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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 PRELIMINARY HEARING BRIEFING** Case No. 251403576 Honorable Tony F. Graf, Jr.

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INTRODUCTION

On September 16, 2025, the State charged Tyler Robinson with the capital offense of *aggravated* murder, and other lesser offenses. The State had over ten months to investigate the shooting death of Charlie Kirk and to develop legally sufficient evidence that Mr. Robinson "knowingly created a great risk of death to another other than Charlie Kirk and the defendant," the sole aggravator alleged in the Information which in theory exposes Mr. Robinson to the potential punishment of death. Utah Code § 76-5-202(2)(a)(iii).

The State's presentation of its evidence as to this alleged circumstance in aggravation at the preliminary hearing in July 2026 wholly fails to carry its burden of proof. The State's failure cannot in any manner be attributed to any orders by this Court limiting its presentation, nor does it fall within Rule 1102(c)(1) because the State's presentation in support of this aggravating factor was not based upon hearsay evidence. Nor did this Court exclude any proffered expert testimony. In fact, the Court did not exclude any evidence on this subject, and it did not limit the amount of time available to the State to present its case.

Yet, the State has failed to establish probable cause that the shooter "knowingly created a great risk of death to another other than Charlie Kirk" and himself. The State is required, as a matter of law, to show more than a "possibility" that someone else may be killed by defendant's conduct, rather that there was a "high probability" of that result and that the defendant knew of that high probability. And where the State has overwhelmingly failed to make this showing, it asks this Court to expand Utah's narrow construction of the "great risk of death" aggravator using decades old cases from another state jurisdiction. Binding constitutional precedent both under Utah law and the United States Constitution demonstrate the State's failure here and why this Court may not impermissibly broaden the scope of "knowingly created a great risk of death." The facts and the law require this Court to strike the sole aggravating factor.

ARGUMENT

The State Has Not Met Its Burden to Show Probable Cause by Relying on Hearsay Deemed Reliable by Rule in Violation of Mr. Robinson's Constitutional Rights and Separation of Powers Principles.

As briefed and argued extensively prior to the preliminary hearing, and as raised as a continuing objection throughout the preliminary hearing itself, the State's extensive use of hearsay deemed reliable by Rule of Criminal Procedure 1102 violates Mr. Robinson's constitutional rights and separation of powers principles. *See* U.S. Const. amends VI, VIII, XIV; Utah Const. art. I, § 1. *See also* Docs. 525, 570, 631, 678. This Court may not bind over Mr. Robinson based upon the State's evidence consisting primarily of hearsay that has not been assessed for reliability.

This is particularly true as it relates to the evidence cited by the State to establish identity for all of the charged counts. *See* StBr:9-10. This evidence consists largely of alleged communications between Mr. Robinson and Mr. [redacted]lleged communications between Mr. Robinson and other individuals on the application Discord, and an identification of Mr. Robinson from UVU surveillance footage. *See* StEx 16.1, 16.2. This evidence came from, or became presumptively admissible through, a recorded interview between the Utah County Attorney's Office and witness [redacted] St.Ex. 16, a witness the Court would not allow Mr. Robinson to seek to subpoena from another state to testify at the preliminary hearing. *See* Doc. 625.

The State has failed to prove probable cause by reliable evidence that satisfies each element of each of the charged evidence. This Court must decline bind over on all charges.

I. As a Matter of Law, the State Has Not Established and Cannot Establish Probable Cause to Support the Aggravator That the Shooting Knowingly Created a "High Probability" of Death to Another Individual From the Single Shot From a High-Powered, Scoped Rifle From a Rooftop Vantage That Hit the Intended Target.

Mr. Robinson is charged with aggravated murder pursuant to Utah Code § 76-5-202(2)(a)(iii), which requires the State to prove that "the actor intentionally or knowingly

cause[d] the death of another individual" under circumstances where "the actor knowingly created a great risk of death to another individual other than the deceased individual and the actor[.]" *Id*. The State has not shown and cannot show probable cause to support this single alleged aggravator.[1]

A defendant may only be bound over for trial "if the prosecution produces evidence sufficient to demonstrate probable cause that the charged crimes were committed" and the defendant committed them. *State v. Murphy*, 2026 UT App 38, ¶ 8, 588 P.3d 1039 (quoting *State v. Ramirez*, 2012 UT 59, ¶ 8, 289 P.3d 444 (cleaned up)); s*ee also* Utah R. Crim. P. 7B(b). This threshold requirement is intended to "ferret[ ] out groundless and improvident prosecutions, relieving the accused from the substantial degradation and expense incident to a modern criminal trial when the charges against him are unwarranted or the evidence insufficient." *Id*. (quoting *Ramirez*, 2012 UT 59, ¶ 8 (cleaned up)).

As discussed further herein, the State's burden requires them to provide evidence to support a "reasonable belief" and "when the evidence, considered under the totality of the circumstances, is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecutor's claim" this Court must decline bindover. *Id*. ¶ 10 (quoting *State v. Prisbrey*, 2020 UT App 172, ¶ 22, 479 P.3d 1126 (cleaned up)). The Court is empowered to make reasonable inferences from the evidence presented; however, the Court may not engage in speculation. *Id*.

a. <u>The United States Constitution and the Utah Constitution Both Require Courts to Construe Alleged Aggravators Narrowly.</u>

"The Eighth and Fourteenth Amendments to the United States Constitution do not permit imposition of the death penalty in an arbitrary or capricious manner." *State v. Wood*, 648 P.2d 71, 77 (Utah 1982). "The objective of the law is to require that the discretion of a sentencing body in a capital case be carefully channeled by standards designed and applied to insure that there is a reasonable distinction between those murder cases in which the death penalty is

[1] For brevity, Mr. Robinson refers to the aggravator as "KGRD" throughout.

imposed and those in which it is not." *Id.* (citing numerous United States Supreme Court holdings to this effect).

In order to bring meaning to this long-standing principle, the United States Supreme Court has explained that the Constitution requires courts to narrowly construe aggravating factors in order to avoid "overly broad interpretation[s]" that violate the Eighth and Fourteenth Amendments. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 202 (1976).

The United States Supreme Court has twice examined the "KGRD" aggravator at issue here. In *Gregg*, the Court upheld the inclusion of KGRD as a statutory aggravating circumstance:

> While such a phrase might be susceptible of an overly broad interpretation, the Supreme Court of Georgia has not so construed it. The only case in which the court upheld a conviction in reliance on this aggravating circumstance involved a man who stood up in a church and fired a gun indiscriminately into the audience. *See Chenault v. State*, [215 S.E.2d 223 (Ga. 1975)]. On the other hand, the court expressly reversed a finding of great risk when the victim was simply kidnaped in a parking lot. *See Jarrell v. State*, [216 S.E.2d 258, 269 (Ga. 1975)].

428 U.S. at 202-03. The same year, in *Proffitt v. Florida*, 428 U.S. 242, 255 (1976), the Court upheld the use of KGRD as an aggravator based upon the Florida Supreme Court's decision in *Alvord v. State*, 322 So. 2d 553 (1975) which also construed KGRD narrowly. In *Alvord*, KGRD was "obvious[ ]" because the defendant "murdered two of the victims in order to avoid a surviving witness to the (first) murder." *Proffitt*, 428 U.S. at 256.[2]

In each of these cases, the Court considered whether the statutory aggravating circumstance was too vague and overbroad to pass Eighth and Fourteenth Amendment muster and in each, the Court upheld the aggravator because the States' highest courts had narrowly construed them.

The principle that the death penalty may not be "wantonly and freakishly imposed" "requires a state to channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance[.]" *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (citation

[2] *Lucas v. State*, 376 So. 2d 1149 (Fla. 1979) is another Florida case in which that State's Supreme Court upheld a KGRD judgment where the defendant had engaged in a "raging gun battle". *Id.* at 1153.

omitted). As a result, a state's "definitions of its aggravating circumstances—those circumstances that make a criminal defendant 'eligible' for the death penalty—therefore play a significant role in channeling the sentencer's discretion." *Id*. Thus, this Court must narrowly construe KGRD, consistent with Utah Supreme Court guidance, and strike the aggravator.

b. Utah Supreme Court Decisions Narrowly Construing the KGRD Aggravator Require This Court to Strike It Here.

Over the course of the past 50 years, the Utah Supreme Court has had at least three opportunities to carefully consider the KGRD aggravator. In doing so, it has identified a minimum set of factual circumstances which must be present in order for the aggravator to be applied in a constitutionally valid manner. Mr. Robinson addresses here the three decisions by this State's highest court which, when applied to the facts presented here, compel this Court to strike the alleged aggravator because those constitutionally required factors are not present.

