

Testimony 2_Part_1_SLCCRTW47_20241231-1205_235900706 pt1.mp3

**Needs to be cross referenced with previous transcript of second testimony.
Audio quality is extremely poor. Will upload**

Notes

[00:13:51.44]

Where were you when you didn't see the blinking signal? Where you in the middle of the street or where you on the side of the road trying to conceal your presence to ensure you weren't seen? Have you ever not seen a blinking signal, but it later turned out there was a signal? For instance, during your training, where you ever made to observe signals of obstructed vehicles? So in general you've never missed a signal or accidentally thought there was no signal but later realized that there a signal? Do you think other officers have ever misidentified a traffic violation? Have any trials been overturned based on the lack of visual evidence or evidence for instance video evidence that showed the officer made a mistake and misidentified an offense? Etc. develop this line of questioning. the point is to get him to either admit to the possibility of him making a mistake, or to stubbornly insist he never makes mistakes which should then be exploited to show that the officer is presenting an unreasonable position, since clearly anyone can make such a mistake at any time, especially at night, from a far away distance, with multiple cars obstructing his view.

[00:15:04.40]

Ask questions about other establishments. Does he watch every establishment that serves alcohol? Based on what criteria does he watch some establishments and not others.

[00:15:36.88]

look up. cross reference with enitre Part 2 Applicability and Obedience of Traffic Laws" 41-6a-201 to 41-6a-217, as well as any other possibly relevant codes that relate to emergency vehicle protocols for responding to emergencies and conducting

"emergency responses/investigations.

[00:16:28.15]

Were in any kind of hurry to get in position to observe Mr. Golub's vehicle? Were you rushed? Or did running the red light give you enough time to get in position?

[00:16:37.26]

Do people every automatically manually turn their signal off after using it to indicate a lane change, since that doesn't automatically turn off?

[00:17:39.54]

Why did you decide to pull him over then? Did you observe any violations when Mr. Golub was getting onto the freeway? Is stopping someone as they enter the freeway cause a higher or lower probability of a traffic accident than if you'd pulled them over on the road, especially if they were under the influence and weren't able to pull over without disrupting traffic? Did Mr. Golub pull over in a safe and composed matter? So thankfully, he wasn't exhibiting signs of reckless driving when he pulled over, otherwise he could have put other drivers in danger.

[00:18:13.70]

Does blocking a lane potentially put other drivers in danger? But this is just a part of your job, you didn't feel it was necessary to pull further ahead on the shoulder where there was maybe more space, more light, and so forth so that other drivers could better avoid your squad car and Mr. Golub's car?

[00:18:34.33]

Is that what you noticed? How many time do you think you've noticed: read from the Handbook, since he repeats it almost verbatim? How long did it take you to make these observations? What order did you make the observations? Was it[read quote]? Is always in this order? What order do you usually give when you're filling out a report or you giving your testifying , as in the case of (cite the last cases he's testified in, including the one where he lost). Is there another order other than the one you've onOr could it have been give different order ([perhaps more logical order) Is it at all possible that since you've "noticed" read again so many times in the past that you could expect to observe [read again]. Make the point that not only is he repeating memorized text, but

that this type of memorization is a clear sign of priming that causes confirmation bias. give def of confirmation bias and an example where memorizing an outcome makes a person more likely to observe an outcome.

[00:20:08.53]

Define "initial approach." How are these things observed? Do they always occur together? Do they ever occur individually? How do you determine glossy bloodshot eyes? Slurred speech? etc. What's the difference between slurred speech and a person's normal speaking style? At 11 pm, when you see someone with bloodshot eyes, what is the normal assumption? Could someone have glossy eyes and not be under the influence? What causes eyes to be glossy? Red? (read back of visine package). Cite if relevant to his previous answer i.e. if there is a discrepancy or if there is too much of an overlap. If possible, suggest that when elements of a complicated story never change it's an indication of lying or fabrication.

[00:20:33.28]

Did the defendant speak English? Did you hear any other language? NB Mr. Golub was speaking Russian while on the phone. Mr. Golub is a native Russian, not English speaker.

[00:21:15.64]

Cite actual clip. Ask: Do you usually say [give quote] to yourself when in the vehicle? What was going through your mind when you were saying that? What would you say was the likelihood that you were going to arrest Mr. Golub by that point (give timestamp)? What do you think What do most people assume at this stage of one of your investigations? What did Mr. Golub think his chances of being let go were?

[00:21:43.44]

Play clip. Clearly shows Mr. Golub holding door from opening into traffic.

[00:22:02.88]

Note that Mr. Golub passed the balance test 100%. Trooper E. saw no sign of balance impairment according to his recording of the balance test.

[00:22:39.91]

Read a medical diagnosis /prognosis of fatigue. Can fatigue be an "illness" i.e. medical condition? Ask TE to give official medical screening procedure. Based on his screening did he notice any signs of fatigue? Is fatigue a medical indication? A medical diagnosis? What are it's effects? The goal here is to have him say "No, there were no signs of fatigue" or "No, fatigue was not a factor" etc. Then to stress that Mr. Golub had been awake since 5:30 a.m. and taught until 8 p.m.

[00:22:41.79]

Ibid. Make it clear that either TE doesn't have enough medical knowledge to understand the influence of fatigue, or does not have the medical skill to identify fatigue.

[00:22:47.79]

Re-state that "fatigue" is not only a medical "illness" but can cause (name all the "signs" he'd observed up to this point) and is not only a typical interrogation technique but is the number one cause of psychosis, disorientation, and confusion in normal people, leading people to make false statements and can be lethal. NB throughout the defense's cross examination, try as much as possible to invalidate/question Mr. Golub's "confession" of having "gone out with friends" and not being able to pass a breath test.

[00:23:10.31]

Ask which is the most falsifiable field sobriety test? Define falsifiability for him. Stress that the HGS is the least falsifiable test vs the balance test which is the most falsifiable.

[00:23:32.07]

Quote the manual, including the verbatim quote about eyes, speech, breath, etc.

[00:23:56.27]

Q: You saw 6/6/ clues? Are the HGN clues less or more falsifiable than say the balance test?

[00:27:03.57]

This is good. He keeps emphasizing random balance "signs" but records nothing on the balance test. Reference report where he mentions these things but records nothing on the actual balance test. Either he's bad at recognizing balance problems or he's bad at

recording signs of balance problems.

[00:27:09.85]

Quote manual. Show that this is verbatim from the manual. List all the times he recites the manual from memory. Especially when questioned about probable cause. So he's bad at recording/recognizing balance problems, and his other "signs" are repeated verbatim, i.e. are not the product of a natural observations, and are instead projections of predetermined signs.

[00:28:20.28]

Highlight that in the main manual and in the Utah Code of Law it stresses that the entire test be fully demonstrated (i.e. with the correct number of steps) especially when forcing a fatigued distraught stranger to walk an imaginary line in the dark.

[00:30:25.19]

Q: What are the four clues? Is it like with the eye test where there are three that are doubled for each eye for a total of six for people with two eyes. repeating clues. Presumably for someone with one eye there would only be three clues. In the balance test, are there two clues per foot or are these distinct clues?

[00:30:28.63]

Ask him to repeat the four clues. Q: And which of clues did you see but forgot to record? (He'll say he didn't forget. Make the correction and say "the clues you thought were borderline") Then repeat them yourself. Q: Is there a hierarchy to these clues? Like is there

[00:31:35.66]

Very important to address this false confession. Strategy: 1) review and show entire exchange; 2) argue that this was a false confession under duress. 3) get into the weeds about whether this even counts as a confession or a clue of impairment. If a person says they are drunk that doesn't mean they are drunk just as if they say they aren't drunk also doesn't mean that they are not drunk. Strategy: Repeat the statement as "I know I will blow over." State that this statement is biconditional. Since a person can be wrong about what they think they know, which is why the law requires a test be administered to determine intoxication. Thus the statement, "I will not blow over"

biconditional with the statement "I will blow over" both statements neither confirm nor deny the whether a person will or will not blow over. Thus, the statement without the corroboration of an actual test is "hearsay" with no bearing on the actual fact of what someone's Breath Alcohol Content or more importantly Blood Alcohol Level might be. Indeed, a breath alcohol test is a corollary not proof of blood alcohol content, which is why in most DUI cases advise that a blood sample be taken at the Special Operations Center (cite), because it is the blood alcohol content that determines a person's impairment. If I use mouthwash and take a Breath Alcohol Test, I will score high (cite example), but that obviously doesn't mean the person who provided the sample is under the influence or impaired by alcohol.

Also note that Utah has a penalty for refusing to take a breath test, but no refusal was documented in the report. The penalty is having your license suspended and jail time. Mr. Golub's license was never suspended or any other penalty given, suggesting that the trooper himself did not consider Mr. Golub's answer "I just want to go home" as a refusal to take the test at the time. However, despite not having given Mr. Golub even a preliminary breath test, TE had the second trooper arrest him anyway.

Is saying you don't want to do something the same as refusing to do it. For instance, if I say, "I don't want to go to work on Monday, mean I'm refusing to go to work?" "Did you inform Mr. Golub that it was an offense to refuse to take a breath test when ordered by an officer?" "So would it be accurate to say that Mr. Golub was never instructed to take the PBT?" "Is it possible that Mr. Golub would have taken the PBT if the question had been worded differently? For instance, if instead asking him if he wanted to take the PBT, you said, 'Will you take the PBT?' or if you'd just plainly said, 'To establish your Breath alcohol level, you need to take the PBT?' "Could not administering the PBT potentially affect the validity of a DUI case? Would you agree that during the time between being pulled over and the administration of an alcohol test, the driver's BAC could fall below the limit set by the state?" Cit case where this occurred. "So you would agree that getting a test done is in the best interest of the case?" "So at the time of his arrest there was no evidence confirming that Mr. Golub was or was not over the limit?"

[00:31:50.86]

Q: Did you arrest him or did another officer arrest him? A second officer put Mr. Golub under arrest.

Q: What was it like? Did he struggle? Put up any physical resistance? Refuse to put his hands behind his back? Or keep his arms stiff? Or was otherwise uncooperative? So he was fully compliant both physically and verbally? So could you say he was resigned to the arrest? Do you think you should have administered a PBT at this point?

[00:32:00.34]

Q: What is the purpose of making sure the handcuffs were loose? Vehicle inventory was done by a second officer.

[00:32:53.21]

Mr. did not ask for his phone and he did not have a wallet. This is important: TE insisted Mr. Golub take his phone, then later in the arrest took Mr. Golub's phone and offered to call Mr. Golub's mother (who is the owner of the vehicle), to put the conversation of speaker phone, and to listen to the conversation while Mr. Golub was on the phone talking to his wife. FACT: This was a an attempt at unwarranted surveillance. See Motion.

[00:33:15.61]

Open line of questioning along the lines of "What is an Intoxylizer?" It's a breath test machine. "What kind of Intoxylizers are there?" There are many models. "What kind of a model is it?" It's an 8000 model. "Are you aware that no fewer than 30,000 Intoxylizer machines have been decommissioned and destroyed across thirteen states?" "Do you know why so many police departments might choose to destroy, not update or fix, but destroy?" "Are you aware of how many court cases have been dismissed and overturned based on a judge's conclusion that not only was a breath test from an Intoxylizer unreliable, but the machine tends to elevate Breath Alcohol Content, failing to automatically invalidate a test or require a retest, even when the parameters of test administration have been grossly violated?" Cite case. "Given all this concern with the accuracy of breath tests, especially the test results provided by the Intoxylizer 8000, why didn't you feel the need to take a blood sample or even administer a second test after the advised administration-time maximum was exceeded." "Do you remember what the advised maximum test time is in The manual for the Intoxylizer 8000?" It suggests that a test shouldn't take more than 12 seconds." "Do you remember how long

it took you to administer Mr. Golub's test?" "It was 144 seconds."

[00:34:04.29]

In the car, it was discovered that Mr. Golub and TE knew each other in high school. TE and his brother were on the baseball team, while Mr. Golub and his brother were skateboarders, who on more than one occasion were bullied and on one occasion assaulted by Skyline athletes.

[00:34:30.44]

Q: "Is the DUI admission the same as the Miranda Rights?" "When did you read Mr. Golub his Miranda rights?" It was hours into the arrest, minutes before Mr. Golub was taken to jail.

[00:34:54.12]

Note th

[00:35:09.68]

Q: "What's the purpose of inspecting a prisoner's mouth?" He'll correct that "prisoner" isn't the right word. "Sorry, what is the right term?" "Right, so what is the purpose of inspecting his mouth?" "Are there any other procedures that ensure that a test is administered correctly?" "After checking a defendant's mouth what might invalidate the test?" And what do you do if you discover one of these things?" "How often is a test invalidated because a defendant has something in their mouth?" "So not very often?" "And the purpose of adhering to all these recommendations is to ensure the test is accurate?" "So to the best of your knowledge you adhered to all testing recommendations?" "Is there anything else that might invalidate a test or provide an inaccurate result?" "Is the duration of the test important?" "What does the Inoxylizer 8000 manual say is the recommended maximum duration of a test?" "Have you ever readministered a test because the test period was too prolonged?" "How often do you readminister a test?" "What about when the test is the only proof the state has confirming a defendant's violation of the law, because at this point Mr. Golub hadn't broken any laws, broken any traffic laws, resisted arrest, that type of thing." the point of this line of inquiry is to show that he followed minor, unimportant protocols while straying from one of the most important ones--the proper administration of the test and its duration.

