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IN THE \_\_\_\_\_\_\_ JUDICIAL DISTRICT COURT, STATE OF UTAH [COUNTY], SALT LAKE DEPARTMENT

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| THE STATE OF UTAH,Plaintiff,-vs-[DEFENDANT],Defendant. | **STATE'S MEMORANDUM IN OPPOSITION TO MOTION TO QUASH BINDOVER**Case No. Judge  |

The State of Utah, through its counsel, [DA], Salt Lake County District Attorney, [ADA], Deputy District Attorney, hereby submits this Memorandum in Opposition to Motion to Quash Bindover. A preliminary hearing was held before [JUDGE] on [DATE]. Following the two-day preliminary hearing, [JUDGE] bound the Defendant over for trial on one Count of Murder, a first degree felony, and four counts of second degree felony Child Abuse. The Defendant has now filed a Motion to Quash the Bindover as to only the Child Abuse Counts, Counts 2,3,4 and 5 of the Amended Information, alleging

there was insufficient evidence to meet the State’s burden in establishing that the crimes were committed by the Defendant. Although the Defendant characterizes the charges bound over as involving necessary proof that the Defendant “intentionally” caused

serious physical injury to the victim, X.T., clearly subsection 76-5-109(2)(A), under which he was charged and bound over involves both “intentionally or knowingly” causing serious physical injury to the child and also includes this language: “or, having the care or custody of such child, . . .permits another to inflict serious physical injury upon a child.” The latter phrase of the charge is also modified by the mental state of

“intentionally or knowingly.”

# STATEMENT OF MATERIAL FACTS

# [STATEMENT OF FACTS]

# ARGUMENT

**I. THE STATE INTRODUCED SUFFICIENT EVIDENCE AT THE PRELIMINARY HEARING OF THIS MATTER TO ESTABLISH THAT THE CHARGED CRIMES WERE COMMITTED BY THE DEFENDANT AND THE MOTION TO QUASH SHOULD THEREFORE BE DENIED**

In Utah, the role of the magistrate in a preliminary hearing is to determine if there is probable cause to bind a defendant over to the District Court for trial. Utah R. Crim. P. 7(i)(1)(i)(2). A Defendant may be bound over for trial if the “magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it.” *Id.* In a preliminary hearing, the prosecution must establish probable

cause by “present[ing] sufficient evidence to support a reasonable belief that the defendant committed the charged crime.” *State v. Virgin*, 2006 UT 29, ¶4, 137 P.3d 787 (*citing State v. Clark*, 2001 UT 9, ¶ 16, 20 P.3d 300). The prosecution’s burden is to produce “believable evidence of all the elements of the crime charged,” but not evidence “capable of supporting a finding of guilt beyond a reasonable doubt.” *State v. Clark*, 2001 UT 9, ¶ 15, 20 P.3d 300. “The bindover standard is intentionally low so that the credibility of witnesses and the truthfulness of the facts are left to the fact-finder [at

trial].” *State v. Balfour,* 198 P. 3d 471, 475 (Ut. Ct. App. 2008).

As the Utah Supreme Court clarified in the case of *State v. Clark*, cited above, the standard of probable cause required of the State at a preliminary hearing is the same as the probable cause needed to sustain the issuance of an arrest warrant. Further, at a

preliminary hearing, “the magistrate must view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution.” 2001 UT 9, 10. The Supreme Court concluded: “[I]f the State presents the court with sufficient information to issue an arrest warrant, a defendant’s motion to quash a bindover should not be granted.” Id. at p. 16. The *Clark* Court acknowledged the confusion created by various previous recitations of the standards applicable at a criminal preliminary hearing and concluded: “Therefore, at both the arrest warrant and the preliminary hearing stages, the prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed

it.” Id. at p. 11, 20 P.3d 300, 306.

