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IN THE FOURTH JUDICIAL DISTRICT COURT - PROVO

IN AND FOR PROVO COUNTY, STATE OF UTAH

_____	)	
STATE OF UTAH,	)	Case No. 251403576
	)	
Plaintiff,	)	
	)	
v.	)	REDACTED TRANSCRIPT OF:
	)	SEALED MOTION HEARING
TYLER JAMES ROBINSON,	)	
	)	
Defendant.	)	
_____	)	

BEFORE THE HONORABLE TONY GRAF

FOURTH DISTRICT COURT
137 NORTH FREEDOM BOULEVARD
PROVO, UT 84601

OCTOBER 24, 2025

Court Reporter: Phoebe S. Moorhead, RDR, CRR, UT CSR
Certified Court Reporter for the State of Utah

A P P E A R A N C E S

For the Plaintiff STATE OF UTAH:

Christopher Ballard
Jeffrey Gray
Chad Grunander
Ryan McBride
David Sturgill
Lauren Hunt
UTAH COUNTY ATTORNEY'S OFFICE
100 East Center Street
Suite 2100
Provo, UT 84606

For the Defendant TYLER JAMES ROBINSON:

Kathryn N. Nester
NESTER LEWIS PLLC
40 South 600 East
Salt Lake City, UT 84102

Staci Visser
BROWN, BRADSHAW & MOFFAT
422 North 300 West
Salt Lake City, UT 84103

Richard G. Novak
LAW OFFICES OF RICHARD G. NOVAK
65 North Raymond Avenue
Suite 320
Pasadena, CA 91103

For UTAH COUNTY SHERIFF'S OFFICE:

Benjamin C. Van Noy
UTAH COUNTY ATTORNEY'S OFFICE
100 East Center Street
Suite 2100
Provo, UT 84606

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P R O C E E D I N G S

(Proceedings commenced at 3:00 p.m.)

THE COURT: Court is now in session. Calling Case 251403576, State of Utah vs. Tyler James Robinson.

Counsel, would you please enter your appearances?

MR. BALLARD: Your Honor, Christopher Ballard on behalf of the state. Also here is Jeff Gray, the Utah County Attorney; Chad Grunander; David Sturgill; Ryan McBride; and Lauren Hunt; also all representing the state. And then also Mr. Ben Van Noy from the Utah County Attorney's Office. He's representing the Utah County Sheriff's Office.

THE COURT: Thank you. Good afternoon to you all.

MS. NESTER: Good afternoon, your Honor. Kathy Nester, Richard Novak, and Staci Visser here on behalf of Mr. Robinson, who's seated to my left.

THE COURT: Thank you. Good afternoon.

Mr. Robinson, good afternoon to you as well.

All right, counsel. We have a few matters to deal with. I appreciate your ability to make yourselves available. I wanted to -- after receiving the motions, I wanted to have a hearing in order for all sides to fully vet out. And it's my anticipation -- and I'm not sure if we've confirmed, but I plan to make an oral ruling on Monday at 1:00. I wanted to take the weekend to consider the arguments, re-review all the memos, all the filings, and put that together. So I appreciate your

1 patience for that. I really want to give these important
2 issues as much time as needed in order to make a good decision.

3 With that, counsel, how would we like to proceed?
4 There are -- for defense, you filed the original motion, and so
5 I want to make sure that we pick a path that is organized and
6 it's easy to follow for all sides.

7 MR. NOVAK: Thank you, your Honor. Richard Novak for
8 Mr. Robinson. And there are sort of some related, partially
9 briefed, fully briefed issues that relate to the primary
10 motion, which relates to shackle -- shackling. The first thing
11 we did want to ask the Court to do is to direct the sheriffs to
12 make one of our client's hands available so he can take notes
13 during the hearing. We've provided him with paper and a pen.
14 And I can tell the Court that after spending two hours in a
15 room with Mr. Robinson today, I can't imagine any reason why he
16 can't take notes during this hearing, and there's no reason why
17 that would jeopardize his safety or the safety of anybody else.

18 So we think to start the hearing, we need to at least
19 begin with a minimal level of unshackling. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED] And he's not able to write or take notes during what we
23 anticipate could be an extended hearing. And we'd like him to
24 be able to do so.

25 [REDACTED]

1 [REDACTED] It's a sealed hearing. The
2 public's not here. So we just can't imagine any specific
3 reason why he can't have one of his hands free for writing.

4 THE COURT: All right. The state? Do you wish to be
5 heard on this issue?

6 MR. VAN NOY: Yes. Ben Van Noy, Utah County
7 Attorney's Office. Given the substance of his motion, I would
8 object on the sheriff's behalf. This is the heart of what
9 we're trying to decide. This is a pretrial proceeding. [REDACTED]
10 [REDACTED], but we would request that
11 that be denied, as it should be in all pretrial hearings.
12 Thank you.

13 THE COURT: Any further input?

14 MR. BALLARD: No, your Honor.

15 THE COURT: All right. Is there a way to unshackle
16 one hand for him to be able to write that doesn't compromise
17 the rest of --

18 BAILIFF: [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 THE COURT: All right. Let's go ahead and proceed
22 with that.

23 MR. NOVAK: Thank you. And your Honor, while we're
24 waiting -- I don't care if this is on the record. I have a
25 really bad sore throat. So if I put something in my mouth,

1 it's not gum and it's not candy. Okay? But if anybody wants a
2 Ricola, I'm happy to share them.

3 THE COURT: All right.

4 MR. NOVAK: Thank you.

5 THE COURT: Depends on the flavor.

6 MR. NOVAK: It's original.

7 THE COURT: Okay. Some of them are nasty.

8 MR. NOVAK: No. I don't like any of that stuff.

9 (Pause in proceedings.)

10 THE COURT: All right. And before we begin, I just
11 want to make sure that we're all on the same page on the issues
12 that we are addressing today. Mr. Novak, if you wouldn't mind
13 just touching on the topics that you anticipate presenting, and
14 I want to make sure that we're all in sync with what's being
15 presented from both sides.

16 MR. NOVAK: Agreed, your Honor. And I appreciate the
17 invitation to sort of do the road map.

18 So on Mr. Robinson's behalf, we filed a motion to
19 permit him to appear in civilian clothing and without
20 restraints at all hearings. That motion is fully briefed, and
21 we understand that's the primary reason why we're here today.

22 Obviously the Court knows that we interpreted part of
23 the state's opposition as a motion to actually limit the types
24 of appearances at which Mr. Robinson would appear in person.
25 And we treated that, even though it wasn't designated as a

1 motion, as a motion, and we filed an opposition to that.

2 The state has not filed a reply. I don't know if
3 that's just because of timing or if they don't -- if the state
4 doesn't intend to file a reply. So that may be a question for
5 counsel for the state.

6 But we also filed a motion to strike the state's
7 opposition to our primary motion because we believe it is
8 impermissibly a pleading filed by a nonparty. The motion to
9 strike is fully briefed. And, in fact, Ms. Nester is going to
10 argue the motion to strike if the Court is prepared to hear
11 argument on that.

12 So I can go a little further down the road of what
13 other issues we think are connected with these. And also just
14 so the Court knows, counsel for the parties met before the
15 hearing about I think one other motion that is partially
16 briefed and some other motions that the parties plan to file in
17 the near future. And we actually wanted to talk to the Court
18 about our proposed sort of briefing schedule for that and when
19 we might have a hearing depending on the Court's schedule.

20 So it's not super linear, right? There's a little
21 bit of complexity there.

22 THE COURT: Sure.

23 MR. NOVAK: Do you want me to mention how -- mention
24 the other slightly related motions now? Or do you want to deal
25 with that later?

1 THE COURT: Let's do that so it's all out there and
2 we can see the trajectory of where we're going.

3 MR. NOVAK: Okay. So I think the two issues that
4 relate most squarely to our primary motion to appear in
5 civilian clothing and without restraints are, one, a motion
6 that we intend to file on behalf of Mr. Robinson to completely
7 eliminate all video and audio broadcasting or delayed feeds of
8 court proceedings. And we haven't briefed it. We're not going
9 to argue it today unless the Court decides it wants to hear
10 preliminary argument. But the parties have discussed the fact
11 that we are going to bring that motion. And I think that we
12 will bring that motion regardless of the ruling of the Court on
13 Monday on the shackling/civilian clothing issue. Okay? So
14 that's one.

15 The second is this Court's sua sponte pretrial and
16 trial publicity order, which the state has informed us they're
17 going to seek both a modification and clarification of, and we
18 were also, even before we knew that, were going to move the
19 Court to modify it. And the reason why we believe that these
20 are all related to each other is because we, meaning
21 Mr. Robinson and his defense team, are very concerned that the
22 nature, content, scope, pervasiveness, of the pretrial
23 publicity, of the statements that have already been made by law
24 enforcement officers, by lawyers, by the representatives of the
25 state in this case, may have a significant impact on the

1 fairness of his trial. And so modifying the pretrial publicity
2 order, addressing the cameras in the courtroom, and, frankly,
3 addressing the individualized propriety of shackling in the
4 courtroom all really relate to the fairness of the proceedings.

5 There are two other reasons why shackling we believe
6 is -- the current shackling protocol and practice with respect
7 to Mr. Robinson is unconstitutional, but those don't relate
8 directly to the fairness of the proceedings in the traditional
9 sense.

10 There's another motion, which we've also discussed
11 with counsel for the state, and they're well aware that we're
12 going to do this. And this is a motion to actually disqualify
13 the Utah County Attorneys from representing the state in the
14 prosecution of this case. If the Utah County Attorneys want to
15 represent the sheriff as an entity for security purposes,
16 that's a different issue. We are focused on whether there is a
17 conflict of interest -- and we are in a sealed hearing,
18 correct, your Honor?

19 THE COURT: Yes.

20 MR. NOVAK: Okay. So -- and I'm not trying to
21 pre-argue the issue, but the Utah County Attorneys have advised
22 us that a family member of one of the attorneys was present at
23 the incident at which Mr. Kirk was shot and killed, that this
24 child -- I don't know if they're an adult, but I'm not
25 referring to them as a minor. This child was present, observed

1 it, was within 85 feet of Mr. Kirk when he was killed; had to
2 flee; that the Utah County Attorney's Office was all advised of
3 this; that law enforcement were actually deployed to the area
4 with her safety and status in mind. I am not trying to
5 pre-argue this, your Honor, and I'm not saying anything that we
6 haven't already discussed a couple times with counsel for the
7 state.

8 So we are going to file a motion to disqualify. And
9 all of these motions, we've already talked about getting them
10 all filed before Thanksgiving. That doesn't mean that we want
11 the Court or anybody else to work over the holidays, but
12 there's a lot of work there. And so we need, you know, a few
13 weeks to get that all done.

14 This Court may have some preferences for how those
15 motions are triaged, if I may, but those are the things sort of
16 circling around today's motions, and I think I should stop
17 talking here.

18 THE COURT: All right.

19 All right. And to the state, I just want to make
20 sure that -- from your perspective, that same understanding of
21 what we're addressing today. I just don't want to go down the
22 path and then one side says, "Wait a second. I thought we
23 weren't going there." I just want everyone to start at that
24 same starting point.

25 MR. BALLARD: That's perfect, your Honor. With

1 respect to what's at issue today, we agree it's the motion to
2 strike the state's response, the joint response of the state
3 and sheriff's office, and then also the substantive motion
4 about clothing and restraints.

5 The state did not make an affirmative motion in its
6 response, and so that's why the state has not filed a separate
7 reply. So -- and I'll explain that later during my argument.
8 But from the state's perspective, those two motions are fully
9 briefed, ready to go for the Court today.

10 As far as the three motions that counsel mentioned, I
11 think that's all the state's understanding as well, that those
12 will be filed. We'll do our best to respond expeditiously.
13 We're very interested in getting a preliminary hearing set in
14 this case as soon as possible. And we were we anticipate that
15 once we get those motions resolved, or at least argued, then we
16 can move forward with setting a preliminary hearing date.

17 There is two other motions that I think the Court
18 should be aware of that are docketed. The Court -- there is
19 Defendant's motion to preserve evidence. That's Docket No. 75.
20 The Court entered a premature order on that motion. That's
21 Docket No. 107. And the state has filed a motion to set aside
22 that premature order. That's Docket 116.

