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UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

v.

ROSALIE JEAN CHILCOAT and
MARK KEVIN FRANKLIN,

Defendants/Petitioners.

PETITION FOR PERMISSION TO APPEAL FROM INTERLOCUTORY ORDER

No. _____
District Court Nos. 171700040 & 171700041
Honorable Lyle R. Anderson

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I. Introduction

Pursuant to Rule 5 of the Utah Rules of Appellate Procedure, Defendant/Petitioners Rosalie Jean Chilcoat and Mark Kevin Franklin, by and through their undersigned counsel, hereby petition for permission to appeal an interlocutory order (the "Order") of the Honorable Lyle R. Anderson of the Seventh Judicial District Court in and for San Juan County, entered on April 24, 2018, denying Ms. Chilcoat's and Mr. Franklin's motions to quash a bindover order.[1]

In binding over Ms. Chilcoat and Mr. Franklin to face trial on second-degree felony charges that lack any significant factual support, the district court's Order raises significant free speech and related constitutional and other issues. Because of the clear chilling effect that the Order has by suppressing unpopular political views in San Juan County, immediate review by this Court is warranted.

II. Facts Material to Consideration of the Issues Presented

Rose Chilcoat and Mark Franklin are a wife and husband who have been charged by the State[2] in separate criminal informations. As relevant here, both Ms. Chilcoat and Mr. Franklin are now charged in two-count amended informations alleged alleging Attempted Wanton Destruction of Livestock in violation of Utah Code Ann. § 76-6-111(3)(d), enhanced by virtue of Utah Code Ann. § 76-6-110(3) (Count 1 – a second degree felony), and Trespassing on State Trust Lands in violation of Utah Code Ann. § 53C-2-301 (Count 3 – a Class A misdemeanor).

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[1] The district court's single order denying motions to quash filed by both Ms. Chilcoat and Mr. Franklin is attached hereto as Exhibit A. The operative criminal informations filed against Ms. Chilcoat and Mr. Franklin at the time of the preliminary hearing are attached hereto as Exhibits B and C respectively. The two cases were joined together below on December 15, 2017, and thus Ms. Chilcoat and Mr. Franklin together file this single petition.

[2] To be more precise, the criminal prosecution is currently being handled by the San Juan County Attorney's Office. A motion to recuse the Office from further involvement in this matter was filed in the district court on April 27, 2018, and is currently pending.

A. The Preliminary Hearing

At the preliminary hearing, the prosecution presented the following relevant evidence in support of its allegations against Ms. Chilcoat and Mr. Franklin:[3]

The cattle that Ms. Chilcoat and Mr. Franklin are alleged to have attempted to wantonly harm are owned by Zane Odell. Odell has a permit to graze cattle on U.S. Bureau of Land Management (BLM) and Utah School and Institutional Trust Land Administration (SITLA) land throughout parts of San Juan County. *See* Preliminary Hearing Transcript at 5-8.[4] On a portion of this property sits a corral where cows come to water. *Id*. at 9. Typically, Odell would leave the gate to the corral open, with a latch chain hooked to the fence so that the gate wouldn't shut. *Id*. On the morning of April 1, 2017, the gate was open as Odell and others went to move cattle. *Id*. When Odell returned to the corral later that afternoon, however, the gate was closed. *Id*.

Once he saw that the gate was closed, Mr. Odell called the San Juan County Sheriff's Office. *Id*. He also observed tire tracks in front of the gate and footprints from the area near the gate to the water trough. *Id*. at 10. Approximately fifty yards from the gate, there was also a large opening in the fence that surrounded the corral. *Id*. at 12. The opening was approximately ten feet wide, large enough for cattle to freely walk in and out of the corral. *Id*. at 35. According to Odell, the opening was not visible from the main gate. *Id*. at 12. Odell did see, however, that the tire tracks continued past the gate to the corral all the way to the opening. *Id.* at 38. Because Odell had a camera on his property, he was able to take pictures of a vehicle that entered and exited his property on April 1. *Id*. at 13. Although the photos depicted the car, they did not show its occupants. *Id*. at 42.

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[3] In recounting the "facts" alleged in the proceedings below, Ms. Chilcoat and Mr. Franklin are simply providing a description of the prosecution's claims for purposes of this appeal – not conceding the accuracy or admissibility of any of the evidence.

[4] The preliminary hearing transcript was filed in the district court file on April 20, 2018.

Two days later, April 3, 2018, Odell and two others were working on the property when he saw a vehicle towing a trailer come into view. *Id*. at 14. Odell's companion stopped the vehicle, which was identical to the vehicle in the photo taken on April 1st. Odell and his companions did not let the occupants of the vehicle, Ms. Chilcoat and Mr. Franklin, leave. *Id*. at 39. The driver of the vehicle, Mr. Franklin, got out of the car and agreed he had shut the gate two days earlier, stating also that he did so to help. *Id*. at 16. Franklin also explained that he had seen an opening in the corral and that cows were going in and out when he left. *Id*. at 40.

Mr. Odell also testified regarding a photograph showing Ms. Chilcoat standing near the property and depicting ponds that were dry. The photo was attached to a complaint that Chilcoat purportedly submitted to the BLM. *Id*. at 19. Odell's testimony regarding the BLM complaint and accompanying documentation was based on his review of BLM files. *Id*. at 20. Defense counsel objected to Odell's testimony regarding the contents of the letter since it was not properly authenticated and lacked sufficient foundation, but the objection was overruled. *Id*. at 21.

