2016

Elizabeth Victoria Cook, Defendant and Appellant, v. State of Utah, Plaintiff and Appellee.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ELIZABETH VICTORIA COOK, Defendant and Appellant, v. **STATE OF UTAH,** Plaintiff and Appellee.	Case No. 20150847-CA

BRIEF OF APPELLANT

ON APPEAL TO THE UTAH COURT OF APPEALS
FROM A JUDGMENT ENTERED BY
THE FIFTH DISTRICT JUDICIAL COURT,
IN AND FOR IRON COUNTY, STATE OF UTAH

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ORAL ARGUMENTS/PUBLISHED OPINION REQUESTED

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JURISDICTION

UTAH CODE ANN. §78A-4-103(2)(e) and UT. R. APP. P. 3 provide this Court with jurisdiction over this appeal from the *Judgment, Sentence and Commitment,* dated October 6, 2015, (the "**Judgment**") by the Honorable Keith C. Barnes of the Fifth District Court, in and for Iron County, State of Utah. A copy of the Judgment is attached hereto as Addendum "A" and incorporated herein by this reference.

STATEMENT OF ISSUES PRESENTED ON APPEAL, PRESERVATION, AND STANDARD OF REVIEW

ISSUE I: *Did the trial court properly find and conclude that Cook exhibited actual physical control of the four-wheeler while riding as a passenger and while intoxicated to support a conviction for DUI?*

PRESERVATION: Cook's defense at trial was that her 10-year-old daughter was the one driving the four-wheeler and that she had not exhibited any control over such vehicle while riding on it as a passenger. R0123-1048. The court found that Cook had control in three (3) ways: (1) by maneuvering the handlebars (from the officer's brief

observation as the vehicle was coming to a stop); (2) by giving commands to her daughter as to how to drive it; and (3) by helping her daughter turn the vehicle by placing her hands on her daughter's shoulders to guide her how to steer it.

STANDARD OF APPELLATE REVIEW (UT. R. APP. P. 9(c)(7)(B)): "Ultimate factual determinations such as this are limited by legal principles that guide a trial court in its fact finding function." *State v. Barnhart*, 850 P.2d 473, 475 (Utah App. 1993); *see State v. Thurman,* 846 P.2d 1256, 1268-1272 (Utah 1993). "These legal guidelines create a field of inquiry within which the trial court can make its ultimate factual findings." *Id., citing State v. Richardson,* 843 P.2d 517, 521-22 (Utah App. 1992)(Bench, P.J., concurring). "Whether or not a trial court operated within the proper field of inquiry is a determination we make using a correction-of-error standard of review." *Id., see Thurman* at 1271-1272; *Richardson* at 522 (Bench, P.J., concurring). "We do not, however, apply the correction-of-error standard to every aspect of a trial court's finding of ultimate fact." *Id.* at 476. "The correction-of-error standard is intended to allow us to review and correct the trial court's determination of 'the legal content' of an ultimate finding." *Id., citing Thurman* at 1271-1272. "We defer, on the other hand, to the trial court's findings of underlying facts." *Id., citing Thurman* at 1271-1272. "Consequently, we defer to a trial court's judgment of a debatable issue made within the trial court's proper realm of factual inquiry, such as a finding based on the totality of the circumstances." *Id.* "Absent a violation of legal guidelines, a trial court's finding of ultimate fact remains on the same level as any other underlying factual finding, and we defer." *Id. see Lopez v. Schwendiman,* 720 P.2d 778, 780 (defer to trial court's finding of actual physical

control unless trial court misapplied the law or the finding was clearly against the weight of the evidence); *Garcia v. Schewendiman,* 645 P.2d 651, 653 (Utah 1982) (same).

ISSUE II: *Did the trial court err in finding that the officer had properly conducted the Baker test given that no information as to synchronization of differing timing devices was presented to ensure the mandated 15 minute time frame had been undertaken?*

PRESERVATION: Cook objected during the trial on a foundation basis when the officer was unable to verify the synchronization of the two (2) different timing devices utilized in administering the *Baker* test on Cook. R108.

STANDARD OF APPELLATE REVIEW (UT. R. APP. P. 9(c)(7)(B)): A trial court's determination as to admissibility based on foundation or lack thereof will not be overturned "unless there is a showing of an abuse of discretion." *State v. Relyea,* 2012 UT App ¶ 16, 288 P.3d 278, *citing Vialpando* at ¶ 13 (internal quotation marks omitted).

ISSUE III: *Was Cook's trial counsel ineffective for failing to follow-through on the suppression motion filed with regard to unreasonable detainment for investigative purposes?*

PRESERVATION: "We have previously stated that two conditions should be met before we will treat the merits of a claim of ineffective assistance of counsel on direct appeal. In *State v. Humphries,* we stated that 'ineffective assistance of counsel should be raised on appeal if [1] the trial record is adequate to permit decision of the issue and [2] defendant is represented by counsel other than trial counsel." *State v. Litherland,* 2000 UT App 76, ¶ 9, 12 P.3d 92 *citing Humphries,* 818 P.2d 1027, 1029 (Utah 1991); *see also State v. Hovater,* 914 P.2d 37, 40 (Utah 1996).

STANDARD OF APPELLATE REVIEW (UT. R. APP. P. 9(c)(7)(B)): 'With respect to any ineffectiveness claim, a defendant must first demonstrate that counsel's

performance was deficient, in that it fell below an objective standard of reasonable professional judgment...Second, the defendant must show that counsel's deficient performance was prejudicial – i.e., that it affected the outcome of the case." *Litherland* at ¶ 19, *citing Strickland v. Washington,* 466 U.S. 668, 687 -88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (additional citations omitted).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. U.S. CONST. AMEND. VI states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

B. UTAH CODE ANN. §41-6a-502 (1) states the following:

> A person may not operate or be in actual physical control of a vehicle within this state if the person:
> (a) has sufficient alcohol in the person's body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
> (b) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or
> (c) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

C. UTAH CODE ANN. §41-22-2(11)(b) states that a "motor vehicle" includes an off-highway vehicle.

D. UTAH CODE ANN. §41-22-2(15) states that "operator" means a person who is in actual physical control of an off-highway vehicle.

E. UT. R. CRIM. P. 12(d) states that a motion to suppress evidence shall:

> (1) describe the evidence sought to be suppressed;

(2) set forth the standing of the movant to make the application; and
(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

F. UT R. EVID. 104(b): Relevance that depends on a fact. When the relevance of evidence depends on whether a fact exits, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

G. UT. R. EVID. 401: Test for Relevant Evidence. Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

H. UT. R. EVID. 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons. The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

STATEMENT OF CASE

On January 3, 2015, Iron County Sheriff Deputy A. Burton ("**Burton**") cited and summoned Cook with a DUI *Summons and Citation* for the offenses of Driving Under the Influence of Alcohol and/or Drugs with Passengers Under Sixteen Years of Age, a class A misdemeanor; and Open Container in a Vehicle, a class C misdemeanor. R005. On January 9, 2015, the State filed an *Information* charging Cook with Driving Under the Influence of Alcohol and/or Drugs, a class A Misdemeanor; and Open Container in a Vehicle a class C Misdemeanor. R007-8.

On January 20, 2015, Cook was before the trial court for an initial appearance. R015. Cook waived the reading of the *Information. Id.* Cook indicated that she planned to hire private counsel and did not want to enter a plea. *Id.* The trial court entered non-guilty pleas

onto the record so that the case would proceed through the system. *Id.* On March 25, 2015, Cook's *Affidavit of Indigency* was filed with the trial court. R025. The trial court found Cook to be indigent and appointed Jack Burns ("**Burns**") to represent her. R0030.

