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IN THE

UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Respondent, vs. MARK KEVIN FRANKLIN AND ROSALIE JEAN CHILCOAT, Defendants/Petitioners.	OPPOSITION TO PETITIONS FOR INTERLOCUTORY APPEAL Case No. 20180335-CA 20180335

Defendants Mark Franklin and Rosalie Chilcoat have petitioned for interlocutory review of two orders: (1) an order denying their motion to quash bindover; and (2) an order denying their motion to disqualify the San Juan County Attorney's office. This Court stayed the proceedings below to consider these petitions and ordered the State to respond. *See* Court Orders of May 9 & 18 2018. This Court should deny interlocutory review because (1) further proceedings will potentially moot these issues, (2) further proceedings will provide this Court with a more complete record to review; (3) the issues lack merit;

and (4) the case will proceed even if this Court grants review and agrees with Defendants. Thus, granting review will prolong rather than shorten this litigation.

RELEVANT FACTS AND PROCEDURAL HISTORY[1]

Zane Odell is a cattle man and has a permit to graze his herd on state and federal trust lands in San Juan County. Document 71 at 5-8. In early spring 2017, Odell's cattle were grazing near his corral at Lime Ridge. *Id.* at 9. Water was scarce—a nearby pond had dried up and been cleaned, and the next-nearest one was about four miles away. *Id.* at 8-9. To make sure his cattle could get a drink, Odell put a water trough inside the corral. *Id.*

Odell's cattle are worth hundreds of thousands of dollars, and it was important for them to have easy access to the trough at that time of year because the weather was hot and it was calving season. *Id.* at 5-8, 29. Baby calves are at particular risk of dehydration, and without sufficient water access, every one of them could be wiped out in as little as three days. *Id.* at 7, 29.

Odell had secured the corral gate open "with the latch chain hooked to the fence." *Id.* at 9, 33. He visited the Lime Ridge corral early one Spring morning to check on his herd, and found the gate still secured open. *Id.* at 10. But when he returned to the corral

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[1] The trial court filings are available online, case nos. 171700040 & 171700041, Seventh District Court. The State refers to documents by number (unless otherwise indicated) in Chilcoat's case (171700041), as the relevant filings are largely duplicative.

The facts are recited in the light most favorable to the trial court's ruling. *State v. Taylor*, 2015 UT 42, ¶2 n.2, 349 P.3d 696. The State presents the allegations against Chilcoat and Frankin as true because of the bindover standard, but recognizes that they have not yet been convicted and retain the presumption of innocence.

that evening, he found the gate "latched shut." *Id.* "It wasn't blown shut"; "somebody had shut it and actually latched the chain." *Id.* at 10, 33. Odell immediately called the San Juan County Sheriff's Department to report the "tampering" with his gate. *Id.* at 10, 34. Looking around, he saw tire tracks in front of the gate and footprints "from where they walked around in an arch on the end of the gate as they shut it." *Id.* He also saw footprints "over to the water trough so that they knew there was water, that was the water source." *Id.* at 11. The footprints then led back to the tire tracks, which "drove up around, and left." *Id.*

About fifty yards from the gate, there was a ten-foot wide, temporary opening in the corral fence to allow repair work on a well. *Id.* at 11-12, 35. But that opening was not visible from the gate or the tire tracks. *Id.* at 11-12, 36-38, 46-47. Based on his observations "of which tracks [were] on top of which tracks," Odell believed that the suspect vehicle either approached the gate first or did not go past the temporary opening until after the corral gate had been latched closed. *Id.* at 48; *see also id.* at 45-48,51-52; SE3.[2]

Because people had tampered with the gate in the past, Odell had mounted a camera near the gate to monitor traffic. *Id.* at 12-13. The camera showed Franklin and Chilcoat's vehicle pulling a trailer "coming and going" from the gate earlier that day. *Id.* at 13-14; SE2. But the footage did not show who was driving or whether there was more than one occupant. *Id.* at 42.

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[2] The exhibits are not available in the electronic record, but an exhibit list is. *See* Document 38 (exhibit list).

A few days later, Odell was back at the Lime Ridge corral when he saw Defendants driving the same vehicle and trailer "as they were leaving Lime Ridge." *Id.* at 14. Odell and the men working with him headed them off. *Id.* at 14-15.

Defendants asked the men what they were doing; one of the men explained that they had Defendants' vehicle on camera and accused them of shutting the corral gate. *Id.* Franklin responded, "[O]h yeah, yeah, I shut the gate. But that's what I do, I help you guys." *Id.* at 16. When asked how that was helping, Franklin "never answered," but kept talking "around it." *Id.* By the time of preliminary hearing, Odell "still [did not] know how that might have helped" him. *Id.*

A sheriff's deputy arrived to investigate. *Id.* at 53-54. Franklin admitted that he knew Lime Ridge was on state land and that he had closed the corral gate, and claimed that "he shuts gates all the time and that he knew there was an opening for cows to get in." *Id.* at 16, 41, 58. But Franklin never explained to the deputy why he closed that or any other gate. *Id.* at 58. The deputy also spoke with Chilcoat, who was inside their vehicle. *Id.* at 55. Neither Franklin nor Chilcoat accused Odell or his men of assaulting them. *Id.* at 57.