In the 2012 case of *State v. Maughan*, 2012 Ut App 121, the Utah Court of Appeals again made clear that: “In circumstances where alternative but equally

reasonable inferences may be drawn from the evidence in favor of either the defendant or the State, the magistrate must rely on those inferences that are favorable to the State,” 2012 Ut App 121, ¶10. The *Maughan* Court further clarified, “An inference is a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts.” Id. at ¶11. In *Maughan*, the Court of Appeals agreed with the magistrate’s decision not to bind the defendant over because of an absence of evidence or reasonable inference that the defendant acted with the specific intent required by the statute under which he was charged.

Since the case of *State v. Humphrey*, 823 P.2d 464 (Utah 1991), it has been clear in Utah that a district court judge has inherent authority to review the magistrate’s decision to bind a defendant over for trial on charges and that such a review is not an appellate review, but merely a determination of whether the jurisdiction of the court has been properly invoked. *Id.* pp. 466-467. In *State v. Dykes*, 283 P.3d 1048, 2012 UT App 212, the Utah Court of Appeals clarified that: “Ordinarily, we review a magistrate’s

bindover decision with some deference, recognizing that the bindover standard is low and requires only that probable cause be presented for each element of the offense.” *Id*. ¶ 5. In *State v. Zahn*, 180 P.3d 186, 2008 UT App 56, the Court of Appeals stated that “A measure of discretion is granted to magistrates and trial courts in considering credibility, plausibility, and consistency when making bindover decisions.” *Id.* ¶ 6. The weighing function of the magistrate at a criminal preliminary hearing was further explained in *State*

*v. Droesbeke*, 241 P.3d 772, 2010 UT App 275, “…magistrates may make limited credibility determinations in preliminary hearings . . .The magistrate’s evaluation of credibility at a preliminary hearing is limited to determining the evidence is wholly

lacking and incapable of reasonable inference to prove some issue which supports the prosecution’s claim . . .The limited responsibility to evaluate credibility does not, however, allow a magistrate to weight credible but conflicting evidence at a preliminary hearing.” *Id. ¶¶* 17,18. In *Droesbeke*, although the victim of child sexual abuse essentially recanted her prior statements about the abuse in a children’s justice center interview in her preliminary hearing testimony, the Court of Appeals found that the district court judge had appropriately denied the defendant’s motion to quash bindover because the evidence was not so incredible that it did not support a reasonable belief the crime had been committed by the defendant.

In the context of child abuse and child homicide decisions, in the case of *State v. Wells*, 977 P.2d 1192, 1999 UT 27, the Utah Supreme Court made clear that although a district court may quash a bindover order, “it may properly do so only upon finding a

lack of probable cause.” The *Wells* Court also reaffirmed that although a magistrate may weigh conflicting evidence, that evidence must be viewed in the light most favorable to the prosecution, the magistrate must resolve all inferences in favor of the prosecution, and must leave weighing of conflicting evidence to the trier of fact at a trial. *Id*. ¶ 2.

Both *Wells* and companion case *State v. Talbot*, 972 P.2d 435 (Utah 1998) involved claims by defendants in child homicide cases that the case should not be bound over or should be dismissed unless the medical expert could express complete certainty as to how the child died. The Court stated: “As in *Talbot*, the evidence that the child was killed by a person rather than by accident may be controverted. Nevertheless, when the evidence is viewed in the light most favorable to the prosecution, it is sufficient to sustain a finding

of probable cause.” 1999 UT 27, ¶ 4. In other words, the issues raised by the defense, like those raised by the defense in this case, are matters for a jury to determine at a trial.