23 And Defendant's response to that motion is due in
24 early November. And then, from our perspective, the
25 defendant -- yeah, Defendant needs to file a reply to -- in

1 support of the motion to preserve evidence.

2 MR. NOVAK: We may be able to meet and confer on the
3 preservation of evidence and eliminate adversarial litigation
4 about it, because I think -- and -- yeah. I just think that we
5 may be able to do that. We will try to do that. It's really a
6 question of what evidence needs to be preserved and what
7 advance notice needs to be given to us before biological
8 evidence can be used even if it might disappear. And so we're
9 going to at least try to meet and confer about that. We may
10 have different definitions of materiality, but we'll do what we
11 can to eliminate things that we maybe can agree upon and not
12 burden the Court with another set of briefing.

13 THE COURT: All right. I appreciate that. Anything
14 else, Mr. Ballard?

15 MR. BALLARD: No, your Honor. Thank you.

16 THE COURT: So the one -- the one concern that I have
17 is -- and I appreciate counsel laying this out -- is the issue
18 of the media and photographs and video, because this is very
19 ripe, as we have a hearing on the 30th. And so I'm just trying
20 to get an idea of where -- how much time do we need -- because
21 as this Court's trying to -- it's intertwined. And so as I'm
22 looking at what decisions to make, that is an important
23 consideration because it touches upon the issues that we'll be
24 talking about today.

25 And so where are the parties at with that,

1 understanding that we have a hearing on the 30th?

2 MR. NOVAK: I think where we are at after speaking
3 before we came into the courtroom is we're not -- especially
4 since we're here today -- we're not sure we actually need a
5 hearing on the 30th.

6 THE COURT: Okay.

7 MR. NOVAK: And we've discussed that with
8 Mr. Robinson. He understands the consequences of further
9 delays so that we can raise these issues and litigate these. I
10 don't want to speak for the state, but I think our idea is
11 given that we need, like I said, before Thanksgiving, to file
12 the motions that we're talking about, maybe the Court wants to
13 suggest a hearing date in early January. We will get all the
14 briefing done in time for that. Or whenever the Court is ready
15 to do that after the holidays. And we don't need the status
16 conference -- the Court set the status conference before any
17 motions were filed, so it makes sense that it's on calendar but
18 now here we are today. We just don't think that there's a need
19 for a hearing. And we certainly can't file, brief, and
20 represent that it's submitted to your Honor before the 30th on
21 any of those.

22 THE COURT: Okay.

23 MR. NOVAK: So if the Court's comfortable with
24 vacating the hearing on the 30th or postponing it or however
25 the Court wants to fashion the scheduling, that's fine with us.

1 We don't need to be here next week unless the Court wants to
2 hear further argument on something that -- that we don't cover
3 today.

4 THE COURT: All right. And to the state?

5 MR. BALLARD: And, your Honor, the state agrees with
6 that approach. We don't think we need -- given everything that
7 we've been able to do today and will be able to do today, we
8 don't need that hearing on the 30th.

9 THE COURT: All right. Well, we can address that at
10 the end of today's hearing.

11 All right. Well, it looks like we'll be addressing
12 the motion to strike and the dress and restraints issue today.
13 So with that, let's go ahead and move forward.

14 MR. NOVAK: Ms. Nester is going to handle the motion
15 to strike. I'm going to sit down. Thank you.

16 MS. NESTER: Good afternoon, your Honor. Kathy
17 Nester on behalf of Mr. Robinson. May it please the Court and
18 counsel.

19 Your Honor, the motion to strike, obviously it's more
20 of a procedural complaint that we have than the substance that
21 Mr. Novak is going to cover with you about the shackling. But
22 we had some concerns in the manner in which the state replied.
23 And I do think there was a little bit of confusion. I think we
24 were all trying really hard, admirably, to get to the Court
25 quickly on this issue because we all recognized this matter

1 needed to be resolved before any additional hearings were held.
2 And we're very grateful to the Court for what you've done to
3 get us here quickly. And all the orders you issued trying to
4 accomplish that, we appreciate that very much. And we know
5 that's what was happening.

6 I do think there was a little bit of confusion. The
7 first order that came out by the Court, it came out on October
8 13th. And in that order, in our motion, we made very clear --
9 and Mr. Novak will get into all the details of this, so I don't
10 want to steal his thunder, but we welcomed the participation of
11 the sheriff in this process. We recognize that the sheriff
12 would have important information that the Court would need to
13 take into consideration in making findings on our motion, our
14 anti-shackling motion if I'll just call it that.

15 So we had invited that. We expected that. We asked
16 that the Court consider whatever documents the sheriff needed
17 to participate with, that they would be looked at on an ex
18 parte basis. We certainly recognize that it might not be
19 judicious for us to see the inner workings of all the jail. We
20 frankly don't want to know any of that.

21 So we had already laid the groundwork in our motion
22 for these -- this information to come from the sheriff. We
23 welcomed it, we wanted it, and we think it's appropriate. We
24 were a little bit surprised when we got the response in that it
25 appeared to us -- it is apparent on its face -- that the

1 sheriff is entering an appearance as a party with this
2 pleading, that they are actually, through -- through
3 Mr. Van Noy, are lodging objections to our motion as a party
4 would. And that just instantly raised some concerns with us.

5 First of all, because we are looking at a very long
6 case. This case is probably going to last a long time,
7 hopefully. And, you know, we're very concerned about right
8 from the get-go a precedent being set where the sheriff can
9 enter appearance in our case, lodge objections to our motions,
10 and appear and, through counsel, to be heard. That -- we
11 certainly were not inviting that in our motion that we filed,
12 and we felt very strongly compelled to shut that down quickly
13 and permanently.

14 We did cite to the Court in our motion -- certainly
15 we recognize the state can and should respond and that it would
16 be perfectly appropriate for the state to reveal either through
17 exhibits or through testimony at the hearing what the concerns
18 of the sheriffs were. I think that would be proper, and we
19 expected that to occur. The concern we have is that it appears
20 the sheriff is actually entering an appearance as a party. We
21 don't think that's proper.

22 We have cited to the Court a couple of cases, the
23 Lane case and also the Brown case where our Courts -- our
24 Supreme Court has dealt with the issue of the fact that there
25 are only two parties in a criminal case. Where this usually

1 comes up in litigation is when victims try to intervene in a
2 matter. It's happened to me. It's happened to other people,
3 I'm sure. I'm sure you will see it as you sit on the bench a
4 little bit longer. But that does happen sometimes where a
5 victim pops in and says, "Hey, you know, I'm not happy with the
6 way something's going. I want to file a motion." A lawyer
7 tries to file a motion. And in these two cases, that's
8 basically what happened. There were questions of
9 appealability. If something the victim wants is denied, can a
10 victim appeal to appellate court? Those kind of things were
11 addressed.

12 But both of these cases, while not on point with
13 what's happening here at all -- and we acknowledge that --
14 they're certainly analogous. And the Supreme Court made very
15 clear in the quotes that we put in our motion to strike that
16 the -- the proper procedure is that the party does not have a
17 right to enter as a party. They cannot file pleadings. They
18 don't have a right to file an appeal. They have a right to be
19 heard under our victim statute, but there's no similar statute
20 for a sheriff or people concerned about security. And
21 actually, in this case, there's an affidavit that's been
22 attached by Mr. Palmer. He actually is part of the court
23 system that is looking at court security, and his affidavit was
24 attached here. I know he's here outside in case any of us are
25 willing to call him in.

1 But I think he did it the right way. I think his
2 attachment of his affidavit is how that should happen. Right?
3 That he's given you his expert opinion, and the Court certainly
4 can take that into consideration. We just felt -- you know, I
5 know it's unusual to start right off with trying to strike a
6 pleading of the other side, and that's not something we do very
7 often. But we do think that's important because we have a lot
8 of litigation ahead of us. And I think we need to just make
9 very clear that we have boundaries here and that, while we
10 welcome the sheriff's participation, we want their information
11 to get to you so you can make your decisions about safety and
12 security for our client as well as everyone else. But we
13 strongly object to them appearing as a party.

14 And so I guess our suggestion was if we could strike
15 the pleading to the extent it is on behalf of the sheriff as a
16 party, we would not object to the information the sheriff wants
17 to share with you. We're not trying to shut the sheriff down
18 or say that you shouldn't consider what they have to say. But
19 we are very concerned, and we are asking for that reason that
20 the pleading be stricken and that the Court consider it as
21 witness testimony or as evidentiary offerings on behalf of the
22 county attorney, but certainly not accept it as a proper and
23 allowable pleading on behalf of the sheriff as a party.

24 And I believe --

25 Anything else I need to add to that?

1 I think I would submit unless Your Honor has any
2 questions for me.

3 THE COURT: In -- so my understanding of what you're
4 saying is that the state should be allowed to call them as
5 potential witnesses.

6 MS. NESTER: Sure.

7 THE COURT: They put on the evidence. And then
8 typically in criminal cases, an evidentiary hearing is held and
9 then briefing occurs afterward.

10 MS. NESTER: Right.

11 THE COURT: And so what would be the -- what would be
12 your thoughts if we follow that path and then they file the
13 exact same motion?

14 MS. NESTER: Right. Well, we would really like to
15 proceed with a hearing on the shackling motion today. And
16 we're not trying to derail that. I think if we could just have
17 some clear indication from the Court that the Court is going to
18 treat this pleading not -- is not accepting it as a party
19 pleading from the sheriff, but that the Court is going to treat
20 this as a pleading from the state and only the state, and that
21 the objections are being made on behalf of the state and is not
22 being made on behalf of the sheriff. I envision some type of
23 order that just makes it very clear that in the future, the
24 sheriff is not invited to file pleadings or objections, but
25 that you will consider the information in the motion as you

1 take this whole matter under consideration. And we actually
2 don't have any objection to that. Does that make sense?

3 THE COURT: So basically clarifying that the
4 sheriff's department is not a party, but as it relates to the
5 motion itself, it sounds like your position is -- and correct
6 me if I'm wrong -- that you're fine as is with the
7 understanding that the sheriff is not a party and cannot file
8 objections.

9 MS. NESTER: Right.

10 THE COURT: Am I understanding that?

11 MS. NESTER: Right. Because the motion actually says
12 "The sheriff objects to" -- blah. "The sheriff" -- like
13 they're lodging objections to our pleading. And I think if we
14 all understand that that's not proper and it can't happen
15 again, but that the -- for expediency purposes, because we all
16 want to have this here today -- heard today, that you will take
17 it into consideration as witness information, as evidentiary
18 information, but not as a -- not as an expression of a party
19 that is entering an appearance and lodging an objection,
20 because we don't think that's provided for under the rules.

21 THE COURT: And is it your preference today if I were
22 to go down that route that the state calls witnesses to support
23 what's in their motion? Or are you willing to accept it as is,
24 as filed?

25 MS. NESTER: I think that's totally up to the state.

1 If they feel that they've sufficiently provided you with the
2 information, that's fine. If they want to call them, that's
3 fine. I don't think we're going to jump in their boat and make
4 that decision for them. But all we're concerned about on the
5 motion to strike is that it's very, very clear that the roles
6 of the sheriff is as a witness. Even as an expert, that's
7 fine. But not as a party and not as someone that can enter
8 appearances now or in the future.

9 THE COURT: All right. Thank you.

10 MS. NESTER: Thank you, your Honor.

11 THE COURT: Mr. Ballard.

12 MR. BALLARD: Your Honor, Christopher Ballard on
13 behalf of the state.

14 There's nothing improper about what the state did
15 about the state and the sheriff filing a joint response to the
16 motion. When the Court ordered the sheriff to respond, when
17 the motion implicates court security, which is the joint
18 responsibility of the sheriff and the Court, and when the
19 state's interests and the sheriff's interests are aligned.

20 And let me just make it clear at the outset, the
21 state is not trying to sneak in the sheriff's participation.
22 The state is not trying to make the sheriff a party or be able
23 to offer his input -- the sheriff's office input on anything
24 that is not directly related to the sheriff's responsibilities
25 in this case.

