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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff and Respondent

vs.

WARREN STEED JEFFS,

Defendant and Petitioner.

PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER

20070317

Trial Court No. 061500526

NATURE OF THE CASE

Defendant/Petitioner, Warren Steed Jeffs, by and through counsel, and pursuant to Rule 5 of the Utah Rules of Appellate Procedure, petitions this Court

for permission to appeal three (3) final orders entered April 3, 2007, by the Honorable Judge James L. Shumate, Judge of the Fifth District Court in and for Washington County, State of Utah, denying the Defendant's motion to change venue, motion to quash bind over, and motion challenging the constitutionality of Utah Code Ann. § 76-5-406(11) (the "enticement" statute), on vagueness and religious First Amendment grounds. Copies of each final order are attached hereto as follows: **Exhibit A** – Findings and Final Order Denying Defendant's Motion to Change Venue Without Prejudice; **Exhibit B** – Order Denying Defendant's Motion to Quash; and **Exhibit C** – Order Denying Defendant's Motion to Declare U.C.A. § 76-5-406(11) Unconstitutionally Vague.

STATEMENT OF FACTS

Mr. Jeffs is the religious leader and prophet of the Fundamentalist Church of Jesus Christ of Latter Day Saints. *See* Tr. Prelim. Hr'g., 91, Nov. 21, 2006. In April, 2001, the Defendant performed a spiritual marriage between the accuser, who at the time was fourteen years old, and a man over three years older than the accuser. *See* Tr. Prelim. Hr'g., 112-13, Nov. 21, 2006. During the spiritual marriage, Mr. Jeffs used traditional religious language, instructing the accuser and her husband to "multiply and replenish" the earth. Tr. Prelim. Hr'g., 39, Dec. 14, 2006. The accuser was unhappy in her marriage and met with Mr. Jeffs to discuss her concerns, and he instructed her to give herself "mind, body and soul"

to her husband and make the marriage work. Tr. Prelim. Hr'g., 160-61, Nov. 21, 2006.

Mr. Jeffs is charged with two counts of Rape As an Accomplice based on his leadership of the FLDS church and because he performed the spiritual marriage and counseled the accuser when she told him she was not happy in her marriage.

ISSUES PRESENTED IN THE TRIAL COURT

I. **Whether the Defendant met his Burden of Demonstrating that He Will not be Afforded a Fair and Impartial Trial in Washington County?**

II. **Whether the Trial Court Erred in Denying the Motion to Quash Re §76-5-406(10) and whether the trial court erred in Denying the Motion to Quash Re Defendant's Knowledge and Encouragement of Non-Consent Through Words or Conduct?**

III. **Whether Utah Code Ann. § 76-5-406(11) is Unconstitutionally Vague or Unconstitutional Based on First Amendment Grounds?**

PRESERVATION OF ISSUES IN TRIAL COURT

These matters were thoroughly briefed and argued before the trial court. A preliminary hearing was begun on November 21, 2006 and concluded on December 14, 2006, before the magistrate. Defense counsel objected to the magistrate binding this case over for trial. Counsel's objections were noted and arguments were heard; however, the court found a reasonable belief that the Defendant had committed the offense.

Defense counsel filed a motion to change venue on March 6, 2007. Counsel also filed a motion to declare Utah Code Ann. § 76-5-406(11) unconstitutionally vague, and a motion to quash bind over on March 6, 2007. The district court heard argument on the matter on March 27, 2007, and considered the written motions and memoranda of defense counsel and the State. On April 3, 2007, the court denied the motions to change venue, the motion to quash and the motion to declare Utah Code Ann. § 76-5-406(11) unconstitutional, in written orders attached hereto as **Exhibits A, B** and **C**.

STANDARD OF REVIEW

"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." *State v. Stubbs*, 123 P.3d 407, 409 (Utah 2005 (quoting *State v. Widdison,* 2001 UT 60, ¶ 38, 28 P.3d 1278). However, on appeal, the trial court's conclusions of law are reviewed for correctness. *Id.* (citing *State v. Geukgeuzian,* 2004 UT 16, ¶ 7, 86 P.3d 742).

Moreover, "[t]he determination of whether to bind a criminal defendant over for trial is a question of law. See *State v. Humphrey*, 823 P.2d 464, 466 (Utah 1991). Accordingly, [this Court] review[s] that determination without deference to the court below. *See id.* at 465-66." *State v. Clark*, 2001 UT 9, ¶ 8, 20 P.3d 300, 303.

Furthermore, constitutional challenges to statutes present questions of law, which this Court reviews for correctness. *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 5, 86 P.3d 735, 737, citing *Midvale City Corp. v. Haltom*, 2003 UT 26, P10, 73 P.3d 334; *I.M.L. v. State*, 2002 UT 110, P8, 61 P.3d 1038.

