Jeremy M. Delicino (9959)
Jon D. Williams, P.C. (8318)
9 Exchange Place
Suite 600
Salt Lake City, UT 84111
Telephone: (801) 364-6474
Facsimile: (801) 364-5014

Paul G. Cassell (6078)
S.J. Quinney College of Law
University of Utah
332 South 1400 East, Room 101
Salt Lake City, Utah 84112
Telephone: (801) 585-5202
Facsimile: (801) 581-6897*

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, -vs- MARK FRANKLIN, ROSALIE JEAN CHILCOAT, Defendant.	**MOTION TO QUASH** Case Number: 171700040/171700041 Judge: Anderson

It is axiomatic that a defendant may not be convicted on a theory of guilt by association. Equally engrained in our law is that a defendant may not be punished for lawful political or environmental activism. The State's prosecution in this case violates both longstanding protections. Because the State did not present any evidence other than conjecture about Rose Chilcoat's involvement in Counts 1 & 3, the bindover order on these counts must be quashed. Similarly, because a citizen may not be prosecuted for voicing her concerns about the misuse of public land, bindover on Count 2 was improper.

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In addition to the infirmities noted above, this Court must quash its previous bindover orders since they relied on inadmissible evidence. Because the Rules of Evidence apply at a preliminary hearing, introduction of inadmissible evidence that was critical to this Court's finding of probable case warrants the dismissal of all counts against the defendants in this case.

BACKGROUND[1]

Rose Chilcoat and Mark Franklin were bound over for trial on charges alleging the Attempted Wanton Destruction of Livestock (Count 1) and Trespassing on Trust Lands (Count 3). In addition, this Court bound over Chilcoat on one count of Retaliation Against a Witness (Count 2).[2] At the preliminary hearing, the following facts were presented:

Zane Odell has a permit to run cattle on BLM and SITLA land throughout parts of San Juan County. *See* Transcript of Preliminary Hearing at 5-8. 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 latched shut. *Id*.

Once he saw that the gate was closed, 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 an opening

[1] Defense counsel offers this background to summarize the testimony at the preliminary hearing. This section should not be construed, however, as acceptance of any of the factual assertions for any other purpose.

[2] This Court did, however, limit the permissible scope of the charge going forward. *See* Transcript of Preliminary Hearing at 85-86.

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. Because Odell had a camera on his property, he was able to take pictures of the vehicle that entered and exited his property on April 1. *Id*. at 13. Although the photos depict the car, they do not show its occupants. *Id*. at 42.

Two days later, Odell and two others were working on the property when he saw a vehicle come into view as they were leaving the area. *Id*. at 14. Odell's companion stopped the vehicle, whose license plate matched the plate depicted in the photo taken on April 1st. Odell and his companions did not let the occupants of the vehicle, Franklin and Chilcoat, leave. *Id*. at 39. According to Odell, the driver of the vehicle, Mark Franklin, admitted that he shut the gate, stating also that he did so to help. *Id*. at 16. When confronted by Odell, Franklin remarked that he had seen an opening in the corral and that cows were going in and out when he left. *Id*. at 40.[3]

During the preliminary hearing, Odell testified regarding a photograph showing Rose Chilcoat standing near the property and depicting ponds that were dry. The photo was purportedly attached to a complaint that Chilcoat purportedly submitted to the BLM. *Id*. at 19. Significantly, 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. *Id*. at 21. After the objection was overruled, Odell testified regarding the letter. *Id*.

[3] *See also Id*. at 58 (Officer Begay testifying that Franklin stated that "he knew that there was an opening for cows to get in.").

The State then moved to admit the letter, to which defense counsel renewed his prior objection, which was again overruled. *Id*.

When the State asked Odell to testify regarding specific statements contained in the letter, defense counsel stated: "Same objection. And objection it calls for hearsay." *Id*. at 22. The Court replied: "Well, it's her statement supposedly so it wouldn't be hearsay. Overruled." *Id*. Allowed to testify regarding the letter and its contents, Odell stated that Chilcoat had claimed she had been assaulted and that Odell had gone outside the scope of his BLM permit. *Id*. At the conclusion of the preliminary hearing, the State argued that the letter supported bindover on Count I, specifically noting:

> Ms. Chilcoat's letter to the BLM indicates that she was in that area recreating over the weekend, the weekend in question, and she was with Mr. Franklin at the end of the weekend. She's down there recreating. It's her vehicle. It's her trailer. She—so she's tied to Mr. Franklin's actions by virtue of, if nothing else, the accomplice, you know, being an accomplice to the fact, to the action itself.[4]

Id. at 65. Critically, no witness testified that Chilcoat was on Odell's property on April 1. And although Franklin admitted to closing a gate to the corral, no statement—by Franklin, Chilcoat, or any other witness—was made implicating Chilcoat in that act.