On cross-examination, Odell testified that it was possible that someone could have driven past the opening in the corral before turning around to exit the property and then closing the gate. *Id*. at 45, 52. Essential to Odell's testimony was his lay opinion regarding the tire tracks and footprints, which Odell believed demonstrated that the driver of the vehicle must have closed the corral's gate before seeing the other opening to the corral. Defense counsel objected to the basis for Odell's opinion, arguing that expert testimony was required, but the objection was overruled. *Id*. at 48.

The prosecution also called as a witness J.R. Begay, a deputy county sheriff in San Juan County. On April 3, 2018, Deputy Begay was responding to a call regarding cows on a road,

when he received instructions to go to the Odell corral. *Id.* at 54. When he arrived, Begay saw Odell and his compatriots talking with Mr. Franklin. *Id.* Begay interviewed Mr. Franklin, while Ms. Chilcoat remained inside the car. *Id.* at 56. Later, Begay approached the car and asked Ms. Chilcoat for her name, which she provided. *Id.* Begay testified that Mr. Franklin stated that "he knew that there was an opening for cows to get in." *Id.* at 58. At some later point, Begay reviewed Ms. Chilcoat's Facebook page, which indicated that she had previously served as a director for "Great Old Broads for Wilderness"—a conservation organization. *Id.* at 59-60. Over objection from the defense, Deputy Begay testified that, based on his review of a website maintained by Great Old Broads, the organization advocated for managing grazing practices because of concern about overgrazing. *Id.* at 61.

Critically, no witness testified that Ms. Chilcoat was even on Odell's property on April 1. And although Franklin admitted to closing a gate to the corral that day, no statement—by Franklin, Chilcoat, or any other witness—was made implicating Chilcoat in that act.

At the conclusion of the preliminary hearing, the State argued that it had provided sufficient evidence for a bindover of both petitioners. With regard to Mr. Franklin, the State contended that he had admitted closing a gate to the corral and that at the time it was not possible for him to see an opening in the fence a short distance way. *Id.* at 63. The State acknowledged that "it's possible that his mental state changed as far as the mental state required for this crime; within minutes of him closing the gate, as he pulled [out] and saw the opening in the fence." *Id.* But according to the prosecution, at the time that he closed the gate, Mr. Franklin had "no reason . . . to close that gate other than, based on testimony that you've heard, *his connections with Ms. Chilcoat as well as the organization that she belongs to*, . . . to cause injury or the death of these livestock." *Id.* (emphasis added).

Turning to Ms. Chilcoat, the State argued that "the same evidence that supports the charge against Mr. Franklin supports it against Ms. Chilcoat." *Id.* at 65. The State pointed to her letter to the BLM about camping in the general area and the fact that the trailer was registered to her, concluding based on this evidence: "So she's tied to Mr. Franklin's action by virtue of, if nothing else, . . . being an accomplice to the fact, to the action itself." *Id.*

The defense then argued against bindover. Counsel for Mr. Franklin explained that that there was no evidence of intent to kill or harm livestock. *Id.* at 78. The magistrate judge asked what was reason behind Mr. Franklin closing gate. *Id.* Defense counsel noted that the prosecution was trying to rely on impermissible burden shifting, that because (in its view) there was no reason for shutting the gate, it was reasonable to infer criminal intent. *Id.* The magistrate judge then stated: "[T]he State has given me one plausible reason. If you can give me one that is not only more plausible but so much more plausible than the State's theory is preposterous, then I won't bind over. So have you got one?" *Id.* at 79. At this point, defense counsel immediately responded closing a gate might provide some assistance in keeping cows off of the road and, in any event, that there were any number of theories for closing the gate. *Id.*

B. The Magistrate Judge's Bindover Decision

After hearing arguments from the defense, the magistrate judge (Anderson, M.J.) bound the defendants over to face trial. With regard to Mr. Franklin, the magistrate judge concluded that "the most likely explanation as to why [Franklin] would shut the gate is he wanted to shut the gate so that animals couldn't get to the water. There may be other explanations but they are not more likely. And I'm required, at this stage anyway, to take the State's inferences unless they are so unlikely as to be inherently improbable. So I'll bind him over on both counts." *Id.* at 86.

Turning to Ms. Chilcoat, the magistrate judge described the issue as whether "there is enough tying Ms. Chilcoat to the actions of Mr. Franklin." *Id.* Referring back to the State's arguments, the Magistrate Judge briefly concluded "I think, certainly for purposes of preliminary hearing, those are enough," *id.* to warrant a bindover on the attempted wanton destruction of livestock charge and the criminal trespass charge.[5]

C. Ms. Chilcoat's and Mr. Franklin's Motion to Quash Bindover

Following the bindover decision, on April 9, 2018, Ms. Chilcoat and Mr. Franklin both filed timely motions to quash the bindover order. They argued that the County's use of Ms. Chilcoat's membership in a conservation organization violated her federal and state constitutional rights. They began by providing some broader context for the criminal charges that the husband and wife were facing. In particular, on May 10, 2014, San Juan County Commissioner Phillip Lyman led a protest ride of off-road vehicles through Recapture Canyon, leading to his conviction the next year for federal criminal conspiracy charges. Reply in Support of Mot. to Quash at 7. Ms. Chilcoat publicly applauded the conviction in local news media, leading to a series of Facebook posts in which Commissioner Lyman blamed Ms. Chilcoat as being responsible for his criminal conviction. *Id.* at 9-10. The San Juan County Attorney handling the prosecution of Ms. Chilcoat also weighed in on Facebook, explaining that he was "proud" of his friendship with Commissioner Lyman and asking critics of Lyman's criminal prosecution not to post that "crap" on his Facebook page. *Id.* at 10. Later, on March 20, 2018,

