

PRETRIAL OUTLINE

"Your Honor, the Defense seeks two provisions: the right to reference evidence and exhibit aids, and to have adequate time for arguments."

I. MOTIONS IN LIMINE (8 minutes total)

A. Prior Conviction (2 minutes)

One-sentence kill: "The 2019 plea is inadmissible propensity evidence that violates 404(b) and demands bifurcation."

When State says "enhancement": "Exactly—that's post-conviction, not guilt phase. We'll stipulate to bifurcation now."

Result: Easy win. Sets commanding tone.

B. Intoxilyzer (3 minutes)

The trap: State has Aug 16 and Sept 19 certs, but nothing for Sept 6.

Your weapon: "21-day certification gap plus 140-second forced blow equals no foundation under R714-500."

When State says "weight not admissibility": "Without foundation, there's nothing to weigh. This isn't a test—it's coercion."

Key phrase: "One test, no verification, 700% protocol deviation."

C. Statements (3 minutes)

Timeline argument: FSTs at 00:37, Miranda at 70+ minutes.

Legal hook: "*Berkemer* custody began at FST order—flanked, commanded, not free to leave."

When State says "roadside not custodial": "*Berkemer* measures restraint, not handcuffs."

II. DISCOVERY MOTION (2 minutes)

Factual basis: 1) There are 42 items listed on the State's Exhibit List, none have been shared with the Defense; 2) zero delivered Prosecution has never contacted to responded to the Defense."

Request: 1) "Can the Defense be given everything on the State's Exhibit List and be given ample time to process this information? 2) Or exclude per Rule 16(i)."

When State claims "clerical error": "Pattern, not accident. Exclude per Rule 16(i)."

III. LISTS (2 minutes)

Witnesses: "Officer 2 exposes investigative gaps. His omission from reports is itself evidence."

Exhibits: "We want to reference already submitted and discussed evidence: videos, motions, and articles. The transcripts are for efficiency, meant to aid and orient Jurors to the relevant evidence."

IV. JURY INSTRUCTIONS (5 minutes)

Attack State's instructions:

1. Page 47: "Having found guilty"—presumes verdict, demands mistrial
2. Page 29: Court endorses machine—judicial comment on evidence
3. Throughout: "Must find guilty"—coercive, not instructive

Defend ours:

- #6: Bias instruction necessary given 24x arrest rate
- #7-8: FST/breath protocols—jury needs standards to find violations
- #10: Stop validity—fruit of poisonous tree

Remember: You're not there to educate the judge about the law. You're there to win specific rulings that gut the State's case. The prior conviction motion is your warm-up. The Intoxilyzer is your knockout punch. Everything else is positioning for appeal.

FINAL STRATEGY

I. MOTION 1: PRIOR CONVICTION

OBJECTIVE: Get the win fast, build momentum [or conceded for GRAMA info].

Defense: "Your Honor, Mr. Golub's 2019 plea is classic 404(b) propensity evidence. Its only purpose is to tell the jury 'he did it before, he did it again.' Under Rule 403, the prejudice substantially outweighs any probative value. The proper procedure is bifurcation—prior convictions only after a guilty verdict, if at all."

Prosecution: "Your Honor, it's relevant for sentence enhancement under 41-6a-502.5."

Defense: "That's our point exactly. Enhancement is post-conviction. The State just admitted it's irrelevant to guilt. We'll stipulate to bifurcation right now."

Judge: "I'll grant the motion. The prior conviction is excluded from the guilt phase."

Defense: "Thank you, Your Honor."

II. MOTION 2: INTOXILYZER

OBJECTIVE: Sow doubt. Make State defend the indefensible.

Defense:

Your Honor, the State cannot establish the Intoxilyzer result's reliability for three independent reasons.

First, while the State has certifications from August 16 and September 19, *Murray City v. Hall* requires they prove the machine was actually functioning properly on September 6. Two bookend certificates don't establish what happened between them—especially when the test itself shows malfunction.

Second, the video proves Trooper Ernstsen made Mr. Golub to blow for 140 seconds—a major deviation from the manufacturer's 12–20 second protocol. This isn't a minor variance; it's a different procedure entirely that induces hyperventilation and artificially inflates results.

