

KITSAP COUNTY DISTRICT COURT
STATE OF WASHINGTON

STATE OF WASHINGTON <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> AUSTIN RIVER KELLER, <p style="text-align: center;">Defendant.</p>	No. 23707601 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING DEFENSE MOTION TO SUPPRESS DRÄGER GENERATED BREATH TEST RESULTS
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BACKGROUND AND SUMMARY

Since 1909, it has been illegal to operate a vehicle in Washington while intoxicated. Over the next century, the Legislature has repeatedly modified Washington’s statutes in an attempt to curtail the incidence of drunk driving.

For almost seven decades, alcohol breath test machines have been used to test breath samples for alcohol content. Washington makes extensive use of breath tests of suspected intoxicated drivers in its efforts to curb drunk driving. Whether a driver is intoxicated is often decided when an alcohol breath test machine analyzes the driver’s breath samples for alcohol content and generates a breath test printout. Alcohol breath test machines must be accurate and reliable to further the safety of Washington streets and to ensure just application of the law.¹

In 1960, the Supreme Court in the landmark case of *State v. Baker*² approved use of the first generation alcohol breath test machine called a Breathalyzer for determining alcohol content in the blood through analysis of a person’s breath samples.

Baker and its progeny have repeatedly discussed the scientific principle that physical and psychological changes in a person associated with alcohol impairment occur when alcohol is transported through the blood to the central nervous system and to the brain. Only central nervous system alcohol directly causes intoxication.

¹ *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 41-42 (2004).

² *State v. Baker*, 56 Wn.2d 846 (1960).

Alcohol in the deeper portions of the lung interacts with the lung's alveolar sacs where alcohol is transferred from the blood into the lung air and expelled from the body through a person's breath. There is a reasonable and substantial relationship between breath alcohol and impairment based on its relationship to blood alcohol. Alcohol breath test machines are designed to measure the last portion of a person's breath expelled from the body to detect alcohol present in the person's deep lung air.

In *Baker*, the prosecution's two experts testified that alcohol breath test results are unreliable unless a subject's mouth is free of all alcohol because alcohol breath test machines are designed to measure alcohol in deep lung air which corresponds to intoxication, not mouth alcohol which does not correspond to intoxication. Alcohol in deep lung air rather than mouth alcohol is assured by keeping the subject under observation for "at least 15 minutes" to allow any alcohol in the mouth to be absorbed by the body. *Baker* requires suppression of an alcohol breath test result where the prosecution is unable to produce prima facie foundational evidence that the breath test machine did not read mouth alcohol as deep lung air alcohol because such a breath test result is not accurate and reliable.

In *Baker*, the Court suppressed the Breathalyzer breath test results because the defendant was only kept under observation for 14 minutes before submitting breath samples into the Breathalyzer machine. *Baker's* prohibition of an alcohol breath test machine analyzing mouth alcohol as deep lung air alcohol remains in effect today.

Over time, scientific research determined that breath test samples contain mouth alcohol when the samples are outside plus or minus 10 percent of the mean of the breath test samples. Alcohol breath test machine software was developed to determine the mean of the breath test samples and conduct plus or minus 10 percent of the mean calculations. Where a breath sample is outside the lower or upper limit, the breath test machine will display a "Samples Outside 10%" message, abort the test and not generate a breath test printout of the results. Another breath test would then have to be performed. Alcohol breath test machines which conduct the plus or minus 10 percent of the mean calculations are called "self-certifying" breath test machines.

In 2004, frustrated by extensive breath test admissibility litigation concerning state toxicologist alcohol breath test machine regulations and in response to the Supreme Court *Clark-Munoz* decision, the Legislature amended RCW 46.61.506 by codifying eight foundational requirements for the admissibility of “valid” breath test machine results. Alcohol breath test results are admissible where the prosecution produces prima facie evidence satisfying all eight of the statutory foundational requirements. All remaining challenges to the breath test results go to the weight to be given to the breath test results and not their admissibility.

Recognizing the scientific principle as held by *Baker* that an alcohol breath test machine must not read mouth alcohol as deep lung air alcohol, among other foundational requirements the Legislature mandates that the “two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist.”³ The state toxicologist is also required by the Legislature to approve any alcohol breath test machine used to perform an alcohol breath test.⁴

In 2010 as mandated by RCW 46.61.506(4)(a)(vi), the state toxicologist promulgated WAC 448-16-060 for determining agreement of duplicate breath samples. The state toxicologist based upon her scientific expertise as delegated to her by the Legislature decided to require “the mean of all four [Dräger breath test] results will be calculated and rounded to four decimal places” before the machine conducts the plus or minus 10 percent of the mean calculations. Breath sample results which do not fall within the lower and upper limits are not valid.

Also in 2010 as mandated by RCW 46.61.506(4)(a), the state toxicologist promulgated WAC 448-16-020(1)(c) approving the Dräger Alcotest 9510 “for the quantitative measurement of alcohol in a person’s breath”. As required by the state toxicologist bid specifications, the self-certifying Dräger software calculates the mean of the four breath test results and truncates the mean before conducting the plus or minus 10 percent of the mean calculations.

The words “round” and “truncate” are terms of art in the scientific community when used in the context of the validity of alcohol breath test results. The state toxicologist knows these words are terms of art.

³ RCW 46.61.506(4)(a)(vi).

⁴ RCW 46.61.506(4)(a).

The state toxicologist approved method also requires that the Dräger shall display a “Samples Outside 10%” message, abort the test and not generate a breath test printout when the scientific methods for conducting the plus or minus 10 percent of the mean calculations approved by the state toxicologist in WAC 448-16-060 are not satisfied.

Since being put into service in Washington in 2010, the Dräger has never conducted the plus or minus 10 percent of the mean calculations in accord with WAC 448-16-060 as mandated by RCW 46.61.506(4)(a)(vi). Despite the state toxicologist approved method requiring the Dräger to abort every breath test when the WAC 448-16-060 rounding requirement is not satisfied, the state toxicologist continues to allow the Dräger to generate breath test printouts in violation of WAC 448-16-060.

The state toxicologist has known for over a decade that the Dräger generates breath test printouts in violation of WAC 448-16-060. Prior to June 2021, the state toxicologist and her office did not disclose to anyone outside their office that the Dräger machine software failed to comply with WAC 448-16-060 as mandated by RCW 46.61.506(4)(a)(vi).

The Dräger truncation versus rounding issue was finally disclosed outside the state toxicologist office in June 2021 to the Washington Association of Prosecuting Attorneys and immediately by WAPA to its membership.

The state toxicologist has submitted false or misleading testimony by declaration in tens of thousands of cases stating the Dräger will not generate a breath test printout where the mean is not calculated “in accord with WAC 448-16-060.” The state toxicologist has known since the Dräger was introduced in Washington in 2010 that the Dräger has generated tens of thousands of breath test printouts which have never been “in accord with WAC 448-16-060.”

The State argues that the Dräger method of truncating instead of rounding the mean of the breath test results before conducting the plus or minus 10 percent of the mean calculations is to Keller’s benefit.

While it may or may not be true that truncation rather than rounding the mean is to the benefit of a person submitting breath samples into a Dräger machine, it is not the Court’s “function to substitute our judgment for that of the state toxicologist”.⁵

⁵ *State v. Ford*, 110 Wn.2d 827, 832 (1988).

Under her legislatively delegated authority, the state toxicologist has chosen to require Dräger breath test machines and software to only generate a breath test printout upon compliance with the state toxicologist approved rounding requirement of WAC 448-16-060 as mandated by RCW 46.61.506(4)(a)(vi).

The State attempts to convince the Court to – (1) ignore the RCW 46.61.506(4)(a)(vi) legislative delegation to the state toxicologist of the decision to determine the proper scientific method of determining whether “breath samples agree to within plus or minus ten percent of their mean”; (2) ignore “rounding” of the mean before conducting the plus or minus 10 percent of the mean calculations as mandated by WAC 448-16-060; and (3) create a new “lack of prejudice to the defense” exception under RCW 46.61.506 and the rules of evidence.

Our Supreme Court has long required the state toxicologist to abide by their own rules, especially when applied to vital privileges like driving.⁶ The Court declines the State’s invitation to ignore WAC 448-16-060 and RCW 46.61.506(4)(a)(vi). The Court also declines to create a new “lack of prejudice to the defense” exception under RCW 46.61.506 and the rules of evidence.

The Dräger breath test machine fails to produce accurate, precise, and reliable breath test results as required by state toxicologist scientifically approved methods and regulations, and state statute.

The State has failed to satisfy the *Baker* and RCW 46.61.506 foundational requirements by producing prima facie evidence that the Dräger does not read mouth alcohol as deep lung air alcohol as determined by the scientific method chosen by the state toxicologist.

Keller’s Dräger generated breath test printout is not admissible because the printout is excluded under the rules of evidence, specifically ER 702, ER 401, ER 402, and ER 403.

As of today’s date, Dräger generated breath test printouts are also not admissible in any Kitsap County District Court cases because the State is unable to produce prima facie evidence of admissibility as required by *Baker* and RCW 46.61.506.

⁶ *Clark-Munoz*, at 50.

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BASIS

THIS MATTER having come before the Court on the motion of the Defendant, Austin River Keller, pursuant to CrRLJ 3.6 for an order suppressing Dräger generated breath test results; the Court having considered the records and files herein, multiple pleadings submitted by the parties in support of their positions, 18 exhibits admitted into evidence, and the argument of the parties; and being fully advised in the premises; now, therefore the following are hereby entered –

FINDINGS OF FACT

1. CASE BACKGROUND⁷

- 1.1 On May 9, 2020 around 8:04 PM, a Kitsap County Sheriff's Office deputy⁸ was dispatched to a single vehicle collision involving a vehicle in a ditch in the 2500 block of Tahuyeh Lake Road NW in Bremerton, Kitsap County, Washington.
- 1.2 The vehicle, a silver 2003 Honda Civic hatchback, was registered to Austin River Keller, the Defendant.⁹ The vehicle was 25 feet into the ditch and had heavy damage. Keller was present at the scene and admitted driving his car into the ditch. Keller was born on February 24, 1998.¹⁰
- 1.3 The deputy noticed the smell of alcohol on Keller's breath and proceeded to conduct field sobriety tests. Keller consented to submit to a portable breath test with an alcohol result of 0.132 g/100 ml of breath. Based upon the results of the sobriety tests, the smell of alcohol on Keller's breath, the portable breath test result, and the one vehicle collision, the deputy arrested Keller for driving under the influence¹¹ and transported Keller to the central office in Silverdale, Washington to administer a breath alcohol concentration¹² test.

⁷ The case background facts are undisputed for the purposes of this motion. *See* KCSO Deputy Tanner Justin Report No. K20-003915, Exhibit 13; and Alcotest 9510 Breath Test Document 05/09/2020, Exhibit 14.

⁸ Hereafter "deputy".

⁹ Hereafter "Keller".

¹⁰ Criminal Complaint (filed Jan. 22, 2021), at 3.

¹¹ Hereafter "DUI".

¹² Hereafter "BAC".

- 1.4 On May 9, 2020 at 9:12 PM, the deputy began the observation period of Keller. At 9:34 PM and 9:38 PM, Keller submitted two breath samples into a Dräger Alcotest 9510 machine, serial number ARKC-0074.¹³ The infrared spectroscopy BAC results were 0.117 and 0.117 and the electrochemical cell BAC results were 0.116 and 0.116. Keller’s BAC results submitted within two hours of Keller driving his car into the ditch are above the 0.08 legal limit set by RCW 46.61.502(1)(a).
- 1.5 Keller was transported by the deputy to Harrison Hospital in Silverdale to be treated for his injuries. Due to the long wait at the hospital and the pandemic, Keller was released from custody at the hospital.
- 1.6 On January 22, 2021, Keller was charged by Criminal Complaint with one count of DUI in alleged violation of RCW 46.61.502(1). Keller was arraigned on October 18, 2021 and entered a plea of not guilty.
- 1.7 The State alleges Keller committed DUI under the per se and affected by prongs of the DUI statute because Keller drove a vehicle within this state – (1) and within two hours after driving had an alcohol concentration of 0.08 or higher as shown by a Dräger generated breath test printout;¹⁴ and (2) while Keller was under the influence of or affected by intoxicating liquor.¹⁵
- 1.8 On December 16, 2021, Keller moved to suppress the Dräger BAC test results. Over the next several months, the parties filed pleadings and responsive pleadings in support of their positions.

¹³ Hereafter “Dräger”.

¹⁴ Alcotest 9510 Breath Test Document 05/09/2020, Exhibit 14.

¹⁵ RCW 46.61.502(1) describes a single offense that a driver might commit by three alternative methods. *State v. Shabel*, 95 Wn.App. 469, 473, *review denied*, 139 Wn.2d 1006 (1999) (“The [DUI] statute sets forth three alternative means of committing the offense, (1)(a), (1)(b), or (1)(c). Each of these alternatives has two statutory elements: (1) driving a vehicle within the state, and (2) either (a) having an alcohol concentration of .10 or greater within two hours after driving, (b) being under the influence of alcohol or drugs while driving, or (c) being under the influence of a combination of alcohol and drugs while driving.”).

1.9 On March 8, 2022, the Kitsap County District Court four-judge bench¹⁶ sat *en banc*¹⁷ to hear the motion. The parties jointly submitted a total of 18 exhibits which were admitted.¹⁸ Oral argument was presented by the parties. The Court took the matter under advisement. The next court date in this matter is scheduled for June 14, 2022, at 1:30 PM in courtroom 104.

2. THE WASHINGTON STATE TOXICOLOGIST¹⁹

2.1 The Washington State Patrol²⁰ is divided into six bureaus.²¹ The Forensic Laboratory Services Bureau²² was created by the Legislature in 1980.²³ The FLSB is comprised of the Crime Laboratory Division, Toxicology Laboratory Division and Impaired Driving Section.

Crime Laboratory Division

The Crime Laboratory Division provides forensic science services to local, state, and federal law enforcement agencies throughout Washington.

Toxicology Laboratory Division

The Toxicology Laboratory provides evidential toxicology services to law enforcement, medical examiners and coroners, and prosecuting attorneys about suspicious deaths, homicides and suicides, traffic fatalities, driving under the influence of alcohol and drugs, and any other forensic cases where alcohol and/or drugs may be involved.²⁴

Impaired Driving Section

The Washington State Patrol's Impaired Driving Section runs the agency's Evidential Breath Test, Drug Evaluation and Classification, Standardized Field Sobriety Testing and Ignition Interlock Programs, and coordinates deployment of the Mobile Impaired Driving Unit.²⁵

¹⁶ Presiding Judge Claire A. Bradley, Assistant Presiding Judge Kevin P. Kelly, Judge Marilyn G. Paja, and Judge Jeffrey J. Jahns. Judge Jahns was designated lead judge.

¹⁷ The bench sat *en banc* because the issues presented by the motion are of countywide significance.

¹⁸ An evidentiary hearing was not requested by the parties. Since there are no disputed facts, the parties chose instead to rely upon the 18 stipulated exhibits. Accordingly, no evidentiary hearing is required. CrRLJ 3.6(a). The Court appreciates the parties working together to stipulate to the exhibits in advance of oral argument.

¹⁹ See 2008 Evidentiary Breath Test Instrument Specifications, Exhibit 1; Transcript of Fiona Couper Interview 01/22/2016, Exhibit 2; and Declaration of Fiona Couper 06/18/2021, Exhibit 3.

²⁰ Hereafter "WSP".

²¹ Field Operations, Commercial Vehicle Enforcement, Fire Protection, Forensic Laboratory Services, Investigative Services, and Technical Services.

²² Hereafter "FLSB".

²³ Laws of 1980, ch. 69, §2 (codified in RCW 43.43.670).

²⁴ WASHINGTON STATE PATROL, <https://www.wsp.wa.gov/about-us/bureaus/> (last visited Apr. 16, 2022).

²⁵ WASHINGTON STATE PATROL, <https://www.wsp.wa.gov/driver/duiimpaired-driving/> (last visited Apr. 16, 2022).