1 The state was simply trying to comply with this
2 Court's orders, the first of which ordered the sheriff to
3 respond and then also ordered the state to respond. And both
4 of those orders required the defendant to serve his motion on
5 the sheriff. And so I don't think you can fault the state for
6 doing its best to just try and comply with this Court's orders.
7 I think even if there was something improper about the way the
8 state did this procedurally, I think the information, the
9 rules, the authority that we've cited in our opposition to the
10 motion to strike explained that the sheriff does have standing,
11 or persons can have standing as limited purpose parties. Not a
12 broad purpose party or a main party in the case. That's not
13 what we're trying to do. The sheriff or anyone in a case can
14 have limited purpose standing when you've got a rule or a
15 statute that allows that person to either claim a right or to
16 offer input.

17 And as opposing counsel pointed out, this comes up
18 most often in the situation of crime victims, but it's not just
19 limited to crime victims. As we cited in *State ex rel. J.T.*,
20 that was a case where you've got a -- it's a child welfare
21 proceeding. You've got a statute that says that relatives can
22 give input as to placement in those kinds of cases, and so the
23 grandmother had limited purpose party standing to be able to
24 give her input. Here, we've got authority that allows the
25 sheriff to give input on these kinds of decisions, and that's

1 all we were trying to do in accordance with what the Court
2 requested.

3 If the Court has further questions about limited
4 purpose standing and the reasons for that, Mr. Van Noy can
5 address that on behalf of the sheriff. But that's -- that's
6 the state's position unless you have any further questions for
7 me.

8 THE COURT: Well, perhaps the Court can give a little
9 bit of clarification, because there were two orders, and what
10 happened was on that day, it was a holiday. The Court came in
11 and was reviewing the order, and it wasn't the official order
12 because it was trying to be sent out as a courtesy given the
13 time constraints. The Court then issued the order the second
14 day with the removal of requiring the sheriff's response. And
15 so for clarification purposes, that's what happened. The first
16 one was simply a courtesy copy just to be like, all right, we
17 have these tight deadlines, and wanted to put all parties on
18 notice to give them opportunity to prepare given the holiday,
19 but that second order was the actual order that was entered in.
20 The first was not. So for whatever clarification that gives to
21 all parties, that's what happened. But I understand the
22 confusion with that.

23 In regards to the position of Ms. Nester that -- that
24 the evidence should come in as witness testimony as opposed to
25 as it was brought in today, what is your position?

1 MR. BALLARD: As long as your Honor fully considers
2 the information that's in that response, whether it's just as a
3 witness or a limited purpose party, we just want that
4 information before the Court because the sheriff is the expert
5 on court security.

6 THE COURT: And moving forward, what's your position
7 on adopting what has been proposed by Ms. Nester for future
8 input as opposed to filing a motion, going the route of calling
9 witnesses, and then, based off witness testimony or affidavits,
10 using that to supplement a motion post-witness testimony?

11 MR. BALLARD: I think that's fine as long as it gives
12 your Honor the information he needs to be able -- to be able to
13 make those decisions about security issues.

14 THE COURT: All right. Thank you, Mr. Ballard.

15 MR. BALLARD: You're welcome.

16 THE COURT: Yes. And if you'd like to give a little
17 bit more background on the limited purpose standing of the
18 parties.

19 MR. VAN NOY: Absolutely. Ben Van Noy, County
20 Attorney's Office. The sheriff's office wants to make it clear
21 that they are not entering an appearance in this case and they
22 do not intend to ever enter an appearance in this case. The
23 sheriff's position is that they would be okay if the state's
24 opposition was entered in or if there was an order entered in
25 finding that that is an opposition from the state. Like

1 Mr. Ballard just expressed, there was some confusion with the
2 two orders. The sheriff's office being a nonparty didn't have
3 the benefit of not knowing that the first order wasn't entered.
4 We didn't get that notice until it was -- until it was too
5 late.

6 So, I mean, quite simply, the sheriff's office was
7 just trying to respond to the Court's orders, which wasn't
8 unusual, because the sheriff's office gets ordered by the
9 judges all the time to do various things. Orders to transport,
10 orders to allow inmates to have access to the law libraries,
11 stuff that is a part of the criminal case, but not -- it is
12 more tangentially related. Which, that's another reason why
13 the sheriff decided it was proper to respond.

14 The sheriff's office is a unique participant in
15 criminal cases. Both statute and rule obligate the sheriff to
16 have input in security measures, and the defendant's motion
17 directly implicates those. And the sheriff, to be clear, is
18 less concerned about how those objections are made. They just
19 want to make sure that they have a seat at the table because
20 they are -- they want to ensure that the safety and security of
21 this court is paramount.

22 So whatever the Court needs to do to clarify that,
23 the sheriff would be okay with that. Whether that's treating
24 them as a witness -- their statements as witness statements, we
25 would be okay with that. I think that's all I have from the

1 sheriff. I would submit unless your Honor has any questions.

2 THE COURT: No. Thank you.

3 Ms. Nester, would you like to respond?

4 MS. NESTER: Just very briefly, your Honor. As far
5 as the limited party appearance, I mean, it sounds like we're
6 getting close to agreeing to how this should happen in the
7 future, which I appreciate that. But just to make it very
8 clear for the record, that we do not think there is sufficient
9 statutory or administrative authority that would open the door
10 to a limited appearance such as there would be for a
11 grandparent in a custody hearing or for a victim in a
12 restitution hearing. We just don't think that exists here, and
13 we don't see the judicial regulations that are referred to in
14 their opposition that provide that a bailiff -- you know, that
15 sheriffs be present and keep us safe in the courtroom. We
16 don't think that opens the door to a limited party appearance
17 of the nature of which was argued in the opposition. But I
18 think that might be moot, but I just wanted to say that for the
19 record, your Honor.

20 THE COURT: Thank you.

21 All right. Anything further on this motion to
22 strike?

23 MR. VAN NOY: Your Honor, one more thing if I may.

24 THE COURT: Yes.

25 MR. VAN NOY: The scenario at hand has the sheriff's

1 office and county attorney's office agreeing. Hypothetically,
2 if the county attorney agrees with the defendant but the
3 sheriff disagrees, we don't know what mechanism we would use to
4 lodge that objection. Utah Code 17-22-21(c) requires the
5 sheriff to obey all lawful orders. In rare circumstances,
6 there are orders issued by the bench that the sheriff's office
7 deems unlawful. In those circumstances, the sheriff's office
8 has filed objections, not as parties, but as an interested
9 party.

10 That is unclear in state law how the sheriff's office
11 is supposed to address that situation. If an order isn't
12 lawful, how does the sheriff's office voice that opinion?
13 That's all I have. Thank you.

14 THE COURT: Can you give me an example of what has
15 happened in the past that helps the Court understand?

16 MR. VAN NOY: Yes. Absolutely. Just a few months
17 ago in a probate case, the mental health of the beneficiary was
18 at stake -- was being questioned. The Court ordered the
19 sheriff's office to transport this individual to a mental
20 health facility for a mental health evaluation in Salt Lake
21 City. It being a probate -- a civil case, the sheriff's office
22 objected because that, in their opinion, was not a lawful
23 order. There was no statute or rule that allowed the Court to
24 include the sheriff to transport an individual in a civil case.
25 That matter was never fully ruled upon, but it was an objection

1 that the sheriff's office made as an interested party in that
2 case.

3 THE COURT: All right. Thank you.

4 MR. VAN NOY: Yep.

5 THE COURT: Ms. Nester, in -- under that scenario,
6 what in your view would be the proper approach if there is a
7 divergence of opinions from the Utah County Attorney's Office
8 and the Utah County Sheriff's Office? How would the sheriff's
9 office be heard on an issue?

10 MS. NESTER: Can you give me one second to ask
11 someone smarter than myself? Let me ask Ms. Visser really
12 quick.

13 I knew she would know, your Honor. Thank you. And I
14 think she's right.

15 So under that scenario, when the sheriff has been
16 ordered to do something by the Court, that does potentially
17 open the door, I would say, to responding to that order. And
18 I -- you know, I have no idea what type of similar situation
19 would arise in this case, but I would hope that we could all
20 maybe just talk about it and see the proper way to handle it.
21 We don't ever want to concede that the proper way to handle it
22 would be to enter an appearance as a party. I do think there's
23 ways for nonparties to object to orders they get from judges,
24 but -- and we can probably figure that out later. But I
25 honestly can't think of a scenario where that would happen in a

1 case like this. It's never, ever happened to me. So -- and
2 I've been doing this quite a while. But I guess there's always
3 the possibility. And if it happens, we'll all confer and see
4 if we can figure that out.

5 THE COURT: All right. And I just want to make sure.
6 Anything else further on this particular issue? Mr. Ballard?

7 MR. BALLARD: Yeah, your Honor. Just let me add: I
8 think for purposes of this motion, it sounds like we're all in
9 agreement that the Court can just consider this however it
10 wants to consider it and making it clear that it's not the
11 sheriff entering an appearance or appearing as a party. If
12 there is some issue down the road and we've got an order that
13 requires the sheriff to do something, then that would be a
14 completely different situation than what we've got here.

15 THE COURT: All right. All right. Thank you to all
16 parties. I will reserve ruling on that issue about the motion
17 to strike until Monday. But for the purposes of this hearing
18 today -- and it sounds like there's, as best can be stated, the
19 stipulation that the motion filed, not acknowledging from
20 defense side that the sheriff's office is a party, but it's
21 still accepting the information therein to be considered as we
22 move forward on the other issues.

23 MS. NESTER: Yes.

24 THE COURT: All right. So with that, we'll go ahead
25 and move forward with the issues of appearance and restraints.

1 MR. NOVAK: Thank you, your Honor. Richard Novak
2 again for Mr. Robinson. And the Court did say in its
3 introductory remarks that it wants to take the weekend to think
4 through things and review things, so I hope the Court will
5 permit me to suggest a couple pieces of case law that the Court
6 may want to look at again over the weekend.

7 I think where I want to start, which is where I think
8 we should always start, is with the constitutional law as
9 explained by the Supreme Court of the United States. And I
10 know that the Court has read our briefing, but Deck --
11 D-E-C-K -- vs. Missouri, a 2005 opinion of the United States
12 Supreme Court, guides us here initially. Basically what Deck
13 says is that a blanket policy of shackling a criminal defendant
14 violates the defendant's constitutional rights. And I would
15 say in a capital case, through the 14th Amendment, since we are
16 in state court, that would be the Fifth Amendment, the Sixth
17 Amendment, and the Eighth Amendment. Because what the
18 constitution requires is an individualized assessment of
19 whether shackling is necessary because of security risks
20 emanating from the defendant.

21 Now, I understand -- I'm going to come back to that,
22 but I just want to bookmark, if I may, that I understand that
23 there's a fundamental disagreement between the parties about
24 whether that constitutional framework applies outside of the
25 jury trial. Okay?

1 The most recent Utah Supreme Court case on this is
2 Cravens -- C-R-A-V-E-N-S -- a 2000 decision, which basically
3 gets it wrong in light of the subsequent decision of the United
4 States Supreme Court. Because in Cravens, what the State of
5 Utah Supreme Court said is "The defendant's been found guilty.
6 He can be shackled during the penalty phase." And clearly what
7 the Supreme Court said in Deck vs. Missouri, is, "No, that's
8 not true without an individualized determination."

9 So I will address why we believe that this Court,
10 without any guidance from the Utah Supreme Court, is free to
11 and should make a finding that Mr. Robinson has a
12 constitutional right not to be shackled in pretrial
13 proceedings, but I do want to go back for a moment to the three
14 different reasons as explained by the Supreme Court why
15 shackling offends our concepts of fairness and liberty and due
16 process.

17 The first is -- because these are applicable to a
18 defendant at every stage of the proceeding, the concepts, the
19 rationale. Okay? The first is because there's a presumption
20 of innocence. The second is a concern with the Sixth Amendment
21 right to actively participate in his defense in the courtroom.
22 And if the Court, if I may, looks back at the rationale of Deck
23 vs. Missouri, when it's considering this over the weekend, the
24 Court will see that the Supreme Court said that to be shackled
25 in a courtroom necessarily interferes with a defendant's right

1 to thoughtfully observe and participate in the proceedings
2 because the shackling is inherently intrusive in his ability to
3 do so.

4 And then the third reason is what the High Court
5 referred to as dignity and decorum in the courtroom. Most of
6 the hearings in this case will be public. And so for the
7 public -- and I'm not even talking about cameras and
8 microphones, especially cameras -- to see Mr. Robinson shackled
9 at the feet, at the waist, at the hands, absent an
10 individualized determination by the Court, offends the dignity
11 and decorum of the courtroom.