On cross-examination, Odell testified that it was possible that the someone could have driven past the opening in the corral before turning around to exit the property and then close the gate. *Id*. at 45.[5] 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

[4] Other than invoking the theory of accomplice liability, the State never presented any evidence demonstrating how Chilcoat in fact aided and abetted in any crime.

[5] Odell again acknowledged this possible route of travel on recross, stating that "[a]nything is possible. If that's what they chose to do, that would have been possible." *Id*. at 52.

corral's gate before seeing the other opening to the corral. Defense counsel objected to the basis for Odell's opinion, specifically stating:

> MR. WILLIAMS: Your Honor, I need to object. This is almost crossing over into the 702 area. This is requiring—this isn't just layperson observation about tire tracks and the direction of travel of the vehicle. I think he's really crossing over into some expert area testimony.

Id. at 48. This Court overruled the objection, and the State later relied on Odell's lay opinion about the tire tracks and footprints to support its argument for bindover. Specifically, the State argued:

> [Franklin] claims or claimed at the time that he saw this opening further down the fence line. But based on testimony that you've heard, the vehicle pulled up to the gate that was then, the gate in question prior to getting to a point down the fence line where they could actually visibly see the opening in the fence.

Id. at 63.

In order to sustain its burden, the State also argued that Franklin's connection to his wife, who belonged to an organization that advocates for environmental protection, revealed Franklin's own intent. As the prosecutor argued:

> The State's position is that at the time that the gate was closed, Mr. Franklin had no reason, no practical, no reasonable 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, that would be to cause injury or the death of these livestock.

Id. Notably, there was no testimony indicating that Great Old Broads for Wilderness, the organization mentioned above, ever advocated for inflicting harm to animals generally or livestock specifically.

ARGUMENT

I. Because the State Did Not Produce Any Evidence that Chilcoat Was Present at the Property When the Gate Was Closed, Bindover is Improper. The State's Inferences are Exactly the "Speculation" that Can Not Support Bindover.

In Utah, a preliminary hearing is a "critical stage" used "to determine whether there is sufficient cause to believe a crime has been committed to warrant further proceedings." *State v. Zahn*, 2008 UT App 56, ¶ 3 (quoting *State v. Brickey*, 714 P.2d 644, 646 (Utah 1986)).[6] Significantly, the preliminary hearing also guarantees a meaningful opportunity for magistrates to ferret out groundless and improvident prosecutions.[7]

"To bind a defendant over for trial, the State must show probable cause at a preliminary hearing by presenting sufficient evidence to establish that the crime charged has been committed and that the defendant has committed it."[8] Although the quantum of evidence required to satisfy this burden is not high, a court's role in this process may not be that of a rubber stamp for the prosecution.[9] Rather, a court must dismiss a charge when the prosecution fails to produce "believable evidence of all the elements of the crime charged."[10] The court should likewise refuse to bind over charges "where the prosecution fails to present sufficiently credible evidence

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[6] Article I, §§ 12 and 13 of the Utah Constitution guarantee a criminal defendant the right to a preliminary hearing. *See also* Utah Rules of Criminal Procedure 7(h)-(k) (setting forth protections provided by preliminary examinations).

[7] *See State v. Jones*, 2016 UT 4, ¶ 11; *Brickey*, 714 P.2d at 646; *State v. Virgin, 2006 UT 29*, ¶ 19; *State v. Ingram*, 2006 UT App 237, ¶ 13.

[8] *State v. Clark*, 2001 UT 9, ¶ 10 (citing authority) (internal quotation omitted); *see also* Utah R. Crim. P. 7(i)(2) (requiring a finding of probable cause that "the crime charged has been committed and that the defendant has committed it").

[9] *See, e.g.*, *Ingram*, 2006 UT App 237 at ¶ 13; *Virgin*, 2006 UT 26 at ¶ 19.