Four days after Franklin closed the gate, Chilcoat filed a complaint with the Bureau of Land Management (BLM) alleging that Odell had violated his federal grazing permit by cleaning some dry-pond beds. *Id.* at 18-19, 21-22; SE1. In support, Chilcoat attached photographs of herself standing in front of some dry ponds. *Id.* at 19. Chilcoat also alleged that Odell "had assaulted her and had destroyed habitat." *Id.* at 22. For his part, Odell

denied assaulting either Chilcoat or Franklin—"[n]obody got within arm[']s length."—and denied acting outside the scope of his permit. *Id.* at 23, 27.

When the deputy researched Chilcoat, he discovered that she had previously served as an associate director of the Great Old Broads for Wilderness (GOBW). *Id.* at 59-60; SE7. In the deputy's understanding, GOBW advocates against what the organization perceives to be the overgrazing of public lands. *Id.* at 60-61.

As relevant here, the State charged Defendants with attempted wanton destruction of livestock, a second-degree felony; and trespassing on trust lands with the purpose to interfere with an animal enterprise, a class A misdemeanor.[3] Document 173; Document 138 in case no. 171700040. The magistrate bound Defendants over. Document 39; *see also* Document 32 in case no. 171700040.

Defendants moved to quash the bindover, arguing that (1) there was no evidence that Chilcoat was present with or aided her husband when he closed the gate; (2) the magistrate improperly relied on Chilcoat's membership in a conservationist organization (GOBW) and her sending BLM letters as evidence of her intent to harm the cattle; and (3) Odell gave improper expert testimony about tire tracks. Document 59 at 8-19; *see also* Documents 60, 61.

The trial court—who had acted as magistrate at the preliminary hearing—denied the motion to quash. *See* Document 101, attached as Exhibit 1. The court rejected the expert

[3] The State charged two additional crimes that are no longer at issue.

opinion argument by making clear that it was not "dazzled by Mr. Odell's brilliance as an interpreter of tire tracks," but was "able to understand" without expert testimony "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." *Id.* at 2. The court also explained that "there would have been little purpose" in Franklin's closing the gate "if he had already observed" the temporary opening. *Id.* at 2-3.

Regarding Chilcoat, the court "recognized that the evidence" of her participation "was circumstantial," but noted the was a basis in the evidence for inferring her participation: (1) her BLM letter in which she admitted being in the Lime Ridge area at the time of the gate closing; (2) her marriage to Franklin; (3) her lack of denials or surprise when discussing the gate closing; (4) her position with GOBW and other BLM letters showing that "she thinks the world would be a better place if Odell's cattle were gone"; and (5) Chilcoat's ownership of the vehicle and trailer. *Id.* at 3-4. As Chilcoat took issue with (4), the court explained that those were proper considerations: "Chilcoat has the same right as any 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." *Id.* at 5.

Defendants petitioned for interlocutory review and asked the trial court to stay the proceedings pending resolution of that petition. Documents 146-47, 152. The trial court denied the motion to stay on two independent grounds: (1) lack of diligence, and (2) lack of a meritorious claim. On the second ground, the trial court noted Defendants' argument that the magistrate had unconstitutionally relied on Chilcoat's membership in a conservationist group to prove her intent to wantonly destroy livestock. The trial court clarified that her membership was not determinative, and that Chilcoat's actions were "[f]ar more persuasive" evidence of her intent. Document 169 at 7.

Defendants also moved to disqualify the San Juan County Attorney, arguing that (1) the court should grant specific performance of the county attorney's alleged promise to recuse himself; and (2) county officials had an "appearance" of bias against Chilcoat. Document 116 at 1.

On the alleged promise, they claimed that the county attorney had called defense counsel on the phone and said that his constituents had grown tired of interference with their cattle operations, and that he had to pursue the prosecutions. *Id.* at 7. Based on this conversation, defense counsel threatened to file a motion to disqualify if the county attorney did not recuse himself. *Id.* at 7-8. The county attorney allegedly agreed—at first—that recusal was the "right thing to do," but later withdrew his agreement. *Id.* at 8-10. On the alleged bias, the defense proffered no direct evidence, but instead relied on (1) dueling

three-year-old social media posts between Chilcoat and a county commissioner;[4] (2) the county attorney's facebook post asking San Juan County residents who may have been contacted for a survey on pre-trial publicity to contact him;[5] and (3) a San Juan County lawsuit to quiet title to a canyon. *Id.* at 6; Document 75 (listing content of facebook messages); *see also* Documents 74, 117-18, 135, 156.