Those Utah Supreme Court cases are its decisions in *State v. Sosa-Hurtado*, 2019 UT 65, 455 P.3d 63 ("*Sosa-Hurtado II*"), and two long-standing decisions in *State v. Johnson*, 740 P.2d 1264, 1265-66 (Utah 1987) and *State v. Pierre*, 572 P.2d 1338, 1342 (Utah 1977). They are addressed below in chronological order so that this Court can see how the doctrine which this Court must apply in this case has evolved to require, as a factual matter, that where one or more firearm is used in a homicide, the defendant actually discharges multiple rounds, hitting and/or killing individual(s) other than the murder victim in series of events. These actions are the "concatenating series of events" which the Utah Supreme Court first referred to in its 1997 decision in *State v. Pierre* and then reaffirmed in its decision in *Sosa-Hurtado II* that may lead the Court to conclude that the conduct alleged created a "high probability" that someone other than the victim and defendant would be killed.

One year after the United States Supreme Court decisions in *Gregg* and *Proffitt*, the Utah Supreme Court considered the application of KGRD in *State v. Pierre*, 572 P.2d at 1342. In *Pierre*, the defendant was convicted of three counts of capital murder. Pierre and two codefendants tied up five individuals in a business establishment and forced them to drink liquid

Drano. *Id*. at 1343. Pierre eventually shot each of the five victims in the head. Two of the victims survived; three did not. *Id*. In upholding the application of Utah's KGRD aggravator, the Utah Supreme Court found that "[t]he evidence fully sustains that the killing of the three victims and the creation of a setting of great risk of death to the two surviving victims occurred within a brief span of time in which were formed a *concatenating series of events*." *Id*. at 1355 (emphasis added).

A decade later, in *State v. Johnson*, the Utah Supreme Court held that the KGRD aggravator did *not* apply to the circumstance where the defendant attacked a husband and wife with a shovel, killing the man. *State v. Johnson*, 740 P.2d at 1265-66. When the defendant delivered the injuries to the man, he was on the other side of a warehouse from his wife, and there were shelves between them. *Id*. The court noted that KGRD "properly applies to situations in which the defendant kills his victim in a manner by which he knows he is gravely endangering others." *Id*. at 1266. The *Johnson* Court also held that "[t]he State produced no evidence indicating that [wife] was placed at grave risk of death by defendant's battery of [husband], nor did it produce evidence indicating that defendant knew that his conduct towards [husband] placed [wife] at great risk." *Id*. at 1267. In *Johnson*, the Utah Supreme Court further explained how the KGRD aggravator is applied. It wrote:

> Section 76-5-202(1)(c) properly applies to situations in which the defendant kills his victim in a manner by which he knows he is gravely endangering others. *See Chenault v. State*, [215 S.E.2d 223 (Ga. 1975)] (defendant was convicted under a statute similar to section 76-5-202(1)(c), but which also includes language concerning killings in public places, when he assassinated his victim by opening fire in a crowded church); [*State v. McMurtrey III*, 664 P.2d 637 (Ariz. 1983), cert. denied, 464 U.S. 858 (1983)] (defendant shot his intended victims in a crowded bar); *State v. Sonnier*, 402 So.2d 650 (La. 1981), cert. denied, [463 U.S. 1229 (1983)] (defendant made his victims lie on the ground and shot them with rapid fire from a rifle); *State v. Doss*, [568 P.2d 1054 (Ariz. 1977)] (defendant shot victim in a crowded auditorium).

740 P.2d at 1266-67. A closer look at the cases referenced by the Utah Supreme Court in *Johnson* demonstrates that the fact patterns which it views as authorizing the KGRD aggravator do not exist here.

In *Chenault v. State*, the defendant was convicted of aggravated murder after shooting multiple individuals inside a church. 215 S.E.2d at 224 (Ga. 1975). There, the defendant fired multiple shots from two pistols, killing two individuals and injuring another, and "randomly shoot[ing] into the congregation." *Id*. The jury recommended the death penalty, finding the aggravating factor of "knowingly created a great risk of death to more than one person in a public place by means of a weapon or a device which would normally be hazardous to the lives of more than one person." *Id*. at 229. The Georgia Supreme Court found the evidence supported the jury's finding. *Id*. at 230.

In *State v. McMurtrey III*, the Arizona Supreme Court issued a remand for resentencing because the trial court did not adequately consider mitigating evidence in the course of imposing a sentence of death. 664 P.2d at 646. The facts underlying the conviction were that after McMurtrey and three victims engaged in "loud discussions" in a bar, he went to the parking lot, retrieved a gun, and then returned to the inside of the bar where he shot three victims, killing two and wounding a third. *Id*. at 639. During sentencing, the trial court found that the defendant knowingly created a grave risk of death to persons other than the murder victims. The Arizona Supreme Court agreed because "[t]he evidence at the trial established that the Ranch House Bar was crowded the night of the killings and that there were from five to nine other people in the immediate area of the victims when they were shot. When he emptied his gun at the victims, appellant created a grave risk of death to those other people." *Id*. at 645 (citing *Doss*, 568 P.2d at 1054).

The other Arizona Supreme Court decision cited by the Utah Supreme Court in *Johnson* is *State v. Doss*, 568 P.2d 1054 (Ariz. 1977). In *Doss*, the Arizona Supreme Court upheld the application of the KGRD aggravating factor where "[t]he defendant shot the victim in a place crowded with college students, and one of the defendant's shots did in fact wound one of those

students." *Id*. at 1061. In the course of conduct, the defendant "emptied his revolver[.]" *Id*. at 1056.[3] Under these facts, there was "no question" KGRD applied. *Id*. at 1061.

The last out of state case cited by the Utah Supreme Court in *Johnson* is a 1981 decision of the Louisiana Supreme Court in *State v. Sonnier*, 402 So. 2d at 650. In *Sonnier*, the jury found to be true the aggravating circumstance that the defendant "knowingly created a risk of death or great bodily harm to more than one person" *Id*. at 658. The Louisiana Supreme Court had previously determined that this aggravator "is established when the defendant by a single and consecutive course of conduct contemplates and causes a great risk to more than one person." *Id*. (citing its prior decisions in *State v. Monroe*, 397 So. 2d 1258 (La.1981) and *State v. Culberth*, 390 So. 2d 847 (La.1980)). In *Sonnier,* the Supreme Court found that "the execution of two victims lying side by side with six rapid rifle shots clearly amounts to a single consecutive course of conduct by which defendant contemplated a great risk to more than one person." *Id*.

In each of these cases relied upon by the Utah Supreme Court in *Johnson*, the defendant filed multiple shots from a firearm in close temporal and spatial proximity to other individuals and in each of these cases, individuals other than the murder victim(s) were, in fact, injured.

In 2019, the Utah Supreme Court revisited the standards for imposition of the KGRD aggravator in *Sosa-Hurtado II*, 2019 UT 65. In *Sosa-Hurtado II*, the defendant was charged and convicted of aggravated murder for shooting and killing Stephen. *Id*. ¶ 8. Just prior to shooting Stephen, the defendant fired his weapon at a second individual, Isabel, which resulted in injuries to Isabel. *Id*. The shooting occurred inside a smoke shop. *Id*. ¶ 6. Sosa-Hurtado entered the smoke shop and pulled an assault rifle from his jacket. *Id*. ¶ 7. Sosa-Hurtado first fired a shot at Isabel that missed but shattered a glass case causing injuries to Isabel. *Id*. After he shot at Isabel,

[3] Arizona eliminated its KGRD aggravator in 2019. *See* Ariz. 54th Leg., S.B. 1314, "Amending Section 13-751, Ariz. Rev. St.; Relating to the Death Penalty" (2019), *available at* https://apps.azleg.gov/BillStatus/BillOverview/71934. The lack of KGRD is now a mitigating factor in Arizona, that is, it is mitigating if the "defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person." A.R.S. § 13-751(G)(4).

Sosa-Hurtado "turned towards Stephen" and fired a shot, hitting Stephen's hand; Stephen fell to the floor. *Id*. ¶ 8. Sosa-Hurtado then shot Stephen two more times, killing him. *Id*.