12 This is not a jail. This is your Honor's courtroom.
13 And what security measures are necessary to ensure everybody's
14 safety, including Mr. Robinson's, are your Honor's decisions,
15 not the sheriff's decisions. So we are not challenging the
16 policy that exists. We're saying that the constitution
17 requires that this Court make an individualized determination
18 as to whether that policy is appropriate in this case.

19 It's -- because it's a constitutional right, it's the
20 state's burden to prove that shackling is necessary. And what
21 *Deck vs. Missouri* says is it's defendant-specific information
22 that suggests that shackling is necessary.

23 So I'm going to provide the Court, if I may, with
24 some hypotheticals. If in his first court appearance
25 Mr. Robinson did anything that suggested a lack of safety to

1 himself, to the Court, to the court staff, to the sheriffs,
2 that would be information. If Mr. Robinson demonstrated, which
3 he has not, some inability to control his conduct while in
4 custody or while in the courtroom, that would be information
5 that the Court should take into consideration. Mr. Robinson's
6 criminal history, which he has none until this incident, would
7 also be something that the Court could take into consideration.

8 I think the Court could look at a rap sheet or a
9 pretrial services report and say, "This person has a history of
10 assaulting law enforcement or fleeing or obstructing justice,"
11 whatever it is, but none of that exists here. And so it's an
12 individualized determination about the defendant, and it's the
13 state's burden of proof.

14 And I want to point out that -- two things. One is
15 in the state's opposition to our motion, the state provides
16 nothing specific, nothing individualized, as to why
17 Mr. Robinson needs to be shackled in a courtroom [REDACTED]
18 [REDACTED]. We are not asking that law
19 enforcement officers not be present. During a jury trial, it
20 may be a very different scenario. But the state has offered no
21 specific evidence that he presents a risk to anybody in the
22 courtroom or to himself by being unshackled. And it is, as I
23 said before, the state's burden.

24 And I'm going to say a couple things because we're
25 under seal, and I think that it's appropriate to take advantage

1 of that. And I appreciate that the Court created the freedom
2 to address things that should not necessarily be further
3 publicized in the public sphere beyond what's already been
4 publicized by others.

5 When Mr. Robinson first was arrested, [REDACTED]
6 [REDACTED]
7 [REDACTED]. And I think it's interesting that the sheriff's
8 department hasn't provided the Court with any information as to
9 why that is, that he has convinced the sheriff's department
10 that that's not necessary.

11 Now, Mr. Robinson has, as I understand it under state
12 law, a right to privacy and confidentiality with respect to his
13 medical records, his mental health records, his psychiatric
14 records, if any, even those created in custody, and so I am not
15 going to offer up those records, nor would I think the Court
16 would interpret what I'm going to say as a waiver, but the
17 sheriff has those rights. The state, to make that distinction
18 again in terms of the parties, should not have those records,
19 and that's complicated if they're represented by the same
20 lawyers or at least their communication with the Court is
21 facilitated by the same lawyers.

22 But the sheriff presumably has an obligation to
23 provide the Court with all the information that it has
24 available to it to make that individualized determination. We
25 have those records and we're not afraid of them. So I would

1 just ask the Court to consider whether it needs more
2 information from the sheriff to make an individualized
3 determination.

4 So what we are saying is even if this Court conducted
5 an evidentiary hearing and conducted an in camera review, there
6 is no way that this Court could reach a conclusion that
7 shackling is necessary based on information directly related to
8 Mr. Robinson.

9 Now, in the state's opposition to our motion, there
10 is a lot of information -- and I'll try not to be sarcastic,
11 but I do think it's kind of noise -- about the intense public
12 interest in this case. There's a reference to, you know,
13 unstable people coming to the courthouse, to conspiracy
14 theorists saying things online. We're all aware of that. I
15 mean, I don't know what the Court has read. It's none of my
16 business. I've received some wacky phone calls and e-mails,
17 people telling me what they think happened here. It's noise.
18 We're not litigating this case in the press. We're not talking
19 to crazies. But that's all on the outside.

20 So we appreciate that the sheriff's department is
21 concerned with the safety of the Court and all of the
22 participants. We were here a few weeks ago, and it was clear
23 that the sheriff's department took the first appearance of
24 counsel very seriously, and we appreciate that. [REDACTED]

25 [REDACTED]

1 [REDACTED] That's not Mr. Robinson.

2 So we don't think that the intense public interest,
3 which may be drawing in unstable fringe people from the left
4 and the right and the center and other places is imputed to
5 Mr. Robinson. The question is: Can the Court trust
6 Mr. Robinson to sit there the way he has been doing for the
7 last hour and respect the decorum and the dignity of the
8 courtroom just like the Court would expect him to? And we
9 think that the answer is obviously yes.

10 So then I want to get to the slightly more open
11 question, which is: What would guide this Court in determining
12 whether that constitutional right should attach at all
13 proceedings and not just before the jury? And there was a
14 dispute in the pleadings about what I would call the
15 relevance -- although not, you know, relevant under the rules
16 of evidence -- the relevance of an en banc opinion of the Ninth
17 Circuit after Deck called United States vs. Sanchez-Gomez.
18 It's a 2017 en banc decision of the Ninth Circuit.

19 And I apologize if this is obvious to everybody, but
20 I -- I live and I practice in the Ninth Circuit. So basically
21 what that means is there was a three-judge panel. Somebody
22 didn't like the outcome of a ruling and invited the Court to
23 take the matter up en banc, and the Court did, which meant that
24 there had to be 18 judges who heard the case.

25 And the citation to that decision is in our briefing,

1 and I'll provide it again. But what the Ninth Circuit says in
2 an en banc ruling -- and I'm going to talk about what it means,
3 as the state points out, that that ruling was vacated by the
4 Supreme Court.

5 The holding in that case, which is based on a lot of
6 rationale from then-Circuit Judge Kozinski, is that the
7 constitutional rights outlined in *Deck vs. Missouri* apply at
8 all proceedings in a criminal case, not just in a jury trial.
9 And I think that if your Honor looks closely at the rationale,
10 this Court would conclude that the rationale applies at all
11 hearings. That doesn't mean that there -- that we abandoned
12 the individualized determination of the need. It just means
13 that the individualized determination of the need should begin
14 at the beginning of the case and not just wait for the jury
15 trial.

16 Sanchez-Gomez is important because it's really the
17 only well thought out opinion of a federal circuit court
18 looking at the constitutionality of this question. But the
19 way -- the procedural posture of that is what led to the United
20 States Supreme Court to vacate the decision. And so what
21 happened there is in the Southern District of California, which
22 is basically San Diego and Imperial Counties, the United States
23 Marshals Service adopted a policy that every defendant would be
24 shackled at every hearing. And the federal judges in the
25 Southern District of California went along with it. They said,

1 "Okay. Fine."

2 Four defendants sought review of that policy, which
3 was affirmed by four district judges in four criminal cases,
4 through a writ of mandamus. By the time it got to the Ninth
5 Circuit and certainly by the time it got en banc, it was what
6 most people would call moot. But what the Ninth Circuit said
7 was, "No, it's not moot. It's capable of repetition and it's
8 an important issue and even" -- the Ninth Circuit even referred
9 to it as a "quasi class action."

10 So if you look -- if the Court looks at
11 Sanchez-Gomez, there's a lot of discussion about mandamus
12 review and whether it meets the criteria of mandamus review and
13 whether mootness interferes with the Court reaching a
14 conclusion. And ultimately the en banc court says, "We're
15 going to resolve the merits of this." Okay?

16 And so what the Ninth Circuit en banc opinion says,
17 written by Judge Kozinski, is "Those constitutional rights to
18 be free from shackling absent an individualized determination
19 apply at every hearing, because dignity and decorum isn't
20 limited to a jury trial, because the Sixth Amendment right to
21 participate isn't limited to a jury trial, and because the
22 presumption of innocence exists from the beginning of the case
23 until the return of the verdict."

24 When it went to the Supreme Court, the Supreme Court
25 said, "It's moot. We're vacating the opinion. It's moot."

1 Those defendants are no longer in court. They're not being
2 shackled." And the Supreme Court also rejected the notion that
3 four criminal defendants can get together and create a quasi
4 class action through a writ of mandamus.

5 But I reviewed the Supreme Court decision again this
6 morning, the one vacating Sanchez-Gomez, and I looked for any
7 hint from the Supreme Court that it was taking issue with the
8 merits, the substantive decision of Judge Kozinski speaking for
9 the majority of the panel, and there is not a word about it.
10 There's not a footnote. There's not a concurrence. There's
11 nothing.

12 So first of all, we're not in the Ninth Circuit. All
13 right? We're in the Tenth Circuit and we're in Utah. So it
14 doesn't even bind -- even if Sanchez-Gomez were still good law
15 procedurally, it's not binding authority anyway. It's
16 persuasive. And I would suggest it should be very persuasive
17 to this Court.

18 But what's important, because there was a big debate
19 in our pleadings about its relevance, its viability, the
20 rationale as to why the shackling -- the right not to be
21 shackled absent an individualized determination of security
22 concerns applies at every hearing is not addressed at all by
23 the Supreme Court. And so that's why the rationale is still
24 worthy of this Court's consideration.

25 So what we are asking this Court to conclude is that

1 while there is nothing in Utah law that compels a decision
2 either way, your Honor has the opportunity to make a decision
3 of constitutional law. And it is a decision that needs to be
4 made by the trial court because here we are. So we think that
5 what this Court should conclude based on what's in Deck vs.
6 Missouri and the rationale in U.S. vs. Sanchez-Gomez is that
7 Mr. Robinson does have a constitutional right not to be
8 shackled at all proceedings other than where the state has made
9 a showing of an individualized risk to the security, to the
10 decorum of the courtroom, emanating from Mr. Robinson.

11 And while we understand that there's a lot of what I
12 call noise -- there's noise on the outside -- [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]. Maybe not. I saw
17 one person with a camera in the lobby today. I don't know --
18 we also got here at 2:00, so maybe there was more. Or maybe
19 nobody was interested because it was going to be a sealed
20 hearing.

21 But none of that affects Mr. Robinson's right to be
22 free from shackling in the courtroom absent this individualized
23 showing. If we need to have an evidentiary hearing about an
24 individualized showing, we can do that. I've already hinted to
25 the Court that the sheriff has information -- and I don't think

1 it's duplicitous or secretive. I just think that we are saying
2 the Court needs to make an individualized determination. The
3 sheriff has information that the Court may or not want to
4 review. But it's their burden of proof, and we're not waiving
5 Mr. Robinson's right to protect the confidentiality of his
6 information. We're not trying to run away from it, but we're
7 just not going to lodge it as an exhibit that needs to be shown
8 to the people, to the state, because it's their burden to make
9 that individualized showing of risk.

10 As long as this Court permits cameras, whether it's
11 video or still cameras, to broadcast either live or with delay,
12 proceedings in this courtroom, we also believe that
13 Mr. Robinson should be dressed roughly like everybody else,
14 because the entire world has already seen him -- because the
15 sheriff's department released a booking photo and because there
16 were cameras in the first remote appearance in this case, has
17 already seen him in a jail jumpsuit with a vest on. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 But if he's going to be in this courtroom and we're
23 going to have a secure courtroom, but it's going to be
24 broadcast to the world, he should not be depicted as a jail
25 inmate. He should be depicted as a citizen of the United

1 States with a presumption of innocence. And that is why we
2 believe he should be able to appear in street clothes that also
3 are consistent with the Court's standards for what kinds of
4 clothing individuals can wear. If he shouldn't have shoelaces,
5 we can get him shoes without laces. If he shouldn't wear a tie
6 and it's a cold, we'll get him a sweater. But unless we're
7 going to shut down all the video and all the photography of
8 what goes on in this courtroom, he shouldn't be wearing jail
9 stripes.

10 So that part of it maybe is wrapped up in another
11 motion that we're going to bring to the Court, as we said
12 before. But we do believe that in the absence of that
13 individualized showing, the shackling should end right now.

14 I don't think there's anything more that I want to
15 say unless my colleagues tell me I missed something. And
16 they're shaking their heads in the negative. So with that,
17 I'll sit down and see if there's any need to reply when the
18 state's done. Thank you, your Honor.

