

Kathryn N. Nester (UT #13967)  
NESTER LEWIS PLLC  
40 S 600 E  
Salt Lake City, UT 84102  
Telephone: 801-535-4375  
Email: kathy@nesterlewis.com

Richard G. Novak, *pro hac vice*  
RICHARD G. NOVAK, APLC  
65 North Raymond Avenue, Suite 320  
Pasadena, CA 91103  
Telephone: 626-578-1175  
Email: richard@rgnlaw.com

Michael N. Burt, *pro hac vice*  
LAW OFFICE OF MICHAEL BURT PC  
1000 Brannan Street Suite 400  
San Francisco, California 94103  
Telephone: 415-522-1508  
Email: MB@michaelburtlaw.com

Staci Visser (UT #14358)  
BROWN, BRADSHAW & MOFFAT  
422 N 300 W  
Salt Lake City, UT 84103  
Telephone: 801-532-5297  
Email: staci@brownbradshaw.com

*Attorneys for Tyler James Robinson*

---

IN THE FOURTH JUDICIAL DISTRICT COURT, PROVO DEPARTMENT  
IN AND FOR THE COUNTY OF UTAH, STATE OF UTAH

---

STATE OF UTAH,  
  
Plaintiff,

vs.

TYLER JAMES ROBINSON,  
  
Defendant.

**DEFENDANT TYLER JAMES ROBINSON'S  
REPLY IN SUPPORT OF DEFENDANT'S  
MOTION *IN LIMINE* TO PRECLUDE THE  
UTILIZATION OF ARTICLE I, SECTION 12  
OF THE UTAH CONSTITUTION AND RULE  
1102 OF THE UTAH RULES OF EVIDENCE  
TO SANCTION THE ADMISSIBILITY OF  
HEARSAY EVIDENCE TO ESTABLISH  
PROBABLE CAUSE AT THE PRELIMINARY  
HEARING; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF**

Case No. 251403576

---

Honorable Tony F. Graf, Jr.

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 10

I. Utah Constitution, Article 1, Section 12 and Rule 1102 violate Mr. Robinson’s Sixth Amendment Right to the Effective Assistance of Counsel..... 10

II. Utah Constitution Article 1, Section 12 and Rule 1102 violate Mr. Robinson’s Fourteenth Amendment Rights to Procedural Due Process and Equal Protection. .... 22

III. Article 1, Section 12 and Rule 1102 Violate the Due Process Clause of the Fourteenth Amendment Because They Establish an Unconstitutional Mandatory Presumption of Reliability for an Overbroad Range of Hearsay Evidence..... 27

IV. Utah Constitution Article 1, Section 12 and Rule 1102 Violate Mr. Robinson’s Eighth Amendment Right to be Free from Cruel and Unusual Punishment. .... 29

V. Article 1, Section 12 and Rule 1102 violate the Fourth Amendment and Separation of Powers Principles..... 34

VI. Article 1, Section 12 and Rule 1102 violate the Confrontation Clause of the Sixth Amendment..... 37

CONCLUSION..... 43

## TABLE OF AUTHORITIES

### Cases

<i>Albright v. Oliver</i> , 510 U.S. 266 (1994) .....	12, 13, 15
<i>Barber v. Page</i> , 390 U.S. 719 (1968) .....	38
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	31, 32
<i>Becker v. Kroll</i> , 494 F.3d 904 (10th Cir. 2007) .....	13, 14, 15
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979) .....	15, 16
<i>Betschart v. Oregon</i> , 103 F.4th 607 (9th Cir. 2024).....	7, 27, 33, 34, 42
<i>Brothers v. Klevenhagen</i> , 28 F.3d 452 (5th Cir. 1994).....	16
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	8
<i>California v. Ramos</i> , 463 U.S. 992 (1983) .....	31
<i>Castellano v. Fragozo</i> , 352 F.3d 939 (5th Cir.2003).....	15
<i>Chicago, Burlington &amp; Q.R. Co. v. Chicago</i> , 166 U.S. 226 (1897) .....	10, 11
<i>Cnty. of Riverside v. McLaughlin</i> , 500 U.S. 44 (1991).....	14
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970) .....	8, 9, 17, 21, 22, 23, 25, 26, 38, 42
<i>Commonwealth v. McClelland</i> , 233 A.3d 717 (2020) .....	6
<i>Cottrell v. Caldwell</i> , 85 F.3d 1480 (11th Cir. 1996).....	16
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	9, 22, 38
<i>Curry v. State</i> , 228 S.W.3d 292 (Tex. Ct. App. 2007).....	20
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005).....	29
<i>Dobbs v. Jackson Women’s Health Org.</i> , 597 U.S. 215 (2022) .....	8
<i>Fed. Power Comm. v. Natural Gas Pipeline</i> , 169 U.S. 466 (1942).....	10
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986) .....	29
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975).....	9, 14, 16, 21, 22, 25, 26, 34, 39, 40
<i>Ghent v. Superior Ct.</i> , 153 Cal. Rptr. 720 (Cal. Ct. App. 1979).....	30
<i>Gideon v. Wainright</i> , 372 U.S. 335 (1963).....	7
<i>Gitlow v. People of State of New York</i> , 268 U.S. 652, 666 (1925) .....	11
<i>Graham v. Connor</i> , 490 U.S. 386 (1989) .....	13, 15, 16
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976) .....	29, 33

<i>Hebert v. State of Louisiana</i> , 272 U.S. 312 (1926).....	11
<i>Hosek v. Superior Ct.</i> , 12 Cal. Rptr. 2d 650 (Cal. Ct. App. 1992) .....	41
<i>Howell v. Mississippi</i> , 543 U.S. 440 (2005) .....	32
<i>Hurtado v. California</i> , 110 U.S. 516 (1884).....	10, 11, 41
<i>In Re Young</i> , 1999 UT 6, 976 P.2d 581 .....	36, 37
<i>Kearns v. Tribune Corp. v. Wilkinson</i> , 946 P.2d 372 (Utah 1997).....	11
<i>Kennecott Copper Corp. v. Anderson</i> , 514 P.2d 217 (Utah 1973) .....	20
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012) .....	33
<i>Lewis v. Dart</i> , 2010 WL 2990101 (N.D. Ill. July 22, 2010).....	25
<i>Mallow v. Hogan</i> , 378 U.S. 1 (1964).....	11
<i>Matter of Crim. Investigation</i> , 754 P.2d 633 (Utah 1988).....	11, 12, 20, 25
<i>McCray v. State of Ill.</i> , 386 U.S. 300 (1967) .....	11
<i>Missouri v. Frye</i> , 566 U.S. 134 (2012) .....	3
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	27
<i>Murray City v. Hall</i> , 663 P.2d 1314 (Utah 1983).....	29
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931) .....	11
<i>Ohio Adult Parole Auth. v. Woodard</i> , 523 U.S. 272 (1998).....	32
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010) .....	33
<i>Page v. King</i> , 932 F.3d 898 (9th Cir. 2019).....	16
<i>Pearce v. Cox</i> , 354 F.2d 884 (10th Cir. 1965).....	21
<i>People v. Huggins</i> , 220 P.3d 977 (Colo. App. 2009).....	5
<i>Peterson v. California</i> , 604 F.3d 1166 (9th Cir. 2010).....	16, 26, 41, 42
<i>Pierce v. Gilchrist</i> , 359 F.3d 1279 (10th Cir. 2004) (en banc).....	15
<i>Pino v. Higgs</i> , 75 F.3d 1461 (10th Cir. 1996).....	13, 14, 15
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896) .....	8
<i>Powell v. State of Ala.</i> , 287 U.S. 45 (1932) .....	10, 12, 13, 38
<i>Ramos v. Superior Ct.</i> , 648 P.2d 589 (Cal. 1982).....	30
<i>Riley v. Dorton</i> , 115 F.3d 1159 (4th Cir.1997).....	15
<i>Roosevelt City v. Nebeker</i> , 815 P.2d 738 (Utah Ct. App. 1991).....	29
<i>San Diego Land &amp; Town Company v. National City</i> , 174 U.S. 739 (1899).....	10

<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973).....	21
<i>Schramm v. State</i> , 366 A.2d 1185 (Del. 1976) .....	6
<i>Shimomura v. Carlson</i> , 811 F.3d 349 (10th Cir. 2015) .....	15
<i>Smyth v. Ames</i> , 169 U.S. 466 (1898).....	10
<i>State v. Cabrera</i> , 2007 UT App 194, 163 P.3d 707 .....	17
<i>State v. Curry</i> , 2006 UT App 390, 147 P.3d 483.....	20
<i>State v. Ehtesham</i> , 309 S.E.2d 82 (W. Va. 1983) .....	20
<i>State v. Goins</i> , 2017UT 61, 423 P.3d 1236.....	24
<i>State v. Johnson</i> , 618 P.2d 759 (Idaho 1980) .....	18
<i>State v. King</i> , 601 P.2d 982 (Wash. App. 1979).....	18
<i>State v. Montes</i> , 2019 UT App 74, 442 P.3d 1247.....	22, 23
<i>State v. O’Brien</i> , 850 N.W.2d 8 (Wis. 2014).....	16, 22, 25
<i>State v. Randolph</i> , 933 A.2d 1158 (Conn. 2007) .....	4
<i>State v. Robbins</i> , 2009 UT 23, 210 P.3d 288 .....	28
<i>State v. Robinson</i> , 2018 UT App 227, 438 P.3d 35 .....	17, 18
<i>State v. Sanwick</i> , 713 P.2d 707 (Utah 1986).....	17, 18, 19, 24, 25
<i>State v. Sigerson</i> , 282 So. 2d 649 (Fla. App. 1973).....	20
<i>State v. Timmerman</i> , 2009 UT 58, 218 P.3d 590.....	3, 4, 37, 38, 39, 40, 42
<i>State v. Virgin</i> , 2006 UT 29, 137 P. 3d 787 .....	3, 34
<i>State v. Zamzow</i> , 2017 WI 29, 892 N.W.2d 637.....	38
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	20
<i>Stromberg v. California</i> , 283 U.S. 359 (1931) .....	11
<i>Sumner v. Shuman</i> , 483 U.S. 66 (1987).....	31
<i>Swingle v. United States</i> , 389 F.2d 220 (10th Cir. 1968).....	41
<i>Taylor v. Meacham</i> , 82 F.3d 1556 (10th Cir. 1996) .....	13, 14
<i>Thomas v. State</i> , 2002 UT 128, 63 P. 3d 672.....	33
<i>Twining v. New Jersey</i> , 211 U.S. 78 (1908).....	11
<i>U.S. ex rel. Durocher v. LaVallee</i> , 330 F.2d 303 (2d Cir. 1964).....	7
<i>United States v. Andrus</i> , 775 F.2d 825 (7th Cir. 1985).....	16, 40, 42
<i>United States v. Campbell</i> , 743 F.3d 802 (11th Cir. 2014).....	39, 40