REASONS WHY IMMEDIATE APPEAL IS NECESSARY

An immediate interlocutory appeal should be granted on the change of venue to permit this Court to review the denial before an error is committed by trying this highly publicized case in an atmosphere tainted by bias and prejudice. This Court has approved the statement of the Supreme Court of the United States in *Sheppard v. Maxwell,* 348 U.S. 333, 363 (1966), that "reversals are but palliatives" and "the cure lies in those remedial measures that will prevent injustice at its inception." As this Court also noted with approval in *James*:

> "Neither an accused whose life hangs in the balance nor the authorities charged with enforcing and administering the law should be required to face the possibility of a second trial when, as here, we face acute dangers to an impartial trial and when we can avoid them by the simple expedience of a change of venue."

(quoting *Martinez v. Superior Court of Placer County*, 629 P.2d 502, 508 (1981)). Thus, the change of venue is an issue particularly well suited to interlocutory review.

The denial of the motion to quash must be appealed on an interlocutory basis, or the issue is waived following a jury's conviction.

Finally, appellate courts, and not trial judges, determine the constitutionality of statutes such as U.C.A. § 76-5-406(11).

REASONS WHY THE APPEAL MAY MATERIALLY ADVANCE TERMINATION OF LITIGATION

An interlocutory appeal will advance the termination of litigation in this matter by settling issues that would be appealed should Mr. Jeffs be convicted. If, for example, the change of venue is granted on interlocutory appeal, the jury's verdict would not be vulnerable to attack based upon community bias and hostility.

QUESTIONS OF LAW PRESENTED

I. **WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO CHANGE VENUE WHERE THERE IS CLEAR EVIDENCE THAT THE DEFENDANT'S RIGHT TO A FAIR TRIAL IS JEOPARDIZED BY HIS STANDING IN THE COMMUNITY; THE SIZE OF THE COMMUNITY; THE NATURE OF THE OFFENSE; AND THE EXTENT OF ADVERSE PUBLICITY IN WASHINGTON COUNTY SURROUNDING THE CASE?**

Notwithstanding the trial court's condemnation of the bias in *The Spectrum*, the local newspaper, the district court denied the motion to change venue:

> "The evidence the court has received, which are photographs of articles, letters to the editor, and op-ed pieces from the local paper, ***constitute an unjustifiable drum-beat to impact this case in an inappropriate fashion that is an abuse of the nearly unfettered power of the press.***" (Emphasis added.)

(*See* **Ex. A**, p.4.)

Although 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," on appeal, this Court will review the lower court's conclusions of law for correctness. *State v. Stubbs*, 123 P.3d 407, 409 (Utah 2005).

The "right to trial by an impartial jury is guaranteed by both the United States Constitution and the Utah Constitution." *Id.* at 409 (citing U.S. Const. amend. VI; Utah Const. art. I, § 12). Additionally, "[t]o protect that right, rule 29(d) of the Utah Rules of Criminal Procedure permits a trial court to change venue if the court believes a fair and impartial trial cannot be had in the jurisdiction where the action is pending." *Id.* at 410. Moreover, if a criminal defendant believes that his right to a fair and impartial jury trial is jeopardized in the jurisdiction where the trial is pending, he may move "to have the trial of the case transferred to another jurisdiction." Utah Crim. P. 29(d)(1).

In the instant case, the Defendant has met the burden to "raise a reasonable likelihood" that a fair and impartial trial cannot be afforded him. *State v. James*, 767 P.2d 549, 552 (Utah 1989). The Defendant has established 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." *State v. Cayer*, 814 P.2d 604, 608-09 (Utah Ct. App, 1991)(quoting *State v. James*, 767 P.2d 549, 552 (Utah 1989)).

A. The Standing Of The Defendant And The Victim In Washington County Are Such That The Defendant Will Not Be Afforded A Fair And Impartial Trial.

Although the trial court recognized that the "spotlight of media attention has given [the Defendant] a standing in the community that he otherwise would not have and there is no evidence that he sought that attention," (*see* **Ex. A**, pp. 2-3), the trial court declined to attribute any weight to the Defendant's substantial negative standing in the community. Instead, the trial court dismissed this factor because the accuser has no special standing in the community and was unlike like the victim in *State v. Stubbs*, 84 P.3d 837 (Ut. Ct. App 2004), whose grandfather was the football coach in a small county.