The Utah Court of Appeals had, below, examined the sufficiency of the evidence supporting KGRD. *State v. Sosa-Hurtado*, 2018 UT App 35, 424 P.3d 948 ("*Sosa-Hurtado I*"). Reviewing Utah case law, specifically *State v. Pierre*, and *State v. Johnson*, and "persuasive authority from other jurisdictions", the Utah Court of Appeals determined that:

> [J]udicial decisions about whether this aggravator applies are often influenced by three main factors: (1) the temporal (or chronological) relationship between any actions the defendant may have taken towards the third party and the acts constituting the murder; (2) the spatial relationship, or proximity, between the third party, the murder victim, and the defendant at the time of the acts constituting the murder; and (3) whether and to what extent the third party was actually threatened by the assailant, either by direct threats or by indirect means such as the risk of stray or ricocheting bullets.

Sosa-Hurtado I, 2018 UT App 35, ¶ 31. The Utah Supreme Court endorsed these factors. *Sosa-Hurtado II*, 2019 UT 65, ¶¶ 2, 28, 39. In its own analysis, the Utah Supreme Court embraced principles from a KGRD decision in New Jersey[4], *State v. Price,* 478 A.2d 1249, 1260 (N.J. Super. Ct. Law. Div. 1984). In *Price*, the New Jersey Court found the following to be *necessary* in order to support a KGRD finding:

> [T]he relevant 'facts' to be considered 'must include a knowing or purposeful state of mind vis-à-vis the creation of a great risk of death, ***that there be a likelihood or high probability of great risk of death created, not just a mere possibility***… and that there be at least another person within the 'zone of danger' created by defendant's conduct.'

Sosa-Hurtado II, 2019 UT 65, ¶ 38 (quoting *Johnson*, 740 P.2d at 1267 (*quoting Price*, 478 A.2d at 1260)) (emphasis added).

In upholding the jury's verdict and the Utah Court of Appeals' decision affirming the verdict, the Utah Supreme Court found that "a reasonable jury could easily find" that the "identified factors" "support the conclusion that Sosa-Hurtado caused a great risk of death to Isabel during the murder of Stephen: Sosa-Hurtado fired at Isabel seconds before shooting

[4] New Jersey abolished the death penalty in 2007. Prior to abolition, New Jersey's version of the aggravator required, "In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim[.]" NJ St 2C:11-3c(4)(b).

Stephen, he shot at Stephen when Isabel was close by, and he specifically acted with the intent to harm or kill Isabel." *Sosa-Hurtado II*, 2019 UT 65, ¶ 40. In so doing, the Utah Supreme Court endorsed the "concatenating series of events" formulation it first identified in *Pierre*. *Id.* ¶¶ 47-52. In order to satisfy the aggravator, there must be acts in a "series" that are "linked together in a meaningful way." *Id*. ¶ 48.

Such a link between acts may be "established based on the defendant's intent and knowledge of the risk and the endangered person's proximity in time and place to the murder." *Id*. (quotation omitted). The Supreme Court found the shot at Isabel alone to be "powerful evidence of Sosa-Hurtado's state of mind toward Isabel." *Id*. ¶ 49. Next, there "was a close causal connection" between the shot at Isabel and the shots at Stephen because the evidence "could reasonably sustain the conclusion that Sosa-Hurtado shot at Isabel to get him out of the way[.]" *Id*. ¶ 50. Finally, the shootings took place in a small area and the victims were within "a couple of feet" when Stephen was shot. *Id*. ¶ 52. These facts led the Utah Supreme Court to conclude that "the killing and the initial shot at Isabel were part of a series of 'concatenating events'… or in other words that Isabel was within the 'zone of danger' when Sosa-Hurtado killed Stephen." *Id*.

c. <u>The Evidence Presented by the State Fails to Establish Probable Cause as to the KGRD Aggravator.</u>

Preliminarily, Mr. Robinson must alert this Court to a significant problem presented by the State's argument as to the *facts* established at the preliminary hearing. The State makes little effort to distinguish between the *evidence* it presented and *inferences* it asks this Court to make based upon that evidence. Rather, the State pursues an unconstitutional expansion of the KGRD aggravator to this case and fails to distinguish *reasonable inferences* from *speculation*. As the Utah Court of Appeals explained earlier this year in *State v. Murphy*:

> [A] magistrate may deny bindover "when the evidence, considered under the totality of the circumstances, is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim." *State v. Prisbrey*, 2020 UT App 172, ¶ 22, 479 P.3d 1126 (cleaned up). In other words, "a magistrate may properly deny bindover where the facts presented by the prosecution provide no more than a basis for speculation." *Id*. (cleaned up). While

> "the line separating speculation from reasonable inference can at times be faint," the two are distinct. *Id*. ¶ 23 (cleaned up). "An inference is a conclusion reached by considering other facts and deducing a logical consequence from them," and speculation entails "the act or practice of theorizing about matters over which there is no certain knowledge at hand." *Id*. (cleaned up). "In short, the difference between an inference and speculation depends on whether the underlying facts support the conclusion." *Salt Lake City v. Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067.

2026 UT App 38, ¶ 10. Furthermore, it is not appropriate to stack inference upon inference to satisfy an element of the offense. "While inferences drawn from facts in evidence are appropriate, inferences drawn from inferences are not." *State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096. And, when "evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation." *Id*.

The following is a recitation of the evidence presented at the preliminary hearing specific to this Court's determination on the aggravator, and the State's arguments regarding the aggravator, without drawing inference upon inference as the State asks this Court to do.

The afternoon of September 10, 2025, "several thousand" people gathered in and around an amphitheater on the UVU campus to watch and listen to guest speaker, Charlie Kirk. PH1:65, 68; *see* StEx 1. At 12:23:28 PM, Mr. Kirk was struck by a projectile on the left side of his neck and the injury resulted in his death. *See* StEx 11[5]; PH1:67 (shot fired at 12:23 PM). The best evidence of the events on September 10, 2025 on the Utah Valley University campus are the videos.

[5] The State quoted liberally from the medical examiner's report admitted as State's Exhibit 11 in its public filing, despite the exhibit not being published and medical records being categorically private under Utah Rule of Judicial Administration 4-202.02(4)(N). *See* StBr:2-3. This appears to be another example of the State publicizing private information in contravention to the rules guiding record classification. It would have been a simple matter for the State to redact this private information. *See also* PH1:204 (Mr. Sturgill: "This is a document that does contain very sensitive information and that information that Mr. Kirk's family would appreciate it not being published… we'd ask that it not be published here in the courtroom or [to the camera.]").

State's Exhibits 12.1[6] and 12.4 are compilations of UVU surveillance footage from September 10, 2025. At 05:33 of 12.1 and 12.4, the surveillance depicts the roof of the Losee building[7] and the walkway between the Losee building and the computer science building, beginning at 12:15:20pm. At 06:18 of 12.4, the shooter is seen going over the railing separating the walkway from the Losee roof. *See* PH1:46-47 (Bagley: "a little guardrail probably about a couple feet high"). Each of the videos then jump to 12:22:12 PM when a figure is seen running West across the Losee roof. At 12:22:25 PM the figure drops to the roof and begins to crawl to the western edge of the roof, going both south and west. The shooter reaches the edge of the roof at approximately 12:22:44 PM although additional body positioning on the ground is visible until approximately 12:22:56 PM; *see also* PH1:90-91, 94 (describing evidence of "prone position" in gravel on rooftop); StEx 5; PH2:67 (Agent Hull testifying the shooter was prone for 15 to 30 seconds). At 12:23:28 PM, the figure gets up and begins running to the northeast corner of the roof and drops off the Losee building roof to the ground. PH1:98-99 (Officer Bagley observed shoe print in grass where individual observed jumping from roof); PH2:36-37.

Exhibits 12.1 and 12.4 show the shooter was in position on the southwest corner of the Losee Center roof for approximately 35-44 seconds. Officer Bagley testified that "there is a clear line of sight between the tent and the top of the Losee Center." PH1:53-54, 117; StExs 3.2, 4.

Exhibit 7 depicts the shooting of Mr. Kirk from behind the individual asking him questions ("questioner") immediately prior to the shooting. The questioner is separated from Mr. Kirk by a barrier, a patch of grass of unknown dimensions, a table, and the space behind the table in front of Mr. Kirk. Mr. Kirk is sitting in a chair on an elevated platform that is centered in the backdrop. StEx 7; *see also* PH2:69-70. The shot occurs at 00:32 of this video. There is one

[6] State's Exhibit 12.1 shows "zoomed in" portions of State's Exhibit 12.4. PH2:46. 12.1 was received into evidence and played in the courtroom but not published to the cameras in the courtroom. PH2:47.