19 THE COURT: Thank you, Mr. Novak.

20 The state?

21 MR. BALLARD: Your Honor, I think this issue -- this
22 motion raises two primary issues. And the first one is: When
23 is Defendant's presence necessary at a hearing? And then the
24 second one is: When his presence is necessary, what security
25 measures are necessary because of Defendant's presence? And I

1 think of course the overarching question involved in this
2 motion is how best to protect the defendant's presumption of
3 innocence and avoid tainting the jury pool while maintaining
4 the security of everyone involved. And let me make it clear
5 that the state is just as concerned about a fair trial in this
6 case as the defendant is. We are going to try this case once.

7 Now, as far as the first question, whether
8 Defendant's presence is necessary, I think this Court can
9 resolve many of those concerns by holding noncritical hearings
10 either virtually or hybrid with the defendant appearing from
11 the jail. [REDACTED]

12 [REDACTED]
13 [REDACTED] And
14 this Court under Rule 17.5 has the discretion as to what format
15 a hearing will take, whether it will be in person or hybrid or
16 completely virtual.

17 Rule 17 -- the factors that this Court looks at in
18 Rule 17.5 in exercising that discretion favor holding virtual
19 hearings for all noncritical hearings. And allowing the
20 defendant to appear virtually, especially at those noncritical,
21 nonevidentiary hearings, it doesn't implicate the defendant's
22 right to be present. He can be present. He can communicate
23 with his counsel face-to-face in realtime and in confidence if
24 necessary and do that all virtually.

25 And I think the Court could require that his -- that

1 if his appearance on the screen is shown, that it not show that
2 he's appearing from the jail, that he is not in -- that he's
3 not in custody in order to protect his presumption of
4 innocence. Holding those kinds of hearings virtually also gets
5 rid of this question about shackling. And it avoids the
6 significant costs and risks, especially the risks to Defendant
7 of transporting him here to court.

8 I think it's interesting that in one of the cases
9 that defense cites in support of his argument that these -- the
10 right to a -- to appear in civilian clothes and without
11 restraints applies beyond the jury trial. State vs. Luthi, the
12 Washington case in 2024. There's a subsequent case in
13 Washington, 2025 case, State vs. Ferguson. That's 568 P.3d
14 314, where, in that case, even though in Luthi, the Washington
15 Supreme Court had said that requiring a defendant to appear in
16 a holding cell that was adjacent to the courtroom violated the
17 right to appear without restraints absent this individualized
18 determination. In Ferguson, which was subsequent to Luthi, the
19 Court said that appearing by video from jail didn't implicate
20 the right to be free from restraints.

21 So, again, I think the first thing for the Court to
22 do is consider when does defendant need to be present? And if
23 he doesn't need to be present, then hold those hearings
24 virtually.

25 So that comes to the second question, which is: When

1 defendant appears in person, what kind of security measures are
2 necessary? Does he need to be in civilian clothes? Does he
3 need to be shackled? And I want to make it clear that at this
4 point, the state agrees that in any proceedings before a jury,
5 the defendant has the right to be in civilian clothes and
6 unrestrained unless those restraints are justified based on a
7 showing that the state would need to make.

8 But Defendant asks this Court to extend those
9 principles to nonjury proceedings. And there's no basis and
10 there's no reason to do that. I just want to remind the Court
11 of the tenuous grounds that Defendant's request rests on.
12 Defendant doesn't cite any controlling Utah case law. What
13 Defendant relies on is a United States Supreme Court case that
14 clearly does not apply to nonjury proceedings and then a
15 vacated Ninth Circuit opinion.

16 And as we point out in our response, the state points
17 out, a vacated opinion isn't like an opinion that's been
18 reversed on other grounds, where part of that opinion remains
19 viable but the reverse part is not viable. When an opinion is
20 vacated, it's vacated. It's like it didn't exist.

21 Now, opposing counsel says that he reviewed the
22 United States Supreme Court opinion that vacated that opinion
23 and that it doesn't take issue with the reasoning of the Ninth
24 Circuit opinion. And that's correct. But the reason for
25 that -- and this -- your Honor's read enough appellate court

1 opinions to know that when a Court vacates an opinion either
2 because it's moot -- the case is moot or because there's some
3 other procedural defect that prevents the Court from reaching
4 the merits of the issue, the Court's not going to comment on
5 those, on the merits. So it's completely unremarkable that the
6 Utah -- the United States Supreme Court case that vacates the
7 Ninth Circuit opinion, that it doesn't say anything about the
8 reasoning there.

9 I think it's interesting in Point 5 of the
10 Defendant's reply that the defendant agrees with the state and
11 the sheriff that these concerns could be resolved if the Court
12 prohibits the media from displaying pictures -- photographs or
13 video or otherwise displaying the defendant's appearance. I
14 think Defendant's willingness to agree to that position,
15 assuming your Honor's willing to order that, resolves this
16 motion. It allows the sheriff to provide whatever security
17 measures he believes is necessary, clothing and shackling,
18 without any possible prejudicial effect of those security --
19 those security measures on any prospective juror, because those
20 images won't be being shown.

21 Now, Defendant says that shackling him somehow
22 impairs his ability to consult with counsel, but I think just
23 like today, if the defendant has the ability to be able to make
24 a note to counsel, I don't see how -- if the sheriff believes
25 that those requirements are necessary, those restraints are

1 necessary, how that could possibly interfere with his ability
2 to participate in his defense and to consult with his counsel.

3 I think any suggestion that this Court might be
4 prejudiced by seeing Defendant in jail clothing or restrained
5 is -- it demeans this Court and it ignores well established
6 precedent in Utah, primarily State vs. Cravens and a host of
7 other cases that talk about situations that might prejudice a
8 jury do not have the same effect on the Court. Knowing the
9 defendant is in custody, knowing the defendant has prior
10 convictions, hearing evidence that should not have been
11 admitted, none of those situations have the same effect on a
12 judge as it would on a jury.

13 And I want to point out because I think Defendant
14 takes issue with this, but Cravens was not just a clothing
15 case, a civilian clothing case. It points out in paragraph 4
16 of that opinion that the defendant appeared for his bench trial
17 in shackles and in jail -- in prison clothing.

18 Now, Deck, the United States Supreme Court case,
19 doesn't change any of this, because as I mentioned, that was
20 about proceedings before a jury, not about proceedings in front
21 of a judge or pretrial proceedings. That was a penalty phase
22 proceeding that was in front of a jury in a capital case.

23 And to the extent that the Court -- even though it's
24 clear that Deck doesn't apply here and that this Court feels
25 like it should nevertheless consider the rationale of that

1 case, I think it's important that the Court also consider the
2 dissenting opinion in that case by Justices Scalia and Thomas,
3 where they talk about and criticize those rationales,
4 especially in non-jury, non-guilt-phase proceedings, which
5 is -- again, I think all that we're talking about now, because
6 the state agrees that at his jury trial and, even at the
7 penalty phase, assuming that we get there, that the defendant
8 should appear in civilian clothing and without restraints
9 unless something changes to -- to demonstrate that the
10 defendant should be restrained in those proceedings.

11 The dissent in *Deck* points out that that case is
12 based on a very ancient common law rule that no longer exists,
13 or at least the rationale for that rule no longer exists. The
14 rationale for that rule was that when that rule was first
15 developed, prisoners actually appeared in irons, heavy
16 ponderous irons. They were painful. They rubbed the skin
17 away, and they wore them constantly in their cell, even when
18 they were sleeping. They wore them during trial. They wore
19 them during a trial where they did not have the right to
20 counsel, where they had to defend themselves literally -- maybe
21 not with their arms tied -- chained behind their back, but with
22 their arms restrained in irons. And the rationale for that
23 rule was not so much that it affected the presumption of
24 innocence, but rather it affected the defendant's ability to
25 defend themselves when they're chained under those conditions

1 and for that long of a period of time.

2 The dissent in that case saw no basis for treating a
3 defendant at a sentencing proceeding where he'd already been
4 convicted, he lost the presumption of innocence, for treating
5 that kind of a defendant the same as a defendant who's on trial
6 and still retains the presumption of innocence.

7 I think it's interesting also that the dissent talks
8 about the rationale of courtroom dignity and decorum and
9 debunks this notion that somehow shackling demeans those
10 interests, somehow undermines the dignity of the court.
11 Courtroom decorum and dignity is not a principle that creates
12 affirmative rights for a defendant. Instead, it's a principle
13 that limits a defendant's behavior in court. The Court relies
14 on those principles in order to make sure that the defendant
15 behaves and that everyone in the courtroom behaves. It doesn't
16 create affirmative rights.

17 The Ninth Circuit opinion, Sanchez-Gomez, as I
18 pointed out, that was vacated. That -- that rationale doesn't
19 apply in this case and shouldn't apply for those reasons. And
20 the same for any court that has relied on that rationale for
21 extending the right to appear in civilian clothes and without
22 restraints beyond just the jury trial.

23 And I think it's important that the Court consider
24 what Defendant is asking the Court to do. Again, there's no --
25 there's no Utah case law that supports the kind of rule the

1 defendant's asking for at pretrial proceedings. It's contrary
2 to the practice of courts across this state. This Court would
3 be plowing entirely new ground, and it would be -- it would be
4 setting precedent for trial courts throughout the state. And I
5 think also this Court should recognize that the rule that
6 Defendant's asking for is contrary to the security plan for
7 this court that the court's security administrator has
8 developed.

9 So even though other courts, non-Utah courts, have
10 held that defendants can appear, or at least have the right to
11 appear, without shackles and in civilian clothing outside of
12 jury proceedings, the Utah Judicial Council has considered this
13 issue. They've promulgated Rule 3-414(9)(C), and it's true
14 that rule leaves the ultimate decision about courtroom security
15 up to this Court, but it creates a presumption that all
16 in-custody defendants should be restrained and supervised --
17 excuse me -- restrained or supervised at all times.

18 And, again, I think it's important for this Court to
19 consider that the court's security administrator and the
20 sheriff, who's responsible to provide security here, in their
21 opinion, restraints are -- should be required for all pretrial
22 detainees.

23 And it's important also to note that that rule,
24 3-414, it talks about cases of when there's significant
25 publicity and -- like this case. And those -- that

1 circumstance calls for more security, greater security, not
2 less. And, again, where Defendant has suggested that he would
3 be okay with -- with not having any photographs of him in the
4 courtroom, then I think that alleviates any concerns of having
5 Defendant appear in jail clothing and restraints, because the
6 images won't be broadcast to the potential jury pool.

7 Oh, let me also point out, as it was mentioned -- it
8 was suggested that -- it was -- Defendant -- defense counsel
9 stated that it was the sheriff that released Defendant's
10 booking photo, and that's not accurate. The booking photo did
11 come from the sheriff, but it was not the sheriff's office that
12 released that to the media. That was a different law
13 enforcement agency that did that. That wasn't the sheriff's
14 doing. It was shared with that law enforcement agency under
15 the government sharing provisions under GRAMA. And there
16 wasn't any intent to try and get that out. In fact, when that
17 was made public, the sheriff -- the sheriff's office was very
18 concerned that it had been made public.

19 Unless the Court has any further questions for me on
20 these issues.

21 THE COURT: I do.

22 MR. BALLARD: Sure.

23 THE COURT: What prejudice is there if Mr. Robinson
24 appears in civilian clothing at proceedings to the state or to
25 security?

1 MR. BALLARD: I think as is pointed out in the
2 security plan -- and I think Mr. Van Noy can address this more
3 particularly because he's -- this is the sheriff's domain. But
4 the prejudice is that if there's anything that happens while
5 Defendant is in civilian clothing, then it's harder to identify
6 him and be able to either neutralize a threat or protect him.
7 If he's in civilian clothes. He's better identifiable in jail
8 clothing.

9 THE COURT: And looking at this courtroom today, if
10 he was in civilian clothing, is that a realistic threat?

11 MR. BALLARD: Again, I think Mr. Van Noy can address
12 this better.

13 THE COURT: I'll direct it to you, sir. I'm just
14 trying to understand this line of thinking. And I appreciate
15 you expounding upon it, and I appreciate the security
16 protocols, which is being applied across the board, not to an
17 individual. But I'm trying to apply it to this case. And it
18 is unique. Whether we like it or not, this case is unique.
19 And I think the shackles and the clothing are two separate
20 issues. They're not -- they can't be lumped together.