Third, during his previous testimony, Trooper Ernstsen stipulated that the reason the test was “improper” was because “*the defendant did not properly blow into the machine.*” When a test fails, protocol requires resetting the instrument and starting over. The officer didn't reset. Didn't recalibrate. Didn't attempt a second test. Didn't draw blood. He knowingly submitted a failed test as evidence.

Your Honor, even if certifications were perfect, a broken procedure on a working machine still produces questionable evidence. The State asks this Court to accept results from a test their own officer admits was improperly conducted. This seems wrong to me.

Prosecution: "These issues go to weight, not admissibility. The machine has a presumption of reliability."

Judge: "I'll allow the jury to consider these issues regarding weight. Motion denied."

Defense: "I respectfully preserve this issue for appeal and request specific findings on the certification gap and procedural violations."

III. MOTION 3: STATEMENTS (*MIRANDA*)

OBJECTIVE: Push for everything, take what we get.

Defense: "Mr. Golub was in custody from the moment he was ordered out for FSTs—flanked by armed officers and clearly not free to leave. Despite what he said in his first Testimony, Trooper Ernstsen admitted in his second Testimony that he was conducting a DUI investigation as an officer with the DUI Task Force. Mr. Golub was never made aware that he was under investigation. Because Trooper Ernstsen had been following Mr. Golub for some time and was clearly performing a DUI investigation, he should have disclosed this fact to Mr. Golub and read the Miranda as soon as Mr. Golub was detained. However, Miranda was never read, not when Mr. Golub was detained, not when he was put into handcuffs, nor when he was placed in Trooper Ernstsen's squad car, and not even when he was transported to Special Operations and forced to undergo further verbal and chemical examination. This is all clearly corroborated by the video evidence."

Prosecution: "It was a routine traffic stop until arrest."

Defense: "*Berkemer* says custody is about restraint, not handcuffs. Watch the video—would a reasonable person feel free to leave?"

Judge: "I'll suppress statements made after formal arrest but not during FSTs. Partial grant."

Defense: "Preserving for appeal, Your Honor."

IV. List 1: MOTION TO COMPEL DISCOVERY LISTED IN “PLAINTIFF’S FIFTH SUPPLEMENTAL RESPONSE”

OBJECTIVE: Show State hasn't communicated; ask for more time to review evidence. We will present this as a simple matter of fairness and due process under Rule 16. We will have the State's "Fifth Supplemental Response" in hand and highlight the list of items we have never received. We will emphasize the date: the trial is days away. The judge orders the State to produce all 42 items by the end of the day or be precluded from using any of them. This either gets us the evidence we need or cripples the State's ability to introduce surprises.

Defense: "Your Honor, on April 4th, the State filed a list enumerating 42 pieces of evidence, including critical items like 'Evidence.com Data,' various files titled 'Other Evidence,' and a 'LEO Subpoena.' [Show document to judge]."

Despite listing these items, the State has never produced a single one of them.

Indeed currently, the Defense does not have access to any video evidence at the time, since the one like shared by Mr. Frazier have expired. The legal foundation is Rule 16(a), which mandates that the prosecutor “shall disclose to the defense evidence material to the preparation of the defense.”

I have tried to reach out to the prosecution several times.

We request to see everything on the State’s Exhibit list and to be given adequate time to review it.

V. DEFENSE WITNESS LIST

Objective: Call Golub and Officer 2.

Fact: There were two arresting officers but TE only reported one both on his Incident Report. The omission of Officer 2 is in itself evidence of oversight.

Defense: “On our **witness list**, we have of course included Trooper Ernstsen. More importantly, we have listed the second, unnamed officer who participated in the arrest but was omitted from all police reports. We have also listed the defendant to preserve his constitutional right to testify. I want to potentially examine Trooper 2. The State’s failure to include the second arresting officer in any report is a significant investigative lapse. His testimony is essential for the jury to have a complete picture of the events.”

VI. DEFENSE EXHIBIT LIST

Objective: Establish necessary evidence.

Factual Basis: All the documents on the Defense’s Exhibit List have either been accepted and filed by the court or are on the exhibit list of the state. The defense merely wants to ensure it can reference all documents (presented during Discovery and Pretrial) to the Jury.

Defense: "Thank you, Your Honor. The defense's exhibit list is concise and targeted. It is designed to provide the jury with the objective, verifiable facts necessary to weigh the credibility of the State's sole witness and the reliability of his investigation. Our case rests on the State's own evidence, and each exhibit is essential for establishing the full context of that evidence.

