebecca and Jennie, told Rulon that they were concerned that Elissa was too young to marry. PH1:85-86. When Rulon looked confused, Warren explained that they were talking about their younger sister Elissa, "who Uncle Fred [Jessop] has directed and asked that she be married to Allen Steed." *Id.* at 86. Jennie interjected, "Father, she is only 14." *Id.* When Rulon asked, "What the hell is Fred thinking," Warren claimed that Jessop was "insisting upon this. And we'd like to go forward with it because he has asked that this happen." *Id.*

"I honestly just wanted to die . . . ."

Elissa again told Jessop that she "just couldn't" marry Allen. PH1:125. Jessop told her, "Well, if you do not do this, your future here will be in jeopardy." *Id.* Elissa's mother finally talked her into "just doing what [she] was told to do" because "the prophet knew what was best." *Id.* at 126. Elissa felt "totally powerless" to "change the situation." PH1:127. She was too scared to leave. She had nowhere to go and her salvation was in jeopardy. PH1:127.

But Elissa could not stop crying. PH1:35-36, 43, 129-30. Elissa's mother and her sister Rebecca sewed her wedding dress. They would try the dress on Elissa and "she would

just be crying and crying." PH1:35. When they asked Elissa how she wanted her dress to look, she responded, "I don't care. I just don't even care what it looks like." PH1:36. At times, "she was sobbing so much that in trying to pin the lace on the dress . . . her body was moving, and [her mother and sister] would have to wait for her to get done to be able to pin it so that it . . . looked the way [they] wanted it to." *Id.* They stayed up all night before the wedding working on the dress, but Elissa kept telling her mother and sister that she could not go through with the wedding. PH1:127.

The following morning, Elissa and two other girls were taken to a hotel in Caliente, Nevada to be married. PH1:128-29. Elissa went upstairs to change into her dress. PH1:129. Elissa cried the entire time: "I honestly just wanted to die because I was so scared. . . . This was the darkest time in my entire life. One of the most painful things I have ever been through." PH1:130. When Elissa told one of the other brides that she did not think she could get married, the girl chastised her for not being obedient. *Id.*

"[G]o forth and multiply and replenish the earth with good priesthood children."

When Elissa was called to the ceremony room, she could hardly stand up. *Id.* at 131. She walked in with Allen. *Id.* at 132-33. She was embarrassed because she was crying and her eyes were red. *Id.* at 133. Warren Jeffs read something out of a book. *Id.* Elissa could not remember what he said, because she was not focusing on his words. *Id.*

Warren told Elissa and Allen to take each other by the hand. Elissa "kind of shook [her] head." *Id.* at 133. Warren repeated, "Take Allen's hand." *Id.* at 133. This time, Elissa

complied. *Id.* Warren proceeded with the ceremony, and then asked, "Do you, Elissa Wall, take Allen to be your lawful wedded husband for time and all eternity?" Elissa "just couldn't say anything." *Id.* at 133. The "room was deadly silent" as Warren looked at Elissa. *Id.* Warren finally asked Elissa's mother to stand up with her and hold her other hand. *Id.*

Warren then repeated the question. But Elissa still "couldn't say anything." *Id.* at 134. Elissa thought that Warren "looked very powerful and very intimidating." *Id.* After "the silence became unbearable," Elissa "finally . . . just said, okay. I do." *Id.*

Warren then told Allen that he "may kiss the bride." But Elissa "kind of turned [her] head away. And [she] shook [her] head." *Id.* at 134. Warren said, "Kiss Allen, Elissa." *Id.* Elissa gave Allen a "peck." *Id.*

After the ceremony, Warren Jeffs took Elissa's hand, which she had dropped, and joined it with Allen's. He admonished the two to "go forth and multiply and replenish the earth with good priesthood children." *Id.* at 136. Feeling "completely defeated and trapped," Elissa locked herself in the bathroom. She refused to come out "for quite a while." *Id.* at 135.

"Please don't do this."

Although no marriage license had been obtained, Elissa considered herself to be married to Allen and she viewed him as her "priesthood head."[3] PH1:137. Married couples

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[3]Of course, there was no valid marriage. First, no marriage license had been obtained. *See* PH1:137. Nevada law requires a marriage license. *See* Nev. Rev. Stat. §§ 122.010, 122.040. Second, Allen and Elissa were first cousins. Neither Utah nor Nevada

in the FLDS community are expected to begin having children immediately: "[I]t's your mission. It's your duty. It's the reason you get married, is to have children and to raise them in priesthood." *Id.* at 136. But although Elissa understood that she was supposed to have babies, she "had no idea" how that would happen. *Id.* at 136-37.