<i>United States v. Clark</i> , 475 F.2d 240 (2d Cir. 1973) .....	20, 39
<i>United States v. Green</i> , 670 F.2d 1148 (D.C. Cir. 1981).....	20
<i>United States v. Harris</i> , 458 F.2d 670 (5th Cir. 1972).....	40, 41, 42
<i>United States v. Hodge</i> , 19 F.3d 51 (D.C. Cir. 1994).....	20
<i>United States v. Leonti</i> , 326 F.3d 1111 (9th Cir. 2003).....	33
<i>United States v. Nueci–Peña</i> , 711 F.3d 191 (1st Cir. 2013).....	39
<i>United States v. Raddatz</i> , 447 U.S. 667 (1980) .....	19
<i>United States v. Wade</i> , 388 U.S. 218 (1967) .....	38
<i>Village of Norwood v. Baker</i> , 172 U.S. 269 (1898).....	10
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984).....	38
<i>Whitman v. Superior Ct.</i> , 820 P.2d 262 (Cal 1991).....	41
<i>Wilkins v. Gaddy</i> , 559 U.S. 34 (2010) .....	15, 16
<i>Williams v. Kobel</i> , 789 F.2d 463 (7th Cir.1986).....	25
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....	30

**Statutes**

42 U.S.C. § 1983.....	12, 13, 15
Conn. Gen. Stat. § 54-46a.....	4
Utah Code § 77-18-103(9)(a).....	18, 24
Utah Code § 77-18-108(3)(e).....	19
Utah Code § 77-27-11(5)(b) .....	19

**Other Authorities**

ALI, Model Code of Pre-arraignment Procedure, Commentary on Art. 330 (Tent. Draft No. 5, 1972).....	9
Chesa Boudin & Eric S. Fish, <i>Toward Pretrial Criminal Adjudication</i> , 66 B.C. L. Rev. 1135 (2025).....	2, 3, 4, 5, 6, 41
Georgetown Law, Indigent Criminal Defense Research Guide, The Law Before Gideon (Last Updated Feb. 20, 2025, 2:47 PM).....	7
Utah Voter Information Pamphlet (General Election Nov. 8, 1994).....	36, 37
Y. Kamisar, W. LaFave & J. Israel, <i>Modern Criminal Procedure</i> (4th ed. 1974) .....	9

## Rules

Iowa R. Crim. P. 2.2(4)(c) .....	6
Utah R. Crim. P. 7B .....	23, 24
Utah R. Crim. P. 7B(a).....	24
Utah R. Evid. 1101(c).....	17
Utah R. Evid. 1102.....	3, 4, 6, 23, 24, 27, 28, 29, 32, 35, 36, 37, 43
Utah R. Evid. 1102(b)(4) .....	24, 27

## Constitutional Provisions

U.S. Const. amend. I .....	10
U.S. Const. amend. IV .....	12, 13, 14, 15, 16, 25, 34, 37
U.S. Const. amend. V .....	10, 12, 26
U.S. Const. amend. VI .....	passim
U.S. Const. amend. VIII.....	29, 30, 31, 32, 33, 34
U.S. Const. amend. XIV .....	7, 10, 11, 12, 13, 15, 16, 22, 26, 31
Utah Const. art. I, § 12 .....	23, 24, 32, 35, 36, 37, 43
Utah Const. art. V, § 1 .....	36, 37

Defendant, Tyler James Robinson, by and through undersigned counsel, hereby files this reply in support of *Defendant's Motion in Limine to Preclude the Utilization of Article I, Section 12 of the Utah Constitution and Rule 1102 of the Utah Rules Of Evidence to Sanction the Admissibility of Hearsay Evidence to Establish Probable Cause at the Preliminary Hearing* (“*Mtn.*”) (Dkt. 525) and in response to the State’s *Opposition* thereto (“*Opp.*”) (Dkt. 557).

## INTRODUCTION

The *Opposition* makes three overarching arguments, two of which feature various sub-arguments: (1) controlling authority establishes that hearsay is admissible at a preliminary hearing because the Federal Confrontation Clause does not apply. If it did, then similar pretrial procedures in the federal system and 45 states would be unconstitutional, *Opp.* at 3-10; (2) Defendant does not explain how another federal constitutional provision can indirectly require a right that the Confrontation Clause directly provides but does not require, *id.* at 10-11; and (3) even if another constitutional provision somehow indirectly requires a right to confrontation, Defendant has not demonstrated that any of those other provisions apply here, *id.* at 12-23.

For reasons that follow, this Court should reject all of the State’s arguments and sub-arguments. Mr. Robinson’s motion presents several compelling reasons why this Court should grant the motion, and the *Opposition* has failed to explain why these reasons do not justify granting the relief that Mr. Robinson seeks, has cited cases that do not hold what the State claims they hold, and that in some instances the cases actually support Mr. Robinson’s motion.

For clarity of analysis, Mr. Robinson addresses the State’s arguments and sub-arguments under the Argument headings contained in his motion. At the outset, however, he addresses the overarching theme of the *Opposition* that Mr. Robinson’s motion should be decided based on a misguided approach which assumes, without evidence, that almost every jurisdiction in the

nation has *similar* preliminary hearing procedures as those existing in Utah and then uses this incorrect comparison to suggest a parade of horrors will result if Mr. Robinson's motion is granted.

**The Court Should Not Credit the State's Oversimplification of How Preliminary Hearings are Conducted Throughout Other Jurisdictions in the United States.**

The State begins its fear-mongering by claiming that "[i]f the Federal Constitution barred the admission of hearsay at a preliminary hearing, then preliminary hearing procedures in the federal courts and 44 other states would also be unconstitutional." *Opp.* at 7. It bases these numbers and comparisons solely on an Appendix B attached to a law review article by former San Francisco District Attorney Chesa Boudin and a co-author entitled *Toward Pretrial Criminal Adjudication*, 66 B.C. L. Rev. 1135 (2025) ("Boudin").<sup>1</sup> A few observations about this study and the State's misapplication are helpful to the Court here.

First, the conclusion of Boudin's article does not support the State's position. Boudin opines that the present state of affairs is a disappointing trend turning the criminal justice system into a plea-bargaining engine that has no roots in a properly functioning due process oriented pretrial adversary-based criminal justice system. As Boudin concludes,

Robust pretrial adjudication can significantly improve a system of pleas. If every case ended up in front of a jury, pretrial adjudication would mostly just help the parties in preparing for trial. In our current system where almost no cases end up in front of a jury, however, pretrial adjudication is imperative to preserve the rule of law and the adversarial system.

Boudin, at 1198.

Consistent with this analysis, the United States Supreme Court has recognized that because our criminal justice system has become "for the most part a system of pleas, not a

---

<sup>1</sup> Available at <https://bclawreview.bc.edu/articles/3196/files/6810da6f82a37.pdf>.

system of trials, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (internal citations and quotation marks omitted).

Second, the Boudin article defines five basic flaws in a criminal justice system devoid of any adversary pre-trial adjudication, all of which counsel strongly in favor of granting Mr. Robinson’s motion:

- (1) the lack of pretrial adversarial adjudication increases the risk of false convictions by “removing neutral factfinders’ role in sorting innocent defendants from guilty ones” (Boudin at 1147);
- (2) “a system of only guilty pleas sacrifices the rule of law” (*id.* at 1148);
- (3) “a system without adjudication lacks transparency” (*id.*);
- (4) “a system without adjudication sacrifices the dignitary value of due process” (*id.* at 1149); and
- (5) “a system without adjudication lacks procedural checks on the imposition of punishment”, *id.*

Third, the State’s assertion that “44 other states...allow hearsay at preliminary hearings,” *Opp.* at 9, tells the Court nothing about how many of those states not only “allow hearsay at preliminary hearings”, but have systems like Utah’s where hearsay alone can support a bindover, where a vast range of hearsay not covered by traditional hearsay exceptions is allowed, and, perhaps most importantly, where the Legislature has dictated that all such hearsay must be considered reliable, even though under *State v. Virgin*, 2006 UT 29, ¶¶ 21-24, 137 P. 3d 787, the magistrate is supposed to be making “some limited credibility determination at the preliminary hearing.” *See also State v. Timmerman*, 2009 UT 58, ¶ 16, 218 P.3d 590 (“Admission of evidence at preliminary hearings is exclusively governed by the reliable hearsay language in the Utah Constitution and rule 1102 of the Utah Rules of Evidence.”). The defense’s research has disclosed no jurisdiction except Utah which combines all of these features. *See also* Boudin, at

1169 (“Our fifty-state survey reveals a good deal of variation in states’ evidence rules at preliminary hearings.”).

Indeed, comparisons between Utah and other jurisdictions based on Boudin’s descriptions of procedures in Appendix B are rendered void from the outset because it erroneously states that in Utah “reliable hearsay is admissible in preliminary hearings[.]” Boudin, at 1226. The State repeats this same description throughout its *Opposition* and uses this misdescription as the basis for its assertion that Utah’s procedures are just like the procedures in 44 other states, but that description mischaracterizes “the reliable hearsay language in the Utah Constitution and Rule 1102 of the Utah Rules of Evidence” and the holding of *Timmerman* that that *specific* language exclusively governs the admission of evidence in Utah preliminary hearings. That language states in no uncertain terms that broad categories of hearsay evidence are in fact “reliable.”

Fourth, the State’s assertion that all of the listed jurisdictions “allow hearsay at the preliminary hearing” is incorrect and misleading. *Opp.* at 9. For example, the State lists Connecticut as a jurisdiction that “allow[s] hearsay at the preliminary hearing” (*id.* at 9-10 n.1), yet the Connecticut Supreme Court has declared that it is an open question whether Connecticut’s statute, which states only that “[t]he court shall be confined to the rules of evidence, except that written reports of expert witnesses shall be admissible in evidence and matters involving chain of custody shall be exempt from such rules” violates the federal confrontation clause. *State v. Randolph*, 933 A.2d 1158, 1186 n. 8, 1191 n. 15 (Conn. 2007) (quoting Conn. Gen. Stat. § 54-46a) (not mentioned in Boudin’s Appendix B). The State and Boudin are thus incorrect in asserting that Connecticut is a state that “allow[s] hearsay at the preliminary hearing”.

The State also lists Colorado as a state that allows hearsay at the preliminary hearing, but as Boudin points out,

Colorado does not apply the rules of evidence to preliminary hearings, but its courts have been unwilling to allow the prosecution to rely solely on hearsay evidence if the perceiving witness is available to testify. In [2009], in *People v. Huggins*, [220 P.3d 977, 980 (Colo. App. 2009)] the Colorado Appeals Court also created guardrails to limit the abuse of hearsay at preliminary hearings. Specifically, “[t]he prosecution satisfies the minimum requirement for nonhearsay if it (1) presents some competent nonhearsay addressing essential elements of the offense, and (2) presents hearsay testimony through a witness who is connected to the offense or its investigation and is not merely reading from a report.” [*Id.*] These guardrails help preserve the adjudicative value of preliminary hearings, but they are not as rigorous as the rules of evidence.

Boudin, at 1170 (footnotes omitted). This system is a far cry from Utah’s system, as is California’s system, another jurisdiction the State claims allows hearsay at preliminary hearings.