The trial court denied the disqualification motion the next day. Document 171, attached as Exhibit 2. The court rejected the specific enforcement argument because the county attorney's decision was "unilateral[]" and without consideration, and Defendants could not have detrimentally relied on the statement where the decision changed within a mere 24 hours and defense counsel threatened to file a "flood of motions" if the county attorney did not recuse himself. *Id.* at 4-5. On the appearance of bias, the court ruled that the county attorney's friendship with a county commissioner who had expressed dislike of Chilcoat was not sufficient. *Id.* at 2-3. The court also explained that "[p]rosecutors are not expected to be impartial" and that "consideration of political implications" was proper for

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[4] A San Juan County Commissioner had been convicted of a federal misdemeanor for leading an ATV protest ride through a canyon. *See* https://www.deseretnews.com/article/900002707/court-affirms-san-juan-com missioner-conviction-in-atv-protest-ride.html; *see also* Document 116 at 2-3. At about this time on facebook, the county commissioner criticized Chilcoat, and Chilcoat praised the conviction. *Id.* at 3-6. Though he did not weigh in on this debate, the county attorney voiced his general support for the commissioner. *Id.* at 3-6.

[5] The defendants had requested permission to have a polling company contact county residents and ask about this case in support of a potential motion to change venue. *See* Document 49, case 171700041. The trial court later granted a venue change to Carbon County. *See* Document 171 at 6.

a prosecutor who was "elected by, and answerable to, the public." *Id.* at 3.[6] Defendants moved for interlocutory review the next day.

This Court consolidated the two petitions and ordered the State to respond. The State opposes the petitions because further proceedings will either moot these issues or provide a more complete record for later review. The issues also lack merit, and the case will proceed regardless.

ARGUMENT

As a general rule, appeals from interlocutory orders are not favored. It is usually best "to allow the case to come to a conclusion in the trial court and then permit any aggrieved party to appeal from the final judgment, assigning as error any and all rulings which he or she claims to be erroneous." *State v. Troyer*, 866 P.2d 528, 530 (Utah 1994). Interlocutory appeal is "granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice." Utah R. App. P. 5(f). In other words, interlocutory review must be "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." *Houghton v. Utah Dep't of Health*, 2008 UT 86, ¶14, 206 P.3d 287

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[6] Damage to cattle herds is a recurring and serious problem in San Juan County. *See* Document 144 at 1. An elected prosecutor should make no apologies for protecting his constituents' livelihoods through criminal prosecution.

(cleaned up). Cases that satisfy this standard are "rare." *See State ex rel. A.F.*, 2006 UT App 200, ¶ 10 n.2, 138 P.3d 65. This is not one of them.

A. This Court should deny review on the bindover claim.

Defendants claim that the bindover ruling merits "immediate review" because it implicates "important constitutional questions"—that is, the State's limited reliance on Chilcoat's GOBW membership and her BLM petitions to show her intent to help her husband close the gate. Pet.(Bindover) at 10. But important constitutional questions are routinely decided on direct review after trial, so that is no reason to grant early review. And the trial court made clear that even in the absence of that evidence, it still would have bound Chilcoat over because other evidence of her intent was "[f]ar more persuasive." Document 169 at 7.

The better course is to permit trial to go forward, because it is not clear at this point what evidence the State will rely on at trial. *See State v. Ramirez*, 2012 UT 59, ¶9, 289 P.3d 444 (holding that prosecution not required to put on full case at preliminary hearing). Both parties have signaled intent to call multiple experts at trial—*see* Documents 65, 66; Documents 123-25 in case no. 171700040 (prosecution experts); Documents 85, 89-91; Documents 71-72, 78 in case no. 171700040 (defense experts)—and with this additional evidence, the prosecutor may not even resort to Chilcoat's GOBW membership or BLM filings as evidence.

At any rate, the State is not "deploying punitive sanctions against protected freedom of thought and expression." Pet.(Bindover) at 12. Defendants assert that *Dawson v. Delaware*, 503 U.S. 159 (1992) supports their case. *Id.* It does not. *Dawson* does not prohibit relying on evidence of association to prove a disputed issue.

Dawson was convicted of capital murder for escaping from prison, brutally murdering a woman, and stealing her car and money. *Dawson*, 503 U.S. at 160-61. During the penalty phase, the prosecution presented evidence of his membership in a white supremacist group. *Id.* at 161-62. On appeal, Dawson argued that "the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." *Id.* at 164. The Supreme Court found that proposition "too broad," and held instead that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those associations are protected by the First Amendment." *Id.* at 164-65. But the Court agreed with Dawson that, in his case, his group membership was irrelevant to the crimes that he committed, and should have been excluded. *Id.* at 166.