[10] *State v. Jones*, 2016 UT 4, ¶ 12.

on at least one element of the crime," or "where the facts presented by the prosecution provide no more than a basis for speculation—as opposed to providing a basis for a reasonable belief."[11]

Although magistrates "have an obligation to construe all evidence in the prosecution's favor," magistrates may still "make credibility determinations in preliminary hearings, but the extent of those determinations is limited."[12] Critically, however, magistrates have the discretion to disregard evidence that is "wholly lacking and incapable of creating a reasonable inference regarding a portion of the prosecution's claim."[13]

Courts May Not Bindover Based on Speculation

As noted above, bindover is improper where "the facts presented by the prosecution provide no more than a basis for speculation—as opposed to providing a basis for a reasonable belief."[14] And "[w]hile it is sometimes subtle, there is in fact a difference between drawing a reasonable inference and merely speculating about possibilities."[15]

While a *reasonable inference* is "a conclusion reached by considering other facts and deducing a logical consequence from them," *speculation* is the "act or practice of theorizing about matters over which there is no *certain* knowledge." *Id*. (quoting *Black's Law Dictionary*

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[11] *Virgin*, 2006 UT 29, ¶ 21; *see also Jones*, 2016 UT 4, ¶ 13 (magistrate has discretion to decline to bind over where "facts presented by the prosecution provide no more than a basis for speculation"); *Schmidt*, 2015 UT 65, ¶ 18 (same).

[12] *Schmidt*, 2015 UT 65, ¶¶ 18, 31, 43.

[13] *Id*. at ¶ 29.

[14] *Virgin*, 2006 UT 29, ¶ 21.

[15] *State v. Cristobal*, 2010 UT App 228, ¶ 16 (quoting *State v. Hester*, 2000 UT App 159, ¶ 16).

781 & 1407 (7th ed. 1999)). "Speculation is 'mere guesswork or surmise,' a conjecture,' or a 'guess.'"[16] As the Utah Court of Appeals has explained:

> When the evidence supports more than one possible conclusion, none more likely that the other, the choice of one possibility over another can be no more than speculation; while a reasonable inference arises when the facts can reasonably be interpreted to support a conclusion that one possibility is more probable than another.

Id.[17]

Further, while inferences drawn from facts in evidence are appropriate, *inferences drawn from inferences* are not.[18] And mere presence at a scene—if such presence can even be established—do not support a reasonable inference of active participation in the crime.[19]

Rose Chilcoat has been bound over for trial on Count 1 (Attempted Wanton Destruction of Livestock) and on Count 3 with Trespassing on Trust Lands. The basis for the first charge is the State's theory that Mark Franklin attempted to cause the death of livestock by closing the gate of a corral with cattle inside.[20] The basis for the second charge is that Franklin and Chilcoat

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[16] *Salt Lake City v. Howe*, 2016 UT App 219, ¶ 11.

[17] *See also Juan F. v. Allen*, 408 F.3d 1262 (9th Cir. 2005) (although we must draw all reasonable inferences in favor of the prosecution, a reasonable inference is one supported by a chain of logic rather than mere speculation dressed up in the guise of evidence); *Smith v. State*, 999 A.2d 986 (Md. App. 2010) ("where from the facts most favorable to the [party with the burden of proof] the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.").

[18] *See Cristobal*, 2010 UT App 228 at ¶ 17 (quoting *United States v. Pahulu*, 274 F.Supp.2d 1235, 1238 (D.Utah 2003) (mem.), *aff'd*, 108 Fed.Appx. 606 (10th Cir. 2004)); *Salt Lake City v. Gallegos*, 2015 UT App 78, ¶ 10.

[19] *See Cristobal*, 2010 UT App 228, ¶ 20.

trespassed by interfering with the activities of a trust lands lessee.[21] Because the State did not put on any evidence demonstrating that Chilcoat was present at the corral or otherwise aided Franklin, bindover was improper.

As noted above, no evidence was presented at the preliminary hearing—none whatsoever—that Rose Chilcoat was on the Odell property when the gate to the corral was closed. The video still depicting the vehicle leaving the area next to the property does not show Rose in the vehicle. No witnesses testified that they saw Rose on the property that day. And although Mark Franklin purportedly admitted that he closed the gate, he did not state that Rose was with him when it was closed. The State set forth its dubious theory by arguing:

> The same evidence that supports the charge against Mr. Franklin supports it against Ms. Chilcoat. Ms. Chilcoat's letter to the BLM indicates that she was in that area recreating over the weekend, the weekend in question, and she was with Mr. Franklin at the end of the weekend. She's down there recreating. It's her vehicle. It's her trailer. She—so she's tied to Mr. Franklin's actions by virtue of, if nothing else, the accomplice, you know, being an accomplice to the fact, to the action itself.[22]

Transcript of Preliminary Hearing at 65.