IMPORTANT: Establish that taking the test multiple times automatically provides multiple results. Q: "But you only recorded one result?" "Do you remember the other results? Or were there other results?" "So technically the test wasn't administered multiple times or it was administered multiple times but you didn't record the result?" "When you say you "tried the test multiple times, did you reset the Breathalyzer 8000 like the manual instructs." Quote manual. "So did you 'try to take the test multiple times' or did you just administer one test over a length of time many tests could have been administered?" "So you wouldn't say you stacked the tests?" "And you don't think exceeding the recommended test time by nearly 12 times could affect the outcome of the test, that it could raise the result?"

[00:36:08.55]

IMPORTANT: Quote this exchange. Q: "Do you remember the prosecutor asking you what the process for getting the Intoxilyzer going is?" "She said, Prosecutor Dunkelman: what's the process for getting the Intoxilyzer going' to which you responded 'Trooper Ernstsen: It's pretty simple. We just push this little green button that says start.'" "So apart from pushing the little green button, are you familiar with any of the mechanics of the machine? How it works. Which parts do what. What the mechanical and chemical process is and how it establishes a Breath Alcohol Content, and what the relation of Breath Alcohol Content is to Blood Alcohol Content, and how Blood Alcohol Content is used to support the conclusion that a person was driving under the influence? Because the test is obviously not the cause of intoxication but its correlation." "We correlate test results with the effect alcohol may have on a specific individual. Of course, this is still all statistics; each person's reaction to alcohol is different, there's nothing definitive that says a breath alcohol content of .08 causes a person's driving to be impaired, the way say the speed of light causes time to slow, or that the faster someone moves causes them to experience greater gravity."

[00:36:12.43]

Cite statement that describes how the machine malfunctions.

[00:36:22.03]

Q: "What are the diagnostic tests?" Tell him if he doesn't know. "What would happen if X test fails?" "Have you ever run diagnostics and had the machine fail? Not on this or

any other machine, for instance doing your training? Or, I apologize, let me back up, how are you trained to use this machine? Do you administer it to real people? Do you maybe use some sort of prosthetic, like one of those CPR dummies?" Have him tell you as much as possible about the training. "Were the various causes and effects of malfunctions discussed during your training?" "Is it possible for the machine to malfunction?" "What would you say is the probability that a test result is gathered from a malfunctioning machine?"

[00:36:44.31]

Quote this exchange: "When Prosecutor Dunkleman asked you whether you received and failure messages indicating the machine wasn't working, you answered 'Not that I recall.' Do you recall any times when the machine wasn't working?" "What are you instructed to do if the machine doesn't work? Do you have another machine? Do you use a backup machine? Or is it easier to take a blood sample? Or maybe you submit the machine printout with the blood test?" "What are the diagnostic tests?" Tell him if he doesn't know. "What would happen if X test fails?" "Have you ever run diagnostics and had the machine fail? Not on this or any other machine, for instance doing your training? Or, I apologize, let me back up, how are you trained to use this machine? Do you administer it to real people? Do you maybe use some sort of prosthetic, like one of those CPR dummies?" Have him tell you as much as possible about the training. "Were the various causes and effects of malfunctions discussed during your training?" "Is it possible for the machine to malfunction?" "What would you say is the probability that a test result is gathered from a malfunctioning machine?"

[00:36:52.07]

Quote: "When Prosecutor Dunkelman asked you if there was any conversation during the test, you said yes. Could talking during a test invalidate the result? Do you remember what you told Mr. Golub while he was taking the test? Do you remember what Mr. Golub said? Make sure to quote the exchange on the video or show the video where Mr. Golub voices his shortness of breath to which TE instructs Golub to keep blowing. "Did Mr. Golub seem to express any signs of distress?" IMPORTANT: During the testing period there should be no conversation. Q: "While a subject is taking the test, should he be talking?" "Could it be said that talking during the test might invalidate the test?"

[00:37:37.15]

IMPORTANT He leaves out the bag. repeat his description and ask "Is there any other piece of equipment?" etc. If he doesn't say, "Another piece of equipment is the bag" (video) "What is the purpose of the bag?" "Is the bag reusable or do you get a new bag for every test?" rf. taking plastic off: Q "Why is it important to take the plastic off?" Line of inquiry meant to show the importance of eliminating contamination.

"When Prosecutor Dunkleman asked you to describe the test, 'I put the mouthpiece in their mouth and have them blow for several seconds.' Would you say that 144 seconds counts as several seconds?" "What the longest you've had someone blow into the machine to give a sample?" "During this time did that machine ever flash that it was malfunctioning?" Quote manual about the error message that appears if the test is being misadministered. Ask TE if he's ever seen this message during his training or his investigations. "What is the recommended response to a machine malfunction? What is the contingency plan if the machine malfunctions?" Also, keep asking about the blood test. Q: "Have you ever decided to take a blood sample bc the machine was malfunctioning?" IMPORTANT "What is the correlation between a Breath Test and a Blood Test?"

[00:38:49.38]

IMPORTANT Can? or can't? Quote in either case, including the "little green bars" statement which makes him seem more a kid playing at cops and robbers as opposed to conducting a real investigation.

[00:39:15.50]

What is the difference between "each attempted breath" v "attempt at getting a full breath sample." Each attempt at getting a full breath sample does need to be restarted, which includes getting a new bag and mouth piece.

[00:39:34.42]

VERY IMPORTANT TO DEAL WITH THIS QUOTE.

"So if it times out you would have to enter all that information in and get it and have them start to blow into it again. But it... it'll allow you within that time frame to do as many attempts as you need to to get the correct amount of air into the machine."

Q: "Do you need to select new sterilized equipment? Do you need a new bag?" What might be the reason you would need to get a new b

Apart from the timeframe, what the different things that could happen during a test for it to the machine to cancel the test? Would drinking a glass of vodka between test periods be picked up by the machine? Would displacing the bag cause the machine to stop the test? Does the machine stop the test when it malfunctions or does it give you a signal and you have to restart the test?

What does "it" mean? like new equipment. Use to show that TE is obv reluctant to retake a test bc it's too much of a hassle.

Quote. What constitutes an "attempt"?

[00:40:18.01]

QUOTE: Prosecutor Dunkelman: Okay. And to your knowledge do more breath attempts raise the level of the results at all?

Trooper Ernstsens: No.

CITATION showing that it can raise or lower the breath alcohol content measured.

SHOW that either TE doesn't know how the machine works or he is lying.

Make sure to quote because TE covers this whole issue in one monosyllabic word.

[00:40:32.85]

"How many times would you say?" "How much time did the machine have until it timed out?" If 180 sec total, 36 sec.

[00:41:13.00]

You said, "the machine will time out if you don't do it within a certain amount of time.

And I can't remember exactly how long it is. It's probably like a minute or two." But the test took 144 s. "Do you know what the time is? How many seconds need to pass before the machine shows an error?" This should be 180 s.

[00:41:26.04]

See if you can quote relatively to show Prosecutor's lack of knowledge of the subject matter. Maybe even ask/suggest she doesn't understand how the machine works, how blood chemistry works, how FSTs work, or what the correct arrest and test admin procedure is supposed to be.

[00:41:47.84]

She's trying to shift the focus from the duration of the test to the amount gathered.

[00:42:11.64]

Maybe, open line of inquiry to underline the fact that after 90 minutes BAC should be lower. Q: "Did you notice anything different when you checked his mouth, or was he the same?" "You didn't notice the odor of an alcoholic beverage?" "Was it stronger or weaker than odor you noticed when you first encountered him?" "So the presumption would be that his breath alcohol content was even higher when you arrested him than what you recorded." "Would you say it could've been .14 ? .15? .16?" "How many DUI arrests have you made in your career? Through a GRAMMA request the defense has received TE's 23 and 24 stop to arrest statistics showing 138 and 107, respectively." "Would a person with a BAC of .16 or possibly more be able to pass the balance test 0/4?" "Would they be able to drive a vehicle without showing any signs of weaving or swerving or making any traffic violations?" SHOW that logically the BAC should be higher earlier and that such a high BAC would have made Mr. Golub drive differently and to take the FST differently.

[00:42:24.56]

"What would a good result be?" "Does what Mr. Golub said suggest he thought he would blow over? And that blowing over would mean he was guilty?" "Does that seem strange to you?" "Did he seem confident to you?" "There wasn't any irony, like where 'bad' means good?" "Could Mr. Golub have thought the BAC would clear him?" "Do you think he still thought he might go home?"

[00:43:23.43]

Check! On video he says, "You know what never mind." He stops reading the questions. Mr. Golub is answering all the questions.

[00:43:28.83]

Again, saying you don't "want to" is not the same as "choosing to stop talking."

"What is the purpose of asking all these questions?" "Is it important to ask all the questions?" "Could not asking x, y, z potentially have a negative effect?"

[00:43:38.51]

Mr. Golub did not want to call anyone. However, TE had tried to access Mr. Golub's phone to call Mr. Golub's mother in order to put Mr. Golub and his mother (car owner) on speaker phone and listen to their conversation while inside the squad car. "You say that when you got back into the car you read Mr. Golub his Miranda Rights. After that why did you try to access Mr. Golub's phone and offer to call his mother? " "According to federal surveillance law, could attempting to access a defendant's phone count as surveillance?" "Under this law, could trying to access a defendant's phone without a warrant constitute a breaking of this law?" "What is the legal protocol for gaining access to a defendant's phone?"

[00:43:46.87]

Check what Mr. Golub actually said.

[00:44:06.95]

"How long did you spend in the car?" "Was it a lot of time? Was it pretty quick? Was it average?" "What's the longest you've spent? What's the longest arrest you've ever had? What's the shortest?"

[00:44:17.75]

NOTE Mr. Golub's transcription is very poor and incomplete. The transcription is missing large sections of dialogue. This is sometimes marked in brackets as [incomplete].

[00:45:10.62]

Cross reference

[00:46:55.89]

Did you demonstrate the balance test? "Is this a natural position for someone to take?"

Did you demonstrate any heuristic the defendant can use to be able to raise his arms
the perfect six inches?"

[00:52:44.14]

check "sudden movements" NOT TRUE

[00:59:42.90]

How long would you say it was?

Transcript

[00:00:01.16] **Judge Hruby-Mills:** Are we still on the calendar? We shall have, I guess, Rockstone [00:00:05.00] and Mr. Golub. [00:00:10.00] Are we ready? Are we ready over [00:00:15.00] there. I can also... We [00:00:20.00] can wait.

[00:00:23.00] **Prosecutor Dunkelman:** Um, is it [00:00:25.00] going to be [inaudible]?

[00:00:27.12] **Judge Hruby-Mills:** Yes.

[00:00:27.52] **Prosecutor Dunkelman:** Okay. I just want to make sure I'm ready.

[00:00:30.96] **Judge Hruby-Mills:** I tried to... you're [00:00:30.00] waiting for an interpreter? No. All [00:00:35.00] right, so with that, then, I'm sure.... And [00:00:40.00] so we are here on a motion... [to Mr. Golub] You can just come [00:00:45.00] up to the table... So [00:00:50.00] this is a last-year case ending in 0706. Right. Okay. [00:00:55.00] And so we [00:01:00.00] have sort of a revised motion [00:01:05.00] to suppress, motion to suppress the statement, and then [00:01:10.00] a motion to dismiss, I guess, if there's..

[00:01:13.51] **Defense:** Yeah. [00:01:15.00] So there's, like, the main one, which is the motion to suppress and dismiss. And then there's one that's a little [00:01:20.00] bit more specific that just refers to Miranda and statements made. But if we could [00:01:25.00] discuss the motion to suppress and dismiss first, maybe [00:01:30.00] because they're sort of tied together.

[00:01:32.03] **Judge Hruby-Mills:** Yeah, they are. Okay. Yeah. And I guess I [00:01:35.00] understood them to be in conjunction with each other as well. But there's quite a bit, especially [00:01:40.00] in the one motion to dismiss. And so she is asking for, [00:01:45.00] I guess, a proffer as to just in reading through [00:01:50.00] that I identified, you know, 15 plus issues, but both of [00:01:55.00] you were making reference to the motion to suppress and dismiss. But that one to me has very little, [00:02:00.00] isn't it? Number 50.

[00:02:01.35] **Prosecutor Dunkelman:** Motion to suppress statements is the one that's lengthy. Let me pull up the motions. [00:02:05.00] The lengthy one is the motion to suppress and dismiss. It's the longer one. [00:02:10.00] It's the one that I have. It's 19 or [00:02:15.00] 20 pages. And then the statement is 12 [00:02:20.00] pages. Okay. I'm sorry. I actually thought it [00:02:25.00] was identical to the other one, but I can see it [00:02:30.00] is not. Okay. Yes. [00:02:35.00] Okay. [00:02:40.00] So I did not realize that. That [00:02:45.00] is different than the other one that I considered to be helpful. But... [00:02:50.00] nevertheless they are... And so we have its witnesses?

[00:02:55.35] **Prosecutor Dunkelman:** Yes. [00:02:55.00] I'm only calling one witness, which I think was the intention, [00:03:00.00] but there is quite a bit, especially in the [00:03:05.00] motion to suppress and dismiss. Document [00:03:10.00] number 49 document. I think that's right.

[00:03:14.26] **Defense:** Pregnant. [00:03:15.00] Can I get my computer?