As Boudin again explains,

In California the rules of evidence generally apply at preliminary hearings with a couple of significant, though limited exceptions. Since the passage of Prop. 115 in 1990, one layer of hearsay evidence via a sworn peace officer is admissible at a preliminary hearing. This ability to introduce one layer of hearsay is equally available to the defense and the prosecution. The defense may also, in some circumstances, call the declarant as a witness even if the prosecutor did not. A second way California relaxes the rules of evidence for preliminary hearings is that the best evidence rule does not apply, meaning copies of documents can be used rather than the originals. While these evidentiary exceptions somewhat diminish the adjudicative value of a preliminary hearing, they still permit robust hearings compared to other jurisdictions. For example, a prosecutor in California could not establish probable cause by simply having a case agent summarize a police report.

*Id.* at 1172-73 (footnotes omitted).

The State also lists Delaware as a state that allows hearsay at a preliminary hearing, but as Boudin’s Appendix B points out, (Boudin, at 1219), the Delaware Supreme Court held that there is “no requirement that Justice of the Peace first determine if such hearsay is reliable, unless [the] Justice of the Peace in his discretion believes inquiry into credibility of witnesses or

reliability of information is necessary to satisfy himself that probable cause exists.” *Schramm v. State*, 366 A.2d 1185, 1192 (Del. 1976). In Utah, that discretion has been removed by operation of Rule 1102, which simply declares that a vast amount of proffered hearsay is “reliable.”

The State also lists Iowa as a state that allows hearsay at a preliminary hearing. *See Opp.* at 9-10 n.1; Boudin, at 1220. However, Iowa’s Rule of Criminal Procedure 2.2(4)(c) specifically provides, “The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.”<sup>2</sup> Again, in Utah, the judicial decisions mandated by Iowa’s Rule 2.2(4) have been supplanted by reliability determinations made by the legislature.

The State also lists Pennsylvania as a state that allows hearsay at a preliminary hearing, but in *Commonwealth v. McClelland*, 233 A.3d 717, 721, 735-36 (2020), the Pennsylvania Supreme Court held that hearsay evidence alone was insufficient to establish a prima facie case at a preliminary hearing, and it left standing a lower court ruling that the Commonwealth may not satisfy its burden by presenting the testimony of a mouthpiece parroting multiple levels of rank hearsay. *See* Boudin, at 1169 n. 217 (Pennsylvania allows hearsay “with some meaningful limitations”).

Finally, the State lists Florida, Indiana, Iowa, Missouri, North Dakota, and Vermont as states that allows hearsay at a preliminary hearing (*Opp.* at 9-10, n.1), yet as Boudin points out, “six states afford criminal defendants a broad right to depose witnesses in the case against them: Florida, Indiana, Iowa, Missouri, North Dakota, and Vermont.” Boudin, at 1180 (footnote

---

<sup>2</sup> Available at <https://www.legis.iowa.gov/law/courtrules/courtruleslistings>.

omitted). The pretrial criminal justice procedures of these states are in no way comparable to the procedure in Utah, where no such “broad right to depose witnesses” exists.

These examples are by no means exhaustive, but illustrative of the fact that the State’s assertion that 44 states “allow hearsay at a preliminary hearing” is an oversimplification of what is actually occurring within these states.

Fifth, the State’s approach ignores the undeniable fact that many positive changes in constitutional law occur against a background of massive legislative and other resistance to such changes. For instance, “[f]or most of U.S. history, the vast majority of state criminal defendants did not have the right to a court-appointed attorney.” Georgetown Law, Indigent Criminal Defense Research Guide, *The Law Before Gideon* (Last Updated Feb. 20, 2025, 2:47 PM) <https://guides.ll.georgetown.edu/c.php?g=363469&p=2455701>. That legislative consensus did not prevent the Supreme Court from holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that under the Sixth and Fourteenth Amendments indigent defendants were entitled to the appointment of counsel in felony cases, and that decision was made despite the fact that it had massive consequences to the existing criminal justice practices. *See, e.g., Betschart v. Oregon*, 103 F.4th 607, 615 (9th Cir. 2024) (noting that “the State of Florida released, or released and retried, over 4,000 prisoners after the Supreme Court issued its decision in *Gideon*.”); *U.S. ex rel. Durocher v. LaVallee*, 330 F.2d 303, 315 (2d Cir. 1964) (Friendly, J., concurring) (noting that “[t]he [*Gideon*] question must have been raised in scores of the many hundred pro se applications from state prisoners which deluged the Supreme Court and other federal courts in the years prior to March 1963”; “[b]y 1963 they were in the prisons of most of the fifty states thousands of defendants who had pleaded guilty without [counsel]”).

As another example, prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), the country “had experienced more than a half-century of state-sanctioned segregation[.]” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 293 (2022). But that consensus did not prevent the Supreme Court from overruling the infamous decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Yet under the State’s analysis, *Plessy* should have been upheld because of a preexisting national consensus.

In other words, legislation restricting the rights of criminal defendants adopted by a majority of states may reflect current public and political opinion that such rights should be restricted. But as the Supreme Court emphasized in *Dobbs*, “[t]he Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.” 597 U.S. at 291 (citation omitted).

Lastly, the State’s focus on an inaccurate comparison of current state practices ignores another constitution precept stressed in *Dobbs*, which is that in determining whether a right is guaranteed by the Constitution, “the Court has long asked whether the right is deeply rooted in [our] history and tradition and whether it is essential to our Nation’s “scheme of ordered liberty. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.” *Dobbs*, 597 U.S. at 237-238 (internal citations omitted). Mr. Robinson’s *Motion*, but not the *Opposition*, takes such an approach in arguing that in *Gerstein* the Court concluded that

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. *See Coleman v. Alabama*, [399 U.S. 1, 90 (1970)]; Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 957–967, 996–1000 (4th ed.

1974). The standard of proof required of the prosecution is usually referred to as ‘probable cause,’ but in some jurisdictions it may approach a prima facie case of guilt. ALI, Model Code of Pre-arraignment Procedure, Commentary on Art. 330, pp. 90–91 (Tent. Draft No. 5, 1972). *When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination.* This kind of hearing also requires appointment of counsel for indigent defendants.

*Gerstein v. Pugh*, 420 U.S. 103, 119-20 (1975) (further citation omitted) (emphasis added).

As was held in *Crawford v. Washington*, 541 U.S. 36, 43 (2004), “[w]e must ... turn to the historical background of the [Confrontation] Clause to understand its meaning”, and that historical background, fully consistent with *Coleman*’s description of the adversary hearings “customarily employed” at a preliminary hearing, firmly establishes that:

- (1) “[t]he common-law tradition is one of live testimony in court subject to adversarial testing,” (*Crawford*, 541 U.S. at 43);
- (2) “by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases” (*id.* at 46);
- (3) an initial proposed Federal Constitution that did not include a right of confrontation was criticized on the grounds that “[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question”, and that “[w]ritten evidence ... [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth” (*id.* at 49) (citations omitted);
- (4) “it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine” (*id.*) (citation omitted); and
- (5) “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused (*id.* at 50).

It is this historical background, and not any false comparisons of current practices, that must guide the Court’s analysis of Mr. Robinson’s motion.

## ARGUMENT

### I. Utah Constitution, Article 1, Section 12 and Rule 1102 violate Mr. Robinson's Sixth Amendment Right to the Effective Assistance of Counsel.

As a foundational objection to the consideration of this claim, the State advances the novel proposition that Mr. Robinson's multiple constitutional challenges must stand or fall on the Sixth Amendment right to confrontation, and that this Court must ignore all other provisions of the Federal Constitution, including the Sixth Amendment right to the effective assistance of counsel, and the Fourteenth Amendment guarantees of procedural due process and equal protection. *See Opp.* at 10-13. This argument is flawed in a number of respects.

First, the proposition was specifically rejected long ago in *Powell v. State of Ala.*, 287 U.S. 45, 67-68 (1932), where, after a comprehensive review of the cases on this issue, the Court concluded:

The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right 'to have the Assistance of Counsel for his defence.' In the face of the reasoning of [*Hurtado v. California*, 110 U.S. 516 (1884) (reasoning that the Fourteenth Amendment did not guarantee the right to an indictment in a state prosecution because such a right was not included in the Fifth Amendment's Grand Jury Clause)], if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* Case does not stand alone. In the later case of *Chicago, Burlington & Q.R. Co. v. Chicago*, [166 U.S. 226, 241 (1897)], this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in [*Village of Norwood v. Baker*, 172 U.S. 269, 277 (1898)]; *Smyth v. Ames*, 169 U.S. 466, 524 [(1898) overruled by *Fed. Power Comm. v. Natural Gas Pipeline*, 169 U.S. 466 (1942)], and *San Diego Land & Town Company v. National City*, 174 U.S. 739, 754 [(1899)].

Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right. *Gitlow v. People of State of New York*, 268 U.S.

652, 666 [(1925)]; *Stromberg v. California*, 283 U.S. 359, 368 [(1931)]; *Near v. Minnesota*, 283 U.S. 697, 707 [(1931)].

These later cases establish that notwithstanding the sweeping character of the language in the *Hurtado* Case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ [*Hebert v. State of Louisiana*, 272 U.S. 312, 316 (1926)], is obviously one of those compelling considerations which must prevail in determining whether [a right] is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U.S. 78, 99 [(1908), overruled by *Mallow v. Hogan*, 378 U.S. 1 (1964)] where Mr. Justice Moody, speaking for the court, said that: “\* \* \* It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. [*Burlington*, 166 U.S. at 226]. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.”

In other words, the fact that the Confrontation Clause establishes a right to confront and cross examine witnesses does not preclude that same right from being guaranteed by other provisions of the constitution, such as the Sixth Amendment right to the effective assistance of counsel or the Fourteenth Amendment rights to procedural due process and equal protection. *See, e.g., McCray v. State of Ill.*, 386 U.S. 300, 312-13 (1967) (reaching the merits of the defendant’s claims that the failure to disclose an informant’s identity at a suppression hearing violated the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment right to confrontation).

This fundamental constitutional principle is well illustrated by *Matter of Crim. Investigation*, 754 P.2d 633, 650 (Utah 1988), *superseded by statute as stated in Kearns v. Tribune Corp. v. Wilkinson*, 946 P.2d 372, 375 (Utah 1997). There, the constitutionality of the

Subpoena Powers Act in effect at the time was challenged under the Fourth Amendment, the Fifth Amendment privilege against self-incrimination, and the Fourteenth Amendment procedural due process right to confront and cross-examine witnesses, but not under the Confrontation Clause. *See generally id.* The Utah Supreme Court concluded that it must interpret the Act “in accordance with the requirements of several federal and state constitutional provisions which provide the basis for a sensible interpretation of the Act and allow us to give it practical effect.” *Id.* at 640; *see also id.* at 650 (“we must determine what form of ‘process’ is due under the fourteenth amendment and what procedural protections the state must afford one who is the potential target of a Subpoena Powers Act investigation”).

The Court went on to hold that the Fourteenth Amendment right to confront and cross examine witnesses did not apply to a Subpoena Powers Act investigation because it was investigatory in nature, but importantly for the present case the court distinguished “[a]djudicative proceedings”, which are “essentially judicial in nature and result in binding determinations that directly affect legal rights”, where “[t]he full panoply of procedural safeguards available in judicial proceedings are therefore available in adjudicative proceedings, including the rights to present evidence and cross-examine witnesses.” *Id.* at 651. According to the State here, the Utah Supreme Court had no authority to reach the merits of the Fourteenth Amendment claim because the Confrontation Clause only applies at the trial and is the sole source of confrontation rights. However, this reasoning is refuted by *Matter of Crim. Investigation* and is inconsistent with the constitutional principles established in *Powell*.