In contrast, Chilcoat's group membership and BLM filings—while no doubt protected under the First Amendment—were relevant here because they supported a motive for Chilcoat to act commit or aid in committing the charged crimes. If Dawson, for example, had committed a racially motivated murder or other crime, then his group membership would doubtless have been admissible in those proceedings. Though GOBW

is not a criminal organization, when one of its members allegedly engages in criminal activity based on the same beliefs that motivate their group membership, that group membership can be relevant to show intent and motive. And while Chilcoat certainly had a right to petition the BLM regarding Odell's use of his permit, the content of the filing and her presence at the scene of the crime the weekend of the alleged crimes is circumstantial evidence of presence, encouragement, and intent.

Defendants also argue that the magistrate lacked sufficient evidence to bind over. Pet.(Bindover) at 14-17. But if the evidence truly is as thin as Defendants suggest, then a trial will more quickly resolve the controversy—if they are acquitted, the case will be over. U.S. Const. amend. V (double jeopardy clause); *see, e.g., Salt Lake City v. Roberts*, 2003 UT App 271, ¶2, 76 P.3d 213. And if they are convicted, that will cure or moot any alleged bindover deficiencies. *See, e.g., State v. Nielsen*, 2014 UT 10, ¶52, 326 P.3d 645 (conviction moots bindover defects). Of course, they could still argue that the evidence at trial was insufficient to convict, but that argument will be made with a different evidentiary picture. Thus, these issues can wait.

To the extent Defendants challenge bindover on both counts, they are unlikely to prevail, and granting his petition can only result in unnecessary delay. "To bind a defendant over for trial, the State must show probable cause at a preliminary hearing by present[ing] sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it." *State v. Clark*, 2001 UT 9, ¶10, 20 P.3d 300 (cleaned up).

The probable cause standard is "relatively low"—the same as that for obtaining an arrest warrant. *Id.* at ¶¶10, 16 (cleaned up). Under both standards, the prosecution must present evidence sufficient only to "support a reasonable belief" that the defendant committed each element of the charged crime. *State v. Ramirez*, 2012 UT 59, ¶9, 289 P.3d 444 (cleaned up). When determining probable cause, a magistrate "must view all evidence in the light most favorable to the prosecution and must draw all reasonable inferences in favor of the prosecution." *Clark*, 2001 UT 9, ¶10 (cleaned up).

An inference is reasonable if a "reasonable jury could accept it." *Ramirez*, 2012 UT 59, ¶14 This includes inferences based on circumstantial evidence, which is often the only kind of evidence available. *See Maughan*, 2013 UT 37, ¶15. But the "bindover standard does not call for an evaluation of the totality of the evidence in search of the most reasonable inference." *Maughan*, 2013 UT 37, ¶17. Instead, a court must accept a prosecution-friendly reasonable inference even where a defense-friendly inference appears *more* likely in light of the "totality of the evidence." *Maughan*, 2013 UT 37, ¶17.

The State presented adequate evidence and inferences to support bindover on both counts for both defendants. A person commits wanton destruction of livestock if he "injures . . . or cause the death of livestock" and "does so intentionally or knowingly and without the permission" of the livestock owner. Utah Code Ann. § 76-6-111(2). A person acts intentionally as to the results of his conduct when it is his conscious desire to bring about a result; he acts knowingly as to the results of his conduct when he is "aware that his

conduct is reasonably certain to cause the result." Utah Code Ann. § 76-2-103(1), (2). The offense is a second degree felony if the value of the livestock is "more than $5,000." *Id.* at (3)(d). If the wanton destruction is committed against an animal enterprise "with the intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage . . . or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise," then the person is subject to increased fines for a second degree felony Utah Code Ann. § 76-6-110(2)(a), (3). An "animal enterprise" includes "a commercial . . . enterprise" that "uses animals for food . . . production." *Id.* at (1)(a)(i).

Two other statues are relevant here. First, the defendants were charged with an attempt to commit these crimes. A person is guilty of "attempt to commit a crime if he engages in conduct constituting a substantial step toward commission of a crime and intends to commit the crime, or, when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result." Utah Code Ann. § 76-4-101(1) (simplified)—that is, if he acts at least knowingly. A defense to attempt "does not arise" "due to factual or legal impossibility if the offense could have been committed if the attendant circumstances had been as the actor believed them to be." *Id.* at (3)(b). An attempt to commit a second degree felony is a third degree felony. Utah Code Ann. § 76-4-102(1)(e).[7] Finally, as to Chilcoat, a person is responsible for the conduct

[7] This count is currently charged as a second degree felony. *See* amended information. The prosecutor has agreed to file an amended information making this count a third degree felony.

of another if she "solicits, requests, commands, encourages, or intentionally aids" in that conduct. Utah Code Ann. 76-2-202 (accomplice liability statute).