In essence, the State is arguing that Chilcoat is criminally liable because (1) she was in Southern Utah that weekend; (2) she and her husband own the vehicle that was seen on the

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[20] *See generally Transcript of Preliminary Hearing* at 62-64 (State summarizing its theory of case).

[21] *Transcript of Preliminary Hearing* at 64 ("[T]heir actions did in fact interfere with the activities of a lease or other person that had been authorized by messing with gates that they have no reason to mess with.").

[22] The State's theory with respect to Count 3 is identical, as it asserted that "[w]e have an accomplice type situation." *Transcript of Preliminary Hearing* at 66.

property; and (3) she is at least an accomplice to the crime of shutting the gate. Not one of the State's theories can clear even the relatively low hurdle imposed at a preliminary hearing.

First, the State's theory that Chilcoat is responsible because she was vacationing in the area and her husband was at the Odell property in their vehicle is based on the same conjecture that Utah's appellate courts have long warned against. Indeed, such theorizing "about matter over which there is no certain knowledge"[23] has long been regarded as speculation. As the Utah Court of Appeals aptly concluded, "[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."[24] The State's attempt to place Chilcoat at the Odell property when the gate was closed is nothing more than guesswork, a feeble attempt to convict her because of an act allegedly committed by her husband. Left unchecked, the State's conjecture would subject countless companions to "groundless and improvident prosecutions" based solely on marital status. Campers whose companions set fire to campgrounds could be held to answer for the criminal conduct of others because they were on the same trip and were related to the perpetrator. Clearly, the law demands more. The State cannot meet its burden by conjuring up a scenario in which Chilcoat was present and therefore responsible.

Nor can the State proceed on a theory of aiding and abetting. Even assuming that the State established that Rose was at the Odell property—which it most certainly did not—it nonetheless failed to show that Rose aided Mark in any fashion. Black's Law Dictionary defines "aid and abet" as "assist[ing] or facilitat[ing] the commission of a crime, or promot[ing] its

[23] Black's Law Dictionary 1435 (8th ed. 2004).

[24] *Cristobal*, 2010 UT App 228 at ¶ 16.

accomplishment."[25] But mere presence does not suffice. Indeed, "[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."[26]

In *State v. Cristobal*, the Utah Court of Appeals addressed the applicability of Utah's gang enhancement statute, which subjects a defendant to an enhanced penalty if the defendant was aided or encouraged by at least two other persons.[27] Not only did the court in *Cristobal* hold that one's mere presence at the scene of a crime insufficient to establish that one aided or encouraged, but it further held that one's flight from the scene of the crime itself was likewise insufficient.[28]

As noted above, the State presented no evidence that Chilcoat was actually present at the scene when the gate to the corral was closed. Even if the State could establish Chilcoat's presence, however, there is nothing to support the State's theory that she affirmatively aided and abetted Franklin. It is beyond dispute that mere presence at the scene of a crime is insufficient. And the State's theory of accomplice liability is just that—a theory grounded in speculation and

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[25] Black's Law Dictionary 81 (9th ed. 2009).

[26] *State v. Labrum*, 959 P.2d 120, 123-24 (Utah Ct. App. 1998).

[27] Although the court addressed the definition of aiding and encouraging in the context of a gang enhancement statute, it nonetheless observed that "the rule … that mere presence is insufficient to infer participation in a criminal act is common to both [the gang enhancement and accomplice liability] statutes." *Id*. at n.6.

[28] *Id*. at ¶ 15. Interestingly, the Court of Appeals noted that the two females did not aid or encourage Cristobal merely by being present at the scene of the crime (sitting in the car), and the State itself conceded that mere presence was insufficient. *Id*. at n.5.

curiously bereft of actual evidence to support it. This Court cannot bindover Rose Chilcoat based on rank speculation about her relationship with Mark Franklin, and the bindover order on Counts 1 and 3 must be quashed.