[00:03:19.18] **Judge Hruby-Mills:** Yes. Yes, [00:03:20.00] it would be document. For [00:03:25.00] the the 48 or 49, they're both [00:03:30.00] one is just kind of the there's a form to. Yeah. One I [00:03:35.00] think each of the form is sort of the memo was filed separately from the motion. [00:03:40.00] So there's 48 and then there is also 70. [00:03:45.00] Those are the two filings I think 49 and 51 are [00:03:50.00] just the the motion. Yeah I think it's just [00:03:55.00] the paperwork, but in particular 48 [00:04:00.00] addresses, so many different things that are... [00:04:05.00] I just want to have a clear idea. All right. Can you summarize [00:04:10.00] for us what the the [00:04:15.00] main points are so that this witness will [00:04:20.00] be able to address it? Yes.

[00:04:23.14] **Defense:** So I [00:04:25.00] think that there's a lack of probable cause. In terms of what the [00:04:30.00] video shows. I think the video shows a traffic violation [00:04:35.00] by the officer. In the very beginning, he pulls a U-turn [00:04:40.00] at an intersection with a red light. So [00:04:45.00] those are the two main ones, the lack of probable cause for the initial stop.

[00:04:23.14] **Judge Hruby-Mills:** Okay. [00:04:50.00] And then what else?

[00:04:54.37] **Defense:** The [00:04:55.00] way that the tests were administered and interpreted.

[00:05:00.09] **Judge Hruby-Mills:** Do [00:05:00.00] you mean the SFS?

[00:05:02.49] **Defense:** Yes.

[00:05:03.25] **Judge Hruby-Mills:** Okay.

[00:05:04.61] **Defense:** And [00:05:05.00] then Let's see. And then the [00:05:10.00] chemical breath test I also think is highly [00:05:15.00] problematic, its administration and the subsequent results. [00:05:20.00] I'm going to try to argue that it was [00:05:25.00] poorly administered and that there should have been a second test done. [00:05:30.00] I'm going to argue that the results are much too high. Okay, does [00:05:35.00] that narrow it down enough for you?

[00:05:40.05] **Judge Hruby-Mills:** You [00:05:40.00] can do it. Yeah. I was just looking for some direction. So that's fine. You're... [00:05:45.00]

[00:05:45.45] **Prosecutor Dunkelman:** The state does have one video exhibit that the state intends to play. [00:05:50.00] It's the officer's body worn camera. And it will play [00:05:55.00] a couple portions of that exhibit. And so I just wanted to give [00:06:00.00] everybody a heads up for the video for making sure that the video....

[00:06:04.97] **Judge Hruby-Mills:** Okay. [00:06:05.00] And so you'll plug in at your station there, and we'll do what we need.

[00:06:09.53] **Prosecutor Dunkelman:** I just didn't [00:06:10.00] know if we should do it. I can do a test, or I can just do it when it [00:06:15.00] should be all fixed.

[00:06:17.41] **Defense:** I didn't know we were going to go over the video evidence. The dash [00:06:20.00] cam footage is the video that shows the officer running a [00:06:25.00] red light and then flipping around, waiting [00:06:30.00] at a location where he could not have seen the violation.

[00:06:33.33] **Judge Hruby-Mills:** Right. Now we're just... We're [00:06:35.00] just about ready to get started. Okay, I was just I think I like [00:06:40.00] that. I think we'll go ahead and you don't [00:07:05.00] need any help with that. Oh my gosh. [00:07:10.00] It's going to work. But finding the time [00:07:15.00] stamp on your log or something? I can't. I think you're going [00:07:20.00] to have one. It's a rotating pattern, but [00:07:25.00] it looks like it should work. Can I just test the audio just to make... I don't know [00:07:30.00] if I can even see. If you can see it on that. Oh, [00:07:35.00] yeah.

[00:07:36.48] **Judicial Assistant Joseph Liuzzi :** Okay. So [00:07:40.00] I have some experience with this. If you would like me to take over, [00:07:45.00] I have to do the audio. Right. Here is your audio. [00:07:50.00] Just press the button. Okay. [00:07:55.00]

[00:07:56.08] **Prosecutor Dunkelman:** Your honor, I think it's important. Thanks for [00:08:00.00] your time. I just thought that. Yeah. [00:08:05.00] You're not hearing me. Yeah, [00:08:10.00] maybe I can. I did it for two days straight in the book.

[00:08:15.44] **Judge Hruby-Mills:** You [00:08:15.00] can do it. It's hard, but you can do it.

[00:08:17.52] **Prosecutor Dunkelman:** Okay, so we should be all ready [00:08:20.00] with that. So with that, then I guess the state's ready with it. Can [00:08:25.00] I go grab him?

[00:08:26.00] **Judge Hruby-Mills:** Sure.

[00:08:29.08] **Prosecutor Dunkelman:** Oh, great. [00:08:30.00] Okay. Perfect. Okay. [00:08:35.00] Can we call? Chris. [00:08:40.00] Right. Corporal Ernstsens?

[00:08:43.92] **Judge Hruby-Mills:** Okay, sure. If you would make [00:08:45.00] your way up here to get sworn in as the witness.

[00:08:49.19] **Prosecutor Dunkelman:** Your honor... [to Corporal Ernstsens] are you okay [00:08:50.00] sitting here? Since I have a video. Can [00:09:00.00] you raise your

right hand, please? Do you affirm the [00:09:05.00] evidence? You shall before the court shall tell the truth, the whole truth, and nothing but the truth.

[00:09:09.31] **Trooper Ernstsen:** Yes. [00:09:10.00]

[00:09:13.19] **Prosecutor Dunkelman:** Well. Thank you. Okay. [00:09:15.00] Could you please state your [00:09:20.00] name and spell your first and last name for the record?

[00:09:23.27] **Trooper Ernstsen:** It's Brock. Brock E r [00:09:25.00] n s t s e n.

[00:09:29.43] **Prosecutor Dunkelman:** Where do you currently [00:09:30.00] work?

[00:09:31.39] **Trooper Ernstsen:** Utah Highway patrol.

[00:09:33.27] **Prosecutor Dunkelman:** What is your current position with Utah [00:09:35.00] Highway Patrol?

[00:09:36.63] **Trooper Ernstsen:** I'm a corporal on what we call a DUI squad. [00:09:40.00]

[00:09:40.51] **Prosecutor Dunkelman:** Okay. And I guess, how do you... how do you get to becoming a corporal?

[00:09:46.11] **Trooper Ernstsen:** It's [00:09:45.00] an interview process, basically. Mostly we're utilized [00:09:50.00] for training purposes.

[00:09:52.58] **Prosecutor Dunkelman:** And does it require quite a bit of experience to get [00:09:55.00] into that position?

[00:09:56.62] **Trooper Ernstsen:** Yes.

[00:09:57.38] **Prosecutor Dunkelman:** Okay. And how long have you been working [00:10:00.00] with Utah Highway Patrol in any sort of capacity?

[00:10:03.54] **Trooper Ernstsen:** Over ten years. Okay. [00:10:05.00]

[00:10:06.66] **Prosecutor Dunkelman:** And would you mind just telling me a little bit about your training and experience? [00:10:10.00] When you started with Utah Highway Patrol? [00:10:15.00]

[00:10:15.74] **Trooper Ernstsen:** Yeah, so, I attended the academy. Are [00:10:20.00] you asking specifically about, like, DUI training or...

[00:10:24.10] **Prosecutor Dunkelman:** I'll ask about that, but [00:10:25.00] just to become a police officer.

[00:10:27.78] **Trooper Ernstsen:** So, yeah, I completed the academy. [00:10:30.00] I began the academy in November of 2014. [00:10:35.00] And then after the academy, we have what we call an in-house academy [00:10:40.00] with highway patrol. And then after that, I went to field training [00:10:45.00] with their field training officer. And then once I was released from field training, I [00:10:50.00] was just on my own.

[00:10:52.02] **Prosecutor Dunkelman:** Okay. And between that [00:10:55.00] time period and now, do you undergo continuous training as well?

[00:10:59.38] **Trooper Ernstsen:** Yes.

[00:11:00.50] **Prosecutor Dunkelman:** And [00:11:00.00] then tell me about specifically any training you've done related [00:11:05.00] to DUI.

[00:11:08.10] **Trooper Ernstsen:** So there's training in the academy [00:11:10.00] on both, like, book work and [00:11:15.00] experience. They have, like, what they call a wet lab where they have people that drink alcoholic [00:11:20.00] beverages and they come in and they perform the field sobriety tests on those people. And [00:11:25.00] then make guesses of where they are as far as their breath, alcohol content.

[00:11:30.00] And then they tell us what the results are. And then after [00:11:35.00] I was on my own, I went through the training and I also went [00:11:40.00] through what's called the battery of tests training. And then I also [00:11:45.00] became a drug recognition expert, DRA. And [00:11:50.00] essentially [00:11:55.00] I go through refresher training every year.

[00:12:00.77] **Prosecutor Dunkelman:** So [00:12:00.00] with respect to DUI recognition and I guess general [00:12:05.00] drug recognition is being a DRA at the highest level of certification you [00:12:10.00] can have with respect to those things.

[00:12:12.93] **Trooper Ernstsens:** Yes.

[00:12:13.37] **Prosecutor Dunkelman:** Okay. Were you also [00:12:15.00] trained to administer an intoxilyzer machine?

[00:12:18.29] **Trooper Ernstsens:** Yes.

[00:12:18.97] **Prosecutor Dunkelman:** Okay. [00:12:20.00] And. Okay, so I want to talk to you about September 6th of 2023, [00:12:25.00] where you SFST certified on that day? [00:12:30.00]

[00:12:30.21] **Trooper Ernstsens:** Yes.

[00:12:30.33] **Prosecutor Dunkelman:** Okay. Were you a certified on that day?

[00:12:32.45] **Trooper Ernstsens:** Yes.

[00:12:33.01] **Prosecutor Dunkelman:** Okay. Were you a DRE at that time?
[00:12:35.00]

[00:12:35.45] **Trooper Ernstsens:** Yes.

[00:12:35.89] **Prosecutor Dunkelman:** Okay. And were you... was your training with respect to an intoxilyzer [00:12:40.00] up to date on that time?

[00:12:41.93] **Trooper Ernstsens:** Yes.

[00:12:42.45] **Prosecutor Dunkelman:** Okay. Were you [00:12:45.00] working with Utah Highway Patrol in September of 2023?

[00:12:49.41] **Trooper Ernstsen:** I was, yes. [00:12:50.00]

[00:12:50.37] **Prosecutor Dunkelman:** What was your position at that time?

[00:12:52.09] **Trooper Ernstsen:** I was the same as now on the DUI squad.
[00:12:55.00]

[00:12:55.33] **Prosecutor Dunkelman:** Okay. And did a vehicle catch your attention on that day?

[00:12:59.89] **Trooper Ernstsen:** Yes. [00:13:00.00]

[00:13:01.69] **Prosecutor Dunkelman:** Can you tell me about where you were when you [00:13:05.00] first saw this vehicle?

[00:13:07.29] **Trooper Ernstsen:** Yeah. So when I was originally [00:13:10.00] traveling northbound on State Street just passing 1700 [00:13:15.00] South, I observed a person in [00:13:20.00] front of the bar on the sidewalk get into the driver's seat of a vehicle. So I drove [00:13:25.00] to what's still northbound State Street to Kensington [00:13:30.00] Avenue, where I stopped at a red light. And then I made [00:13:35.00] a U-turn at that intersection and came back and observed [00:13:40.00] the vehicle that I saw the person get into the driver's seat, pull away from the curb and [00:13:45.00] go across the right lane and into the middle lane [00:13:48.28] and never saw a blinking [00:13:50.00] signal light. [00:13:51.40]

[00:13:51.44] **Prosecutor Dunkelman:** Okay, can I... I'm going to back up and just ask you a couple questions. Do you remember what [00:13:55.00] time of day it was when this happened?

[00:13:57.72] **Trooper Ernstsen:** It was definitely dark. It was [00:14:00.00] somewhere around probably 11 or midnight. Somewhere in there.

[00:14:04.44] **Prosecutor Dunkelman:** Okay. [00:14:05.00] And just so I'm following, you saw an individual [00:14:10.00] come out of a bar and get into their vehicle?

[00:14:12.68] **Trooper Ernstsen:** I remember seeing him in [00:14:15.00] front of the bar. I don't remember seeing them come out of the bar, but I saw them in front of the bar like, [00:14:20.00] on the sidewalk. And then get into the driver's door.

[00:14:24.12] **Prosecutor Dunkelman:** Okay. And [00:14:25.00] so why given the circumstances you've just described, why was this [00:14:30.00] of a concern to you?

[00:14:32.40] **Trooper Ernstsen:** So my primary responsibility on the DUI squad is [00:14:35.00] to remove impaired drivers from the roadway. When I see somebody in [00:14:40.00] front of a bar, get into the driver's seat of a car. There's, I mean, we all know that it's [00:14:45.00] common knowledge that in bars and saloons. I think this was Aces [00:14:50.00] High saloon that many times people were drinking alcoholic beverages in those [00:14:55.00] establishments. And then when I see somebody in front of an establishment like that [00:15:00.00] and get into the driver's seat, it is of interest to me.

[00:15:04.40] **Prosecutor Dunkelman:** Okay. So [00:15:05.00] did you ever concern that that individual may be drinking and then subsequently [00:15:10.00] driving?