The State showed probable cause on count 1. There can be no dispute that Odell's herd qualifies both as "livestock" and as an "animal enterprise" valued at more than $5000, and that Odell did not give Franklin and Chilcoat permission to interfere with his herd. And there was ample evidence to show that Chilcoat and Franklin at the very least knew that it was reasonably certain that some of Odell's cattle would be injured or killed by cutting them off from the only source of water visible from the gate.[8] Though that injury and death did not occur, closing the only apparent opening leading to the water constituted a substantial step toward committing that offense. Franklin admitted to closing the gate and gave no plausible innocent explanation why. It was reasonable for the magistrate to infer that he had none.

As to Chilcoat's participation, her presence in the area that weekend, her marriage to Franklin, her conservation activities, and her BLM filings provide circumstantial evidence of her intent to solicit, request, command, encourage, or intentionally aid Franklin in his gate closing. *See* Utah Code Ann. § 76-2-202 (accomplice liability statute). Her BLM filings in particular—made within a few days of these events—show that she was focused

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[8] Defendants argue that the State needed to show intentional action, Pet(Bindover) at 18, but the statute by its plain terms permits conviction for knowing action. Utah Code Ann. § 76-6-111(2) (a person commits wanton destruction of livestock if he "injures . . . or cause the death of livestock" and "does so intentionally *or knowingly* and without the permission" of the livestock owner).

on the very land and cattle at issue, and knew that the other water source (the pond) had been dried and cleaned. And by closing the gate, it is reasonable to infer that both Chilcoat and Franklin intended to "impede, obstruct, interfere" or cause damage or loss to Odell's herd enterprise by closing the gate at the Lime Ridge Corral.

The same evidence and reasonable inferences also showed probable cause on count 2. A person is guilty of trespass on trust lands if he "trespasses upon . . . trust lands." Utah Code Ann. § 53C-2-301. Trespassing is to enter or remain unlawfully on another's property. *See* Utah Code Ann. § 76-6-206 (criminal trespass statute). The offense is a class A misdemeanor if done with the "intent to halt, impede, obstruct, or interfere with the lawful operation of an animal enterprise or to damage . . . or cause the loss of any property owned by, used by, or in the possession of a lawful animal enterprise." Utah Code Ann. § 76-6-110(2)(a), (3)(b). The animal enterprise element was met as just explained. There was testimony that Lime Ridge is located on State land—which no one disputed was State trust land. *See* Document 71 at 64 (prosecutor arguing that the "state land" at issue was "trust land"), 68-80 (defense counsel not taking issue with land being trust land). And there was also no question that Odell did not give them permission to be at the Lime Ridge corral and that Franklin admitted to being there and closing the gate. It is also reasonable to infer that his wife was with him because she admitted being in the area and even took pictures of herself there. There was thus probable cause on count 2.

Defendants offer several arguments against bindover, none of them persuasive. First, they argue that there was no foundation for Odell's testimony interpreting the tire tracks that he saw. Pet(Bindover) at 15. The district court rejected this argument, explaining that Odell essentially gave lay, not expert, opinion. Document 101 at 2. The district court was right—this level of tire track testimony is simple lay observation akin to comparing footprints. *See State v. Ellis*, 748 P.2d 188, 191 (Utah 1987) (affirming admission of lay testimony regarding footprints). And Odell had Defendants' car on camera, as well as Franklin's admission to closing the gate and the other evidence detailed above. *See* Document 101 at 2-3.

Chilcoat also argues that there was "no evidence—none whatsoever" that she aided, encouraged, etc. her husband in the gate closing. Pet(Bindover) at 16-17. Though there is no direct evidence, it is reasonable to infer from her marriage, her admitted presence in the area at the time, and her actions in filing the BLM complaint that she did act as an accomplice with her husband in the gate closing. There was thus probable cause to bind Defendants over on both counts, and granting review would needlessly prolong the cases.

B. This Court should deny review on the disqualification issue.

Defendants also argue that this Court should grant immediate review of the trial court's denial of their motion to disqualify the county attorney. It should not.

The thrust of the disqualification motion is that the county attorney is biased against them. Pet(Disqualify) at 4. But Defendants have not proven a right to an unbiased prosecutor—they merely cite generalities on prosecutorial duties. *Id.* at 15-16.

Prosecutors have wide discretion in charging decisions; "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring . . . generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). But that discretion is not entirely unlimited. If a prosecutor has a conflict of interest that is not properly screened, then a prosecutor's office may be disqualified based on that conflict. *See, e.g., State v. McClellan*, 2009 UT 50, 216 P.3d 956 (disqualifying county attorney's office after McClellan's former counsel joining office while case was pending, but was apparently not screened from prosecution). Or if a prosecutor engages in selective prosecution—that is, she brings charges based on a protected status or exercise of a constitutional right—then a defendant may also raise that claim. *See generally Wayte v. United States*, 470 U.S. 598 (1985). But that claim does not disqualify the prosecutor; it annuls the charge. *See id.* at 604.