- 2.2 The Washington state forensic investigations council²⁶ was created by the Legislature to “preserve and enhance the state crime laboratory and state toxicology laboratory, which are essential parts of the criminal justice and death investigation systems in the state of Washington”.²⁷
- 2.3 The Council “shall oversee” the FLSB. In consultation with the WSP chief, the Council “shall control the operation and establish policies” of the FLSB. The Council also is directed to be actively involved in preparation of the FLSB budget and shall approve the budget prior to its formal submission to the office of financial management.²⁸
- 2.4 The Council, after consulting with the WSP chief and FLSB director, “shall appoint a toxicologist as state toxicologist”²⁹ who shall report to the FLSB director.³⁰
- 2.5 The Washington State Toxicology Laboratory³¹ was established in 1963. The Tox Lab “performs drug and alcohol testing for coroners, medical examiners, law enforcement agencies, prosecuting attorneys and the State Liquor and Cannabis Board in all 39 Washington counties.” Tox Lab staff “perform analysis of samples submitted to the laboratory and provide court testimony as experts on alcohol, drugs and their effects.”³²
- 2.6 The Tox Lab was accredited by the American Board of Forensic Toxicology³³ in July 2005, becoming the 19th forensic toxicology laboratory to achieve ABFT accreditation. The Tox Lab is currently accredited to ABFT requirements by the ANSI National Accreditation Board.^{34 35}

²⁶ Hereafter “Council”.

²⁷ RCW 43.103.010(1).

²⁸ RCW 43.103.030.

²⁹ Hereafter “state toxicologist”.

³⁰ RCW 43.103.090(2)(b).

³¹ Hereafter “Tox Lab”.

³² WSP CRIME & FORENSIC LABORATORY SERVICES, <https://www.wsp.wa.gov/crime/crime-and-forensic-laboratory-services/> (last visited Mar. 15, 2022).

³³ Hereafter “ABFT”.

³⁴ Hereafter “ANAB”.

³⁵ WSP CRIME & FORENSIC LABORATORY SERVICES, *supra*. See ANAB Certificate of Accreditation issued to the Tox Lab on November 24, 2021 (expiry date Feb. 28, 2024) at ABFT, <https://abft.org/anab-accredited-labs/> (last visited Apr. 16, 2022).

- 2.7 The Breath Test Program “manages, maintains, and certifies the calibration of more than 220 evidentiary breath testing instruments in the state.”³⁶
- 2.8 The Breath Test Program and Tox Lab successfully attained ASCLD/LAB International accreditation for calibration for their breath alcohol program in November 2009. In April 2016, ANAB announced the merger of its forensics operations with those of ASCLD/LAB. The Breath Test Program is currently accredited for calibration by ANAB.³⁷
- 2.9 The Tox Lab further attained ASCLD/LAB International accreditation for testing for its toxicology testing program in February 2016. The Tox Lab is currently accredited for testing by ANAB.³⁸
- 2.10 Dr. Fiona Jane Couper³⁹ has a Bachelor of Science degree with Honors in Pharmacology/ Toxicology and a Ph.D. degree in Forensic Medicine/Forensic Toxicology. She served as chief toxicologist for the District Of Columbia Office of the Chief Medical Examiner from November 2001 through February 2008.
- 2.11 Dr. Couper was hired as the Washington state toxicologist in March 2008. She currently serves as FLSB director and as state toxicologist.

³⁶ WASHINGTON STATE PATROL, <https://www.wsp.wa.gov/driver/duiimpaired-driving/> (last visited Apr. 16, 2022).

³⁷ WSP CRIME & FORENSIC LABORATORY SERVICES, *supra*. See ANAB Certificate of Accreditation issued to the Tox Lab on November 24, 2021 (expiry date Feb. 28, 2024) at ABFT, <https://abft.org/anab-accredited-labs/> (last visited Apr. 16, 2022).

³⁸ *Id.*

³⁹ Hereafter “Dr. Couper”.

3. THE DRÄGER ALCOTEST 9510

- 3.1 The Breathalyzer⁴⁰ was a machine designed to measure a sample of breath to determine the alcoholic content of the blood.⁴¹ Breathalyzer alcohol test results were used as evidence in Washington DUI prosecutions for many years.⁴²
- 3.2 In 1983, an *ad hoc* committee was formed to explore replacing the Breathalyzer with a machine that used infrared spectroscopy⁴³ to conduct and analyze breath alcohol content. After significant testing of the BAC Verifier DataMaster,⁴⁴ the state toxicologist approved the substantially similar DataMaster in December 1985 to replace the Breathalyzer.^{45 46}
- 3.3 In 2007, the Breath Test Program began evaluating new breath test instruments to replace the DataMaster just prior to Dr. Couper becoming state toxicologist in March 2008.
- 3.4 Sgt. Rod Gullberg and Sgt. Ken Denton of the Breath Test Program developed the technical and administrative specifications for the new breath testing machine.
- 3.5 Dr. Couper reviewed these specifications and offered some suggested changes. After modifications to the new breath test machine specifications were made, Dr. Couper approved the final version of the bid specifications in 2008 which were submitted to the competitive bidding process.⁴⁷

⁴⁰ The Breathalyzer came into existence in 1955. *State v. Baker*, 56 Wn.2d 846, 852 (1960).

⁴¹ *Id.*, at 851.

⁴² *State v. Ford*, 110 Wn.2d 827, 833 (1988).

⁴³ Infrared spectroscopy “quantifies the absorption of infrared energy by molecules of matter” based upon the principle that compounds of molecules absorb infrared energy at various wavelengths. 32 LINDA M. CALLAHAN, WASHINGTON PRACTICE: WASHINGTON DUI PRACTICE MANUAL §25:2 (2021-2022 ed.) (32 WASHINGTON PRACTICE cited with approval by *State v. Deer*, 175 Wn.2d 725, ¶14 (2012)).

See also Washington State Patrol Breath Test Program Training Manual (Nov. 2018), Exhibit 4B, at 73-74.

⁴⁴ See *State v. Straka*, 116 Wn.2d 859, 864-65 (1991).

⁴⁵ *Ford*, 110 Wn.2d at 828, 835-36 (validating state toxicologist approval of the DataMaster).

⁴⁶ In 2004, in addition to the DataMaster the state toxicologist approved the DataMaster CDM as an instrument “approved for the quantitative measurement of alcohol in a person’s breath.” Former WAC 448-16-020 (2005).

⁴⁷ 2008 Evidentiary Breath Test Instrumentation Specifications, Exhibit 1.

3.6 As required by the 2008 bid specifications approved by Dr. Couper, the Dräger calculates the mean of the breath test results truncated to four decimal places, determines the lower acceptable limit by multiplying the truncated mean by 0.9, determines the upper acceptable limit by multiplying the truncated mean by 1.1, and truncating each limit to three decimal places.⁴⁸

3.7 The 2008 bid specifications approved by Dr. Couper also required that no breath test document shall print if the mean calculation requirements of WAC 448-16-060 are not met.

If the samples are outside of the mean requirement, the instrument shall require another complete breath test to be performed and will not print a breath test document on the samples that were outside of the mean.⁴⁹

3.8 The Dräger machine is “self-certifying” because Dräger software has “built in safeguards” “designed to give a proper test or none at all” by detecting “numerous potential issues affecting validity” and aborting the test if the software detects a potential issue.⁵⁰

3.9 Dr. Couper testified by declaration that all approved Washington breath test machines will not generate a breath test if the breath test results are outside plus or minus 10 percent of their mean as calculated pursuant to WAC 448-16-060 –

All approved breath test instruments calculate whether the breath test results are within plus or minus 10% of their mean in accord with WAC 448-16-060. If a breath sample is outside this parameter, no breath test result will generate.⁵¹

3.10 If the breath test samples are outside plus or minus 10 percent of their mean, the Dräger will display a “Samples Outside 10%” message and the Dräger will abort the test because the “comparison of calculated breath test results failed.”⁵² The officer is then directed to run the test again.⁵³

⁴⁸ 2008 Evidentiary Breath Test Instrumentation Specifications, Exhibit 1, at 5, ¶¶24,28.

⁴⁹ *Id.*, at 5 ¶24 (emphasis added).

⁵⁰ Washington State Patrol Breath Test Program Training Manual (Nov. 2018), Exhibit 4B, at 7.

⁵¹ DOL Fiona Couper Declaration 05/08/2015, Exhibit 11 (emphasis added).

⁵² Washington State Patrol Breath Test Program Technical Manual (Mar. 2020), Exhibit 5, at 29.

⁵³ Washington State Patrol Breath Test Program Training Manual (Nov. 2018), Exhibit 4B, at 34, 77.

- 3.11 Dr. Couper approved the Dräger and its software⁵⁴ including the 2008 bid specifications discussed in Finding of Fact 3.6 for quantitative measurement of alcohol in a person's breath effective December 31, 2010.⁵⁵
- 3.12 In accordance with Dr. Couper's 2008 bid specifications, the Dräger software has since its introduction in Washington always truncated the mean of the breath test samples before conducting the plus or minus 10 percent of the mean calculations.

4. ALCOHOL BREATH TEST STATUTORY FOUNDATIONAL REQUIREMENTS

- 4.1 Since 1909, it has been illegal to operate a vehicle in Washington while intoxicated.⁵⁶ Over the next century, the Legislature has repeatedly modified Washington statutes in an attempt to curtail the incidence of drunk driving.⁵⁷
- 4.2 Physical and psychological changes in a person associated with alcohol impairment occur when alcohol is transported through the blood to the central nervous system and to the brain. Only central nervous system alcohol directly causes intoxication.⁵⁸
- 4.3 Alcohol in the deeper portions of the lung interacts with the lung's alveolar sacs where alcohol is transferred from the blood into the lung air and expelled from the body through the breath.⁵⁹ There is a reasonable and substantial relationship between breath alcohol and impairment based on its relationship to blood alcohol.⁶⁰ Alcohol breath testing machines, which have been in existence for many decades, are designed to measure the last portion of a person's breath expelled from the body to detect alcohol present in the person's deep lung air.⁶¹

⁵⁴ Pursuant to RCW 46.61.506.

⁵⁵ Dr. Couper has currently approved the DataMaster, the DataMaster CDM, and the Dräger as alcohol breath testing machines in Washington. WAC 448-16-020(1).

⁵⁶ RRS §2527 (1909); Laws of 1909, ch. 249, §275.

⁵⁷ *City of Fircrest v. Jensen*, 158 Wn.2d 384, ¶2 (2006).

⁵⁸ *State v. Brayman*, 110 Wn.2d 183, 187-90 (1988). *See also* Washington State Patrol Breath Test Program Training Manual (Nov. 2018), Exhibit 4B, at 8-11.

⁵⁹ *Brayman*, 110 Wn.2d at 188-89.

⁶⁰ *Id.*, at 194-95 (upholding Legislature's amendment of DUI statute replacing alcohol in blood standard with alcohol in breath standard).

⁶¹ *Id.*, at 188; *Baker*, 56 Wn.2d at 853.

- 4.4 The prima facie foundational requirements for admissibility of Breathalyzer alcohol breath test results were established by the Supreme Court in *State v. Baker*, a case of first impression in Washington.⁶² In order to satisfy its initial burden to establish the foundation for alcohol breath test results to be admissible as evidence under *Baker*, the prosecution must show –
- (1) That the machine was properly checked and in proper working order at the time of conducting the test;
 - (2) that the chemicals employed were of the correct kind and compounded in the proper proportions;
 - (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test; [and]
 - (4) that the test be given by a qualified operator and in the proper manner.⁶³
- 4.5 If the *Baker* alcohol breath test foundational requirements are met, alcohol breath test results are admissible as evidence and all remaining challenges go to the weight of the breath test results, not their admissibility.⁶⁴ The *Baker* alcohol breath test foundational requirements remain in effect today.⁶⁵
- 4.6 The expert testimony introduced by the prosecution in *Baker* showed that unless the above four foundational requirements are satisfied, alcohol breath test results are “wholly unreliable” and thus inadmissible according to *Baker*.⁶⁶
- 4.7 In *Baker*, the prosecution’s two experts testified that alcohol breath test results are unreliable unless a subject’s mouth is free of all alcohol because alcohol breath testing machines are designed to measure alcohol in deep lung air which corresponds to intoxication, not mouth alcohol which does not correspond to intoxication.⁶⁷
- 4.8 According to the prosecution experts in *Baker*, alcohol in deep lung air is established by keeping the subject under observation for “at least 15 minutes” to allow any alcohol in the mouth to be absorbed by the body.

⁶² *Baker*, 56 Wn.2d at 851.

⁶³ *Id.*, at 852.

⁶⁴ *Jensen*, 158 Wn.2d at ¶16 (2006) (citing to *Baker*, 56 Wn.2d at 852-55).

⁶⁵ *Id.*, at ¶23.

⁶⁶ *Baker*, 56 Wn.2d at 852.

⁶⁷ *Id.*, at 855.

- 4.9 Baker was only observed for 14 minutes before submitting to the Breathalyzer test. Since Baker was not observed for “at least 15 minutes,” the *Baker* Court held that the trial court erred in admitting Baker’s Breathalyzer breath test results because the prosecution did not meet its foundational burden of establishing Baker’s breath was free of all mouth alcohol before submitting to the Breathalyzer test.⁶⁸
- 4.10 In 1969, the voters created Washington’s implied consent law with the passage of Initiative 242.⁶⁹ The initiative also delegated to the state toxicologist the role of approving alcohol breath test machines, establishing procedures for conducting alcohol breath tests, and licensing individuals to administer alcohol breath tests.⁷⁰
- 4.11 In response to the initiative, the state toxicologist in 1969 and 1970 promulgated several regulations for the “Administration of Breathalyzer Test.” The state toxicologist approved the Breathalyzer “as a device for the chemical testing of a person’s breath for intoxication” and mandated requirements for Breathalyzer calibration, maintenance, and administration along with defining instructors, operators, permit cards and training.⁷¹
- 4.12 Following the adoption of the initiative, the state toxicologist also codified the 15-minute observation foundational requirements mandated by *Baker*.⁷²
- 4.13 In 1984, the state toxicologist expanded the regulations by also approving the BAC Verifier DataMaster infrared alcohol breath testing machine as a device for the measurement of a person’s breath for alcohol concentration.⁷³
- 4.14 The question of the validity of the state toxicologist’s approval of an alcohol breath testing machine is one of fact, not law.⁷⁴

⁶⁸ *Id.*, at 855-57. See also *State v. Daw*, 19 Wn. App. 855, 858-59 (1978).

⁶⁹ Laws of 1969, ch. 1, §1 (codified in former RCW 46.20.308). Hereafter “initiative”.

⁷⁰ *Jensen*, 158 Wn.2d at ¶16; Laws of 1969, ch. 1, §3 (codified in former RCW 46.61.506).

⁷¹ Former WAC 448-12-010 through 448-12-100.

⁷² Former WAC 448-12-020 (1969) (“Prior to the administration of a Breathalyzer test it must be determined (a) that the subject has had nothing to eat or drink for at least fifteen minutes prior to the administration of the test, and (b) that the subject does not have any foreign substances in his mouth at the time of the test, which shall be determined by either an examination of the mouth or a denial by the subject that he has any foreign substances in his mouth.”).

As mandated by *Baker*, a mouth check continues to be required today by the state toxicologist. WAC 448-16-040(1).

⁷³ Former WAC 448-12-210 through 448-12-340.

⁷⁴ *State v. Ford*, 110 Wn.2d 827, 831 (1988).