Although several cases recognize that magistrates at preliminary hearings have some discretion to refuse to bind over based on insufficiency of evidence or credibility issues, the case of *State v. Droesbeke*, 241 P.3d 722, 2010 UT App 275, clarifies what is meant by this limited discretion in a situation where the child victim of sexual crimes had offered an account in a CJC interview, but then largely recanted her prior statement at the preliminary hearing. The Court of Appeals stated that: “The preliminary hearing ‘probable cause’ standard requires the State to present evidence sufficient to support a reasonable belief that the defendant committed the crime charged . . . (citations omitted). Inclusion of the word ‘reasonable’ in this standard suggests that, at some level of inconsistency or incredibility, evidence becomes incapable of satisfying the probable cause standard.” *Id. ¶* 16. However, “the magistrate’s evaluation of credibility at a preliminary hearing is limited to determining that *evidence is wholly lacking and incapable of reasonable inference to prove some issue* which supports the prosecution’s claim.” *Id.* ¶ 17. Only in that situation is the magistrate justified in failing to bind over. In *Droesbeke* the magistrate determined that there was sufficient believable evidence to justify the bindover and the trial court denied the motion to quash the bindover finding the CJC interview of the victim supported a reasonable belief the crime was committed by the Defendant and it was up to the jury at a trial to determine the victim’s credibility, given her later recantation.

In this case, the crimes charged required the State to prove that the Defendant, while acting intentionally or knowingly, caused serious physical injury to X.T., a child

under the age of eighteen years.. Under §76-5-109(2)(a), which defines the second degree felony version of the crime of Child Abuse, to prove a “serious physical injury”, the State must show that a physical injury or set of injuries either (1) seriously impaired the child’s health, (2) involved physical torture, (3) caused serious emotional harm to the child, or (4) involved a substantial risk of death to the child. In addition to one of those four “predicates”, the State must show that the victim’s injuries fit one or more of the

examples of serious physical injury set out in subsection 76-5-109(1)(f)(ii). The evidence introduced at the Preliminary Hearing made clear that the injuries inflicted on X.T. were fractures of his bones, and would have seriously impaired his health. Under Subsection 76-5-109(1)(f)(ii)(A) – “fracture of any bone or bones,” is the element of the definition of serious physical injury which was proven here. Given the degree of force that must have accompanied the infliction of the four different fractures inflicted upon X.T. and the fact they were of at least three different ages based on the degree of healing, any person who inflicted that degree of force would have at least been aware that his actions were substantially certain to result in serious physical injury to the baby.

Despite the Defendant’s argument that there must be some direct evidence of his identity as the person who caused the older and healing fractures to X.T., that would be an impossible standard for the prosecution to meet in almost all cases of physical assault on children. Both child sexual abuse and child physical abuse are well known to occur in secrecy, without eyewitnesses, and even the child’s parent is often unaware of and unwilling to believe that their partner is the one who harmed their child, because the abuse doesn’t happen in their presence.

The United States Supreme Court as early as 1991 recognized that where an infant child is killed by abuse and there is evidence the child suffered numerous inflicted injuries prior to the final, fatal injuries:

# “The proof of battered child syndrome itself narrowed the group of possible perpetrators to McGuire and his wife, because they were the only two people regularly caring for Tori during her short life . . .Only someone regularly caring for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months.”

*Estelle v. McGuire,* 502 U.S. 62, 74 112 S.Ct. 475, 483 (1991). In *McGuire*, the United States Supreme Court had to determine whether it was error for the California trial court to admit evidence of prior injuries suffered by the 6 month-old homicide victim which included a prior sexual injury and older, healing rib fractures, even though that evidence was not directly linked to the defendant as the perpetrator. The holding of *McGuire* is that even though such evidence is not directly tied to the identity of the perpetrator, it is still relevant to establish that the child’s final, fatal injuries were not the result of accident, but were inflicted by some other person. The quoted language is significant because it represents the Supreme Court’s logical decision that where an infant has several injuries caused by some other person inflicted at an earlier time than the injuries which ultimately resulted in her death, that itself narrows the list of possible perpetrators to those who are regular caretakers – in that case, the defendant and his wife, who were the only ones who had the continuing opportunity to inflict abusive injuries over a period of time. Although defendants regularly urge the courts to consider that anyone with “access” to a child may have caused an abusive injury, the ruling of the Supreme Court in McGuire impeaches that illogical contention where the victim has multiple inflicted injuries caused over a lengthy period of time. Here, during the critical window of time

between October 3, 2013, when X.T. did not have any fractures, and December 30, 2013 when skeletal survey showed he had multiple older inflicted fractures at different stages of healing, the only three caregivers of the baby were [NAMES] and the Defendant. [NAMES] denied ever doing anything to cause the types of fractures found in X.T. This certainly supports the inference that it was the Defendant who did something previously to the baby which resulted in the fractures, and who was alone with the victim when the final, fatal head injuries were caused.