[00:15:11.12] **Trooper Ernstsen:** Yes.

[00:15:11.60] **Prosecutor Dunkelman:** Okay. And this just so I'm understanding, [00:15:15.00] this was seen by you prior to you making the U-turn.

[00:15:18.64] **Trooper Ernstsen:** Yes.

[00:15:19.04] **Prosecutor Dunkelman:** Okay. And that was the [00:15:20.00] cause for you making that U-turn?

[00:15:22.16] **Trooper Ernstsen:** Correct.

[00:15:22.68] **Prosecutor Dunkelman:** Okay. Okay. [00:15:25.00] And It's okay if you don't. But to your knowledge, is [00:15:30.00] there a code or statute or anything that would allow you to make the U-turn at by red light [00:15:35.00] based on what you observed?

[00:15:36.88] **Trooper Ernstsen:** Yes. 41-6a-212.

[00:15:39.91] **Prosecutor Dunkelman:** Okay. [00:15:40.00] And what? I guess. Tell me more about why that would. Why [00:15:45.00] you understood that would allow you to do what you did?

[00:15:47.59] **Trooper Ernstsen:** Essentially, it says in there that [00:15:50.00] if there's a reason that I am in [00:15:55.00] the pursuit of somebody that I suspect may have [00:16:00.00] or will commit a crime I can disregard, [00:16:05.00] essentially, that I can violate traffic laws, like, if even specifically, [00:16:10.00] say, the stoplight.

[00:16:11.63] **Prosecutor Dunkelman:** Okay. And so just so I'm following at [00:16:15.00] what point in that or I guess, at what point in your driving did you notice [00:16:20.00] the vehicle pull away from the curb without signaling?

[00:16:23.79] **Trooper Ernstsen:** After I made the U-turn, [00:16:25.00] I was headed back southbound on State Street.

[00:16:28.15] **Prosecutor Dunkelman:** Okay. And so you [00:16:30.00] noticed that it doesn't use a signal as it leaves the curb. And then what about when it crosses [00:16:35.00] the subsequent lanes of travel.

[00:16:37.26] **Trooper Ernstsen:** Did not use a signal light either on that. [00:16:40.00]

[00:16:40.58] **Prosecutor Dunkelman:** Okay. And so is that in itself a violation of the law? [00:16:45.00]

[00:16:45.46] **Trooper Ernstsen:** Yes. So it's a signal.

[00:16:47.10] **Prosecutor Dunkelman:** Okay. Do you remember what kind of vehicle it was? [00:16:50.00]

[00:16:50.22] **Trooper Ernstsen:** It was a silver Hyundai Sonata.

[00:16:54.66] **Prosecutor Dunkelman:** And tell [00:16:55.00] me what happened. Once you were behind the vehicle and saw this [00:17:00.00] traffic violations that you had just testified to.

[00:17:03.50] **Trooper Ernstsen:** So after I made the U-turn, I saw the [00:17:05.00] violations. I got behind the vehicle. At some point [00:17:10.00] after I followed it for a while. The [00:17:15.00] vehicle turned or changed lanes to the left. I [00:17:20.00] didn't note it in my report, but I did notice that the vehicle got pretty close to the left side of [00:17:25.00] the lane, close to the raised median there. And then [00:17:30.00] after I observed the vehicle in the left turn lane to get on to I-80 I [00:17:35.00] initiated a traffic stop at that point so that we wouldn't enter the freeway.

[00:17:39.54] **Prosecutor Dunkelman:** Okay. [00:17:40.00] And just to back up really quickly did you have a clear view [00:17:45.00] of the vehicle as it left the curb and then moved between the lanes?

[00:17:49.46] **Trooper Ernstsen:** I did, yes. [00:17:50.00]

[00:17:50.38] **Prosecutor Dunkelman:** Okay. And when you initiated your traffic stop, did you turn on your overhead [00:17:55.00] lights?

[00:17:55.62] **Trooper Ernstsen:** I did.

[00:17:56.62] **Prosecutor Dunkelman:** Okay. And did the driver of the vehicle pull over?

[00:18:00.62] **Trooper Ernstsen:** Yeah, [00:18:00.00] we had to change several lanes, and then we went underneath I-80, [00:18:05.00] the overpass there, and then pulled over to the right shoulder. Well, actually, I think we were [00:18:10.00] blocking a lane. The right lane.

[00:18:13.70] **Prosecutor Dunkelman:** And did you approach [00:18:15.00] the vehicle after both vehicles stopped? I did, okay. And [00:18:20.00] did you made it, I guess. Make any observations on your initial approach to [00:18:25.00] the What was it? The driver's side of the vehicle.

[00:18:28.30] **Trooper Ernstsens:** It was the driver's side? Yes.

[00:18:29.58] **Prosecutor Dunkelman:** Okay. Did [00:18:30.00] you notice anything as you first approached the driver's side of the vehicle?

[00:18:34.33] **Trooper Ernstsens:** Yeah. Multiple [00:18:35.00] things. [00:18:35.81] So I could smell an odor of an alcoholic beverage coming from the vehicle. I [00:18:40.00] observed that the person sitting in the driver's seat had glassy, [00:18:45.00] bloodshot eyes, and that when he spoke with me, some of his words were slurred. [00:18:49.53]

[00:18:51.85] **Prosecutor Dunkelman:** Were [00:18:50.00] there any other occupants in the vehicle?

[00:18:53.97] **Trooper Ernstsens:** He was the only occupant. [00:18:55.00]

[00:18:55.13] **Prosecutor Dunkelman:** Okay. And do you see the driver in the courtroom today?

[00:18:58.89] **Trooper Ernstsens:** I do.

[00:18:59.65] **Prosecutor Dunkelman:** Would you [00:19:00.00] mind pointing them out and identifying articles of clothing they're wearing?

[00:19:03.17] **Trooper Ernstsens:** Yeah, he's wearing the brown suit [00:19:05.00] coat with a black tie with the shirt.

[00:19:07.77] **Prosecutor Dunkelman:** Let the record reflect the identification. Would [00:19:10.00] you mind telling me about the conversation as you first [00:19:15.00] approached the vehicle?

[00:19:17.01] **Trooper Ernstsens:** Yeah. So I asked him for his driver license [00:19:20.00] and the insurance. The proof of insurance for the vehicle. He handed me the the [00:19:25.00] registration instead of the insurance. And then eventually, I think he handed me an [00:19:30.00] expired insurance card. So I asked him to see if he

could find that. [00:19:35.00] I asked him if he had anything to drink. He told me he had a couple. [00:19:40.00] I believe he said Coronas at the bar. About an hour before that when [00:19:45.00] I went back to my vehicle to perform a records [00:19:50.00] check I informed him if he could just keep looking for the insurance [00:19:55.00] information.

[00:19:56.25] **Prosecutor Dunkelman:** Okay. And was [00:20:00.00] it during this time period that you were noticing the speech patterns that you talked about and the observations [00:20:05.00] with respect to his eyes being glossy and bloodshot?

[00:20:08.53] **Trooper Ernstsen:** Yeah. That initial approach. I noticed [00:20:10.00] all those things.

[00:20:11.01] **Prosecutor Dunkelman:** Okay. So based on your training and experience what could those be? [00:20:15.00]

[00:20:15.13] **Trooper Ernstsen:** Possible indicators of that he's consumed alcohol.

[00:20:20.21] **Prosecutor Dunkelman:** Okay. [00:20:20.00] Okay. And once [00:20:25.00] he returned, or I guess, as you were returning to your vehicle, did you hear anything [00:20:30.00] else that was stated by the defendant.

[00:20:33.28] **Trooper Ernstsen:** Yeah, I heard him drop [00:20:35.00] an F-bomb.

[00:20:37.92] **Prosecutor Dunkelman:** Yeah. Okay. I would refer to it as [00:20:40.00] a yes. Okay. [00:20:45.00] And once in your vehicle after you had [00:20:50.00] run his information, did you make any determinations as to how you wanted to proceed from [00:20:55.00] there?

[00:20:55.92] **Trooper Ernstsen:** Yeah. When I ran that records check, I [00:21:00.00] you know, as I was narrating to my camera in my patrol vehicle, I [00:21:05.00] said that I was going to have him do test to make sure he's okay to be driving.

[00:21:09.88] **Prosecutor Dunkelman:** Okay. [00:21:10.00] So you actually narrated that out loud onto your body camera? The observations [00:21:15.00] you had made?

[00:21:15.64] **Trooper Ernstsen:** Yes.

[00:21:16.20] **Prosecutor Dunkelman:** Okay. So at [00:21:20.00] some point after you made that determination, did you return back to the defendant's vehicle? [00:21:25.00]

[00:21:25.24] **Trooper Ernstsen:** I did.

[00:21:26.56] **Prosecutor Dunkelman:** Okay. And when you returned off the vehicle did you explain [00:21:30.00] what you wanted to do from there?

[00:21:32.32] **Trooper Ernstsen:** Yeah, I told him I wanted him to step out of the vehicle. [00:21:35.00]

[00:21:35.64] **Prosecutor Dunkelman:** Okay. And as he exited the vehicle, did you notice [00:21:40.00] anything about how he exited that vehicle?

[00:21:43.44] **Trooper Ernstsen:** Yeah. As he was exiting, he [00:21:45.00] braced himself on his driver door with both hands. And then we walked over to the sidewalk. [00:21:50.00]

[00:21:50.64] **Prosecutor Dunkelman:** And why is... was that of any significance to you?

[00:21:54.56] **Trooper Ernstsen:** It [00:21:55.00] could, you know, essentially, his balance could be off from possibly [00:22:00.00] alcohol consumption.

[00:22:02.88] **Prosecutor Dunkelman:** Okay. In your training experience, can [00:22:05.00] a balance be impacted by consuming alcohol? [00:22:10.00]

[00:22:10.48] **Trooper Ernstsen:** Yes.

[00:22:13.12] **Prosecutor Dunkelman:** Okay. And did you ask [00:22:15.00] him to do the roadside maneuvers?

[00:22:20.92] **Trooper Ernstsen:** Yeah. [00:22:20.00] So I told him I wanted him to do some tests to make sure he was okay.

[00:22:24.92] **Prosecutor Dunkelman:** Okay. [00:22:25.00] And prior to doing those are there any sort [00:22:30.00] of questions that you ask him with respect to his ability to complete those tests? [00:22:35.00]

[00:22:35.11] **Trooper Ernstsen:** Yeah, I do what's called a medical pre-screening.

[00:22:38.51] **Prosecutor Dunkelman:** Okay. And was that done here?

[00:22:39.91] **Trooper Ernstsen:** It [00:22:40.00] was. Yes.

[00:22:41.79] **Prosecutor Dunkelman:** Based on his responses to the medical screening, any questions or [00:22:45.00] concerns about his ability to do the test?

[00:22:47.79] **Trooper Ernstsen:** No. He told me he did not have any injuries [00:22:50.00] or illnesses.

[00:22:51.39] **Prosecutor Dunkelman:** Okay. So is there a standardized [00:22:55.00] way in which you do these the battery of tests [00:23:00.00] for this?

[00:23:01.23] **Trooper Ernstsen:** Yeah, it's actually in the name of the test. It's called the standardized field sobriety test. [00:23:05.00]

[00:23:05.19] **Prosecutor Dunkelman:** Okay. And what is the first test that you are to start with? [00:23:10.00]

[00:23:10.31] **Trooper Ernstsen:** Horizontal gaze nystagmus.

[00:23:11.99] **Prosecutor Dunkelman:** Okay. And did you explain [00:23:15.00] the instructions for this particular test? I did, okay. And [00:23:20.00] is there a way or I guess, what is there some sort of manual [00:23:25.00] or instruction booklet that you are trained on in order to administer [00:23:30.00] these tests?

[00:23:32.07] **Trooper Ernstsen:** Yeah. It's the it's referred to as the manual.

[00:23:35.00] It's the National Highway Traffic Safety Administration.

[00:23:38.51] **Prosecutor Dunkelman:** Okay. And [00:23:40.00] did you explain the instructions for... I'm just going to refer to it as NHTSA... as you [00:23:45.00] had been trained to do?

[00:23:48.11] **Trooper Ernstsen:** Yes.

[00:23:48.63] **Prosecutor Dunkelman:** Okay. And [00:23:50.00] so how many possible clues are there on the hidden [00:23:55.00] test?

[00:23:56.27] **Trooper Ernstsen:** Six.

[00:23:57.51] **Prosecutor Dunkelman:** And how many clues did you see?

[00:23:59.47] **Trooper Ernstsen:** Six.

[00:24:00.23] **Prosecutor Dunkelman:** Would [00:24:00.00] you mind just telling the court what those clues were?

[00:24:03.03] **Trooper Ernstsen:** Yep. So, lack of smooth pursuit, [00:24:05.00] the distinct and sustained and maximum deviation and the onset of nystagmus [00:24:10.00] prior to 45 degree angle and 45.

[00:24:13.47] **Prosecutor Dunkelman:** Okay, I was just going to clarify. So [00:24:15.00] three for each eye?

[00:24:16.51] **Trooper Ernstsen:** Yes.