The Defendant believes the trial court erred by failing to give weight to the Defendant's enormous negative standing in the community. The Defendant's standing, as the leader of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), is similar to the defendant's standing in *James*, which troubled the court because his unique lifestyle "tend[ed] to depict him as being different from most residents." *James*, 767 P.2d at 552. The Defendant clearly stands out. He is the prominent, if not notorious leader of the FLDS church. One article in *The Spectrum* described him as the most "vilified polygamist since

Joseph Smith." The residents of the FLDS church residing in Hildale and Colorado City are in Washington County's backyard. The religious tradition of the FLDS church includes arranged marriages and polygamy. As the leader and prophet of this church, many people hold Mr. Jeffs personally responsible for the continued practice of arranged marriages and polygamy. It is the Mr. Jeffs that most people hold responsible for these cornerstone principles of the FLDS church and this standing places him at odds with other residents of Washington County.

According to the Dan Jones & Associates Survey of citizens of Washington County, there is widespread condemnation of the community of the FLDS church, and Mr. Jeffs as the church's leader and prophet. (*See* Dan Jones & Associates Survey attached hereto as **Exhibit D**.) Specifically, residents of Washington County who participated in the survey noted that Mr. Jeffs is a "wicked man," a "very immoral man, thinking he has the right to hide behind religion to do whatever he wants," and "the leader of the fundamentalist group. He is also a very bad man." *Id.* at Washington County Comments, at p. 1. These comments epitomize Mr. Jeffs' standing in the community, as an outsider who is subject to widespread condemnation because of his unpopular religion, and "a jury selected from the prospective juror population would be reasonably likely to fall short of the standards for fairness and impartiality to which a defendant is entitled." *State v. Stubbs*, 123 P.3d 407, 411 (Utah 2005).

Mr. Jeffs' notoriety should be juxtaposed with the accuser's standing in the community. The *James* court expressed additional concern over the community's reaction to the age and vulnerability of the victim. *James*, 767 P.2d at 552-53. The accuser in the present case is a former member of the FLDS community who was fourteen years old at the time of the alleged crime. Her perceived standing as a vulnerable, minor girl further contributes to an atmosphere of community hostility and intolerance towards Mr. Jeffs, and is reasonably likely to preclude Mr. Jeffs from receiving a fair and impartial trial in Washington County.

The trial court abused its discretion by failing to assign any weight to the disproportionate standing in the community of Mr. Jeffs and the accuser. Mr. Jeffs is widely recognized as the notorious leader of the polygamist practicing FLDS church. This was not acknowledged by the trial court. The accuser's age and perceived vulnerability was also disregarded by the trial court. Instead, the trial court ruled that the accuser has no standing at all. Mr. Jeffs' notoriety unquestionably gives him a standing which weighs against finding fair and impartial jurors in Washington County.

B. Mr. Jeffs Established A Reasonable Likelihood That He Will Not Have A Fair And Impartial Trial Because Washington County Is a Small And Tight-Knit Community.

The trial court concluded the size of the community did not weigh in favor of granting a change of venue because "Washington County is remarkably

diverse considering the history of the area." (**Ex. A.**, at p. 3.) The trial court misapplied the second *James* factor.

Mr. Jeffs established before the district court that Washington County is a small, tight-knit community and the intimacy of this community will further impair the fairness and impartiality of Mr. Jeffs' trial. In *James*, the court noted that "'[t]he smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed.'" *James*, 767 P.2d at 553 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 599-600 (1976) (Brennan, J., concurring in judgment)). Conversely, a "populous metropolitan community will decrease the need for a change of venue." *James*, 767 P.2d at 553 (quoting *People v. Harris*,28 Cal. 3d 935, 623 P.2d 240). In the instant case, the charged crimes allegedly occurred in Hildale, Washington County. In 2005, the population of Washington County was estimated at 118,885, and in the 2004 census the population of Hildale was only 1,980. These communities are quite small, particularly compared to Salt Lake County, which was estimated by the U.S. Census Bureau in 2005 to have a population of 948,172.

Moreover, as the Dan Jones & Associates Survey (*see* **Ex. D**) notes, 30% of the survey respondents in Washington County said a neighbor or friend was a source of information for this case, compared to only 12% in Salt Lake County. This indicates that citizens of Washington County were discussing the case and using unreliable person-to-person communication for their source of information.

According to both Dianne Meppen, a senior research analyst with Dan Jones & Associates, and Dan Jones, this statistic also means that more people in Washington County are talking about Warren Jeffs than the people of Salt Lake County.

Thus, there is a more pervasive atmosphere of gossip and rumor about Warren Jeffs in Washington County. Such anecdotal gossip and intimacy create the same concern the court had in *James*, that Mr. Jeffs will not be granted a fair and impartial trial because "[i]n a small town, a major crime is likely to be embedded in the public consciousness with greater effect and for a longer time than it would be in a large, metropolitan area." *James*, 767 P.2d at 553.