Second, the State’s argument rests primarily on the plurality opinion in *Albright v. Oliver*, a case arising from a 42 U.S.C. § 1983 civil rights action involving a Fourth Amendment claim which concluded that “[w]here a particular Amendment ‘provides an explicit textual source of

constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

As the Tenth Circuit correctly observed in *Becker v. Kroll*, in cases like *Albright*, "[t]he Court has been careful to tie all actions under § 1983 to specifically protected constitutional rights in order to avoid creating a free-standing constitutional tort regime under § 1983." 494 F.3d 904, 915 (10th Cir. 2007). The State here is trying to apply *Albright* totally divorced from the context in which the case was decided. Mr. Robinson's challenges are not being brought in a § 1983 civil rights action and he is not alleging a substantive due process violation. The concerns underlying *Albright* are irrelevant and do not overrule the Supreme Court's holding in *Powell*, which was a criminal case. *See also Taylor v. Meacham*, 82 F.3d 1556, 1561 n. 5 (10th Cir. 1996) ("As many courts have observed, in many ways *Albright* muddied the waters rather than clarified them. *Albright*'s discussion about the Fourth Amendment governing pretrial deprivations of liberty is *dicta*, inasmuch as Mr. Albright never alleged a Fourth Amendment violation. Thus, the Supreme Court specifically avoided deciding whether a Fourth Amendment malicious prosecution claim would succeed.").

Third, the State asserts that in two other civil rights cases, *Becker* and *Pino v. Higgs*, 75 F.3d 1461, 1469 (10th Cir. 1996) the Tenth Circuit extended the reasoning of the *Albright* plurality opinion to procedural due process claims. *See Opp.* at 12-13. The State interprets this to mean that Mr. Robinson's Sixth Amendment right to counsel and Fourteenth Amendment procedural due process or equal protection guarantees do not extend to Mr. Robinson's preliminary hearing, which is allegedly governed solely by the Fourth Amendment. *Id.* Once again, the State has improperly lifted these cases out of the context in which they were decided.

More fundamentally, this argument completely ignores the Supreme Court’s decision in *Gerstein* and fails to inform the Court of the limitations of *Becker*, *Pino* and other like cases.

More specifically, the State’s argument overlooks that in *Gerstein*, the Supreme Court held that the Fourth Amendment was the constitutional provision to use *when evaluating questions of probable cause for arrest and detention*, but carefully distinguished the later preliminary hearing stage of a case where the Court concluded, without reference to the Fourth Amendment, that “[a] full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury”, that “[w]hen the hearing takes this form, adversary procedures are customarily employed” and that “[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination.” 420 U.S. at 119-20. *See also* *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 55 (1991) (“The Court recognized in *Gerstein* that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly.”); *Taylor*, 82 F.3d at 1564 (distinguishing a Fourth Amendment claim based on an unlawful seizure from one arising from the conduct of “a preliminary hearing, which, under Utah law is an adversarial proceeding”).

In other words, the deprivation of liberty inherent in an initial arrest or detention is not the same thing as determining what procedures are required at an adversary preliminary hearing, or even determining what restrictions can be imposed on a detainee following an arrest or detention. For “evaluating the constitutionality of conditions or restrictions of pretrial detention,” the Supreme Court directs that the “proper inquiry” is “whether those conditions or restrictions amount to punishment of the detainee” under the Due Process Clause. *Bell v. Wolfish*, 441 U.S.

520, 535 (1979). As in *Bell*, in this case “[w]e are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails,” *Id.* at 533-34, but rather with determining what procedures are required by the Sixth Amendment right to the effective assistance of counsel and the Fourteenth Amendment at an adversary preliminary hearing to be conducted months after Mr. Robinson’s arrest.

Further, neither the plurality opinion in *Albright*, nor the Tenth Circuit’s opinions in *Becker*, 494 F.3d at 918-19, and *Pino*, 75 F.3d at 1469, address procedural rights at a preliminary hearing, and *Becker* expressly acknowledges that,

Several cases suggest that at some point in the prosecutorial process, due process concerns can be sufficient to support a claim under § 1983. *See, e.g.,* [*Pierce v. Gilchrist*, 359 F.3d 1279, 1285–86 (10th Cir. 2004) (en banc)]. In *Pierce*, we recognized that “at some point after arrest, and certainly by the time of trial, constitutional analysis [of a malicious prosecution claim] shifts to the Due Process Clause.” 359 F.3d at 1285–86; *see also* *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir.2003) (analyzing knowing use of manufactured evidence and perjured testimony at trial as violations of due process sufficient to support a § 1983 malicious prosecution claim); *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir.1997) [*abrogated on other grounds in Wilkins v. Gaddy*, 559 U.S. 34 (2010)] (holding that once a suspect is subject to pre-trial detention, due process governs the conditions of ongoing custody).

494 F.3d at 920. *Accord* *Shimomura v. Carlson*, 811 F.3d 349, 361 (10th Cir. 2015).

*Riley v. Dorton*, is particularly instructive in rebutting the State’s argument that Mr. Robinson is confined to raising a Fourth Amendment challenge to preliminary hearing procedure. In *Riley*, the Fourth Circuit refused to apply a Fourth Amendment analysis to the plaintiff’s excessive force claim, stressing that “[t]he Fourth Amendment governs claims of excessive force during the course of an arrest, investigatory stop, or other “seizure” of a person. The events about which Riley complains, however, took place at least two hours and ninety miles from the time and place of Riley’s arrest.” *Riley*, 115 F.3d at 1161-62 (citing *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989) (“It is clear...that the Due Process Clause protects a

pretrial detainee from the use of excessive force that amounts to punishment.”)). The court elaborated that “[a] review of the Supreme Court’s basic jurisprudence reinforces our refusal to adopt the ‘continuing seizure’ theory of the Fourth Amendment. Decades of Fourth Amendment precedent have focused on the initial deprivation of liberty[,]” citing to numerous cases, including *Gerstein. Id.* at 1162-63.<sup>3</sup>

Finally, not even the cases cited by the State adopt the State’s proposed radical departure from constitutional principles. *See, e.g., United States v. Andrus*, 775 F.2d 825, 836 (7th Cir. 1985) (“[e]ven though the admission of out of court statements at a pretrial hearing may not violate the confrontation clause, the statements may still be an impermissible basis upon which to find the coconspirator’s declarations admissible.”); *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010) (addressing whether the admission of hearsay evidence at a preliminary hearing violates defendants’ rights to compulsory process or procedural due process); *State v. O’Brien*, 850 N.W.2d 8, 23 (Wis. 2014) (addressing whether the admission of hearsay evidence at a

---

<sup>3</sup> *See also Page v. King*, 932 F.3d 898, 904 (9th Cir. 2019) (upholding a defendant’s right to assert a due process procedural challenge to his preliminary hearing procedure because “Page’s claim is closely analogous to the claim in *Gerstein*: The defendant in *Gerstein* challenged the state’s refusal to hold a probable cause hearing, while Page challenges the state’s alleged failure to hold a *constitutionally adequate* probable cause hearing.” (emphasis in original)); *Brothers v. Klevenhagen*, 28 F.3d 452, 456 (5th Cir. 1994) (rejecting the contention that the Fourth Amendment must govern post-arrest encounters; “First, the text of the Fourth Amendment—prohibiting unreasonable “seizures”—does not support its application to a post-arrest encounter. Second, the Supreme Court has refused to apply the Fourth Amendment to protect inmates after incarceration. And third, *Graham* and *Bell v. Wolfish* [ ] (refusing to concede that Fourth Amendment applied to pretrial detainee subjected to body cavity search), dictate that the Due Process Clause is the appropriate constitutional basis for pretrial detainee excessive force suits.”); *Wilkins v. May*, 872 F.2d 190, 192-93 (7th Cir. 1989) (endorsing the position that the Fourth Amendment’s text limits “seizure” to the “initial act of seizing.”); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (“[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment’s Due Process Clause”).

preliminary hearing violates defendants' rights to compulsory process, effective assistance of counsel, or procedural due process).

When the State finally reaches the merits of Mr. Robinson's Sixth Amendment right to the effective assistance of counsel claim, its arguments are extremely thin and easily refuted.

The State first argues that Mr. Robinson's claim that the right to confront and cross examine hearsay declarants is necessary to effectuate his Sixth Amendment right to the effective assistance of counsel at a critical stage of the proceedings is "demonstrably false" because:

Although a defendant has the right to counsel at sentencing, *see State v. Cabrera*, 2007 UT App 194, ¶ 11, 163 P.3d 707, the rules of evidence do not apply and reliable hearsay is admissible, *see State v. Robinson*, 2018 UT App 227, ¶ 27, 438 P.3d 35 ("The rules of evidence in general, and the rules on hearsay exclusions in particular, are inapplicable in sentencing proceedings.") (quoting *State v. Sanwick*, 713 P.2d 707, 709 (Utah 1986)); *see also* Utah R. Evid. 1101(c) (providing that the Utah Rules of Evidence do not apply at sentencing).

*Opp.* at 17. This analogy is flawed in a number of respects.

First, none of three Utah cases cited by the State address the issue of whether the right to confront and cross examine hearsay declarants is necessary to effectuate the Sixth Amendment right to the effective assistance of counsel at a critical stage of the proceedings. *Cabrera* actually cuts against the State's Confrontation Clause argument because, like *Coleman v. Alabama*, it demonstrates that the Sixth Amendment applies outside the context of the trial itself and extends to sentencing proceedings. *Cabrera*, 2007 UT App 194, ¶ 11.

*Robinson* only addressed the defendant's contention that "Robinson contends that the district court plainly erred because police reports and photographs are insufficiently reliable to satisfy due process." 2018 UT App 227, ¶ 26. The court confirmed that "[d]ue process requires that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence", and that, in contrast to Utah's preliminary hearing procedure, it

is up to the judge (not the legislature) to determine “if the evidence in question had indicia of reliability and was relevant in sentencing.” *Id.* (quotation marks and citations omitted).