II. The State's Theory Impermissibly Infringes on Chilcoat's First Amendment and State Constitutional Rights.

In addition to the several shortcomings spelled out above, the State's case against Chilcoat suffers from another striking and ultimately fatal flaw: its case is predicated on an unconstitutional infringement of Chilcoat's constitutional rights. Indeed, the State resorts to introducing evidence of what appears to be its core concern: that Rose Chilcoat has the audacity to be an unapologetic environmental activist. Remarkably, the State actually introduced evidence of Chilcoat's membership in Great Old Broads at the preliminary hearing.[29] Over defense objection, this Court allowed evidence of the organization's environmental goals, specifically the group's concerns about the misuse of public land.[30] Of course, as the State surely knows, a considerable segment of the population in San Juan County finds such environmental views objectionable.

The First Amendment of the United States Constitution does not permit such a naked assault on freedom of association. Indeed, it has long been settled that the "First Amendment protects an individual's right to join groups and associate with others holding similar beliefs."[31]

[29] Transcript of Preliminary Hearing at 60.

[30] Notably, the State introduced no evidence—none whatsoever—suggesting that the organization has ever advanced a position that would advocate harm to animals. Nor could the State, since such a position is antithetical to the organization's aims.

[31] *Dawson v. Delaware*, 503 U.S. 159, 164-64 (1992) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

And the Supreme Court has repeatedly instructed that "speech on matters of public concern is at the heart of the First Amendment's protection."[32]

What the State appears to be attempting is to imply that anyone who has the temerity to join an environmental organization must, of necessity, have the motive to injure or kill cattle.[33] Such obviously overbroad—and completely unfounded—claims have no place in a criminal trial, particularly in a community where environmental views may be unpopular. The Supreme Court has repeatedly cautioned that the State must avoid any chilling effect on speech because "[t]o do so otherwise could only result in a deterrence of speech which the Constitution makes free."[34]

Naturally, these longstanding principles are protected not only by the United States Constitution but also by the Utah Constitution. The Utah Supreme Court has repeatedly recognized that Utah's state constitutional provisions may extend greater protection to criminal defendants than do parallel federal provisions.[35] Indeed, the Utah Constitution provides that

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[32] *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011).

[33] In its argument in support of bindover, the State noted that "Mr. Franklin had no reason, no practical, no reasonable 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*[.]" Transcript of Preliminary Hearing at 63 (emphasis added).

[34] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

[35] *See, e.g.*, *State v. Tiedemann*, 2007 UT 49 (rejecting U.S. Supreme Court decision interpreting due process protections and extending defendants *greater* protections under article 1, section 7 of the Utah Constitution). Unsurprisingly, the Utah Supreme Court has repeatedly encouraged defense attorneys to present and brief issues arguing for separate and more expansive state constitutional protections. *Brigham City v. Stuart*, 2005 UT 13 (concluding that defense counsel's failure to raise a separate state constitutional argument was "surprising in light of our repeated statements that federal [constitutional] protections may differ from those guaranteed our citizens by our state constitution"), *rev'd and remanded sub nom. Brigham City v. Stuart*, 547 U.S. 398 (2006).

"[n]o law shall be passed to abridge or restrain the freedom of speech …" and that they have the right "to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right." Utah Const. art. I, §§ 1, 15. Indeed, the Utah Supreme Court has made clear that these protections extended to speech, assembly, and petitioning under the State constitution are *broader* than those under the federal constitution. *See American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 21 (noting that "the 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).

Under both federal and state constitutional principles, it would clearly and obviously offend Chilcoat's right to free speech and association to permit the State to proceed with a criminal prosecution that in any way rested on Chilcoat's association with an environmental organization and connected communications with the government, particularly where the prosecution takes place in a community where such views are largely unpopular. Prosecuting Chilcoat and Franklin for the views of an organization Chilcoat belongs to is precisely the kind of "chilling effect" on the right to freedom of speech that the United States and Utah Constitutions unambiguously condemn.[36] As such, evidence of her membership in an environmental organization is irrelevant and its use must be forbidden. A bindover order that rests in any part

[36] Perhaps more troubling is that the State seeks to prosecute Franklin for his relationship with Chilcoat—regardless of whether he personally endorses his wife's environmental views or those of Great Old Broads. The State explicitly acknowledged as much when it claimed that Franklin's motive was based on "his connections with Chilcoat as well as the organization that she belongs to[.]" Transcript of Preliminary Hearing at 63.

on Chilcoat's membership in an environmental organization must be quashed to protect Chilcoat's First Amendment and state constitutional rights.