4.15 State toxicologist approval of the DataMaster and its usage of infrared spectroscopy was validated by the Supreme Court in *Ford*.⁷⁵

The ultimate concern of the judiciary is that the methods approved [by the state toxicologist] result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content.⁷⁶

4.16 In 2004, the Legislature “restored its authority to prescribe [alcohol breath test] admissibility requirements which had previously been delegated to the state toxicologist.”⁷⁷ In the first section of the 2004 bill, the Legislature “conveys its frustration with the inadequacy of previous attempts to curtail the incidence of DUI and sets a goal of ensuring swift and certain consequences for those who drink and drive.”⁷⁸

4.17 The Legislature amended RCW 46.61.506 in 2004 by codifying the foundational requirements for the admissibility of alcohol breath test results in the statute. This legislation provides that a “valid” breath test “shall have been performed according to methods approved by the state toxicologist”⁷⁹ and is admissible in a “criminal action”⁸⁰ if the prosecution produces “prima facie evidence” of the eight foundational requirements in RCW 46.61.506(4)(a).⁸¹

4.18 The alcohol breath test statutory foundational requirements codified in RCW 46.61.506(4) currently read –

(4)(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

⁷⁵ *Id.*, at 836 (“[T]here is nothing in the record to suggest that the DataMaster produced an inaccurate result when the test was administered to defendant Ford.”).

⁷⁶ *Id.*, at 833.

⁷⁷ *Jensen*, 158 Wn.2d at ¶17 (“Essentially, the legislature is attempting to return the requirements of BAC admissibility to the way it was before our holding in [*City of Seattle v. Clark-Munoz*], 152 Wn.2d 39 (2004) (alcohol breath test results suppressed because thermometers not traceable to NIST standards as required by former WAC 448-13-035 even though breath tests met *Baker* foundational requirements)].”).

⁷⁸ *Jensen*, 158 Wn.2d at ¶2. See SHB 3055; Laws of 2004, ch. 68, §1.

See also the numerous appellate cases resulting in mostly unsuccessful defense challenges to state toxicologist regulations culminating in the *Clark-Munoz* suppression decision discussed by Justice Madsen in *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, ¶¶28-42 (2007) (Madsen, J., concurring).

⁷⁹ RCW 46.61.506(3).

⁸⁰ RCW 46.61.506(1).

⁸¹ RCW 46.61.506(4)(b).

- (i) The person who performed the test was authorized to perform such test by the state toxicologist;
- (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;
- (iii) The person being tested did not have any foreign substances, not to include dental work or piercings, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;
- (iv) Prior to the start of the test, the temperature of any liquid simulator solution utilized as an external standard, as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;
- (v) The internal standard test resulted in the message “verified”;
- (vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;
- (vii) The result of the test of the liquid simulator solution external standard or dry gas external standard result did lie between .072 to .088 inclusive; and
- (viii) All blank tests gave results of .000.

(b) For purposes of this section, “prima facie evidence” is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution’s or department’s evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.⁸²

4.19 RCW 46.61.506(4)(a) alcohol breath test foundational requirements (ii), (iii), and (vi) codify *Baker’s* alcohol breath test foundational requirement (3) mandating the scientific and evidentiary principle that an alcohol breath test machine must measure only alcohol in a person’s deep lung air which causes intoxication instead of measuring mouth alcohol which does not cause intoxication.⁸³

⁸² Emphasis added.

⁸³ *Baker*, 56 Wn.2d at 852 (“(3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test”).

4.20 Once an alcohol breath test result is admitted into evidence, the defense may introduce evidence attacking the reliability or accuracy of the reading.⁸⁴

The foundational requirements to establish the admissibility of breath tests were first established in *Baker*. Since *Baker*, the State has always had the initial burden to satisfy the foundational requirements. Once the results are admitted, the defendant may introduce evidence attacking their accuracy or reliability. *City of Seattle v. Allison*, 148 Wn.2d 75, 79-80, 59 P.3d 85 (2002).

Similarly, SHB 3055 sets forth the requirements the State must establish, including the four modified *Baker* requirements, before the BAC test results may be admitted.

Once the State makes a prima facie showing of admissibility and the court admits the evidence, the defendant may introduce evidence attacking the reliability or accuracy of the test. SHB 3055 does not alter the burden of the State in DUI cases, it is merely codifying it. The appellant has not shown an impermissible or unconstitutional shifting of the evidentiary burden.⁸⁵

4.21 The defense has multiple methods of attacking an alcohol breath test result after the result is admitted into evidence.

The defense is entitled to an expert witness instruction which was offered in this case by Franco and refused by the court, in error. Additional expert testimony, while available to the defendant, is not the only method of impeaching the reading on the breathalyzer.

The State's expert testimony may be controverted by the defendant testifying about the number of drinks he consumed and the effects of the alcohol upon him, he may call lay witnesses to testify as to those same factors, he may argue that the machine must be in error because of the slight effect the alcohol had upon him. It is simply not the case that the giving of the breath sample proves the crime.⁸⁶

⁸⁴ RCW 46.61.506(4)(c).

⁸⁵ *Jensen*, 158 Wn.2d at ¶23 (Supreme Court approves RCW 46.61.506(4) alcohol breath test foundational requirements) (paragraphs added for ease of reading).

⁸⁶ *State v. Franco*, 96 Wn.2d 816, 828-29 (1982) (paragraphs added for ease of reading), *abrogated on other grounds by State v. Sandholm*, 184 Wn.2d 726 (2015) (former version of DUI statute does not create alternative means to commit DUI under its various "affected by" clauses).

5. THE MOUTH ALCOHOL PLUS OR MINUS TEN PERCENT OF THE MEAN FOUNDATIONAL REQUIREMENT

- 5.1 As discussed in Findings of Fact 4, an alcohol breath test machine is designed to measure alcohol in deep lung air which corresponds to intoxication, not mouth alcohol which does not correspond to intoxication. For this reason, *Baker* held that a subject must be under observation for “at least 15 minutes” prior to submitting to an alcohol breath test to ensure the breath testing machine does not inappropriately measure mouth alcohol.⁸⁷
- 5.2 As alcohol breath test machine software developed over time, the state toxicologist began including a requirement that the mean of the breath test results must be within plus or minus 10 percent of that mean to protect against the machine measuring mouth alcohol as alcohol from deep lung air as prohibited by *Baker*.
- 5.3 The plus or minus 10 percent of the mean requirement was adopted because breath test sample results “will not be within plus or minus 10% of their mean” if alcohol is present in the mouth at the time the breath test sample is taken.⁸⁸
- The plus or minus 10% of the mean rule protects against [m]outh alcohol.⁸⁹
- 5.4 After the state toxicologist approved the plus or minus 10 percent of the mean requirement, calculation of the mean and the acceptable lower and upper limits had to be manually performed after examination of the breath test machine generated printout. Charts were created to assist in determining the acceptable lower and upper limits after the mean was manually calculated.
- 5.5 Eventually, breath test machine software was developed to automatically calculate the mean and the acceptable lower and upper limits. If mouth alcohol was present because the mean was outside the acceptable lower and upper limits, the breath test machine software would abort the test, not generate a breath test printout, and another breath test would have to be performed.
- 5.6 Reviewing the history of the plus or minus 10 percent of the mean mouth alcohol rule is helpful. In 1986, the state toxicologist amended former WAC 448-12-220 (1986) by requiring for the first time that an “accurate” DataMaster alcohol breath test must include a

⁸⁷ *Baker*, 56 Wn.2d at 855-56.

⁸⁸ Washington State Patrol Breath Test Program Training Manual (Nov. 2014), Exhibit 4A, at 32.

⁸⁹ *Id.*

mandatory plus or minus 10 percent breath test results “average” calculation. The amended 1986 regulation read –

WAC 448-12-220 Test defined. The test of a person’s breath for alcohol concentration by infrared test method shall consist of the person insufflating deep lung air samples at least twice into the instrument sufficient to allow two separate measurements. There will be sufficient time between the provision of each sample by the person to permit the instrument to measure each sample individually. The two breath samples supplied by the individual shall constitute one test. An accurate test will be presumed if the results of each measurement is within plus or minus ten percent of the average of the two measurements.⁹⁰

5.7 Former WAC 448-12-220 (1986) remained in effect until chapter 448-12 WAC was repealed by the toxicologist in 1991 when a new chapter 448-13 WAC was promulgated.

5.8 Starting in 1991, to meet the criteria for “precision and accuracy,” a “valid” DataMaster alcohol breath test must comply with the plus or minus 10 percent mean calculation as mandated by former WAC 448-13-060 (1991) which read –

WAC 448-13-060 Validity and certification of test results. A test shall be a valid test and so certified, if the requirements of WAC 448-13-040 and 448-13-050 are met, and in addition the following criteria for precision and accuracy, as determined solely from the breath test document, are met:

- (1) The internal standard test results in the message “verified.”
- (2) The results of both breath samples are within, and inclusive of, plus or minus ten percent of the average of the two measurements. The upper and lower limits of this range shall be based on a three-digit average and shall be truncated to two digits (e.g., .109 will be read as .10).
- (3) The simulator external standard result lies between .090 to .110 inclusive.
- (4) All four blank tests give results of .00.

If these criteria are met, then these and no other factors are necessary to indicate the proper working order of the instrument, and so certify it, at the time of the breath test.⁹¹

This is the first time the state toxicologist incorporated **truncation** as part of the mandatory plus or minus 10 percent mean calculation criteria.

5.9 In 1995, the state toxicologist amended former WAC 448-13-060 (1991) to include an expanded “precision and accuracy” methodology for determining a “valid” breath test through the mandatory plus or minus 10 percent mean calculation. Former WAC 448-13-060 (1995) read –

⁹⁰ Underlined emphasis added. Bold emphasis in original.

⁹¹ Underlined emphasis added. Bold emphasis in original.

WAC 448-13-060 Validity and certification of test results. A test shall be a valid test and so certified, if the requirements of WAC 448-13-040, 448-13-050 and 448-13-055 are met, and in addition the following criteria for precision and accuracy, as determined solely from the breath test document, are met:

- (1) The internal standard test results in the message “verified.”
- (2) In order to be valid, the two breath samples must agree to within plus or minus ten percent of their mean. This shall be determined as follows:
 - (a) The breath test results shall be reported, truncated to three decimal places.
 - (b) The mean of the two breath test results shall be calculated and rounded to four decimal places.
 - (c) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.
 - (d) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.
 - (e) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.
- (3) The simulator external standard result must lie between .090 to .110 inclusive.
- (4) All four blank tests must give results of .000.

If these criteria are met, then these and no other factors are necessary to indicate the proper working order of the instrument, and so certify it, at the time of the breath test.⁹²

This is the first time the state toxicologist incorporated **rounding** as part of the plus or minus 10 percent mean calculation criteria.

- 5.10 In 2001, the state toxicologist amended former WAC 448-13-060 (1995) to require the plus or minus 10 percent mean criteria to be the criteria in effect when the breath test is administered. Former WAC 448-13-060 (2002) was amended by adding paragraph (5) and read –

WAC 448-13-060 Validity and certification of test results. A test shall be a valid test and so certified, if the requirements of WAC 448-13-040, 448-13-050 and 448-13-055 are met, and in addition the following criteria for precision and accuracy, as determined solely from the breath test document, are met:

- (1) The internal standard test results in the message “verified.”
- (2) In order to be valid, the two breath samples must agree to within plus or minus ten percent of their mean. This shall be determined as follows:
 - (a) The breath test results shall be reported, truncated to three decimal places.
 - (b) The mean of the two breath test results shall be calculated and rounded to four decimal places.

⁹² Underlined emphasis added. Bold emphasis in original.

(c) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.

(d) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(e) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.

(3) The simulator external standard result must lie between .090 to .110 inclusive.

(4) All four blank tests must give results of .000.

If these criteria are met, then these and no other factors are necessary to indicate the proper working order of the instrument, and so certify it, at the time of the breath test.

(5) These criteria have changed over time, and the criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect at the time the test is administered.⁹³

5.11 The Legislature amended RCW 46.61.506 in 2004 by codifying the foundational requirements for the admissibility of alcohol breath test results in RCW 46.61.506. This legislation provides that a “valid” breath test “shall have been performed according to methods approved by the statute toxicologist”⁹⁴ and is admissible in a “criminal action”⁹⁵ if the prosecution produces “prima facie evidence” of the six foundational requirements in RCW 46.61.506(4)(a).⁹⁶

5.12 In response, in 2004 the state toxicologist repealed chapter 448-13 WAC and promulgated a new streamlined⁹⁷ set of breath test regulations in chapter 448-16 WAC.⁹⁸ In explaining the reasons for the new chapter 448-16 WAC, the state toxicologist wrote that the new regulations were necessary to ensure “reliable” breath alcohol test evidence –

WAC 448-16-010 Basis for rules governing breath testing. In RCW 46.61.506(4), the legislature establishes criteria for the admissibility of breath alcohol test evidence. RCW 46.61.506(3) authorizes and directs the state toxicologist to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits to those individuals. These rules are intended to implement the direction of the statute by 1) approving instruments and associated equipment capable of performing a reliable breath alcohol test, 2) identifying classifications of individuals who are to be examined for their competence to conduct such

⁹³ Underlined emphasis added. Bold emphasis in original.

⁹⁴ RCW 46.61.506(3).

⁹⁵ RCW 46.61.506(1).

⁹⁶ RCW 46.61.506(4)(b).

⁹⁷ *Ludvigsen*, 162 Wn.2d at ¶32 (Madsen, J., concurring).

⁹⁸ Effective on October 23, 2004.

tests, and operate or maintain that equipment, and 3) identifying certain aspects of the operation of that equipment, necessary for reliable testing.⁹⁹

5.13 In evaluating the propriety of the state toxicologist adoption of the new chapter 448-16 WAC made in light of the enactment of RCW 46.61.506, the Supreme Court wrote –

The ultimate concern of the judiciary is that the methods approved [by the state toxicologist] result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content.¹⁰⁰

5.14 The state toxicologist retained the mandatory plus or minus 10 percent mean requirement. Former WAC 448-16-060 (2005) read –

WAC 448-16-060 Determining agreement of duplicate breath samples. Pursuant to RCW 46.61.506 the following method is approved for determining whether two breath samples agree to within plus or minus ten percent of their mean.

- (1) The breath test results shall be reported, truncated to three decimal places.
- (2) The mean of the two breath test results shall be calculated and rounded to four decimal places.
- (3) The lower acceptable limit shall be determined by multiplying the above mean by 0.9, and truncating to three decimal places.
- (4) The upper acceptable limit shall be determined by multiplying the mean by 1.1 and truncating to three decimal places.
- (5) If the results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.¹⁰¹

The state toxicologist did not modify the **truncation** and **rounding** provisions from previous WACs.

5.15 Dr. Couper approved the Dräger and its software for quantitative measurement of alcohol in a person’s breath effective December 31, 2010.¹⁰² Former WAC 448-16-060 (2005) was amended by Dr. Couper¹⁰³ effective December 31, 2010 (published in 2011) to read –

⁹⁹ WAC 448-16-010 (underlined emphasis added) (bold emphasis in original).

¹⁰⁰ *Ford*, 110 Wn.2d at 833. See *State v. Wittenbarger*, 124 Wn.2d 467 (1994) (approving the streamlined chapter 448-16 WAC promulgated by the state toxicologist).

¹⁰¹ Underlined emphasis added. Bold emphasis in original.

¹⁰² WAC 448-16-020 (2011).

¹⁰³ “As State Toxicologist, I adopted WAC 448-16-060, which approves the method for determining whether two breath samples agree to within +/- ten percent of the calculated mean.” Declaration of Fiona Couper 06/18/2021, Exhibit 3, at 1, ¶4.

WAC 448-16-060 Determining agreement of duplicate breath samples. Pursuant to RCW 46.61.506 the following method is approved for determining whether two breath samples agree to within plus or minus ten percent of their mean.

(1) The breath test results will be reported, truncated to three decimal places.

(2) For the DataMaster instruments, the mean of the two breath test results will be calculated and rounded to four decimal places. For the Dräger instrument, the mean of all four results will be calculated and rounded to four decimal places.

(3) The lower acceptable limit will be determined by multiplying the above mean by 0.9, and truncating to three decimal places.

(4) The upper acceptable limit will be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(5) If the individual results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.¹⁰⁴

Dr. Couper did not modify the **truncation** and **rounding** provisions from previous WACs.