On March 31, 2015, a status conference was held. R042. During the hearing, Burns requested that the jury trial scheduled for April 8, 2015, be continued because he had just been appointed to represent Cook. *Id.* The State did not object to the continuance. *Id.* The trial court granted Burn's motion to continue the jury trial. *Id.*

On July 15, 2015, Cook was before the trial court for a preliminary hearing. After the presentation of evidence and testimony, the trial court found that there was sufficient evidence to proceed towards trial. R054. Cook was bound-over on Driving Under the Influence of Alcohol and/or Drugs, a class A misdemeanor. *Id.* The trial court dismissed the Open Container charge. *Id.* Cook waived the reading of the *Information* and entered a not-guilty plea. *Id.*

On July 16, 2015, Burns filed a *Motion to Suppress* (the "**Motion**"). R060. The Motion requested the trial court suppress any and all evidence obtained via a police search of the personal property of Cook, all statements that Cook made to police and/or other state agents, and results of tests conducted on any alleged evidence seized from Cook. *Id.* The Motion indicated that Cook had standing to move for the suppression of the above-referenced items/evidence because the search was conducted on her person. *Id.* The Motion stated that Cook had been seized and transported to the Iron County Jail (the "**Jail**") without probable cause. *Id.* The Motion requested that evidence obtained subsequent to the seizure be suppressed. *Id.*

Cook's bench trial occurred on September 17, 2015. R066-7. After the trial court received witness testimony and evidence, Cook was found guilty of the offense of Driving Under the Influence of Alcohol and/or Drugs, a class A misdemeanor. *Id.*

On October 6, 2015, Cook was sentenced and the Judgment was entered. R069. The Judgment indicated that Cook was sentenced to serve a term of three hundred sixty-four (364) days in the Iron County Jail for the offense of Driving Under the Influence of Alcohol/Drugs, a class A misdemeanor. R070. The trial court suspended three hundred sixty-two (362) days of the imposed sentence. *Id.* Cook was ordered to pay a fine in the amount of one thousand five hundred dollars ($1500), with a fifty dollar ($50) payment being made on the first of each month beginning on December 1, 2015. *Id.*

Also on October 6, 2015, the Judgment, Sentence and Probation Order (the "**Probation Order**") was entered. R072. The Probation Order indicated that Cook was placed on probation for a period of twenty-four (24) months with probation to be supervised through Private Probation. *Id.* Cook was ordered to sign-up for Private Probation within forty-eight (48) hours. *Id.* She was ordered to serve two (2) days in Jail beginning on October 9, 2015. *Id.* Cook was ordered to pay a one thousand five hundred dollar ($1500) dollar fine, including a 90% surcharge and a court security fee in the amount of forty-three dollars ($43). *Id.* She was ordered to reimburse Iron County for her court-appointed attorney in the amount of one hundred dollars ($100) and ordered to obey all laws and commit no further violations of law. *Id.* Cook was ordered to obtain an alcohol/drug assessment evaluation, which was to be filed with the trial court on or before December 1, 2015. R072. She was also ordered to not possess or consume alcoholic beverages, sign a

consent-to-release treatment form to be accessed by authorized individuals, submit to warrantless searches of her person and/or property, submit a DNA sample and pay the required fee, and keep the trial court informed of any change in address. *Id.*

Counsel herein entered his *Notice of Appearance – Appellate Matter* on October 13, 2015. R076. On October 13, 2015, the jail sent a letter to the trial court. R078. The letter indicated that Cook failed to appear for her two (2) day commitment as was so ordered in the Probation Order. *Id.* An *Amended Commitment Order* was filed with the trial court on October 15, 2015, commanding the Iron County Sheriff to take Cook and deliver her to the Jail on October 16, 2015, to serve her two (2) day commitment. R085. Offender Management Solutions ("**OMS**"), a private probation provider company, emailed an *Activation Report* to the trial court on October 16, 2015, which indicated that Cook entered into an agreement with OMS for her probation supervision. R089.

On October 22, 2015, Southwest Behavioral Health Center counselor Rylee Munn, submitted a letter to the trial court which indicated that Cook participated in a Drug and Alcohol Evaluation at the Horizon House on October 20, 2015. R091. The letter stated that, "based on the results of the Evaluation, [Cook] appeared to score in a fashion similar to someone who [was] chemically dependent." *Id.* Munn recommended that Cook attend and complete day treatment at the Horizon House. *Id.*

On December 3, 2015, Southwest Behavioral Health Center filed a letter with the trial court. R174. The letter stated that, on November 11, 2015, Cook entered into residential treatment at the Horizon House. *Id.* Cook's treatment was estimated to last for approximately ninety (90) days. *Id.*

STATEMENT OF FACTS

A. Bench Trial – September 17, 2015

On September 17, 2015, the matter came for a bench trial. R095. The State passed on giving an opening statement. *Id.* Burns reserved the giving of his opening statement. R096. Burns pointed out that an error had occurred on the court calendar. *Id.* Burns stated that the court calendar showed two (2) pending charges for Cook; however, count two (2) had been dismissed at the preliminary hearing. *Id.* The State understood as well that count two (2) had been dismissed. *Id.* The trial proceeded only on count one (1). *Id.* The State presented their case by calling their first witness. *Id.*

1. Direct-Examination of Burton

Burton was a fully certified Category I Peace Officer employed with the Iron County Sheriff's Office for the past nine (9) years as a patrol supervisor and canine handler. R097. Burton was POST certified in field-sobriety tests and Intoxilyzer certification. *Id.* He was also ARIDE certified, meaning Advanced Roadside Impairment Enforcement. *Id.* Burton estimated that he had been involved in approximately seventy-five (75) to one hundred (100) DUI investigations *Id.*

On January 3, 2015, Burton was responding to another matter when he allegedly observed Cook on a four-wheeler coming towards him at a high rate of speed. R098. Burton stopped his vehicle and the four-wheeler slid to a stop. *Id.* The roads were covered with snow. *Id.* Burton made contact with the four-wheeler which consisted of three passengers to wit: J.C. in the front, Cook in the middle and James Himmel ("**Himmel**") on the back. *Id.* When asked if he noticed or saw who had been steering the four-wheeler,

Burton testified that "Elizabeth Cook had her hand on the handlebars when I made initial contact..." R099. Cook was also holding a beer can. *Id.* Burton allegedly never observed J.C. operating the four-wheeler. R101. Burton identified that Himmel was only eighteen (18) years old. *Id.* Himmel admitted to Burton that he had a cap of hard alcohol at his mother's home. *Id.* Burton could smell an odor of alcohol on Cook, she was belligerent, had slurred speech and bloodshot eyes. *Id.* and R102. Cook admitted to Burton that she had drank a little bit that day and that it had been her daughter, J.C., who was driving the four-wheeler not her. *Id.* Burton located the beer can he observed Cook holding on the ground near her feet. *Id.* Burton also found a second beer can in the pocket of Cook's coat. *Id.* Burton cited Himmel for under-age consumption and transported Cook to Jail. *Id.*

While at the Jail, Burton conducted the Standardized Field-Sobriety Tests ("**FSTs**") on Cook. R103. Burton explained that FSTs are standardized tests that show the level of alcohol and/or impairment that may be on a person or in their blood. *Id.* FSTs consisted of horizontal gaze nystagmus, the walk-and-turn, and the one-legged stand. *Id.* The first FST Burton had Cook perform was the horizontal gaze nystagmus. R104. He observed six (6) out of six (6) clues. *Id.* Secondly, Burton had Cook perform the walk-and-turn. *Id.* He observed six (6) out of eight (8) clues. R105. Lastly, Burton performed the one-legged stand on Cook. *Id.* He observed three (3) out of six (6) clues. *Id.* No portable breath test was conducted upon Cook. R106. Burton gave Cook a breath-alcohol concentration ("**BAC**") test using the Intoxilyzer ("**Intoxilyzer**") Machine 8000. *Id.* Burton had previously received training on how to operate the Intxoilyzer. *Id.* The Intoxilyzer had been calibrated before

and after Cook's BAC. *Id.* Burton identified State's Exhibit I as the calibration certificates for the Intoxilyzer. *Id.*

Burton observed *Baker* on Cook. R107. Burton explained that *Baker* tested for "mouth alcohol." *Id.* In order to observe *Baker,* you have the person open their mouth and lift up their tongue. *Id.* and R108. The purpose of *Baker* is to ensure that nothing was in the person's mouth and that no regurgitation or belching occurred prior to BAC testing. *Id.* After observing *Baker,* Burton received consent from Cook to conduct the BAC. *Id.*

Burns raised an objection on the basis of foundation arguing that not all of the *Baker* element requirements had been met through the State's line of questioning. *Id.* Burns also argued in his objection that no questions had been asked whether Burton was certified to use the Intoxilyzer. *Id.* Burns objection was sustained. *Id.*

Burton was certified to use the Intoxilyzer. *Id.* Burton observed *Baker* at 14:34. R109. *Baker* is observed for fifteen (15) minutes. *Id.* Burton did not observe Cook to have any regurgitation, belching nor eat or drink anything during the fifteen (15) minute period of observation. *Id.* Burton observed *Baker* at 14:34 and gave the BAC test at 14:51. R110. Mr. Burns requested and was allowed to ask Burton a few questions on voir dire towards foundation. *Id.*

2. <u>Voir Dire Examination of Burton</u>

Burton verified that he recorded the time of 14:34. *Id.* Burton "probably used his cell phone" to note the time of *Baker* but could not recall if that is what he had done. Burton stated that he normally used his cell phone to note the time. R111. Burton administered the BAC test on Cook at 14:51 and he pulled that time off of the Intoxilyzer

receipt. *Id.* Burton did not enter the time of 14:51 into the Intoxilyzer; the Intoxilyzer entered the time. *Id.*

Burns objected to the admission of the BAC results because two (2) separate time pieces were used and no testimony was offered as to whether the two (2) separate times pieces were synchronized. R112. Burns also objected that no testimony was offered regarding the specific amount of time that elapsed between the time recorded and the time of *Baker*. *Id.* Burns argued that *Baker* is a foundational issue in order for evidence to be admissible. *Id.* Burns argued that the fifteen (15) minute time requirement on *Baker* is a strict compliance admissibility issue and that it is part of the foundational requirement in order for the BAC test results to be offered as evidence. R113.