Defendants argue a novel claim that does not entirely fit in either category—that the prosecutor should be disqualified because he is biased against them because of their conservationist views and activities. The evidence of bias here is razor-thin: dueling facebook posts between Chilcoat and a county commissioner for whom the county attorney

expressed general support. Pet.(Disqualify) at 17. Being friends with or supporting someone does not mean adopting all of their views and biases.

Defendants have cited no case holding that prosecutors are required to appear unbiased toward those they prosecute. The United States Supreme Court has indicated—albeit in dicta—that they are not. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (explaining judicial bias cases are "not applicable to those acting in a prosecutorial or plaintiff-like capacity"). And the law elsewhere appears largely to not require disqualification for bias. *See e.g., Nichol v. Falk*, case no. 13-CV-002152, 2015 WL 328593, *13 (D. Colo., Jan. 22, 2015) (State court explaining that "a prosecutor is entitled to be biased against a defendant" and must recuse only "if there is a possibility of receiving some personal benefit from the outcome of the prosecution that is unrelated to his duty to enforce the law") (cleaned up); *State v. Ellis*, 161 So.3d 64, 80 (La. Ct. App. 2015) (holding allegation of bias insufficient for recusal); *Buntion v. State*, 482 S.W.3d 58 (Tex. Crim. App. 2016) (explaining why a prosecutor "need not be a neutral party in criminal litigation"). Even those cases recognizing bias as a basis for prosecutorial recusal require that the bias "create[] an opportunity for conflict or other improper influence on professional judgment," *State v. Juan*, 242 P.3d 314 (N.M. 2010) (cleaned up), which is not at issue here.

Further, the evidence and discussion above shows that Defendants are not being prosecuted because of their legal *views*; they are being prosecuted for their illegal *actions*.

The First Amendment "confers no such immunity from prosecution" on protesters who break the law. *Wayte*, 470 U.S. at 614. Even if there were alleged "political motivations" involved in the charging decision, a county attorney is an elected official—that is, *a politician*—and thus expected to be both responsive and accountable to his constituency. *See, e.g., State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990) (explaining that elected prosecutor, "like all elected officials, must regularly answer to the will of the electorate," and "[s]hould his conduct create too much appearance of impropriety and public suspicion, he will ultimately answer to the voters.").

In any case, while there may be little law on this issue, its resolution can wait. If a jury acquits Defendants, then this issue will be moot; if they are convicted, the Court can address the issue on direct appeal. And there is no evidence—other than Defendants' bare assertion, Pet.(Disqualify) at 19—that another prosecutor would treat this case any differently than the San Juan County Attorney has. Thus, even if the case were transferred to another prosecutor, it would still go forward. Nor is there any reason that this issue could not be reviewed after trial, as disqualification matters such as conflict-of-interest claims are regularly adjudicated after trial. *See, e.g., State v. Griffin*, 2016 UT 33, 384 P.3d 186; *McClellan*, 2009 UT 50; *Parsons v. Barnes*, 871 P.2d 516 (Utah 1994).

To the extent that Defendants argue that there was a binding agreement to recuse, they are also unlikely to prevail. *Id.* at 17-18. The Utah Supreme Court recently made clear in the related context of plea agreements that the State can withdraw a proposed resolution

at any time before a plea, provided there is no detrimental reliance. *See generally State v. Francis*. 2017 UT 49, __ P.3d __. Since the alleged agreement here was withdrawn within about 24 hours, and the Defendants did nothing to implicate themselves or provide something of value to the State, it is difficult to imagine how they can prove prejudice. Stopping work on the case for about a day, Pet(Disqualify) at 18, is not detrimental reliance—it is not even a weekend. Although they claim that they fulfilled an agreement not to file a reply brief on the motion to quash, Pet.(Disqualify) at 18, they ultimately did file that reply a short time later, as well as a supplemental reply. *See* Document 74, 81. That is not detrimental reliance either. *See Francis*, 2017 UT 49, ¶¶18-19 (holding no detrimental reliance where Francis alleged to have forgone pressing claims, but he actually briefed, argued, and lost them).

Finally, Defendants assert that State constitutional issues require immediate review. Pet(Disqualify) at 14-16. They do not, because they are not preserved. Defendants argue that the prosecutor below "fail[ed] to respond" to their State constitutional arguments. Pet(Disqualify) at 15. The prosecutor did not "fail" to respond—he never got the chance to, because Defendants withheld the state constitutional argument until they filed their reply memorandum. *See* Document 155 at 14-15. Because courts generally do not permit raising new arguments in reply memoranda, the trial court was not required to address their untimely argument. *See generally State v. Garcia*, 2018 UT 3, ¶23, 416 P.3d 1118. Because the argument was untimely, it is not preserved and could not be addressed on appeal even

if this Court were to allow an immediate appeal. And because Defendants ask the Court to establish a new state constitutional rule, they could not get relief on a plain error argument. *State v. Dean*, 2004 UT 63 ¶18, 95 P.3d 276 (an error cannot be plain where the law is "not sufficiently clear or plainly settled"). In the procedural posture of this case, the state constitutional argument cannot not support appellate relief. Consequently, it cannot justify interlocutory review.