[5] The State had also charged Ms. Chilcoat with providing false information to a police officer, by acceding to Deputy Begay's indication that her last name was Franklin. The magistrate judge refused to bindover on that charge, concluding that the evidence showed "she just did not want to have a discussion she may had had many, many times about why if you're married do you not have the same last name . . . ." *Id.* at 85. The State also obtained a bindover against Ms. Chilcoat on the charge of retaliating again a witnesses – i.e., Mr. Odell – by sending an inquiry to BLM raising questions about compliance with his permit. On May 1, 2018, the State filed an amended criminal information against Ms. Chilcoat dropping this charge.

the County Attorney used Lyman's Facebook page to ask prospective jurors who had been surveyed by Dan Jones and Associates about pre-trial publicity to email him to discuss the survey. *Id.*

Against the backdrop that Ms. Chilcoat and Mr. Franklin held politically-unpopular views, they argued that using Ms. Chilcoat's involvement in Great Old Broads for Wilderness as an indispensable link to criminal prosecution violated their rights to freedom of speech and freedom of association under the First Amendment to the United States Constitution and article I, § 1 and § 15 of the Utah Constitution. This concern was particularly acute where the County Attorney had argued, in his response to the motion to quash bindover, that he intended to rely upon what he described as Ms. "Chilcoat's *public beliefs* against livestock grazing on public lands." Reply in Support of Mot. to Quash (*citing* County Resp. at 5 (emphasis added)). Ms. Chilcoat and Mr. Franklin developed this argument at length, including a specifically-briefed argument based on Utah state constitutional protections.

Finally, Ms. Chilcoat and Mr. Franklin raised a series of evidentiary and other defects in the State's efforts to support bindover. For example, Ms. Chilcoat and Mr. Franklin also explained that the State's circumstantial case rested on a pseudo-scientific interpretation of tire track evidence by Odell, something that was not scientifically reliable, accordingly to an expert affidavit from a retired FBI agent who was a certified crime scene expert. *See generally* Reply in Support of Mot. to Quash at 18-25.

D. The District Court's Denial of the Motion to Quash

On April 24, 2018, the district judge (Anderson, J.) entered an order denying Ms. Chilcoat's and Mr. Franklin's motion to quash bindover. The district judge began by asserting that there was "little point" in the "existence of the motion to quash" in districts such as the

Seventh Judicial District, because the district judge ruling on the motion to quash is the same judge as the magistrate judge who presided over the preliminary hearing. Order at 2.

With regard to the tire tracks, the district judge held that no expert was required to interpret the tracks, adding petitioners "were not bound over for trial because the magistrate was dazzled by Mr. Odell's brilliance as an interpreter of tire tracks." *Id.* at 2. As to evidence of Mr. Franklin's criminal intent in closing the gate, the district judge offered just two sentences of analysis: "More importantly, regardless of the tire track evidence, the magistrate had sufficient mental capacity to understand that there would be little purpose in Mark Franklin closing the gate – whatever his motive – if he had already observed that a panel of the fence was already down. Only if Mr. Franklin had an overriding and unreasoned compulsion to shut every open gate, no matter what, would his shutting the gate after seeing the open fence sections make any sense." *Id.* at 2-3.

Turning to the charges against Ms. Chilcoat for attempted wanton destruction of livestock, the district judge began by acknowledging that "the evidence that Ms. Chilcoat participated in the closing of the gate was circumstantial." *Id.* at 3. However, the district judge concluded that a sufficient circumstantial case against her existed because of: (1) a letter "purportedly signed by Ms. Chilcoat" said that she had been camping with Mr. Franklin on the days in question; (2) she was married to Mr. Franklin; (3) Ms. Chilcoat had failed to deny any involvement in Mr. Franklin's action in closing the gate; (4) Ms. Chilcoat's position "with Great Old Broads for Wilderness, as well as her letters to the BLM, show that she thinks the world would be a better place if Odell's cattle were gone"; and (5) the vehicle and the trailer used by Franklin belonged to Chilcoat. *Id.* at 3-4.

The district judge conceded that any one of these items would have been insufficient to

bindover Ms. Chilcoat, but concluded that collectively they were sufficient: "Other inferences can be drawn that are less damaging to Chilcoat, but the magistrate was required by precedent to draw those inferences supporting the charges." *Id.* at 4-5.

This timely petition for interlocutory review followed, pursuant to Utah R. App. P. 5.

III. Issues Presented, Standard of Review, and Preservation

Issue 1: Did the district court violate Ms. Chilcoat's and Mr. Franklin's free speech and free association rights under U.S. Const., amend. I, and Utah Const., articles I, §§ 1 & 15, in using Ms. Chilcoat's membership in a conservationist organization as evidence of criminal intent to support bindover on serious criminal charges involving attempted wanton destruction of livestock?

Issue 2: Did the district court have before it sufficient admissible evidence to deny Ms. Chilcoat's and Mr. Franklin's motion to quash bindover on serious felony charges of attempted wanton destruction of livestock and related crimes?

Standard of Review: Constitutional issues, such as those presented here, are "matters of law" subject to de novo review "for correctness." *State v. Salt*, 2015 UT App 72, ¶ 11, 347 P.3d 414, 419. Moreover, in order to establish probable cause for bindover, the prosecution must produce evidence sufficient to support a reasonable belief that the defendant committed the charged crime. *State v. Virgin*, 2006 UT 29, ¶ 17, 137 P.3d 787, 791. A magistrate judge's determination is subject to "limited deference" when reviewed on appeal, *Virgin*, 2006 UT 29, ¶ 34, 137 P.3d at 796, as the decision to bind a defendant over for trial presents a "mixed question of fact and law." *State v. Droesbeke*, 2010 UT App 275, ¶ 14, 241 P.3d 772, 775.

Preservation: All of these issues were preserved in Ms. Chilcoat's and Mr. Franklin's motions to quash bindover, filed in the district court on April 9, 2018.