5.16 Dr. Couper reiterated in her testimony by declaration in 2021 that WAC 448-16-060(2) requires the mean to be rounded before performing the plus or minus 10 percent of the mean calculations.¹⁰⁵

5.17 However, in the same 2021 declaration Dr. Couper testified that the Dräger truncates the mean before performing the plus or minus 10 percent of the mean calculations.¹⁰⁶

5.18 WAC 448-16-060(2) recognizes that to calculate plus or minus 10 percent of the mean, the DataMaster machine provides two breath test results while the Dräger machine provides four breath test results.

5.19 The 2011 version of WAC 448-16-060 in Finding of Fact 5.15 promulgated by Dr. Couper remains in effect as of May 18, 2022.¹⁰⁷

5.20 A breath test machine that does not read mouth alcohol as deep lung air alcohol is so important that Dr. Couper as state toxicologist has testified tens of thousands of times by

¹⁰⁴ Underlined emphasis added. Bold emphasis in original.

¹⁰⁵ Declaration of Fiona Couper 06/18/2021, Exhibit 3, at 1, ¶5.

¹⁰⁶ Declaration of Fiona Couper 06/18/2021, Exhibit 3, at 2, ¶8.

¹⁰⁷ WASHINGTON ADMINISTRATIVE CODE, at <https://app.leg.wa.gov/WAC/default.aspx> (last visited May 18, 2022).

declaration¹⁰⁸ that Washington breath test machines will not generate a breath test result if the 10 percent mean requirements of WAC 448-16-060 are not met.

All approved breath test instruments calculate whether the breath test results are within plus or minus 10% of their mean in accord with WAC 448-16-060. If a breath sample is outside this parameter, no breath test result will generate.¹⁰⁹

- 5.21 Accordingly, if alcohol breath test samples are outside plus or minus 10 percent of their mean as calculated by WAC 448-16-060, the Dräger is required to display a “Samples Outside 10%” message and abort the test because the “comparison of calculated breath test results failed.”¹¹⁰ The officer is then directed to run the test again.¹¹¹
- 5.22 If the Dräger displays a “Samples Outside 10%” message, Dr. Couper testified that the Dräger will not print a breath test document.¹¹²
- 5.23 WAC 448-16-050 outlines the mandatory 10-step protocol every alcohol breath test machine must perform “when being employed to quantitatively measure an individual’s breath alcohol concentration.” WAC 448-16-050 reads –

Test defined.

A test of a person’s breath for alcohol concentration will consist of the person exhaling end-expiratory air samples at least twice into the instrument, sufficient to allow two separate measurements. There will be sufficient time between the provision of each sample to permit the instrument to measure each sample individually. Two valid breath samples, provided consecutively, will constitute one test.

The instrument will perform this test according to the following protocol when being employed to quantitatively measure an individual’s breath alcohol concentration. Successful compliance with each step of this protocol is determined from an inspection of the printout of results. These steps are necessary to ensure accuracy, precision, and confidence in each test.

¹⁰⁸ Clark Jones Letter to WAPA 06/16/2021, Exhibit 15 (“comprehensive review of approximately 81,000 [Dräger generated] evidential breath test results”). *See also* Findings of Fact 6.

¹⁰⁹ DOL Fiona Couper Declaration 05/08/2015, Exhibit 11 (emphasis added).

¹¹⁰ Washington State Patrol Breath Test Program Technical Manual (Mar. 2020), Exhibit 5, at 29.

¹¹¹ Washington State Patrol Breath Test Program Training Manual (Nov. 2018), Exhibit 4B, at 34,77.

¹¹² Fiona Couper Declaration Re: Truncation Approval 01/20/2022, Exhibit 18 (no breath test result will generate if a breath sample is outside the 10 percent requirement).

See also 2008 Evidentiary Breath Test Instrumentation Specifications, Exhibit 1, at 5, ¶24 (“If the samples are outside of the mean requirement, the instrument shall require another complete breath test to be performed and will not print a breath test document on the samples that were outside of the mean.”).

- Step 1. Data entry.
- Step 2. Blank test with a result of .000.
- Step 3. Internal standard verified.
- Step 4. First breath sample provided by subject.
- Step 5. Blank test with a result of .000.
- Step 6. External standard test. The result of this test must be between .072 and .088, inclusive.
- Step 7. Blank test with a result of .000.
- Step 8. Second breath sample provided by subject.
- Step 9. Blank test with a result of .000.
- Step 10. Printout of results.¹¹³

5.24 Step 10 of WAC 448-16-050 requires the alcohol breath test machine to provide a written “[p]rintout of results” after the previous nine steps are completed by the machine.

5.25 WAC 448-16-050 requires successful compliance with all 10 steps which are determined from inspection of the printout of the results. The regulation reads in pertinent part –

Successful compliance with each step of this protocol is determined from an inspection of the printout results. These steps are necessary to ensure accuracy, precision, and confidence in each test.¹¹⁴

5.26 If no printout of the results is generated, the breath test lacks “accuracy, precision and confidence” because no printout exists from which to determine successful compliance with the 10-step WAC 448-16-050 protocol. A breath test not performed according to the methods approved by the state toxicologist is not a “valid” test.¹¹⁵

5.27 In *Wittenbarger*,¹¹⁶ the majority found the self-certifying DataMaster machine accurate and reliable because unlike the Breathalyzer machine, the DataMaster possessed “the technical capability of monitoring its own performance at each breath test”. A breath test printout thus becomes crucial in determining the accuracy and reliability of breath test results –

The breath test ticket, then, is a crucial document in determining whether the DataMaster was operating properly during a particular test.¹¹⁷

¹¹³ Bold emphasis in original.

¹¹⁴ Emphasis added.

¹¹⁵ RCW 46.61.506(3).

¹¹⁶ *Wittenbarger*, 124 Wn.2d at 483.

¹¹⁷ *Id.* (emphasis added).

- 5.28 Like the DataMaster, the Dräger is also a self-certifying machine because the Dräger is required to produce a printout of the results so the Dräger’s successful compliance with the mandatory 10-step WAC 448-16-050 protocol can be determined from an inspection of the printout.
- 5.29 As with the self-certifying DataMaster, the Dräger breath test printout is a crucial document in determining whether the Dräger was “operating properly” during a particular test to “ensure accuracy, precision, and confidence in each test” pursuant to WAC 448-16-050 and be a “valid” test as required by RCW 46.61.506(3).
- 5.30 In Keller’s case, on May 9, 2020 the Dräger software generated a breath test printout despite the Dräger software being in non-compliance with the plus or minus 10 percent of the mean rounding calculations mandated by WAC 448-16-060(2).¹¹⁸
- 5.31 “Truncation” and “rounding” are terms of art with an accepted meaning in the scientific community when used in the context of the validity of an alcohol breath test result.¹¹⁹

Truncation means a cutoff of the measurement at two decimal places without regard to the value of any number in the third decimal place. It differs from the colloquial meaning of “rounding off” the second decimal place downward or upward by consideration of the third decimal place number.⁴

⁴ Truncating, as opposed to rounding, involves simply reporting the first and second decimal places and dropping the third. For example, by truncating, a reading of 0.079 [per cent blood alcohol content] would be reported as 0.07 and a reading of 0.089 [per cent blood alcohol content] would be reported as 0.08.¹²⁰

- 5.32 Dr. Couper knew or should have known truncation and rounding are terms of art in the scientific community when she used those terms in the 2008 bid specifications and her subsequent approval in 2010 of the Dräger machine and its software.
- 5.33 Dr. Couper knew or should have known in 2010 that truncation and rounding are terms of art in the scientific community when she used those terms in the WACs she promulgated

¹¹⁸ Alcotest 9510 Breath Test Document 05/09/2020, Exhibit 14.

¹¹⁹ At oral argument on March 8, 2022, both parties agreed that “truncation” and “rounding” are terms of art in the scientific community in the context of alcohol breath testing machines.

See also ARHC-0003 Discovery Report and ARHC-0005 Discovery Report, Exhibit 6.

¹²⁰ *Commonwealth v. Hourican*, 10 N.E.3d 646, 650 (Mass.App.Ct. 2014) (citations omitted) (emphasis added) (quotation marks omitted).

Both parties cite with approval to *Hourican*’s definition of truncation and rounding. Defense Reply Brief (filed Jan. 20, 2022), at 2; and State’s Supplemental Memorandum of Authorities Opposing Suppression of Breath Results (filed Feb. 25, 2022), at 5.

requiring the Dräger software to conduct the mandatory plus or minus 10 percent of the mean calculations for determining the validity of an alcohol breath test by analyzing deep lung air for alcohol instead of mouth alcohol.

- 5.34 Dr. Couper knew or should have known in 2010 when she promulgated the mean rounding requirement in WAC 448-16-060(2) that the Dräger software she approved based upon her 2008 Dräger software bid specifications did not round the mean but instead truncated the mean.
- 5.35 Until June 16, 2021, no one outside Dr. Couper’s office knew the Dräger software has never been in compliance with the WAC 448-16-060(2) mean rounding requirement.¹²¹
- 5.36 On January 20, 2022, Dr. Couper approved the Dräger software truncation of the mean calculation which the machine has been doing since its approval by Dr. Couper in 2010.

The Draeger Alcotest 9510 calculates whether the breath test results are within plus or minus 10% of their mean (inclusive) using the following formula – the sum of the four breath test results divided by four (4) to obtain the mean result, which is truncated to four decimal places. To calculate the acceptability range (+/- ten percent of the mean), the mean is then multiplied by 0.9 and 1.1, truncated to three decimal places – this method is approved. If a breath sample is outside this parameter, no breath test result will generate.¹²²

- 5.37 Dr. Couper has not repealed the rounding of the mean method mandated for Dräger machines since 2010 by WAC 448-16-060(2), which remains in effect as of May 18, 2022.¹²³
- 5.38 The self-certifying Dräger machine has never generated a Washington breath test printout in compliance with WAC 448-16-050, WAC 448-16-060, and RCW 46.61.506 because the Dräger software truncates the mean instead of rounding the mean before performing the plus or minus 10 percent of the mean calculation as mandated by WAC 448-16-060(2).
- 5.39 The self-certifying Dräger machine has improperly generated tens of thousands of breath test printouts despite the state toxicologist approved method requiring the Dräger software to display a “Samples Outside 10%” message and abort the test when in non-compliance with WAC 448-16-060.

¹²¹ See Findings of Fact 6.

¹²² Fiona Couper Declaration Re: Truncation Approval 01/20/2022, Exhibit 18 (emphasis added).

¹²³ WASHINGTON ADMINISTRATIVE CODE, at <https://app.leg.wa.gov/WAC/default.aspx> (last visited May 18, 2022).

6. “POTENTIAL IMPEACHMENT DISCLOSURE”

- 6.1 On June 16, 2021, Lieutenant Clark Jones of the Impaired Driving Section of the WSP Forensic Laboratory Services Bureau sent a letter via email to the Washington Association of Prosecuting Attorneys¹²⁴ titled “Subject: Potential Impeachment Disclosure Concerning Evidential Breath Test Results.”¹²⁵ The June 16, 2021 PID letter was cc’d to Dr. Couper, the director of the FLSB and the state toxicologist.
- 6.2 Paragraph one of the June 16, 2021 PID letter reads –
- On June 3, 2021, the Washington State Patrol Impaired Driving Section (IDS) was notified that the process used by the Draeger Alcotest 9510 to determine agreement of duplicate breath samples is potentially not calculated in accordance with the Washington Administration Code (WAC 448-16-060).¹²⁶
- 6.3 The Impaired Driving Section is within the Washington State Patrol Forensic Laboratory Services Bureau along with the Crime Laboratory Division and the Toxicology Laboratory Division.¹²⁷
- 6.4 Dr. Couper has known since 2008 that the Dräger bid specifications and ultimately the Dräger software she approved as state toxicologist required the Dräger software to truncate the mean, not round the mean as required in 2010 when Dr. Couper promulgated WAC 448-16-060.
- 6.5 The statement in paragraph one of the June 16, 2021 PID letter that the Impaired Driving Section was notified on “June 3, 2021” that the Dräger potentially failed to comply with WAC 448-16-060 is false or misleading. Due to the information known by Dr. Couper since 2008, the Impaired Driving Section has been on notice since the Dräger was approved in 2010 by Dr. Couper that the Dräger has never rounded the mean as required by WAC 448-16-060.
- 6.6 As of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not issued a correction of the June 16, 2021 PID letter to WAPA that the Impaired Driving Section which Dr. Couper supervises was on notice over a decade before the June 3, 2021 “notification” date that the Dräger software has never rounded the mean as required by WAC 448-16-060.

¹²⁴ Hereafter “WAPA”.

¹²⁵ Clark Jones Letter to WAPA 06/16/2021, Exhibit 15. Hereafter “PID”.

¹²⁶ Emphasis added.

¹²⁷ Finding of Fact 2.1

- 6.7 The statement in paragraph one of the June 16, 2021 PID letter that Dräger breath test results are “potentially” not calculated in accordance with WAC 448-16-060 is false or misleading. Dräger breath test results have never been calculated in accordance with WAC 448-16-060 because Dr. Couper required the Dräger software in the 2008 bid specifications to truncate the mean rather than round the mean as required in 2010 by the Dr. Couper when she promulgated WAC 448-16-060.
- 6.8 As of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not issued a correction of the June 16, 2021 PID letter to WAPA that the Dräger software has never complied with WAC 448-16-060 rather than the false or misleading statement in the PID letter that the software “potentially” does not comply with WAC 448-16-060.
- 6.9 Paragraph two of the June 16, 2021 PID letter begins by explaining the failure of the Dräger to properly calculate plus or minus 10 percent of the mean in accordance with the rounding requirement of WAC 448-16-060.

The WAC states, for determining whether two breath samples agree to within $\pm 10\%$ of their mean, the mean of the four breath test results is calculated and rounded to four decimal places. Initial investigation indicates the Draeger Alcotest performs this mean calculation and truncates to four decimal places.¹²⁸

- 6.10 The statement in paragraph two of the PID letter that the Impaired Driving Section’s post-June 3, 2021 “[i]nitial investigation” indicated the Dräger performed the mean calculation and “truncates” to four decimal places is false or misleading. Due to the information known by Dr. Couper since 2008, the Impaired Driving Section has known or should have known that the Dräger has always truncated the mean because Dr. Couper required the Dräger software in the 2008 bid specifications to truncate the mean rather than round the mean as required in 2010 when Dr. Couper promulgated WAC 448-16-060.
- 6.11 As of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not issued a correction of the June 16, 2021 PID letter to WAPA that the Dräger software has never complied with WAC 448-16-060 rather than the false or misleading statement in the PID letter that a post-June 3, 2021 “[i]nitial investigation” discovered the Dräger software truncates the mean.

¹²⁸ Emphasis added.

6.12 Paragraph three of the June 16, 2021 PID letter notes that the Dräger manufacturer has been contacted.

The Impaired Driving Section has contacted Draeger Safety Diagnostics Incorporated for assistance in this ongoing investigation. An updated disclosure letter will be provided within thirty (30) days, as additional information becomes available.¹²⁹

6.13 The June 16, 2021 PID letter to WAPA did not disclose as part of a post-June 3, 2021 “ongoing investigation” that Dr. Couper has known since 2008 that the Dräger bid specifications she approved required the Dräger software to truncate the mean, not round the mean which was required in 2010 when Dr. Couper promulgated WAC 448-16-060.

6.14 Upon receipt of the June 16, 2021 PID letter, WAPA immediately forwarded the letter to its membership.¹³⁰

6.15 On July 8, 2021, Lt. Jones sent a second letter to WAPA titled “Subject: Potential Impeachment Disclosure Concerning Evidential Breath Test Results – Follow-up.”¹³¹ The July 8, 2021 follow-up PID letter was cc’d to Dr. Couper, the director of the FLSB and the state toxicologist.

6.16 Paragraph two of the July 8, 2021 follow-up PID letter reads –

Continued analysis of breath test instrument data downloaded from Washington State Patrol Central Reporting Services has revealed eight total tests which appear to have met the acceptance criteria outlined in WAC 448-16-060 but were not accepted. No accepted breath tests have been identified as incorrectly meeting the acceptance criteria.¹³²

6.17 The “acceptance criteria” for a Dräger breath test are promulgated in WAC 448-16-060 which requires the Dräger to calculate the mean of all four breath test results and round the mean to four decimal places before performing the plus or minus 10 percent of the mean calculations.¹³³

¹²⁹ Emphasis added.