C. Mr. Jeffs Has Established That He Will Not Be Afforded A Fair And Impartial Trial Because The Gravity Of The Alleged Offense Will Prejudice The Community Against Mr. Jeffs.

Mr. Jeffs has established that he will not be afforded a fair and impartial jury trial in Washington County because of the seriousness of the allegations against him. Mr. Jeffs has been charged with two counts of being an accomplice to the rape of a young girl. In *State v. Stubbs*, the court granted a change of venue because, among other things, the seventeen year-old victim was a "defenseless juvenile, a virgin who was allegedly raped by a near-stranger eight years older than she was." 84 P.3d 837, 840 (Utah Ct. App. 2004). The *Stubbs* court noted that the county where the alleged rape occurred was small and that,

in such a community, "a single instance of rape is certainly a notable, memorable, and heinous crime." *Id.* at 840-41.

The instant allegations are similarly notable and memorable in the small Washington County community. The accuser was fourteen and fifteen years old when the alleged rapes occurred, and Mr. Jeffs was her religious leader. Notwithstanding the seriousness of the crime, the trial court erred by giving this factor essentially no weight in his balancing of the four *James* factors. The trial court explained:

> "In the court's experience of 400 to 500 jury trials, potential jurors view all crime as an important matter and whether a specific crime is heinous or non-heinous, carries very little weight." (*See* **Ex. A** at p.3.)

This observation ignores the strong feelings that people polled in Washington County hold about underage and arranged marriages. The open-ended comments of the survey respondents are illustrative of the bias against Mr. Jeffs in Washington County. (Dan Jones & Associates Survey, **Ex. D**., Washington County comments at p. 4.)

Question 8:

- **"He has abused children and married them."**
- **"He was having sex with 15 year-old women."**
- **"It's so close to Washington County that that's the hot topic that everyone's talking about."**

- **"He is a bad dude who is a polygamist and married younger women to older men."**
- **"That he is the leader of the fundamentalist group. He is also a very bad man."**
- **"They can't prosecute him enough."**

The trial court's conclusion that the gravity of the offense-accomplice to Rape, a first-degree felony, is entitled to very little weight ignores the balancing required by the four factor analysis in *James*. The Defendant asserts that this ruling is incorrect as a matter of law and is an abuse of discretion.

D. Mr. Jeffs Has Established That The Nature And Extent Of The Pretrial Publicity Will Bias The Jury And Prevent A Fair And Impartial Jury Trial.

Defendant has established that there is a reasonable likelihood that the significant media coverage and bias in Washington County is different in quantity and quality from the media attention anywhere else in the state and will prevent him from having a fair and impartial trial in Washington County.

The pervasive publicity in Washington County, and in *The Spectrum* in particular (*The Spectrum* articles attached hereto as **Exhibit E** and **Exhibit F**), differs from the media reports in the rest of Utah. Numerous articles about the Defendant's arrest and the allegations against him have been published in *The Spectrum*, Washington County's newspaper, which is circulated daily to over

18,000 Washington County residents. The editorials, opinion pieces, and articles in *The Spectrum* establish a reasonable likelihood of prejudice against Mr. Jeffs.

The Spectrum articles constantly and consistently portray Mr. Jeffs in an unfavorable light. Whether the articles trumpet sympathy for the Lost Boys or report that Mr. Jeffs showed up on the FBI's 10 most wanted list, *The Spectrum's* articles are all decidedly unfavorable. Like the prejudicial media coverage in *James* which "carried implications and innuendos of defendant's complicity in [the crime]," Washington County's *Spectrum* coverage in this case also includes innuendos and bias against Mr. Jeffs and his religion. *James,* 767 P.2d at 554. For instance, in May 2004 and August 2006, *The Spectrum* ran articles in which Ross Chatwin described Mr. Jeffs as legally murdering people and called Jeffs a "Hitler-like dictator." On August 30, 2006, *The Spectrum* reported that "the manhunt for Warren Steed Jeffs did not end as some had speculated—in a hail of gunfire, leaving the polygamist sect with a martyr." *See* Patrice St. Germain, no headline, *The Spectrum,* Aug. 30, 2006, at A1. One day later, *The Spectrum* carried an article which noted that when Mr. Jeffs, "the self-proclaimed prophet of the [FLDS church] steps foot in Utah again, he will be put behind bars without bail." *See* Mark Shaffer, no headline, Aug. 31, 2006, *The Arizona Republic* [printed in *The Spectrum*], at A1. Finally, on September 2, 2006, *The Spectrum* ran an editorial titled "Jeffs: It's not about religion," which began by stating that "prosecuting a polygamous in Utah is a gutsy thing," and Washington County

Attorney "has reeled in the biggest fish in the polygamy pool." Editorial, Jeffs: It's Not About Religion," Sept. 2, 2006 at A6 . The editorial continues and asserts that Mr. Jeffs misused his "faith to hold complete control over an innocent mind. Never mind the talk of fraud or other abuses, this was a little girl forced to become a woman before she was mentally and physically able to do so." *Id.* (All of the foregoing *Spectrum* articles are included in **Ex. E**.)