Timeliness: The district court denied the motion to quash bindover on April 24, 2018. Petitioners have sought review within 20 days of that order, as permitted by Utah. R. App. 5(a). Petitioners respectfully request that this Court rule on their petition before their trial begins. Currently the trial is set for May 23, 2018. Contemporaneously with filing this petition, petitioners are moving in the district court for a stay of further substantive proceedings below, consistent with the guidance provided in Utah R. App. P. 8(a) (stays must ordinarily be sought in the first instance in the trial court). If the district court has not granted the stay by May 9, 2018, petitioners intend to seek a stay of further proceedings in this Court pursuant to Utah R. App. P. 23C.

IV. Reasons Why Immediate Interlocutory Appeal Should be Permitted

This case presents important constitutional and other issues that this Court should immediately review. The constitutional issues deserve immediate review to avoid a possible "chilling effect" on protected speech. And against the backdrop that Ms. Chilcoat's and Mr. Franklin's views are clearly unpopular in San Juan County, this Court should also carefully review the sufficiency of the evidence supporting the bindover of any charges.

A. The Subject Matter and Posture of this Case Warrant Immediate Interlocutory Review

1. The Constitutional Issues Deserve Immediate Review

This petition presents important constitutional questions that warrant interlocutory review. It is clear that Ms. Chilcoat's involvement with a conservation organization – Great Old Broads for Wilderness – is the centerpiece of the State's efforts to prove "criminal intent," both

as to her and then, by implication, as to her husband, Mr. Franklin. Before the two are forced to stand trial in a hostile community,[6] the constitutional implications deserve close scrutiny.

Federal and state constitutional guarantees provide protection against "punishing [a person] solely because [she] is a member of a particular political organization or because [she] holds certain beliefs." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6, 91 (1971). And courts must be mindful of any "chilling effect' on protected activity," that is, the concern that "[i]ndividuals who are contemplating participating in protected speech may choose to avoid possible prosecution or litigation by refraining from the constitutionally protected activity." *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 11, 86 P.3d 735, 739.

Unless this Court intervenes, the State will have used Ms. Chilcoat's alleged "public beliefs" about the need to manage livestock grazing to provide the necessary evidence for forcing her and her husband to stand trial for second degree felonies for attempted wanton destruction of livestock. The First Amendment, of course, shields thoughts and beliefs from punishment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977). And under Utah Const., arts. 1 & 15, "[f]reedom of speech is not only the hallmark of a free people, but is, indeed, an essential attribute of the sovereignty of citizenship." *I.M.L. v. State,* 2002 UT 110, ¶ 14, 61 P.3d 1038, 1043 (*citing Cox v. Hatch*, 761 P.2d 556, 558 (Utah 1988)). In fact, Utah's Constitution provides more comprehensive protections for freedom of expression than those under the federal constitution. *See American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 21 (noting that "the

[6] On May 3, 2018, Ms. Chilcoat and Mr. Franklin filed a motion for change of venue to a county other than San Juan County. As recounted in that motion, a survey conducted in March 2018 by the respected Utah polling firm Dan Jones & Associates. The poll showed that in San Juan County, there was 74% awareness of Great Old Broads for Wilderness, with 57% of county residents holding unfavorable views about the organization. As further recounted in the motion, recent local on-line and social media comments about petitioners have included "[s]tring that bitch up," "get a rope," and "lynch them."

language of the Utah Constitution seems to prohibit laws which either directly limit protected rights or indirectly inhibit the exercise of those rights" to freedom of speech). This Court should review whether the State is deploying punitive sanctions against protected freedom of thought and expression in violation of these constitutional commands.

Dawson v. Delaware, 503 U.S. 159 (1992), illustrates the principles ignored by the trial court. *Dawson* reversed a criminal sentence based in part on the prosecution's admission of evidence that a defendant was a member of the Aryan Brotherhood, "a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates." *Id.* at 165. The Supreme Court noted that "[b]ecause the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance." *Id.* at 166. Here, obviously, the chain of reasoning that the State is attempting to employ is far more attenuated than the chain found constitutionally impermissible in *Dawson.* While the Aryan Brotherhood specifically advocated unlawful acts such as murder, the Supreme Court found that "that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs." *Id.* at 167. Of course, in this case, Great Old Broads for Wilderness hardly advocates unlawful activity, but instead proposes greater emphasis on conserving natural resources on public lands. But as in *Dawson*, after reviewing the record in this case, "one is left with the feeling that the [membership] evidence was employed simply because the [finder of fact] would find these beliefs morally reprehensible." *Id.* Such an argument targeting freedom of belief and association can survive neither federal nor state constitutional scrutiny. *See, e.g., Flanagan v. State*, 109 Nev. 50, 53, 846 P.2d 1053, 1056

(1993) ("Evidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence"); *cf. Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State").

The trial court rejected Ms. Chilcoat's – and thus Mr. Franklin's – free speech claims on grounds that her membership in Great Old Broads for Wilderness shows "a *particular interest* in the area where the government permits Odell to graze his cattle . . . ." and helps support an inference that Ms. Chilcoat "thinks the world would be a better place if Odell's cattle were gone." Order at 3, 5 (emphasis added). But the only evidence introduced at the preliminary hearing (over defense objection) was a single question and answer from a deputy sheriff, who read the Great Olds Broads website: "From what I've read and what they make public on their website at greatoldbroads.org, is that they are advocates for, I guess, managing the grazing practices . . . in how they see that there's overgrazing. The livestock are disturbing water, soil, [and] other free . . . animals that the livestock industry's affecting." Prelim. Trans. at 61.[7] This hardly evidences any "particular interest" in Odell's cattle, much less any interest that Ms. Chilcoat (and, by inference, her husband) would want to criminally harm those cattle.

