

KITSAP COUNTY DISTRICT COURT
STATE OF WASHINGTON

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STATE OF WASHINGTON, <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> MICHAEL TERRANCE WELSH, <p style="text-align: right;">Defendant.</p>		No. 23379901 AMENDED ORDER CLARIFYING JUNE 13, 2022 EN BANC DRÄGER SUPPRESSION DECISION
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1. BASIS

THIS MATTER having come before the Court upon the defendant’s motion to clarify the Court’s June 13, 2022 en banc Dräger suppression decision in light of the amendment to former WAC 448-16-060; the Court having considered the records and files herein and the argument of the parties; and being fully advised in the premises; now, therefore, the following is entered –

2. BACKGROUND

- 2.1 EN BANC HEARING REQUESTED IN STATE V. KELLER.** In January 2022, the State and defense jointly requested the Court to hold an en banc hearing on the defense’s motion to suppress Dräger breath test printouts in *State v. Keller*. The en banc request was made “because the issues presented by the motion are of countywide significance.”¹ The Court granted the parties’ joint en banc hearing motion.
- 2.2 KELLER EN BANC HEARING.** On March 8, 2022, the Court sat en banc as requested. Eighteen exhibits were admitted totaling over 500 pages in length. The parties presented oral argument. The Court took the matter under advisement.
- 2.3 KELLER DRÄGER SUPPRESSION DECISION.** On June 13, 2022, the Court issued its en banc decision ruling in part that the Dräger machine failed to comply with former WAC 448-16-060 in violation of RCW 46.61.506(4)(a)(vi).

The Court suppressed Dräger generated breath test printouts in “all Kitsap County District Court cases because the State was unable to produce prima facie evidence of admissibility as required by RCW 46.61.506.”²

¹ Findings Of Fact And Conclusions Of Law Regarding Defense Motion To Suppress Dräger Generated Breath Test Results, at 5 n.17. *State v. Keller*, Kitsap County District Court No. 23707601.

² Order Suppressing Dräger Generated Breath Test Results. *State v. Keller*, Kitsap County District Court No. 23707601 (emphasis added). Hereafter “Dräger suppression decision”.

- 2.4 SUPREME COURT ACCEPTS DIRECT REVIEW.** On August 25, 2022, the State was granted direct review by the Supreme Court of the Dräger suppression decision. *State v. Keller*, Supreme Court No. 101171-7.
- 2.5 BASIS FOR DIRECT REVIEW.** Review was granted by the Supreme Court because the Dräger suppression decision “has the potential to affect a great number of Washington prosecutions for driving under the influence, [and] this case involves significant public interest questions in need of prompt and ultimate resolution in this court ...”.³
- 2.6 WAC 448-16-060 AMENDED.** Effective November 6, 2022, former WAC 448-16-060 was amended in response to the Dräger suppression decision.
- Former WAC 448-16-060(2) read in pertinent part – “For the Dräger instrument, the mean of all four results will be calculated and rounded to four decimal places.”
- Current WAC 448-16-060(2) replaced the word “rounded” with “truncated” and now reads – “For the Dräger instrument, the mean of all four results will be calculated and truncated to four decimal places.”
- 2.7 MOTION TO CLARIFY DRÄGER SUPPRESSION DECISION.** On December 21, 2023, the defendant in this case filed a motion for clarification of the Court’s June 13, 2022 en banc Dräger suppression decision. The defense also sought an en banc hearing which was granted.
- 2.8 FIRST OPPORTUNITY TO ADDRESS AMENDMENT.** Today’s clarification motion is the first opportunity this Court has been given to consider the impact of the November 2022 amendment of former WAC 448-16-060 on the June 2022 en banc Dräger suppression decision.⁴

³ Ruling Granting Direct Review Of RALJ Decision. *State v. Keller*, Supreme Court No. 101171-7.