The State also cites *State v. Sanwick*, 713 P.2d 707, 709 (Utah 1986) (per curium) for the proposition that “[t]he rules of evidence in general, and the rules on hearsay exclusions in particular, are inapplicable in sentencing proceedings.” *Opp.* at 17. However, the State fails to point out that in that case the Utah Supreme Court also added the important qualification that “it does not follow, however, that a defendant must stand mute in the face of allegations which he claims are untrue” because, as was held in *State v. Johnson*, 618 P.2d 759 (Idaho 1980), “[h]earsay was admissible as long as the defendant had the opportunity to rebut the adverse evidence and to challenge the reliability of the evidence presented”, and as was held in *State v. King*, 601 P.2d 982 (Wash. App. 1979), “due process considerations come into play at the time of sentencing and require that if hearsay allegations incorporated in a presentence report are challenged [that] defendant be given a chance to rebut them.” *Sanwick*, 713 P. 2d at 709. The *Sanwick* Court also agreed with defendant’s argument that he had a statutory right of confrontation at sentencing. *See id.* at 709 (“Defendant maintains he could never refute or disprove such vague accusations except through cross-examination of his daughters. These arguments form the underpinnings for his request that upon remand he be permitted to confront his daughters and that his sentence be redetermined in light of their cross-examination. He claims that section 77–18–1(4) of the Code of Criminal Procedure mandates that the sentencing court ‘shall hear any testimony ... the defendant ... may wish to present concerning the appropriate sentence.’ We have no quarrel with defendant’s interpretation of the statute.”).<sup>4</sup>

---

<sup>4</sup> This current version of this provision is exactly the same but has been redesignated as Utah Code § 77-18-103(9)(a) (“At the time of sentence, the court shall receive any testimony, evidence, or information that the defendant or the prosecuting attorney desires to present

Especially in light of *Sanwick*, the State’s analogy to sentencing proceedings proves too much. For if, as the State suggests, Mr. Robinson should be granted the same procedural rights at his critical stage preliminary hearings that are granted to defendants at critical stage sentencing proceedings, then under *Sanwick* he is entitled as a matter of procedural due process to confront and cross examine hearsay declarations. *Sanwick* also challenges the State’s assertion that confrontation rights must be grounded only in the Sixth Amendment Confrontation Clause.

Lastly, if, as the State contends, we must look to other critical stages of the criminal proceedings to define Mr. Robinson’s procedural rights, then surely, we must look at suppression hearings, a comparison that the State understandably does not bring to the Court’s attention. Suppression hearings are indistinguishable from sentencing hearings and preliminary hearings in that all three are critical stages at which the right to counsel attaches and in which hearsay evidence is allowed. *See United States v. Raddatz*, 447 U.S. 667, 679 (1980) (“At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.”).

Yet numerous cases hold that the right to confrontation extends to suppression hearings precisely because they are a critical stage of the proceedings at which the accused is entitled to the Sixth Amendment right to the effective assistance of counsel. *See State v. Curry*, 2006 UT

---

concerning the appropriate sentence.”). The statutory right to confrontation at sentencing is also extended to those convicted defendants who are accused of probation or parole violations. *See* Utah Code § 77-18-108(3)(e) (“The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant, unless the court for good cause otherwise orders.”); Utah Code § 77-27-11(5)(b) (“The board or the board’s appointed examiner shall provide the parolee the opportunity: . . . (iv) to confront and cross-examine adverse witnesses, absent a showing of good cause for not allowing the confrontation.”).

App 390, ¶ 9-10, 147 P.3d 483 (suppression hearing was a critical stage where counsel must be present to cross-examine the prosecution’s witness).<sup>5</sup>

The State’s next argument, although not clear, seems to be centered in the notion that “the right to counsel cannot create any additional substantive right, because the [*Strickland v. Washington*, 466 U.S. 668 (1984)] standard for gauging counsel’s effectiveness is incompatible with that notion.” *Opp.* at 17. However, as was held in *Matter of Crim. Investigation*, “[a]lthough a court cannot supply substantive terms that are absent from a statute... it not only may, but must supply omitted procedural elements that are necessary to implement legislation consistent with constitutional requirements.” 754 P.2d at 640–41 (citing *Kennecott Copper Corp. v. Anderson*, 514 P.2d 217, 219 (Utah 1973)) (collecting cases). One of those “constitutional requirements”, as established in *Strickland*, is the right to the effective assistance of counsel. In the context of a preliminary hearing,

---

<sup>5</sup> See also *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994) (a suppression hearing is a critical stage of the prosecution and “any limitations on the right of cross-examination ... must be justified by weighty considerations”) (internal quotation marks and citations omitted); *United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (because of the historical and practical importance of the right of cross-examination, any limitations on the right at the suppression hearing must be justified by weighty considerations); *United States v. Clark*, 475 F.2d 240, 246-47 (2d Cir. 1973) (the defendant has a right to be present at a pretrial suppression hearing “held to determine the constitutionality of a seizure of evidence from an accused”; defendant was “entitled to assist his counsel in cross-examining [the prosecution’s] witnesses and in developing [ ] matters further at the suppression hearing.”); *Curry v. State*, 228 S.W.3d 292, 297 (Tex. Ct. App. 2007) (the Confrontation Clause applies at a suppression hearing because it is a “critical stage” of the criminal prosecution); *State v. Ehtesham*, 309 S.E.2d 82 (W. Va. 1983) (per curiam) (suppression hearing should be “a meaningful hearing, at which both the state and the defendant should be afforded the opportunity to produce evidence and to examine and cross-examine witnesses” (citation omitted); defendant’s right denied where judge refused defense opportunity to cross examine officer who obtained search warrant); *State v. Sigerson*, 282 So. 2d 649, 651 (Fla. App. 1973) (“The hearing on the motion to suppress, while not deciding the guilt or innocence of the appellee, is clearly a critical stage of the prosecution and the confrontation clause of the Sixth Amendment to the United States constitution guarantees an accused in a criminal case the right to confront the witnesses against him.”).

Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over.

*Coleman*, 399 U.S. at 9. *See also Gerstein*, 420 U.S. at 120 (“The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination.”); *Pearce v. Cox*, 354 F.2d 884, 890 (10th Cir. 1965) (“We hold that preliminary examination, from the arraignment of the defendant until the end of the examination, is a critical stage of the criminal proceedings against the defendant. This, because a defendant needs ... the assistance of counsel in cross-examining the state's witnesses at the preliminary examination”).

Indeed, one of the very cases cited by the State at page fourteen of its *Opposition* broadly endorses the Sixth Amendment principle set forth in *Coleman*, *Gerstein*, and *Pearce*. In *State v. Montes*, the Utah Court of Appeals wrote:

The examination and cross-examination of witnesses also constitutes a critical stage of the criminal process. The United States Supreme Court has stated that a preliminary hearing is a “critical stage” in the criminal process precisely because it involves the examination and cross-examination of witnesses: “[T]he lawyer's skilled examination and cross-examination of witnesses [during a preliminary hearing] may expose fatal weaknesses in the State's case.... [T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial....” [*Coleman*, 399 U.S. at 9]; *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 239 [ ] (1973) (The “right of cross-examination ... is an essential safeguard to [a defendant's] right to confront the witnesses against him.”). The inability of an accused to realize the advantages of effective examination and cross-examination absent a lawyer's assistance makes a preliminary hearing “a critical stage of the State's criminal process at which the accused is as much entitled to such aid of counsel as at the trial itself.” *Coleman*, 399 U.S. at 10 [ ] (cleaned up). Part of a lawyer's value is assisting the accused by making informed and experienced judgment calls about when and to what extent, if at all, to engage in examination and cross-examination of witnesses. Thus, where courts have recognized the critical nature of examination and cross-examination of witnesses at preliminary

proceedings, it follows, a fortiori, that the examination of witnesses marks a critical stage of the trial itself.

2019 UT App 74, ¶ 38, 442 P.3d 1247.

The State's last argument is that this Court should follow *State v. O'Brien*, which reasoned that "[t]he admission of hearsay at a preliminary hearing does not infringe on defendants' right to assistance of counsel," because "the constitution does not require that counsel be allowed to play the same role at a preliminary examination as counsel at trial." *Opp.* at 18 (quoting *O'Brien*, 850 N.W.2d at 19-20 (quotation marks and citation omitted)). This reasoning simply begs the question of what role counsel is required to play at the preliminary hearing. *Coleman*, *Gerstein*, *Crawford* and *Montes* authoritatively answer that question and require that counsel be allowed to confront and cross examine hearsay declarants at a preliminary hearing.

## **II. Utah Constitution Article 1, Section 12 and Rule 1102 violate Mr. Robinson's Fourteenth Amendment Rights to Procedural Due Process and Equal Protection.**

The State's principal response to this claim is that the Fourteenth Amendment's Due Process Clause cannot indirectly impose a right to confrontation because that right is exclusively governed by the Confrontation Clause. *See Opp.* at 13. As argued above, this argument is inapposite to the law.

The State's back-up argument is that "[g]iven the extremely limited nature of a preliminary hearing, due process does not demand a right to confrontation at that hearing and the corresponding ability to prevent the admission of hearsay." *Opp.* at 14. This reasoning is contradicted by *Coleman*, which recognized and stressed the limited nature of a preliminary hearing, but nonetheless concluded that the Sixth and Fourteenth Amendments required that a

defendant be provided with the effective assistance of counsel at a preliminary hearing so that the attorney could effectively exercise the right to cross examine his accusers. 399 U.S. at 7-9.

Contradicting itself, the State then argues that “[d]espite this very limited purpose of a preliminary hearing, a defendant is nevertheless entitled to counsel and to cross-examine *any witness that the prosecution calls at the hearing.*” *Opp.* at 14 (citing *Montes*, 2019 UT App 74, ¶ 38) (emphasis added). The referenced passage from *Montes* is quoted in full above, and a fair reading of it indicates that the court’s statement that “a preliminary hearing is a ‘critical stage’ in the criminal process precisely because it involves the examination and cross-examination of witnesses” was premised on the assumption that the preliminary hearing being discussed was the customary one discussed in *Coleman* where witnesses are called to meet the State’s burden of establishing probable cause as to each and every element of the charged offense, and the defendant is then entitled to have counsel cross examine those witnesses. The Court did not hold or even imply, that the right to confrontation it recognized was limited only to “any witness the prosecution calls at the hearing” under a procedure like the one established by article 1, section 12 and Rule 1102 where the State need not call *any* witness to establish the essential element of the charged offense, but can establish those elements based exclusively on hearsay evidence that the legislature mandates must be considered reliable. Such a system intolerably diminishes the federal constitutional rights to counsel and to confrontation established by *Coleman* and emphasized by *Montes*.

The State next argues that “[a] defendant also has the right to call witnesses, to testify himself, and to argue that the prosecution’s evidence is insufficient (citing Utah R. Crim. P. 7B)”, and that “Defendant has not shown why these procedural protections are inadequate to satisfy due process given the limited nature of a preliminary hearing.” *Opp.* at 14. This argument

is disingenuous in light of the position that the State took in Dkt. 476 in which it vigorously opposed a continuance of the preliminary hearing and argued that once the State established a prima facie case based entirely on hearsay evidence that the Court was required to consider as reliable, the defense had no right to call any witnesses, expert or otherwise. *See* Dkt. 476 at 5 (emphasizing that “rule 1102(b)(4) of the Utah Rules of Evidence deems ‘scientific, laboratory, or forensic reports and records’ to be reliable hearsay admissible without foundation or the testimony of their author”); *id.* at 6 (“even if Defendant could show that expert testimony and additional expert discovery would defeat expert conclusions tying him to the murder, it would not defeat probable cause”); *id.* at 8 (emphasizing that “[t]he findings of probable cause may be based, in whole or in part, on reliable hearsay” and that “[b]y definition, [hearsay expert reports] are reliable hearsay...” (citations omitted)). In fact, Dkt. 476 goes so far as to concede that if the preliminary hearing is conducted in accordance with article I, section 12, and Rule 1102, the defendant’s constitutional right to have effective assistance of counsel to cross examine witnesses will be rendered meaningless. *See* Dkt. 476 at 9 (quoting *State v. Goins*, 2017UT 61, ¶ 34, 423 P.3d 1236 for the proposition that “[a] defense attorney who assumes that the magistrate will conduct a preliminary hearing that comports with article I, section 12 does not have an incentive to prepare to thoroughly cross-examine on credibility.”)).