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[7] Deputy Sheriff Begay did not explain specifically what part of the website he was referring to. For the record, the website has long described the purposes of the organizations as follows:

> Great Old Broads for Wilderness is a national grassroots organization, led by women, that engages and inspires activism to preserve and protect wilderness and wild lands. Conceived by older women who love wilderness, Broads gives voice to the millions of Americans who want to protect their public lands as Wilderness for this and future generations. We bring knowledge, commitment, and humor to the movement to protect our last wild places on earth.

http://www.greatoldbroads.org.

2. The Sufficiency of the Evidence Issue Deserves Immediate Review

In addition to the constitutional issues at stake, this Court should also review the underlying question of whether probable cause exists to force Ms. Chilcoat and Mr. Franklin to stand trial. The "fundamental purpose served by the preliminary examination is the ferreting out of groundless and improvident prosecutions. This relieves the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." *State v. Virgin*, 2006 UT 29, ¶ 20, 137 P.3d 787, 792.

The magistrate judge – and later, the same judge sitting as a district judge – failed to properly scrutinize the sufficiency of the evidence offered in support of serious criminal charges. As a result, a groundless and improvident prosecution is moving forward against a backdrop that strongly suggests the possibility of political motivation. The magistrate judge, for example, indicated that if the defense could offer a reason for closing the gate that "is not only more plausible but so much more plausible that the State's theory is *preposterous*, then I won't bind over." Prelim. Trans. at 79 (emphasis added). In applying such a deferential "preposterousness" standard, the magistrate judge became "a mere rubber stamp for the prosecution," *State v. Virgin*, 2006 UT 29, ¶ 22, 137 P.3d 787, 792, and failed to discharge his obligation "to discontinue groundless prosecutions." *Id.* at ¶ 22, 137 P.3d at 792.

In their motion to quash bindover, Ms. Chilcoat and Mr. Franklin identified a series of specific failures in the State's proof. For example, critical to the prosecution's theory that Mr. Franklin had the required specific criminal intent to harm livestock was the fact the Mr. Franklin intended to cut off livestock from their water supply. While the prosecution had no direct evidence of criminal intent, it argued that the gate closing could have been understood as blocking the access to water because Mr. Franklin was somehow unaware, when he closed the

gate, of a large gap in the fence adjacent to the gate. The prosecution readily conceded that its evidence, reasonably interpreted, showed no actual harm to the livestock and could establish that "within minutes" of closing the gate, Mr. Franklin's "mental state changed" as he pulled out in his car and saw the gap in the fence. Prelim. Tran. at 63. And there is no dispute that Mr. Franklin, when questioned about closing the gate two days later, immediately explained that the "the cows were fine, they were going in and out" of the gap in the fence. *Id.* at 41. But the prosecution argued that tire track evidence established that Mr. Franklin would only have been able to see the gap in the fence *after* he closed the gate – and thus the requisite criminal intent could be inferred to exist for several "minutes" after he closed the gate.

It is "preposterous" (to use the magistrate judge's term) to think that attempting to block livestock's access to water for several minutes would form the basis for serious second degree felony charges. No evidence was presented that keeping livestock from water for minutes would have caused any harm. But even that theory rests on an inadequate foundation.

The prosecution's alleged tire track evidence rested on Odell's interpretation of which way the tire tracks showed a vehicle traveling. The defense provided an affidavit from a retired FBI agent with crime scene specialization that "Odell's proffered testimony was not supported by the appropriate skills and qualifications, lacked any scientific methods, and was at best, a guess." Rogers Declaration, Ex. A to Defense Motion to Quash. In addition, it is well-settled that in order to offer "opinion" evidence, a lay witness's conclusions must be "rationally based on the perception of the witness." Utah R. Evid. 701. Going beyond factual descriptions with interpretive conclusions is prohibited under the rule. For example, in excluding a treating physician's testimony about causation of an injury, this Court explained that "[l]ay witnesses can testify only to matters of which they have personal knowledge, *see* Utah R. Evid. 602, and it is

undisputed that [the plaintiff's] treating physicians do not have personal knowledge of causation. Therefore, testimony from [the plaintiff's] treating physicians as to causation would go beyond the physicians' 'factual description of his or her personal observations during treatment.'" *Ladd v. Bowers Trucking, Inc.*, 2011 UT App 355, ¶ 13, 264 P.3d 752, 756–57 (*quoting Pete v. Youngblood*, 2006 UT App 303, ¶¶ 13–15, 141 P.3d 629) (determining that the plaintiff's designation of her treating physician as a lay witness, and not an expert witness, foreclosed the physician's ability to offer opinion testimony in an affidavit as to standard of care and breach)).

So too here. Odell offered his opinion was that the vehicle in question approached the gate first and then proceeded forward and around in a counter clockwise fashion and exited the area. *See* Prelim Trans. at 38. Whatever else may be said about such speculation, it was obviously not describing "the perception of the witness" but rather conclusions based on interpretations that are not fully articulated and thus inadmissible. *See, e.g., State v. Rothlisberger*, 2004 UT App 226, ¶¶ 11–12, 95 P.3d 1193. And this Court will search the record in vain for any specific explanation from the magistrate judge as to why he believed that the conclusions drawn by Odell were accurate or for any record evidence supporting the conclusion.[8]

Even most basically, the defense argued that there was scant evidence even placing Ms. Chilcoat at the alleged "scene of the crime" and, even if she was, no evidence – none whatsoever – that she had somehow "aided and abetted" Mr. Franklin when he closed the gate. It is, of course, well-settled law that "[m]ere presence, or even prior knowledge, does not make one an accomplice when he neither . . . encourages [n]or assists in perpetration of the crime." *State v.*

[8] This Court's efforts to locate any such evidence will be complicated by the fact that, in responding to the defense's motion to quash bindover (which was supported by specific page references to the preliminary hearing transcript), the State chose to respond with its recollection of "notes" from the hearing. Reply in Support of Motion to Quash at 4. And, in turn, the district judge did not cite in his ruling any references to specific testimony at the hearing.