[00:24:16.95] **Prosecutor Dunkelman:** Okay. And when you're administering this test would [00:24:20.00] you mind just, I guess, walking us through how the test is actually administered? [00:24:25.00]

[00:24:16.95] **Trooper Ernstsen:** So I asked about injuries and illnesses. I [00:24:30.00] asked him if he was wearing contacts or glasses. Asked [00:24:35.00] him to look at my finger. I held my finger just in front of his face, and I looked [00:24:40.00] to see if the thing was present, and it was not. Then I [00:24:45.00] performed. I also looked at the size of his pupils to make sure his pupils were the same size. [00:24:50.00] To again rule out medical prescreening. And then [00:24:55.00] I did two passes per eye. Just to see if his eyes were tracking [00:25:00.00] the stimulus, which was my index finger.

[00:25:02.62] **Prosecutor Dunkelman:** And one second. Just. Would the record reflect that? [00:25:05.00] The witness just brought his finger back and forth [00:25:10.00] in front of his face once in each direction. Okay. [00:25:15.00] Okay. So you can continue from there.

[00:25:19.06] **Trooper Ernstsen:** So it's [00:25:20.00] very standardized. How, like the distance and everything. So I held my [00:25:25.00] stimulus, my index finger, approximately 12 to 15in away from the station, slightly above [00:25:30.00] eye level. Once I did make sure his eyes were tracking, I took the [00:25:35.00] stimulus away to basically. Indicate [00:25:40.00] that I was through with the medical pre-screening, and at that point I start [00:25:45.00] watching for clues on the horizontal gaze nystagmus clues that I mentioned earlier.

[00:25:49.85] **Prosecutor Dunkelman:** Okay. [00:25:50.00] And in doing so, are you using the determined distances [00:25:55.00] away from the individual and distances? I guess back and [00:26:00.00] forth on each side of his face?

[00:26:03.05] **Trooper Ernstsen:** Yes. And it also mattered [00:26:05.00] how quickly you move the stimulus, depending on which clue you're looking for.

[00:26:09.57] **Prosecutor Dunkelman:** Okay. [00:26:10.00] So I guess in summary was this maneuver [00:26:15.00] done, as you have been trained to do and as determined in the manual?

[00:26:19.89] **Trooper Ernstsen:** Yes. [00:26:20.00]

[00:26:21.61] **Prosecutor Dunkelman:** Okay. And so you said that you saw six clues [00:26:25.00] on HCN. Is that right?

[00:26:26.65] **Trooper Ernstsen:** Correct.

[00:26:27.69] **Prosecutor Dunkelman:** How many clues do you need to see to determine [00:26:30.00] impairment on HCN?

[00:26:32.37] **Trooper Ernstsen:** Essentially the manual talks about [00:26:35.00] the... On the test, four out of the six clues indicates [00:26:40.00] an 88% probability that there are 0.8 or greater.

[00:26:43.45] **Prosecutor Dunkelman:** Okay. And you saw how many [00:26:45.00] out of six?

[00:26:46.13] **Trooper Ernstsen:** Six out of six.

[00:26:48.25] **Prosecutor Dunkelman:** Did you notice anything about the defendant's [00:26:50.00] balance during the HCN test?

[00:26:52.13] **Trooper Ernstsen:** Yeah. So while I was standing there just on normally [00:26:55.00] on both, he had a slight circular sway.

[00:26:59.77] **Prosecutor Dunkelman:** And why [00:27:00.00] was this of any significance again?

[00:27:03.57] **Trooper Ernstsen:** His balance.

[00:27:05.73] **Prosecutor Dunkelman:** Okay. [00:27:05.00] So there was a concern with his ability to maintain his balance.

[00:27:09.85] **Trooper Ernstsen:** Yeah. [00:27:10.00] Plus, [00:27:11.09] I could smell the odor of an alcoholic beverage coming from his mouth as he was speaking to me [00:27:15.00] there in the open air environment [00:27:16.37] as well.

[00:27:17.13] **Prosecutor Dunkelman:** Okay. So what is the next test [00:27:20.00] that you conducted?

[00:27:21.29] **Trooper Ernstsen:** The WAT or the walk and turn test.

[00:27:23.64] **Prosecutor Dunkelman:** Okay. And [00:27:25.00] can you or I guess, what is the instruction? What are the instructions [00:27:30.00] for the walk and turn test?

[00:27:33.48] **Trooper Ernstsen:** So essentially I have [00:27:35.00] I get in what's called the starting position or the instructional stance, where I put [00:27:40.00] my right foot in front of my left foot with my heel touching my toe, and I tell him to get in that same position. I [00:27:45.00] tell him, imagine if there's an actual line painted [00:27:50.00] on the road or something we can use. I haven't stepped on that line. It's not. In this case. There was no [00:27:55.00] line. So I told him to imagine just an imaginary line that started under his left foot and went straight out [00:28:00.00] in front of him. Then I instructed him to put, as I was doing, put his right foot in front of his [00:28:05.00] left foot with his heel touching his toe on his hands, down to his side. And then I told him once he got in, that [00:28:10.00] not to move from there and not to start walking until I told him to begin.

[00:28:14.12] **Prosecutor Dunkelman:** Okay. So once [00:28:15.00] he's in that starting position what do you do in terms of demonstration from that point? [00:28:20.00]

[00:28:20.28] **Trooper Ernstsen:** So I explained the test as I demonstrated in [00:28:25.00] the... well there's another manual for the manual. It's the instructor manual where [00:28:30.00] it teaches the instructors how to actually perform and/or [00:28:35.00] teach the the cadets and whoever it is they're training how to administer [00:28:40.00] the test. And so in that manual it says [00:28:45.00] that you demonstrate three steps, demonstrate the turn and then demonstrate [00:28:50.00] three steps back. So that's what I did. And [00:28:55.00] how many possible clues are there on this test? [00:29:00.00] Okay. And how many clues, if any, did you [00:29:05.00] observe? Once the defendant completed this test, four out of the eight. [00:29:10.00] And what clues were those? I stopped walking and asked a question, and then he made [00:29:15.00] an improper turn by taking one large spinning step to turn around, and then took his

front foot off the line and [00:29:20.00] stepped backwards with that foot. And then he again stopped [00:29:25.00] walking and asked a question on the second set of nine steps. He also stepped off line once, and [00:29:30.00] instead of nine steps, he took 11 steps.

[00:29:33.43] **Prosecutor Dunkelman:** Okay. Okay. [00:29:35.00] And did that [00:29:40.00] conclude the walk and turn test?

[00:29:42.15] **Trooper Ernstsen:** Yes.

[00:29:43.11] **Prosecutor Dunkelman:** What was the next test that you did?

[00:29:44.99] **Trooper Ernstsen:** The [00:29:45.00] one leg test.

[00:29:46.39] **Prosecutor Dunkelman:** Okay. And what is this next test? [00:29:50.00]

[00:29:50.39] So I instructed him just to stand with his feet together and his hands to his side. Explained and demonstrated again this [00:29:55.00] test. And then I instructed him that he can choose [00:30:00.00] which foot he wants to use when I tell him to begin he can stand whatever foot he decides. He can stand on any foot of his choice and then [00:30:05.00] raise his foot up six inches, point his toe down towards the ground and [00:30:10.00] keep both legs straight, but also look at his foot and count out loud in thousands: 1001, 1002, 1003 [00:30:15.00] and keep counting and not ask when to stop.

[00:30:18.95] **Prosecutor Dunkelman:** And those are the instructions [00:30:20.00] that you gave him on this day?

[00:30:21.39] **Trooper Ernstsen:** Yes.

[00:30:22.87] **Prosecutor Dunkelman:** And how many possible clues are there on this test? [00:30:25.00]

[00:30:25.19] **Trooper Ernstsen:** Four.

[00:30:25.71] **Prosecutor Dunkelman:** Okay. And did you see any clues on this test?

[00:30:28.63] **Trooper Ernstsen:** I saw one clue, [00:30:30.00] but I felt like it was kind of borderline, so I did not count that clue, and [00:30:35.00] I counted.... well, I essentially documented zero clues out of the four clues possible.

[00:30:39.87] **Prosecutor Dunkelman:** Okay. [00:30:40.00] And what's the clue that you're alluding to but didn't notate on the report?

[00:30:44.95] **Trooper Ernstsen:** Raising [00:30:45.00] his arms above six inches.

[00:30:48.23] **Prosecutor Dunkelman:** Okay. So is that typically one [00:30:50.00] of the four possible clues?

[00:30:51.71] **Trooper Ernstsen:** It is.

[00:30:52.19] **Prosecutor Dunkelman:** Okay. And [00:30:55.00] so did you ignore the results of this test in your analysis [00:31:00.00] of making an impairment determination?

[00:31:02.87] **Trooper Ernstsen:** No, I actually documented that zero [00:31:05.00] clues observed.

[00:31:06.79] **Prosecutor Dunkelman:** Okay. So based [00:31:10.00] on your observations so far and the defendant's performance on SFSTs, [00:31:15.00] did you have any further concern about the defendant's ability to drive? [00:31:20.00]

[00:31:20.50] **Trooper Ernstsen:** Yes. I determined at that point that I was going to arrest him for DUI.

[00:31:26.30] **Prosecutor Dunkelman:** And [00:31:25.00] did you ask him to do a PBT?

[00:31:29.62] **Trooper Ernstsen:** I did. [00:31:30.00]

[00:31:31.18] **Prosecutor Dunkelman:** Okay. And when you asked him if you wanted to do it, how did he respond? [00:31:35.00]

[00:31:35.66] **Trooper Ernstsen:** He had his hands up by his face, covering his mouth and his nose, and basically [00:31:40.00] told me that he did not want to blow into it because he had been drinking, and he knew he would blow [00:31:45.00] over.

[00:31:46.02] **Prosecutor Dunkelman:** Okay. So what happened at this point? [00:31:50.00]

[00:31:50.86] **Trooper Ernstsen:** I placed him under arrest.

[00:31:52.86] **Prosecutor Dunkelman:** Okay. After he was placed under [00:31:55.00] arrest where did... What happened from there? [00:32:00.00]

[00:32:00.34] **Trooper Ernstsen:** So I did a search of his person. His pockets, his waistband, his pants, [00:32:05.00] his shirt. And then made sure that the handcuffs [00:32:10.00] were okay, that they weren't too tight. I locked them so they didn't tighten up. I put him in my patrol vehicle. [00:32:15.00] And then eventually I did a vehicle inventory [00:32:20.00] because I had to impound the car.

[00:32:23.61] **Prosecutor Dunkelman:** And was there another [00:32:25.00] trooper around at this point?

[00:32:26.77] **Trooper Ernstsen:** Yeah, he arrived there right before I'm placed under [00:32:30.00] arrest for DUI.

[00:32:31.45] **Prosecutor Dunkelman:** Okay. Did were... Were you and did you remain to be [00:32:35.00] the primary officer in the case?

[00:32:36.61] **Trooper Ernstsen:** Yes.

[00:32:38.33] **Prosecutor Dunkelman:** Is it fair to say he was there for support? [00:32:40.00]

[00:32:41.29] **Trooper Ernstsens:** Yeah, he was just there as a backup officer.

[00:32:43.85] **Prosecutor Dunkelman:** Yeah. Okay. [00:32:45.00] Okay. So was anything taken out of the defendant's vehicle prior [00:32:50.00] to you guys leaving that location?

[00:32:53.21] **Trooper Ernstsens:** Yeah, I believe he wanted his phone. [00:32:55.00] And I think a wallet.

[00:32:58.69] **Prosecutor Dunkelman:** Okay. Was [00:33:00.00] the defendant transported somewhere else?

[00:33:04.25] **Trooper Ernstsens:** Yeah. After [00:33:05.00] the car was towed away, I transported him to what we call special operations. [00:33:10.00]

[00:33:11.05] **Prosecutor Dunkelman:** Okay. And what? What is that or why were you bringing him to that particular location? [00:33:15.00]

[00:33:15.61] **Trooper Ernstsens:** So special ops, it's like... It's a room that we have the code to enter. [00:33:20.00] It's really... it's actually a... an evidence room for unified police. [00:33:25.00] They have an Intoxilyzer machine in there. We also draw blood in there many times. So [00:33:30.00] that's where I went. We entered that evidence room.

[00:33:34.13] **Prosecutor Dunkelman:** Okay. [00:33:35.00] And while you were driving him to this location, [00:33:40.00] did you ask him any questions likely to elicit an incriminating response? No. Okay. [00:33:45.00] Did he ask you any questions or make any statements to you [00:33:50.00] during that time?

[00:33:51.01] **Trooper Ernstsens:** Yeah. Yeah. I mean, many questions.

[00:33:53.13] **Prosecutor Dunkelman:** Okay. Do [00:33:55.00] you remember what type the general nature of the statements he was making to you?

[00:34:01.81] **Trooper Ernstsens:** While [00:34:00.00] we were in the vehicle?

[00:34:03.05] **Prosecutor Dunkelman:** Yeah.

[00:34:04.29] **Trooper Ernstsen:** I think he was just [00:34:05.00] curious, like what was going to happen. He wanted me to let him go. Things [00:34:10.00] like that.

[00:34:13.48] **Prosecutor Dunkelman:** And do you remember is [00:34:15.00] it fair to say you kind of explained to him what explained to him what the next steps were [00:34:20.00] going to be at that point?

[00:34:21.32] **Trooper Ernstsen:** Yeah, I read the DUI admissions at some point.
[00:34:25.00]

[00:34:25.44] **Prosecutor Dunkelman:** Okay. And what are the DUI admonitions?
[00:34:30.00]

[00:34:30.44] **Trooper Ernstsen:** It basically. Excuse me. It basically explains why he's under arrest [00:34:35.00] for DUI again. I'd already told him he was under arrest for DUI, but I [00:34:40.00] have to read these DUI admonitions word for word. And so I read that, and then [00:34:45.00] I requested a breath test at that point and told him the possible [00:34:50.00] ramifications of the breath test results.