These innuendo-laden articles, published day after day, use language that could influence residents of Washington County who rely heavily on the media for information, to be biased and prejudiced against Mr. Jeffs. The constant editorial attacks by *The Spectrum* have contributed to the pervasive bias and prejudice against Mr. Jeffs in Washington County. There have been no editorials or op-ed pieces in either *The Deseret News* or *The Salt Lake Tribune.* The media coverage in Washington County has been decidedly different and, in the words of Judge Shumate, constitute "an unjustifiable drumbeat to impact this case in an inappropriate fashion that is an abuse of the nearly unfettered power of the press." **Ex. A** at 4. As this court stated in *State v. James,* "there are limits to what should reasonably be asked and expected of prospective jurors who have been exposed" to repeated media editorials, inflammatory articles, and op-ed pieces that have convicted Mr. Jeffs before the first witness has been called to testify. *Id.* at 555.

This extensive hostile coverage in *The Spectrum* has created a demonstrable prejudice against Mr. Jeffs in Washington County. For instance, in the survey conducted by Dan Jones & Associates, 52% of respondents in Washington County believe Mr. Jeffs is definitely guilty. (See **Ex. D**, Dan Jones & Associates Survey, Results, at p. 5.) In Salt Lake County, on the other hand, only 39% of those polled believe that Mr. Jeffs is definitely guilty. *Id.* The significantly higher percentage of individuals who obtain their information from the media, and who have already condemned Mr. Jeffs in Washington County, substantially jeopardizes his right to a fair and impartial trial.

The evidence on the nature and extent of the pretrial publicity in Washington County weighs in favor of granting a change of venue. Granting a change of venue is in the interest of all parties. Avoiding a second trial furthers the interests of justice and judicial economy. A reversal is merely a palliative. Moving the location of the trial to a place far enough away where the prejudicial influence will be diminished is a fairly simple remedial step. The venue should be moved to a community like Salt Lake County where the jury is not selected from a jury pool that may feel it is on trial for harboring the FLDS church with its unique religious beliefs. Because Mr. Jeffs established that there is a reasonable likelihood that he will not be afforded a fair and impartial trial in Washington County, the trial court erred by refusing to change the venue.

II. WHETHER THE DISTRICT COURT ERRED IN DENYING THE MOTION TO QUASH THE BIND OVER RE RULING THAT THE PURPORTED HUSBAND OCCUPIED A POSITION OF SPECIAL TRUST AND RE RULING THAT DEFENDANT'S PERFORMANCE OF MARRIAGE AND PROVIDING MARRIAGE COUNSELING PUT HIM ON NOTICE THAT THE ACCUSER EXPRESSED LACK OF CONSENT TO SEXUAL INTERCOURSE THROUGH WORDS OR CONDUCT.

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)).

This Court held in *State v. Houskeeper*, that if a "bind-over order was not timely appealed, we have no jurisdiction to hear challenges to the order. Bind-over orders are final, appealable orders." 62 P.3d 444, 450 (Utah 2002)(citing *M.C. v. State,* 916 P.2d 914, 916 (Utah Ct. App.1996)). This Court further noted that "[p]ursuant to rule 4 of the Utah Rules of Appellate Procedure, a notice of appeal must be 'filed with the clerk of the trial court within thirty days after the date of entry of the judgment or order appealed from.'" *Id.* (quoting Utah R.App. 4(a)). Thus, "[f]ailure to timely file an appeal pursuant to rule 4 constitutes a waiver of the right to appeal. Additionally, failure to timely file deprives an

appellate court of jurisdiction over the appeal." *Id.* (citing *Reisbeck v. HCA Health Servs. of Utah, Inc.*, 2 P.3d 447 (Utah 2000)).

Thus, this case stands for the proposition that if bindover is not timely appealed, Mr. Jeffs waives the right to challenge the order because is it considered a final, appealable order.

A. Whether The District Court Erred In Concluding That The Accuser's Purported Husband Occupied A Position Of Special Trust Because He Held The Priesthood Pursuant To §76-5-406(10)?

The magistrate made an order binding Mr. Jeffs over for trial on Counts I 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).[1] 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." (Tr. Prelim. Hr'g, 148:19-21, Dec. 14,

[1] 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.

