

JURY INSTRUCTIONS ARGUMENT

State v. Golub, No. 235900706 October 29, 2025 - Time Allotment: 10 minutes

OPENING STATEMENT (30 seconds)

" "Your Honor, the jury instructions are the legal map for the jury, and it is critical they be neutral and accurate. The State's proposed instructions contain two fundamental flaws.

First, Page 29 of the State's instructions improperly tells the jury that 'The Court has made... affirmative findings concerning the Intoxilyzer machine.' This is an invasion of the jury's role. The reliability of that machine is the central contested fact in this case. This instruction anoints the State's evidence with the Court's own credibility and tells the jury that a key issue has already been decided. That is reversible error.

Second, throughout its instructions, the State uses coercive language like, 'it is your duty to find the defendant GUILTY.' This misstates the jury's true duty, which is to determine if the State has met its extraordinary burden of proof. Under *In re Winship*, this language violates due process by turning deliberation into a Pavlovian exercise.

In contrast, the Defense's proposed instructions are neutral statements of Utah law tailored to the evidence. Specifically, we request instructions on **confirmation bias** (*State v. Perea*), the **scientific protocols** for breath testing (*Utah Admin. Code R714-500*), and the legality of the **initial traffic stop** (*Terry v. Ohio*). These are not arguments; they are the necessary legal tools the jury needs to weigh the evidence fairly. We ask that our proposed instructions be adopted as the working framework for this trial."

PART I: ATTACK STATE'S INSTRUCTIONS (5 minutes)

A. THE COURT AS STATE'S WITNESS (Page 29)

"Your Honor, the State's instruction on page 29 reads: '**The Court has made the following affirmative findings concerning the Intoxilyzer machine... the affidavit establishes a rebuttable presumption that the Intoxilyzer machine was functioning properly.**'

This is reversible error under **State v. Bradley, 578 P.2d 1292 (Utah 1978)**, which prohibits judicial comment that resolves contested facts for the jury. The reliability of the Intoxilyzer is THE central contested fact. We've spent the entire hearing arguing about it. Yet this instruction tells the jury that Your Honor—the most powerful and impartial figure in the room—has already decided the machine works. It transforms you from neutral arbiter to the State's expert witness. We've shown the officer admitted it was improperly administered, there's a 21-day certification gap, and a 700% protocol deviation.

The defense will present evidence that:

- The machine had no certification for September 6
- The test was administered improperly per the officer's own admission
- The result came from a 144-second forced blow

But the State's instruction tells the jury to ignore all this because the Court has already blessed the machine. That's not just error—it's structural error that denies Mr. Golub a fair trial.

This instruction tells the jury that Your Honor—the most powerful figure in the room—has already blessed the machine as reliable. It anoints defective evidence with judicial credibility.

This violates **State v. Bradley**, 578 P.2d 1292 (Utah 1978), which holds that courts cannot make affirmative findings on contested evidentiary facts that the jury must decide. Under Utah Rule of Evidence 103, such judicial comment constitutes plain error affecting substantial rights when it involves the central disputed fact at trial."

B. MANDATORY CONVICTION LANGUAGE (Throughout)

Your Honor, the State's proposed instruction uses coercive language: "it is your duty to find the defendant GUILTY." This formulation is contrary to constitutional guarantees of due process under *In re Winship*, 397 U.S. 358 (1970), which firmly establishes that a jury's true duty is to determine whether the State has proven its case beyond a reasonable doubt—not to deliver a conviction as a foregone conclusion.

The jury's central function is to decide if the prosecution has met its extraordinary burden. Only if the State has proved every element beyond a reasonable doubt does the jury have the authority—and the discretion—to convict. The mandatory wording proposed by the State risks undermining the independence of the jury's deliberation, reducing it to a mechanical process that strips the jury of its essential constitutional role as conscience of the community.