In sum, this Court should deny interlocutory appeal because it is more efficient to let trial proceed. If the evidence is as weak as the Defendants claim, then they will likely be acquitted and the case will be over. If they are convicted, then this Court will have a more complete record to review. The claims will likely fail on the merits at any rate, and the prosecution will proceed regardless. For all these reasons, granting interlocutory appeal will protract, rather than materially advance, the termination of litigation, and this Court should deny discretionary review.

CONCLUSION

This is not one of those rare cases where interlocutory appeal is appropriate and the Court should thus deny Defendants' petitions.

Respectfully submitted on June 1, 2018.

SEAN D. REYES
Utah Attorney General

/s/ John J. Nielsen

JOHN J. NIELSEN
Assistant Solicitor General
Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on June 1, 2018, a copy of the Answer in Opposition to Petition for Permission to Appeal Interlocutory Order was ☑ mailed ☐ hand-delivered to Defendant's counsel of record as follows:

Paul G. Cassell
383 South University Street
Salt Lake City, UT 84112

/s/ Melanie Kendrick

Exhibit 1

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 2

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,	**ORDER DISPOSING OF PENDING MOTIONS** Case Nos. 171700040 171700041

The court conducted a hearing on the following pending motions on May 9, 2018, by telephone conference with defense counsel and the prosecutor present in the courtroom. The following motions were addressed:

1. Motion to Disqualify the San Juan County Attorney's Office (the "Motion to Disqualify") filed on April 30, 2018.
2. Motion for Change of Venue (the "Venue Motion") filed on May 3, 2018.
3. State's Request for Reciprocal Discovery (the "Reciprocal Discovery Request") filed on April 24, 2018.
4. Motion to Admit Polygraph Results of Mark Franklin and Motion for Rimmasch Hearing (the "Polygraph Motions")

filed on April 26, 2018.

During the course of the hearing, the San Juan County Attorney, prosecutor for the state in this case, advised the court that counsel for the defendants contacted him in early to mid April, 2018, and informed him that they were prepared to flood him with motions on the approach to trial. None of defense counsel denied this communication. Whether a flood of motions was promised, it has certainly occurred. In addition to the motions listed above, the court ruled on April 24, May 4, and May 9, 2018, on other pending motions. At least one additional motion from the defense is promised. The court will dispose of these motions as they arise.

Motion to Disqualify

This motion has two prongs. The essence of the first prong is that San Juan County Attorney Kendall Laws ("Laws"), in 2015, called San Juan County Commissioner Phil Lyman ("Lyman"), a friend of his and that, in 2018, also on Facebook, Lyman expressed extreme distaste for defendants Rosalie Chilcoat ("Chilcoat") and Mark Franklin ("Franklin"). There is more detail than this in the presentation, but boiled to its essence, it amounts to this. The court does not believe this is sufficient to require

disqualification.

The standard for disqualification of prosecutors is understandably high. Prosecutors are not expected to be impartial. They may not, however, pursue a personal agenda at the expense of the accused. This limitation does not, of necessity, extend to consideration of political implications. In Utah, prosecutors are elected by, and answerable to, the public, presumably so they will be responsive to public will with respect to their exercise of their vast discretion.

To show that the county attorney has called a county commissioner a friend and the commissioner has a serious dislike for defendants is not enough. The county attorney cannot control what county commissioners say and cannot be held accountable for what they say. This prong of the defense argument fails.

The second prong is an effort to enforce a purported agreement by Laws to disqualify himself. There is, refreshingly, little dispute about the words offered by Laws during a conversation with three defense attorneys on April 17, 2018, at about noon. Confronted by the circumstances described above, which those attorneys pressed him to acknowledge as representing a conflict of interest, Laws said, with respect to the idea of disqualifying

himself, "It's the right thing to do." Some discussion followed concerning whether Laws would appear to disqualify himself sua sponte or in response to a motion. Laws made it clear that any action he took would be done unilaterally and the parties then discussed agreeing to a two week stay of proceedings to allow a replacement to get on board and up to speed.

Laws then took the rest of April 17, and part of April 18 to try to find another prosecutor willing to take the case. The Utah Attorney General's Office told him they could not take a case adverse to Paul Cassell, one of the defense attorneys, because there were a number of cases where Cassell was representing the state. No other county prosecutor was willing or able to step in, and Laws got substantial input from those prosecutors that no disqualification was required and that the defense effort most likely had the purpose of "cherry picking" a prosecutor.