[7] Officer Bagley testified that the Losee Center has four or five levels with level one being courtyard level and the top level has an atrium on top of it. PH1:52.

individual seen to Mr. Kirk's right and behind Mr. Kirk under the tent.[8] This individual is on the opposite side of where the bullet struck Mr. Kirk. *See* StEx 7, at 00:32. The video has no timestamps.

State's Exhibit 8, begins with Mr. Kirk in the courtyard throwing hats to members of the crowd. The video has no timestamps. Beginning at 00:32, State's Exhibit 8 depicts Mr. Kirk seated at the table under the pop-up tent with the same questioner visible in front of Mr. Kirk. There are what appear to be two security personnel in front and diagonal to Mr. Kirk, standing in the grass area by the barrier seen in Exhibit 7. The camera recording Mr. Kirk is visible above and behind Mr. Kirk in State's Exhibit 7, meaning the camera is angled downward. The shot occurs at 00:48 in this video. One of Mr. Kirk's security guards comes into frame from the right of Mr. Kirk three seconds after the shot.

State's Exhibit 9 is UVU surveillance footage from behind the pop-up tent that begins at 12:21:14 PM. The moment of the shot occurs at 02:13 in the video. Confirmed in testimony from Agent Hull, no one is immediately behind the center of the "American Comeback" pop-up tent when the shot occurred. PH2:69. It is also self-evident from this video and State's Exhibit 7 that no one can "see through" the back of the pop-up tent. *See* PH2:84-85 (Agent Hull: "You would not be able to see through it."). Agent Hull testified that he "can't answer" what would have been visible to the shooter on the Losee Center roof. PH2:68.

Finally, State's Exhibit 6 depicts twenty-two seconds of the event from the perspective of witness AW. There is no timestamp on the video but based on the content, it appears to be taken close in time to when Mr. Kirk initially sat on the elevated platform under the pop-up tent.

The State's forensic investigator, Agent Jennifer Faumuina testified that the distance of the slope between the rooftop vantage and the pop-up tent was "approximately 415 feet." PH4:91. Agent Faumuina also testified that the elevation difference between the bottom of the

[8] The State claims in its brief that "[a]t least two individuals were standing under the tent where Mr. Kirk was seated[.]" StBr:16. This claim is contrary to the evidence and is indicative of the State's reckless recitation of the evidence in its brief. *See, e.g.*, StEx 7; StEx 8 at 00:40.

amphitheater and the Losee roof was "approximately 68 feet." PH4:92; *see also* PH1:25 (Officer Bagley description of the amphitheater). Finally, Agent Faumuina testified that the distance without consideration of the slope between the two points was 410 feet. *Id*.

A Mauser model 98 rifle was recovered in a wooded area across the street from the northeast corner of the Losee Center where the individual ran after jumping from the roof. *See* PH2:126; PH4:96-97; StEx 32. The rifle was a 30.06 caliber with a scope. StExs 10.3, 32; PH2:126. The rifle was a bolt action rifle. PH2:126. In order to "load it, lock it, as well as extract anything that's in" the rifle, the user has to manipulate the bolt. PH2:102. When law enforcement manipulated the bolt, the rifle had a "fired cartridge case" inside and three unfired cartridges." *Id*.; *see also* StExs 19-22. The fired cartridge case was still in the chamber of the rifle. PH4:106; *see also* PH4:130-31 (cartridge fired from recovered weapon).

State's Exhibits 12.1 and 12.4 also contain video of an individual the State's witnesses identified as Mr. Robinson entering and exiting campus parking structures "four times" on September 10, 2025—twice before the shooting, once at the time of the shooting, and once after the shooting a vehicle is seen matching Mr. Robinson's on campus. PH1:212-13. The first entry was at approximately 8:30am with an individual State's witnesses identified as Mr. Robinson returning to his vehicle at approximately 9:25 AM. PH2:29-30. Agent Hull testified that during this initial visit, Mr. Robinson went to the amphitheater area and spoke to "some representatives from TPUSA." PH2:29. The second entry was at approximately 10:00 AM and Agent Hull testified that Mr. Robinson went to a Chick-fil-A in the Sorenson Center, walked to a wooded area across Campus Drive, and appears at the railing on the walkway between the computer science building and Losee Center roof. PH2:31-32.[9] Mr. Robinson left campus the second time "just prior to 11:00am." PH2:32.

The individual identified as Mr. Robinson is next seen returning to campus in different clothing and walking with "[a] limp" at 11:53:05 AM. *See* StEx 12.4 at 03:25; TR2:33-35.

[9] The State did not show footage of the individual identified as Mr. Robinson's movements in and around campus during the hearing, only the footage from the parking structures.

According to Agent Hull, the individual he identifies as Mr. Robinson is seen walking in a parking structure, in front of the Losee Center, and then on the walkway between the Computer Science Building and Losee Center at approximately 12:15 PM. TR2:34-35. None of the footage shows the individual identified as Mr. Robinson passing by or near individuals that are clearly minors. *See* StExs 12.1, 12.4.

A search was later conducted of the residence Mr. Robinson shared with [redacted] St. George, Utah. PH3:35. In the closet on the first floor of the apartment, law enforcement found "some shooting targets [with] perforations on it[.]" PH4:113; StEx 25. Agent Faumuina testified that the perforations were consistent with bullet holes. PH4:115-16. The targets show perforations outside the target, closer to the target, and then even closer with a perforation in the center. PH4:116.

The communications the State admitted between Mr. Robinson and Mr. [redacted]ndicate Mr. Robinson's intention to kill Charlie Kirk. *See* StEx 16.3 ("I had the opportunity to take out Charlie Kirk and I took it."). There is no mention of any threat or intended harm to any other individual(s).

d. <u>This Court Must Reject the State's Asserted Theories as to How It Has Established Facts Supporting the KGRD Aggravator Because It Has Failed to Establish the Facts That Are Constitutionally Required.</u>

The State offers two interrelated theories of KGRD that fail to conform to the criteria established by the Utah Supreme Court, criteria which if not met render application of the KGRD aggravator violative of U.S. Const. amend. VIII, XIV and Utah Const. art. I, § 9. Each is deconstructed here.

First, the State has propounded a "line of sight" theory which is based upon out-of-state authority that has never been adopted in Utah. It is primarily based upon the decisions of courts in Pennsylvania before that state enacted a moratorium.[10] Moreover, the State's reliance on this

[10] For over a decade, Pennsylvania has had a moratorium on the death penalty.

authority fails to support the application of a "line of sight" formulation to the facts it presented at the preliminary hearing. The State's "line of sight" theory as applied to the "questioner" to the East and below Mr. Kirk fails based upon the facts the State presented to this Court and no further reasonable inferences based upon those facts can support that basis for the aggravator.

The second theory is an "everyone near" argument, which relies upon only one of the three factors identified in *Sosa-Hurtado II*, and ignores the other two factors which are not present here. Moreover, the State asks the Court to speculate about the shooter's knowledge. Even assuming that one can infer a knowledge of some risk to the shooter, the State has failed to show that the actual conduct created a "high probability" that someone other than Mr. Kirk would be killed and, thus, this theory fails as a matter of law. Where there were people in some proximity to a discharge of a single projectile from a precision firearm with a high-powered scope which the evidence establishes hit its *intended target*, the single factor of proximity fails to permit an inference of a subjective knowledge of the shooter of a high probability of risk of death to others. Where no other person was injured in a manner creating a great risk of death, and no other shots were fired, the allegation of a KGRD aggravator cannot be sustained.

i. Line of Sight.

The State broadly argues that certain individuals were in the shooter's "line of fire." There are two fatal flaws in the State's argument—one is factual, and the other is legal.

Factually, the "line of fire" assertion as to the questioner defies logic. The evidence established that there was one shooter on the roof of the Losee Center. Mr. Kirk was seated under a pop-up tent in the center of a courtyard to the southwest of where the shooter was positioned on the roof. *See* PH1:27 (Losee directly east of amphitheater). The single shot fired travelled from east to west at a downward slope into the bottom of the "bowl" where the tent was located. *See* StEx 8, at 00:35 (showing crowd at increasing elevation to the East of the pop-up tent); *see also* StEx 3. State's Exhibit 7 shows the vantage behind the questioner prior to and at 12:23:28 PM. The questioner is in front of Mr. Kirk—to the East. If the questioner had been in the "line of fire" from a bullet moving towards Mr. Kirk, the questioner would have been struck

by the bullet as it travelled. In fact, the State's evidence shows exactly why the questioner was *not* in the line of fire—the single bullet came from above. The video evidence shows that Mr. Kirk was seated on an elevated platform and separated from the questioner by a security barrier, a grassy area, and then tables that surrounded Mr. Kirk on three sides. StEx 8, at 00:35. The bullet traveled at a downward angle and hit Mr. Kirk in the left side of his neck. *See* PH4:91-92; StEx 11. Where Mr. Kirk's head/neck area was elevated and an unidentified distance away from the questioner (certainly more than a "few feet" away[11]), the only evidence presented supports that the bullet travelled *above*, not through, the crowd.