[00:34:54.12] **Prosecutor Dunkelman:** Okay. And did he agree [00:34:55.00] to do a breath test?

[00:34:57.00] **Trooper Ernstsen:** Yes.

[00:34:58.08] **Prosecutor Dunkelman:** Okay. So once you got to [00:35:00.00] the second location what [00:35:05.00] did you do in order to prepare to do a breath test?

[00:35:09.68] **Trooper Ernstsen:** Yeah. So [00:35:10.00] there's what's called a baker period, where it's a 15 minute period of time. I [00:35:15.00] had him open his mouth, and I shined my flashlight in his eye and his mouth to [00:35:20.00] check and make sure there was nothing inside of his mouth. No fluids or any objects or anything [00:35:25.00] inside his mouth. And then I looked at the the time that was on the Intoxilyzer [00:35:30.00] machine, and I wrote that down and began the Baker period off

of [00:35:35.00] that time. I waited 15 minutes, and at the end of that 15 minutes [00:35:40.00] I again looked at his mouth with my flashlight to make sure there was nothing in his mouth. Both [00:35:45.00] times that I inspected that and didn't see anything in his [00:35:50.00] mouth after I inspected it the second time after the Baker period was over, I had [00:35:55.00] him... well, we tried to do the breath test multiple times.

[00:35:59.48] **Prosecutor Dunkelman:** Okay. And let [00:36:00.00] me back up just a second. And so what about what's the process for getting [00:36:05.00] the Intoxilyzer going?

[00:36:08.55] **Trooper Ernstsen:** It's pretty simple. We just [00:36:10.00] push this little green button that says start.

[00:36:12.43] **Prosecutor Dunkelman:** Okay. And when it turns on [00:36:15.00] if there were an error message or something that wasn't functioning with [00:36:20.00] the machine, would it tell you that?

[00:36:22.03] **Trooper Ernstsen:** Yeah. If it's not functioning. It does [00:36:25.00] what's called an error blank to make sure that there's no alcohol [00:36:30.00] in the actual system of the machine. It does diagnostic testing. And [00:36:35.00] if any of those tests fail, it will not let you proceed.

[00:36:38.71] **Prosecutor Dunkelman:** Okay. Did you receive [00:36:40.00] any messages of that nature indicating that the machine wasn't working?

[00:36:44.31] **Trooper Ernstsen:** Not that I recall, [00:36:45.00] no.

[00:36:45.67] **Prosecutor Dunkelman:** Okay. So I guess let me clarify. To your knowledge, did it appear that the machine [00:36:50.00] was functioning as normal?

[00:36:51.51] **Trooper Ernstsen:** Yes.

[00:36:52.07] **Prosecutor Dunkelman:** Okay, okay. And [00:36:55.00] during this period were you... Was there a conversation going [00:37:00.00] between you and the defendant?

[00:37:02.23] **Trooper Ernstsen:** Yeah.

[00:37:02.23] **Prosecutor Dunkelman:** Okay. Were you asking [00:37:05.00] him questions or what was kind of this conversation like?

[00:37:09.31] **Trooper Ernstsen:** I think I asked [00:37:10.00] him where he worked and stuff and just kind of conversation. [00:37:15.00]

[00:37:15.51] **Prosecutor Dunkelman:** Okay. And was he also engaging you in conversation as well? [00:37:20.00]

[00:37:20.31] **Trooper Ernstsen:** Yes.

[00:37:20.91] **Prosecutor Dunkelman:** Okay. Okay. [00:37:25.00] And so, would you mind just walking me through? We'll [00:37:30.00] first talk about the general process for getting a breath sample and then how [00:37:35.00] it went in this case.

[00:37:37.15] **Trooper Ernstsen:** So just the general process for a breath [00:37:40.00] sample. Yeah. So basically there's a mouthpiece [00:37:45.00] in a little plastic container. I take the plastic [00:37:50.00] off of the mouthpiece. I put the mouthpiece on the end of the tube that's connected to the [00:37:55.00] Intoxilyzer machine, and then I instruct them that basically, I show them where my [00:38:00.00] fingers are. I need you to put your mouth on that part of the mouthpiece, and then just blow for several seconds [00:38:05.00] until I tell you to stop. If I basically instruct him that if he's [00:38:10.00] blowing enough air that you'll... you hear this high pitched noise coming from the machine. [00:38:15.00] If you're not blowing enough, you won't hear anything. I'll be right here telling you a little bit more. [00:38:20.00] Get a little harder. Keep going, keep going. Once the... once [00:38:25.00] there's enough air volume introduced into the machine, it will register the results, and it will print [00:38:30.00] the results off on a little receipt and then it tears off. And I show them what the results are, and [00:38:35.00] eventually I give them a copy of the result.

[00:38:37.34] **Prosecutor Dunkelman:** Okay. And so as air [00:38:40.00] is being blown into the machine, are you getting a reading of like [00:38:45.00] the quantity of air or is it more of an insufficient versus sufficient thing?

[00:38:49.38] **Trooper Ernstsen:** Yeah, essentially. [00:38:50.00] I can't see how much air is being blown into the [00:38:55.00] machine. It basically... It just shows these little green bars. And [00:39:00.00] then once there's enough air that's been introduced, it will start [00:39:05.00] the process. You can hear the machine working and starting to analyze the [00:39:10.00] sample, and then eventually it shows you what the result is. It prints the results off okay. [00:39:15.00]

[00:39:15.50] **Prosecutor Dunkelman:** And then with respect to say someone was doing a test [00:39:20.00] and it took a couple tries to get the sufficient sample is [00:39:25.00] there any reason why you would need to restart the test after each attempted breath [00:39:30.00] or I guess, each attempt to get a full breath sample?

[00:39:34.42] **Trooper Ernstsen:** No. The only [00:39:35.00] thing that happens is if it's a certain amount of time goes by, [00:39:40.00] it will time out the machine and you'll have to just basically enter all the information. So [00:39:45.00] initially I enter like it asked for my name and badge number and [00:39:50.00] the person's name and date of birth and driver's license. So if it times out [00:39:55.00] you would have to enter all that information in and get it and have them [00:40:00.00] start to blow into it again. But it... it'll allow you within that time [00:40:05.00] frame to do as many attempts as you need to to get the correct amount of air into the [00:40:10.00] machine.

[00:40:10.81] **Prosecutor Dunkelman:** Okay. And to your knowledge do more breath attempts [00:40:15.00] raise the level of the results at all?

[00:40:18.01] **Trooper Ernstsen:** No.

[00:40:18.57] **Prosecutor Dunkelman:** Okay. So I'd [00:40:20.00] like to talk to you about how it went in this case. Would you mind just [00:40:25.00] walking me through what happened after the defendant was given the instructions on how to [00:40:30.00] blow into the machine and everything you described already? Yeah.

[00:40:32.85] **Trooper Ernstsen:** So I told him all the things that I [00:40:35.00] mentioned that I tell people instructions on how to perform the breath test. [00:40:40.00] And multiple times, I can't remember exactly how many it was. Many times. [00:40:45.00] He didn't blow enough air into the machine to have it register the results. [00:40:50.00] And so I had to have him try it over and over and over again. And before it timed [00:40:55.00] out, we were able to collect a sample.

[00:40:58.25] **Prosecutor Dunkelman:** Okay. And just [00:41:00.00] one more, I guess procedural question. Is there any sort of, to your knowledge, [00:41:05.00] any sort of minimum or maximum time period that you're allotted [00:41:10.00] to get these breath samples in?

[00:41:13.00] **Trooper Ernstsen:** Yeah. Like I said, the [00:41:15.00] machine will time out if you don't do it within a certain amount of time. And I can't remember exactly how long [00:41:20.00] it is. It's probably like a minute or two.

[00:41:22.64] **Prosecutor Dunkelman:** Okay. And did you did the machine time out in this case? [00:41:25.00]

[00:41:25.20] **Trooper Ernstsen:** No it didn't.

[00:41:26.04] **Prosecutor Dunkelman:** Okay. And ultimately, were [00:41:30.00] you able to get I don't know if this is the right word, but, like, a viable breath sample?

[00:41:35.04] **Trooper Ernstsen:** Yes. [00:41:35.00] So there is a minimum amount of breath that you have to blow into it. And I [00:41:40.00] think it's around 1.1 or 1.2 liters of air before it will [00:41:45.00] accept the sample.

[00:41:47.84] **Prosecutor Dunkelman:** Okay. And to your knowledge, is there... If [00:41:50.00] someone blew... is there like an amount? Is there [00:41:55.00] too much air you can blow in?

[00:41:57.40] **Trooper Ernstsen:** I've never seen that. No.

[00:41:59.84] **Prosecutor Dunkelman:** Okay. [00:42:00.00] Okay. And do you. So [00:42:05.00] did you receive a printout from this test?

[00:42:09.16] **Trooper Ernstsen:** I did, yes.

[00:42:09.88] **Prosecutor Dunkelman:** Okay. [00:42:10.00] And what was the result of that?

[00:42:11.64] **Trooper Ernstsen:** .104.

[00:42:13.28] **Prosecutor Dunkelman:** Okay. And [00:42:15.00] while awaiting for those results do you recall if the defendant [00:42:20.00] made any statements about the result?

[00:42:24.56] **Trooper Ernstsen:** Yeah. [00:42:25.00] Before we... we got the results, he told me that he felt like it was going to be bad.

[00:42:30.80] **Prosecutor Dunkelman:** Okay. [00:42:30.00] And after you received the results, [00:42:35.00] did you inform the defendant of the result?

[00:42:37.40] **Trooper Ernstsen:** I did, I showed him on the paper and told him what it was. Read it [00:42:40.00] out loud.

[00:42:40.80] **Prosecutor Dunkelman:** Okay. And what happened after he...after the test was completed? [00:42:45.00]

[00:42:47.48] **Trooper Ernstsen:** I believe we just went back out to my patrol vehicle, and [00:42:50.00] I... and while we were inside my patrol vehicle, I read his Miranda [00:42:55.00] rights to him.

[00:42:56.80] **Prosecutor Dunkelman:** Okay. And why did you? Why did you decide to advise [00:43:00.00] Miranda at this point?

[00:43:02.35] **Trooper Ernstsen:** So my department likes us to perform [00:43:05.00] an interview. It's just part of our DUI form on our computers. It's [00:43:10.00] just

multiple questions that we ask them pertaining to the crime of the DUI. [00:43:15.00]
And so I wanted to, before I ask them any incriminating questions about that crime,
specifically, [00:43:20.00] I wanted him to understand his rights.

[00:43:23.43] **Prosecutor Dunkelman:** Okay. And [00:43:25.00] did he choose to
continue speaking with you?

[00:43:28.83] **Trooper Ernstsens:** He told me he did not want to. [00:43:30.00]

[00:43:30.31] **Prosecutor Dunkelman:** Okay. And [00:43:35.00] so did you proceed
with questioning after that?

[00:43:38.51] **Trooper Ernstsens:** I did not. No. He just [00:43:40.00] wanted to call
somebody, so.

[00:43:42.11] **Prosecutor Dunkelman:** Okay. And did you... was he able [00:43:45.00]
to call somebody?

[00:43:46.87] **Trooper Ernstsens:** I asked him if he wanted me to get into his phone and
dial a [00:43:50.00] number for him to call somebody. And he said yes. And when I went
to dial [00:43:55.00] the number, his phone was dead, so he couldn't call anybody.

[00:43:58.59] **Prosecutor Dunkelman:** Okay. And [00:44:00.00] did that conclude your
involvement in the case, or, I guess, how did [00:44:05.00] it end?

[00:44:06.95] **Trooper Ernstsens:** Eventually, once I got all the forms filled out and
printed off for [00:44:10.00] him, we went over to the jail where I had booked him into
the jail.

[00:44:14.67] **Prosecutor Dunkelman:** Okay. [00:44:15.00] Nothing further, Your
Honor.

[00:44:17.75] **Defense:** All right. Hello! Okay. [00:44:20.00] Excuse [00:44:25.00] me
for... if I'm not good at this, but I'll try [00:44:30.00] to not waste everyone's time. Okay.
So I didn't know that we [00:44:35.00] were going to do another testimony because I

figured you already did one. Can [00:44:40.00] you just... can you do as many as you want? And [00:44:45.00] I'm sorry I couldn't hear you. Oh, okay. Never mind. I just, I just I just was a little confused [00:44:50.00] about procedure, but that's fine. It's not, it's not. that's not the point. Okay. So what I remember [00:44:55.00] in the first testimony was that, and [00:45:00.00] again, if I'm wrong, just tell me that I'm wrong. Did you say that it was a routine traffic stop in your initial [00:45:05.00] testimony, or did you say it was because you saw me walk out of the bar?

[00:45:10.62] **Trooper Ernstsen:** I [00:45:10.00] don't recall if I said it was routine. I don't remember.

[00:45:14.90] **Defense:** Well [00:45:15.00] why do you think [00:45:20.00] you have to do another testimony today? Why [00:45:25.00] are you doing this one? Why call you in for [00:45:30.00] a second one?