¹³⁰ Pam Loginsky Email to WAPA Members 06/16/2021, Exhibit 16.

¹³¹ Clark Jones Letter to WAPA 07/08/2021, Exhibit 17. Hereafter “follow-up PID”.

¹³² Emphasis added.

¹³³ WAC 448-16-060(2).

- 6.18 The statement in paragraph two of the follow-up PID letter that “[n]o accepted breath tests have been identified as incorrectly meeting the acceptance criteria” is patently false. No Washington Dräger breath test has ever met the acceptance criteria mandated by WAC 448-16-060 because the Dräger truncates the mean rather than rounds the mean as required by the WAC.
- 6.19 Despite knowing the statement was false, as of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not issued a correction of the July 8, 2021 follow-up PID letter to WAPA that the Dräger software has never complied with the WAC 448-16-060 acceptance criteria rather than the false statement in the letter that a post-June 3, 2021 “[c]ontinued analysis” revealed the Dräger has not accepted any breath tests which incorrectly meet the acceptance criteria of WAC 448-16-060.
- 6.20 Perhaps most importantly, neither PID letter disclosed that the Dräger has generated tens of thousands¹³⁴ of breath test result printouts since 2010 in non-compliance with the 10 percent mean rounding calculations mandated by WAC 448-16-060 .
- 6.21 Despite knowing the Dräger has improperly generated tens of thousands of breath test printouts in violation of WAC 448-16-060, as of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not issued a correction of the two PID letters to WAPA disclosing the Dräger has never complied with WAC 448-16-060. Rather, Dr. Couper has permitted the Dräger to continue to generate breath test printouts in violation of WAC 448-16-060 which when inspected as required by WAC 448-16-050 on their face inaccurately show successful compliance with each of the 10-step protocol to “ensure accuracy, precision, and confidence in each test.”

¹³⁴ Clark Jones Letter to WAPA 06/16/2021, Exhibit 15 (“comprehensive review of approximately 81,000 [Dräger generated] evidential breath test results”).

7. THE IMPLIED CONSENT LAW AND DOL HEARINGS¹³⁵

7.1 In 1968, the voters approved Washington’s implied consent law with the passage of Initiative 242 codified in RCW 46.20.308.¹³⁶ The purpose of the legislation is to address the long-standing problem of drunk driving.¹³⁷ The essence of the implied consent statute which has been modified several times over the last half century reflects the “trade-off approved by the voters in 1968.”¹³⁸ The trade-off is discussed in the opening sentence of the statute –

Any person who operates a motor vehicle within this state is deemed to have given consent, ... to a test or tests of his or her breath for the purpose of determining the alcohol concentration in his or her breath if arrested for any offense where, ... the arresting officer has reasonable grounds to believe the person had been driving ... while under the influence of intoxicating liquor.¹³⁹

7.2 The implied consent of the driver recognized in RCW 46.20.308 is not final. Prior to obtaining a breath sample, the officer must – (1) advise the driver that the driver still has the right to refuse to consent to the test but that a license revocation and use of that refusal at trial are among the consequences that follow if the driver declines the test; and (2) inform the driver that if the driver submits to a breath test and the alcohol concentration is over a certain level a license suspension is a consequence of the driver’s decision to submit to the test.¹⁴⁰

7.3 If the driver submits to a breath test, the driver’s license, permit, or privilege to drive will be suspended, revoked, or denied for at least 90 days –

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if:

(i) The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver’s breath is 0.08 or more; or

(ii) The driver is under age twenty-one and the test indicates either that the alcohol concentration of the driver's breath is 0.02 or more; or

(iii) The driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and

¹³⁵ Findings of Fact 7 focuses on the implied consent law concerning an age 21 or older arrestee who submits to a Dräger breath test resulting in an alcohol concentration of 0.08 or more because Keller is age 21 or older, was arrested for DUI, and his Dräger breath test printout readings are 0.116/0.117.

¹³⁶ Laws of 1969, ch. 1.

¹³⁷ *State v. Moore*, 79 Wn.2d 51, 53 (1971).

¹³⁸ *State v. Nelson*, 7 Wn.App.2d 588, ¶7 (2019).

¹³⁹ RCW 46.20.308(1).

¹⁴⁰ RCW 46.20.308(2).

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.¹⁴¹

- 7.4 If a breath test result indicates an alcohol concentration of 0.08 or more, the arresting officer or other law enforcement directing the test shall "immediately notify" the Department of Licensing¹⁴² of the arrest and within 72 hours transmit a sworn report to DOL concerning the specifics of the arrest and breath test results. The officer shall also serve written notice to the arrested person of the DOL intention to suspend the person's license.¹⁴³
- 7.5 Upon receipt of this information from the officer, DOL shall suspend, revoke, or deny the person's license, permit, or privilege to drive effective 30 days from the date of arrest.¹⁴⁴
- 7.6 The arrested person has a statutory right to a DOL administrative hearing to challenge the administrative license suspension by requesting a formal DOL hearing within 7 days of the driver's receipt of the DOL notice from the officer.¹⁴⁵
- 7.7 The scope of the formal DOL hearing is defined by statute –

For the purposes of this section, the scope of the hearing shall cover the issues of

[1] whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug ...

[2] whether the person was placed under arrest, and ... if a test or tests were administered,

[3] whether the applicable requirements of this section were satisfied before the administration of the test or tests,

[4] whether the person submitted to the test or tests... and

[5] whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more...if the person was age twenty-one or over at the time of the arrest...¹⁴⁶

¹⁴¹ RCW 46.20.308(2)(c) and (2)(d) (emphasis added). License suspension may be longer than 90 days if the person has a second or subsequent incident within 7 years. RCW 46.20.308(6) and RCW 46.20.3101.

¹⁴² Hereafter "DOL".

¹⁴³ RCW 46.20.308(5). The statute includes additional requirements as well.

¹⁴⁴ RCW 46.20.308(6).

¹⁴⁵ RCW 46.20.308(7).

¹⁴⁶ RCW 46.20.308(7) (emphasis added) (paragraphs added for ease of reading).

DOL hearing procedural rules are promulgated in chapter 308-101 WAC (effective Sep. 4, 2018). *See* also RCW 46.20.329; and former chapter 308-103 WAC DOL hearing procedural rules (repealed effective May 21, 2018).

- 7.8 The Legislature amended RCW 46.61.506 in 2004 by codifying the foundational requirements for the admissibility of alcohol breath test results in RCW 46.61.506. This legislation provides that a “valid” breath test “shall have been performed according to methods approved by the statute toxicologist”¹⁴⁷ and is admissible in a “civil” action including a DOL hearing¹⁴⁸ if the “department”¹⁴⁹ produces “prima facie evidence” of the eight foundational requirements in RCW 46.61.506(4)(a).¹⁵⁰
- 7.9 The officer’s sworn report and any evidence including the breath test printout accompanying the report shall be admissible at the DOL hearing without further evidentiary foundation. Certifications authorized by the criminal rules for courts of limited jurisdiction¹⁵¹ shall also be admissible at the DOL hearing without further evidentiary foundation.¹⁵²
- 7.10 The conduct of a DOL administrative hearing is outlined in WAC 308-101-210. In addition to the evidence discussed in Finding of Fact 7.9, the DOL hearings examiner is authorized to –
- Examine and admit public records including, but not limited to, maps, policy and procedure manuals, breath testing equipment manuals and the Washington state patrol breath test section website at any time before, during, or after the hearing, subject to full opportunity, including the opportunity to request a continuance if needed, for cross-examination and rebuttal by the petitioner ...¹⁵³
- 7.11 DOL hearings examiners routinely examine and admit WSP breath test section website materials¹⁵⁴ including Dr. Couper’s testimony through her sworn declarations titled “Instruments, Equipment and External Standards Approved for the Quantitative Measurement of Alcohol in Person’s Breath in Washington State”¹⁵⁵ which are posted on the website.¹⁵⁶ Dr. Couper’s testimony through her declarations purportedly establishes that a Dräger breath test

¹⁴⁷ RCW 46.61.506(3).

¹⁴⁸ RCW 46.61.506(1).

¹⁴⁹ “The term ‘department’ shall mean the department of licensing unless a different department is specified.” RCW 46.04.162.

¹⁵⁰ RCW 46.61.506(4)(b).

¹⁵¹ CrRLJ 6.13.

¹⁵² RCW 46.20.308(7).

¹⁵³ WAC 308-101-210(10) (emphasis added).

¹⁵⁴ See WASHINGTON STATE PATROL IMPAIRED DRIVING SECTION DISCOVERY MATERIALS SITE, http://wsp.wa.gov/breathtest/wdms_home.htm (last visited Apr. 16, 2022).

¹⁵⁵ See Exhibit 11 (May 8, 2015); and Exhibit 18 (Jan. 20, 2022).

¹⁵⁶ Attorney Declarations Re: DOL Fiona Couper Declarations, Exhibit 12.

properly administered by an operator meets all the breath alcohol testing methods mandated by the state toxicologist.

- 7.12 Dr. Couper’s testimony through her declarations is routinely admitted into evidence by hearings examiners in tens of thousands of implied consent DOL hearings along with the other evidence previously discussed.¹⁵⁷
- 7.13 Dr. Couper’s testimony through her declarations is “prima facie evidence” meeting the foundational requirements necessary for the admission of a “valid” Dräger breath test printout because a “valid” breath test “shall have been performed according to methods approved by the state toxicologist”.¹⁵⁸
- 7.14 Without the admission of Dr. Couper’s testimony through her declarations, a Dräger breath test printout would not be admissible in a DOL hearing because the Dräger breath test would not be “valid” as required by RCW 46.61.506(3), RCW 46.61.506(4)(a), WAC 448-16-050 and WAC 448-16-060.¹⁵⁹
- 7.15 Without the admission of Dr. Couper’s testimony through her declarations at an implied consent DOL administrative hearing, tens of thousands of people whose driver’s licenses were suspended by DOL hearings examiners would not have had their driver’s licenses suspended.¹⁶⁰
- 7.16 Dr. Couper has testified tens of thousands of times in her May 8, 2015 declaration “Instruments, Equipment and External Standards Approved for the Quantitative Measurement of Alcohol in Person’s Breath in Washington State” as follows –

All approved breath test instruments calculate whether the breath test results are within plus or minus 10% of their mean in accord with WAC 448-16-060. If a breath sample is outside this parameter, no breath test result is generated.¹⁶¹

¹⁵⁷ *Id.* See also Clark Jones Letter to WAPA 06/16/2021, Exhibit 15 (“comprehensive review of approximately 81,000 [Dräger generated] evidential breath test results”).

¹⁵⁸ RCW 46.61.506(3), RCW 46.61.506(4)(a), WAC 448-16-050 and WAC 448-16-060.

¹⁵⁹ Attorney Declarations Re: DOL Fiona Couper Declarations, Exhibit 12.

¹⁶⁰ *Id.* See also Clark Jones Letter to WAPA 06/16/2021, Exhibit 15 (“comprehensive review of approximately 81,000 [Dräger generated] evidential breath test results”).

¹⁶¹ DOL Fiona Couper Declaration 05/08/2015, Exhibit 11 (emphasis added).

- 7.17 As discussed in Findings of Fact 6, Dr. Couper’s testimony in Exhibit 11 that all approved breath test instruments calculate the 10 percent mean “in accord with WAC 448-16-060” and that a breath test printout will not be generated if the breath samples are outside the WAC 448-16-060 mean calculation requirements is false or misleading. Dr. Couper has known since she approved the Dräger in 2010 and promulgated WAC 448-16-060 that the Dräger software has never complied with the Dr. Couper mandated WAC 448-16-060 mean rounding requirement yet the Dräger software continues to generate a breath test document in non-compliance with WAC 448-16-060.
- 7.18 As of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not issued a declaration correcting her false or misleading statements of material fact made in her May 8, 2015 testimony which has been filed and relied upon by DOL hearings examiners in tens of thousands of implied consent administrative DOL hearings.
- 7.19 On January 10, 2022, Dr. Couper testified in a new “Instruments, Equipment and External Standards Approved for the Quantitative Measurement of Alcohol in Person’s Breath in Washington State” declaration. Dr. Couper’s testimony in her new declaration reads in the final paragraph –
- The Draeger Alcotest 9510 calculates whether the breath test results are within plus or minus 10% of their mean (inclusive) using the following formula – the sum of the four breath test results divided by four (4) to obtain the mean result, which is truncated to four decimal places. To calculate the acceptability range (+/- ten percent of the mean), the mean is then multiplied by 0.9 and 1.1, truncated to three decimal places – this method is approved. If a breath sample is outside this parameter, no breath test result will generate.¹⁶²
- 7.20 In her January 10, 2022 testimony, Dr. Couper approves the Dräger software mean truncation method which the machine has been doing since Dr. Couper approved the Dräger in 2010.
- 7.21 Unlike the false or misleading testimony in Exhibit 11 that “[a]ll approved breath test instruments calculate whether the breath test results are within plus or minus 10% of their mean in accord with WAC 448-16-060”, Dr. Couper’s testimony in her January 10, 2022 Dräger software declaration approving Dräger truncation of the mean fails to mention WAC 448-16-060.

¹⁶² Fiona Couper Declaration Re: Truncation Approval 01/20/2022, Exhibit 18.

- 7.22 As of March 8, 2022, the date of the *en banc* hearing, Dr. Couper has not codified her January 20, 2022 approval of the Dräger mean truncation method nor has Dr. Couper repealed the Dräger rounding method mandated by WAC 448-16-060(2). The WAC 448-16-060(2) mean rounding requirement remains in effect for all Dräger breath tests.
- 7.23 Although the Dräger truncation of the 10 percent mean calculation is now approved by Dr. Couper, the Dräger software continues to generate a breath test document after truncating the mean despite being in non-compliance with the rounding requirement still mandated by WAC 448-16-060(2).

CONCLUSIONS OF LAW

1. THE COURT HAS JURISDICTION

- 1.1 All judicial power vests only in the Article IV courts created by the Washington Constitution.¹⁶³
- 1.2 Every analysis of a court’s jurisdiction begins with the Washington Constitution because the Legislature cannot restrict a court’s jurisdiction where the Constitution has specifically granted jurisdiction to that court.¹⁶⁴
- 1.3 The Legislature may, however, prescribe reasonable limitations on a court’s jurisdiction provided that the limitations do not have the effect of depriving the court of its constitutional jurisdiction.¹⁶⁵
- 1.4 Const. art. IV, §1 creates Washington district courts.¹⁶⁶ Const. art. IV, §10 delegates limited Article IV judicial power to the Legislature to “prescribe by law the powers, duties and jurisdiction” of district courts by legislatively transferring judicial power from superior courts to district courts.¹⁶⁷
- 1.5 A court’s jurisdiction is comprised of two components – jurisdiction over the subject matter and jurisdiction over the person.¹⁶⁸ A court has jurisdiction to determine whether it has jurisdiction over a particular case.¹⁶⁹

¹⁶³ *In re Barbee*, 19 Wash. 306, 310 (1898); and *Taylor v. Huntington*, 34 Wash. 455, 461 (1904).

¹⁶⁴ *Buecking v. Buecking*, 179 Wn.2d 438, ¶25 (2013).

¹⁶⁵ *Id.*, at ¶27.

¹⁶⁶ The Constitution titles these courts “justices of the peace” courts. Justices of the peace courts were retitled as “district courts” by the Legislature in the Court Improvement Act of 1984 (codified in RCW 3.30.015). *State v. Eng*, 113 Wn.2d 178, 185-86 (1989).

“[D]istrict courts are justice of the peace courts, simply renamed. RCW 3.30.015.” *Banowsky v. Guy Backstrom, DC*, 193 Wn.2d 724, ¶19 n.3 (2019).