Further, like its citation to *Sanwick*, the State’s reliance on Utah Rule of Criminal Procedure 7B for the proposition that “[a] defendant also has the right to call witnesses” proves too much. *Opp.* at 14. Rule 7B(a) does in fact state that “[a]t the conclusion of the state’s case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.” As indicated above, in *Sanwick* the Utah Supreme Court agreed with the defendant that the similarly worded Utah Code § 77-18-103(9)(a) guaranteed the

right to cross examine hearsay declarants at a sentencing hearing. *Sanwick*, 713 P.2d at 709. The same result should follow here given the State’s insistence that preliminary hearings are comparable to other hearings held for purposes of determining procedural rights.

The State again urges the Court to follow the Wisconsin Supreme Court in *O’Brien*, which rejected a similar due process claim based solely on the reasoning that “[t]he United States Supreme Court has determined that informal proceedings are sufficient for probable cause determinations.” *Opp.* at 14 (quoting *O’Brien*, 850 N.W.2d at 20 (citing *Gerstein*, 420 U.S. at 121)). The Court should decline the invitation because *O’Brien* is not only inconsistent with *Matter of Crim. Investigation* and *Sanwick*, but its reasoning represents a gross misreading of *Gerstein*.

As Mr. Robinson’s motion explains at pages five through six, the Court in *Gerstein* took great pains to distinguish the non-adversarial probable cause determination required by the Fourth Amendment and referenced by *O’Brien*, from the formal adversary preliminary hearing at issue in *Coleman*. *See also Gerstein*, 420 U.S. at 120 (describing the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses available at the “full preliminary hearing...modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury” and then stating that “[t]hese adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment.”); *Williams v. Kobel*, 789 F.2d 463, 468-69 (7th Cir.1986) (discussing the distinction between the probable cause determination under Illinois law at the preliminary hearing for binding over for trial and the probable cause required to make a warrantless arrest); *Lewis v. Dart*, 2010 WL 2990101, at \*3 (N.D. Ill. July 22, 2010) (“The ‘probable cause’ determination in the preliminary hearing is to determine if there is

a reason to hold the accused over for trial, not whether there was probable cause to arrest and detain as required by *Gerstein*.”).

The State also asks the Court to rely on the terse reasoning of *Peterson v. California*, which rejected a procedural due process claim similar to the one raised here with the comment that “[i]f the phrase ‘due process of law’ in the Fifth Amendment does not prohibit the use of hearsay in grand jury proceedings, then the same phrase in the Fourteenth Amendment cannot be read to prohibit the use of hearsay evidence at a preliminary hearing.” *Opp.* at 15 (quoting *Peterson*, 604 F.3d at 1171). If this logic was sound, and it was really true that a defendant’s rights at a preliminary hearing must be restricted to the rights granted at a grand jury proceeding, then *Coleman* would have rejected out of hand defendant’s claim of entitlement to the effective assistance of counsel at a preliminary hearing because there is obviously no right to counsel at grand jury proceedings. *Peterson* is not persuasive.

Lastly, the State claims that Mr. Robinson’s equal protection claim is flawed because “he makes no effort to explain how a parolee facing the reimposition of the remainder of his prison sentence is similarly situated to a pretrial detainee, who will not be subject to a prison sentence without first being convicted at trial with full confrontation rights.” *Opp.* at 20. Mr. Robinson’s motion at pages ten to fifteen explains in great detail how parolees are similarly situated to a pretrial detainee like Mr. Robinson who is facing the same *prolonged pretrial detention* that a parolee is facing when he is detained on a parole violation and faces revocation. The State’s sleight of hand in substituting the words “prison sentence [following a trial and conviction]” for the words “prolonged pretrial detention” in the foregoing comparison is an apples and oranges comparison that incorrectly assumes that fundamental constitutional protections such as the right to counsel and the right to confront and cross examine hearsay declarants have no role to play in

any context outside a criminal trial itself. *Morrissey v. Brewer*, 408 U.S. 471 (1972), and the Supreme Court’s rulings cited in Mr. Robinson’s *Motion* requiring such protections in a civil context refute the premise of this illogical comparison. And as the Ninth Circuit has held in response to the identical argument made with respect to the Sixth Amendment right to counsel:

Again citing no authority, the dissent claims that “the harm the Sixth Amendment protects against is a conviction obtained through uncounseled critical stages” and that “[t]here’s no *independent* Sixth Amendment protection against being held in pretrial custody without counsel.” In other words, the dissent apparently believes there is *no* Sixth Amendment protection for those jailed by the state before conviction, when they are presumed innocent, and that Sixth Amendment protection only kicks in *after* they have been proven guilty beyond a reasonable doubt. This cannot be correct. The Sixth Amendment’s protection applies to “all criminal prosecutions.” U.S. Const. Amend. VI. The dissent would edit the Sixth Amendment from “prosecutions” to “prosecutions that *result in convictions*.” This view also ignores all of the caselaw, ... holding that the Sixth Amendment provides essential protection for defendants awaiting trial.

*Betschart*, 103 F.4th at 618 (emphases in original).

### **III. Article 1, Section 12 and Rule 1102 Violate the Due Process Clause of the Fourteenth Amendment Because They Establish an Unconstitutional Mandatory Presumption of Reliability for an Overbroad Range of Hearsay Evidence.**

The State’s response to this claim is again an instance where the State is taking inconsistent positions. The State now claims that Rule 1102 does not create an unconstitutional mandatory presumption because it “merely deem[s] evidence to be *admissible*” and does not create “a mandatory presumption that the evidence is *credible*.” *Opp.* at 15 (emphasis in original). But that is not what the State told the Court in its *Memorandum in Opposition to Defendant’s Motion to Continue Preliminary Hearing*, filed April 3, 2026 (Dkt. 476) where the State emphasized that “Rule 1102(b)(4) of the Utah Rules of Evidence deems ‘scientific, laboratory, or forensic reports and records’ to be reliable hearsay admissible without foundation or the testimony of their author” (*id.* at 5), and that “[b]y definition, [hearsay expert reports] are reliable hearsay[.]” (*id.* at 6). The State’s present position is both inconsistent with its prior

position and with the plain language of Rule 1102 which clearly does much more than deem a broad range of hearsay evidence admissible. Rule 1102 dictates that all such evidence must be deemed by the Court to be “reliable hearsay.” Therefore, unless there is some distinction between “credible” evidence and “reliable” evidence, which the State does not advance, Rule 1102 creates an unconstitutional mandatory presumption. *See State v. Robbins*, 2009 UT 23, ¶¶ 14, 20, 210 P.3d 288 (using “reliable evidence” and “credible evidence” interchangeably).

The State’s remaining responses to this claim are all premised on the clearly erroneous premise that Rule 1102 merely deems certain evidence admissible. For instance, the State claims that “mandatory presumptions are improper only when they pertain to ultimate issues that a factfinder must determine, not merely to the admissibility of certain evidence.” *Opp.* at 16. An ultimate issue that this Court must determine at the preliminary hearing is whether the hearsay evidence that the State will offer to establish the elements of the charged crime is “reliable,” or, in the words of the State, “credible.” Rule 1102 dictates that all such evidence must be deemed “reliable” and thus credible evidence. Because of this Rule it is simply not true, as the State contends, that “[t]he ultimate determination of whether evidence is credible always rests with the factfinder.” *Opp.* at 15.

The State further contends that “if Defendant were correct that presumptions of admissibility are improper, then any number of evidentiary rules would be unconstitutional.” *Opp.* at 16. Once again, as the State itself conceded in Dkt. 476, Rule 1102 does not create a “presumption of admissibility”, but rather, a “presumption of reliability”.

As Mr. Robinson argues in his motion at page nineteen, the fundamental constitutional flaw in Rule 1102 is that it seeks to replace the magistrate’s duty to “assess the credibility of the evidence presented” with a legislatively created irrebuttable presumption that broad categories of

hearsay evidence must be considered “reliable hearsay”. Unlike the rebuttable presumption upheld in *Murray City v. Hall*, 663 P.2d 1314, 1320 (Utah 1983) and *Roosevelt City v. Nebeker*, 815 P.2d 738, 739-40 (Utah Ct. App. 1991) (*see Mtn* at 16-17) the irrebuttable presumption contained in Rule 1102 is not confined to a narrow range of hearsay evidence the reliability of which has “universal acceptance”, it does not leave the ultimate question of reliability of evidence in the hands of the magistrate, it establishes conclusive evidence that the hearsay is reliable, and it does not constitute “a very limited intrusion upon an accused’s right of confrontation.” *Hall*, 663 P.2d at 1320-22. Rule 1102 should therefore be found unconstitutional.

#### **IV. Utah Constitution Article 1, Section 12 and Rule 1102 Violate Mr. Robinson’s Eighth Amendment Right to be Free from Cruel and Unusual Punishment.**

The State’s first response to this claim is that Mr. Robinson’s motion “cites no authority establishing that the heightened reliability required to impose a death sentence applies to pretrial proceedings.” *Opp.* at 20. The State has overlooked Mr. Robinson’s citation to *Ford v. Wainwright*, which broadly proclaims that “[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.” 477 U.S. 399, 411 (1986). The State does not and cannot claim that this case is presently not a “capital proceeding[ ]” or that a preliminary hearing is not a “factfinding procedure.” *Ford* therefore applies to this case. *See also Deck v. Missouri*, 544 U.S. 622, 632 (2005) (“The Court has stressed the ‘acute need’ for reliable decisionmaking when the death penalty is at issue.”).

In making this argument, the State also completely ignores another Eighth Amendment principle that Mr. Robinson invokes at page twenty-one of his motion, which is that “[w]hen a defendant’s life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The State does not and cannot claim that Mr. Robinson’s life is not presently at stake or that the right to confront

hearsay declarants at a preliminary hearing is not encompassed within the broad phrase “every safeguard.”

To the State’s point that there is “no authority establishing that the heightened reliability required to impose a death sentence applies to pretrial proceedings”, California has a long line of cases establishing exactly that proposition. The leading case is *Ghent v. Superior Ct.*, 153 Cal. Rptr. 720, 726–27 (Cal. Ct. App. 1979), where the Court held:

Allegations of special circumstances may produce the penalty of death, which cannot realistically be equated with “additional punishment” because it is Total punishment. (*See Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [].) They are thus distinguishable from “enhancement” allegations on the stark basis that death is distinguishable from life. A further distinction appears in the gross disparity between the consequences of “enhancement” allegations, on the one hand, and allegations of special circumstances on the other.