2006.) 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 Mr. Jeffs under Subsection 10.[2]

As the accuser'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 must "produce evidence sufficient to support a reasonable belief that Mr. Jeffs committed the charged crime." *Virgin*, 137 P.3d at 791 (citing *Clark*, 2001 UT 9 at P 16). Thus,

[2] The magistrate's ruling for the bind over is attached hereto as **Ex. B.**

to bind Mr. Jeffs 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." (Tr. Prelim. Hr'g, 148:23; 14:1, Dec. 14, 2006.) 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." (Tr. Prelim. Hr'g, 148:2-5, Dec. 14, 2006.) Essentially the Court seems to have found that Mr. Jeffs 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.

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," (Tr. Prelim. Hr'g, 148:23-24, Dec. 14, 2006.), along with "the pre-ceremony interview, and as it applies to Count 2, the post ceremony interview," (Tr. Prelim. Hr'g, 148:25-149, Dec. 14, 2006.) This finding suggests that Mr. Steed occupied a

position of special trust as the accuser's purported husband by way of the religious implications generally associated with husbands in the FLDS community, as explained to Mr. Steed and the accuser by Mr. Jeffs 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 Mr. Jeffs.

Finally, Mr. Jeffs contends that Mr. Steed could not occupy a position of special trust based upon the perceptions of the accuser. 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." (Tr. Prelim. Hr'g, 148:2-5, Dec. 14, 2006.) This position requires a subjective analysis of the accuser'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 accuser 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 accuser. It does not call for an inquiry into the subjective perception of the accuser, 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. Mr. Jeffs has shown that Mr. Steed did not occupy a position of authority by which he could exert undue influence over the accuser, 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 Mr. Jeffs's accomplice charges, the Court erred in binding over Mr. Jeffs under Subsection 10.

B. The State Did Not Establish that Mr. Jeffs Was On Notice of the Complainant's Non-Consent Through Words Or Conduct and that He Encouraged Non-Consensual Sexual Intercourse.

The magistrate erred in binding over Mr. Jeffs for trial on Counts I and II under subsection 1 of Utah Code Ann. § 76-5-406, that the accuser expressed a

lack of consent through words or conduct, because the State did not produce believable evidence to infer that Mr. Jeffs was on notice of the accuser's non-consent to sexual intercourse. *See* Utah Code Ann. § 76-5-406 (2005).

Here, the State did not provide believable evidence that Mr. Jeffs acted recklessly as to Count I, and relies only on the inference that Mr. Jeffs, in performing a marital union between the accuser and the principal, was aware of, but consciously disregarded the complainant's non-consent to sexual intercourse with the principal. The court based the inference not on the actual words or conduct of the complainant 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 complainant's reluctance and opposition to the marriage was sufficient to be 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. In

this case, the inference that marriage necessarily implies sexual consummation, and because the complainant was reluctant to marry, she expressed her non-consent to sexual intercourse through words and conduct, is speculation.

Thus, although the complainant was reluctant to marry the principal, and expressed those concerns to Mr. Jeffs, this did not put him on notice, through her words and conduct, that she did not consent to sexual intercourse with the principal; it 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," Mr. Jeffs was not acting recklessly. 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)).

C. Mr. Jeffs Was Not On Notice Of Non-Consent To Sexual Intercourse For Purposes Of Count II.

The magistrate erred in determining that Mr. Jeffs acted recklessly as to the commission of rape in Count II. The magistrate based its determination on the fact that the Defendant counseled that complainant to remain in her marriage.

In *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 the complainant's case relies on the determination that Mr. Jeffs gave her "bad advice" to remain in her marriage, try to make the relationship work, and abide by the tenants of her faith. Although the advice may have been bad, it is insufficient to establish probable cause that Mr. Jeffs was on notice that the victim did not consent to sexual intercourse. Thus, it was erroneous for the magistrate to bind Mr. Jeffs over on Count II under subsection 1 of Utah Code Ann. § 76-5-406.

III. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT UTAH CODE ANN. § 76-5-406 (11) IS NOT VAGUE OR OPERATIONALLY DISCRIMINATORY AND THEREFORE CONSTITUTIONAL?

The district court held that Utah Code Ann. § 76-5-406(11) is constitutional because "words to encourage the young woman to go against her will could

easily be seen as enticements" and therefore the statute satisfied the due process notice requirements. Under Utah law, a person commits rape by having "sexual intercourse with another person without the victim's consent." Utah Code Ann. § 76-5-402(1) (2006). One instance in which an act of sexual intercourse is deemed to be without consent is when

> the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate.