Laws ultimately concluded disqualification was not required and clearly communicated by the late afternoon of April 18, that he had no intention of disqualifying himself. The question now raised is whether a prosecutor must be disqualified when the law does not otherwise require just because he has said he would. In the view of this court, this question cannot be answered in a vacuum: The

answer depends on the circumstances. In this case, where scarcely 24 hours elapsed between the initial expressions of a willingness to recuse and the ultimate flat rejection of the idea, disqualification would require a showing of substantial prejudice.[1] As a contract analysis, defendants' claims would fail because of the collateral and insubstantial nature of their "reliance". But this is not a simple contract analysis. Other entities have interests here, such as the taxpayers who pay Laws' salary, the voters who elected him, and the court which is entitled to expect that trials once scheduled will not be delayed and trial dates wasted because a county prosecutor is overwhelmed by the arguments of three lawyers who have promised a "flood of motions". The standard is "prejudice", not "reliance" and defendants have demonstrated no prejudice.

The Motion to Disqualify is denied.

Venue Motion

Defendants have amply demonstrated with the Dan Jones survey many things that any sentient resident of Southeastern Utah already knew. One aspect of the survey is, however, striking enough to

[1]Defendants allege that they postponed filing a brief for one or two days, postponed looking for expert witnesses and "other short term work", and that they agreed to draft – but apparently never did draft – a motion to stay.

warrant serious scrutiny. According to the survey, 74% of San Juan County residents know about the Great Old Broads for Wilderness and two-thirds of those have very unfavorable views of the Great Old Broads. If jurors and prospective jurors know defendants are associated with the Great Old Broads, it is difficult to see how this court can seat an impartial jury.

The court considered inviting the state to stipulate to eliminate all reference to the Great Old Broads from statements, arguments or evidence, but ultimately determined that this effort was likely to be unworkable or ineffective. To try to seat a jury in San Juan County that will perceive no connection between Chilcoat and the Great Old Broads, or be persuaded to confidently set aside any preconceptions, is likely to result in significant wasted time and effort.

The court is aware of, and committed to, the idea that citizens are entitled to be involved in decisions of guilt or innocence in their counties. In this case, that principle must give way to the right of defendants to a fair trial. For that reason, the court orders a change of venue to Carbon County. The trial date will be unchanged, and this change is only for purposes of trial. The location of any other proceedings is unchanged.

Reciprocal Discovery Request

The Reciprocal Discovery Request has largely been resolved by agreement. To the extent it was not, the court announced its order at the hearing. Counsel will be expected to comply.

Polygraph Motions

Defense counsel are experienced attorneys. They are not naive. And yet they have filed a motion that asks this court to be virtually the first court in the United States of America to admit polygraph evidence of innocence over the objection of the prosecution. The polygraph examination was given on December 4, 2017. No notice was given to the state and the state was afforded no opportunity to participate in the formulation of questions or to observe the administration of the exam.

According to the information provided by the defense, the polygraph scored just over the boundary between an inconclusive result and a truthful result. Put more colloquially, defendant passed, but not with flying colors. And the state proffers that its expert, were this court to hold a hearing, would testify that evidence in the test data he examined suggested an effort to defeat the polygraph exam with countermeasures.

Invited to suggest when a hearing could be held on the motion,

defense counsel offered two days when this court is committed to a jury trial for which a jury has already been summoned, and a third date in the middle of the District Court Judges Conference in St. George, Utah. Moreover, defense counsel was unable to offer any information about the availability of the polygraph examiner, whose current health situation was described as uncertain.

Polygraphs can clearly be defeated. The classic case illustrating this point in Utah is Mark Hoffman, whose counsel famously leaked to the press a story that Mr. Hoffman had passed a polygraph, only months before Hoffman agreed to a plea deal admitting to two murders and one attempted murder. This court would not be averse to considering admission of polygraph results under circumstances that provide protections against manipulation. But the prospect of a polygraph result completely overriding all juror deliberation is too real to ignore. How is a jury to weigh evidence against a polygraph result, or a polygraph result against evidence?

The long delay between administration of the test, and the filing of the Polygraph Motions suggests that defense counsel are either not diligent or filed the Polygraph Motions with no genuine purpose or expectation to see them granted. A lawyer who truly

wants the results of a December, 2017 polygraph admitted would have filed the motion in January, 2018, for a May trial. And he would have come to today's hearing with information about the polygrapher's availability for a hearing. It is difficult for this court to treat seriously something the defense offers almost as an afterthought, and at the very last moment.

The Polygraph Motions are denied.

DATED this 10th day of May, 2018.

Lyle R. Anderson
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I emailed, a true and correct copy of the foregoing ORDER, this 10th day of May, 2018, to the following:

Kendall Laws	sjattorney@sanjuancounty.org
Paul G. Cassell	cassellp@law.utah.edu
Jon D. Williams	jwilliam@lawyer.com
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Connie Adams
Deputy Court Clerk

STATE OF UTAH
SEVENTH DISTRICT COURT