Utah's Model Jury Instructions properly avoid this error by instructing that "if you find the State has proven every element beyond a reasonable doubt, you may find the defendant guilty," thus preserving the jury's prerogative to decline to convict even if it believes the formal elements have been met. This careful wording is the difference between compelled verdicts and genuine justice.

The power of the jury includes the inherent right to acquit, even against the weight of the evidence—what jurists and scholars call "jury nullification." While courts need not (and generally do not) instruct jurors explicitly about this prerogative, the law is clear that jury instructions should not misstate or diminish the jury's independent function.

Accordingly, the State's proposed language does not accurately state the jury's duty and risks a structural error by coercing a guilty verdict. The proper instruction should read: "If you find the State has proven all elements beyond a reasonable doubt, you may find the defendant guilty." The difference between "must" and "may" is the difference between compulsion and constitutionally required deliberation.

PART II: DEFEND OUR INSTRUCTIONS (4 minutes)

The Defense's instructions provide the legal tools the jury needs to evaluate the specific evidence:

Instruction #6: Confirmation Bias

This instruction, grounded in *State v. Perea*, gives the jury the framework to evaluate whether the officer's observations were objective or colored by his previous experience and arrest pattern. Without it, the jury lacks important context for assessing credibility."

Instructions #7-8: Scientific Standards

"The jury will see:

- The officer demonstrated 3 steps of a 9-step test
- A breath test lasting 144 seconds instead of 12-20
- Bookend certification documents with a 21-day gap

Our instructions provide the NHTSA standards and Utah Admin Code requirements the jury needs to evaluate these deviations. Without these yardsticks, the jury has no way to measure whether the State followed the law."

Instruction #10: Initial Stop Validity

"This goes to the heart of our defense. If the initial stop was unlawful—a pretextual violation the officer couldn't have seen from his position—then all subsequent evidence must be suppressed under the fruit-of-the-poisonous-tree doctrine. This instruction, based on *Terry v. Ohio* and *State v. Bello*, empowers the jury to enforce the Fourth Amendment. To deny this instruction denies the jury its constitutional role."

"The defense will show the initial stop was pretextual—a violation the officer couldn't have seen from his position. This instruction, based on *Terry v. Ohio* and *State v. Bello*, tells the jury that if they doubt the stop's legality, all subsequent evidence must be disregarded under the fruit-of-the-poisonous-tree doctrine.

To deny this instruction is to deny the jury the ability to police police misconduct—their most fundamental role."

PART III: VOIR DIRE & PROCEDURAL MATTERS (1 minute)

"Brief procedural requests:

Voir Dire:

- Time allocation for each side?
- May we use visual aids to demonstrate 'reasonable doubt'?
- Simple chart showing burden of proof levels
- **Visual demonstration** of 'reasonable doubt' using a simple graphic
- **Time allocation:** How much time per side?
- **Jury questions:** May we ask about attitudes toward police testimony and scientific evidence?"

Trial Technology & Jury Materials

Given 12+ hours of video evidence, we request:

- **PowerPoint presentation** with embedded clips and synchronized transcripts
- **Jury packets** with tabbed reference documents
- **Note-taking permission** during video playback
- **Written questions** from jurors to the Court

These tools are essential for jury comprehension of complex evidence."

- Tabbed jury packets with key documents
- Written questions from jurors permitted?

Technology:

- PowerPoint with synchronized transcripts for 12+ hours of video
- Smart screen for displaying evidence

These tools are essential for jury comprehension of complex evidence."

CLOSING ARGUMENT (30 seconds)

Your Honor, the State's instructions presume guilt and command conviction. They tell the jury the Court has already decided the Intoxilyzer works and they must find guilt. That's not justice—it's jury tampering by instruction.

Our instructions empower the jury with the actual law they need: standards for scientific evidence, frameworks for assessing bias, and the power to enforce constitutional limits. A fair trial requires fair instructions. We ask that ours be adopted.

A fair trial requires instructions that fit the facts. We ask that our framework be adopted."