This Court must also reject the legal theory behind the State's factual argument. The State asks this Court to adopt its interpretation of out-of-state authority on a "line of fire" theory. However, a thorough examination of the cases which construct a "line of fire" theory are not as the State suggests and support that this Court should not expand Utah's KGRD application.

In *Commonwealth v. Watson,* 565 A.2d 132, 134 (Pa. 1989), the Pennsylvania Supreme Court considered the application of Pennsylvania's "grave risk" aggravator to a case in which Watson fired three shots into an occupied car, striking an individual twice. Watson then shot the lock off the door of a home, pulled his ex-girlfriend from the closet where she was hiding with her two children, and shot her twice. *Id*. He then reloaded, left the room, returned, and then shot her again and then shot himself. *Id*. One of the shots lodged in the door frame around the closet where the children were hiding but did not hit them. *Id*. Under these facts, the Pennsylvania court affirmed a jury's finding as to the KGRD aggravating factor because the children in the closet were endangered by his conduct. *Id*.

In *Silvia v. State*, 60 So. 3d 959, 971-73 (Fla. 2011), the defendant argued that there "was not competent, substantial evidence" to support KGRD because the gunfire was *intended* only for one person. *Id*. at 971. The Florida Supreme Court disagreed because Silvia engaged in

[11] The State calls this "a few feet" in its brief but there was no evidence of the distance submitted to the Court. StBr:12. The video from behind the questioner, State's Exhibit 7, shows the distance and speaks for itself.

"indiscriminate shooting in the direction of at least four persons other than [the intended victim] who were not only put in an immediate and present risk of death but were also in the line of fire." *Id*. at 972. One of the other individuals was shot and the defendant "pumped the shotgun" and aimed it at two others. *Id*. The Court explained:

> We therefore conclude there was competent, substantial evidence that Silvia's actions created a great risk of death to many persons. He approached the house while pumping shells into his shotgun. Pellets hit one of the cars in the carport, different locations in the carport, and the door from the carport to the house. Pellets were found inside the house in the kitchen, dining room, and bedroom. There were six unarmed people in the carport and house when Silvia approached, shooting and pointing the gun at people.

Id.

In *Commonwealth v. Reid*, 626 A.2d 118, 123 (Pa. 1993), the Pennsylvania Supreme Court found sufficient evidence to uphold the "grave risk" aggravating circumstance. Reid had fired multiple gunshots at fleeing children after chasing them in his vehicle. *Id*. at 119. One of the shots hit a young man in the back, killing him. *Id*. Less than a week later, Reid killed another individual with the same weapon. *Id*. The Court noted that "twelve to fourteen others were in the line of fire" when Reid "chased the boys while driving his car" and "gunfire flashed from the windows of Reid's car" killing the first victim. *Id*. n.3.

In *Commonwealth v. Buck*, 709 A.2d 892 (Pa. 1998), the court considered whether the Commonwealth's notice to the defendant of the aggravating circumstance was sufficient and if the Commonwealth abused its discretion in proceeding on three aggravators, one of them "grave risk." *Id.* at 897-98. In finding the Commonwealth did not abuse its discretion in alleging "grave risk," the *Buck* Court found that evidence raised a factual question for the jury because, while only one individual was shot and killed, the potentially endangered person stood behind the decedent in a bathroom and, importantly, because the endangered person wrestled with the defendant over the gun after the shot was fired. *Id*.

In *State v. Wood*, 881 P.2d 1158 (Ariz. 1994), Wood challenged the application of KGRD in a double-murder case where he did not shoot any persons other than the victims and there were no bystanders in the line of fire. *Id*. at 69. The court found that although the defendant's

argument had merit, the interpretation of KGRD proposed was too narrow "under the unusual facts" of the case. *Id*. The *Wood* Court found "no single factor is dispositive" of KGRD and the inquiry turns on "whether, during the court of the killing, the defendant knowingly engaged in conduct that created a real and substantial likelihood that a specific person might suffer fatal injury." *Id*. Thus, the several factors "*in combination*" supported KGRD. *Id*. (emphasis in original). There was the presence of others, the defendant turned to another and it appeared as if he was going to shoot a third individual, another employee fought defendant over the gun, and there was evidence the defendant "knowingly prepared the gun to fire when he assumed a shooting stance toward one employee and when he grappled with another." *Id*.

None of these cases support the State's position here. Each involves conduct directed at the endangered person, consistent with the Utah Supreme Court's endorsement of the three "zone of danger" factors in *Sosa-Hurtado II*. In determining if KGRD applies, as a matter of law, this Court must consider if any conduct constituting a great risk of death was *directed* at any individuals other than the victim. Here, there is none.

Utah has never adopted an interpretation of KGRD that would permit its application where the firing of a single shot at an intended victim that hit only the intended victim, merely because other people were in the vicinity. Nor does the State's reliance on out of state authorities in which personas other than the decedent are targeted and/or injured support this proposition. As a matter of law, the Court cannot bind Mr. Robinson over on this theory of the KGRD aggravator based on the facts presented by the State.

ii. The State's "Anyone Near" Argument Similarly Fails Both Factually and as a Matter of Law.

The State's second argument in support of the KGRD aggravator is that the shooter *knowingly* "created a great risk of death to everyone near Mr. Kirk" when a single shot was fired. StBr:14. The State's argument here also fails because it requires the Court to speculate in the absence of evidence that would otherwise permit reasonable inferences. Moreover, the State's argument fails again, as a matter of law, because the conduct here fails to satisfy any of the three

factors the Utah Supreme Court has held must be present in order for the KGRD aggravator to be pursued in a manner which does not violate a defendant's constitutional rights under the Eighth and Fourteenth Amendments.

1. Knowledge.

The State asks this Court to make a finding that the shooter *knowingly* created a "high probability of a grave risk of death" based upon speculation that is not supported by the evidence. The State speculates, and asks this Court to speculate:

a) That the shooter actually observed security personnel standing an unknown distance from Mr. Kirk;

b) That the shooter may have known that there were people behind the pop-up tent when the single shot was fired, although the State's evidence actually shows otherwise.

c) That the shooter knew that they may strike someone other than the intended target because there were four cartridges found in the rifle.

d) That the shooter knew that they may strike someone other than the intended target because targets with bullet holes in them were recovered from Mr. Robinson's shared apartment.

e) That the shooter knew they may strike someone other than the intended target because the rifle may have been taken apart and put back together.

These assertions are not reasonable inferences from the evidence actually presented and, in one instance, are actually inconsistent with the evidence before the Court. The evidence does not support that the shooter acted *knowingly*, that is, that the shooter was aware that there was a high probability that someone else may die from his single gunshot that hit the intended victim.

As to a), the State's evidence shows that the presumed shooter was on the Losee Center roof, in a "prone" position, for approximately 35-44 seconds before firing their weapon once. *See* StEx 12.4. According to the State's evidence, this means that the shooter had approximately forty seconds after coming to rest to ready their rifle, acquire the target with the scope on the rifle, steady their breathing, and fire the weapon. The State asks the Court to speculate about what the shooter saw through the scope during this limited window of time while focusing on these tasks. However, one of the State's case agents, Agent Hull, testified that he could not testify as to what the shooter saw. PH2:68. Indeed, the *only* reasonable inference from this

limited time window and the fact that Mr. Kirk was shot, was that the shooter observed Mr. Kirk through his scope.

As to b), the State's assertion that the shooter would have known that there were individuals behind the pop-up tent is not a reasonable inference supported by its own evidence. In fact, State's Exhibit 9 shows no one directly behind where Mr. Kirk was located when the single shot was fired. PH2:70 ("There's no one stood in the middle behind the tent"). Moreover, the shooter could not, of course, see through the tent and, again, was on the rooftop vantage for only 35-44 seconds before taking a single shot with a high-powered rifle with a precision scope attached to it, and then immediately fleeing to the back of the rooftop area.