III. This Court Should Strike ODell's Unreliable and Unscientific Testimony Regarding Footprints and Tire Tread.

Utah Rule of Evidence 1101(a) specifically notes that the rules of evidence "apply to *all* actions and proceedings in the courts of this state except as otherwise provided in Subdivisions (c) and (d)."[37] Thus, even though the Utah Rules of Evidence permit the introduction of reliable hearsay evidence at preliminary hearings, no such laxity exists to permit the introduction of all other evidence that would be inadmissible at trial.

Similarly, although the Utah Rules of Criminal Procedure clearly contemplate a relaxed standard for admission of hearsay statements,[38] traditional evidentiary rules still apply. Indeed, Rule 7(i)(1) specifically requires that "a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court."[39]

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[37] Subdivision (c) enumerates instances in which the Utah Rules of Evidence do not apply. Notably, preliminary hearings are not one of those instances. Indeed, the only mention of a special rule governing preliminary hearings comes in Subdivision (d), which renders reliable hearsay admissible at preliminary hearings.

[38] *See* Utah R. Crim. P. 7(i)(2) (observing that "findings of probable cause may be based on hearsay in whole or in part"). The basis for this rule was to avoid the need for crime victims to testify in person during preliminary hearings. *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendments*, 1994 Utah L.Rev. 1373, 1440-50. Such concerns are not present in this case.

[39] It should also be noted that the Utah Constitution specifically permits reliable hearsay evidence at a preliminary hearing, but makes no such exception for other evidence that would be otherwise inadmissible at trial. *See* Utah Constitution, article 1, section 12.

Because Odell was permitted to give expert testimony without sufficient foundation or expertise, his testimony must be stricken. Once stricken, there is no basis for the bindover orders in these cases.

This Court Should Have Exlcuded the Pseudo-Expert Testimony Under Rule 702.

The Utah Supreme Court has noted that it relies "on our district court judges to act as "gatekeeper[s]" to "screen out unreliable expert testimony."[40] To do so requires "judges to view proposed expert testimony with "rational skepticism."[41] In order to carry out its essential gatekeeping function, judges must first determine that the expert is qualified "by knowledge, skill, experience, training or education" and that the proposed expert testimony will help the trier of fact to understand the evidence or to determine a fact in issue.[42] Next, the judge must determine whether the "scientific, technical, or other specialized knowledge" underlying the expert's testimony meets a threshold showing that the "principles or methods … underlying … the testimony (1) are reliable, (2) are based on sufficient facts or data, and (3) have been reliably applied to the facts."[43] As the Supreme Court in *Lopez* observed, the threshold showing is only satisfied if "the underlying principles or methods, including the sufficiency of facts or data and

[40] *State v. Lopez*, 2018 UT 5, ¶ 20 (citing Utah R. Evid. 702 advisory committee's note).

[41] *Id*.

[42] Utah R. Evid. 702(a).

[43] Utah R. Evid. 702(b).

the manner of their application to the facts of the case, are generally accepted by the relevant expert community."[44]

At the preliminary hearing, Zane Odell testified regarding the number and direction of footprints and tire tread marks. Most troubling was that Odell was permitted to give an opinion—over repeated objections—regarding the direction of travel that a vehicle would have taken given the tired tread marks. Such an opinion should have required this Court to exercise its gatekeeping function, and the opinion should have been excluded under the framework set forth by the Utah Supreme Court and Rule 702. As evidenced by the attached declaration of Greg Rogers,[45] analysis of tire tracks and footprints is not permissible lay opinion testimony. Even Rogers, an experienced federal agent who has investigated thousands of crime scenes, could not offer a definitive expert opinion based on the dearth of forensic evidence in this case. And yet the State relied on Odell's lay opinion to reach its ultimate conclusion that Franklin shut the gate to the corral unaware that there was a separate opening in the corral that permitted the cattle to freely enter and exit. Such conjecture, unsupported by expert testimony, cannot suffice to bindover the defendants.

IV. The Bindover Order for Retaliation Against a Witness Must be Quashed.

By broadly construing the statute criminalizing the retaliation against a witness to encompass citizen complaints lodged with governmental actors, the State has misconstrued the

[44] *Id*.

[45] *See* Attachment A (Declaration of Greg Rogers); *see also* Attach B (Greg Rogers CV).

statute's prohibitions. For the reasons enumerated below, this Court's bindover order on Count 2 must be quashed.

A. Prosecuting Chilcoat for Purportedly Sending a Complaint to the BLM Violates Her Constitutional Right to Petition the Government for Redress of Grievances.