QUICK REFERENCE CARD (Keep at Podium)

STATE'S FATAL FLAWS:

1. Page 29: Court's "affirmative findings" = judicial comment on evidence
2. Mandatory "GUILTY" language = *Winship* violation
3. No instruction on burden/presumption tailored to evidence

OUR KEY INSTRUCTIONS:

- #6: Confirmation bias (24x arrest rate)
- #7-8: Scientific standards (144-second test)
- #10: Stop validity (fruit of poisonous tree)

CONTROLLING AUTHORITY:

- *State v. Rammel*, 721 P.2d 498 (judicial comment prohibited)
- *In re Winship*, 397 U.S. 358 (burden of proof)
- *State v. Perea*, 2013 UT 68 (confirmation bias)
- *Terry v. Ohio*, 392 U.S. 1 (stop validity)

IF INTERRUPTED: "Your Honor, the State's instruction has the Court endorsing evidence. That's reversible error. The State wants Your Honor to tell the jury the broken machine works. That's not instruction—it's indoctrination."

VOIR DIRE PRIORITIES:

1. Visual aid for reasonable doubt
2. Time allocation
3. Jury note-taking permission

ARGUMENTS AGAINST STATE'S JURY INSTRUCTIONS

"Your Honor, page 29 of the State's instructions tells the jury 'The Court has made affirmative findings concerning the Intoxilyzer machine.' This transforms Your Honor from neutral arbiter to State's expert witness. It's reversible error under State v. Rammel, 721 P.2d 498 (Utah 1986), which prohibits judicial comment on evidence."

"Your Honor, the jury instructions are the legal map for the jury, and it is critical they be neutral and accurate. The State's proposed instructions contain two fundamental flaws.

First, Page 29 of the State's instructions improperly tells the jury that 'The Court has made... affirmative findings concerning the Intoxilyzer machine.' This is an invasion of the jury's role. The reliability of that machine is the central contested fact in this case. This instruction anoints the State's evidence with the Court's own credibility and tells the jury that a key issue has already been decided. That is reversible error.

Second, throughout its instructions, the State uses coercive language like, 'it is your duty to find the defendant GUILTY!' This misstates the jury's true duty, which is to determine if the State has met its extraordinary burden of proof. Under *In re Winship*, this language violates due process by turning deliberation into a Pavlovian exercise.

In contrast, the Defense's proposed instructions are neutral statements of Utah law tailored to the evidence. Specifically, we request instructions on **confirmation bias** (*State v. Perea*), the **scientific protocols** for breath testing (*Utah Admin. Code R714-500*), and the legality of the **initial traffic stop** (*Terry v. Ohio*). These are not arguments; they are the necessary legal tools the jury needs to weigh the evidence fairly. We ask that our proposed instructions be adopted as the working framework for this trial."

D. Voir Dire and Jury Aids

DEFENSE: "Finally, Your Honor, we have a few brief requests for trial procedure. We ask for clarification on the time allotted for voir dire. We also request permission to use a simple visual aid during voir dire to illustrate the legal concepts of 'presumption of innocence' and 'reasonable doubt.' Further, we request permission to prepare a tabbed jury packet with key documents for reference, and we ask if jurors will be permitted to submit written questions to the Court."

"The State's instruction that the Court has made 'affirmative findings' that the Intoxilyzer works is an invasion of the jury's province. Whether that machine was reliable is THE question for the jury."

Defend Your Instructions: "Our instructions provide the legal standards the jury needs:

- Confirmation bias instruction given the officer's extreme arrest rate
- Scientific standards for evaluating deviations from protocol
- The lawfulness of the initial stop under Terry"
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Procedural Matters

- Trial after November 21 for witness availability
- PowerPoint with embedded video/transcripts for 12+ hours of evidence
- Visual aids for voir dire on reasonable doubt

- Jury note-taking and questions

CRITICAL DOCUMENTS TO BRING

1. **Highlighted transcript** where Ernstsen says test wasn't "properly" done
2. **Intoxilyzer manual** pages on test duration (12-20 seconds)
3. **Your motions** with key passages tabbed
4. **Berkemer v. McCarty** citation on custody
5. **Murray City v. Hall** on foundation requirements

BOTTOM LINE

You have Ernstsen's admission that the test was improperly conducted. That's your ace. Everything else supports it—the 144-second deviation, the calibration gap, the failure to retest.