The State relies on surveillance footage from earlier in the day on September 10, 2025 to suggest that the shooter had knowledge that there would be people behind the pop-up tent during the event. The State's evidence is that Mr. Robinson was on campus at 8:30 AM and went to the amphitheater at that time, three and a half hours before the event began. *See* StEx 12.4. The State asks the Court to speculate that the amphitheater, and the people around it, looked to the shooter at that time just as it did four hours later when the shot was fired, as depicted in State's Exhibits 6, 7, 8 and 9. There is no evidence from which the Court can make such an inference and, again, the evidence is that the shooter had an extremely narrow window of time to observe the intended target through the scope of the rifle. The only reasonable inference that can be drawn is that the shooter saw the intended target.

As to c), the State asks the Court to speculate about the shooter's "knowledge" that he was creating a high probability that someone else could be killed because the recovered Mauser 98 had more than one round of ammunition in it. This is a circumstance in which the State cannot prove one inference is more likely than any other and is thus asking this Court to speculate. *See Cristobal*, 2010 UT App 228, ¶ 16. It is just as likely that the shooter did not believe he would miss as it is that the shooter believed as the State speculates. Having a loaded weapon does not mean that the individual believes there is a high probability of missing and killing someone else. It only means that they have the ability to fire more than one round. The

facts here are that the shooter did not miss his intended target and did not chamber another round, leaving the spent cartridge in the rifle. *See* PH4:106, 130-31.

As to d), the State argues that targets taken from Mr. Robinson's apartment support an inference that Mr. Robinson used the targets in connection with the shooting at UVU and therefore knew of a high probability of a risk of death to others. However, this Court cannot reasonably infer that Mr. Robinson's alleged use of the targets at some point in time in the past with some unknown weapon led to such knowledge on his part. The State presented no evidence of *when* the targets were used, *what weapon was used* with the targets, the conditions under which the targets were used, or even that Mr. Robinson was alone in shooting at the targets (i.e. that all of the target shots were fired by him). Without any evidence tying the targets to the seized weapon, the relevant timeframe, and the conditions under which the targets were used, the targets are not a basis for any reasonable inference about the shooter's state of mind.

As to e), the State also asks this Court to speculate that after scoping the rifle, it was taken apart and put back together prior to the shooting, and that therefore the shooter knew that a lack of accuracy created a high probability of risk of death to others. StBr:11. The State presented no evidence to support any inference that rifle was in pieces at any time. The video evidence shows Mr. Robinson walking up and down stairs at UVU with a gait impaired by something long in his pant leg—the reasonable inference from the evidence provided is that it was a fully assembled rifle. *See* StEx 12.4 at 03:25. The presence of a screwdriver on the roof does not establish that the rifle was taken apart and put back together any more than it establishes that the screwdriver was intended to take the rifle apart *after* the shooting.[12] The State did not present any evidence as to how the screwdriver could have been used to disassemble and reassemble this weapon in the period of time at issue. Even if the Court draws the inference that there is a connection between the rifle and the screwdriver, the Court cannot *then reasonably*

[12] The State cites to PH1:72-73 to support this assertion. The testimony from Officer Bagley here is "a red and black screwdriver" was observed "10 or 15 feet in from the other side of the guardrail in the gravel." There is no development of the State's theory in this testimony.

infer from that inference that a rifle deconstructed and then reconstructed would be less accurate, *let alone* that the shooter knew of that risk. *See Salt Lake City v. Gallegos*, 2015 UT App 78, ¶ 10, 347 P.3d 842.

2. Presence Alone Is Insufficient as a Matter of Law to Show KGRD.

Even assuming *arguendo* that the shooter had knowledge that there were other individuals near Mr. Kirk, this fact alone does not satisfy that there was great risk of death to another. The State relies on cases from Pennsylvania for the assertion that "a zone of danger encompasses everyone near a shooting victim." StBr:16-17. As noted above, Utah has never adopted a formulation of KGRD under which a single gunshot fired at a specifically identified target who was near others is sufficient to establish KGRD. Moreover, the cases cited by the State from Pennsylvania, again, do not support its position, as explained below.

In *Commonwealth v. Rios*, 684 A.2d 1025 (Pa. 1996), three assailants entered a home to commit a robbery. The residence was occupied by four individuals. Two of the individuals were beaten and multiple firearms were involved. All four of the victims were forced to lay down either on a bed or on the floor in a single bedroom, and one of them was shot and killed. *Id*. at 1028. The court found that the facts presented at trial supported the KGRD finding because the fatal bullet was fired "while the victim lay on the floor of an enclosed bedroom" with one individual "on the floor close to the victim" and the others on the bed nearby. *Id*. at 1037.

In *Commonwealth v. Ly*, 599 A.2d 613, 622 (Pa. 1991), the court upheld the finding of "grave risk" when three assailants with multiple firearms shot one individual in the head inside the kitchen of a restaurant while the murder victim's sister was "standing directly next to" her.

In *Commonwealth v. Smith*, 540 A.2d 246, 248 (Pa. 1988), the Commonwealth presented "medical and forensic evidence" to demonstrate "grave risk of death to another person[.]" The evidence demonstrated that four shots were fired by the defendant. *Id*. The first shot fired hit the victim, who fell but then tried to get up. *Id*. Thereafter, the defendant fired three more shots at the victim—three of the rounds lodged in the victim while a fourth passed through. One of the bullets fired at the victim ricocheted off of a solid surface before hitting the victim. *Id*. at 248.

There were several people on the porch in "very close proximity" to the murder victim. *Id*. at 260. The Pennsylvania Supreme Court affirmed the finding by the jury on these facts. *Id*.

In *Commonwealth v. Wright*, 961 A.2d 119, 146 (Pa. 2008), the evidence supporting "grave risk" was that Wright "broke into a small bedroom while swinging his loaded gun in all directions" then put his gun to the victim's wife's head. Once finding the victim, Wright "fired five shots at him, three of which went through him and one of which was never located." *Id*. The victim was "only a few feet from the bed on which the child was lying, and shell casings were found all over the bedroom." *Id*. The Pennsylvania court determined that under these circumstances, it was proper to leave "the grave risk of danger determination to the jury." *Id*.

The significant factual differences between these cases and the case before this Court are plain. The bullet that struck and killed Mr. Kirk was not fired in an enclosed bedroom or space but rather, an open-air arena with what the State's witnesses termed, "a clear line of sight." There were no threats to others in the course of conduct. There was no one "directly" next to Mr. Kirk when he was shot, and there was no one under the tent on the side that Mr. Kirk was struck or behind him in the breezeway. Multiple shots were not fired. There were no ricocheting bullets.

These cases, from a state with a moratorium on its own death penalty, are not Utah law and do not support the State's call for this Court to adopt out of state authority that vastly expands Utah's KGRD aggravator beyond its constitutionally narrow application, as explained in *Sosa-Hurtado II*, *Johnson*, and *Pierre*. Utah law requires this Court to look at *more than* mere presence and to determine there is a "high probability," not a "mere possibility" that another would be killed by the shooter's conduct and that the shooter knew of that high probability.

e. A Plenary of Jurisdictions Support Utah's Narrow Construction of KGRD.

Many other jurisdictions have interpreted KGRD as the Utah Supreme Court has—a multifactor analysis that examines the course of conduct of the defendant and actions toward the "another" in determining both the defendant's knowledge and the probability of risk.

For example, Oklahoma has determined that evidence is sufficient to support KGRD where "the defendant created a great risk of death in close proximity in terms of time, location,

and intent to the killing, or threatened the life of another and had the apparent ability and means of taking that person's life." *Lockett v. Trammel*, 711 F.3d 1218, 1243 (10th Cir. 2013) (internal citations omitted) (cleaned up). In the rare instances where the person at risk was not actually injured, "the defendants in those cases seriously considered killing people other than the actual victims." *Valdez v. State*, 900 P.2d 363, 383 & n.97 (Okla. Crim. App. 1995).

In the Oklahoma case of *Littlejohn v. State*, 989 P.2d 901 (Okla. Crim. App. 1998), the court considered the sufficiency of the evidence supporting KGRD. The court found the evidence was insufficient to support KGRD aggravating factor where the prosecution presented no evidence that defendant "considered injuring anyone other than the actual victim." *Id*. at 912. Although defendant pointed a gun at a clerk when he asked for the store's money, this act was driven by defendant's intent to rob. *Id*. Additionally, only a single shot was fired and it hit its intended victim, rather than endangering anyone else present in the store. *Id*. As summarized:

> This is not a case where the defendant shot wildly into a store or a crowd. Only one shot was fired. This shot hit its intended victim. This single shot did not endanger anyone else present in the store. Consequently, under the specific circumstances of this case, we find the evidence was insufficient to prove Littlejohn knowingly created a great risk of death to more than one person.