[00:45:33.46] **Judge Hruby-Mills:** Yeah. That's not him; [00:45:35.00] he probably was subpoenaed to get here today. Okay. That's that's that's [00:45:40.00] that's fine, I don't. Your motions to suppress.

[00:45:42.98] **Defense:** Absolutely. [00:45:45.00] Okay. So you said that there was a code [00:45:50.00] that you cited for running the red light.

[00:45:52.18] **Trooper Ernstsen:** Correct. Correct.

[00:45:53.94] **Defense:** Does it show that you have to have to turn [00:45:55.00] the lights on?

[00:45:56.30] **Trooper Ernstsen:** No, you're not turning. Well, [00:46:00.00] turns out the f bomb. Is that on the [00:46:05.00] video or anything like that? I just mentioned it. I was thinking if [00:46:10.00] I could find a Russian. So I'm gonna say [00:46:15.00] can I see the defendant or just me? You [00:46:20.00] just pick something and say that you can. Okay. Okay. I think I'll just do the sentence.

[00:46:24.82] **Defense:** Okay. [00:46:25.00] So then you say that the defendant braced [00:46:30.00] himself against the door when he got out?

[00:46:34.18] **Trooper Ernstsen:** Yeah.

[00:46:34.58] **Defense:** He just [00:46:35.00] he put both hands on the door, and that's absolutely [00:46:40.00] on the video. That's an indication of what can [00:46:45.00] be an indication of balance issues. But they should not get a perfect [00:46:50.00] score on the test, which is the actual balance test.

[00:46:55.89] **Trooper Ernstsen:** Well, [00:46:55.00] like I mentioned before, I could have counted raised arms above [00:47:00.00] six inches to help maintain his balance, but I felt like it was fairly borderline, so I did not count [00:47:05.00] that test or that clue.

[00:47:06.85] **Defense:** Okay, putting two hands on a door. Could [00:47:10.00] it be because you're walking into traffic and you don't want that door to swing open and hit a cyclist [00:47:15.00] or something? It's possible.

[00:47:17.61] **Trooper Ernstsen:** Pardon?

[00:47:18.45] **Defense:** The defendant is a cyclist and [00:47:20.00] he is very scared of doors and being hit by them. It's happened to him several times. So [00:47:25.00] you said that you've been trained to perform the field [00:47:30.00] sobriety tests. Particularly the horizontal gaze nystagmus test. [00:47:35.00] I'm trying to think about how fatigue could [00:47:40.00] cause a false positive horizontal [00:47:45.00] gaze nystagmus test. The menu goes over [00:47:50.00] many different types of Nice Okay. With me? I'm with you. Nice. [00:47:55.00] Resting. Nice. Whatever [00:48:00.00] the causes of that Well, all the different types of instruments can [00:48:05.00] do different things. So optokinetic nystagmus can be flashing lights. Cause [00:48:10.00] fatigue is one type of nystagmus. [00:48:15.00] I was exhausted and tired from [00:48:20.00] a year of teaching.

[00:48:22.16] **Prosecutor Dunkelman:** Objection, your honor.

[00:48:31.16] **Judge Hruby-Mills:** Any [00:48:30.00] response to the objection?

[00:48:33.52] **Defense:** No. I mean, I [00:48:35.00] assume that's what you're supposed to say.

[00:48:38.96] **Judge Hruby-Mills:** Yeah, the [00:48:40.00] objection is sustained.

[00:48:41.32] **Defense:** Okay. So. [00:48:45.00] You said that he passed four for [00:48:50.00] the Walk the line test; he got four out of the eight clues. But [00:48:55.00] he got four out of eight, right? [00:49:00.00]

[00:49:00.56] **Trooper Ernstsen:** Four. I observed four out of the eight clues possible.

[00:49:03.04] **Defense:** So what were the four clues that were not observed?
[00:49:05.00]

[00:49:06.96] **Trooper Ernstsen:** That were not observed? So [00:49:10.00] you he did not step out of the instructional [00:49:15.00] stance, did not start too soon. Did [00:49:20.00] not miss heel to toe and did not raise arms with those six inches.
[00:49:25.00]

[00:49:25.32] **Defense:** Okay. [00:49:30.00] I read an article where it was [00:49:35.00] said that, you know, some people may perform certain aspects of the task [00:49:40.00] but still blow, you know, blow the legal limit. [00:49:45.00] Is that true? Can that happen?

[00:49:47.44] **Trooper Ernstsen:** Anything is possible.

[00:49:48.52] **Defense:** Okay. So [00:49:50.00] what happened on balance test that you didn't [00:49:55.00] feel like putting down the one thing that he was positive. Positive that he showed [00:50:00.00] no clue that he showed that you didn't bother putting on the report. [Incomplete] [00:50:05.00]

[00:50:05.99] **Trooper Ernstsen:** Well, I didn't put it on there because I gave him the benefit of the doubt. Yeah. No, but just above [00:50:10.00] 60in to help maintain his balance.

[00:50:13.95] **Defense:** Okay. [00:50:15.00] Do you know that you are supposed to offer the PBT [00:50:20.00] and that you are you supposed [00:50:25.00] to give a person the right to the option to either [00:50:30.00] agree or disagree to take it? [Incomplete]

[00:50:32.95] **Trooper Ernstsen:** I don't understand your question.

[00:50:35.51] **Defense:** So [00:50:35.00] I may be wrong here, but I thought that under [00:50:40.00] section 4165 of the Utah Code [00:50:45.00] there's an implied consent section, and that when an officer who [00:50:50.00] offers a party to take the test, the the defendant must comply. [Incomplete/inaccurate]. [00:50:55.00] Because if you say no, that [00:51:00.00] would be a violation, and your license would be taken away for two years if you [00:51:05.00] refuse to take the PBT. But Mr. Golub still has his license. [00:51:10.00] The actual loss applies to the PBT too. [00:51:15.00] Okay. And from what I understand, I don't think the [00:51:20.00] defendant realized that there was an official order [00:51:25.00] like this. I do want to take the defendant on the on the camera [00:51:30.00] should say something like, I just want to go home. So I think it was a matter [00:51:35.00] of like, what do we want to do? Versus like, do you have to take off?

[00:51:39.63] **Prosecutor Dunkelman:** Objection, your [00:51:40.00] honor. Counsel is testifying to the question.

[00:51:48.54] **Judge Hruby-Mills:** Any [00:51:45.00] response to the objection?
[00:51:50.00]

[00:51:51.54] **Defense:** So all I'm trying to say is that I thought the law was... [When defense speaks there seems to be something wrong with the recording].

[00:51:54.86] **Judge Hruby-Mills:** But [00:51:55.00] that's kind of the issue right now. You're asking questions of this witness, [00:52:00.00] which you want to call yourself as a witness. You can do that at some other time.

[00:52:04.58] **Defense:** Okay. So [00:52:05.00] based on the question, based on what I said, do you think you properly offered [00:52:10.00] the witness to take the PBT?

[00:52:13.42] **Trooper Ernstsen:** Yes.

[00:52:14.06] **Defense:** Okay. Thank you. [00:52:15.00] Do you remember [00:52:20.00] what the second officer's name was?

[00:52:24.34] **Trooper Ernstsen:** Trooper Carpenter, [00:52:25.00] I believe.

[00:52:26.90] **Defense:** Did you include his name on the report or any of the other documentation? [00:52:30.00]

[00:52:30.70] **Trooper Ernstsen:** I don't believe so, no. Do you ever shut up right [00:52:35.00] before I placed you under arrest?

[00:52:38.18] **Defense:** So you don't remember him putting handcuffs [00:52:40.00] on the on the defendant? No.

[00:52:44.14] **Trooper Ernstsen:** I believe when I went [00:52:45.00] to place the defendant under arrest, he made some sudden movements [00:52:50.00] and took his headphones off. I believe that [00:52:55.00] secondary officer took those headphones. And [00:53:00.00] as I placed him under so that the second officer [00:53:05.00] put him in handcuffs, that would be that wouldn't be a big deal. So different. I [00:53:10.00] don't believe that the second officer put him under.

[00:53:13.34] **Defense:** Okay. After the [00:53:15.00] second officer we looked at the video, assisted in the arrest. [00:53:20.00] Did he do anything else? Did the secondary officer do anything else? [00:53:25.00]

[00:53:13.34] **Trooper Ernstsen:** I don't know. I [00:53:30.00] don't recall. I don't think so. I don't know.

[00:53:33.02] **Defense:** Do you remember if he searched the vehicle? [00:53:35.00]

[00:53:36.82] **Trooper Ernstsen:** I don't recall.

[00:53:38.18] **Defense:** [This is complete gibberish in the recordings... really starting to suspect the audio for the defense has something wrong with it]. A little bit of the [00:53:40.00] truck driver and I to encounter [00:53:45.00] court. So he searched the vehicle and he also I think we [00:53:50.00] have to look at the video, arrested, that kind of thing. [00:53:55.00] Like somebody held the hand and somebody put the handcuffs on. Was [00:54:00.00] the the second officer there [00:54:05.00] when you offered the defendant to take the PBT? Over [00:54:10.00] there.

[00:54:12.01] **Trooper Ernstsen:** At that time, I don't recall. [00:54:15.00]

[00:54:12.01] **Defense:** Okay. [00:54:20.00] Sorry. Thank [00:54:25.00] you. I'm [00:54:30.00] sorry. [00:54:35.00] I tried to write down some more. Okay. Sorry about that. [00:54:40.00] So. So you're a Civilian expert in administrating the [00:54:45.00] chemical drug test.

[00:54:50.09] **Trooper Ernstsen:** You're [00:54:50.00] asking me if I'm an expert?

[00:54:52.33] **Defense:** Yeah. Can you testify as an expert witness [00:54:55.00] for the defense?

[00:54:57.77] **Trooper Ernstsen:** I don't believe so.

[00:54:59.05] **Defense:** Okay. So [00:55:00.00] for what? What is the training [00:55:05.00] that you have to administer the chemical drug tests. How long does it take you [00:55:10.00] to get the certificate?

[00:55:11.85] **Trooper Ernstsen:** You want me to go over it again?

[00:55:13.89] **Defense:** I would think so. [00:55:15.00]

[00:55:16.09] **Trooper Ernstsen:** In the academy, we do some book training. [00:55:20.00] Also, like I mentioned, the wet lab, where we have [00:55:25.00] people that drink come in and we do tests that we learned about and see what it [00:55:30.00] looks like on a real person. And then we review them [00:55:35.00] again in the in-

house academy, and then we're involved [00:55:40.00] in field training. I also went through the program, the program [00:55:45.00] and the battery of tests.

[00:55:48.24] **Defense:** So how many hours do you think that was in total, including [00:55:50.00] all the ongoing training. The [00:55:55.00] initial training that you have to have, I [00:56:00.00] think that you take at the end of it, isn't it?

[00:56:04.24] **Trooper Ernstsen:** Yeah. [00:56:05.00]

[00:56:05.60] **Defense:** How many hours?

[00:56:13.36] **Trooper Ernstsen:** I [00:56:10.00] don't know.

[00:56:14.16] **Defense:** It's okay. [00:56:15.00] What about the test that you took? Do you remember what the test [00:56:20.00] consisted of? I [00:56:25.00] think for the most part, you score 80% [00:56:30.00] and they're certified.

[00:56:32.52] **Trooper Ernstsen:** I believe so.

[00:56:33.28] **Defense:** Okay. Something like that. Yeah, I think [00:56:35.00] I think that's about right. Yeah. No, it's a long time ago [What the x is this recording doing?] Can [00:56:40.00] you tell me what the name of the machine is that you used [00:56:45.00] to do? The chemical breath test?

[00:56:47.35] **Trooper Ernstsen:** Yeah, the Intoxilyzer 8000.

[00:56:50.23] **Defense:** And [00:56:50.00] during your training, or maybe your additional training, has anyone ever [00:56:55.00] had you ever discuss or learn about false positives or what could cause an unreliable [00:57:00.00] result?

[00:57:05.03] **Prosecutor Dunkelman:** Well, in [00:57:05.00] my experience in training, I've never seen it allow any basically. We [00:57:10.00] can't even proceed to get [00:57:15.00] a valid sample if there's any problems with the machine or any interference [00:57:20.00] that are introduced to the machine.

[00:57:24.51] **Defense:** Are you aware [00:57:25.00] of the fact that over 30,000 of these machines [00:57:30.00] have been discontinued due to exactly that problem? That when the [00:57:35.00] machine makes a mistake, it doesn't tell you? It just [incomplete]. Do you know that there's a whole procedure [00:57:40.00] protocol put in there that you need to follow, because it doesn't [00:57:45.00] necessarily tell you that something has gone wrong.

[00:57:50.75] **Trooper Ernstsen:** I'm [00:57:50.00] not sure.

[00:57:51.75] **Defense:** Did you know that that was a protocol that that [00:57:55.00] officers used all over the country?

[00:57:58.55] **Trooper Ernstsen:** What is the protocol?

[00:58:00.75] **Defense:** Well, [00:58:00.00] for duration, right? So if you have a duration, that's [00:58:05.00] I think is in the 100 and 40s, into [00:58:10.00] the machine. The protocol should be about 20s. [00:58:15.00] And the machine. The machine. It's not going to tell you that something's gone [00:58:20.00] awry, right? It's all about the time that it's taking. So [00:58:25.00] when it resets. But in terms of providing an accurate sample [00:58:30.00] I think that the time is about 2 to 12 seconds. So in [00:58:35.00] the end In case there is much over 100 [00:58:40.00] and 30s at 100%, where are we supposed to do [00:58:45.00] another test and restart the machine? [really need to get this right]

[00:58:21.51] **Prosecutor Dunkelman:** Objection, Your Honor.