The State argued that Burns should have brought up this issue as to the admissibility of the BAC being submitted as evidence prior to trial. *Id.* The trial court indicated that a Motion was filed by Burns on July 16, 2015; however the Motion was vague and did not provide details of what it contained. *Id.* Burns stated "obviously he had not followed through with the Motion." R114.

Burns indicated that during suppression hearing, he would address any issues there may be with *Baker*. *Id.* The trial court asked for a case to guide them on the factual determination on whether or not the fifteen (15) minutes as set forth under the *Baker* standard was actually met and whether *Baker* was a weight or admissibility issue. *Id.* Burns indicated that *State v. Ramirez* is Utah's *Baker* case. *Id.* The trial court indicated that the remainder of the evidence would be heard first and the Burns would brief the *Ramirez* case. *Id.*

The trial court allowed Burton to finish answering the questions because evidence was offered to show that the fifteen (15) minute requirement had been met, because of two (2) electronic devices that gave a two (2) minute cushion. R115. The court indicated that seventeen (17) minutes on competing devices did meet the fifteen (15) minute *Baker* requirement. R116. The trial court allowed Burns to continue with his voir dire questioning. *Id.* Burton did not use his cell phone to time the fifteen (15) minutes when he observed *Baker*. *Id.* Burton explained that the officer physically entered the time from his cell phone in the Intoxilyzer. *Id.* The Intoxilyzer then counted down the fifteen (15) minutes from the time that was manually entered in. *Id.* As soon as the *Baker* test was finished, the Intoxilyzer went through air blank and the diagnostic testing, which resulted in the gap of time. R117. Burton explained that the results did not show that he gave the BAC test at 14:51 and that *Baker* was also observed at 14:51. *Id.* To clarify what he meant, Burton stated that "I typed it in and then observed Baker for fifteen (15) minutes on the machine, so the machine did the fifteen (15) minute timing thing." *Id.* Burton further explained that the Intoxilyzer requested certain information such as: driver license number; name; officer name; case number; and time observed, where he types in the time manually. *Id.* After the information was manually entered, the officer would "press start" to begin the *Baker* fifteen (15) minute countdown. *Id.* . Burton assumed that the Intoxilyzer had its own time set, but did not know for sure. R118. Burton stated that he was unsure where the Intoxilyzer pulled its time from because the Intoxilyzer was not plugged into an outside source such as the internet or a telephone line. *Id.*

3. <u>Continuation of Direct-Examination of Burton</u>

Burton gave the BAC to Cook; which indicated a BAC of 0.119 grams. R119. Burton told Cook the results of her BAC, placed her into a holding cell and filled out a probable cause statement to support her being booked into jail. R120.

4. Cross-Examination of Burton

Burton separated J.C., Cook and Himmel to speak with them individually. *Id.* When Burton questioned Cook, there was an issue as to whether she was the one operating the four-wheeler. *Id.* Burton did not talk with J.C. or Himmel as to who had been operating the four-wheeler. R121. At the conclusion of Burns direct examination of Burton, the State rested. *Id.* Burns called Cook as the first witness for the defense. *Id.*

5. Direct-Examination of Cook

On January 3, 2015, Cook was at a cabin that belonged to family friends. R123. Also on that date, Cook and J.C. were on a four-wheeler; with J.C. sitting in front driving the four-wheeler. *Id.* Cook did not operate the four-wheeler. R124. Cook put her hands on the handlebars when they stopped quickly as a way to protect J.C. *Id.* Cook did not operate the accelerator, the brakes, and the clutch nor steer the four-wheeler. *Id.* Cook was a passenger while J.C. operated the four-wheeler. *Id.*

6. Cross-Examination of Cook

Cook was at the cabin on a family outing. R128. It was not snowing. *Id.* It had snowed days prior. R129. It was a sunny day, however Cook and J.C. both were wearing coats and gloves. *Id.* Cook did not know brands and sizes of four-wheelers, but the four-wheeler they had been on was big enough for three people. *Id.* Cook and her family had been to the cabin owned by the Himmels several times prior to the date in question. R130.

Cook had operated the four-wheeler before. *Id.* At the time of this family outing, J.C. was ten (10) years old. *Id.* J.C. had also been on the four-wheeler before and had received training on how to operate four-wheelers. *Id.* When the four-wheeler slid to a stop, Cook was concerned for J.C.'s safety so she reached forward and placed her hands in the middle of the handlebars in front of J.C. as a way to protect her. R131. The only time Cook had her hands on the handlebars was when she was protecting J.C. R132. Cook never operated the four-wheeler. *Id.* Cook and her husband gave J.C. training on how to properly stop and operate four-wheeler, as well as how many riders can safely be on the four-wheeler at one time. R133.

7. <u>Direct-Examination of J.C.</u>

J.C. was operating the four-wheeler when they were stopped by the officer. R136. J.C. was in the front, Cook in the middle and Himmel on the back of the four-wheeler. R137. When J.C. first got onto the four-wheeler, she was sitting in the middle so that Himmel could start it. *Id.* and R138. Once the four-wheeler was started, J.C. moved into the front position and drove. R138. J.C. stated that Cook protected her from almost crashing but otherwise just directed by saying 'turn this way' and held J.C.'s shoulders. *Id.* J.C. was using the accelerator. *Id.* J.C. does not recall Cook ever operating the four-wheeler. *Id.*

8. <u>Cross-Examination of J.C.</u>

Himmel taught J.C. how to ride the four-wheeler. R140. J.C. had only ridden on a four-wheeler a few times prior to January 3, 2015. *Id.* The four-wheeler was large enough for three (3) people. *Id.* Cook told J.C. which way to turn and how to stop the four-wheeler. R141. The only time J.C. felt scared while driving the four-wheeler was when she almost

swerved off the road to stop for the Officer. *Id.* J.C. felt in control of the four-wheeler. R142. Cook held J.C.'s shoulders and told her to "be careful." *Id.* J.C. does not recall Cook ever placing her hands on the handlebars of the four-wheeler. R143. Cook only placed her hands on J.C. shoulders and said: "hurry up and push the brakes or we're going to crash." *Id.*

9. Direct-Examination of Himmel

Himmel knew Cook. R145. Himmel recalled interacting with the officer on January 3, 2015. R146. Himmel was on the back of the four-wheeler. R147. Himmel helped to stop the four-wheeler by placing his foot on the foot brake. *Id.* Himmel's position was passenger. R148. Himmel never observed Cook operating the four-wheeler. *Id.*

At the conclusion of Himmel's testimony, Burns rested. *Id.* The State called Burton as a rebuttal witness. *Id.*

10. Direct-Examination of Rebuttal Witness Burton

Burton had previous interaction with four-wheelers. R149. He recognized that Cook was on an Arctic Cat 500, which was a large four-wheeler. *Id.*

11. Closing Arguments

At the conclusion of testimony and evidence, the trial court heard arguments from the State and Burns. R150. The State argued that they had met the burden of proving the elements for Driving Under the Influence of Alcohol and/or Drugs with a Minor. *Id.* The State believed it had shown through evidence and testimony that Cook was in control and operating the four-wheeler. *Id.* The State argued against the defense theory that J.C. was operating the four-wheeler simply because J.C. could not start the four-wheeler on her own.

Id. Burton observed Cook with her hands on the handlebars. *Id.* Cook's BAC results indicated that she was above the legal limit and that J.C. was on the four-wheeler with her. R151. The State requested that the trial count convict Cook of Driving Under the Influence of Alcohol and/or Drugs with a Minor. *Id.*

Burns argued that a passenger on a vehicle could not constitute actual physical control over that vehicle. R152. Burns argued that all the evidence before the trial court proved that J.C. was operating the four-wheeler, not Cook. R153. Burns argued that the State had not met its burden beyond a reasonable doubt. *Id.* Burns requested the trial court acquit Cook on the charge of Driving Under the Influence of Alcohol and/or Drugs with a Minor. *Id.*

During rebuttal, the State further argued that it was not possible for a nine (9) year old girl of J.C.'s size and physicality to have been in control of the four-wheeler. *Id.* The four-wheeler was an Arctic Cat, which is a large four-wheeler. R154. Cook was operating and in control of the four-wheeler. R155.