¹⁶⁷ See *In re Cloherty*, 2 Wash. 137, 139 (1891) (“The jurisdiction of these courts is universal, covering the whole domain of judicial power, even to that growing out of the supposed existence of municipal ordinances. But to the legislature of the state the constitution delegates authority to transfer from one of the constitutional courts to another certain limited portions of the judicial power ...”).

¹⁶⁸ *Buecking*, 179 Wn.2d at ¶23.

¹⁶⁹ *In the Matter of the Estate of Reugh*, 10 Wn.App.2d 20, ¶28 (2019).

- 1.6 Subject matter jurisdiction refers to a court’s ability to hear and determine a type of case. A court lacks subject matter jurisdiction when it attempts to decide a type of case over which it has no authority to adjudicate.¹⁷⁰ A court order is void where a court lacks subject matter jurisdiction to issue the order.¹⁷¹
- 1.7 The Legislature has long granted district courts, concurrent with superior courts, jurisdiction over all misdemeanors and gross misdemeanors committed by adult offenders in their respective counties.¹⁷²
- 1.8 Keller is charged with one count of DUI, a gross misdemeanor.¹⁷³ The incident allegedly occurred in Kitsap County, Washington. Keller is an adult.
- 1.9 Kitsap County District Court has subject matter jurisdiction over this case and personal jurisdiction over Keller.

2. KELLER HAS STANDING

- 2.1 The State seeks to admit in its case-in-chief the breath test printout¹⁷⁴ generated by a Dräger breath test machine as a result of Keller’s submission to a Dräger breath test.
- 2.2 The defense objects to the admissibility of Keller’s Dräger generated breath test printout – (1) under RCW 46.61.506; (2) under the rules of evidence; and (3) because the state toxicologist approval of the Dräger and its software in 2010 was arbitrary and capricious.
- 2.3 As will be discussed in Conclusions of Law 3, the State admits Dräger generated breath test printouts do not satisfy the RCW 46.61.506(4)(a)(vi) foundational requirement which requires Dräger breath test samples to agree “within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist ...” as calculated by the rounding method mandated by WAC 448-16-060(2).

¹⁷⁰ *Banowsky*, 193 Wn.2d at ¶18 (citations omitted).

¹⁷¹ *Buecking*, 179 Wn.2d at ¶20.

¹⁷² RCW 3.66.060(1). Courts of limited jurisdiction also have jurisdiction over juveniles aged 16 and 17 when the offense is a misdemeanor, gross misdemeanor or infraction which is a traffic, fish, boating, or game offense, or a traffic or civil infraction. RCW 13.04.030(1)(e)(iii).

¹⁷³ RCW 46.61.502(5).

¹⁷⁴ Alcotest 9510 Breath Test Document 05/09/2020, Exhibit 13.

- 2.4 The State argues instead that Keller lacks standing despite the Dräger’s non-compliance with the alcohol breath test foundational statute and state toxicologist regulations because the non-compliance has no prejudicial effect on admissibility of the test results. The State argues – (1) it is to Keller’s benefit that the Dräger software truncates the mean of the four breath test results to four decimal places before conducting the plus or minus 10 percent of the mean calculations instead of rounding the mean as mandated by WAC 448-16-060(2); and (2) in Keller’s case based upon inspection of his Dräger generated breath test printout there is no fifth decimal place to truncate or round to four decimal places after the mean of the four breath test results is calculated.
- 2.5 For the reasons discussed in Conclusions of Law 3 and 4, the Court declines the State’s request to create a new “lack of prejudice to the defense” breath test admissibility foundational exception to RCW 46.61.506 or the rules of evidence.
- 2.6 Additionally, the State’s “lack of prejudice to defendant Keller” argument is based upon an inspection of Keller’s Dräger generated breath test printout. This argument pre-supposes Keller’s Dräger generated breath test printout is admissible in the State’s case-in-chief . This is precisely the subject of Keller’s motion to suppress.
- 2.7 The State seeks to admit Keller’s Dräger generated breath test printout in its case-in-chief. Keller moves to suppress his Dräger generated breath test printout pursuant to CrRLJ 3.6. Keller has standing to bring his suppression motion.

**3. DRÄGER GENERATED BREATH TEST PRINTOUTS ARE NOT ADMISSIBLE
BECAUSE THE STATE IS UNABLE TO PRODUCE PRIMA FACIE EVIDENCE
OF ADMISSIBILITY AS REQUIRED BY RCW 46.61.506**

Deep Lung Air And Mouth Alcohol

- 3.1 Since 1909, it has been illegal to operate a vehicle in Washington while intoxicated.¹⁷⁵ Over the next century, the Legislature has repeatedly modified Washington’s statutes in an attempt to curtail the incidence of drunk driving.¹⁷⁶
- 3.2 Physical and psychological changes in a person associated with alcohol impairment occur when alcohol is transported through the blood to the central nervous system and to the brain. Only central nervous system alcohol directly causes intoxication.¹⁷⁷
- 3.3 Alcohol in the deeper portions of the lung interacts with the lung’s alveolar sacs where alcohol is transferred from the blood into the lung air and expelled from the body through the breath.¹⁷⁸ There is a reasonable and substantial relationship between breath alcohol and impairment based on its relationship to blood alcohol.¹⁷⁹ Alcohol breath testing machines, which have been in existence for many decades, are designed to measure the last portion of a person’s breath expelled from the body to detect alcohol present in the person’s deep lung air.¹⁸⁰

State v. Baker Prohibits A Breath Test Machine From Accepting Mouth Alcohol

- 3.4 The prima facie foundational requirements for admissibility of Breathalyzer alcohol breath test results were first established by the Supreme Court in *State v. Baker*, a case of first impression in Washington.¹⁸¹ In order to satisfy its initial burden to establish the foundation for alcohol breath test results to be admissible as evidence under *Baker*, the prosecution must show –

¹⁷⁵ RRS §2527 (1909); Laws of 1909, ch. 249, §275.

¹⁷⁶ *City of Fircrest v. Jensen*, 158 Wn.2d 384, ¶2 (2006).

¹⁷⁷ *State v. Brayman*, 110 Wn.2d 183, 187-90 (1988). See also Washington State Patrol Breath Test Program Training Manual (Nov. 2018), Exhibit 4B, at 8-11.

¹⁷⁸ *Brayman*, 110 Wn.2d at 188-89.

¹⁷⁹ *Id.*, at 194-95 (upholding Legislature’s amendment of DUI statute replacing alcohol in blood standard with alcohol in breath standard).

¹⁸⁰ *Id.*, at 188; *State v. Baker*, 56 Wn.2d 846, 853 (1960).

¹⁸¹ *Baker*, 56 Wn.2d at 851.

- (1) That the machine was properly checked and in proper working order at the time of conducting the test;
 - (2) that the chemicals employed were of the correct kind and compounded in the proper proportions;
 - (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test; [and]
 - (4) that the test be given by a qualified operator and in the proper manner.¹⁸²
- 3.5 If the *Baker* alcohol breath test foundational requirements are met, alcohol breath test results are admissible as evidence and all remaining challenges go to the weight of the breath test results, not their admissibility.¹⁸³ The *Baker* alcohol breath test foundational requirements remain in effect today.¹⁸⁴
- 3.6 The expert testimony introduced by the prosecution in *Baker* showed that unless the above four foundational requirements are satisfied, alcohol breath test results are “wholly unreliable” and thus inadmissible according to *Baker*.¹⁸⁵
- 3.7 In *Baker*, the prosecution’s two experts testified that alcohol breath test results are unreliable unless a subject’s mouth is free of all alcohol because alcohol breath testing machines are designed to measure alcohol in deep lung air which corresponds to intoxication, not mouth alcohol which does not correspond to intoxication.¹⁸⁶
- 3.8 According to the prosecution experts in *Baker*, alcohol in deep lung air is established by keeping the subject under observation for “at least 15 minutes” to allow any alcohol in the mouth to be absorbed by the body.
- 3.9 *Baker* was only observed for 14 minutes before submitting to the Breathalyzer test. Since *Baker* was not observed for “at least 15 minutes,” the *Baker* Court held that the trial court erred in admitting *Baker*’s Breathalyzer breath test results because the prosecution did not meet its foundational burden of establishing *Baker*’s breath was free of all mouth alcohol before submitting to the Breathalyzer test.¹⁸⁷

¹⁸² *Id.*, at 852 (emphasis added).

¹⁸³ *Jensen*, 158 Wn.2d at ¶16 (2006) (citing to *Baker*, 56 Wn.2d at 852-55).

¹⁸⁴ *Id.*, at ¶23.

¹⁸⁵ *Baker*, 56 Wn.2d at 852.

¹⁸⁶ *Id.*, at 855.

¹⁸⁷ *Id.*, at 855-57. See also *State v. Daw*, 19 Wn. App. 855, 858-59 (1978).

Mouth Alcohol Plus or Minus 10 Percent Of The Mean Calculations

- 3.10 In 1969, the voters created Washington’s implied consent law with the passage of Initiative 242.¹⁸⁸ The initiative also delegated to the state toxicologist the role of approving alcohol breath test machines, establishing procedures for conducting alcohol breath tests, and licensing individuals to administer alcohol breath tests.¹⁸⁹
- 3.11 As alcohol breath test machine software developed over time, the state toxicologist began including a requirement that the mean of the breath test results must be within plus or minus 10 percent of that mean to protect against the machine measuring mouth alcohol as alcohol from deep lung air as prohibited by *Baker*.
- 3.12 The state toxicologist approved the plus or minus 10 percent of the mean requirement because scientific research shows that breath test sample results “will not be within plus or minus 10% of their mean” if alcohol is present in the mouth at the time breath test samples are taken.¹⁹⁰
- 3.13 After the state toxicologist approved the plus or minus 10 percent of the mean requirement, calculation of the mean and the acceptable lower and upper limits had to be manually performed after examination of the breath test machine generated printout. Charts were created to assist in determining the acceptable lower and upper limits after the mean was manually calculated.

Self-Certifying Breath Test Machines

- 3.14 Eventually, breath test machine software was developed to automatically calculate the mean and the acceptable lower and upper limits. If mouth alcohol was present because the mean was outside the acceptable lower or upper limits, the breath test machine software would not generate a breath test printout and another breath test would have to be performed.
- 3.15 As with the previous DataMaster machine, the Dräger as approved by the state toxicologist is a self-certifying machine because the Dräger possesses “the technical capability of monitoring its own performance at each breath test”.¹⁹¹

¹⁸⁸ Laws of 1969, ch. 1, §1 (codified in former RCW 46.20.308). Hereafter “initiative”.

¹⁸⁹ *Jensen*, 158 Wn.2d at ¶16; Laws of 1969, ch. 1, §3 (codified in former RCW 46.61.506).

¹⁹⁰ Washington State Patrol Breath Test Program Training Manual (Nov. 2014), Exhibit 4A, at 32. Findings Of Fact 5.2 and 5.3.

¹⁹¹ *State v. Wittenbarger*, 124 Wn.2d 467, 483 (1994) (approving DataMaster’s generation of a breath test printout as sufficient proof of reliability and accuracy to permit admission of the printout in the prosecution’s case-in-chief without review of maintenance and repair records).

3.16 Critical to a breath test result from a self-certifying breath test machine being found accurate and reliable is the machine's generation of a breath test printout showing the machine was "operating properly during a particular test."¹⁹²

Mouth Alcohol And The Dräger

3.17 As approved by the state toxicologist in 2010 to avoid detection of mouth alcohol as deep lung air alcohol, the Dräger will not generate a breath test printout if the Dräger's plus or minus 10 percent of the mean calculation is outside the acceptable lower and upper limits.

3.18 When the Dräger detects mouth alcohol pursuant to its programming,¹⁹³ the Dräger is required by the state toxicologist to display a "Samples Outside 10%" message and abort the test because the "comparison of calculated breath test results failed." The Dräger will not generate a printout when a "Samples Outside 10%" message is displayed.¹⁹⁴ The officer is then directed to run the test again.

The Dräger Generated Breath Test Printout

3.19 The state toxicologist mandates in WAC 448-16-050 that the Dräger comply with a 10-step protocol for every alcohol breath test the machine performs. The final tenth step is the Dräger's generation of a printout of the results. Successful compliance with the 10-step protocol is "determined from an inspection of the printout results." Compliance with all 10 steps as determined by inspection of the printout ensures "accuracy, precision, and confidence in each test."

3.20 If no printout of the results is generated by the Dräger, the Dräger breath test lacks "accuracy, precision and confidence" because no printout exists from which to determine successful compliance with the mandatory 10-step WAC 448-16-050 protocol.

¹⁹² *Id.*

¹⁹³ *See* WAC 448-16-060.

¹⁹⁴ Findings of Fact 5.21 and 5.22.

RCW 46.61.506 Alcohol Breath Test Foundational Requirements

- 3.21 The Legislature in RCW 46.61.506 codified the foundational requirements for the admissibility of alcohol breath test results. This legislation provides that a “valid” breath test “shall have been performed according to methods approved by the state toxicologist”¹⁹⁵ and is admissible in a “criminal action”¹⁹⁶ if the prosecution produces “prima facie evidence” of the eight foundational requirements in RCW 46.61.506(4)(a).¹⁹⁷
- 3.22 In other words, RCW 46.61.506 creates a two-part analysis concerning admissibility of breath tests. A breath test not “performed according to methods approved by the state toxicologist” is not a “valid” breath test under RCW 46.61.506(3). If a breath test is “valid” under RCW 46.61.506(3), the breath test is still not admissible in evidence if the prosecution fails to produce “prima facie evidence” of the eight foundation requirements in RCW 46.61.506(4)(a).

A Dräger Breath Test Result Is Not A “Valid” Test Under RCW 46.61.506

- 3.23 Keller argues that Dräger breath test printouts are not admissible because – (1) a Dräger breath test is not a “valid” test under RCW 46.61.506(3); and (2) the State cannot produce prima facie evidence of compliance with all eight foundational requirements of RCW 46.61.506(4)(a).
- 3.24 Keller points out the state toxicologist required in her Dräger bid specifications and when she approved the Dräger machine in 2010 that the Dräger shall not generate a breath test printout if the self-certifying Dräger calculates according to its programming that the breath test samples are outside the plus or minus 10 percent of the mean requirement. Instead of the Dräger generating a breath test printout, Keller correctly notes the state toxicologist requires the Dräger when it detects mouth alcohol according to its mean calculation programming to display a “Samples Outside 10%” message and abort the test.
- 3.25 In Keller’s case, the Dräger generated a breath test printout. Inspection of the breath test printout as required by WAC 448-16-050 shows the Dräger’s successful compliance with each step of the 10-step WAC 448-16-050 protocol. According to WAC 448-16-050, the Dräger has successfully complied with the 10-step protocol based upon inspection of Keller’s

¹⁹⁵ RCW 46.61.506(3).

¹⁹⁶ RCW 46.61.506(1).

¹⁹⁷ RCW 46.61.506(4)(b).

printout. Accordingly, based solely upon an inspection of Keller’s Dräger generated breath test printout, his breath test results “ensure accuracy, precision, and confidence.”

3.26 The Legislature recognizes the importance of protecting against a breath test machine measuring mouth alcohol as alcohol from deep lung air as prohibited by *Baker*. As part of the prima facie foundation the prosecution must show for the admissibility of a breath test result, the Legislature incorporates in RCW 46.61.506(4)(a)(vi) the scientifically validated plus or minus 10 percent of the mean calculation “to be determined by the method as approved by the state toxicologist” to ensure a breath test machine does not measure mouth alcohol as deep lung air alcohol.

3.27 In accordance with RCW 46.61.506(4)(a)(vi), the state toxicologist has approved and codified in WAC 448-16-060 the method for determining whether breath samples agree to within plus or minus 10 percent of their mean. WAC 448-16-060 reads –

WAC 448-16-060 Determining agreement of duplicate breath samples. Pursuant to RCW 46.61.506 the following method is approved for determining whether two breath samples agree to within plus or minus ten percent of their mean.

(1) The breath test results will be reported, truncated to three decimal places.