Labrum, 959 P.2d 120, 123-24 (Utah Ct. App. 1998). Here, the "facts presented by the prosecution provide no more than a basis for speculation—as opposed to providing a basis for a reasonable belief" that Ms. Chilcoat committed any crime. *Virgin*, 2006 UT 29, ¶ 21.

The district judge's response to such concerns was incomplete and inadequate. The district judge failed to address many of the defense claims. And with respect to others, his response was sparse. For example, for evidence that Ms. Chilcoat had aided and abetted the gate closing, the trial court cited "Ms. Chilcoat's failure to deny any involvement with Franklin's action in closing the gate, or express any surprise about those actions." Order at 3. But the testimony on this point was only that Ms. Chilcoat remained as a passenger in a car while the responding officer collected information regarding the case from Odell and her husband some distance away. *See* Prelim. Trans. at 56. There was no evidence at the preliminary hearing that the officer told her about what was going on, much less that she somehow failed to "express any surprise" at those actions – which would, in any event, hardly be evidence of assisting in a crime.

This Court has made clear that "[w]hen the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation." *State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096, 1100-01. This Court should review the evidence supporting the bindover to ensure that Ms. Chilcoat and Mr. Franklin are not forced to stand trial on serious felony charges based on nothing other than speculation.

B. The District Court's Order Should be Reversed

If the Court grants the petition to appeal, the bindover orders against Ms. Chilcoat and Mr. Franklin should be reversed. As further briefing will more fully establish, even allowing for the fact that a magistrate conducting a preliminary hearing must "view the evidence in the light

most favorable to the prosecution," *Droesbeke*, 2010 UT App. 275, ¶ 18, 241 P.3d at 775, in this case sufficient evidence to support bindover was lacking. For example, as discussed above, the magistrate judge lacked sufficient evidence of criminal intent to bind over the defendants, particularly given that the most serious charges were *attempted* wanton destruction of livestock – a specific intent crime for which the prosecution must prove that a defendant engaged in an act "with the purpose of causing" the result in question. *See State v. Casey*, 2003 UT 55, ¶ 28, 82 P.3d 1106, 1113.

V. Reasons Why Immediate Interlocutory Appeal Will Materially Advance Termination of this Litigation

If the petition is granted, this Court's guidance on the issues raised by this appeal will substantially aid in the efficient resolution of this matter. "The purpose . . . [of] an interlocutory appeal is to get directly at and dispose of the issues as quickly as possible consistent with thoroughness and efficiency in the administration of justice." *Houghton v. Dep't of Health*, 2008 UT 86, ¶ 14, 206 P.3d 287 (internal quotation marks omitted). The Utah Supreme Court has consistently stated that it will "grant interlocutory review if it appears essential to adjudicate 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." Id. (internal quotation marks omitted); accord *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 2016 UT 43, ¶ 15, 388 P.3d 753, 756 (granting interlocutory review).

Here, immediate review of the district court's Order is needed "to adjudicate principles of law . . . as a necessary foundation upon which the trial may proceed." Id. The district court's Order denying Ms. Chilcoat's and Mr. Franklin's motions to quash present fundamental constitutional and other questions that must be resolved before they can receive a fair trial. For

example, the extent to which Ms. Chilcoat's views can form the basis of a "criminal intent" argument is pivotal to the trial. And the Court's ruling will determine what evidence can be introduced on such issues. Moreover, without interlocutory review, the very chilling effect that the First Amendment and state constitutional provisions are designed to prevent will necessarily occur, as the petitioners will be forced to defend their views in a hostile community at peril of criminal conviction. The only opportunity for preventing that chilling effect is for this Court to review this case now. *Cf. State v. Morgan*, 2001 UT 87, 34 P.3d 767, 769 ("A defendant normally must seek interlocutory review of a district court's denial of a motion to dismiss a bindover order since conviction renders any defect moot.").

Immediate interlocutory review of the district court's order will also materially advance the termination of this litigation by likely resulting in the dismissal of some – or even all – of the charges against Ms. Chilcoat and Mr. Franklin, thereby shortening the trial below or even obviating the need for any trial. Moreover, even if this Court sides with the State on all the issues presented, the Court's review of this matter will provide assurance that criminal charges against persons holding unpopular views will be carefully scrutinized, thereby significantly reducing any chilling effect on free speech.

The State will not be harmed if this case is reviewed on an interlocutory basis. Ms. Chilcoat and Ms. Franklin have been released on their own recognizance and pose no threat to the community. And the State cannot articulate any legitimate reason why a criminal trial in this matter needs to take place immediately, rather than after this Court's review.

VI. Conclusion

For the foregoing reasons, Ms. Chilcoat and Mr. Franklin respectfully request that this Court grant their petition and permit immediate appeal of the district court's Order.

DATED this 4th day of May, 2018.