Elissa and Allen returned from Nevada to Elissa's bedroom, which was decorated as as a "Honeymoon Hideout." *Id.* at 138-39. Allen did not touch Elissa that night. *Id.* at 140. But he began touching Elissa "in places that totally shocked her" during a honeymoon trip a few days later. *Id.* at 140. Elissa asked Allen to "please" not touch her. *Id.* at 141. She did not know "why he was touching [her] there." *Id.* It "embarrassed" and "shocked" her. When Allen persisted, Elissa would "go and sleep on the other bed in the hotel rooms." *Id.*

Allen had sexual intercourse with Elissa for the first time in mid-May 2001. *Id.* at 141-44. Allen had taken Elissa to the park where he exposed his genitals to her. *Id.* at 142. Elissa asked him what he was doing and told him to "[p]ut that away." *Id.* Allen replied, "This is what I look like." *Id.* at 142-43. Saying, "I don't even want to see," Elissa ran home to her mother's room and started to cry. *Id.* at 143. Elissa could not bring herself to tell her mother what was wrong. *Id.* Elissa thought she "had done something wrong in seeing a man like that, because [she had been] taught to never see each other naked, ever." *Id.* at 143.

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permit first cousins to marry at their age. *See* Nev. Rev. Stat. § 122.020; Utah Code Ann. § 30-1-1. Finally, at age 14, Elissa could not marry in Utah. *See* Utah Code Ann. § 30-1-2. In Nevada, she could marry at age 14 only if one her parents consented by following certain formal requirements. Nev. Rev. Stat. 122.040. Nothing in the record suggests that either of Elissa's parents executed such a consent.

Elissa hid in her mother's room until after midnight, hoping that Allen would be asleep. *Id.* He wasn't. He lay on their bed in his underwear. *Id.* at143. When Elissa came in, he stood and began to undress her. *Id.* Elissa said, "Don't you touch me. I don't want anything to do with you" *Id.* When Allen removed his underwear, she closed her eyes and begged, "[O]h, please don't do this. I don't know what you are doing. I don't want to – I don't want anything to do with this." *Id.* Allen replied, "[T]his is what we are supposed to do. This is what men and wives do." *Id.* Elissa repeated, "Well, I don't know what you are doing. So, please, don't." *Id.* Frightened and confused, Elissa returned to her mother's bedroom. *Id.* at 143-44.

For about a week Elissa "camped out" in her mother's room. *Id.* at 144. One night, after she returned to sleeping in her own room, Allen told her, "It's time for us to do our responsibility and for you to be a wife." *Id.* He undressed himself and began to undress Elissa. Elissa froze and begged Allen, "[P]lease don't do this. I don't know what you are doing." Allen continued to undress Elissa, saying, "[T]his is what I'm supposed to do to you. You are my wife. We are going to have children. And this is what has to be done." *Id.*

Elissa cried as Allen finished undressing her. He stood back and said, "I have always wanted to see a woman naked." *Id.* Elissa was "so embarrassed." Allen then laid her on the bed and had intercourse with her. *Id.* Elissa cried throughout and continued to ask Allen "to please don't do this." *Id.* at 145. Allen just "kept saying that it was okay. That . . . [she] was

going to learn that this is what was supposed to happen." *Id.* So Elissa "just laid there in shock. And it hurt." *Id.*

Elissa was confused. She did not understand why Allen was doing this to her. She did not yet understand that this was "how babies were made." *Id.* Allen had intercourse with Elissa several times after that, even though she kept telling him that she did not want to. *Id.* at 145-46.

You need "to go home and give [yourself] mind, body and soul to Allen."

At the urging of her sister, Elissa went to see Warren Jeffs a few months later. *Id.* at 145-48. Elissa told Warren that she could not be Allen's wife anymore. *Id.* at 148. She explained that Allen "touches me in my private parts and touches me in ways that I don't like." *Id.* 148. Warren told her that Allen was her "priesthood head and he knew what was right for [her]." *Id.* Elissa begged to be released from Allen. *Id.* at 148-49.

Warren instead told Elissa "to go home and give [her]self, mind, body and soul to Allen because he was [her] priesthood head and he knew what was best for [her] and that he would be directed by the priesthood and the spirit of God to know how to handle [her]." *Id.* at 149. He also told her to "read the marriage covenant every day," and to not come see him again without Allen. *Id.* at 151.