Id. *See also Brecheen v. Reynolds*, 41 F.3d 1343, 1361 (10th Cir. 1994) (rejecting Eighth Amendment vagueness challenge to KGRD because reviewing Oklahoma case law, "Oklahoma courts provided consistent guidance to the jury so as to limit its discretion").

The Wyoming Supreme Court upheld KGRD in *Engberg v. State*, 668 P.2d 541 (Wyo. 1984), concluding: "In *shooting errantly at persons in parked vehicles in the lot*, Engberg manifested an utter disregard for lives of innocent persons. This evidence demonstrated beyond a reasonable doubt that Engberg knowingly created a great risk of death to two or more persons." *Id*. at 557 (emphasis added). Later, *Olsen v. State*, 2003 WY 46, 67 P.3d 536, addressed another "bystander" case. The *Olsen* Court noted the State failed to produce evidence or suggest "that there were other bystanders involved who were threatened with grave harm as Olsen shot his intended victims." *Id*. ¶ 121. Thus, "[s]trictly construing the Wyoming statute" the *Olsen* Court found "the use of the terms 'risk' and 'persons' was given its proper application in Engberg's

factual situation of placing bystanders in a parking lot at great risk of death by errant shooting." *Id*. ¶ 123.

In the Alabama case of *White v. State*, 587 So. 2d 1218, 1232 (Ala. Crim. App. 1990), the appellate court upheld the finding of KGRD where, "the defendant indiscriminately fired a shotgun into an occupied dwelling containing not only the victim but two other people" and "the defendant fired the pistol out in the front yard in a residential neighborhood where many other people were present." The Court found "the defendant's conduct in the indiscriminate firing of these weapons did, in fact, create a great risk of death to many other people." *Id*.

Finally, there is also an almost identical federal statutory aggravator. *See* 18 U.S.C. § 3592(c)(5) ("defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense."). In *United States v. McVeigh*, 944 F. Supp. 1478, 1490 (D. Colo. 1996), the Oklahoma City bombing case, the district court found the inclusion of KGRD in the indictment was proper where "[t]he government intend[ed] to prove that the truck bomb was of such force as to create a risk to persons who were not physically affected by the explosion." Similarly, in *United States v. Bin Laden*, 126 F. Supp. 2d 290, 300 (S.D.N.Y. 2001), another bombing case, the district court sanctioned the inclusion of KGRD as an aggravator noting KGRD "relates to Defendants' mental state with respect to persons who were not the intended victims of the bombings." The *Bin Laden* Court noted, there may be "a qualitative difference between a defendant who carefully targets an intended victim or victims without endangering others, and one who acts with indifference to 'additional persons.'" *Id*. n.15.

These examples are non-exhaustive[13] but illustrate how other jurisdictions have interpreted KGRD consistently with the Utah Supreme Court. These jurisdictions all require a

[13] *See also State v. Johnson*, 284 S.W.3d 561, 577 (Mo. 2009) (upheld the jury's finding of KGRD where the defendant shot a law enforcement officer multiple times "and a bullet struck a juvenile standing next to the patrol car."); *State v. Hazelton*, 985 P.2d 698 (Kan. 1999) (upholding KGRD where defendant lured two victims to the woods, intended to shoot both, shot one victim, and shortly thereafter shot the other victim—demonstrating a "course of conduct"); *State v. Carver*, 356 S.E.2d 349 (N.C. 1987) (trial court did not err in finding KGRD

close examination of the defendant's course of conduct and the mental state of the defendant relative to the "other" individuals.

II. Count Six Must Be Stricken Because the Evidence Does Not Establish That Mr. Robinson's Statement to Mr. [redacted] to "Ask for a Lawyer and Stay Silent" was Intended to Obstruct an Investigation.

Count Six charges Mr. Robinson with "tampering with a witness" in violation of Utah Code § 76-8-508. The Information alleges that Mr. Robinson committed this offense by "directing his roommate to stay silent if police questioned the roommate." Information at 3. The State alleges that by telling Mr. [redacted]o exercise his right under the Fifth Amendment to the United States Constitution to ask for counsel and to remain silent, Mr. Robinson "attempted to induce or otherwise cause his roommate to ... withhold testimony or information" with the "inten[t] to prevent an official proceeding or investigation."

Count Six must be stricken because Mr. Robinson's advice to Mr. [redacted]s consistent with the long-standing constitutional principle that every person in this country has "the right to remain silent" in the face of government interrogation, and because the context in which the allegedly improper statement was made demonstrates that it was "purely altruistic" and for Mr. [redacted] benefit, rather than for the purpose of obstructing an investigation.

"Where the inducer's motive in advising [another] to remain silent is to impede the investigation against him, rather than to give purely altruistic advice, he is obstructing justice."

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where defendant fired multiple shots in a crowd of people with a semi-automatic rifle capable of firing eight bullets without being reloaded); *Johnson v. State*, 38 S.W.3d 52 (Tenn. 2001) ("we decline to adopt a *per se* rule that would automatically allow this aggravating circumstance in all felony murder cases where the defendant is armed with a pistol and others are present. Such a *per se* rule would not adequately provide for individualized sentencing, and it would unnecessarily broaden [KGRD] to a point that it would fail in its essential function of narrowing the death-eligible class."); *Porter v. State*, 732 So. 2d 899 (Miss. 1999) (evidentiary basis insufficient where a defendant, hired to kill the victim, hid outside the doorway of the victim's home and shot him when he came to the door, fleeing afterwards despite the fact that there were other persons in the house); *State v. Sandoval*, 788 N.W.2d 172, 219 (Neb. 2010) (three men with semiautomatic handguns entered bank full of people and fired at the people in the bank; the three survivors "were within range of Sandoval's weapon at all times and he unquestionably placed them at a great risk of death").

United States v. Peterson, 385 F.3d 127, 142 (2d Cir. 2004). The inverse is therefore true. Where the advice is purely altruistic, one is not obstructing justice.

Mr. Robinson's advice to Mr. [redacted]was as follows:

> If any police ask you questions, ask for a lawyer and stay silent. My lawyer should be Doug Terry, I'll see if he can reach out to you. And make sure the police follow the right procedures, proper warrants and stuff, but be polite and respectful of course.

StEx 16.1.

Whether an individual who is under investigation is obstructing that investigation or providing "truly altruistic" advice to another requires a context-specific analysis. Here, the conversation between Mr. [redacted]nd Mr. Robinson demonstrates that Mr. Robinson' s focus was on protecting *Mr.* [redacted] from any fallout from the events which had transpired, and not on inducing him to obstruct an investigation. He says to Mr. [redacted]

> Im gonna turn myself in willingly, one of my neighbors here is a deputy for the sheriff. We hope to keep things sorta quiet here. I only hope they let you visit.
> …
> I'm gonna miss you too. Please be good for me. If you need anything at all both of my parents are willing to help you. Please go to them.
> …
> leave the room alone. The feds will search it top to bottom for certain, then work with my family to sort it out, what goes where and such
> …

In response to Mr. [redacted] question, "is there any way you don't go to prison?"

Mr. Robinson responded:

> I highly doubt it. I will update you as much as I can. If you need a place to stay im sure my family would have you in my old room.
> …
> You are all I worry about love
> …
> Don't talk to any media please. don't take any interviews or make comments.
> …
> I will always love you too. I will write to you as often as possible.
> …
> If any police ask you questions ask for a lawyer and stay silent… make sure the police follow the right procedures, proper warrants and stuff, be polite and respectful of course

StEx 16.1.

These statements by Mr. Robinson contextualize his altruistic advice to Mr. [redacted] exercise his rights under the Fifth Amendment, "to ask for a lawyer and stay silent" The facts do not support the State's allegation that this statement by Mr. Robinson was made with an intent to prevent an official proceeding or investigation. Count Six must be stricken.

III. Count Seven Must Be Stricken Because the Evidence Does Not Establish That Mr. Robinson Had Knowledge That a Child Under the Age of 14 Was Present and Would See or Hear the Commission of the Charged Homicide.

The Information charges Mr. Robinson, in Count Seven, with the substantive offense of *knowingly* exposing a child under the age of 14 to the charged homicide, in violation of Utah Code § 76-3-203-10(2).