These distinctions invalidate [cases involving non-capital enhancements] as authority for the Attorney General’s argument that allegations of special circumstances may not be challenged on a section 995 motion [challenging a bindover]. The distinctions also demonstrate that the People, as well as the accused, have an overriding interest in the assurance that these allegations are founded on perceptible evidence showing reasonable cause to make them and to assume their portentous consequences in a prosecution for murder. ... That assurance will be forthcoming only if the prosecuting authorities produce the requisite evidence at the pre-accusatory inquiry on the murder charge And if its sufficiency to support the allegations may be tested in a pretrial procedure which includes appellate review.

*See also Ramos v. Superior Ct.*, 648 P.2d 589, 593 (Cal. 1982) (“Following *Ghent*’s lead, a number of Court of Appeal decisions have confirmed that the adequacy of evidence to support a charged special circumstance allegation may be reviewed under section 995.”).

In contrast to these cases, the State reads the Supreme Court’s Eighth Amendment jurisprudence narrowly, contending that “[w]hile the Eighth Amendment imposes a ‘heightened reliability’ requirement in capital cases, that requirement applies ‘in the determination [ of] whether the death penalty *is appropriate* in a particular case.’” *Opp.* at 20-21 (quoting *Sumner v.*

*Shuman*, 483 U.S. 66, 72 (1987)) (emphasis added). The one sentence that the State plucks out of context from *Sumner* states:

In explaining why the guided-discretion statutes of Georgia, Florida, and Texas were facially valid, but the mandatory statutes of North Carolina and Louisiana were not, the Court relied to a significant degree on the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case.

*Sumner*, 483 U.S. at 72. The State interprets this one sentence to mean that while the Eighth Amendment imposes a heightened reliability requirement in capital cases, that requirement applies *only* “in the determination [ of] whether the death penalty *is appropriate* in a particular case.” *See Opp.* at 20-21. Neither *Sumner* nor any other Supreme Court case so holds, and as the State apparently concedes *Beck v. Alabama*, 447 U.S. 625 (1980) flatly contradicts that notion. *See Opp.* at 21. *See also California v. Ramos*, 463 U.S. 992, 1009 (1983) (“[T]he concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the deliberative process in which the capital jury engages in determining the appropriate penalty, where there is no single determinative issue apart from the general concern that the penalty be tailored to the individual defendant and the offense.”).

The State dismisses *Beck* on the ground that “*Beck’s* holding that jurors must be instructed on lesser-included offenses was based on due process, not a conclusion that the Eighth Amendment’s heightened reliability standard required that result.” *Opp.* at 21. The State is wrong. In *Beck*, the petitioner contended that “the prohibition on giving lesser included offense instructions in capital cases violates both the Eighth Amendment as made applicable to the States by the Fourteenth Amendment and the Due Process Clause of the Fourteenth Amendment by substantially increasing the risk of error in the factfinding process.” 447 U.S. at 632. The Court agreed with this contention, ruling that

To insure that the death penalty is indeed imposed on the basis of “reason rather than caprice or emotion,” we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

*Id.* at 638. The Court then dropped a footnote, which reads: “We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case.” *Id.* at 638 n.14. The State seizes on this footnote as somehow indicating that the Court was placing no reliance on the Eighth Amendment. *Opp.* at 21. However, *Beck* specifically references the death penalty as the basis for the Court’s decision. *See also Howell v. Mississippi*, 543 U.S. 440, 442 (2005) (referring to *Beck* as establishing a “rule of our capital jurisprudence.”); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998) (describing *Beck* as an “Eighth Amendment decision[ ] holding that additional procedural protections are required in capital cases”).

As Mr. Robinson argues, application of article 1, section 12 and Rule 1102 in this case would violate the Eighth Amendment principle of heightened reliability because it would allow the Court to make a critical factual finding necessary for the State’s continued pursuit of the death penalty based on evidence that has not been subjected to the full adversarial testing process, and that is based on an assessment by the Legislature, and not a court, that certain evidence is reliable. *See Mtn.* at 20-21. Further, these unique Utah provisions eliminate the procedural rights of confrontation and cross examination, rights which are afforded even to alleged parole and probation violators. They thus violate another precept of Eighth Amendment jurisprudence, which is that “[w]hen a defendant’s life is at stake, the Court has been particularly

sensitive to insure that every safeguard is observed.” *Gregg*, 428 U.S. at 187. The State’s incorrect legal analysis does not address or rebut these arguments.

Lastly, without citing any authority for the proposition, the State makes the bizarre argument that this Court should apply the appellate concept of harmless error at a point in the proceedings when the Court has the opportunity to prevent the error from ever happening. The State asserts:

Moreover, even if the admission of reliable hearsay at Defendant’s preliminary hearing somehow decreased the reliability of the probable cause determination there, Defendant still would be eligible for the death penalty only if he were later convicted beyond a reasonable doubt at the guilt phase of his trial where the Confrontation Clause would apply. That conviction beyond a reasonable doubt would cure any defect in the preliminary hearing proceeding. *See Thomas v. State*, 2002 UT 128, ¶ 7, 63 P .3d 672 (“[A]n error at the preliminary stage is cured if the defendant is later convicted beyond a reasonable doubt.”) (cleaned up). The Eighth Amendment has no application to this pretrial hearing.

*Opp.* at 22.

A very similar argument was strongly rejected by the Ninth Circuit in the context of a Sixth Amendment right to counsel in *Betschart*,

The dissent ignores ... bedrock Sixth Amendment cases and dismisses every Sixth Amendment violation that occurs prior to a jury verdict as “collateral.” That is incorrect. The Sixth Amendment is not a haphazard jack-in-the-box that occasionally appears when cranked. As the Supreme Court made clear when rejecting a similar argument, it is an ongoing right that persists throughout trial court proceedings. *See [Lafler v. Cooper]*, 566 U.S. 156, 164-65 (2012) (“[T]he Solicitor General claim[s] that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself. The Sixth Amendment ... is not so narrow in its reach.” (citations omitted)); *see also [Padilla v. Kentucky]*, 559 U.S. 356, 373 (2010) (detailing counsel’s duty to provide competent immigration advice to defendants during plea bargaining). [*United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003)], a case the dissent itself cites, also undercuts its argument. *Leonti* held that the right to counsel extended to the entire period of time in which a defendant could “attempt[ ] to render substantial assistance to the government” to lower his sentence—*after*

pleading guilty and thus, *after* the merits of his case were already decided. 326 F.3d at 1122.

103 F.4th at 621 (emphasis in original). This Court should likewise reject the State's argument that the Eighth Amendment does not apply to pretrial proceedings.

**V. Article 1, Section 12 and Rule 1102 violate the Fourth Amendment and Separation of Powers Principles.**

The State's response to Mr. Robinson's separation of powers claim is both incomplete and muddled.

More specifically, the State does not respond to Mr. Robinson's Fourth Amendment claim, which is based on the holding in *Gerstein* that the Fourth Amendment requires as a precondition to detaining an arrestee for a significant time pending trial a prompt determination of probable cause, and that "[w]hatever procedure a State may adopt, it must provide a *fair and reliable determination* of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a *judicial officer* either before or promptly after arrest." *Gerstein*, 420 U.S. at 124-25 (emphasis added). *See also Virgin*, 2006 UT 29, ¶¶ 21-24 ("*[M]agistrates* must, to a certain extent, assess the credibility of the evidence presented." (emphasis added)); *Mtn.* at 21-23.

Mr. Robinson argues that a State cannot avoid this federal constitutional and state law requirement by mandating, without any procedural safeguards, that all expert and lay hearsay reports offered by the prosecution shall be admissible and conclusively reliable, which in effect shifts the determination of probable cause solely to the Legislature and the prosecutor and unconstitutionally allows for a finding of probable cause based solely on hearsay that has never been tested. *See Mtn.* at 22. The State has conceded the validity of this argument by failing to respond to it.

The State's response to the separation of powers claim is muddled because it begins with the assertion that "Defendant fails to demonstrate that separation of powers principles can prohibit the legislature from classifying certain evidence as reliable hearsay" *Opp.* at 22. This would seem to be an implicit concession of the fact that in Rule 1102 the legislature was in fact "classifying certain evidence as reliable hearsay", which of course is in contradiction to the State's response on the unconstitutional presumption claim where the State was adamant that Rule 1102 was only deeming certain evidence admissible. To confuse things further, on the very next page after asserting that Mr. Robinson fails to demonstrate that separation of powers principles can prohibit the legislature from classifying certain evidence as reliable hearsay, the State reverts back to the position it asserted in response to the unconstitutional presumption claim by arguing that "as explained, even when reliable hearsay is admitted at a preliminary hearing, the determination of whether the admissible evidence demonstrates probable cause rests solely with the magistrate." *Opp.* at 23. As argued above, that argument is contradicted by the plain language of Rule 1102.

Although not developed, the State also asserts that no separation of powers issue is present in this case because "[t]he Utah Constitution expressly allows for the admission at a preliminary hearing 'of reliable hearsay evidence as defined *by statute or rule.*' Utah Const. art. I, § 12 (emphasis added)", and "[t]his provision therefore expressly allows the legislature to define categories of reliable hearsay." *Opp.* at 22-23 (emphasis in original). What this argument is apparently directed to is article V, section 1 of the Utah Constitution, which provides:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of the powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art. V, § 1.

To determine whether a statute or rule violates this provision, the Utah Supreme Court applies an analytical model that poses three questions:

First, are the [actors] in question “charged with the exercise of powers properly belonging to” one of the three branches of government? Second, is the function that the statute has given the [actors] one “appertaining to” another branch of government? The third and final step in the analysis asks: if the answer to both of the above questions is “yes,” does the constitution “expressly” direct or permit exercise of the otherwise forbidden function? If not, article V, section 1 is transgressed.

*In Re Young*, 1999 UT 6, ¶ 8, 976 P.2d 581 (quoting Utah Const. art. V, § 1).

The State appears to be conceding that the answer to the first two questions is “yes”, since its only argument is that article 1, section 12 “expressly allows the legislature to define categories of reliable hearsay.” *Opp.* at 23. It is questionable, however, whether the voters who passed Proposition 1 in 1994 ever expressly allowed the legislature to define categories of reliable hearsay as broadly as the Utah Legislature did in Rule 1102.

Utah Proposition 1, captioned “Rights Of Crime Victims”, was on the ballot as a legislatively referred constitutional amendment in Utah on November 8, 1994. It was approved. See Utah Voter Information Pamphlet (General Election Nov. 8, 1994), available at <https://vote.utah.gov/wp-content/uploads/2023/09/1994-IP.compressed.pdf>.

According to the Impartial Analysis in the Voter Information Pamphlet, the purpose of the provision amending article I, section 12 to allow the use of reliable hearsay at a preliminary hearing was as follows:

Hearsay is a statement that is made by a person outside the courtroom which may be retold by another person in the courtroom to prove the truth about something in the case. Under this proposal, reliable hearsay may be used by the magistrate at a preliminary hearing under rules or statutes which define the hearsay standards more broadly than under existing courts rules of evidence. For example, a magistrate could rely solely on the law enforcement officer’s

testimony at the preliminary hearing to determine probable cause when the investigating officer gives the victim's description of the crime, This means that the crime victim need not testify in person and be cross-examined by the defendant's attorney for the court to determine probable cause at this stage of the criminal proceedings. The provisions protecting the use of reliable hearsay may apply also at any pretrial proceeding, such as a bail hearing concerning the release of the defendant.