Allen continued to have intercourse with Elissa at least once a week. *Id.* Elissa sometimes slept elsewhere to avoid Allen's advances. *Id.* Elissa submitted to sex with Allen

because she "felt like [she] had no choice." *Id.* at 152. "If I would have had a choice I never would have married Allen. I never would have got married at all let alone have sex." *Id.*

In the summer of 2002, Elissa again asked Warren to be released from her relationship with Allen. *Id.* at 159. Warren instead told her to break off her relationship with her mother so that she could place all her loyalties with Allen. *Id.* at 160. Warren again told her to "give [her]self mind, body and soul to that man, because he's a priesthood man." *Id.* at160-61.

PROCEDURAL BACKGROUND

Based on the foregoing, Warren Jeffs was charged with two counts of rape, as a party accomplice, in violation of Utah Code Ann. §§ 76-5-402 & 76-2-202. At the preliminary hearing, the State presented four theories for concluding that Elissa did not consent to sexual intercourse with Allen: (1) Elissa "express[ed] lack of consent through words or conduct," Utah Code Ann. § 76-5-406(1); (2) "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); (3) Elissa was "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," Utah Code Ann. § 76-5-406(10); and (4) Elissa was "14 years of age or older, but younger than 18 years of age, and the actor [was] more than three years older than the victim and entice[d] or coerce[d] the victim to submit or participate," Utah Code Ann. § 76-5-406(11).

The magistrate refused to bind over on the second theory, but bound over on the other three theories. PH2:141-54.

Defendant subsequently moved to change venue. At the same time, he moved to quash the bindover on two grounds: (1) that the evidence did not support a reasonable belief that defendant was aware, when he "married" Allen and Elissa, that non-consensual sex would occur; and (2) that the magistrate erred in concluding that Allen "occupied a position of special trust in relation to the victim," under subsection (10) of Utah Code Ann. § 76-5-406, the consent statute. Defendant finally moved to declare subsection (11) of the consent statute unconstitutional on the ground that the term "entice" is unconstitutionally vague. The trial court denied all three motions.

ARGUMENT

As this Court has recognized, "only a small number of [petitions for interlocutory appeal] are granted." *State v. Troyer*, 866 P.2d 528, 530 (Utah 1993). "This is because it is usually better judicial policy to allow the case to come to a conclusion in the trial court and then permit any aggrieved party to appeal from the final judgment, assigning as error any and all rulings which he or she claims to be erroneous." *Id.* This allows the appellate court to review the entire trial proceeding in one appeal, thereby avoiding unnecessary delay and expense. *See id.*

For that reason, this Court will grant a petition for interlocutory review only if (1) the petitioner establishes that the interlocutory order involves "substantial rights and may materially affect the final decision"; or (2) reviewing the order before final judgment "will better serve the administration and interests of justice." Utah R. App. 5(e). "Permission to

proceed with such an appeal is granted only when it is 'essential to adjudicate the principles of law or procedure in advance as a necessary foundation upon which the trial may proceed; or if there is a high likelihood that the litigation can be finally disposed of on such an appeal.'" *Williams v. State*, 716 P.2d 806, 807-08 (Utah 1986) (quoting *Manwill v. Oyler*, 361 P.2d 177, 178 (Utah 1961)). This is why rule 5(c)(1)(D), Utah Rules of Appellate Procedure, expressly requires interlocutory petitions to include a "statement of the reason why the appeal may materially advance the termination of the litigation."

As explained below, granting the petition on any of the grounds advanced by defendant will not "materially advance the termination of the litigation," nor will it "better serve the administration and interests of justice." Utah R. App. P. 5.

POINT I

THIS COURT SHOULD DENY THE PETITION AS TO THE CHANGE OF VENUE BECAUSE DEFENDANT'S OWN POLL SUGGESTS THAT A FAIR TRIAL CAN BE HAD IN WASHINGTON COUNTY AND BECAUSE THE TRIAL COURT PROMISED TO REVISIT THE ISSUE IF ENOUGH UNBIASED JURORS COULD NOT BE FOUND

Defendant seeks interlocutory review of the trial court's denial of his motion to change venue, arguing that he has shown "a reasonable likelihood that he will face a prejudiced jury because of '(1) the standing of the victim and the accused in the community; (2) the size of the community; (3) the nature and gravity of the offense; and (4) the nature and extent of the publicity.'" Petition at 7-8 (citations omitted). This Court should deny the

petition because, as explained below, the evidence before the trial court supports a likelihood that a unbiased jury can be seated in Washington County.

A. The Dan Jones Poll.

Before filing his motion, defendant commissioned a poll from Dan Jones and Associates. (A copy of the poll is attached as Exhibit D to defendant's petition). The objective of the survey was "to determine the percent of the population [in each of the counties surveyed] that had a predetermined notion about guilt or innocence in this case." T:65 (attached as **Addendum A**). The surveyors interviewed 210 people in Washington County, 212 in Iron County, and 206 in Salt Lake County. T:72. The survey had a margin of error of plus or minus 6.9 percent. T:72-73.