Don't retreat. Make them defend the indefensible. When an officer admits his own evidence is faulty, any competent judge should suppress it. If they don't, you've preserved a powerful appeal.

Defense: "Your Honor, the jury instructions and their presentation are of paramount importance to the Defense. They are the legal map and primary heuristic that will guide the jury to their decision."

The State's Jury Instructions run over 50 pages and are 1) replete with prejudicial language that presumes guilt, 2) position the Court as witness *for* the State, and 3) uses coercive tactics that misstates the jury's fundamental duty. These non-neutral instructions are improperly prescriptive by priming the Jury to convict before seeing any evidence or hearing any arguments."

1. "The Court's Affirmative Findings Concerning the Intoxilyzer Machine"—The Court's "Affirmative Findings" on the Intoxilyzer (Page 29): The Court as the State's Expert

Problematic Language: "*The Court has made the following affirmative findings concerning the Intoxilyzer machine... the affidavit establishes a rebuttable presumption that the Intoxilyzer machine... was functioning properly.*"

- **Defense:** "Your Honor, this instruction is a profound invasion of the jury's role as the sole finder of fact. The reliability of the Intoxilyzer 8000 is key issue on which they will decide. The defense will present evidence that the Intoxilyzer is 1) notoriously unreliable, 2) that the night of September 6, 2023 it had not been certified for nearly two weeks, and 3) that the test was administered *improperly* (according to the officer's own admission. However, the Prosecution's instruction tells the jury that the Court—the most powerful and impartial figure in the room—has already reviewed the evidence and found that the machine works. It anoints the State's evidence with the Court's own credibility. Whether that machine was reliable is a question for the jury, not a forgone conclusion."

2. Coercive and Mandatory Language (Page 32 and throughout): Misstating the Jury's Duty

Problematic Language: "If you believe the evidence establishes all the elements beyond a reasonable doubt, it is your duty to find the defendant GUILTY..."

- **Defense:** "Your Honor, throughout their instructions, the State repeatedly uses the coercive commands that the jury *must* find the defendant guilty. This misstates the jury's duty. The jury's duty is to determine if the State has met its extraordinary burden. If and only if that burden is met, they *may* find the defendant guilty. This language turns the Jury's deliberation into a Pavlovian exercise and flouts the due process clause, established by the Supreme Court (*Winship*, 397 U.S. 358 (1970), which holds that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged."
- Indeed, in the case of Jury Nullification, the Jury can legally make any finding it chooses within the confines of the law. The State's instructions strip the Jury of their agency as the conscience of the community. Our proposed instructions use, neutral, non-coercive phrasing, and we ask that the State's *mandatory* language be stricken wherever it appears."

Defense: "Thank you" or "I respectfully preserve this issue for appeal."

The defense must attack the State's instructions, arguing they are prejudicial, coercive, and improperly prescriptive.