As explained above, the State's prosecution in this case unconstitutionally infringes on Chilcoat's First Amendment rights. Similarly, its prosecution for the complaint sent to the BLM unconstitutionally infringes on her federal constitutional right to petition the government for redress of grievances.[46] Accordingly, no liability—civil or criminal—can be imposed when a citizen approaches a government agency for redress.[47] Here, the State seeks to do precisely what the Constitution forbids: impose criminal liability on Chilcoat because she petitioned the government for redress of grievances.

Likely motivated by First Amendment concerns, the retaliation statute contains a safe harbor for citizens. Specifically, the statute permits one to seek "any legal redress to which the person is otherwise entitled." Utah Code Ann. § 76-8-508.3(3). Chilcoat cannot be held to answer for retaliation against a witness when she—and everyone else in the public—is entitled to lodge complaints against a BLM permittee.

B. The BLM Letter Was Inadmissible and Testimony About Its Contents Should be Stricken.

As explained above, the Utah Rules of Evidence apply at preliminary hearings. At the preliminary hearing, the State introduced a letter purportedly sent by Chilcoat to officials at the Bureau of Land Management to substantiate its allegation that such letter constituted retaliation

[46] U.S. Amend. Art. I.
[47] *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 26, 116 P.3d 323, 332.

against Zane Odell. The admission of such a letter—over the defense objection and without authenticating the letter or otherwise laying the proper foundation—was obviously erroneous. The contents of the letter and Odell's testimony regarding those contents must therefore be stricken before determining whether the State introduced sufficient evidence to support bindover. Because the only evidence supporting Count 2 came from this unauthenticated letter purportedly sent by Chilcoat, striking such evidence should necessarily result in quashing the bindover order on that count.

C. Because the State Did Not Demonstrate that Chilcoat Knew an Official Proceeding Was Pending and the Letter Did Not Contain a Threat of Harm, the Bindover Order on Count 2 Must be Quashed.

Even if the letter was properly admitted, the State still did not meet its burden. First, the State did not present sufficient evidence to show that Chilcoat believed an official proceeding or investigation was pending or about to be instituted.[48] Despite Franklin's acknowledgment that he shut the gate to the corral, neither Chilcoat nor Franklin received a citation from Officer Begay on April 3, 2018. Nor were any charges filed before the letter to the BLM was purportedly sent.

Second, by the plain terms of the statute, the BLM letter cannot constitute retaliation against a witness as it neither "ma[de] a threat of harm," or "cause[d] harm." Utah Code Ann. § 76-8-508.3(2)(a)(i) & (ii). Nowhere in the letter is there a threat of harm. It simply relates a complaint regarding the incident on April 3 and the improper use of BLM land. Further, the State did not introduce any evidence that the letter caused harm. In fact, in its attempt to argue

[48] Chilcoat's arguments regarding the letter should not be construed as admissions that she sent the letter to BLM. For the sake of this motion, however, Chilcoat addresses the evidence adduced at the preliminary hearing as if the State had established that she sent the letter.

that the complaints contained in the letter were unfounded, the State itself acknowledged that Odell suffered no harm. The following exchange occurred during the preliminary hearing:

> THE COURT: Okay. But the way you think you establish that a complaint is unfounded is that the BLM decided not to pursue it.
>
> MR. LAWS: Yeah. That he hasn't received any consequences for going outside the scope.[49]

Clearly, the State cannot have it both ways. Because the State itself concedes that no harm was caused, it cannot meet its burden under the statute since the letter made no threat of harm.

For all of the reasons above, the bindover order on Count 2 should be quashed.

CONCLUSION

Our citizens have long cherished the freedom of speech and freedom of association guaranteed by the First Amendment. The prosecution in this case—one aimed at silencing an environmental activist and her husband by threat of criminal prosecution and imprisonment—is an attack on those fundamental rights. Because the State's prosecution is impermissibly founded on Chilcoat's association with the Great Old Broads for Wilderness, and Franklin's association with his wife, the bindover orders must be quashed. In addition, the evidentiary and statutory infirmities highlighted above independently dictate the same result.

DATED this 9th day of April, 2018.

/s/ Paul G. Cassell
Paul G. Cassell

[49] Transcript of Preliminary Hearing at 24-25.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically served on this 9th day of April, 2018, to:

San Juan County Attorney
Via Green File

/s/ Paul Cassell
_____