This section of Utah law requires that the State prove that a violent offense occurred "in the physical presence of a child younger than 14 years old" with the defendant "having knowledge that the child is present and may see or hear the commission of a violent criminal offense." Utah Code § 76-3-203-10(2).

The State has failed to present sufficient evidence to establish probable cause that Mr. Robinson did in fact have the requisite knowledge. While the State presented a video which shows two children, in fact, present at the TPUSA rally at UVU on September 10, 2025, the State presented no evidence that the shooter was aware of this child's presence, nor that he was aware of the presence of any other child under the age of 14. *See* StEx 6.

Without any evidentiary support, the State invites this Court to speculate that Mr. Robinson, from approximately 400 feet away and during a 35-44 second period, came to be aware of the presence of children under the age of 14, relying upon Mr. Robinson's alleged walking tour of the campus several hours before the TPUSA rally began. There was no evidence that Mr. Robinson was anywhere near the crowd that formed prior to the rally, or that he observed children or families with children making their way to the space where the rally occurred. Indeed, the path Mr. Robinson travelled as visible in State's Exhibits 12.1 and 12.4 suggests Mr. Robinson did not even pass anyone that could be identified as under 14 years old.

The reasonable inferences might differ if the location of the incident were not a college campus. If a defendant were to engage in crimes of violence at an obviously occupied elementary school or a day care facility, it might be reasonable to infer the knowledge required under Count Seven. With the evidence as it is, this is not a reasonable inference.

a. The "Violent Offense Committed in the Presence of a Child" Aggravating Factor Must Be Stricken for the Same Reason—There Is No Evidence That Mr. Robinson Had the Requisite Knowledge.

Separate and apart from Count Seven, the State has alleged the identical aggravating factor in connection with Counts One and Two, pursuant to Utah Code section 76-3-203.9. The analysis is no different. There is no evidence that Mr. Robinson had the requisite knowledge and the State improperly invites the Court to speculate. *See Murphy*, 2026 UT App 38, ¶ 10 ("An inference is a conclusion reached by considering other facts and deducing a logical consequence from them," and speculation entails "the act or practice of theorizing about matters over which there is no certain knowledge at hand." (citation omitted)). *Id*.

b. The State's Backup Position, That Sentencing Enhancements Are Not Subject to Proof at a Preliminary Hearing, Is Inconsistent with Well-Established Constitutional Law.

The State asserts that the enhancements alleged in the Information are not subject to this Court's review in a preliminary hearing. The State is incorrect about this important matter and relies on an invalidated distinction between "elements" and "sentencing factors". While the Utah Supreme Court did so hold in cases in the 1970s and 1980s, in the year 2000 the United States Supreme Court squarely held that any fact which increases the potential punishment in a case, other than criminal history facts, are elements of the offense which must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey* 530 U.S. 466 (1980). In fact, the Court wrote, "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 490.

Here, the State has charged Mr. Robinson, in an Information subject to a probable cause determination, with two separate sentencing enhancements, each of which carries the possibility

of increasing Mr. Robinson's punishment. Utah Code § 76-3-203.9 requires the sentencing court or the Board of Pardons and Parole to consider whether "the knowing presence of a child" enhancement has been proven in the course of exercising their authority over sentencing and release decisions. Utah Code § 6-3-203.14 is a "victim targeting enhancement" which makes "one classification higher" the offense for which the defendant was convicted. Therefore, it too is subject to *Apprendi*.

Where the State has elected *not* to proceed by way of grand jury but instead elects to present the evidence in support of its Information to a magistrate, the defendant's constitutional right not to be tried on any of the charged offenses absent an initial finding of probable cause extends to enhancements that increase the potential punishment. This is a logical consequence of *Apprendi*, which eliminated, with exceptions not applicable here, the distinction between elements of an offense and sentencing factors which increase the maximum punishment.

The State must prove each of the enhancements to this Court, sitting as a Magistrate, by probable cause. As to the "violent offense committed in the presence of a child" Mr. Robinson has explained above why the State has failed to meet its burden of proof. Mr. Robinson now turns to the second enhancement alleged in the Information, the allegation that Mr. Robinson selected Mr. Kirk based upon Mr. Robinson's views of Mr. Kirk's political expression.

IV. The State Has Failed to Produce Reliable Evidence That the "Victim Targeting Enhancement" Applies Here.

The "victim targeting enhancement" set forth in Utah Code section 76-3-203(14) is focused on the defendant's perception concerning a "personal attribute" of the victim. The single "personal attribute" alleged in the Information is Mr. Kirk's "political expression" (§ 76-3-203(14)(1)(k)) without any further specificity in the charging document. In support of this enhancement, the State proffers two disconnected sets of facts which fail to establish probable cause.

One set is Exhibit 5.1, a Rule 1102 witness statement of David Englehardt, a pastor. Pastor Englehardt's statement contains no information concerning Mr. Robinson's state of mind

as to Mr. Kirk's political expressions. While it purports to present this Court with information as to what Charlie Kirk believed "as all theologically-orthodox-Christians believe" about gender identity and sexuality, it does not identity any specific statements made by Mr. Kirk on these topics prior to September 10, 2025. It also identifies subject matters that Mr. Kirk would debate and discuss at various events, but it does not identify a specific political expression of Mr. Kirk on such topics, let alone statements of Mr. Kirk that were both known to and motivated Mr. Robinson.

Therefore, Mr. Englehardt's written sermon as to what "all theologically-orthodox-Christians" including Mr. Kirk "believe" does not establish that Mr. Robinson "intentionally" selected "the victim of the criminal offense because of the defendant's belief or perception regarding the victim's personal attribute or a personal attribute of another individual or group of individuals with whom the victim has a relationship."

The only other "fact" is Mr. Robinson's statement to Mr. [redacted] I had enough of his hatred." StEx 16.1. Mr. Robinson does not tell Mr. [redacted]n this text exchange, nor was there, according to Mr. [redacted]ny prior communication between them concerning Mr. Kirk, nor that Mr. Robinson targeted Mr. Kirk because of his religious beliefs or his political beliefs or any other category of beliefs. He refers to "hatred" and nothing more.

Ironically, it is the State that argues that because Mr. Robinson and Mr. [redacted]re two men who love each other and/or, it speculates, because Mr. [redacted](and not Mr. Robinson) was at least intermittently identifying as a female to his close friends, it is Mr. Kirk's views on these topics which are the "hatred" Mr. Robinson was referring to.

These circumstances are not sufficient to establish, even by probable cause which if any political expression of Mr. Kirk motivated Mr. Robinson to select Mr. Kirk for an act of violence. There is no evidence of specific political expressions of Mr. Kirk which, if any, Mr. Robinson may have been aware of or focused on. There are no writings attributed to Mr. Robinson on this topic. There are no other statements by Mr. Robinson to third parties which address Mr. Kirk or his political viewpoints and Mr. Robinson's perception of them. After

searching his residence, his parents' residence, his computers, his telephone, Mr. [redacted] telephone, and hundreds of law enforcement interviews, there is nothing to base this sentencing enhancement upon other than that single criticism of Mr. Kirk's "hatred".

In the face of the absence of evidence, the State focuses on Mr. Robinson's sexuality and Mr. [redacted] gender identity, if only because those are two topics on which Mr. Kirk was, in fact, widely viewed as expressing hatred and intolerance. However, that is not an evidentiary substitute for proof that Mr. Robinson targeted Mr. Kirk because of those expressions. It is the State's speculation that he did so.

The victim targeting enhancement must be stricken.

CONCLUSION

In relying largely on hearsay deemed reliable by rule, the State has failed to prove probable cause by reliable evidence that satisfies each element of each of the charged evidence. For this reason alone, this Court must decline bindover. In addition, the State has not provided this Court with sufficient evidence, as a matter of law, to satisfy the sole alleged aggravator in the Information. Under controlling constitutional law and Utah Supreme Court interpretation, the Court cannot find based on the State's evidence that the circumstances presented a great risk of death to another other than Charlie Kirk and himself, and that the shooter knew of this "high probability" of death of another. Finally, the Court should decline to bindover on the State's alleged aggravators and Counts 6 and 7 where the State requires this Court to speculate in the absence of evidence to establish essential elements.

RESPECTFULLY SUBMITTED this 11th day of August, 2026.

/s/ Kathryn N. Nester
Kathryn N. Nester

/s/ Michael N. Burt
Michael N. Burt

/s/ Richard G. Novak
Richard G. Novak

/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 11th day of August, 2026, thereby serving all attorneys of record.

/s/ Staci Visser