21 But just going to the clothing issue, citing to
22 security presence, which both sides have cited to -- but to the
23 clothing, I'm trying to understand the rationale about that
24 as -- because that's what I saw was one of the main issues, was
25 being able to identify and -- identify the person in custody

1 as -- and there will be potentially confusion if they're
2 wearing civilian clothing. And I'm just trying to apply it to
3 this scenario because this is what's in front of me and this is
4 the decision. So I'm trying to gain that guidance in applying
5 that logic to the case where we've noted there is significant
6 security.

7 MR. BALLARD: Which is exactly what your Honor needs
8 to do. I guess I would just add, before I turn it over to
9 Mr. Van Noy, that we're talking about hearings that will not be
10 sealed, where there will be members of the public, potentially
11 members of the media. This courtroom will be full with a
12 lot -- with many more participants. And the issue will be
13 having to identify Defendant in that setting, not just in a
14 setting like this.

15 THE COURT: And before we turn to you, sir, one
16 question is we've talked about the prejudice and we've talked
17 about in a jury trial setting, it's established that they're to
18 be dressed in civilian clothing. However, the proposed
19 solution theoretically proposed by both sides is if it's
20 remotely transmitted, we don't run into this issue. Even if
21 he's in Court.

22 But what stops a journalist from saying,
23 "Mr. Robinson appeared in jail clothing"? Doesn't that create
24 the same risk as a video?

25 MR. BALLARD: I think your Honor's order could stop

1 that.

2 THE COURT: To suppress a journalist from writing?

3 MR. BALLARD: I think from writing about a particular
4 topic. Just like your Honor can protect jury members'
5 identities, prevent the press or anyone from identifying a
6 juror, you could also say there's to be no comment, no
7 pictures, no videos about the defendant's appearance.

8 THE COURT: But would -- oh, I'm sorry. Go ahead.

9 MR. BALLARD: And if that's the case, then I guess
10 I'm thinking what is -- and there's not going to be any --
11 anything broadcast about the defendant's appearance that -- or
12 communicated to the public, then why not just have him appear
13 in jail clothing because it's not going to prejudice anyone in
14 the court, any decision-maker, any potential juror?

15 THE COURT: But even if I were to go down that route
16 and say a blanket order that journalists, members of the press
17 cannot comment about his clothing, every member of the public
18 could be a blogger. Does that extend to them?

19 MR. BALLARD: I think what -- your Honor controls
20 what happens in this courtroom. And I think your Honor could
21 say there's to be no comment about the defendant's appearance.

22 THE COURT: Okay. And I appreciate your responses to
23 that. Thank you.

24 MR. VAN NOY: Thank you, your Honor. Mr. Ballard and
25 your Honor expressed and got it right with the general concerns

1 the sheriff's office and Mr. Palmer have about civilian
2 clothing. The specific concern about this case is that -- in
3 the filing documents, the state alleges that Mr. Robinson
4 changed his clothing along the way. So specifically in this
5 case, if he's in civilian clothing, that is -- at least in the
6 allegations, that is a real concern to the sheriff's office,
7 that the clothing could be changed if there was commotion.

8 We recognize that most pretrial proceedings --
9 there's public law and motion calendars, there's other
10 defendants and attorneys in here that create more commotion,
11 not in the sense that it's undignified, but there's more
12 people. [REDACTED]

13 [REDACTED] So those are the sheriff's office's
14 specific concerns about this case.

15 I think going to the suggestion and I think agreement
16 that no video or photographic reporting -- the articles that
17 the defense counsel cites in their motion, they hit on visual
18 prejudice. When a person sees the individual in jail clothing,
19 that that creates the prejudice. I think there's a different
20 effect from -- based off of what they've provided -- from
21 seeing the individual as opposed to a reporter writing about
22 it.

23 THE COURT: All right.

24 MR. NOVAK: Did the Court have more questions for the
25 state?

1 THE COURT: It takes me a little bit for my brain to
2 kind of go through all my tick points. So I'm still thinking.

3 MR. NOVAK: I just don't want to interfere.

4 THE COURT: No. And I appreciate it.

5 MR. BALLARD: I'm happy to answer your Honor's
6 questions.

7 THE COURT: And I appreciate that, the willingness of
8 both sides. I'm just trying to think if -- I'm looking at my
9 notes. I've been trying to take detailed notes, and I
10 appreciate the presentations by all parties.

11 Going back to the clothing -- and let's assume that
12 this Court orders no video, no cameras, and even goes even
13 further and says to the press, "You cannot write about
14 clothing," and even if it extends to the weekend blogger or
15 influencer or anyone, "Do not write about it," what stops
16 prejudice to potential jurors -- because this is an open
17 courtroom? What stops anyone -- 75 people is what we've
18 limited this courtroom for security reasons -- from them
19 talking to others and saying, "You know, I was in court. He
20 was in jail clothing"? Does that prejudice the potential jury
21 pool?

22 MR. BALLARD: I don't think it does, your Honor.
23 This has been the practice -- every pretrial detainee in the
24 state of Utah to date comes to trial -- comes to the hearings
25 in jail clothing and restraints. I don't know why this -- this

1 situation presents any -- anything different than any of those
2 other situations. And to the extent that there is some
3 potential for prejudice, this Court can fully explore that at
4 voir dire.

5 THE COURT: Okay. All right. Thank you. I
6 appreciate the responses.

7 So Mr. Novak -- and I don't mean to make this into a
8 law school scenario.

9 MR. NOVAK: It's fine.

10 THE COURT: But why has no Court found that this
11 right of shackles and vestiture, how they're dressed, doesn't
12 apply prior to jury? We've had this -- I imagine that this has
13 come up throughout the United States, throughout the years, but
14 we don't have a single opinion that says prior to a jury trial,
15 that this should be in effect.

16 MR. NOVAK: Well, we actually did have that
17 opinion --

18 I'll let you talk about that.

19 We actually did have an opinion that addressed that,
20 which is the vacated on other grounds opinion we've been
21 talking about. So that actually was the prevailing law in the
22 Ninth Circuit in 2017 and 2018, and there were district courts
23 that applied that ruling, which applied to the Southern
24 District of California, to other districts within the Ninth
25 Circuit until, as counsel is right, the Supreme Court vacated

1 it for the reasons that we've talked about.

2 So I think it's more accurate to say that there was
3 case law that governed the entire western corner of the United
4 States, if I can talk about west of Utah -- and Colorado for
5 quite a period of time -- well, for a period of time until the
6 Supreme Court vacated it on other grounds.

7 I want to go back to the rationale. Okay? And so I
8 think what's important -- and unfortunately it falls on this
9 Court's lap, so to speak -- is this is an open question in
10 Utah. That's where we are. We're in -- we're in the trial
11 court and it's an open question. There isn't a binding
12 authority one way or the other on this Court. We are
13 suggesting that existing law and the rationale in existing law
14 and rationale expressed by well considered jurists in other
15 jurisdictions guide this Court in what it should do. But
16 that's just where we are.

17 I cannot really give the Court the law school answer,
18 which is: Why don't we have case law on this from this
19 jurisdiction or others? Maybe it's because nobody raised it.
20 Maybe it's because not every defendant is actually shackled in
21 court. I mean, I have -- I'm just going to testify. Okay?
22 I've been in many courts in many jurisdictions and -- with
23 clients who are in custody, and sometimes they're shackled and
24 sometimes they're not. It depends on local practices. It also
25 depends on what the judicial officer's standards are.

1 So I don't think it's that everybody is shackled
2 everywhere and now all of a sudden Mr. Robinson is bringing up
3 something that's settled practice otherwise. It's an open
4 question that the Court has the opportunity to wrestle with.
5 I'm not trying to avoid the Court's question. I just think
6 that's the reality, is that it is an issue of first impression
7 since Deck in Utah.

8 THE COURT: And I appreciate your candor, sir.

9 The second question I have is applying the
10 individualized approach and basically determining security risk
11 or potential, is in the criminal court, as you are well aware,
12 issues can turn on the moment. And, for example,
13 hypothetically, in a preliminary hearing, a witness could
14 testify to something that could cause someone who's in custody
15 to suddenly have a surge of emotion. And how can we account
16 for that when that -- when there are so many variables in a
17 courtroom that we cannot control? How someone reacts to a
18 statement, how someone reacts to a shoutout from the crowd, how
19 someone reacts from a glance that may cause them to react
20 emotionally. How can we apply that in realtime if we're
21 relying upon an assessment that has to be done before a
22 hearing?

23 MR. NOVAK: I think it's a fair question, and I have
24 two answers that may or may not be sufficient for the Court.
25 One is I think it can be an evolving understanding of how the

1 defendant before the Court does handle themselves in the
2 courtroom. Okay? So, so far, we've got a couple hours of
3 experience. I don't think that the Court -- if it's an
4 individualized determination, which is what Deck says -- that's
5 still good law -- then that individualized determination of
6 course can always be subject to reconsideration by the Court.
7 I am sure that your Honor has been involved in a situation
8 where somebody who was not even in custody, but was appearing
9 in their own criminal case, became a problem in the courtroom.
10 And similarly, you could have somebody who maybe was a problem
11 and is in custody but over time has demonstrated that they
12 should not be. So I think that the individualized
13 determination can be one subject to -- I don't mean
14 reconsideration in the technical legal sense, but review. So
15 that's one thing.

16 The other thing is that the Court can look at the
17 information it has before it. So I'm going to provide what I
18 think is responsive to this Court's question by pointing out
19 that even with the state having the opportunity to stand here,
20 they still haven't provided any individualized information at
21 all. I invited it multiple times. There's nothing
22 individualized that has been represented by the state whether
23 we accepted the proffer or not.

24 What we do know about Mr. Robinson that goes to the
25 Court's question is he surrendered. A neighbor of his -- I'm

1 sure the Court has read enough of the materials -- I think it's
2 even in the probable cause statement -- you don't even have to
3 read the public accounting -- a neighbor of his was a retired
4 sheriff from Washington County, and he got in that man's car,
5 and they took him to the sheriff's department with his parents
6 in the vehicle with him. That, if you were just doing sort of
7 a run-of-the-mill bail assessment, would be a factor in support
8 of release. A factor. Okay?

9 So what information does the Court have to say that
10 if somebody was testifying in a preliminary hearing who said
11 something that Mr. Robinson felt uncomfortable with, that he
12 would react in a way that placed somebody at risk? And with
13 all due respect, it's total speculation because you're talking
14 about somebody who surrendered.

15 Okay. I'm happy to engage in this colloquy. I
16 wanted to say a few things about what the people said.

17 THE COURT: Of course. Go ahead.

18 MR. NOVAK: Your Honor's questions are more important
19 than my retort.

20 THE COURT: No. And I appreciate -- and I know it's
21 a difficult question because there's so many variables.

22 I guess the other factor I wish to touch on is -- and
23 this is not speaking to Mr. Robinson. This is speaking to all
24 criminal cases. As criminal cases proceed -- and I don't know
25 how this case is going to proceed. It could last a week; it

1 could last a year; it could last -- who knows. But I believe
2 it's the experience of all attorneys in the criminal world that
3 as cases progress, pressure progresses. And in a case where
4 the potential death penalty -- and, again, not referring to
5 Mr. Robinson, but the psychological effect on a person as they
6 go down the track puts in a variable that's hard to examine in
7 realtime. And how do we address for that? If we were even to
8 go down that route. I don't know about this case. But you
9 have that experience. What insight can you provide?

10 MR. NOVAK: I've never -- so I've been a criminal
11 defense attorney since -- I don't know. I can't remember how
12 long. It's been a long time. I can't think of any client
13 who's ever attempted to harm me or myself -- me or himself or
14 herself or a law enforcement officer in a courtroom or tried to
15 flee a courtroom or lash out at a witness or throw something in
16 the courtroom. I of course have heard about such things. And
17 usually, because of my own experience, it's somebody who spent
18 decades in prison and now they're being prosecuted for
19 something they did in prison and they got nothing to lose.
20 That's the best I can do.