[00:58:49.66] **Judge Hruby-Mills:** Calm down. [00:58:50.00] Question?

[00:58:51.30] **Prosecutor Dunkelman:** Defendant is testifying in the question.

[00:58:54.98] **Judge Hruby-Mills:** Wait. [00:58:55.00] What? How would you respond to the objection?

[00:58:59.22] **Defense:** Can I just make my [00:59:00.00] question simple?

[00:59:01.74] **Judge Hruby-Mills:** Yes. You need to take the objection.

[00:59:04.62] **Defense:** Okay. [00:59:05.00] Okay. Yeah. Sorry. Okay. Do you know that the protocol is to [00:59:10.00] have a test. Is it 12, 20s long?

[00:59:17.46] **Trooper Ernstsen:** It [00:59:15.00] should take only a few seconds, but the defendant would [00:59:20.00] not properly blow into the machine, so we had to make several attempts.

[00:59:27.02] **Defense:** Another [00:59:25.00] attempt?

[00:59:27.90] **Trooper Ernstsen:** No.

[00:59:28.86] **Defense:** Okay. And [00:59:30.00] the second issue is [...] [00:59:35.00] Is it possible that one could [00:59:40.00] create a false positive?

[00:59:42.90] **Trooper Ernstsen:** Not to my knowledge, no. So [00:59:45.00] the defendant would blow into the machine and not blow out there, for example. And [00:59:50.00] we did that over and over and over again. So I assume that's what you're speaking to the 100 [00:59:55.00] and 40s of the test. Well, the actual time that you blew [01:00:00.00] in when you provided, when the defendant provided a valid sample was not 100 and 40s. Not even [01:00:05.00] close.

[01:00:05.94] **Defense:** Okay. Well, you should definitely look at that. I think that's very, very helpful. [01:00:10.00] [...] What else? I'm [01:00:20.00] finished my honor.

[01:00:23.82] **Judge Hruby-Mills:** Okay. Anything further from the [01:00:25.00] state?

[01:00:26.06] **Defense:** No.

[01:00:28.06] **Judge Hruby-Mills:** All right. Thank you for your testimony. You can step down. [01:00:30.00] Did you have any [01:00:35.00] further witnesses or did you anticipate calling any witnesses?

[01:00:43.33] **Defense:** So [01:00:40.00] I would have liked to call [01:00:45.00] 1 or 2. I didn't know that we were calling them this early. I [01:00:50.00] can do it at a later time. Or should I just... what should I do now? [01:00:55.00] Because I don't have anyone, I can't. I'm not going to call an expert witness [01:01:00.00] about the machine. And also the person that I [01:01:05.00] went and met at the establishment was working there that day, [01:01:10.00] and I don't even know if it's going to have her support. [01:01:15.00] My argument that I was there for, you [01:01:20.00] know, to, to to do something other than visit the establishment for the procurement [01:01:25.00] of alcohol.

[01:01:26.69] **Judge Hruby-Mills:** Yeah. Yeah. But [01:01:30.00] do you, do you want to show the video does not have any more. [???] [01:01:35.00]

[01:01:35.89] **Defense:** Oh, how should... How should I pursue the evidence [01:01:40.00] that I have throughout my motions? I keep finding [01:01:45.00] different videos and different times, and I could make a compilation of just those [01:01:50.00] things.

[01:01:51.05] **Judge Hruby-Mills:** If that's easier to do and do that. I [01:01:55.00] can have them sent to whoever we were set today [01:02:00.00] for the evidentiary hearing. Do you have your do [01:02:05.00] you want to put your portions of the video? Do you want to?

[01:02:09.13] **Defense:** Yeah. I [01:02:10.00] think I was a little confused about what was going to happen today. I figured [01:02:15.00] that we were going to review the motions, and then we would [01:02:20.00] decide which parts could stand, and then I would provide, [01:02:25.00] if necessary... I would provide evidence for certain parts [01:02:30.00] of it, But I don't think that I would have to do that today. I [01:02:35.00] thought I would just, like, go through the motion and see which parts you [01:02:40.00] know, you guys support.

[01:02:45.00] **Judge Hruby-Mills:** I [01:02:45.00] go to, you know, and I do research on your motions. You. [01:02:50.00] I think I asked you about narrowing down your topics, and you [01:02:55.00] file some additional narrowed down, more narrow down topics. And so today, we were set [01:03:00.00] for the evidentiary hearing on the motion to

suppress. And the state subpoenaed its witness. Okay. With [01:03:05.00] that, and you could have subpoenaed witnesses if you didn't. [01:03:10.00] But do you wish to rely on the body [01:03:15.00] cam?

[01:03:16.64] **Defense:** Yes. There's that video. There's [01:03:20.00] not just the body cam but the dash cam is pretty important because the [01:03:25.00] dash cam is it supports that there was no violations.

[01:03:31.63] **Judge Hruby-Mills:** Okay. [01:03:30.00] So did you want to ask the witness [01:03:35.00] about that or not? I'm [01:03:40.00] not aware of that. I haven't seen any camera or video come up on my screen. [01:03:45.00]

[01:03:45.47] **Defense:** Yeah. So, yeah. No, I mean, yeah, maybe I got sidetracked because [01:03:50.00] the first thing was that which I know is typically legal. [01:03:55.00] I went first on the prior testimony. I don't know what is legal, [01:04:00.00] but in terms of the defense of the officer from [01:04:05.00] the defendant in his car and what you see on the dash cam, you can't [01:04:10.00] see.

[01:04:11.87] **Judge Hruby-Mills:** I know you're arguing. Yeah. Yeah, that's that's correct. Yeah. [01:04:15.00] So I don't are you did you have more questions for that?

[01:04:18.31] **Defense:** I don't have any more questions. [01:04:20.00]

[01:04:22.27] **Judge Hruby-Mills:** Okay. Are you submitting them [01:04:25.00] or did you. Can I submit these two motions? And resubmit [01:04:30.00] them. And that's done. Okay. The motion. Motion. You filed [01:04:35.00] these two motions?

[01:04:36.23] **Defense:** Yeah.

[01:04:36.79] **Judge Hruby-Mills:** And that's what we're here on today. Okay. So the state had [01:04:40.00] an obligation to bring it to witness, to refute what you've [01:04:45.00] alleged to be unconstitutional.

[01:04:48.39] **Defense:** Yes.

[01:04:50.23] **Judge Hruby-Mills:** So [01:04:50.00] do you have any other evidence that you wanted to present?

[01:04:55.23] **Defense:** I [01:04:55.00] don't want to waste any time. But do I need to submit the evidence that the [01:05:00.00] state provided me or that I would have to leave? It's not [01:05:05.00] something that I have. Can I submit that later today?

[01:05:10.00] All of the [01:05:15.00] video... There's like eight hours of video. No, just [01:05:20.00] just just the parts that I'm citing in my in my motion.

[01:05:23.67] **Judge Hruby-Mills:** Well, there's quite a bit of [01:05:25.00] additions in the motion, so I would probably want something more specific.

[01:05:29.90] **Defense:** I [01:05:30.00] can strip it down to ten minutes or less whatever time you think [01:05:35.00] is appropriate. I can cut it to that.

[01:05:38.02] **Judge Hruby-Mills:** So your approach would be to put [01:05:40.00] on a flash drive, just the portions of it, and upload it to the stream [01:05:45.00] so that you can apply it. Can you can you attach video to the [01:05:50.00] file a motion? No, I don't have access.

[01:05:53.02] **Defense:** Okay. Yes, I will put it on [01:05:55.00] a flash drive and take it wherever I need to take it.

[01:05:58.70] **Judge Hruby-Mills:** Give me a compliment if [01:06:00.00] she puts that on a flash drive. The portions that he [01:06:05.00] wants the court to look at and gets it to you. Do you have any objection to that?

[01:06:10.50] **Prosecutor Dunkelman:** Your [01:06:10.00] honor, the state does have an objection. There's not a witness for which he's calling to bring [01:06:15.00] these videos in. And so I just don't think it's [01:06:20.00] properly admitted to the court to view.

[01:06:26.58] **Defense:** Well, [01:06:25.00] I mean, I can defend [01:06:30.00] myself because they share with the political statements that I made.

[01:06:33.62] **Judge Hruby-Mills:** One more time, though, do you think [01:06:35.00] you have additional questions for that fire?

[01:06:37.90] **Defense:** I don't know.

[01:06:39.62] **Judge Hruby-Mills:** You don't want [01:06:40.00] to ask him about the things that you see are in the video?

[01:06:45.34] **Defense:** Well, [01:06:45.00] I mean, I could I, I don't want to waste people's time. [01:06:50.00] Is that the proper procedure I should ask him about?

[01:06:53.70] **Judge Hruby-Mills:** No. I [01:06:55.00] think the state is saying there's [01:07:00.00] no underlying foundation for the the collage of [01:07:05.00] videos that that it sounds like you want to present. I know you've referenced things in your in your motion. [01:07:10.00] Yeah. But oftentimes it will be the witness will be up here.

[01:07:13.94] **Defense:** So I'm familiar with the [01:07:15.00] case or so I did ask about the 100 and 40s [01:07:20.00] right. And I did ask about the second officer [01:07:25.00] searching the car during the arrest.

[01:07:27.57] **Judge Hruby-Mills:** It's not in the report. But, [01:07:30.00] yeah, there's a there's a lot of there's a lot in there. [01:07:35.00] Those questions really don't have anything to do with your proposed [01:07:40.00] video.

[01:07:42.29] **Judge Hruby-Mills:** Well, I know that on the video, but [01:07:45.00] if the if the task takes 100 and 40s [01:07:50.00] and if that's considered expert witnesses to be too long, [01:07:55.00] but it needs to be. We need to do another test. The video showed that it took 100 [01:08:00.00] and 40s.

[01:08:02.65] **Defense:** And that's what you say. I'm not aware of that. The [01:08:05.00] video on that. I don't know if there's a video on that. I know that we have expert testimony regarding [01:08:10.00] that issue. So there's a there's a number of concerns [01:08:15.00] that you have that may or may not part appropriately, part of what you filed [01:08:20.00] for today. [Unclear]

[01:08:21.09] **Judge Hruby-Mills:** Okay. But but for the [01:08:25.00] issues you've raised in your motion to suppress the motion to dismiss related to the motion to suppress [01:08:30.00] is there anything else that you think I should know before [01:08:35.00] it's submitted?

[01:08:41.09] **Defense:** I [01:08:40.00] don't want to waste people's time. I'm not really sure. You know, [01:08:45.00] I would like to submit this. I would like to submit it. I assume all of it. [01:08:50.00]

[01:08:50.29] **Judge Hruby-Mills:** You know I think what makes sense is that [01:08:55.00] you you want to use portions of various things. You're saying if you get it [01:09:00.00] down to ten minutes.

[01:09:01.01] **Defense:** Yeah.

[01:09:01.45] **Judge Hruby-Mills:** But so, for example, you want 30s of the dash [01:09:05.00] from the very beginning.

[01:09:08.73] **Defense:** Yeah. That would be the dash cam. [01:09:10.00]

[01:09:12.77] **Judge Hruby-Mills:** Will you have any objection for [01:09:15.00] Mr. Golub to put together the portions of the video that would [01:09:20.00] line up with what he has referenced in his motion. And just so we're all clear. [01:09:25.00] I think there's citations to videos [01:09:30.00] of several of the documents. Right?

[01:09:33.04] **Defense:** Yeah. So that's right. I just want to show the stuff [01:09:35.00] I cited as short as possible.

[01:09:39.24] **Prosecutor Dunkelman:** Objection, Your [01:09:40.00] Honor, the state is objecting on the foundation for these videos to come [01:09:45.00] in or his foundation for videos to come in. He [01:09:50.00] is not calling for those videos to come in on [01:09:55.00] those terms. That will create a little bit of a procedural problem, [01:10:00.00] because these motions are very lengthy and include numerous, numerous [01:10:05.00] different portions of the video. And so [01:10:10.00] and so he

has no idea even [01:10:15.00] what is being reported or asked. And really no ability to [01:10:20.00] cross-examine on these things.

[01:10:21.52] **Judge Hruby-Mills:** And so I was just [01:10:25.00] going to ask, do you have any other [01:10:30.00] questions for the witness?

[01:10:32.96] **Prosecutor Dunkelman:** I don't know, sorry.

[01:10:34.76] **Judge Hruby-Mills:** Okay. [01:10:35.00] So with that does the state anticipate filing a [01:10:40.00] written response to the motion at this time?

[01:10:44.08] **Prosecutor Dunkelman:** The state is comfortable [01:10:45.00] proceeding with arguments today based on the issue itself.

[01:10:49.84] **Judge Hruby-Mills:** Okay. [01:10:50.00] All right. And so I am not going to allow the the video to come in [01:10:55.00] after the motion. Okay. I tried to see about [01:11:00.00] you laying the foundation for that. You want to get into the witness, but you don't want to call [01:11:05.00] anyone else. So we're going to take a brief recess and try to call some of the other matters that are pending, and [01:11:10.00] then we will have summary arguments on the motion. Okay. [01:11:15.00] And so I guess Mr. Golub and Miss Dunkelman, do you have some matters that you're ready on?