Of those surveyed in Washington County, 52 percent had formed an opinion that defendant was "definitely guilty"; 23 percent believed that defendant was "probably guilty"; 22 percent had formed no opinion; and one 2 percent believed that defendant was "probably not guilty." T:93, 98; Exhibit D of Defendant's Petition.

In Salt Lake County, where defendant believes the trial should be held, 39 percent believed that defendant was "definitely guilty"; 39 percent believed that defendant was "probably guilty"; 20 percent had not yet formed an opinion; 1 percent believed that defendant was "probably not guilty"; and 1 percent believed that defendant was "definitely not guilty." T:93; Exhibit D of Defendant's Petition.

Thus, slightly *more* residents of Washington County (22 %) than Salt Lake County (20%) had formed no opinion as to defendant's guilt.

B. The trial court's ruling.

Given defendant's polling numbers, the trial court ruled that regardless of where the trial took place, the jury selection process would "be driven by the general idea that we begin with potential jurors who have expressed no opinion regarding the guilt or innocence of the defendant." *See* Order Denying Defendant's Motion to Change Venue Without Prejudice, attached as **Addendum B**, at 2. The trial court noted that the press coverage on this case had been "unprecedented" not only in Washington County, but nationally. *Id.* Because of that extensive press coverage, the trial court voiced its discomfort with "including potential jury members who express an opinion of [even] 'probably guilty' at least long enough to engage them in *voir dire* questioning regarding setting aside their opinions." *Id.* Thus, the court stated, "regardless of which county we are in, we will begin the selection process with potential jurors who have expressed no opinion whatsoever and then work to select eight jurors and perhaps three alternates." *Id.* The court then explained that given the polling data submitted by the defense, "if we begin with 300 potential jurors in Salt Lake County, we can expect approximately 60 jurors with no opinion. If we begin with 300 potential jurors in Washington County, we will get approximately 66 jurors with no opinion." *Id. See also* T:137.

The trial court then weighed the four factors set out in *State v. James*, 767 P.2d 549 (Utah 1989):

> (1) the standing of the victim and the accused in the community; (2) the size of the community; (3) the nature and gravity of the offense; and (4) the nature and extent of publicity.

Id. at 552.

The court first considered the relative standing of the defendant and the victim in the community. It noted that unlike the victim in *State v. Stubbs*, 2005 UT 65, 123 P.3d 407, the victim in this case had no standing in the community.[4] **Add. B** at 2-3; T:163-68. The defendant's standing in the community, on the other hand, was based solely on his notoriety in the press. *Id.*

The court next addressed the size of the community. According to the evidence before the trial court, Washington County has a total population of 117,385. *See* Exhibit attached to State's Memorandum Opposing Change of Venue, attached her as **Addendum C**. Moreover, of all Utah counties, including Salt Lake, Washington County is the least insular, having the highest percentage of persons born outside Utah. *Id.*

The trial court then addressed the gravity of the offense. It did not place much weight on this factor, however, because in the judge's experience of 400 to 500 jury trials as a

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[4]The 17-year-old rape victim in *Stubbs*, lived in a small, insular community and was the granddaughter of the local high school football coach and the daughter of the county treasurer. *Stubbs*, 2005 UT 65, ¶ 4.

lawyer and a judge, "potential jurors view all crime as an important matter and whether a specific crime is heinous or non-heinous carries very little weight." **Add. B** at 3; T:165.

Finally, the court weighed pretrial publicity, which it considered, in this case, to be the weightiest of the *James* factors. *Id.* The court was concerned about the local press coverage, but stated that it was not sure that local coverage had fatally impaired its ability to seat an impartial jury. *Id.* at 4.

Returning to defendant's polling figures, the trial court concluded that "the only reasonable way to impanel a jury in either Washington or Salt Lake County is to disqualify those who have expressed any opinion as to Mr. Jeff's innocence or guilt." *Id.* at 4. The trial court accordingly promised that as "we go through that process, we will not subscribe to the idea that a potential juror can be rehabilitated by the leading question "yes, but you can set that aside couldn't you?" Rather, the "*voir dire* process will be done on an individual basis and it will be done with very careful attention." *Id.* at 5.

The trial court then denied defendant's motion for a change of venue without prejudice, with the promise that the motion would be granted immediately during *voir dire* if the court was unable, from a pool of 300 potential jurors, to find at least 25 unbiased jurors.[5] *Id.* at 5; T:166-67.