/s/ Paul G. Cassell
Paul G. Cassell
Jon D. Williams
Jeremy M. Delicino

Attorneys for Petitioners

Certificate of Service

This is to certify that on the 4th day of May, 2018, I caused a true and correct copy of the foregoing to be served via first-class mail, postage prepaid, with a copy by email, on:

Kendall Laws
San Juan County Attorney
P.O. Box 850
Monticello, UT 84535
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Utah Attorney General Office
Criminal Appeals Division
Utah State Capitol
PO Box 142320
Salt Lake City, UT 84114-2320
criminalappeals@agutah.gov

/s/ Paul G. Cassell

EXHIBIT A

District Court Order Denying Motion to Quash Bindover

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARK KEVIN FRANKLIN and ROSALIE JEAN CHILCOAT, Defendants,	**RULING ON MOTION TO QUASH BINDOVER** Case Nos. 171700040 171700041

Both defendants have joined in a Motion to Quash (the "Motion") having been bound over for trial. The Motion is denied.

No rule provides for filing a motion to quash a bindover. The motion is a creation of case law, dating from days when either circuit judges or justice court judges acted as magistrates. In State v. Humphreys, 823 P.2d 464 (Utah 1991), the Utah Supreme Court stated:

> [I]t is always proper for a trial court, as a threshold jurisdictional matter, to consider whether it has jurisdiction over a criminal defendant.

This court has no quarrel with the notion that each district judge has the ultimate responsibility to determine whether the evidence in a case warrants a trial, applying, of course, the standards established by statute and interpreted by our appellate

courts. However, in this district, as in all other districts with the possible exception of the Sixth District Court, each judge presides over and decides the preliminary hearings in the cases assigned to that judge for eventual trial. There is little danger that a judge who determines whether to bind that judge's own cases over for trial - admittedly in a magisterial capacity - will be forced to take a case to trial - in that judge's judicial capacity - against that judge's own will. There is thus little point, outside the Sixth District Court, for the existence of the motion to quash. In its current incarnation, it amounts essentially to a motion to reconsider, the bane of all trial judges.

Defendants were not bound over for trial because the magistrate was dazzled by Mr. Odell's brilliance as an interpreter of tire tracks. The magistrate was able to understand the basic principle that, if two tire tracks intersect or overlap, the track made later in time will tend to obliterate the track made earlier in time. No expert is needed to testify about that.

More importantly, regardless of the tire track evidence, the magistrate had sufficient mental capacity to understand that there would be little purpose in Mark Franklin closing the gate - whatever his motive - if he had already observed that a panel of

the fence was already down. Only if Mr. Franklin had an overriding and unreasoned compulsion to shut every open gate, no matter what, would his shutting the gate after seeing the open fence sections make any sense.

The magistrate recognized that the evidence that Ms. Chilcoat participated in the closing of the gate was circumstantial. It was based on:

1. A letter purportedly signed by Ms. Chilcoat, addressed to the BLM, produced by the BLM from Odell's file with the BLM, stating that she had been in the remote portion of San Juan County during the three days in question, with Mr. Franklin.
2. The marital connection between Chilcoat and Franklin.
3. Ms. Chilcoat's failure to deny any involvement with Franklin's action in closing the gate, or express any surprise about those actions.
4. Ms. Chilcoat's position with Great Old Broads for Wilderness, as well as her letters to the BLM, show that she thinks the world would be a better place if Odell's cattle were gone.

5. The vehicle and the trailer used by Franklin belonged to Chilcoat.

Chilcoat has attempted to separate each piece of evidence linking her to Franklin's actions and, by arguing correctly that each by itself is insufficient, persuade the court that all together are also insufficient. They are not. With the standard magistrates - and judges - are required to apply, there was enough here to make it likely that Chilcoat participated in and encouraged Franklin's actions. This is not a case where one is asked to believe that a husband is responsible for the acts of his wife because they were both in Manhattan on the same day. Both Chilcoat and Franklin, a couple, were admittedly present together in a very remote area of San Juan County during the weekend of April 1-3, 2017, gathering evidence to support efforts to remove Odell's cattle from his permitted range, and Franklin admittedly while driving Chilcoat's car and pulling her trailer, closed the gate that usually allowed Odell's cattle access to water. When confronted by Odell, in Chilcoat's presence, Franklin admitted closing the gate, and Chilcoat expressed no concern.

Other inferences can be drawn that are less damaging to Chilcoat, but the magistrate was required by precedent to draw

those inferences supporting the charges. Whether that evidence is enough to persuade a jury or even warrant submission of the question to a jury is a different question which the magistrate cannot consider and the judge cannot now reconsider.

Chilcoat argues that her position with the Great Old Broads for Wilderness cannot be considered as evidence that she wants Odell's cattle removed from certain federal lands without violating her First Amendment rights. Chilcoat has the same right as every other citizen to speak out and petition the government. But if those words show a particular interest in the area where the government permits Odell to graze his cattle, and Chilcoat is present in that same area and complaining to the BLM about Odell's cattle during the same three days where someone allegedly tried to deny those same cattle access to water, her position and her petition are relevant, and need not be disregarded just because they are otherwise perfectly permissible.

Finally, with respect to the charge of retaliating against a witness, the magistrate made it clear, and this judge agrees, that it will not be enough for the state to show that Chilcoat wrote to the BLM after April 3, complaining of Odell, because she was concerned Odell would pursue charges against her. The state will

have to show that Chilcoat used a corrupt means; such as telling the BLM something she knew was not true.

DATED this 24th day of April, 2018.