(2) For the DataMaster instruments, the mean of the two breath test results will be calculated and rounded to four decimal places. For the Dräger instrument, the mean of all four results will be calculated and rounded to four decimal places.

(3) The lower acceptable limit will be determined by multiplying the above mean by 0.9, and truncating to three decimal places.

(4) The upper acceptable limit will be determined by multiplying the mean by 1.1 and truncating to three decimal places.

(5) If the individual results fall within and inclusive of the upper and lower acceptable limits, the two breath samples are valid.¹⁹⁸

3.28 According to WAC 448-16-060, Dräger breath test samples are “valid” if the method in the regulation for determining whether two breath samples agree to within plus or minus 10 percent of their mean is followed.

3.29 In other words, if the plus or minus 10 percent of the mean calculation method approved by the state toxicologist in WAC 448-16-060 is not followed, Dräger breath test results are not “valid” and do not satisfy RCW 46.61.506(3) or RCW 46.61.506(4)(a)(vi).

¹⁹⁸ Underlined emphasis added. Bold emphasis in original.

- 3.30 Although WAC 448-16-060(2) requires Dräger software to round the mean before performing the plus or minus 10 percent calculations, the 2008 Dräger bid specifications and the state toxicologist approval of the Dräger machine in 2010 require the Dräger to truncate the mean before performing the plus or minus 10 percent calculations in non-compliance with WAC 448-16-060(2)'s rounding of the mean requirement.¹⁹⁹
- 3.31 The words “truncating” and “rounded” are terms of art in the scientific community when used concerning breath test machines. Each word has a specific meaning. These technical terms of art are to be given their technical meaning.²⁰⁰
- 3.32 No Washington Dräger breath test has ever rounded the mean before performing the plus or minus 10 percent of the mean calculations as approved and mandated by the state toxicologist in WAC 448-16-060(2).
- 3.33 According to methods approved by the state toxicologist, the Dräger should never generate a breath test printout unless the Dräger software complies with the requirements of WAC 448-16-050 and WAC 448-16-060. Yet the Dräger has generated tens of thousands of breath test printouts in violation of these state toxicologist approved methods.²⁰¹
- 3.34 A Dräger breath test is not a “valid” test under RCW 46.61.506(3) and the State cannot produce prima facie evidence of compliance with all eight foundational requirements of RCW 46.61.506(4)(a) because – (1) the Dräger has never rounded the mean in violation of WAC 448-16-060(2); and (2) despite non-compliance with WAC 448-16-060 and the

¹⁹⁹ On January 20, 2022, the state toxicologist approved the Dräger software truncation of the mean before calculating the plus or minus 10 percent limitations. Finding of Fact 5.36.

The state toxicologist truncation approval was by her testimony through a declaration. The state toxicologist is required to “approve” breath testing protocols but is not required to promulgate the approval in the Washington Administrative Code. *State v. Straka*, 116 Wn.2d 859, 862-63 (1991).

As of May 18, 2022 (Finding Of Fact 5.37), the state toxicologist has not repealed rounding the mean as the method required by WAC 448-16-060(2). While Dräger truncation of the mean is now approved, the state toxicologist through WAC 448-16-060(2) still requires the Dräger to round the mean as the method approved “[p]ursuant to RCW 46.61.506” for “determining whether the two breath samples agree to within plus or minus ten percent of their mean.”

Accordingly, the January 20, 2022 state toxicologist Dräger truncation approval has no impact on the Court’s analysis because the WAC 448-16-060(2) Dräger rounding requirement is still mandated by the state toxicologist for a breath test to be “valid” under RCW 46.61.506.

²⁰⁰ Finding of Fact 5.31. *See also City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 47 (2004) (“Traceable” is a term of art with an accepted meaning in the scientific community. Technical terms are to be given their technical meaning.).

²⁰¹ Clark Jones Letter to WAPA 06/16/2021, Exhibit 15 (“comprehensive review of approximately 81,000 [Dräger generated] evidential breath test results”).

methods approved by the state toxicologist, the Dräger generates a printout in violation of WAC 448-16-050.

State Prejudice Argument Number 1 – Dräger Truncation Of The Mean Is A Benefit To People Who Submit To A Dräger Breath Test

- 3.35 The State does not dispute that the Dräger truncates the mean before performing the plus or minus 10 percent calculations nor disputes the Dräger generates a breath test printout based upon its truncation of the mean.
- 3.36 Rather, the State asserts – (1) it is to the benefit of the person submitting to a Dräger breath test that the Dräger software truncates the mean before calculating the plus or minus 10% of the mean limitations instead of rounding the mean as mandated by WAC 448-16-060(2); and (2) in Keller’s case based upon the Dräger generated breath test printout there is no fifth decimal place to truncate or round to four decimal places after the mean of Keller’s four breath test results is calculated.
- 3.37 First, the State argues that truncating the mean of a breath test result before performing the plus or minus 10 percent of the mean calculations, as opposed to rounding the mean, will benefit the person submitting breath samples into a breath test machine.²⁰²
- 3.38 The State postulates that “[s]trict compliance to the WAC is not required for admissibility” of Dräger generated breath test printouts pursuant to RCW 46.61.506.²⁰³
- 3.39 The State reasons that since truncation of the mean is to the benefit of the person submitting to a breath test, the State has met the RCW 46.61.506 breath test admissibility requirements because Keller is not prejudiced by the Dräger truncation of the mean instead of rounding the mean.

²⁰² At oral argument on March 8, 2022, the State asserted it could produce expert witness opinion testimony from a qualified witness in support of the proposition that truncating the mean before calculating the plus or minus 10 percent limitations instead of rounding the mean will benefit the person submitting the breath samples. Keller stipulated that the State could produce this expert testimony but objects to the Court considering this testimony.

See Commonwealth v. Hourican, 10 N.E.3d 646, 650 (Mass.App.Ct. 2014) (“The effect of truncating, as opposed to rounding, is to under-report the concentration, to the benefit of the arrestee.”).

See also State ex rel. Dawson v. Cascade District Court, 62 Wn.App. 587, 591 n.6 (1991) (“Additionally it should be pointed out that the reason for truncating the results of the DataMaster is based on a ‘scientific limitation’, and is a benefit to the defendant ...”); *New Jersey v. Chun*, 943 A.2d 114, 131, *cert. denied*, 555 U.S. 825, 129 S.Ct. 158, 172 L.Ed.2d 41 (N.J. 2008) (“The effect of truncating, as opposed to rounding, is to under-report the concentration, to the benefit of the arrestee.”).

²⁰³ Supplemental Memorandum of Authorities Opposing Suppression of Breath Tests (filed Feb. 25, 2022), at 8.

- 3.40 Keller responds that RCW 46.61.506(4)(a)(vi) requires the State to produce prima facie evidence the Dräger breath samples “agree to plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist”. Keller notes that the approved method promulgated by the state toxicologist in WAC 448-16-060(2) requires the Dräger to round, not truncate, the mean before performing the plus or minus 10 percent calculations.
- 3.41 Keller argues that the State’s proffered expert witness opinion testimony the Dräger truncation of the mean is to Keller’s benefit is irrelevant because WAC 448-16-060(2) requires the mean to be rounded.
- 3.42 No authority was produced or could be found that the Court can or should ignore breath test regulations promulgated by the state toxicologist or methods approved by the state toxicologist pursuant to RCW 46.61.506 when determining whether a breath test is “valid” under the statute.
- 3.43 Under RCW 46.61.506, the State either meets its burden of producing prima facie evidence of compliance with the breath test foundational requirements in the statute or it does not. Substantial compliance with RCW 46.61.506 is not sufficient for a Dräger generated breath test printout to be admissible under the statute.²⁰⁴
- 3.44 ER 401 provides that relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”²⁰⁵ Relevant evidence is generally admissible. Evidence which is not relevant is not admissible.²⁰⁶
- 3.45 The State’s proffered expert witness opinion testimony that the Dräger truncation of the mean before calculating the plus or minus 10 percent limitations is to the benefit of a person who submits to a Dräger breath test is irrelevant under ER 401.
- 3.46 This “truncation” testimony does not have the tendency to make the existence of any fact that is of consequence to the determination of the action²⁰⁷ more or less probable than it would be

²⁰⁴ *Clark-Munoz*, 152 Wn.2d at 48 (Since the State has not met its foundational burden for admissibility of a breath test result, there is no need for the court to reach whether substantial compliance would be sufficient.).

²⁰⁵ Emphasis added.

²⁰⁶ ER 402.

²⁰⁷ Has the State produced prima facie evidence of compliance with RCW 46.61.506 including prima facie evidence of compliance with the methods approved by the state toxicologist in WAC 448-16-060 promulgated pursuant to the statute?

without the “truncation” evidence because RCW 46.61.506 does not authorize the State to produce evidence showing substantial compliance with the statute and/or substantial compliance with the methods approved by the state toxicologist made pursuant to the statute.

3.47 Irrelevant evidence is not admissible. ER 402. The Court will not consider the State’s proffered testimony that the Dräger truncation of the mean is to the benefit of the person submitting to a Dräger breath test. Keller’s objection to this testimony is granted.

State Prejudice Argument Number 2 – There Is No Fifth Decimal Place To Round In Keller’s Case

3.48 Second, the State asserts that upon inspection of Keller’s Dräger generated breath test printout there is no fifth decimal place to truncate or round after the mean of his four breath test results is calculated.

3.49 The State in essence argues that it has produced prima facie evidence in substantial compliance with RCW 46.61.506 because there is no prejudice to Keller since no fifth decimal place exists.

3.50 The State seeks to introduce opinion testimony from a qualified expert witness²⁰⁸ that a review of the Dräger generated breath test printout shows Keller’s four breath test results are 0.117, 0.116, 0.117, and 0.116.²⁰⁹ The expert witness would offer opinion testimony that the mean of all four breath test results is 0.1165 as calculated pursuant to WAC 448-16-060.²¹⁰ The witness would also offer expert opinion testimony that as required by WAC 448-16-060, the lower acceptable limit is 0.104²¹¹ and the upper acceptable limit is 0.128.²¹²

²⁰⁸ The State provides these mathematical calculations in its Supplemental Memorandum of Authorities Opposing Suppression of Breath Tests (filed Feb. 25, 2022), at 8-9.

At oral argument on March 8, 2022, the State asserted it could produce expert witness opinion testimony from a qualified witness in support of these mathematical calculations. Keller stipulated that the State could produce this expert testimony but objects to the Court considering this testimony.

²⁰⁹ Alcotest 9510 Breath Test Document 05/09/2020, Exhibit 14.

²¹⁰ $0.117 + 0.116 + 0.117 + 0.116 = 0.466$.

$0.466 \div 4 = 0.1165$.

²¹¹ $0.1165 \times 0.9 = 0.10485$, truncated to three decimal places as required by WAC 448-16-060(3) is 0.104. The State’s calculation in its briefing incorrectly rounded the lower acceptable limit to 0.105. Supplemental Memorandum of Authorities Opposing Suppression of Breath Tests (filed Feb. 25, 2022), at 9.

²¹² $0.1165 \times 1.1 = 0.12815$, truncated to three decimal places as required by WAC 448-16-060(4) is 0.128. The State’s calculation in its briefing incorrectly rounded the upper acceptable limit to 0.129. Supplemental Memorandum of Authorities Opposing Suppression of Breath Tests (filed Feb. 25, 2022), at 9.

- 3.51 Based upon these calculations, the State argues it has produced prima facie evidence of the plus or minus 10 percent of the mean calculation as required by RCW 46.61.506 because in Keller’s case there is not a fifth decimal place of the mean for the Dräger to round to four decimal places as required by WAC 448-16-060(2).
- 3.52 Keller does not dispute the State can produce such expert witness opinion testimony. Keller argues instead that – (1) the state toxicologist has not approved calculation of the 10 percent of the mean analysis by testimony of a witness months or years after the Dräger generates a breath test printout; and (2) there is no admissible Dräger breath test printout in Keller’s case for the witness to consider because the state toxicologist requires the Dräger to issue a “Samples Outside 10%” message, abort the breath test and not generate a breath test printout when the Dräger does not round the mean as required by WAC 448-16-060(2).
- 3.53 Keller reasons that the state toxicologist approved the Dräger and its software as a self-certifying machine which limits testimony in the State’s case-in-chief to whether the Dräger produces a “valid” test pursuant to RCW 46.61.506 by determining successful compliance with WAC 448-16-050 “from an inspection of the printout of the results.”
- 3.54 Since Dräger breath test printouts are not admissible unless the Dräger analysis is performed according to methods approved by the state toxicologist as required by RCW 46.61.506, Keller objects to the Court considering this proffered expert witness opinion testimony because the testimony is irrelevant.
- 3.55 RCW 46.61.506(3) requires a “valid” breath test to be “performed according to the methods approved by the state toxicologist”. RCW 46.61.506(4)(a)(vi) requires Dräger breath test samples to “agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist.”
- 3.56 The method the state toxicologist has approved for calculation of the plus or minus 10 percent of the mean RCW 46.61.506(4)(a)(vi) requirement is for the self-certifying Dräger to conduct the calculation and either – (1) generate a breath test printout if the breath samples satisfy WAC 448-16-060; or (2) abort the test and not generate a breath test printout if the breath samples do not satisfy WAC 448-16-060. The state toxicologist has not approved the method sought to be admitted by the State of a witness months or years later performing the mean calculation based upon an improperly generated Dräger breath test printout.

- 3.57 No authority was produced or could be found that the Court can or should ignore breath test regulations promulgated by the state toxicologist or methods approved by the state toxicologist pursuant to RCW 46.61.506 when determining whether a breath test is “valid” and admissible under the statute.
- 3.58 Under RCW 46.61.506, the State either meets its burden of producing prima facie evidence of compliance with the breath test foundational requirements in the statute or it does not. Substantial compliance with RCW 46.61.506 is not sufficient for a Dräger generated breath test printout to be admissible under the statute.²¹³
- 3.59 ER 401 provides that relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”²¹⁴ Relevant evidence is generally admissible. Evidence which is not relevant is not admissible.²¹⁵
- 3.60 The State’s proffered expert witness opinion testimony that there is no fifth decimal place of the mean for the Dräger to round based upon an improperly generated Dräger breath test printout is irrelevant under ER 401.
- 3.61 This testimony does not have the tendency to make the existence of any fact that is of consequence to the determination of the action²¹⁶ more or less probable than it would be without the evidence because –
- (1) the state toxicologist methods approved in WAC 448-16-050 and WAC 448-16-060 pursuant to RCW 46.61.506 do not authorize the State to produce evidence months or years later through testimony of a witness who conducts a calculation of the plus or minus 10 percent of the mean requirement by review of an improperly generated Dräger breath test printout;

²¹³ *Clark-Munoz*, 152 Wn.2d at 48 (Since the State has not met its foundational burden for admissibility of a breath test result, there is no need for the court to reach whether substantial compliance would be sufficient.).

²¹⁴ Emphasis added.

²¹⁵ ER 402.

²¹⁶ Has the State produced prima facie evidence of compliance with RCW 46.61.506 including prima facie evidence of compliance with calculation of the plus or minus 10 percent of the mean method approved by the state toxicologist in WAC 448-16-060 promulgated pursuant to the statute?

(2) RCW 46.61.506 does not authorize the State to produce evidence showing substantial compliance with the statute and/or substantial compliance with the methods approved by the state toxicologist made pursuant to the statute; and

(3) there is no Dräger generated breath test printout for the witness to review because the printout is not admissible.

3.62 Irrelevant evidence is not admissible. ER 402. The Court will not consider the State’s proffered testimony of a witness months or years later performing the mean calculation based upon an improperly generated Dräger breath test printout. Keller’s objection to this testimony is granted.

The Court Declines To Create A New “Lack Of Prejudice To The Defense” Exception Under RCW 46.61.506 For Dräger Breath Tests

3.63 The State asks the Court to create a new “lack of prejudice to the defense” foundational requirement for all Kitsap County DUI cases which is not mandated by statute, administrative rule, protocol, or the rules of evidence.