21 THE COURT: Thank you.

22 MR. NOVAK: Okay. A couple things if I may about
23 Rule 17.5. I think the 14th Amendment says that Mr. Robinson
24 has a right to be present at all of his proceedings. And I --
25 you know, I hope I don't say this too many times, but I'm from

1 another state, and most of my time practicing in that other
2 state has been in federal court. And with respect to the
3 notion of hybrid hearings and remote hearings, the pandemic is
4 over. I understand it's convenient for the sheriff. I
5 understand it saves government money. But this is a capital
6 case and Mr. Robinson wants to be present at every hearing in
7 person. If he's not present at every hearing in person, then
8 he's either appearing remotely in a place in the sheriff's jail
9 facility where there are staff present with him -- he's not in
10 a room by himself. And then that would mean that maybe one of
11 his attorneys could be over there, but that attorney wouldn't
12 be able to consult with other attorneys or --

13 I mean, I just think it is a shortcut which this
14 Court should not engage in in this type of a case.
15 Mr. Robinson is not going to waive his appearance for hearings
16 in order to eliminate the need for him to assert his right not
17 to be shackled. Okay? That's not a voluntary waiver.

18 If the Court, as it has, which has been fine with us,
19 wants to convene a hearing on short notice, the Court says,
20 "Hey, I need to get everybody on the telephone," and we do
21 that. But from our standpoint, that's appropriate for the
22 administration of justice, but when we're having meaningful
23 hearings -- and I'm not going to use the word "critical" in a
24 legal sense -- Mr. Robinson wants to be in court in person so
25 that your Honor and he are in the same room, so that he knows

1 what's going on, so that you can fully observe him, so that he
2 can fully observe witnesses. So it's not an accommodation that
3 interests us, respectfully.

4 The question about jail clothing, which your Honor
5 asked, I would ask the Court to consider the cases we cite at
6 page 13 of our reply brief. They are Mitchell, which is a Utah
7 decision; Estelle, which is a Supreme Court decision; and
8 Hernandez vs. Beto, which is a Fifth Circuit decision; which
9 basically all say that there is no essential state interest in
10 compelling somebody to wear jail clothing.

11 The idea that because Mr. Robinson maybe changed
12 clothes before or after the charged shooting has nothing to do
13 with whether Mr. Robinson sitting there in a sweater and blue
14 jeans or whatever the sheriff and Mr. Robinson's counsel agree
15 is appropriate clothing could somehow turn into Superman, you
16 know, by spinning around in a circle, it's just not going to
17 happen. And I have no problem with it, but there have been

18 [REDACTED]

19 [REDACTED]

20 So I think what your Honor is saying is like, "Why
21 does he need to be in prison garb when we have all the security
22 in the courtroom generally speaking?" is the right -- if I may,
23 the right question. And if things happen in the courtroom
24 which suggests to the Court that it has made an assumption that
25 Mr. Robinson demonstrated it shouldn't have made, then the

1 Court can make restrictions.

2 I do want to say something about just like
3 presumptions and language. Sure. We can have a statewide or
4 districtwide policy. That doesn't create presumptions. The
5 constitution is what controls where the presumptions are. And
6 it's the people's burden. It's the state's burden to interfere
7 with a constitutional right. The policy doesn't create a
8 presumption that we have to rebut. The policy is what the
9 sheriff and the Court's security specialist would like. It's
10 not a presumption. It may be guidance for this Court once the
11 Court completes its individualized determination.

12 I think the last thing I want to say -- and I'm sure
13 that will make everybody happy -- is that it is not correct
14 that defendants charged with very serious offenses who are in
15 custody always appear in shackles and in jail clothing.
16 Ms. Nester has pointed out to me twice in the last 15
17 minutes -- and I appreciate it because I forget things -- that
18 she actually represents a defendant who is in custody, who is
19 charged with first degree murder in another state -- I'm
20 sorry -- another county -- who sits in court without shackles,
21 and who wears street clothing. Because a judicial officer made
22 an individualized determination that that was okay.

23 If I've left something out, please tell me. Submit
24 it.

25 THE COURT: All right. And is there anything further

1 from either side that you wish for me to consider? And before
2 I go there, I also want to clarify that my understanding is I'm
3 not ruling about the media. I'm not ruling about which
4 hearings he should or should not be able to attend. My
5 understanding is that's going to be further briefed. And so I
6 want to be clear that even though it is -- there is this
7 attachment, that that's not the expectation of my ruling on
8 Monday. I'm ruling on the issue of striking the motion, which
9 is obviously the easier of the motions, and in regards to how
10 he is dressed and whether he is restrained, is my focus. Even
11 though I've heard from both sides about other issues, I want
12 that to be more fully briefed even though it does touch upon
13 that. And it sounds like we may have the time if we continue
14 the 30th hearing, so that issue is not immediately upon us.

15 But with that, I want to open it up to either side.
16 Any other information or argument you want me to consider as it
17 relates to those three issues?

18 MR. BALLARD: Well, I think your Honor raises a good
19 point in that if we're going to have further briefing on an
20 issue that talks about potential limitations on what the media
21 can cover, and if that ruling is going to bear directly on the
22 ruling on the motion today, then I think maybe -- and we're not
23 going to have that hearing on the 30th, then maybe the Court
24 delay its ruling on this motion until it has the fully briefed
25 motion about what the media can do.

1 MR. NOVAK: If I may, that reminds me that I did
2 forget something, but my co-counsel wouldn't know it because I
3 didn't share it. The suggestion that this Court can order the
4 entire world not to say anything about what Mr. Robinson is
5 wearing in court is both impractical -- I think it's a prior
6 restraint. And the burden would fall on us to enforce it. I
7 mean, that's asked with a question mark at the end. It's
8 completely unenforceable.

9 The idea of prohibiting cameras and video in the
10 courtroom is very easy for this Court to enforce. That's easy.
11 What people can say outside the courtroom even if it is
12 constitutional -- I understand that it is very common for
13 Courts to order the media not to comment upon what jurors --
14 what they look like, information they provide in voir dire,
15 like all kinds of limitations, but -- but to somehow believe
16 that this Court can effectively prohibit everybody -- every
17 blogger in the world from commenting on what Mr. Robinson is
18 wearing in court, it's totally unenforceable. And I actually
19 don't think anybody's going to enforce it other than the
20 defense, and that would be completely impractical. I mean, our
21 effort to keep track of who is saying what about our client is
22 already, you know, an insane project.

23 And I also don't think that if this Court were to
24 eliminate cameras and video in the courtroom, which I know we
25 haven't fully briefed at all, doesn't go to the shackling

1 issue, because the shackling issue is about other
2 constitutional rights than just the first concern, which is the
3 visual appearance of somebody in shackles suggests that they
4 are guilty of something. Because the other two interests are
5 the decorum in the courtroom, the sanctity of the courtroom,
6 and the Sixth Amendment right to be free from shackles in order
7 to participate with your counsel.

8 So I don't -- I don't think that banning video
9 depictions from the courtroom addresses the shackling issue at
10 all.

11 THE COURT: All right. Mr. Ballard.

12 MR. BALLARD: If I could just add, your Honor. Your
13 Honor has a difficult decision to make. Really what it comes
14 down to is a weighing, right? A balancing of Defendant's right
15 to a presumption of innocence and a fair trial and security.
16 And at trial, there's no question that the right to a fair
17 trial and to -- and to the presumption of innocence -- when
18 you're in front of the jury, there's no question that that
19 balance tips in favor of what Defendant's requesting. At
20 pretrial hearings, the calculus is completely different.

21 And even with the media and even if this Court is
22 uncomfortable with an order saying, "Don't talk about, don't
23 write, don't state the way the defendant appeared in court," I
24 think a description of the way Defendant appeared is -- has far
25 less prejudicial -- potential prejudicial impact than a photo,

1 which I think the Court could restrict, a photo or a video.

2 Just two other issues, your Honor, to briefly
3 mention. Defendant's repeatedly made the point that the state
4 hasn't provided any individualized information about the
5 defendant. The state hasn't done that at this point because
6 there's no requirement for the state to do so. Until this
7 Court finds that it's going to plow completely new ground and
8 extend the rights that Defendant's asking for beyond the jury
9 process, then there's no need for the state to provide that
10 information.

11 And as far as the right to be present, "A defendant
12 is guaranteed the right to be present" -- this is from State
13 vs. Maestas, a Utah Supreme Court opinion that's cited in both
14 of the -- all of the briefing -- or from both sides. "A
15 defendant is guaranteed the right to be present at any stage of
16 the criminal proceedings that is critical to its outcome if his
17 presence would contribute to the fairness of the procedure."

18 And it's the state's position that Defendant
19 certainly would be entitled to be present in the courtroom with
20 his counsel during those kinds of proceedings. But in others,
21 he does not need to be in the courtroom. He can still be
22 present, but he can be present virtually where he can
23 communicate in realtime and confidentially if necessary.

24 And just one final point, your Honor. It sounded to
25 me like defense counsel was saying that if he were in -- in

1 civilian clothing, [REDACTED]
2 [REDACTED]
3 [REDACTED] I'm curious if that's
4 accurate. But that might be one way to further balance
5 interests.

6 THE COURT: Thank you. And just to clarify -- I
7 don't mean to repeat myself, because we are coming to the end.
8 I am not making a ruling on what hearings he can or cannot be
9 on. That, I'm assuming, both sides is requesting more briefing
10 on. I'm simply limiting it to the motion to strike the filing
11 of the state, the clothing issue, and the restraints. I just
12 don't want there to be -- I don't want there to be any
13 miscommunication or expectation. Are we all on the same page?

14 MR. NOVAK: We are asking leave of the Court to more
15 fully address what we thought -- which we addressed very --
16 very quickly -- which we thought was a motion under 17.5 to
17 limit Mr. Robinson's appearances. We want to address that more
18 fully. So, for example, in the state's paper, they address the
19 11 factors that a Court should consider under 17.5. I didn't
20 want to take that up today given the timing, but, yeah, we want
21 to address that more fully, and we will. And we can work it
22 out with the state whether we file simultaneous briefs or reply
23 and surreply or whatever we call it. They're saying they
24 didn't file a motion. We thought they filed a motion, so we
25 filed an opposition to nothing. We'll get the Court points and

1 authorities from both sides.

2 THE COURT: Thank you. I just want to clarify that.

3 All right. So it sounds like with that
4 expectation -- and does Monday at 1:00 on WebEx work for all
5 parties?

6 MS. NESTER: Yes, sir.

7 THE COURT: And because we are in a sealed
8 proceeding, I want to address an issue that goes to the very
9 heart of what we're dealing with. It seems to me that because
10 we're addressing the issue of Mr. Robinson's dress and
11 restraints and because that ruling will be public and will be
12 streamed, it seems, to protect the interest of Mr. Robinson,
13 his constitutional rights -- first of all, he should be able to
14 participate, but it seems counterproductive if his camera was
15 on, because it would defeat the whole purpose of why we're
16 here. How do all parties feel? I'm not saying that's what
17 should happen. I'm saying I want your input so we're all in
18 agreement come Monday at 1:00. I don't --

19 MR. NOVAK: We are agreeing to a WebEx hearing as the
20 Court proposed, which would mean that for this -- for the Court
21 to issue its ruling -- right? The Court's not entertaining
22 more argument. The Court is issuing a public ruling on
23 documents that were mostly publicly filed. And then there was
24 appropriately sealed argument. We are okay for purposes of
25 receiving the Court's ruling with Mr. Robinson appearing from

1 the jail, audio only, for the same reason we did last time and
2 for the reason that the Court just stated.

3 THE COURT: All right. And I just wanted to check.
4 Because I don't want us to get there and someone has an issue.
5 Because this kind of goes to the heart of what we're dealing
6 with today, and I don't want to --

7 MR. NOVAK: Yeah.

8 THE COURT: -- go -- okay. Thank you. I think we're
9 all on the same page.

10 MR. BALLARD: I think that's the perfect procedure,
11 your Honor.

12 THE COURT: All right. So we have that Monday at
13 1:00 via WebEx. In regards to -- are we in agreement to strike
14 the 30th, the hearing on the 30th?

15 MR. NOVAK: Yes. And our suggestion, if we may, is
16 that the Court give us a date that's convenient to the Court in
17 early January. We I think can work out amongst ourselves a
18 schedule for sort of briefing all of that stuff with the
19 understanding that we will file our motions before
20 Thanksgiving. And the parties have committed to working
21 through the responsive pleadings in December. We just would
22 like the Court to tell us while we're all here with our
23 calendars what works in January.