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[5]This was the number the trial court believed necessary to get the necessary eight jurors and alternates, after the exercise of peremptory challenges. **Add. B** at 5.

C. An interlocutory appeal is unnecessary because defendant's own poll supports the trial court's decision and because the trial court has agreed to grant a change of venue if necessary.

"A decision to grant or deny a motion to change venue is within the trial court's sound discretion and will not be disturbed absent a finding that the court exceeded its discretion." *Stubbs*, 2005 UT 65, ¶ 8.

In view of the defendant's own polling figures, the trial court did not exceed its discretion in denying the motion to change venue without prejudice. As stated, defendant's survey shows that virtually the same percentage of persons in both Salt Lake and Washington County–20 and 22 percent respectively–have formed no opinion regarding defendant's guilt. Given those figures, the trial court reasonably concluded that the best course of action was to try to seat an unbiased jury in Washington County by starting with a pool of 300 jurors and trying to cull only those potential jurors who had not yet formed any opinion regarding defendant's guilt. Defendant has not shown that this course of action is unreasonable, particularly given that according to his own poll, Salt Lake County will not afford him a greater likelihood of an impartial jury.

Defendant makes much of the pretrial publicity in Washington County and the fact that more people there believe that defendant is "definitely guilty." The issue, however, is not the quantity or quality of pretrial publicity, but rather the effect such publicity is likely to have on potential jurors. As the trial court noted, pretrial publicity has been unprecedented, not only in Washington County, but nationally. Defendant was, after all, on

the FBI's Ten Most Wanted List. Thus, defendant cannot escape that publicity, even in Salt Lake.[6]

Moreover, as stated, defendant's poll demonstrates that the effect of the extensive pretrial publicity has been about the same in both counties. About 20 percent in both counties has yet to form an opinion. While the poll suggests that more people in Washington County believe that defendant is definitely guilty, 48 percent have not formed that strong of an opinion. In any event, the question is not whether fewer people in Salt Lake County have formed an opinion, but whether there is a reasonable likelihood that an impartial jury cannot be seated in Washington County. If, as the trial court intends, 300 potential jurors are called, there is every reason to believe that enough impartial jurors can be found in Washington County.

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[6]A search of the internet archives of both the *Salt Lake Tribune* and *Deseret News* brings up several hundred stories containing defendant's name. In 2007 alone, the *Tribune* and the *Deseret News* ran over a 100 stories with defendant's name in it. In 2006, the combined stories were over 350. While defendant complains that the local media in Washington County publish unflattering stories about him, Pet. at 14-17, the State has not found that any of the stories in the *Tribune* or *Deseret News* are any more flattering. Indeed, the *Tribune* recently published a story suggesting that defendant is keeping one of his follower's wife and young child from him because of a minor infraction by the follower. *See* Brooke Adams, *On the Lam with Warren Jeffs*, Salt Lake Tribune, Apr. 29, 2007. Other articles mentioning Warren Jeffs feature the expulsion of teens from his FLDS community. *See* Adams, *She Escaped Polygamy and Has a Story to Tell*, Salt Lake Tribune, Apr. 24, 2007; Adams, *'Lost Boy' Sues to Contact Mom*, Salt Lake Tribune, Feb. 21, 2007. Thus, defendant's claims notwithstanding, it appears that the nature and quantity of pretrial press coverage is comparable in both Salt Lake and Washington County.

But more importantly, the trial court here denied the motion without prejudice. The trial court promised to proceed through voir dire "with careful attention," and without trying to rehabilitate jurors who appear to have already formed an opinion. The trial court further promised to change venue immediately should its attempt to seat an impartial jury in Washington County fail. **Add. B** at 5; T:166-67.

Given defendant's polling figures, the trial court's assurance that it would proceed carefully with *voir dire*, and the trial court's promise that it would grant the motion to change venue if its efforts proved fruitless, an interlocutory appeal will neither "materially advance the termination of the litigation" nor "better serve the administration and interests of justice."

Indeed, a change in venue would aid defendant only if he intends to seat jurors who believe he is "probably guilty." If he wants jurors who have no pre-conceived position on his guilt or innocence, the jury pools are virtually indistinguishable.

In sum, if the trial court is able to seat an impartial jury in Washington County, which defendant's poll suggests is likely, an appeal would be rendered unnecessary and would serve only to delay the termination of the litigation. Likewise, if the trial court ultimately grants defendant's motion, an interlocutory appeal would be unnecessary, and again serve only to delay termination of the prosecution. Indeed, rather than serving the administration and interests of justice, an interlocutory appeal is more likely to disserve those interests by requiring two appeals in the event defendant is convicted.