Utah Code Ann. § 76-5-406(11) (2006). In binding Mr. Jeffs over on Counts 1 and 2, the magistrate found probable cause for enticement, but ruled "I specifically do not find coercion." Tr. Prelim. Hr'g.,150, Dec. 14, 2006.

Constitutional challenges to statutes present questions of law, which this Court reviews for correctness. *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 5, 86 P.3d 735, 737 (citing *Midvale City Corp. v. Haltom*, 2003 UT 26, P10, 73 P.3d 334; *I.M.L. v. State*, 2002 UT 110, P8, 61 P.3d 1038). Utah Code Ann. § 76-5-406(11) is unconstitutionally vague, and basic principals of due process prohibit the application of a statute if it is vague. This is because first, "[v]ague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Second, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant

dangers of arbitrary and discriminatory application." *Id.* Third, the statute is unconstitutional because it impinges upon the Defendant's First Amendment rights, and "where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Id.*

A. Utah Code Ann. § 76-5-406(11) Is Unconstitutionally Vague Because It Does Not Define The Criminal Offense With Sufficient Definiteness That Ordinary People Can Understand The Conduct Prohibited.

In this case, the enticement statute is unconstitutionally vague because it does not provide any meaning as to what constitutes enticing behavior, thus failing to provide sufficient notice for due process, because an ordinary person cannot understand exactly what type of behavior is prohibited. This ambiguity combined with the broad interpretation by the Utah courts allows for "arbitrary and discriminatory enforcement of the law." *Kolender*, 461 U.S. at 357.

The Utah Supreme Court has not directly interpreted the work "entice," but in *State v. Scieszka*, the Utah Court of Appeals applied five factors to determine whether an older individual had enticed or coerced a younger victim:

> (1) the nature of the victim's participation (whether the defendant required the victim's active participation), (2) the duration of the defendant's acts, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim.

897 P.2d 1224, 1227 (Utah Ct. App. 1995) (quoting *State v. Bishop*, 753 P.2d 439, 482 (Utah 1988)(examining a statute criminalizing the taking of "indecent liberties with a minor")).

Although the Utah Court of Appeals has confirmed that these five factors must be considered when determining whether conduct constituted enticement or coercion, these factors do not assist an ordinary person in understanding what conduct is prohibited. *See State v. Gibson*, 908 P.2d 352, 356 (Utah Ct. App. 1995). This is because under the five *Scieszka* factors, the trial court must inquire into the nature of the complainant's participation; however, the Utah courts and legislature have implied that under the enticement statute, a court must look to the behavior of the older individual who is seeking consent. *See* Utah Code Ann. § 76-5-406(11). For instance, in *State v. Gibson*, the Utah Court of Appeals noted that "the purpose of subsection (11), in combination with the statutory section defining the crime, is to prevent 'mature adults from preying on younger and inexperienced persons.'" 908 P.2d 352, 356 (Utah Ct. App. 1995). The *Gibson* court held that to determine enticement, a court must look to the behavior of the older person, and conclude that that person used "improper psychological manipulation to influence the will of another. In other words, the 'enticement' of a teenage by an adult occurs when the adult uses psychological manipulation to instill improper sexual desires which would not have otherwise

occurred." *Id.* However, the test to determine whether the enticement occurred does not sufficiently put a defendant on notice to satisfy due process.

The United States Supreme Court has held that in order to determine whether a statute provides sufficient notice to satisfy due process, the "statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33 (1963). In the instant case, Mr. Jeffs is charged as an accomplice to rape, predicated on section 76-5-406(11). The State's theory is that Mr. Jeffs conducted a marriage ceremony between the victim and her husband, and later provided the couple with counseling, and that such conduct constituted, or perhaps aided in, the enticement of the victim into submitting to her husband's sexual advances. However, from the statute and its accompanying case law, Mr. Jeffs had no notice that his conduct was prohibited.

Mr. Jeffs could not have foreseen that his conduct, conducting a marriage ceremony and counseling the complainant, amounted to "psychological manipulation to instill improper sexual desires which would not have otherwise occurred." *Gibson*, 908 P.2d at 356. On the contrary, Mr. Jeffs was uniting a couple in a relationship that "includes both public and private conduct...extending beyond the confines of the home to our society." *State v. Holm*, 137 P.3d 726, 743 (Utah 2006). Thus, by merely marrying the two individuals, Mr. Jeffs was not on notice that he was violating the enticement statute or encouraging

unconsented sexual intercourse. The statute is therefore void for vagueness because it does not provide "the kind of notice that enables ordinary people to understand what conduct it prohibits." *State v. Honie*, 57 P.3d 977, 986-86 (Utah 2002).

B. Utah Code Ann. § 76-5-406(11) Is Unconstitutionally Vague Because It Encourages Arbitrary And Discriminatory Enforcement.