The trial court did not believe J.C. was big enough "to do everything she [needed] to do on an Arctic Cat 500." R157. The trial court did not "[believe] that J.C. could shift, reach the breaks and run the accelerator because her body [was] not big enough." *Id.* The trial court could not see that a mother would put their nine (9) year old child on a four-wheeler and say "drive." *Id.* The trial court stated that in a crisis the adult would take control over the vehicle so that they did not wreck and no harm came upon themselves or their children. R158. The court believed that, by Cook's own admission as to her actions taken to protect J.C., that she admitted she had control of the vehicle. *Id.* The trial court found

three (3) different ways that Cook had "actual physical control" of the four-wheeler. *Id.* First, Cook was driving. *Id.* Cook maneuvered the handlebars. *Id.* Secondly, Cook gave commands to a person in control. *Id.* The trial court stated that accomplice liability statute implied that "if you are participating then you are doing it." *Id.* Third, J.C. testified that Cook took control the four-wheeler to get it started. R159. The trial court found Cook guilty of the offense of Driving Under the Influence of Alcohol/or Drugs. *Id.* Burns requested that Cook be sentenced according to the timeframe permitted by the statute. *Id.* Sentencing was scheduled for October 6, 2015. *Id.* Burns expressed to the trial court that he no longer wanted to brief the issue about the Intoxilyzer and the standard of *Baker* because Burton testified under Voir Dire to the workings of the Intoxilyzer. R160.

SUMMARY OF ARGUMENT

The trial court committed error in failing to properly conclude that Cook exhibited "actual physical control" over the four-wheeler. The "totality of the circumstances" were not met to support Cook's conviction of Driving Under the Influence of Alcohol and/or Drugs. Testimony was offered through Cook's daughter J.C., who stated that she had been operating the four-wheeler, and Himmel testified that he used the foot brake in order to help the four-wheeler stop. Himmel had exercised actual physical control of the vehicle, but Cook had not. The four-wheeler had to stop suddenly once Burton was spotted. Given that the roads were snow packed and the four-wheeler started sliding, Cook felt concerned for the safety of J.C. and raised her hands in front of J.C. in order to protect her from harm; with her hands landing on the middle of the handlebars. What was observed by the officer was that "Elizabeth Cook had her hand on the handlebars when I made initial contact..." R099.

No further testimony was offered by the State that Cook had exhibited any other actions required to be in "actual physical control" of the four-wheeler. Cook was convicted of the offense of Driving Under the Influence of Alcohol and/or Drugs, a class A misdemeanor.

In order for Cook's BAC test results to be admissible as relevant evidence, the standard three (3) steps *Baker* requirement needed to be met. The State presented evidence to suggest that the first two steps of *Baker* had been met. Specifically, the State introduced evidence that the Intoxilyzer had been calibrated and that Burton had received training on how to properly work the Intoxilyzer and administer a BAC; however, the third requirement of *Baker* was not met. The third requirement was that *Baker* was observed for the fifteen (15) minute time period. The evidence introduced by the State as to the fifteen (15) observation period was that Burton used his cell phone to note the time of *Baker* in the Intoxilyzer machine, and the Intoxilyzer machine counted 15 minutes from that time taken from a different device, then the print-out sheet noted the time from the Intoxilyzer machine that the BAC was administered. The State neglected to introduce any evidence that would show that the two differing timing devices were synchronized. The trial court committed error in determining that the *Baker* fifteen (15) minute observation period had been sufficiently met in order for Cook's BAC to be admissible.

A suppression hearing was "critical' to Cook. Burns rendered "ineffective assistance of counsel" for failure to follow-through with the *Motion* that he filed on behalf of Cook. Burns *Motion* correctly laid out the evidence that needed to be suppressed; however, he neglected to articulate legal and factual authority to support what he was seeking be suppressed. Burns was also "ineffective" for failure to have a suppression hearing. The

Motion to Suppress was crucial to Cook because it addressed issues with *Baker* and the admittance of her BAC. Burns ineffectiveness impacted Cook and the outcome of her case.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR IN FAILING TO PROPERLY FIND AND CONCLUDE THAT COOK EXHIBITED ACTUAL CONTROL OF THE FOUR-WHEELER WHILE INTOXICATED TO SUPPORT A CONVICTION FOR A DUI.

According to UTAH CODE ANN. 41-22-2(11)(b) an off-highway vehicle is considered a motor vehicle. "Operator" has been defined as a "person who is in actual physical control of an off-highway vehicle." UTAH CODE ANN. 41-22-2(15). "[A]ctual physical control' in its ordinary sense means 'existing' or 'present bodily restraint, directing influence, domination or regulation." *State v. Vialpando*, 2004 UT App 95, ¶ 21, 89 P.3d 209 (citations omitted). Concerning the scope of "actual physical control," this Court concluded that "the determination must be made through examining the 'totality of the circumstances.'" *Id.* at ¶ 22, *citing State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442, 478 (1971).

In a jurisdiction where the negligence of a driver can be imputed to the passenger if the driver and passenger are found to be in an agent/principal relationship, the court undertook an analysis as to whether a passenger giving directions to the driver and the driver following such direction creates an agency relationship. *Benson v. Sorrell*, 627 N.E.2d 866 (Ind. App. 1994). The *Benson* court analyzed a case that had found the passenger "had the right to give her husband directions and, to be sure, could well have had a duty to warn if and only if she knew of an impending danger and the husband-driver was unaware of its presence." *Id.* at 868, *citing Leuck v. Goetz*, 151 Ind.App. 528, 280 N.E.2d 847, 855 (1972). In another case, the *Benson* court noted that control could not be imputed to a passenger where no evidence

showed they "had any control over the speed at which the automobile was traveling, the yielding or failure to yield the right of way at intersections, or any other of the elements which contributed to the manner in which the automobile proceeded along the route selected." *Id.*, *citing Shannon v. Hollingsworth*, 291 Ala. 159, 163, 279 So.2d 428, 432 (1973). The *Benson* court further cited a case indicating that "the circumstances must be such that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it." *Id.*, *citing Bryant v. Pacific Electric* R.R. *Co.*, 174 Cal. 737, 164 P. 385 (1917). The *Benson* court agreed with these cases and concluded that, "[m]erely giving a driver directions does not amount to control over the vehicle equal to that the driver exercises." *Id.* at 869. The control was instead the manner in which the operator themselves choose to drive the vehicle, regardless of any directions given, which the *Benson* court found appropriate since otherwise intoxicated individuals taking a taxi cab and providing directions would still implicate them for DUI. *Id.* at 868-869, *citing Churchill v. Briggs,* 225 Iowa 1187, 1190, 282 N.W. 280, 282 (1938)(*quoting Cram v. City of Des Moines*, 185 Iowa 1292, 172 N.W. 23 (1919)); *see also* 8 Am.Jur.2d Automobiles § 706("...the mere giving of directions to the driver does not establish that the passenger has control over the vehicle.").

In *State v. Sanchez*, the Kansas appeal court recently undertook an analysis indicating taht an intoxicated passenger can exert actual physical control over a vehicle by grabbing the steering wheel while in the passenger seat and altering the vehicle's movement. *Ibid.,* 48 Kan.App.2d 608, 296 P.3d 1133 (2013); *see also* 94 A.L.R.6th 671 (2014). The recitation of cases in *Sanchez* all indicate that, "a passenger can exert actual physical control over a vehicle

by grabbing the steering wheel or by doing other things that cause the vehicle to move." *Id.* at 611-612, *citing State v. Rivera*, 207 Ariz. 69, 74, 83 P.3d 69 (2004)("[W]e conclude that, a passenger who grabs the steering wheel of a moving car and alters the car's movement has assumed actual physical control for purposes of the DUI statutes."); *In re F.H.*, 192 Ca.App.4th 1465, 1472, 122 Cal.Rptr.3d 43 (2011)("The defendant ... grabbed the wheel and caused the vehicle to change direction and crash. By that act she made herself the driver as she exercised actual physical control over the vehicle."); *People v. Yamat*, 475 Mich. 49, 5758, 714 N.W.2d 335 (2006)("[D]efendnat's act of grabbing the steering wheel and thereby causing the car to veer off the road clearly constitutes 'actual physical control of a motor vehicle.'"); *People v. Crombleholme*, 8 A.D.3d 1068, 1070, 778 N.Y.S.2d 256 (2004)("Defendant's action in grabbing the steering wheel [as passenger[and controlling the direction of the vehicle fall within the definition of operation of a motor vehicle."); *City of Valley City v. Berg*, 394 N.W.2d 690, 691 (N.D. 1986)(holding passenger exercised "actual physical control" by staritng the vehicle, after which it lurched forward and struck another vehicle); *State v. Wallace*, 166 Ohio App.3d 845, 849, 853 N.E.2d 704 (2006)("Wallace's conduct [as passenger] caused movement of the vehicle and the driver's loss of control when she grabbed the steering wheel and caused the vehicle to crash."); *Moe v. MVD*, 133 Or.App. 75, 79, 889 P.2d 1334 (1995)(holding passenger was a "driver" by turning on the ignition and inadvertently putting the car into gear, causing it to move); *Com. Dept. of Transp. v. Hoover*, 161 Pa.Cmwlth. 517, 522, 637 A.2d 721 (1994)("When a passenger in a vehicle chooses to engage in such foolish conduct as grabbing the steering wheel ... that person is assuming actual physical control."); *Dugger v. Com.*, 40 Va.App. 586, 594, 580 S.E.2d 477 (2003)("By

forcibly taking the steering over from the driver, appellant manipulated perhaps the most fundamental feature of a moving vehicle—the direction in which it would travel. That deliberate act placed him in actual physical control of the vehicle."); *In re Arambul,* 37 Wash.App. 805, 808, 683 P.2d 1123 (1984)("[M]omentary grabbing of the steering wheel of a vehicle [by the passenger] comes within the ordinary meaning of the term 'actual physical control.'"). The *Sanchez* court concluded "that a passenger becomes the driver or operator when he or she grabs the steering wheel and alters the vehicle's movement." *Id.* at 613.