1. **Court Endorses Machine (Page 29):** The State's instruction that the Court has made "affirmative findings" on the Intoxilyzer's function is characterized as a "**profound invasion of the jury's role**". It anoints the State's evidence with the Court's credibility, especially when the reliability of the machine is the key issue of the case.
2. **Coercive and Mandatory Language (Page 32 and throughout):** The State repeatedly uses commands like "it is your duty to find the defendant GUILTY". This **coercive language misstates the jury's fundamental duty** by turning their deliberation into a "Pavlovian exercise" and flouting the due process clause.
Procedural Matters and Voir Dire Parameters
The defense must bring up procedural questions to structure the upcoming trial.
 - **Scheduling:** Request a trial date following November, as witness Tatyana Golub will be out of state for a religious visit to a monastery.
 - **Visual Aids/Technology:** Request permission to use the smart screen to present a PowerPoint with imbedded video clips and subtitles to aid comprehension of the nearly 12 hours of video and audio evidence.
 - **Jury Aids:** Request to use a visual aid during *Voir Dire* to illustrate the meaning of "presumption of innocence" and "reasonable doubt". Request permission to prepare a jury packet with key documents tabbed for reference.
 - **Jury Input:** Ask if jurors will be allowed to submit written questions.
 - **Voir Dire Time:** Ask how much time will be allotted for each step of *Voir Dire*.

ARGUMENT FOR DEFENSE JURY INSTRUCTIONS

- **Defense:** "Your Honor, the Defense's proposed instructions are tailored to the specific evidence the jury will be tasked with evaluating. They are not arguments; they are neutral, descriptive statements of Utah law that provide the jury with the necessary tools to do their job."

1. Instruction #6 (Confirmation Bias): Arming the Jury to Assess Credibility

- **Argument:** "Instruction Six, regarding confirmation bias, is vital in this specific case. The jury will hear evidence that Corporal Ernstsen has a DUI arrest rate more than 24 times the state average. That is an extraordinary fact. This instruction is necessary to provide the jury with the proper legal and psychological framework to consider whether the officer's observations were truly objective, or whether they were colored by a pre-existing expectation to make a DUI arrest. This neutral concept is directly relevant to the central issue of reliability, credibility, and it is grounded in the authority of *State v. Perea*."

2. Instructions #7 & #8 (FST & Breath Test Protocols): Providing the Necessary Standards

- **Argument:** "Instructions Seven and Eight establish a fair evaluation of the State's evidence. The jury will see on video that the officer demonstrated only three steps for a nine-step test. They will see him coerce a breath sample for 140 seconds—a 700% deviation from protocol. They will see that the State's own certification documents do not cover the date of the test. These facts are meaningless to a lay jury unless they are instructed on what the legal and scientific standards *are*. Our instructions provide those standards, taken directly from NHTSA and Utah Administrative Code. Without them, the jury has no yardstick with which to measure the State's performance. They are essential for a fair trial."

3. Instruction #10 (Validity of the Initial Stop): Empowering the Jury

- **Argument:** "Finally, Instruction Ten is fundamental. The defense's case begins with the proposition that the initial stop was unlawful—a pretext based on a violation that was not seen on video and as the Defense will show, could not have possibly been seen from his vantage point. This instruction correctly states the law of *Terry v. Ohio* and *State v. Bello*. It tells the jury that if they have a reasonable doubt about the legality of that first moment, they must disregard all additional evidence based on *the-fruit-of-the-poisonous-tree doctrine*. To deny the jury this instruction is to deny them the ability 1) to consider the Defense's key theory of the case and 2) to act as the conscience of the community and prevent injustice."

Final Summary Argument

"Your Honor, in summary, the State's instructions presume guilt, endorse evidence, and command a conviction. They are designed to make the jury's job easy by taking the hard questions away from them.

The instructions of the Defense, by contrast, are designed to make the jury's job *possible*. They empower the jury with the correct legal standards they need to fairly and accurately weigh the specific,

contested evidence in this case—the officer's potential bias, the flawed administration of tests, and the very legality of the stop itself.

A fair trial requires instructions that fit the facts. We respectfully submit that our proposed instructions are the only ones before the Court that do so, and we ask that they be adopted as the working framework for this trial."

ARGUING IN FAVOR OF DEFENSE JURY INSTRUCTIONS

The defense argues that its instructions are necessary because they are "**tailored to the specific evidence**" and empower the jury with the legal tools required to weigh the contested facts.