⁴ As Justice Ginsberg instructs, the American adversarial system of adjudication relies on the principle of party presentation. The American judicial branch –

[relies] on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

United States v. Sineneng-Smith, 590 U.S. ___, 140 S.Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) (emphasis added) (citations omitted) (quotation marks omitted).

Counsel are responsible for seeking relief for their clients, not the courts.

But as a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.

Id. (citations omitted) (quotation marks omitted) (brackets omitted).

Courts should not look for wrongs to right.

[C]ourts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.

Id. (emphasis added) (citations omitted) (quotation marks omitted) (brackets omitted).

Nor is it a court’s role to conduct legal research on behalf of counsel, to do counsel’s thinking and briefing, or to apply such research to hypothetical facts. As our Supreme Court reminded attorneys in *Orwick v. City of Seattle*, 103 Wn.2d 249, 256 (1984) –

To identify the issues without analysis of the underlying legal theory giving rise to the issues means that an adversary expects the court to research all possible theories of legal liability and apply them to the hypothetical facts. It is not the function of trial or appellate courts to do counsel’s thinking and briefing.

3. ORDER

It is hereby –

ORDERED that the June 13, 2022 en banc Dräger suppression decision is no longer in effect for breath test printouts generated by the Dräger machine on or after November 6, 2022.⁵

The Dräger suppression decision is clarified because current WAC 448-16-060 requires a Dräger machine to “truncate” to four decimal places the mean of all four breath sample results rather than former WAC 448-16-060’s requirement that the mean be “rounded” as found to be in violation of RCW 46.61.506(4)(a)(vi) by the Dräger suppression decision.⁶

DATED – January 19, 2024

Jeffrey J. Jahns

JUDGE JEFFREY J. JAHNS

Claire A. Bradley

CLAIRE A. BRADLEY
Presiding Judge

Kevin P. Kelly

KEVIN P. KELLY
Assistant Presiding Judge

Shane R. Seaman

SHANE R. SEAMAN
Judge

⁵ On December 12, 2023, the State and defense jointly requested the Court to schedule an en banc hearing on a new defense Dräger suppression motion. *State v. Karina Renae King*, Kitsap County District Court No. 10016314.

During the *King* hearing, the Court reminded the parties that Dräger generated breath test printouts have been suppressed by Kitsap County District Court since June 13, 2022. Accordingly, the Court declined to schedule an en banc hearing on the new *King* Dräger suppression motion but indicated a hearing could be set on the new *King* Dräger motion after the impact of the amendment to former WAC 448-16-060 on the Dräger suppression decision had been resolved.

Also during the *King* hearing, the Court noted multiple times there was a simple pathway to resolve the Dräger suppression decision issue and that the Court would hear any motion at any time on any Kitsap County District Court DUI breath test case to address the impact of the amendment to former WAC 448-16-060 on the Dräger suppression decision. The Court also noted multiple times that although no such motion had yet been brought, the State was invited to discuss with defense counsel a suitable time to set a hearing to address the Dräger suppression decision issue.

Apparently surprised that the Dräger suppression decision remains in effect despite the lack of any order to the contrary, fewer than two hours after the *King* hearing the State informed the Court that they would immediately begin filing all DUI cases in Superior Court.

The Court remains mystified why the State has failed to bring any motion to address the impact of the November 2022 amendment to former WAC 448-16-060 on the Court’s June 2022 en banc Dräger suppression decision.

⁶ Historically, this Court has enjoyed communication and collaboration with all court system stakeholders, including of course the Prosecutor’s Office. For decades, the Court and stakeholders have been able to effectively communicate in order to further the fair administration of justice. This Court remains steadfastly dedicated to continue this collaboration.

The State unilaterally decided to file DUI cases in Superior Court shortly after the *King* hearing without any discussion with this Court.

Curiously, rather than bringing a motion in this Court to address the amendment to former WAC 448-16-060, the State chose instead the Chesterton’s Fence option by filing DUI cases in Superior Court.