When an ultimate finding of fact is made in violation of a legal guideline, we correct it under a correction-of-error standard of review. *State v. Rochell,* 850 P.2d 480, 485 (Utah App 1993)*citing State v. Thurman,* 846 P.2d 1256, 1271-72 (Utah 1993) (using correction-of-error standard allows appellate court to consider "legal content" of ultimate factual findings). These legal guidelines create a field of inquiry within which the trial court can make its ultimate factual findings. *State v. Barnhart,* 850 P.2d 473 (Utah App 1993); *citing State v. Richardson,* 843 P.2d 517, 521-22 (Utah App.1992) (Bench, P.J., concurring). Whether or not a trial court operated within the proper field of inquiry is a determination we make using a correction-of-error standard of review. *See, Thurman* at Thurman, 846 P.2d at 1271-1272; *Richardson,* 843 P.2d at 522 (Bench, P.J., concurring).

> If an appellant asserts that the trial court has incorrectly identified the legal guidelines establishing its permissible field of inquiry, we use the correction-of-error standard because the appellant has challenged the "legal content" of the trial court's finding. If, on the other hand, an appellant cannot show that the trial court's ultimate finding was erroneous as a matter of law, the appellant is requesting nothing more than a second opinion on a debatable question of fact. In such cases, an appellant is simply challenging the trial court's judgment in its ultimate factual finding. Absent a violation of legal guidelines, a trial court's finding of ultimate fact remains on the same level as any other underlying factual finding, and we defer.

Lopez v. Schwendiman, 720 P.2d 778, 780 ; *Garcia v. Schwendiman,* 645 P.2d 651, 653 (Utah 1982) (same). The State must prove that Cook had an "'existing' or 'present bodily restraint, directing influence, domination or regulation'" over a vehicle. *See, Vialpando* at ¶ 25 *citing Bugger* at 442.

The trial court opined herein that, in a crisis, an adult would take control over the vehicle so that they did not wreck and no harm came upon themselves or their children. R158. The court believed that, by Cook's own admission as to her actions taken to protect J.C., that she admitted she had control of the vehicle. *Id.* The trial court thus found three (3) different ways that it believed Cook had "actual physical control" of the four-wheeler: Cook was driving and maneuvered the handlebars; Cook gave commands to a person in control; and, under theorizing the accomplice liability statute, if Cook was participating by placing her hands on her daughter's shoulders to guide her how to steer it, then she was controlling the vehicle. The court then mistakenly found that J.C. testified that Cook took control the four-wheeler to get it started; however, the testimony was that Himmel had done so. R159.

During trial, Burton testified that he observed Cook driving towards him on a four-wheeler on January 3, 2015. R098. The four-wheeler slid to a stop when Burton stopped his vehicle. *Id.* He observed that the four-wheeler contained three (3) passengers; J.C. was in the front, Cook in the middle and Himmel on the back. *Id.* Burton observed Cook's hands on the handlebars of the four-wheeler as it came to a stop. R099. Burton never observed J.C. operating the four-wheeler at all. R109. Cook informed Burton that J.C. had been the one driving the four-wheeler. *Id.* Burton never questioned J.C. or Himmel as to who had been driving the four-wheeler. R120.

Cook never operated the four-wheeler, the accelerator, the brakes, the clutch, nor steered the four-wheeler. *Id.* Cook was concerned with J.C.'s safety when the four-wheeler slid to a stop. R131. In order to protect J.C. from harm, Cook placed her hands in the middle of the handlebars directly in front of J.C. *Id.* Cook testified that the only time she placed her hands on the handlebars was when she was protecting J.C. *Id.*

J.C. testified that she was operating the four-wheeler when they stopped for the officer. R136. Himmel started the four-wheeler for J.C. R137-8. J.C. used the accelerator. R139. J.C. did not recall Cook ever operating the four-wheeler. *Id.* Himmel testified that he was a passenger on the four-wheeler and that he used the foot brake to help stop the four-wheeler. R147.

Cook was riding as a passenger on a vehicle operated by her daughter, J.C. *See,* UTAH CODE ANN. 41-22-2(11)(b). J.C. was in actual physical control of the vehicle according to testimony provided by Cook, Himmel and J.C. herself that she was directing influence, domination or regulation over the vehicle. UTAH CODE ANN. 41-22-2(15); *Vialpando* at ¶ 21. The totality of the factual circumstances, together with the application of the law on the matter, dictated that J.C. was the sole person in actual physical control of the vehicle herein. *Id.* at ¶ 22, *citing State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442, 478 (1971).

The court imputed actual physical control to Cook, who was a passenger on the vehicle due to a perceived agent/principal relationship. In other words, Cook was the operator's (J.C.'s) mother and the operator was a minor. *Benson* at 868. Specifically, the court discounted Cook's claim that she was protecting J.C. when he placed her hands on the steering wheel, but not seeking to operate the vehicle. The court found that, as a mother, she

was more likely taking control back to avoid a "crisis." However, the "crisis" was simply skidding to a stop on the snowy road when Burton motioned for them to do so. Himmel was the one who applied the brake to the vehicle. Burton's only testimony was that Cook's hands were on the steering wheel as he observed the vehicle slide and then come to a stop. In *Sanchez* and the line of cases cited therein, numerous courts have found actual physical control by a passenger when two facts are present: grabbing the steering wheel ***and*** causing the vehicle to move from its normal path. *Ibid.* at 611-612; *Rivera*, 207 Ariz. at 74, 83 P.3d 69; *F.H.*, 192 Ca.App.4th at 1472, 122 Cal.Rptr.3d 43; *Yamat*, 475 Mich. at 57-58, 714 N.W.2d 335; *Crombleholme*, 8 A.D.3d at 1070, 778 N.Y.S.2d 256; *Berg*, 394 N.W.2d at 691; *Wallace*, 166 Ohio App.3d at 849, 853 N.E.2d 704; *Moe*, 133 Or.App. at 79, 889 P.2d 1334; *Hoover*, 161 Pa.Cmwlth. at 522, 637 A.2d 721; *Dugger*, 40 Va.App. at 594, 580 S.E.2d 477; *Arambul*, 37 Wash.App. at 808, 683 P.2d 1123. While Cook contested that she maneuvered the steering wheel and had only placed her hands on them as they stopped to protect J.C., the district court clearly did not credit this in its theory that a mother would take back control in those situations. However, what was observed by and testified to by the officer was only that "Elizabeth Cook had her hand on the handlebars when I made initial contact..." R099. The vehicle was already stopped at the time he claims to have observed her in this position. There was no testimony from Burton that he saw Cook grab the steering wheel or that he saw her cause the vehicle to move from its normal path—factors required to find that she took actual physical control from J.C. All Burton observed was that she had a hand on the handlebars when at a standstill. This is insufficient to find actual physical control for purposes of the DUI statute.

Even under Utah's statutory scheme which allows an attempted control to be sufficient to rise to "actual physical control" (i.e. in possession of keys whether the individual is located in or outside the vehicle), where there is a designated "operator" of the vehicle, another cannot take control without there being actual physical actions towards doing so. The line of cases in *Sanchez* support the concept that some physical control has to occur, which is in line with Utah's statutory scheme. For instance, if a passenger took the keys from the intoxicated individual, they would be taking their "actual physical control" element away; however, it required a physical action to deprive them of such. Herein, Cook was required to have not only grabbed the wheel, but also moved the vehicle from the operator's (J.C.) chosen path. All Burton observed was Cook's hand on the steering wheel while the vehicle was at a rest. This was not sufficient evidence to find that Cook was the operator, nor was it sufficient to conclude that a transfer of actual physical control from J.C. to Cook had occurred.

The district court's analysis of the totality of the circumstances did not end there, however. It also found that Cook was exhibiting actual physical control because she was directing J.C. verbally, and also placing her hands on her shoulders to guide her in which way she should go if she needed it. There was no evidence presented that J.C.'s agency was overborne by Cook in these actions as operator of the vehicle. As a passenger, Cook had the right to give her child directions, just as the spouse in *Leuck*. *See, Benson* at 868, *citing Leuck* at 855. Also as a passenger, Cook maintained a duty in that capacity to warn J.C. of an impending danger if J.C. was unaware of its presence. *Id.* However, the court erroneously

found these rights and duties to be indicators of a transfer of actual physical control for purposes of DUI.