Defense Instruction	Argument Needed	Authority
#6 (Evaluating Law Enforcement Testimony/Confirmation Bias)	This instruction is vital given evidence that Corporal Ernstsen has an arrest rate more than 24 times the state average . It provides the proper framework for the jury to assess whether the officer's observations were objective or " colored by a pre-existing expectation to make a DUI arrest ".	<i>State v. Perea</i>
#7 & #8 (Scientific Evidence/FST & Breath Test Protocols)	The jury needs these standards because they will see evidence of massive deviation from protocol (e.g., 140-second coerced blow, three steps demonstrated for a nine-step test, certification gaps). Without instructions derived from NHTSA and Utah Administrative Code, the jury has no "yardstick" to measure the State's performance.	<i>Utah Admin. Code R714-500; Murray City v. Hall</i>
#10 (Validity of Initial Traffic Stop)	This instruction is fundamental because the defense argues the stop was unlawful, based on a violation that could not have been seen from the officer's vantage point. If the jury has reasonable doubt about the legality of the initial stop, they must disregard all additional evidence ("fruit of the poisonous tree doctrine"). To deny this instruction is to deny the jury the ability to consider the defense's key theory and prevent injustice.	<i>Terry v. Ohio; State v. Bello</i>

- **Defense:** "Your Honor, the Defense's proposed instructions are tailored to the specific evidence the jury will be tasked with evaluating. They are not arguments; they are neutral, descriptive statements of Utah law that provide the jury with the necessary tools to do their job.

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- **Argument:** "Instruction Six, regarding confirmation bias, is vital in this specific case. The jury will hear evidence that Corporal Ernstsen has a DUI arrest rate more than 24 times the state average. That is an extraordinary fact. This instruction is necessary to provide the jury with the proper legal and psychological framework to consider whether the officer's observations were

truly objective, or whether they were colored by a pre-existing expectation to make a DUI arrest. This neutral concept is directly relevant to the central issue of reliability, credibility, and it is grounded in the authority of *State v. Perea*."

2. Instructions #7 & #8 (FST & Breath Test Protocols): Providing the Necessary Standards

- **Argument:** "Instructions Seven and Eight establish a fair evaluation of the State's evidence. The jury will see on video that the officer demonstrated only three steps for a nine-step test. They will see him coerce a breath sample for 140 seconds—a 700% deviation from protocol. They will see that the State's own certification documents do not cover the date of the test. These facts are meaningless to a lay jury unless they are instructed on what the legal and scientific standards *are*. Our instructions provide those standards, taken directly from NHTSA and Utah Administrative Code. Without them, the jury has no yardstick with which to measure the State's performance. They are essential for a fair trial."

3. Instruction #10 (Validity of the Initial Stop): Empowering the Jury

- **Argument:** "Finally, Instruction Ten is fundamental. The defense's case begins with the proposition that the initial stop was unlawful—a pretext based on a violation that was not seen on video and as the Defense will show, could not have possibly been seen from his vantage point. This instruction correctly states the law of *Terry v. Ohio* and *State v. Bello*. It tells the jury that if they have a reasonable doubt about the legality of that first moment, they must disregard all additional evidence based on *the-fruit-of-the-poisonous-tree doctrine*. To deny the jury this instruction is to deny them the ability 1) to consider the Defense's key theory of the case and 2) to act as the conscience of the community and prevent injustice."

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"Your Honor, in summary, the State's instructions presume guilt, endorse evidence, and command a conviction. They are designed to make the jury's job easy by taking the hard questions away from them.

The instructions of the Defense, by contrast, are designed to make the jury's job *possible*. They empower the jury with the correct legal standards they need to fairly and accurately weigh the specific, contested evidence in this case—the officer's potential bias, the flawed administration of tests, and the very legality of the stop itself.

A fair trial requires instructions that fit the facts. We respectfully submit that our proposed instructions are the only ones before the Court that do so, and we ask that they be adopted as the working framework for this trial."