Lyle R. Anderson
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I emailed, a true and correct copy of the foregoing RULING ON MOTION TO QUASH BINDOVER, this 24 day of April, 2018, to the following:

Kendall Laws	sjattorney@sanjuancounty.org
Paul G. Cassell	cassellp@law.utah.edu
Jon D. Williams	jwilliam@lawyer.com
Jeremy M. Delicino	jeremy@jeremydelicino.com

M. Parrott
Deputy Court Clerk

Franklin order

EXHIBIT B

Amended Criminal Information Against Rose Chilcoat (at the time of the preliminary hearing)

Kendall G. Laws #14700
San Juan County Attorney
Matthew J Brooks #15552
Deputy San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535
Phone:(435) 587-2128
Fax:(435) 587-3119

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROSALIE JEAN CHILCOAT 2914 JUNCTION STREET DURANGO, CO 81301 DOB: 05/13/1958 Defendant.	**AMENDED INFORMATION** CASE NO. 171700041 Judge Lyle R. Anderson OTN #:

This information is based on evidence obtained from the following witness: JAY BEGAY SAN JUAN COUNTY SHERIFFS DEPARTMENT

THE UNDERSIGNED COMPLAINANT, KENDALL G. LAWS, states on information and belief that the defendant, in San Juan County, State of Utah, committed the crime(s) of:

COUNT 1: ATTEMPTED WANTON DESTRUCTION OF LIVESTOCK (ANIMAL ENTERPRISE) Second Degree Felony, in violation of §76-6-111(3)(d), in that on or about April 03, 2017, the defendant did attempt to , without the permission of the livestock's owner, intentionally or knowingly injure, physically alter, release, or cause the death of livestock which was valued at more than $5,000. with the intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage, take, or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise as defined in Utah Code 76-6-110.

COUNT 2: RETALIATION AGAINST A WITNESS, VICTIM, OR INFORMANT Third Degree Felony, in violation of §76-8-508.3, in that on or about April 03, 2017, the defendant did , believing that an official proceeding or investigation was pending, was about to be instituted, or had been concluded,
(a) (i) make a threat of harm; or
(ii) cause harm; and
(b) directed the threat or action:
(i) against a witness or an informant regarding any official proceeding, a victim of any crime, or any person closely associated with a witness, victim, or informant; and
(ii) as retaliation or retribution against the witness, victim, or informant.

COUNT 3: TRESPASSING ON TRUST LANDS (ANIMAL ENTERPRISE) Class A Misdemeanor, in violation of §53C-2-301, in that on or about April 03, 2017, the defendant did , without written authorization from the director:
(a), extract, use, consume, or destroy any mineral resource, gravel, sand, soil, vegetation, water resource, or improvement on trust lands;
(b)livestock on trust lands;
(c), occupy, or construct improvements or structures on trust lands;
(d)or occupy trust lands for more than 30 days after the cancellation or expiration of written authorization;
(e)and willfully used trust lands for commercial gain;
(f), alter, injure, or destroy any improvement or any historical, prehistorical, archaeological, or paleontological resource on trust lands;
(g)upon, use, commit waste, dump refuse, or occupy trust land;
(h)with the activities of an employee or agent of the administration on trust lands; or
(i)with activities of a lessee or other person that have been authorized by the administration, whether or not the trust land has been withdrawn from occupancy or use pursuant to Subsection 53C-2-105(1)(b). with the intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage, take, or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise as defined in Utah Code 76-6-110.

COUNT 4: FALSE PERSONAL INFORMATION TO A PEACE OFFICER Class C Misdemeanor, in violation of §76-8-507(1), in that on or about April 03, 2017, the defendant did , with the intent of misleading a peace officer as to the defendant's identity, birth date, or place of residence, knowingly give a false name, birth date, or address to a peace officer in the lawful discharge of the peace officer's official duties.

DATED this 18th day of April, 2017.

/s/ Kendall G Laws
San Juan County Attorney

EXHIBIT C

Criminal Information Against Mark Franklin

Kendall G. Laws #14700
San Juan County Attorney
Matthew J Brooks #15552
Deputy San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535
Phone:(435) 587-2128
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IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARK KEVIN FRANKLIN 2914 JUNCTION STREET DURANGO, CO 81301 DOB: 10/14/1955 Defendant.	**INFORMATION** CASE NO. Judge Lyle R. Anderson OTN #:

This information is based on evidence obtained from the following witness: ROBERT WILCOX SAN JUAN COUNTY SHERIFFS DEPARTMENT

THE UNDERSIGNED COMPLAINANT, KENDALL G. LAWS, states on information and belief that the defendant, in San Juan County, State of Utah, committed the crime(s) of:

COUNT 1: ATTEMPTED WANTON DESTRUCTION OF LIVESTOCK (ANIMAL ENTERPRISE) Second Degree Felony, in violation of §76-6-111(3)(d), in that on or about April 01, 2017, the defendant did attempt to , without the permission of the livestock's owner, intentionally or knowingly injure, physically alter, release, or cause the death of livestock which was valued at more than $5,000. with the intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage, take, or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise as defined in Utah Code 76-6-110.

COUNT 2: TRESPASSING ON TRUST LANDS (ANIMAL ENTERPRISE) Class A Misdemeanor, in violation of §53C-2-301, in that on or about April 01, 2017, the defendant did , without written authorization from the director:

(a), extract, use, consume, or destroy any mineral resource, gravel, sand, soil, vegetation, water resource, or improvement on trust lands;

(b)livestock on trust lands;

(c), occupy, or construct improvements or structures on trust lands;

(d)or occupy trust lands for more than 30 days after the cancellation or expiration of written authorization;

(e)and willfully used trust lands for commercial gain;

(f), alter, injure, or destroy any improvement or any historical, prehistorical, archaeological, or paleontological resource on trust lands;

(g)upon, use, commit waste, dump refuse, or occupy trust land;

(h)with the activities of an employee or agent of the administration on trust lands; or

(i)with activities of a lessee or other person that have been authorized by the administration, whether or not the trust land has been withdrawn from occupancy or use pursuant to Subsection 53C-2-105(1)(b). with the intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage, take, or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise as defined in Utah Code 76-6-110.

DATED this 11th day of April, 2017.

/s/ Kendall G Laws
San Juan County Attorney