Burton did not testify, nor was any evidence presented, that Cook had any control over the speed the vehicle was traveling, the starting or stopping of the vehicle, or any other element contributing to the vehicle's movement. *Benson* at 868, *citing Shannon*, 291 Ala. at 163, 279 So.2d at 432. No evidence was presented, but it was required to show that Cook's directions or guidance made both J.C. and Cook in joint or common control of the vehicle. *Id.*, *citing Bryant*, 174 Cal. 737, 164 P. 385. Cook's mere directions to J.C. did not amount to control over the vehicle equal to that J.C. which was exercising. *Benson* at 869. J.C. was in control of how the vehicle was operated, regardless of any directions from Cook. To find otherwise would cause a precedent rendering intoxicated individuals guilty of DUI for taking a taxi cab and providing directions to the driver. *Id.* at 868-869, *citing Churchill,* 225 Iowa at 1190, 282 N.W. at 282 (*quoting Cram*, 185 Iowa 1292, 172 N.W. 23). Cook's mere giving of directions to J.C. does not establish that Cook had control over the vehicle. 8 Am.Jur.2d Automobiles § 706.

The ultimate factual finding, as well as the legal conclusion, that Cook was in actual physical control of the vehicle was in violation of the legal guidelines and should be corrected by this Court. *Rochell*, 850 P.2d at 485, *citing Thurman,* 846 P.2d at 1271-72. None of the evidence supports a finding that Cook either exercised actual physical control of the vehicle, nor that it was transferred to her from J.C. by any means. The court did not operate properly within its field of inquiry by theorizing and applying accomplice liability to its determination. No accomplice liability charge had been raised, nor was it applicable to this

case. In order for Cook to be an accomplice in aiding J.C., it required J.C. to be committing a crime, which is just a preposterous proposition. *Barnhart,* 850 P.2d 473; *citing Richardson,* 843 P.2d at 521-22.

This Court should correct such legal error by applying the appropriate field of inquiry to the determination—that of actual physical control as applied to passengers respecting DUI. *See, Thurman* at 1271-1272; *Richardson,* 843 P.2d at 522. The "legal content" of the findings and conclusions are flawed, and the district court's ultimately determination in this matter was subsequently erroneous as a matter of law. *Lopez,* 720 P.2d at 780; *Garcia,* 645 P.2d at 653. This Court should thus reverse the Judgment.

II. THE TRIAL COURT COMMITTED ERROR IN FAILING TO FIND THAT THE OFFICER HAD PROPERLY CONDUCTED THE *BAKER* TEST GIVEN THAT NO INFORMATION AS TO SYNCRONIZATION OF DIFFERING TIMING DEVICES WAS PRESENTED TO ENSURE THE MANDATED 15 MINUTE TIME FRAME HAD BEEN UNDERTAKEN.

This Court can exclude relevant evidence when "its probative value is substantially outweighed by a danger of . . . unfair prejudice." UT. R. EVID. 403. "A trial court's determination that there was a proper foundation for the admission of evidence ... [is reviewed for] an abuse of discretion. This means that we will reverse the trial court's decision to admit evidence only if the ruling is beyond the limits of reasonability." *State v. Woodward,* 2014 UT App 162,¶ 14, 330 P.3d 1283; *citing State v. Burke,* 2011 UT App 168, ¶ 17, 256 P.3d 1102 (alterations in original) (citation and internal quotation marks omitted).

In determining whether evidence is admissible, UT. R. EVID. 104(b) states that, "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." UT. R. EVID. 401 states

that, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

"Relevant evidence is presumptively admissible; irrelevant evidence is not." *State v. Ashby,* 2015 UT App 169, ¶ 24, 357 P.3d 554; *citing State v. Richardson,* 2013 UT 50, ¶ 24, 308 P.3d 526.

In order for Cook's BAC results to be admissible, "the State must present evidence, inter alia, that: (1) the intoxilyzer machine had been properly checked by a trained technician, and that the machine was in proper working condition at the time of the test; (2) the test was administered correctly by a qualified operator; and (3) a police officer observed the defendant during the fifteen minutes immediately preceding the test to ensure that the defendant introduced nothing into his or her mouth during that time." *State v. Vialpando,* 2004 UT App 95, ¶ 14, 89 P.3d 209; *See In re Oaks,* 571 P.2d 1364, 1367 (Utah 1977) (Maughan, J., dissenting) (citing *State v. Baker,* 56 Wash.2d 846, 355 P.2d 806, 809–10 (1960) (articulating foundation elements for intoxilyzer tests)); *see also Salt Lake City v. Womack,* 747 P.2d 1039, 1041 (Utah 1987) (affirming the necessity of the pre-test observation period).

"The burden of demonstrating the admissibility of the proffered evidence is on the prosecution. The prosecution must lay a foundation upon which the trial court can make any necessary preliminary factual findings and reach any necessary legal conclusions. *State v. Ramirez,* 817 P.2d 774, 778 (Utah 1991), *citing State v. Carter,* 776 P.2d 886, 890 (Utah 1989); *State v. Bishop,* 753 P.2d 439, 463 (Utah 1988); *State v. Wright,* 745 P.2d 447, 451 (Utah

1987). The Due Process Clause of the Utah Constitution guarantees that "[n]o person shall be deprived of life, liberty or property, without due process of law." *State v. Guzman*, 2006 UT 12, ¶ 14, 133 P.3d 363 (Utah 2006).

Rule 901 requires that the proponent of an item of evidence authenticate or identify it with "evidence sufficient to support a finding that the item is what the proponent claims it is." *State v. Woodward*, 2014 UT App 162, ¶ 16, 330 P.3d 1283; *quoting* UTAH R. EVID. 901(a). "Proper authentication does not require conclusive proof but, instead, requires only that the trial court determine that there is 'evidence sufficient to support a finding of the fulfillment of [a] condition' of fact." *Id* at ¶ 17, *citing State v. C.D.L.*, 2011 UT App 55, ¶ 24, 250 P.3d 69 (*quoting* UTAH R. EVID. 104(b) (2011)) (alteration in original).

In the instant matter, Burton testified that he had previous training on how to operate the Intoxilyzer. R106. Burton testified that the Intoxilyzer had been calibrated by a technician before and after Cook's BAC was given. *Id.* The State submitted as evidence the calibration certificates for the Intoxilyzer. *Id.* Burton testified during trial that he observed *Baker* on Cook at 14:34. R109. The BAC was then administered at 14:51. R110. Burton testified that he "probably used his cell phone" to note the time of *Baker* but could not recall if that is what he had done. Burton pulled the time the BAC was administered off of the Intoxilyzer print-out. *Id.*

Burns objected to the admission of Cook's BAC test results based upon the testimony that two (2) separate time pieces were used and no testimony was offered as to whether the two (2) separate time pieces were at all synchronized. R112. Burns also argued as part of his objection, that no testimony had been offered in regards to the specific amount

of time that elapsed between the time recorded and the time of *Baker*. *Id.* Burns argued that the *Baker* standard fifteen (15) minute time requirement was a strict compliance admissibility issue that was part of the foundational requirements for the BAC test results to be offered and submitted as evidence. R113. The trial court stated that evidence was offered to show that the fifteen (15) minute requirement had been met. R115. Specifically, the trial court stated that the fifteen (15) minute requirement had been met because of two (2) electronic devices that gave a two (2) minute cushion. *Id.*

Further on voir dire, Burton stated that he did not use his cell phone to time the fifteen (15) minutes when he observed *Baker*. *Id.* Burton explained that the officer physically entered the time taken from another device into the Intoxilyzer. *Id.* The Intoxilyzer then counted down the fifteen (15) minutes from the time stamp that was entered. Burton assumed that the Intoxilyzer had its own time set but did not know for sure. R118. Burton stated that he was unsure where the Intoxilyzer pulled its time from because the Intoxilyzer was not plugged into an outside source such as the internet or a telephone line. *Id.* At the conclusion of trial, Burns declined to brief the issues of synchronization any further. R160.

This Court can review the trial court's ruling that the State had meet its burden in laying the "proper foundational" requirements of *Baker* in order for Cook's BAC to be admissible evidence as an "abuse of discretion." *See, Woodward* at ¶ 14 *citing Burke* at ¶ 17.

Cook's argument herein is that the State failed to adequately lay the proper foundational requirements on *Baker* in order for her BAC test results to be proffered as admissible evidence. *See, Ramirez* at 778, *citing Carter* at 890; *Bishop* at 463 and *Wright* at 451.

In order for Cook's BAC to be admissible, the State needed to have presented evidence towards the three (3) foundational requirements set forth as part of the elements of *Baker.* Burton testified that the Intoxilyzer had been calibrated by a trained technician and that he [Burton] had been trained on how to properly operate the Intoxilyzer. R106. The calibration certificates were submitted by the State as evidence. *Id.* The State fulfilled the first two (2) requirements for *Baker;* however, they failed to properly meet the third requirement of the fifteen (15) minute observation period through Burton's testimony. *See, Vialpando* at ¶ 14, *citing Oaks* at 1367, *Baker* at 809-10 and *Salt Lake City* at 1041.