As the Utah Supreme Court noted in *State v. Tanner*, 675 P.2d 539 (Utah 1983), “Where there is child abuse, there will invariably be secrecy. The great disparity of power and control between the abuser and the child assures that there will be little, if any, direct evidence. Even in cases where the victim survives, the child’s age and

vulnerability make it unlikely that he or she could be expected to testify competently.” *Id*. p. 547. In *Tanner*, the Supreme Court recognized that evidence of prior abuse of the victim of a homicide, and of the prior relationship between the defendant and the child, may be the only credible evidence to support a homicide charge. *See also State v. Kelsey*, 532 P.2d.1001, 1005 Utah 1975) – “Persons bent on crime do not usually invite

spectators”; *State v. John*, 586 P.2d 410, 411-412 (Utah 1978) – defendant was the only one alone with the child victim when a brutal attack caused the child’s death, “Crimes of this character, as in most types of serious misbehavior, are not usually committed in the presence of witnesses, but in such secrecy as the perpetrator can manage,”; *State v.*

*Blubaugh*, 904 P.2d 688 (Utah App. 1995) involved a situation where a mother’s infant daughter had been abused and ultimately killed by abuse. Although the mother was the person who identified that the baby’s eyes were “rolled back in her head” and her skin

was cold and gray, the Court of Appeals upheld the conviction of the boyfriend for depraved indifference murder despite acknowledging the evidence of his guilt was all

circumstantial. “It is well accepted that circumstantial evidence alone may be competent to establish the guilt of the accused (citing *Tanner*) – if circumstantial evidence and reasonable inferences were to be discounted, it is doubtful that convictions would ever be found in cases of this nature where the crime takes place in the home and where the youth of the victim, combined with the relationships of the family members, makes it difficult, if not impossible, to obtain direct evidence.” *Id.* 694, citing page 550 of *Tanner*; *State v. Watts*, 675 P.2d 566, 569 (Utah 1983) – “We cannot ignore that the pernicious acts of the child abuser are always attended by secrecy, denied by protestations of innocence, and ‘peculiarly identified by the marked discrepancy between the clinical or physical findings and the historical data provided by the caretaker. . . “ – 14 month-old boy was killed by boyfriend while he was alone with the child, apparently by hitting him in the head and abdomen with a hand-held shower attachment. The other significant issue noted by the *Watts* Court is the almost universal feature of child physical abuse and child homicide cases that the perpetrator either has no explanation at all for the cause of the injuries to

the child or offers inadequate or “discrepant” stories that could not possibly account for the severity of the child’s injuries. In this case, the Defendant told police and [WITNESS] that he had no idea what happened to X.T. in the few minutes that [WITNESS] was upstairs and the Defendant was alone with the baby, but quite clearly the fatal head

injuries to the baby were caused by the Defendant by shaking or impacting the baby’s head in a violent fashion; most likely by both violent mechanisms.

When it is clear that a victim of child abuse was harmed by one of his primary caregivers on one occasion and there are prior, unexplained injuries to that same child discovered, the logical assumption is that the same person who caused the fatal injuries also caused the prior injuries, especially when the older injuries are the result of somewhat similar conduct and likely mechanisms of injury. Although the case involved the issue of whether prior acts of child abuse and prior injuries to a child who was killed by child abuse would be admissible under Rule 404(b), the South Carolina Court of Appeals case of *State v. Martucci*, 369 S.C. 232, 669 S.E.2d 598 (2008) contains some very insightful language to this effect. In *Martucci*, the boyfriend of the two year-old victim’s mother was convicted of homicide by child abuse and the trial court allowed evidence of prior incidents of abusive injuries caused to the victim along with discrepant stories offered to explain those earlier injuries under the auspices of Rule 404(b) of the Rules of Evidence. The Court of Appeals held that the evidence of prior abuse was admissible as proof of intent and absence of accident, as well as to assist in proving the identity of the perpetrator of the homicide. The Court of Appeals referred to the following language from a recent South Carolina case:

# “Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one’s home. The abusive conduct is not usually confined to a single instance, but rather is a *systematic pattern of violence progressively escalating and worsening over time.*. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help. It is also not uncommon for child abuse victims to be so young that they are incapable of offering testimony against the abuser. For these reasons, proving the crime of child abuse is extremely difficult. . . When a child is brought into an emergency room with injuries in various stages of healing, there is evidence of recurring child abuse. If the multiple, separately occurring injuries are not admissible in child abuse prosecutions,

**the crime would be virtually impossible to prove.”**

*Id.* at ¶19 (emphasis added). The Court also discussed the need for such evidence to prove the identity of the perpetrator of the fatal abuse to the child, finding that a pattern of ongoing abuse of the same victim is highly probative of the identity of the perpetrator of the homicidal assault on the child. The *Martucci* Court also stated:

# “When a criminal defendant’s prior bad acts are directed toward the same victim and are *very similar in nature*, those acts are admissible as a common scheme or plan. . .

**[C]hild abuse generally involves *the same perpetrator committing abuse against the same helpless victim.* And where, as here, the perpetrator is the parent or a person with exclusive custody and control over the victim, proving abuse becomes extremely difficult. As a result of the difficulties in proving child abuse, evidence which shows a pattern of abuse becomes even more probative than it**

**might otherwise be.”**

*Id.* at ¶¶ 26-27 (emphasis added).

# CONCLUSION

The State provided sufficient evidence to support a reasonable belief that the crime charged was committed by the defendant at the two-day preliminary hearing in this case. Under the standard to be applied by [JUDGE], sitting as magistrate, a bind over was proper unless the evidence was “wholly lacking and

incapable of reasonable inference to prove some issue which supports the prosecution’s claim” such that even after drawing all reasonable inferences from the evidence in favor of the State, there is no evidence of one or more elements of the crimes charged that support a reasonable belief. *Virgin*, supra, ¶¶22, 23.

This Court’s review of the preliminary hearing transcript and [JUDGE] ruling binding the Defendant over for trial on Counts 2 through 5 should be limited to whether the magistrate violated the above standard by finding probable cause when there was no reasonable inference to be drawn from the evidence as to the

Defendant’s identity as the person who caused the baby’s fractures, or as a caretaker for the child, who permitted another to cause those fractures, given the deference to [JUDGE] ruling that is due under the case law cited in this Memorandum.

Although the defense has raised issues and speculations that may be relevant at a later

trial of this case, no argument has been advanced that the State’s evidence, considered in its entirety and judged as it must be in the light most favorable to the State, could not possibly support a finding of probable cause that the Defendant committed the charged crimes. As outlined herein and contrary to the Defendant’s claims there was no evidence introduced to support the bindover, there was substantial evidence connecting him to the commission of the prior acts of child abuse that resulted in multiple fractures caused to the baby over a range of time, and most of which were likely caused in very similar ways to the actions that resulted in X.T.’s fatal brain injuries. At this stage, it is not in dispute that the fatal brain injuries to X.T. occurred while the baby was in the Defendant’s exclusive care. In addition, the defense has not established in any way that the State’s evidence at the preliminary hearing of this matter was “so contradictory, inconsistent, or unbelievable that it is unreasonable to base belief of an element of the prosecutor’s claim on that evidence”, and thus the Motion to Quash Bindover should be denied by this Court.

RESPECTFULLY SUBMITTED this \_13th\_ day of May, 2015.

Deputy District Attorney