24 THE COURT: All right. Let's pull up a date. But
25 while we're going there, one of the purposes of the 30th's

1 hearing is I wanted to get an update on the discovery because
2 that's going to guide where we go. And I just wanted to check
3 the pulse of both sides to see where we're at, to see: Are we
4 on track? And the state had indicated they wish to be setting
5 a preliminary hearing.

6 So while we have that time -- and I'm fine with that.
7 I think it's appropriate. I want that time to be well used to
8 ensure that we don't come back the 30th and say, "Oh, your
9 Honor, there was this issue of discovery." Now we're back
10 another 60, 90 days. And so that was one of the purposes of
11 the 30th's hearing. And I want -- I want us to have an ability
12 to address that in a timely basis for Mr. Robinson's speedy
13 rights and for alleged victim's rights of dispositions as well
14 as in the interest of justice. And so -- and I know it's late,
15 but I want to touch on that to see where we're at, if we have
16 any issues that we can quickly address or if we just need
17 another hearing. And so I wanted to keep us on track for
18 everyone's benefit.

19 MR. GRUNANDER: Chad Grunander for the state, your
20 Honor. I can provide an update for the Court. And defense
21 counsel and the state, we met before this hearing and talked
22 about this.

23 First of all, our offices are working together. Our
24 paralegals are in constant communication about sending and
25 receiving discovery. We have to date, as of this afternoon,

1 received in the range of about 4,085 files from law
2 enforcement. We received about 1,700 of those within the last
3 probably 12 hours. There's a process that our office is going
4 through and making the necessary redactions per statute, per
5 the law, and then we're moving that to the defense as quickly
6 as possible. We have provided 1,442 files to the defense thus
7 far, so it's about 35 percent of what we have in hand right
8 now. Every week at least once a week, we provide a batch of
9 information to the defense. There have been a couple of
10 hiccups because of the size of the files and the system we're
11 using that we're working through. I think we're getting to the
12 bottom of that, and we'll continue to work through that when
13 issues arise. We're also identifying the dates when the
14 information is received and trying to push that out
15 chronologically to the defense as quickly as possible as well.

16 This case involves a lot of surveillance camera from
17 UVU. And we're starting with September 10th being the most
18 probative, most important day, and then working backward from
19 that. So we're trying to prioritize our efforts as well. So I
20 think we're making progress there. And I think we're going to
21 iron out a few kinks, and the progress will be expedited as we
22 move forward.

23 THE COURT: All right. And from defense, any --

24 Mr. Grunander, did you have anything else? I didn't
25 mean to cut you off.

1 MR. GRUNANDER: No.

2 THE COURT: Okay. From defense, any thoughts?
3 Progress or things that you wish to bring up with the Court?

4 MR. NOVAK: Everything that was just stated
5 accurately represents the collaboration, and it also presents a
6 picture of the amount of material we need to get through. So
7 far.

8 THE COURT: Right. Right. And my final question --
9 and I appreciate it. I think when there's good cooperation
10 between the parties, that is in the interest of justice, and it
11 just makes the process go so much better even though it is an
12 adversarial system.

13 MR. NOVAK: We have no discovery disputes given the
14 way things have gone. There will of course be requests that we
15 may have based on what we see in the discovery, but we're not
16 there yet.

17 THE COURT: And I'm not holding anyone to this, but
18 I'm trying to earmark time for a potential preliminary hearing.
19 And whatever you say is not something I'm holding you to, but
20 do we have a very basic idea of how much time the Court should
21 be allocating if -- for a potential preliminary hearing? And
22 again, I don't mean to put you on the spot. You were not
23 prepared for this. I'm just trying to see: How much time
24 theoretically should I be looking at? Because I want to get
25 that available and have that in mind.

1 MR. GRUNANDER: Very fair question, your Honor. And
2 we're trying to come up with that as well. And as we sit here
3 today -- in my experience, I've done preliminary hearings that
4 last ten minutes to five days. This will be probably more
5 complex than a typical homicide case, but I would ask the Court
6 for at least five days. Understanding it's a probable cause
7 hearing as well. As much as we want to get in to do it -- to
8 litigate every issue, it's a probable cause hearing. So I
9 would say five days as I stand here today.

10 THE COURT: Okay.

11 MR. GRUNANDER: And then I just had one more issue to
12 bring up after we --

13 THE COURT: Sure. And again, I'm not trying to put
14 you in a corner or in a box. Any thoughts? And if not, that's
15 okay. Because --

16 MR. NOVAK: I don't think we can really comment on
17 how long the preliminary hearing would be at this point. I
18 think the state has a better sense of what kind of a case it
19 wants to present. Obviously there's cross-examination. You
20 know?

21 THE COURT: All right. Okay. Thank you,
22 Mr. Grunander.

23 MR. GRUNANDER: There's one outstanding issue, and
24 that's the preservation order, and there's some pending filings
25 with respect to that. And I just want -- I know we're going to

1 talk about an early January date to convene next, but there
2 might be a need to meet before then. And the reason I say
3 that, if an issue comes up, again, we don't want to violate any
4 orders. We want to act appropriately. But there's still
5 additional testing that's being done, forensic testing with
6 respect to evidence.

7 So we're going to cooperate with the defense on that,
8 but there may be a need of some time to reconvene with respect
9 to that issue.

10 THE COURT: Absolutely.

11 MR. GRUNANDER: Because, again, we want to
12 investigate this as expeditiously as possible and move the
13 information to the defense in the same fashion. So...

14 THE COURT: And I want the parties to know if an
15 issue does come up, this Court will prioritize to make sure
16 that we have that time to act quickly, because it's in the
17 interest of all parties and in the interest of justice. So I
18 will make that a priority. And I realize things can come up
19 that we don't even know about, which they will. And that's
20 okay.

21 All right. What potential dates do we have in
22 January? And how much time do we need, is probably an
23 important question? That's going to dictate --

24 MR. NOVAK: I think we outlined a number of motions.
25 A different way to do it would be, depending upon the Court's

1 own calendar, is to do two -- I don't want to say two half days
2 because I don't want to say it's, you know, eight hours of
3 argument. But there's a few motions there. Right?

4 So maybe -- maybe -- I don't know how the Court's
5 calendar works. I'm just thinking, you know, that's one way to
6 think about it, is if there are two days where the Court has
7 time, we can knock out some on one day and some on the other.
8 But maybe the Court prefers to just use a clear day and go from
9 start to finish. I have no idea how the Court --

10 THE COURT: Assuming the Court has a clear day.

11 MS. NESTER: That's the point.

12 MR. NOVAK: Two partial days back to back
13 eliminates -- well, at least travel for some of us.

14 THE COURT: All right. So potentially two four-hour
15 blocks, and then we can figure out what we argue on which days,
16 whatever is effective or works for the parties.

17 MS. NESTER: Your Honor, if I could ask respectfully,
18 that is the month before I have a fairly large homicide trial
19 starting, and so we have cleared several days for evidentiary
20 hearings on our last round of motions. So that week of January
21 5th, if we could avoid that week and maybe look at the next
22 week of the 12th, just because I've got three days of hearings
23 that week of the 5th in my other case.

24 THE COURT: All right.

25 MS. NESTER: Thank you, your Honor.

1 THE COURT: So give me the good or bad news about
2 dates.

3 THE CLERK: You are booked with jury trials every
4 week.

5 THE COURT: Oh, interesting.

6 MR. NOVAK: Jury trials every week?

7 THE COURT: Apparently.

8 THE CLERK: Except for one week where you are packed
9 from 9:00 to 5:00 with other civil matters. Unless a jury
10 trial settles. But I can't -- I can't even begin to guess
11 which one may or may not.

12 THE COURT: Well, let's look at a Friday, because if
13 we have a jury trial, it's -- usually it will -- hopefully
14 they're in deliberations, and that does -- I don't need to be
15 in court per se. Because we shouldn't be taking evidence on a
16 Friday afternoon if the trial has to end by Friday. So can we
17 look at a Friday perhaps at 1:00 on the weeks in January,
18 excluding that first week of January? Just trying to think
19 what's most likely to give us time.

20 THE CLERK: We could look at 1:00 on the 16th and
21 then again on the 30th.

22 THE COURT: Counsel, what are your thoughts?

23 MR. GRUNANDER: The state is available.

24 MR. NOVAK: That works for us, the afternoon of the
25 16th and the afternoon of the 30th.

1 THE COURT: All right. And obviously we'll address
2 who needs to be -- well, there's issues we'll address, but
3 these hearings, unless there is mention of it needing to be a
4 closed hearing, the assumption is they will be open hearings
5 unless the parties bring compelling reasons to close them.

6 MR. NOVAK: There may be aspects of the hearing on
7 the motion to disqualify, which, out of respect for the privacy
8 of the family of a member of the state prosecution team, should
9 be sealed, because it would necessarily reveal family
10 relationships and names and where somebody goes to school or --
11 I mean, I don't want to say too much; although, we're in a
12 sealed hearing. We're sensitive to that. And we're actually
13 going to file that motion and request that it be filed
14 privately so it's not a public document, but so the Court has
15 the specifics.

16 MR. GRUNANDER: I think that's fair. And counsel has
17 given us a heads-up with respect to that issue, and we'll see
18 how we respond. There may be interest and a need for the Court
19 and for the record to have a response as far as the identity or
20 to some degree the identity. But we'll cross that bridge when
21 we get there.

22 MS. NESTER: I definitely don't want his -- I don't
23 want the family member getting the e-mails that I'm getting
24 right now, so we're going to try to protect that innocent
25 family member from experiencing that.

1 THE COURT: All right. So just for the benefit of
2 that being a potential issue, can we address that on the 16th?
3 And if there's any other potential issues that needs to be
4 sealed, let's kind of group them together so we don't have to
5 seal both of them. That can affect transparency. And so let's
6 say the 16th theoretically is sealed.

7 MS. NESTER: Honestly, your Honor, we may only just
8 need to -- like just have everybody leave and seal like a
9 portion of the hearing, just like a few minutes where we enter
10 into the record the part that we're trying to protect, the
11 person we're protecting.

12 THE COURT: Okay. I appreciate that.

13 MS. NESTER: So I don't even think we would need to
14 seal the entire hearing, just where if you need to know the
15 details about the individual and if the prosecution would like
16 that to remain private.

17 THE COURT: All right. So we'll earmark the 16th
18 potentially for partial seal.

19 MR. GRAY: I just want to add I think we can file
20 these in such a way that we have a public document and a
21 protected document. The public one would be redacted. And so,
22 you know, because -- I think that's what I would prefer to do
23 so that we can argue these. And then we'll just provide the
24 Court with both a public and a redacted one.

25 MS. NESTER: We'll do that.

1 THE COURT: All right. And it sounds like there's
2 good communication between the parties. Unless the parties are
3 requesting filing motion dates, I'm happy to leave it to you
4 since it's still kind of up in the air. It sounds like we now
5 know the dates and so we can work toward those dates, allowing
6 the opposing party time to respond. We're all well established
7 in what time that takes, and so I'll leave it to you unless
8 there's a request otherwise.

9 Counsel, anything else that we need to address today?

10 MS. NESTER: Perhaps just a docket entry striking the
11 hearing on the 30th.

12 THE COURT: All right. We'll go ahead and strike the
13 hearing on the 30th.

14 THE CLERK: It's already done.

15 THE COURT: All right. And counsel, in closing, I
16 want to comment on the professionalism and the civility all
17 sides have shown. I recognize that this is a very difficult
18 matter for all parties. And I wish to comment that your
19 professionalism, your civility, and the way that I see that you
20 are working together is very commendable. So, thank you.

21 MR. NOVAK: Thank you, your Honor.

22 MS. NESTER: Thank you, your Honor.

23 THE COURT: And with that, I wish you a good weekend,
24 and this court is in recess.

25 (Proceedings concluded at 5:19 p.m.)

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REPORTER CERTIFICATION

I, PHOEBE S. MOORHEAD, Registered Diplomat
Reporter, do hereby certify:

That the foregoing proceedings were taken before me
at the time and place set forth herein and were taken down by
me in shorthand and thereafter transcribed into typewriting
under my direction and supervision;

That the foregoing pages contain a true and
correct transcription of my said shorthand notes so taken.

I FURTHER CERTIFY that I am neither counsel for nor
related to any party to said action nor in anywise interested
in the outcome thereof.

Certified and dated this 26th day of December,
2025.



PHOEBE S. MOORHEAD, RDR, CRR
Certified Shorthand Reporter
for the State of Utah

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