Burton first testified that he "probably had used his cell phone to note *Baker.*" R110. Upon further questioning as to the timing issues, Burton testified that he "did not use his cell phone to time *Baker.*" *Id.* Burton testified that the Intoxilyzer would count down the fifteen (15) minutes, after he manually entered in the time into the Intoxilyzer. R115. Now, based upon Burton's testimony, he could not recall where he pulled the time from. The information presented through Burton's testimony was very non-specific as to whether *Baker* ran from the time observed on the "unknown timing device" or the time it was entered on the Intoxilyzer. The facts presented confused the timing issue and were not clear and concise in order for the State to "lay a foundation" that would have allowed the trial court to have "reached legal conclusions" to accept Cook's BAC as admissible evidence. *See, Ramirez* at 778, *citing Carter* at 890, *Bishop* at 463 and *Wright* at 451. Cook's Due Process right was violated without the necessary evidence proving that the two (2) differing timing devices utilized in observing Baker was sufficiently reliable in order to be admitted into evidence. *See,* Guzman at ¶ 14; U.S. Const. Amend. XIV; Utah Const. Art. I §§ 7 and 12.

The time *Baker* was observed by Burton was recorded by him at 14:34. R109. It is unclear if Burton then typed 14:34 into the Intoxilyzer and that machine counted to 14:49 on its own internal clock or, instead, if the Intoxilyzer counted 15 minutes from a beginning and end point both on its own internal clock from the time Burton input information. Cook's BAC was administered at 14:51 by the Intoxilyzer clock, according to the Intoxilyzer print-out sheet. R110. Further, the State failed to provide evidence identifying of the "unknown timing device" or any synchronization. Without these specifics, Burton could not lay sufficient foundation to fulfill the final requirement to deem Cook's BAC admissible under *Baker*. *See, Vialpando* at ¶ 14, *citing Oaks* at 1367, *Baker* at 809-10 and *Womack* at 1041. The Court's finding and conclusion that the 2 minute "cushion" rendered the *Baker* requirement met was arbitrary since two clocks can be more than 2 minutes off from one another, particularly where evidence indicates that the Intoxilyzer is not on a standard time since it is not connected to the internet or another device from which it obtains its clock.

Cook's BAC should have been excluded as irrelevant evidence because it unfairly prejudiced her by lacking sufficient foundational support. UT. R. EVID. 403. The State bore the burden of establishing that the two timing devices were authenticated and synchronized. UT. R. EVID. 401 and 901; *see, Woodward* at ¶ 16. The State did not present any testimony or evidence that would authenticate the synchronization of the two (2) timing devices in order to support a finding as to the fulfillment of the *Baker* three (3) step requirements for the admittance of Cook's BAC test results. *See, C.D.L.* at ¶ 24. There was absolutely no authentication made.

The State's presentation of Cook's BAC results should have been excluded as lacking foundational support, and therefore nonadmissible and irrelevant to the proceedings. *See, Ashby* at ¶ 24 *quoting Richardson* at ¶ 24. This Court should thus reverse the Judgment accordingly and, if found to be necessary, remand with direction to exclude such results from determination on the charges herein.

III. BURNS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO FOLLOW-THROUGH WITH THE *MOTION TO SUPPRESS* THAT WAS FILED WITH REGARD TO UNREASONABLE DETAINMENT FOR INVESTIGATIVE PURPOSES.

This Court and our Utah Supreme Court have previously stated that two (2) conditions should be met before they will consider the merits of a claim of ineffective assistance of counsel on direct appeal. In *State v. Humphries,* the Utah Supreme Court stated that "ineffective assistance of counsel should be raised on appeal if [1] the trial record is adequate to permit decision of the issue and [2] defendant is represented by counsel other than trial counsel." *State v. Litherland,* 2000 UT 76, ¶ 9, 12 P.3d 92, *citing State v. Humphries,* 818 P.2d 1027, 1029 (Utah 1991); *see also State v. Hovater,* 914 P.2d 37, 40 (Utah 1996). "On appeal, it is the defendant's obligation to provide supporting arguments by citation to the record." *Id* at ¶ 11. The U.S CONST. AMEND. VI provides for the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In *State v. Curry,* the Utah Court of Appeals stated that "the Sixth Amendment, the Utah Constitution, and state statutory law ... guarantee an accused the right to be represented by

counsel." *Ibid,* 2006 UT App 390, ¶ 6, 147 P.3d 483, *citing State v. McDonald,* 922 P.2d 776, 779 (Utah App.1996); *see also* U.S. CONST. AMEND VI; UTAH CONST. ART. I, § 12; UTAH CODE ANN. § 77–1–6(1)(a) (2003). "[T]he Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 144, 125 L.Ed.2d 763 (1970).

A defendant's right to effective assistance of counsel is discussed in *State v. Houston* as follows:

> The right to counsel under the Sixth Amendment to the United States Constitution includes "the right to the effective assistance of counsel." In *Strickland v. Washington,* the United States Supreme Court announced the two-part test for ineffective assistance of counsel claims. First, the defendant must show that "his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment." Second, the defendant must demonstrate "that counsel's performance prejudiced the defendant."

Ibid., 2015 UT 40 ¶70, 353 P.3d 55; *citing Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052. Utah has adopted the *Strickland* test and indicated "[t]o show ineffective assistance of counsel ..., a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome ... would have been different." *State v. Gailey,* 2015 UT App 249 ¶14, --- P.3d ----, quoting *State v. Smith,* 909 P.2d 236, 243 (Utah 1995).

A Motion to Suppress evidence shall contain the following:

> (1) describe the evidence sought to be suppressed; (2) set forth the standing of the movant to make the application; and (3) specify the sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of

> the issues and to enable the court to determine what proceedings are appropriate to address them.

UT. R. CRIM. P. 12(d). The Utah Court of Appeals in *Curry* went on to further state that "[u]nder both the United States Constitution and the Utah Constitution, [Defendant] had the right to the assistance of counsel at all critical stages of his criminal proceeding." *Ibid,* 2006 UT App 390, ¶ 6, 147 P.3d 483, *citing Wagstaff v. Barnes,* 802 P.2d 774, 778 (Utah App.1990). "The accused's right to the assistance of counsel during the critical stages of a criminal proceeding has long been recognized as a fundamental constitutional right." *Wagstaff.*

In the instant matter, Burns filed a Motion with the trial court on July 16, 2015. R060. The Motion specifically requested the suppression of test results conducted. *Id.* During trial, after Burns questioned Burton on voir dire, he raised an objection. R111. The objection raised was in regards to the BAC results being offered and submitted as evidence. *Id.* Burns argued that *Baker* is a foundational admissibility requirement in order for BAC results to be offered as evidence. R113. The State argued that Burns should have raised the admissibility issue prior to trial. *Id.* The trial court responded to the arguments made by counsel stating that Burns had in fact filed a Motion. *Id.* Burns' Motion was vague and did not contain details. *Id.* Burns admitted that "obviously he did not follow through with the Motion." R114. Burns expressed to the trial court that during a suppression hearing, he would have addressed the aforementioned *Baker* issues. *Id.*

The record is adequate for this Court's review, as set forth more particularly *supra* at Argument II. Cook's arguments are supported by citations to the record. *Id.* at ¶ 11. Thus this Court can evaluate Cook's ineffective assistance of counsel claim given that she is

represented by new counsel for her appeal herein. *See, Litherland* at ¶ 9, and *Humphries* at 1029.

Cook maintained the right to the effective assistance of counsel. U.S. CONST. AMEND. VI; *Curry* at ¶ 6, *McDonald* at 779; and UTAH CONST. ART I §12; *McMann* at 771; *Houston* at ¶ 70. However, Burns' failure to follow-through with the Motion did not protect Cook's constitutional rights. Burns' failure fell below the objective standard of reasonableness. *Id.* This failure greatly prejudiced Cook because she went to trial without her Motion regarding the suppression of the BAC results. *Id.* Had Burns actually followed-through and argued the *Motion*, there was a reasonable likelihood that the outcome of Cook's case could have been drastically different. *See, Gailey* at ¶ 14 and *Smith* at 243.

The Motion that Burns filed requested the suppression of evidence and set forth the standing that such Motion was applicable by the moving party. Specifically as Burns indicated, the Motion requested the suppression of Cook's BAC test results. R060. While Burns correctly followed the first two (2) requirements for this Motion, he neglected to articulate legal and factual grounds that gave weight and support to the evidence he was seeking be suppressed. *See,* UT. R. CRIM. P. 12(d). By articulating legal and factual grounds, it would have made the trial court aware that a suppression hearing on the Motion was in order. The trial court even stated that the Motion was "vague" and did not "provide details of what it contained." R113. Burns admitted during trial that he did not "follow-through with the Motion." R114. Burns performance in providing the trial court with a proper Motion containing relevant legal authority and a factual basis for the suppression of said

evidence fell below the reasonable standard of professional judgment and such performance prejudiced Cook and her case. *See, Gailey* at ¶ 14 and *Smith* at 243.