POINT II

AN INTERLOCUTORY APPEAL OF THE DENIAL TO QUASH THE BINDOVER ALSO WOULD NOT MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION NOR BETTER SERVE THE ADMINISTRATION AND INTERESTS OF JUSTICE

Defendant next asks for immediate review of the trial court's denial of his motion to quash the bindover. Defendant argues that the trial court should have quashed the bindover on two grounds: (1) Allen Steed did not occupy a position of special trust as a matter of law; and (2) the evidence did not show that defendant was on notice of Elissa's non-consent through words or conduct or that defendant encouraged non-consensual sexual intercourse.

As a preliminary matter, an interlocutory appeal on these two issues and the next one—the constitutionality of the consent statute—would materially advance the termination of the litigation and serve the administration of justice *only* if defendant prevailed on all three claims. This is because the case was bound over on three theories of non-consent. Unless all three theories are stricken, defendant will stand trial on two counts of rape. An interlocutory appeal would, at best, merely narrow those theories. As explained below, defendant is unlikely to succeed on any of his claims, let alone all of them.

A. The bindover standard.

"To bind a defendant over for trial, the State must show 'probable cause' at a preliminary hearing by 'present[ing] sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it.'" *State v. Clark*, 2001 UT 9, ¶ 10, 20 P.3d 300 (quoting *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995)) (additional

internal quotation marks and citation omitted). The quantum of evidence necessary to support a finding of probable cause for a bindover is "relatively low"—the same as that for obtaining an arrest warrant. *Id.* at ¶¶ 10, 16. *See also State v. Virgin*, 2006 UT 29, ¶ 18, 137 P.3d 787. Under both standards, the prosecution must only present "'sufficient evidence to support a *reasonable belief* that an offense has been committed and that the defendant committed it.'" *Id.* at ¶ 20 (quoting *Clark*, 2001 UT 9, ¶ 16) (emphasis added).

In determining whether the evidence supports a reasonable belief that defendant committed each element of the charged offense, "[t]he magistrate must view all the evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution." *Clark*, 2001 UT 9 ¶ 10 (internal quotation marks and citations omitted) (alternation in original). "[W]hen faced with conflicting evidence, the magistrate may not sift or weigh the evidence . . . but must leave those tasks to the fact finder at trial." *Clark*, 2001 UT 9, ¶ 10 (internal quotation marks and citations omitted). Thus, when the evidence gives rise to alternative reasonable inferences, the magistrate must choose those inferences that support the State's case. *See id.* at ¶ 20.

B. The elements of rape as an accomplice.

Defendant is charged as an accomplice to rape. "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). The mental state for rape is intentional, knowing, or reckless. *See* Utah Code Ann. § 76-2-102. A person is an accomplice when "acting with the mental state

required for the commission of an offense," he "solicits, requests, commands, encourages, or intentionally aids another person" to commit the offense. Utah Code Ann. § 76-2-202. Thus, the State was required to adduce sufficient evidence to create a reasonable belief that defendant intentionally, knowingly, or recklessly solicited, requested, commanded, encouraged, or intentionally aided Allen Steed to have sexual intercourse with Elissa without her consent.

Under Utah law, lack of consent can be shown in several ways. *See* Utah Code Ann. § 76-5-406. As stated, the State alleged that Elissa did not consent in three ways. First, she "express[ed] her lack of consent through words or conduct." Utah Code Ann. § 76-5-406(1). Second, Elissa was younger than 18 and the actor "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). Third, Elissa was over 14, but younger than 18, and "the actor [was] more than three years older than the victim and entice[d] or coerce[d] the victim to submit or participate . . . ." *Id.* at (11).

C. Defendant's liability as an accomplice is irrelevant to Allen Steed's status as a person in a position of special trust.

Defendant first challenges his bindover on the theory that the trial court erred in concluding that Allen Steed occupied a position of special trust in relation to Elissa. Pet. at 18-24. Defendant theorizes that if Allen did not occupy a position of special trust, the State may not rely on subsection (10) of the consent statute to show lack of consent. Defendant

urges this Court to grant his petition and hold that as Elissa's husband, Allen could not occupy a position of special trust as a matter of law. *Id.*

This Court should deny the petition on this issue because whether or not Allen occupied a position of special trust is irrelevant to defendant's criminal liability as an accomplice. It is well-settled that while a defendant "can be criminally responsible for an *act* committed by another, . . . the *degree of his responsibility* is determined by his own mental state in the acts that subject him to such responsibility, not by the mental state of the actor." *State v. Crick*, 675 P.2d 527, 534 (Utah 1983). Here, defendant does not dispute that as Elissa's religious leader, he occupied a position of special trust. Thus, if he had had sexual intercourse with her, there would be no question that she could not have consented under subsection (10).