Utah's enticement statute, Utah Code Ann. § 76-5-406(11), is unconstitutionally vague because it "fails to establish guidelines to prevent arbitrary and discriminatory enforcement of the law." *City of Chicago v. Morales*, 527 U.S. 41, 64-65 (1999). The United States Supreme Court has held that a statute is void for vagueness "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who can be rightfully detained, and who should be set at large." *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

In the instant case, the enticement statute provides no guidance for law enforcement, instead casting a wide net that could catch all possible offenders, and allowing for arbitrary enforcement of the law. In *Gibson*, the Utah Court of Appeals determined that an older defendant had enticed a younger victim, despite evidence in the record that the victim was often "enticing [the] defendant rather than vice versa." *Gibson*, 908 P.2d at 358 (Orme, J., concurring).

Moreover, the young girl made "inappropriate sexual remarks to [the] defendant on a couple of occasions," but the defendant did nothing to encourage those remarks, and he later claimed to have been embarrassed by her statements. *Id.* However, because the Utah legislature provided no guidelines for enforcement of the enticement statute, it is being arbitrarily enforced whenever "an adult instigates a sexual encounter with a teenage[r], without force or cajoling on his part or resistance or protest on her part." *Id.* Thus, the enticement statute has been reduced to a strict liability statute, eliminating the element of consent entirely, the potential for arbitrary and discriminatory enforcement is significant, and the statute is void for vagueness.

C. Utah's Enticement Statute Is Unconstitutional Because It Violates Mr. Jeffs' First Amendment Right To Free Exercise Of Religion.

Utah's enticement statute is unconstitutional because it impinges upon the Defendant's First Amendment rights, and "where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Utah Code Ann. § 76-5-406(11) is unconstitutional because it is not operationally neutral and it violates the Defendant's federal First Amendment right to free exercise of religion. The First Amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free

exercise thereof." U.S. Const. amend. I. The Free Exercise Clause has been interpreted to mean that "if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). In this case, although Utah's enticement statute is facially neutral, it is unconstitutional because it is not of general applicability and it is not neutral because "the object of the law 'is to infringe upon or restrict practices because of their religious motivation.'" *State v. Green*, 99 P.3d 820, 826 (Utah 2004)(citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520, 531(1993)). Thus, because the statute is being discriminatorily applied, it violates Mr. Jeffs' First Amendment rights and is unconstitutional.

A statute is not operationally neutral if, "apart from the text, the effect of a law in its real operation is strong evidence of its object." *Hialeah*, 508 U.S. at 535. In this case, although the enticement statute appears to be facially neutral, it is being applied as a pretext for religious discrimination because the effect of the law in its operation is to target the Defendant's religion. The Defendant's use of common religious doctrine, during the marriage ceremony and while he counseled the complainant, is being used as the only evidence that the Defendant enticed the accuser to consent to sexual intercourse with the principal.

The State relies on three commonly used religious statements for the proposition that the Defendant enticed the accuser. First, the Defendant performed a religious marriage ceremony, and included in the vows language from the Old Testament, that the couple should "go forth and replenish the earth and multiply." Second, when the accuser approached the Defendant about problems in her marriage, the Defendant counseled her to "give herself mind, body and soul, to her husband." Finally, the Defendant also counseled the accuser to be obedient and submissive to her husband.

The State's assertion that the Defendant's religious statements enticed the accuser to have sexual intercourse creates the same problems the Tenth Circuit faced in *Axson-Flynn*, which held that a University of Utah rule was operationally discriminatory because it was being applied more strictly to the plaintiff because of the defendant's "anti-Mormon sentiment." 356 F.3d 1277 (10th Cir. 2004). Like the defendants in *Axson-Flynn*, the State in this case is singling out one religious sect and applying a rule differently to the Defendant than it would to other religious groups.

The Defendant's use of common religious language, including "multiply and replenish," and "submit and obey," is a general directive to engage in a marital relationship and may include "both public and private conduct." *State v. Holm*, 137 P.3d 726, 743 (Utah 2006). It does not follow that a religious counselor who performs a marriage and uses religious language to comfort a

follower is directing her to have sexual intercourse against her will; this religious language is more broad and general than that interpretation. Thus, the State's assertion that in this particular case, language that has been used for generations to symbolize the complex commitment between spouses, now means enticement to consent to sexual intercourse, is a violation of the Defendant's free exercise rights because it is a non-neutral application of Utah Code Ann. § 76-5-406(11).

Therefore, because the enticement statute is being applied non-neutrally in this case and violates the Defendant's First Amendment right to free exercise of religion, it is unconstitutional.

DATED this 18TH day of April, 2007.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of April, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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