

October 29 Hearing

The defense's overall strategy is to secure rulings that *gut the State's case* (Intoxilyzer), position for appeal, and arm the jury with the legal tools necessary to challenge the State's evidence and the officer's credibility.

Documents and Arguments Needed for the Next Hearing

The next scheduled event is the **October 29, 2025 Pretrial hearing**, which has an allocated time of one hour. The defense needs to have the following documents resubmitted and prepared for the judge and prosecution:

Document Needed	Hearing Allocation	Source/Notes
Motion in Limine to Exclude Intoxilyzer Test Result	10 minutes	See Motion.
Motion in Limine: Statements	10 minutes	See Motion.
Defendant's Witness List	10 minutes (with Exhibits)	See List.
Defendant's Exhibit List	10 minutes (with Witnesses)	See State Exhibit list.
Defense's Proposed Jury Instructions	15 minutes (with State's)	To be argued as the necessary framework for the trial.
State's Jury Instructions	15 minutes (with Defense's)	Needed for direct criticism of prejudicial language.
Transcripts (May 29, 2024, and December 31, 2024)	Used to reference Corporal Ernstsen's prior sworn testimony. Used to demonstrate Cpl.	
GRAMA Response	Ernstsen's arrest data.	

A. (GOAL 1) ARGUMENTS TO ACHIEVE SUPPRESSION OF EVIDENCE

The defense anticipates that the motions may be denied or partially granted, and thus the strategy emphasizes winning specific rulings and "preserving this issue for appeal".

I. MOTION TO EXCLUDE INTOXILYZER TEST RESULTS

The defense must argue that the State cannot lay the necessary foundation to establish the scientific reliability of the Intoxilyzer 8000 result.

Argument Point	Necessary Specifics and Evidence
Certification Gap	The State must prove the device was properly certified and calibrated on the date of the test (September 6, 2023). The State only has "bookend certificates" from August 16 and September 19, creating a 21-day evidentiary gap . <i>Authority: Murray City v. Hall</i> .
Procedural Violation/Coercion	The officer forced the defendant to blow for approximately 140 seconds . This is a 700% deviation from the standard 12–20 second duration required for a valid deep-lung sample. This flawed procedure is inherently unreliable and can artificially inflate BAC readings .
Officer Admitted	Corporal Ernstsen previously testified that the test was "improper" because the defendant "would not properly blow into the machine". When a test fails, protocol requires resetting the instrument and starting over; instead, the officer did not reset, did not attempt a second test, and did not draw blood, knowingly submitting a single faulty test.
Faulty Test	If the State argues these issues go to <i>weight</i> rather than <i>admissibility</i> , the defense must respond: " Without foundation, there's nothing to weigh. This isn't a test—it's coercion. "
Rebuttal	

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 proof that the machine was actually functioning properly on September 6. Two bookend certificates don't establish that when there is only one data point—one attempted test and one attempted calibration.

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 1) didn't reset, 2) didn't recalibrate, 3) didn't attempt a second test, 4) didn't draw blood. Instead, he knowingly submitted a single faulty 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 invalidating the result.

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."

II. MOTION TO SUPPRESS STATEMENTS (MIRANDA)

The defense must argue that custody began when restraint was placed on Mr. Golub, well before the Miranda warnings were administered at the jail 70 to 80 minutes later.

ARGUMENT	NECESSARY SPECIFICS AND EVIDENCE
Custody Attached at FSTs	Custody began the moment Mr. Golub was ordered out of his vehicle to perform field sobriety tests (FSTs). A reasonable person, commanded to exit their car and perform tests under the watch of two armed officers, would not feel free to terminate the encounter and leave.
Legal Hook	The encounter escalated from a routine traffic stop to a custodial interrogation because the officer's actions restrained Mr. Golub's freedom to a degree associated with formal arrest. <i>Authority: Berkemer v. McCarty</i> —custody is measured by restraint, not handcuffs .
Officer's Intent	The video and testimony corroborate that Trooper Ernstsen was a DUI Task Force officer conducting a DUI investigation from the moment he detained Mr. Golub, yet failed to disclose this or read Miranda.

Fact: *Miranda* not read for 80+ minutes.

Legal basis: Based on the *Berkemer* rule, custody begins at restraint, not handcuffs. In the very least, custody began upon FST order.

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. 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."

B. SETTING UP THE PARAMETERS OF THE CASE (GOAL 2)

The defense uses the lists and jury instruction arguments to ensure the jury can evaluate the reliability of the State's evidence and the credibility of its witness.

Witness and Exhibit Lists

The defense seeks approval for its lists to ensure it can reference crucial evidence and call essential witnesses.

Area	Argument for Inclusion
Witness List	It is essential to call the second, unnamed officer ("Officer 2") because his omission from police reports is itself evidence of oversight or investigative lapse . His testimony is necessary for the jury to gain a complete picture of the event. The defense also preserves Mr. Golub's constitutional right to testify.
Exhibit List: Officer Bias	Exhibits 4, 5, and 6 (GRAMA data, statistical chart, KSL article) are offered under Rule 404(b) to prove a pattern of practice and potential for confirmation bias . The statistical chart demonstrates the officer's DUI arrest rate is over 20 times higher than state and national averages.
Exhibit List: Reliability	Exhibits 7–10 (Intoxilyzer manual, NYT article, previous motions) provide context for the Intoxilyzer and establish scientific and legal standards against which the jury can measure the officer's faulty administration of the test.
Videos/Transcripts	Exhibits 1, 2, and 3 (videos and transcripts) are the primary record and are indisputably relevant for establishing the chronology and facts of the case.

a. DEFENSE WITNESS LIST

Objective: Ensure that Tatyana Golub is allowed to testify. Officer 2 is tangential but still important to mention.

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 included Mr. Golub, Trooper Ernstsen, and the second, unnamed officer who participated in the search and arrest of Mr. Golub but was omitted from all police reports. The State's failure to include the second arresting officer in any report is a significant investigative lapse and evidence of oversight. Trooper 2's testimony is essential for the jury to have a complete picture of the events. 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 event."

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

b. 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: "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.

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 State evidence (video, testimony, incident report), as well as previously discussed exhibits, including two articles and an instruction manual for the Intoxilyzer Machine. Each exhibit is essential for establishing the full context of the facts.

- **Exhibits 1, 2, and 3**—the videos and transcripts—constitute the primary record of the encounter. They are indisputably relevant and will be used to establish a chronology of events and the facts of the case.
- **Exhibits 4, 5, and 6**—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 over 20-times higher when compared to national and state averages. The GRAMA is essential for the jury to understand the context in which this stop was made.

This data is relevant to the jury's evaluation of the officer's motive and his state of mind under Rule 404(b).

- **Finally, Exhibits 7–10**—the Intoxilyzer manual, NYT article, and previous motions—are relevant to providing context for the Intoxilyzer and establishing scientific and legal standards for breath testing. They are necessary to establish the baseline of reliability from which to evaluate officer's administration of the test.

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."

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

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 Ernstsens 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**".

State v. Perea

#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.

Utah Admin. Code R714-500; Murray City v. Hall

#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.

Terry v. Ohio; State v. Bello

- **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 Ernstsens 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."

CRITIQUES OF STATE'S JURY INSTRUCTIONS

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 Intoxylizer 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 *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*.

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 transcripts and 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?"