Defendant's culpability, however, would be no different if he, as her religious leader, solicited, requested, commanded, encouraged, or intentionally aided another person to have sexual intercourse with her. In such a case, the defendant would be using his position of special trust to accomplish the same result—illicit sexual intercourse with a 14-year-old girl. The fact that the person the defendant chooses to have sex with the girl is not in a position of special trust does not vitiate defendant's culpability. Defendant, as Elissa's religious leader, had a duty to protect her from the very thing he subjected her to, irrespective of Allen's status.

Thus, whether or not Allen occupied a position of special trust is irrelevant to whether defendant may be found guilty under this subsection. Accordingly, this Court should not grant the petition on this ground.[7]

But even if Allen's status were relevant to defendant's liability, the trial court correctly found probable cause to believe that Allen did occupy a position of special trust.

> '[P]osition 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, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent.

Utah Code Ann. § 76-5-404.1(4)(h). Defendant asserts that 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." Pet. at 22. Defendant continues that "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 protect freedom of religion." *Id.*

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[7]The trial court here agreed with defendant and concluded that the State could proceed under this theory only if it also showed that Allen occupied a position of special trust. PH2:148-49. The fact that defendant has received a more favorable ruling than he is entitled to, however, is not a basis for granting the petition. But if this Court were to grant the petition, it should correct the trial court's ruling on this point.

Defendant's argument can only be read as assuming that Allen was Elissa's husband. Pet. 21-22. But, as the trial court recognized, Allen was not Elissa's husband. T:3, 148-49. As explained in footnote 3 above, Allen and Elissa were never legally married, nor could they be, because of Elissa's age and their status as first cousins. Thus, the trial court did not find, as defendant appears to suggest, that Allen occupied a position of special trust as a husband. Rather, the trial court found, based on extensive testimony at the preliminary hearing, that as Elissa's "priesthood head," Allen was in a position where he could "exercise undue influence over the victim." Utah Code Ann. § 76-5-404.1(4)(h).

And contrary to defendant's assertions, according to the preliminary hearing testimony, this position allowed Allen to exert *more* influence over Elissa than if he had merely occupied the "unequal positions of parent and child, adult coach and athlete, teacher and student, or doctor and patient," Pet. 22. Not only was Elissa expected to obey her "priesthood head," but she was also required to submit her "mind, body and soul" to him. Few doctors, teacher, coaches, or even parents enjoy such complete control over a child.

Accordingly, the trial court reasonably concluded that Allen occupied a position of special trust in relation to Elissa.

D. The preliminary hearing evidence supports a reasonable belief that defendant knew that Elissa did not consent to a sexual relationship with defendant.

Defendant next asks this Court to review the trial court finding of probable cause to believe that Elissa expressed her lack of consent through words or conduct. Pet. 24-27. Defendant conceded below that Elissa expressed her lack of consent through words or

conduct to Allen. T:43. Defendant asserts only that the evidence does not support a reasonable belief that he was on notice that Elissa objected to intercourse with Allen. Pet. 24-27. The record refutes this claim.

Elissa repeatedly told defendant that she did not want to "marry" Allen. She made it clear that she believed she was too young and she did not want to marry her first cousin. When she obtained permission from the prophet to "follow her heart," defendant nevertheless insisted—to placate her stepfather, it appears— that she go through with the wedding. Even when Elissa's sisters tried to intervene on her behalf, defendant persisted.

Elissa's words and conduct at the wedding ceremony must have made it clear even to a man of limited understanding that she did not want to touch Allen, let alone submit to sexual relations with him. Elissa's eyes were red from crying when she entered the room. Defendant had to tell Elissa twice to take Allen's hand. She shook her head the first time. When asked if she took Allen to be her lawfully wedded husband, Elissa said nothing. Only after defendant had Elissa's mother stand next to her and after he repeated the question did Elissa finally assent. And when defendant told Allen to kiss the bride, Elissa turned her head. Defendant had to command Elissa to kiss Allen before she gave him a "peck." Elissa then locked herself in the bathroom.

All of Elissa's words and conduct told defendant that she did not want to have sex with Allen. Yet, defendant did all within his considerable power and influence to ensure that result.

Moreover, it is clear from the preliminary hearing testimony that defendant anticipated that, despite Elissa's resistance to the relationship, the two would engage in sexual relations sometime after the ceremony. He joined their hands and commanded them to "go forth and multiply and replenish the earth with good priesthood children." Defendant did not tell them to wait to have children. Indeed, Elissa testified that it was understood that they would "immediately" have children. She also explained that the sole purpose of marriage in her community was to have children.