Cook had a "right to effective assistance of counsel" during all "critical stages of her criminal proceedings." *See, Curry* at ¶ 6 and *Wagstaff* at 778. The "effective assistance of counsel" during "critical stages" [was] a constitutional right. *Id.* The Motion filed by Burns was very "critical" to Cook. During trial, Burns objected to the admission of the BAC test results based upon the lack of foundational requirements set forth in *Baker* for the admission of such evidence. R113. Burns even expressed to the trial court that during a suppression hearing, he would have "addressed any issues with *Baker*." R114. At trial, Burns only briefly argued his objection in regards to the *Baker* issues. A suppression hearing would have given Burns the time he needed to properly address the Motion, provide a well thought-out argument as to the merits of the Motion, and argue in-depth as to the issues the Motion raised. At an evidentiary hearing, Burns would have had a chance to thoroughly question Burton as to the admissibility of the BAC test results. Had this *Motion* been heard prior to trial, Cook's case could have been impacted drastically. Failure to follow-through with the Motion and request a suppression hearing on the Motion deprived Cook of the constitutional right to "effective assistance of counsel." U.S. CONST. AMEND. VI and UTAH CONST. ART I §12. This Court should thus reverse the Judgment and, if necessary, remand for correction of such violations.

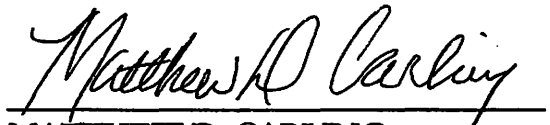
CONCLUSION

WHEREFORE, based upon the foregoing, Cook respectfully requests that this Court reverse the Judgment based on the clearly erroneous findings of "actual physical control"

and the error as a matter of law in concluding Cook was guilty of DUI. Alternatively, should this Court affirm that issue, Cook requests that this Court reverse the Judgment and remand the matter for correction of the violation of her constitutional rights on the basis that, due to ineffectiveness of counsel, inadmissible evidence was admitted below with a lack of foundation that had a prejudicial impact on the outcome of the case.

DATED this 18th day of March, 2016.

CARLING LAW OFFICE, PC

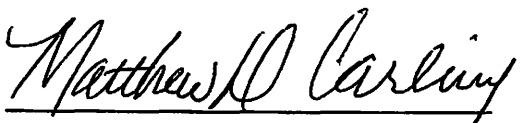


MATTHEW D. CARLING
Attorney for Appellant Elizabeth Victoria Cook

RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

Counsel herein certifies that this *Opening Brief of Appellant* is in compliance with the type-volume limitations contained in UT. R. APP. P. 24(f)(1) in that it contains 12201 words, as was determined by the word processing system used to prepare *Opening Brief of Appellant.*

CARLING LAW OFFICE, PC



MATTHEW D. CARLING
Attorney for Appellant Elizabeth Victoria Cook

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Opening Brief of Appellant*, with attachments, on this 18th day of March, 2016, to the following:

Utah Attorney General's Office
Attn. Criminal Appellate Division
160 East 300 South
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Addendum ~A~

Judgment, Sentence and Commitment, dated October 6, 2015.

IN THE FIFTH DISTRICT COURT FOR
IRON COUNTY, STATE OF UTAH
40 North 100 East, Cedar City, Utah 84720
435-867-3250

FILED
OCT - 6 2015
5th DISTRICT COURT
IRON COUNTY
DEPUTY CLERK

STATE OF UTAH, Plaintiff, vs. Elizabeth V. Cook, Defendant.	**JUDGMENT, SENTENCE and PROBATION ORDER** (Revised 09/15) Criminal No. 155500004 Judge Keith Barnes

JUDGMENT

The Defendant has been convicted of the following criminal offense(s):

Count 1: Driving Under the Influence of Alcohol, a class A misdemeanor.
Count 2: _____, a class ___ misdemeanor.
Count 3: _____, a class ___ misdemeanor.
Count 4: _____, a class ___ misdemeanor.

SENTENCE

On this judgment, the sentence of the Court is as follows:

Count 1: 364 days incarceration; $2,500.00 fine; plus 90% surcharge & $43 court security fee
Count 2: _____ days incarceration; $_____ fine; plus 90% surcharge & $43 court security fee
Count 3: _____ days incarceration; $_____ fine; plus 90% surcharge & $43 court security fee
Count 4: _____ days incarceration; $_____ fine; plus 90% surcharge & $43 court security fee

Credit is given for _____ days incarceration already served.

Multiple jail sentences shall be served ( ) concurrently ( )consecutively.

ORDER OF PROBATION

Execution of the sentence is stayed. You, the Defendant, will have 24 months of probation and you will be ( ) responsible to the Court (X) supervised by Private Probation on these conditions:

X Sign up for private probation within 48 hours. To be privately supervised for at least 6 months and may receive up to $240 credit to fine if no violations.

X Obey all laws and commit no further law violations.

X Serve 2 days in jail, with credit for 0 days served; report to the Iron County Jail ( ) immediately (✓) by 7 a.m./p.m. on 10/31/15, (✓) to serve straight time ( ) to serve _____ hours and then report on each _____ thereafter to serve _____ hours until the sentence has been served, and obey all jail rules and policies while incarcerated.

X Pay a fine of $1500, including the 90% surcharge, and the court security fee of $43 to the Clerk of the Court, in payments of at least $50 per month, on the 1 day of each month, beginning 12/1/15, plus interest at the legal rate.

_____ Pay $_____ to the Clerk of Court for victim restitution, in payments of at least $_____ per month, on the first business day of each month, beginning _____.

X Reimburse Iron County $100.00 for the services of your court appointed attorney. Payments received will be first credited to your obligation to pay victim restitution, then to reimburse Iron County for the services of your court appointed attorney and then to pay your fines and fees.

_____ Complete _____ hours of community service, at no fewer than _____ hours per month. File monthly written reports of hours completed; your first report is due _____. ( ) Sign up with the Volunteer Center within _____ hours and pay the required fee.

__4__ Obtain a written evaluation for ( ) mental health (X) alcohol/drug abuse ( ) domestic violence ( ) anger management from a court-approved professional counselor/therapist and file the evaluation with the Court on or before December 4, 2015. Then complete all recommended counseling, treatment and therapy at your own expense, and file proof of completion. The cost of the evaluation and treatment, if recommended, will be credited toward your fine, to a maximum of $_____, once you provide proof of payment and successful completion of treatment.

_____ Sign up for a life skills course within 48 hours, and complete it within 60 days. If complete within 30 days, the cost will be credited against your fine.

_____ Do not possess, distribute or use any illegal drugs or synthetic versions thereof, do not associate with persons who do so, and do not go to or remain at any location where such drugs are present.

__X__ Do not possess or consume any alcoholic beverages, including medications and energy drinks that contain alcohol, and do not go to any private location where alcohol is being served or any business where alcohol is the main item on the menu (such as a bar) and do not go to any location where alcohol is the chief item of sale (such as a liquor store).

__X__ Sign a consent to release treatment information form for all providers of mental or physical health care so that the Iron County Attorney and any person supervising your probation has access to your mental and medical health care records and may discuss you and your treatment with your mental or medical health care providers.

__X__ Submit to warrantless searches of your person and property, and/or to testing of breath and/or bodily fluids, upon request of any probation officer, if your probation is being supervised by someone other than the court, or any law enforcement officer or anyone involved in providing any treatment ordered as a condition of probation.

_____ Write a letter of apology to the victim(s) and submit it to the Court and prosecutor within 30 days.

_____ Maintain full-time employment and/or education, schooling or job training.

_____ Have no contact or communication with _____.

_____ Attend the first review hearing with Judge Barnes on _____ at 9:00 am, and attend all other review hearings as ordered.

__X__ Keep the Court advised of your current address at all times and notify the Court of any change of address within 48 hours of the change.

__X__ Submit a DNA sample to the State Department of Corrections and pay the fee.

_____ Exonerate bond. _____ Refund cash bail to payor.

_____ Other terms of probation: _____

_____

_____

_____

IF YOU FAIL TO MEET ANY OF THE ABOVE CONDITIONS, THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST AND MAY REVOKE YOUR PROBATION.

__X__ Defense counsel's withdrawal is granted.

Dated 10/6/15

JUDGE KEITH C. BARNES

COPY TO:

☒	County Attorney	(X) in court	( ) by hand ( ) mailed ( ) faxed
Barnes ☒	Defense Counsel	(X) in court	( ) by hand ( ) mailed ( ) faxed
☒	Defendant	(X) in court	( ) by hand ( ) mailed ( ) faxed
☒	Jail	(X) in court	( ) by hand ( ) mailed ( ) faxed
☐	Other_____	( ) in court	( ) by hand ( ) mailed ( ) faxed

Dated 10/06/15

Deputy Clerk