- **Exhibits 1, 2, and 3**—the videos and prior hearing transcripts—constitute the primary record of the encounter. They are indisputably relevant and will be used to show significant contradictions between the officer's testimony and his actions, particularly regarding the administration of the roadside tests.

- **Exhibits 4, 5, and 6**—the GRAMA data, the statistical chart, and the KSL article quoting the officer—are offered to prove a pattern of practice and potential for confirmation bias. This is not character evidence, Your Honor. It is statistical evidence showing that this officer's DUI arrest rate is a 24-fold anomaly compared to the state average. This data is directly relevant to the jury's evaluation of the officer's motive and his state of mind under Rule 404(b), and it is essential for the jury to understand the context in which this stop was made.
- **Finally, Exhibits 7 and 8**—the Intoxilyzer manual and related literature—provide the official, scientific standards for breath testing. They are necessary to establish the baseline of reliability from which the officer's 700% deviation in test duration must be judged.

Your Honor, each of these exhibits is directly relevant and highly probative. We ask that the Court approve the list so that the jury may have access to the complete and accurate set of facts."

VII. BAD JURY INSTRUCTIONS: STATE

Defense:

"Your Honor, the jury instructions are the most important document in this case besides the verdict form itself. They are the legal map that will guide the jury to their decision. The State's proposed map, however, contains prejudicial language that presumes guilt, makes the Court a witness for the State, and uses coercive language that misstates the jury's fundamental duty. These are not neutral instructions; they are priming the jury for a conviction before any argument is presented."

1. The Bifurcation Instruction (Page 47): An Unconstitutional Presumption of Guilt

- **Problematic Language:** "*Having unanimously found beyond a reasonable doubt the Defendant, PETER GOLUB, guilty... the trial will now move to a second phase.*"
- **Defense:** "Your Honor, this instruction is constitutionally radioactive. It is a 'bifurcation instruction' that is read to the jury *before* the trial begins. It literally instructs the jury by starting with the premise that they have already found Mr. Golub guilty. This is not a mere error; it is a structural violation of the presumption of innocence and the right to a fair trial. It is grounds for an immediate mistrial if it were ever read to a jury. It must be stricken in its entirety. There is no way to cure this."

2. 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 perhaps the single most contested

factual issue in this case. The defense will present significant evidence that the machine was not certified and that the test was administered improperly. This 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. This is an improper judicial comment on the evidence and it must be stricken. Whether that machine was reliable is a question for the jury, not a pre-ordained 'finding' by the Court."

3. 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 command 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. The word 'must' turns their sacred deliberation into a mechanical, Pavlovian exercise. It strips them of their agency as the conscience of the community. Our proposed instructions use the legally correct, non-coercive phrasing, and we ask that the State's mandatory language be stricken wherever it appears."

VIII. GOOD JURY INSTRUCTIONS: DEFENSE

Defense: "Your Honor, unlike the State's generic and flawed draft, our proposed instructions are tailored to the specific, contested evidence the jury will actually have to evaluate. They are not arguments; they are neutral, correct statements of Utah law that provide the jury with the necessary tools to do their job.

Point-by-Point Cogent Argument:

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. It is a neutral concept, directly relevant to the central issue of officer 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 are the heart of 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."

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 the officer could not have seen. 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 the evidence that followed. This is the 'fruit of the poisonous tree' doctrine. To deny the jury this instruction is to deny them the ability to consider the defense's primary theory of the case and to act as a check on police conduct."

C. 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.

Our instructions, 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 the roadside 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."

IX. PROCEDURAL QUESTIONS

Defense: "Your Honor, I have several procedural questions:

- How much time will we be allotted for each step of Voir Dire?
- To get better acquainted with court proceedings, what would be the best way to observe Voir Dire before presenting the case?

Defense: "Your Honor, regarding the exhibit aids:

- Given the nearly 12 hours of video and audio evidence, may we use PowerPoint with imbedded clips and subtitles to aid Jury comprehension?
- During Voir Dire, may we use a visual aid to illustrate the meaning of the phrases "presumption of innocence" and "reasonable doubt"?
- May we prepare a jury packet with key documents tabbed for reference?"

Defense: "Can jurors submit written questions?"