*Id.* at 8.

It is readily apparent that Rule 1102 went well beyond the one example cited in the Voter Information Pamphlet to inform voters of the meaning of the proposed amendment. In light of this history, the Court should conclude that all three requirements of the *In Re Young* test are met and that Rule 1102 violates Utah Const. art. V, § 1 and that in any event article 1, section 12 and Rule 1102 violate the Fourth Amendment.

**VI. Article 1, Section 12 and Rule 1102 violate the Confrontation Clause of the Sixth Amendment.**

The State relies primarily upon *State v. Timmerman*, 2009 UT 58, to address Mr. Robinson's Sixth Amendment Confrontation Clause challenge to article 1, section 12 and Rule 1102. *Opp.* at 3-6. Despite *Timmerman*, Mr. Robinson maintains that article 1, section 12 and Rule 1102 violate the Confrontation Clause of the Sixth Amendment. *Mtn.* at 23-24. *Timmerman* runs contrary to federal constitutional law.

First, *Timmerman* never addresses the text of the Sixth Amendment, which enumerates an accused's rights "in all criminal prosecutions." The very words "in all criminal prosecutions" signify that the confrontation right is guaranteed in proceedings before, during, and after the trial. The text of the Sixth Amendment does not use the word "trial" in stating the accused's confrontation right. In comparison, the accused's Sixth Amendment right to "enjoy the right to a speedy and public trial" explicitly refers to "speedy and public" as a trial right.

In its cases interpreting and applying the enumerated Sixth Amendment right to counsel, the Court has interpreted the Sixth Amendment text “in all criminal prosecutions” to mean at “critical stages” of the criminal prosecution. *See, e.g., Coleman v. Alabama*, 399 U.S. at 7 (an accused “requires the guiding hand of counsel at every step in the proceedings against him” (quoting *Powell*, 287 U.S. at 69 )); *United States v. Wade*, 388 U.S. 218, 226 (1967) (“It is central to that principle that *in addition to counsel’s presence at trial*, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might *derogate from the accused’s right to a fair trial.*” (emphasis added)).

The United States Supreme Court has also declared that an accused’s Sixth Amendment right to a public trial grants an accused the right to a public suppression hearing. *See Waller v. Georgia*, 467 U.S. 39 (1984). Given these decisions, the text of the Sixth Amendment, and the historical background of the Confrontation Clause set forth in *Crawford* and summarized above, there is no sound reason to invoke a selective interpretation of the words “in all criminal prosecutions.”

Second, *Timmerman* relied on the statement in *Barber v. Page*, 390 U.S. 719, 725 (1968) that “[t]he right to confrontation is basically a trial right.” *Timmerman*, 2009 UT 58, ¶ 10. But as Justice Abrahamson has correctly noted,

Indeed, the United States Supreme Court has never explicitly held that the Confrontation Clause is an accused’s right at trial only. True, the Court has referred to confrontation as a trial right or a right at trial in its discussion of the Sixth Amendment. But these references have been in the context of cases involving trials. It makes good sense to confine an opinion’s discussion to the facts presented—which, in each of the Court’s cases referenced by the majority opinion, was a trial. It does not make good sense to extrapolate from these decisions that the confrontation right is exclusively a right at trial.

*State v. Zamzow*, 2017 WI 29, ¶¶ 45-46, 892 N.W.2d 637 (Abrahamson, J., dissenting)

Third, *Timmerman* placed heavy reliance on the Court’s conclusion that “*Gerstein* failed to clarify the relevant differences between an arraignment and a preliminary hearing.” 2009 UT 58, ¶ 12. As demonstrated above and in *Gerstein* itself, that is manifestly not true.

Lastly, although *Timmerman* itself does not cite any decisions from the lower federal court supporting its brief discussion of the Confrontation Clause claim in that case, it does cite several state court decisions which in turn rely on a number of lower federal court decisions. *Timmerman*, 2009 UT 58, ¶ 13 n. 2. These federal decisions are also cited in the State’s *Opposition. Opp.* at 4.

The federal cases that the State cites for the proposition that the Sixth Amendment right to confrontation applies only at trial are unconvincing and provide a shaky foundation upon which the State cases relied upon by *Timmerman* are built. *United States v. Campbell*, 743 F.3d 802, 806 (11th Cir. 2014) did not involve preliminary hearing procedure and held only that “[b]ecause the stateless nature of Campbell’s vessel was not an element of his offense to be proved at trial, the admission of [a] certification [at a pretrial hearing] did not violate his right to confront the witnesses against him.” The *Campbell* Court cited several cases in support of the its holding, including *United States v. Nueci-Peña*, 711 F.3d 191, 199 (1st Cir. 2013) (holding that “[i]n this non-trial context, where evidence does not go to guilt or innocence, the Confrontation Clause does not apply” (citation omitted)) and *United States v. Clark*, 475 F.2d 240, 247 (2d Cir. 1973) (holding that the confrontation right applies at a pretrial suppression hearing because “the suppression hearing centers upon the validity of the search for and seizure of evidence which the government plans to use later in seeking to prove guilt”). *Campbell*, 743 F.3d at 808-09. *Campbell* expressly declared: We need not decide whether the Confrontation Clause could ever apply to a pretrial determination and conclude only that it does not apply to this pretrial

determination of jurisdiction where the certification does not implicate either the guilt or innocence of a defendant charged with an offense under the Act.” *Id.* at 809. Unlike the hearsay evidence at issue in *Campbell*, the hearsay at issue here does relate to all of the elements of the offense to be proved at trial.

Cited also by *Timmerman*, 2009 UT 58, ¶ 10, *United States v. Andrus*, did not involve preliminary hearing procedure and held only that a trial court could use hearsay evidence in determining whether a foundation had been established for the admissibility of a co-conspirator statement at trial. 775 F.2d at 836. In the course of reaching that decision, the *Andrus* Court stated in dicta that “the sixth amendment does not provide a confrontation right at a preliminary hearing”, citing to *United States v. Harris*, 458 F.2d 670, 677–78 (5th Cir. 1972), but the court’s ultimate holding was that “[a] hearing to determine whether statements are admissible under rule 801(d)(2)(E) does not take place before the jury, nor does it determine the guilt of the defendant.” *Andrus*, 775 F.2d at 836. Here, the hearsay evidence sought to be admitted will determine Mr. Robinson’s probable guilt.

*United States v. Harris*, in turn, involved a claim that the failure to require a pre-trial hearing for the purpose of having a government witness identify the defendants prior to trial was reversible error. 458 F.2d at 672. The case was prosecuted by way of indictment, not preliminary hearing. *Id.* The court’s entire discussion of the issue presented, rendered three years before *Gerstein*, 420 U.S. at 119-120, declared that “[t]he importance of the issue [presented at a preliminary hearing] to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination”, was as follows:

“We find no merit whatsoever to appellants’ fourth contention, that they were denied their Sixth Amendment right to confront witnesses against them. Each of the appellants confronted and cross-examined witness Johnson, the alleged co-conspirator, during the trial. There is no Sixth Amendment requirement that they

also be allowed to confront Johnson at a preliminary hearing prior to trial. The indictment returned by a grand jury is sufficient to establish probable cause for trial, and further preliminary hearing for the purpose of direct pre-trial identification of any defendant is not constitutionally mandated.

*Harris*, 458 F.2d at 677 (citing *Swingle v. United States*, 389 F.2d 220 (10th Cir. 1968)). *Swingle* held only that, “[i]n the case at bar the appellant was arrested upon a grand jury indictment. No provision is found in the rules for a preliminary examination under this circumstance.” 389 F.2d at 223.

*Peterson v. California*, 604 F. 3d at 1166, did involve a Confrontation Clause challenge to California’s preliminary hearing procedures, but as *Whitman v. Superior Ct.*, 820 P.2d 262, 274 (Cal 1991), *Hosek v. Superior Ct.*, 12 Cal. Rptr. 2d 650, 652 (Cal. Ct. App. 1992), and the Boudin article discussed above demonstrate, California’s allowance of hearsay at a preliminary hearing is far more limited than is allowed in Utah and such hearsay has not been deemed to be reliable by the legislature.

Moreover, for a number of reasons, *Peterson*’s rejection of a Confrontation Clause challenge to California’s preliminary hearing procedure is based on faulty reasoning and is therefore not controlling or persuasive.

First, *Peterson* stressed that “the preliminary hearing itself is not constitutionally mandated.” *Peterson*, 604 F.3d at 1169. If that logic was sound, there would have been no reason for the Supreme Court to have held in *Hurtado*, 110 U.S. at 538 that,

[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

The Court could simply have disposed of the case in a brief opinion like the one in *Peterson* declaring that since “the preliminary hearing itself is not constitutionally mandated”, no constitutionally enforceable rights attach to that hearing.

Similarly, in *Coleman*, 399 U.S. at 8, where the Court expressly acknowledged that “[t]he preliminary hearing is not a required step in an Alabama prosecution”, if the logic of *Peterson* was sound, there would have been no need for the Court to have held, as it did, that the defendant was constitutionally entitled to the effective assistance of counsel at a preliminary hearing. *Id.* at 9.

Second, *Peterson* found it significant that “both the Fifth and Seventh Circuits have held that there is no right to confront witnesses at a preliminary hearing before being required to stand trial.” 604 F.3d at 1170 (citing *Harris*, 458 F.2d at 677-78; *Andrus*, 775 F.2d at 836). But as just demonstrated, neither *Harris* nor *Andrus* involved preliminary hearing procedure and the courts’ brief dicta about preliminary hearings were not holdings essential to the decision of those cases.

Third, like *Timmerman*, *Peterson* reasoned that “the United States Supreme Court has repeatedly stated that the right to confrontation is basically a trial right” (604 F.3d at 1169), without ever addressing the analysis of this claim set forth above or the text of the Sixth Amendment. Yet in its more recent decision in *Betschart*, quoted above, it takes a very expansive view of the Sixth Amendment and counsel’s duties under that Amendment. *See, e.g.*, 103 F.4th at 620 (“The right to counsel encompasses myriad attorney duties beyond mere presence at certain pretrial hearings.”). *Peterson*’s perfunctory analysis of the Sixth Amendment cannot be squared with the Ninth Circuit’s sweeping decision in *Betschart*.

## CONCLUSION

For all of the foregoing reasons, and those stated in Mr. Robinson's motion this Court should rule that article I, section 12 and Rule 1102 are constitutionally infirm under the Federal Constitution and that the State is therefore precluded from utilizing article I, section 12 of the Utah Constitution, and Rule 1102 of the Utah Rules of Evidence to sanction the admissibility of hearsay evidence to establish probable cause at the preliminary hearing.

RESPECTFULLY SUBMITTED this 3rd day of June, 2026.

/s/ Kathryn N. Nester  
Kathryn N. Nester

/s/Richard G. Novak  
Richard G. Novak

/s/ Michael N. Burt  
Michael N. Burt

/s/ Staci Visser  
Staci Visser

*Attorneys for Defendant, Tyler James Robinson*

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing was served via the Court's electronic filing system on the 3rd day of June 2026, which served all attorneys of record.

/s/ Staci Visser  
Staci Visser