When viewed in the light most favorable to the prosecution, the foregoing evidence and its reasonable inferences are more than sufficient to support a reasonable belief that defendant was on notice that Elissa did not and would not consent to a sexual relationship with Allen, even under the guise of a marriage. Those inferences are further supported by Elissa's subsequent request that defendant release her from her relationship with Allen. Elissa told defendant that Allen was touching her private parts and that she was uncomfortable with this. Rather than release her as requested, defendant persisted, commanding Elissa to return and submit herself to Allen, "mind, body, and soul." The only reasonable inference to be drawn from that statement is that defendant expected Elissa to submit to sexual intercourse with her husband, whether or not she wanted to. Elissa testified that she thereafter returned to her husband and continued to submit to sexual intercourse with him, even though she did not want to.

In sum, the State presented sufficient evidence to reasonably believe that defendant intentionally, knowingly, or recklessly solicited, requested, commanded, encouraged or intentionally aided Allen in having non-consensual sexual intercourse with Elissa.

POINT III

THIS COURT SHOULD NOT GRANT AN INTERLOCUTORY APPEAL TO REVIEW THE CONSTITUTIONALITY OF THE CONSENT STATUTE BECAUSE THE ISSUE IS UNRIPE

Defendant finally asks this Court to immediately review the trial court's denial of his motion to declare Utah Code Ann. § 76-5-406(11) unconstitutionally vague. Pet. 27-33. Defendant also asserts that this provision violates the Free Exercise Clause of the First Amendment. Pet. 33-36. The Court should deny the petition on this ground because the issue is unripe.

Subsection (11) of section 76-5-406 provides that a victim does not consent if she is between 14 and 18 years of age, and the actor is more than three years older than the victim, and the actor "entices or coerces the victim to submit or participate . . . ." The magistrate bound defendant over under the theory that defendant enticed Elissa, but specifically declined to find that he coerced her. T:150. Defendant argues that "entice" is unconstitutionally vague. He therefore asks this Court to strike that part of the statute.

This Court, however, has previously invoked the ripeness doctrine to decline to address the constitutionality of statutes where the defendant has yet to be convicted. *See State v. Ortiz*, 1999 UT 84, ¶¶ 2-4; *State v. Herrera*, 895 P.2d 359, 371 (Utah 1995). The

ripeness doctrine "serves to prevent courts from issuing advisory opinions." *Ortiz*, 1999 UT 84, ¶ 2. For example, in *Herrera*, the two defendants challenged the constitutionality of section 76-2-305, which made mental illness a valid defense only when that mental illness prevented an individual from forming the mental state required as an element of the offense charged. *Herrera*, 895 P.2d at 371. Specifically, the defendants argued that the statute constituted cruel and unusual punishment. *Id.* This Court noted that several possible outcomes would made a decision on that constitutional issue unnecessary. *Id.* at 371. The Court explained:

> This court will not issue advisory opinions or examine a controversy that has not yet "sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto. Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication."

Id. (additional quotation marks and citations omitted). *See also Ortiz*, 1999 UT 84, ¶ 3.

There are also several possible outcomes to this case that would render a decision on the constitutionality of this statute unnecessary. Defendant may be acquitted. Or he may be convicted of a lesser offense. Moreover, as noted, this is only one of three possible theories of non-consent. The State understands that the trial court intends to use a special verdict form addressing each of the three theories of non-consent. If defendant is convicted based on either of the other two theories, there would be no need to address the constitutionality of this statute. The issue, therefore, is unripe.

CONCLUSION

Based on the foregoing, the State requests the Court to deny defendant's petition for interlocutory appeal.

RESPECTFULLY SUBMITTED this 23rd day of May, 2007.

MARK L. SHURTLEFF
ATTORNEY GENERAL

Laura B. Dupaix

LAURA B. DUPAIX
ASSISTANT ATTORNEY GENERAL

MAILING CERTIFICATE

I hereby certify that on this 23 day of May, 2007, I caused a copy of the foregoing opposition to interlocutory appeal to be mailed to the following:

Walter F. Bugden
Tara L. Isaacson
BUGDEN & ISAACSON, L.L.C.
445 East 200 South, Suite 150
Salt Lake City, UT 84111

Richard A. Wright
WRIGHT, JUDD & WINCKLER
Bank of America Plaza
300 South Fourth Street, Suite 701
Las Vegas, NV 89101

Counsel for Defendant/Petitioner

Brock R. Belnap
WASHINGTON COUNTY ATTORNEY
178 North 200 East
St. George, UT 84770