3.64 In *King County District Court*,²¹⁷ the trial court concluded that alcohol breath test machine results were not admissible unless the State also provided at trial an accompanying uncertainty statement, presented as a confidence interval. Rejecting the trial court’s authority to adopt a new foundational requirement, the Court of Appeals wrote –

Nothing in RCW 46.61.506 prevents the trial court from exercising its discretion under ER 702 to exclude an unreliable, inaccurate, or erroneous BrAC test result on a case-by-case basis.

However, by adopting a blanket exclusion, the district court implicitly imposed a new foundational requirement for BrAC tests admissibility, beyond that required by *Frye* or RCW 46.61.506(4).

This was error.²¹⁸

3.65 The Court declines the State’s invitation to impose a new “lack of prejudice to the defense” foundational requirement to RCW 46.61.506 by rewriting RCW 46.61.506 and the breath test regulations and methods approved by the state toxicologist made pursuant to that statute.

²¹⁷ *State v. King County District Court West Division*, 175 Wn.App. 630, review denied, 179 Wn.2d 1006 (2013).

²¹⁸ *Id.*, at ¶18 (paragraph added for ease of reading).

A Dräger Generated Breath Test Printout Is Not Admissible Under RCW 46.61.506

3.66 The state toxicologist is required to abide by her own rules and methods made pursuant to RCW 46.61.506 which currently – (1) mandate a Dräger rounding of the mean before conducting the plus or minus 10 percent of the mean calculation; and (2) prohibit the Dräger from generating a breath test printout when not in compliance with the rounding requirement.

This court has long required the State to abide by its own rules, especially when applied to vital privileges like driving.²¹⁹

3.67 A Dräger machine should never generate an alcohol breath test printout in Washington because the method approved by the state toxicologist for a Dräger to generate a breath test printout requires Dräger software to comply with the WAC 448-16-060. When the Dräger software determines a violation of WAC 448-16-060, the state toxicologist requires the Dräger as a self-certifying machine to display a “Samples Outside 10%” message, abort the breath test, and not generate a breath test printout.

3.68 A Dräger generated breath test printout is not a “valid” analysis “performed according to methods approved by the state toxicologist” as required by RCW 46.61.506(3).

3.69 The State is unable to produce prima facie evidence that Dräger “breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist” as required by RCW 46.61.506(4)(a)(iv) and WAC 448-16-060.

3.70 As of today’s date, Dräger generated breath test printouts are not admissible in Kitsap County District Court cases because the State is unable to produce prima facie evidence the printout can be generated in compliance with RCW 46.61.506(3), RCW 46.61.506(4)(a), the methods approved by the state toxicologist pursuant to RCW 46.61.506, and *State v. Baker*.

3.71 Keller’s motion to suppress breath test printouts²²⁰ generated by a Dräger breath test machine is granted.²²¹

²¹⁹ *Clark-Munoz*, 152 Wn.2d at 50 (citations omitted).

²²⁰ Alcotest 9510 Breath Test Document 05/09/2020, Exhibit 14.

²²¹ A self-certifying breath machine generated breath test printout that does not meet the requirements of chapter 46.61 RCW and state toxicologist approved methods and regulations is not admissible as evidence concerning the per se or the affected by prongs of the DUI statute. *Clark-Munoz*, 152 Wn.2d at 50.

4. KELLER’S DRÄGER GENERATED BREATH TEST PRINTOUT IS NOT ADMISSIBLE UNDER THE RULES OF EVIDENCE

The Trial Court Gatekeeping Function Under The Rules Of Evidence

4.1 In *City of Fircrest v. Jensen*,²²² the Supreme Court held that the Legislature’s codification in RCW 46.61.506 of foundational requirements for the admissibility of breath test results does not violate the separation of powers doctrine and is constitutional because the statute is permissive, not mandatory.

The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent.

The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible*. The statute is permissive, not mandatory, and can be harmonized with the rules of evidence.²²³

4.2 Importantly, the Supreme Court wrote that a “trial court resumes its role as gatekeeper and may exclude otherwise admissible evidence by applying the rules of evidence” after a breath test result is found admissible pursuant to RCW 46.61.506.²²⁴

There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence.²²⁵

4.3 The Supreme Court more recently reminded trial courts of their gatekeeping function which allows trial courts to exclude otherwise admissible evidence by applying the rules of evidence.

We are mindful that “[t]he trial court has a gatekeeping function under the rules of evidence.” *State v. Ellis*, 136 Wn.2d 498, 540 (1998).

This necessarily entails making judgment calls as to what the jury may hear. *Id.* at 541 (noting judges “must not abdicate our gatekeeping role by receding from difficult decisions and letting the jury decide how much weight to give to evidence that is in fact irrelevant”).²²⁶

²²² *City of Fircrest v. Jensen*, 158 Wn.2d 384 (2006).

²²³ *Id.*, at ¶21 (underlined emphasis added) (italics emphasis in original) (paragraph added for ease of reading).

²²⁴ *Id.*, at ¶18.

²²⁵ *Id.*, at ¶21.

²²⁶ *State v. Arndt*, 194 Wn.2d 784, ¶43 (2019) (paragraph added for ease of reading).

4.4 Keller asserts that even if Dräger generated breath test printouts are admissible pursuant to RCW 46.61.506, the rules of evidence compel the Court to exercise its gatekeeping function by excluding Keller’s Dräger generated breath test printout because of actions taken by the state toxicologist and her office concerning Dräger machine breath tests.

4.5 The State in response acknowledges Keller’s concerns –

While the state acknowledges that the defendant’s concerns about the Toxicologist’s decision-making are not without some merit²²⁷

While the defendant certainly does list a background of admittedly questionable actions by the State Toxicologist, none of the evidence provided calls into question the reliability of the breath samples collected by the Draeger 9510²²⁸

4.6 Despite “admittedly questionable actions by the State Toxicologist,” the State argues Keller’s Dräger generated breath test printout should not be excluded under the rules of evidence because – (1) Keller will have ample opportunity to impeach his Dräger generated breath test results by cross-examining the State’s witnesses in the State’s case-in-chief; and (2) Keller may introduce a variety of evidence attacking the reliability or accuracy of Dräger breath test machines in the defense’s case-in-chief as permitted by *State v. Baker*, *City of Seattle v. Allison*, *City of Fircrest v. Jensen*, and *State v. Franco*.²²⁹

4.7 While Keller will have ample opportunity to present evidence in his case-in-chief concerning the Dräger machine, Keller’s motion to exclude his Dräger generated breath test printout under the rules of evidence focuses on the State’s case-in-chief, not the defense’s case. Accordingly, the Court will analyze Keller’s motion to exclude his Dräger generated breath test printout under the rules of evidence in the context of the State’s case-in-chief.

²²⁷ Supplemental Memorandum Of Authorities Opposing Suppression Of Breath Test Results (filed Feb. 25, 2022), at 14-15 (emphasis added).

²²⁸ *Id.*, at 16.

²²⁹ See Findings of Fact 4.20 and 4.21.

Prosecutor Duty To Disclose Impeachment Evidence – Brady v. Maryland

- 4.8 The Fourteenth Amendment requires criminal prosecutions to conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense.²³⁰ To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense.²³¹
- 4.9 The United States Supreme Court held in *Brady v. Maryland* that the prosecution’s suppression of evidence by failure to disclose material exculpatory evidence to the defense violates due process, leading to reversal.²³² In essence, *Brady* held that the prosecution lacks the constitutional power to self-suppress evidence favorable to the defense.
- 4.10 The *Brady* rule has been codified in the Rules of Professional Conduct.²³³ A Washington prosecutor has several special ethical responsibilities under the RPC, including –
- The prosecutor in a criminal case shall: ...
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal ...²³⁴
- 4.11 The prosecution’s constitutional duty to provide *Brady* disclosures to the defense is not limited to disclosure of exculpatory evidence. The prosecution has a constitutional duty under the *Brady* rule to disclose impeachment evidence to the defense as well as exculpatory evidence.²³⁵

²³⁰ *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

²³¹ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See also *State v. Wittenbarger*, 124 Wn.2d 467, 474-75 (1994).

²³² *Brady*, 83 S.Ct. at 1196-97 (“We now hold that the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

²³³ Hereafter “RPC”.

²³⁴ RPC 3.8(d).

²³⁵ *State v. Benn*, 120 Wn.2d 631, 650 (1993) (recognizing *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985)); *State v. Davila*, 184 Wn.2d 55, ¶31 (2015) (“As noted above, ‘favorable’ evidence under *Brady* includes impeachment evidence as well as exculpatory evidence.”) (citation omitted).

4.12 Under *Brady*, the prosecution also has a duty to seek out “*Brady*” evidence held by all members of the prosecution team.

This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.²³⁶

4.13 The prosecution unconstitutionally “suppresses” evidence by failing to disclose “*Brady*” evidence favorable to the defense even if that evidence is held by others acting on the government’s behalf such as police investigators.²³⁷

4.14 *Brady* holds that due process requires prosecutors to disclose evidence known to the prosecution team which is favorable to the defendant, including impeachment evidence. *Brady* does not stand for the proposition that due process requires the prosecution to present *Brady* material in their case-in-chief.²³⁸

4.15 In the context of DUI prosecutions where the prosecution seeks to admit Dräger generated breath test printouts, the Forensic Laboratory Services Bureau of the Washington State Patrol, including the Crime Laboratory Division, Toxicology Laboratory Division and Impaired Driving Section, are members of the prosecution team for the purposes of *Brady*.²³⁹

4.16 Accordingly, the state toxicologist’s knowledge and her office’s knowledge concerning Dräger breath test machines is imputed to the prosecution for the purposes of the prosecution’s duty under *Brady* to disclose favorable defense evidence including impeachment evidence.²⁴⁰

4.17 The state toxicologist office partially recognized their *Brady* due process duty to disclose evidence favorable to the defense including impeachment evidence when in June and July 2021 the office notified WAPA of “potential impeachment” evidence concerning “evidential” Dräger generated breath test results. WAPA immediately forwarded these two “potential impeachment” disclosures to its members. It is unknown what if any additional investigation WAPA or prosecutors conducted in response to these two “potential impeachment” disclosures.

²³⁶ *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995).

²³⁷ *Davila*, 184 Wn.2d at ¶36.

²³⁸ *United States v. Holt*, 486 F.3d 997, 1003 (7th Cir. 2007).

²³⁹ *Davila*, 184 Wn.2d at ¶36 (“[T]he Crime Lab is an arm of the State whose knowledge is imputed to the prosecution for the purposes of *Brady*.”).

²⁴⁰ *Id.*

- 4.18 The self-certifying Dräger machine has never generated a Washington breath test printout in compliance with WAC 448-16-050, WAC 448-16-060, and RCW 46.61.506.²⁴¹ As found in Findings of Fact 6, the two “potential impeachment” disclosures issued by the state toxicologist office are rife with false or misleading statements which the state toxicologist knows are false or misleading. As of March 8, 2022, the date of the *en banc* hearing, the state toxicologist has not acknowledged her knowledge that a Dräger generated breath test printout has never complied with her approved Dräger regulations and methods as required by RCW 46.61.506.
- 4.19 As found in Findings of Fact 7, the state toxicologist has testified by declaration in a false or misleading manner in tens of thousands of cases that Dräger generated breath test printouts have complied with WAC 448-16-060.
- 4.20 Keller however is aware through *Brady* disclosures and public disclosure requests of the Dräger’s non-compliance with RCW 46.61.506 and the state toxicologist approved Dräger machine regulations and methods. Therefore, a *Brady* violation does not exist here because Keller presumably has complete information upon which to cross-examine and impeach the Dräger generated breath test results in the State’s case-in-chief.²⁴²
- 4.21 The question becomes under *Brady* how does a criminal defendant during the State’s case-in-chief effectively cross-examine and impeach forensic evidence generated by a machine?
- 4.22 Before reaching Keller’s motion to exclude his Dräger generated breath test printout under the rules of evidence, the *Brady* due process opportunity for effective cross-examination and impeachment of witnesses the State chooses to call in its case-in-chief requires an analysis of the Sixth Amendment Confrontation Clause as interpreted by *Crawford v. Washington* and its progeny.

²⁴¹ Finding of Fact 5.38.

²⁴² By cross-examining the State’s Dräger machine expert witness(es) under ER 611 (cross-examination) and ER 607 (impeachment).

Sixth Amendment Right Of Confrontation – Crawford v. Washington

4.23 The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against [them].” The Confrontation Clause is concerned with “‘witnesses’ against the accused,” meaning those who “‘bear testimony.’”²⁴³

4.24 In *Crawford v. Washington*, the United States Supreme Court held under the Sixth Amendment that a person accused of committing a crime has a right to be confronted by those who bear testimony against the accused and the opportunity for cross-examination. The Confrontation Clause prohibits the admission of testimonial statements made out-of-court (hearsay) unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.²⁴⁴

To be sure, the Clause’s [Sixth Amendment Confrontation Clause’s] ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.²⁴⁵

4.25 Cross-examination is the “greatest legal engine ever invented for the discovery of truth”.

Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.

This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth’; (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.²⁴⁶

²⁴³ *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177 (2004).

²⁴⁴ *Id.*, 124 S.Ct. at 1354.

²⁴⁵ *Id.*, at 1370 (emphasis added).

²⁴⁶ *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (footnote omitted) (emphasis added).

4.26 The opportunity for adequate cross-examination is the essence of the Sixth Amendment right of confrontation.

The purpose of such confrontation is to test the perception, memory and credibility of witnesses. Also, it serves the purpose of testing the witnesses' narrative powers.²⁴⁷

4.27 “Even apart from the Sixth Amendment, fair opportunity for cross-examination is an indispensable element of due process. Any substantial impairment of cross-examination, therefore, violates these rights.”²⁴⁸

4.28 Only testimonial statements implicate the Confrontation Clause. Out-of-court statements that are not testimonial do not implicate a defendant's constitutional right of confrontation.²⁴⁹

4.29 In the years following *Crawford*, the Supreme Court articulated the “primary purpose” test to determine whether out-of-court statements are testimonial. Statements “are testimonial when the circumstances objectively indicate that ... the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”²⁵⁰

4.30 The primary purpose test applies to all out-of-court testimonial statements that implicate the Confrontation Clause, regardless of to whom they are made.²⁵¹

4.31 The Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to subpoena adverse witnesses into court.

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear.

Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused.

More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the

²⁴⁷ *State v. Parris*, 98 Wn.2d 140, 144 (1982).

²⁴⁸ ROYCE A. FERGUSON, JR., 13 WASH. PRAC., CRIMINAL PRACTICE & PROCEDURE §3801 (3rd ed.) (footnotes omitted) (citations omitted).

²⁴⁹ *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006) (citing and quoting *Crawford*, 124 S.Ct. at 1354).

²⁵⁰ *Id.*, 126 S.Ct. at 2266.

²⁵¹ *State v. Burke*, 196 Wn.2d 712, ¶24, *cert. denied*, 142 S.Ct. 182, 211 L.Ed.2d 74 (2021) (citations omitted).

defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses.²⁵²

Alcohol Breath Machine Test Results And Forensic Evidence

4.32 Forensic evidence more and more plays a decisive role in criminal trials today.²⁵³ “Juries may give special weight to testimony by forensic scientists.”²⁵⁴

4.33 But forensic evidence is hardly infallible.”²⁵⁵ In response to the government claim that defense confrontation of expert scientific opinion testimony is of little value because neutral, scientific testing is not prone to distortion, the United States Supreme Court wrote –

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation.

According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.”

And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.”

A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.²⁵⁶

²⁵² *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2540, 174 L.Ed.2d 314 (2009) (The Confrontation Clause does not permit admitting certificates of analysis sworn by state laboratory analysts without requiring in-court testimony by the analyst) (citation omitted) (emphasis added) (paragraphs added for ease of reading).

²⁵³ *Stuart v. Alabama*, ___ U.S. ___, 139 S.Ct. 36, 202 L.Ed.2d 414 (2018) (Gorsuch, J., dissenting from the denial of certiorari, joined by Sotomayor, J.).

²⁵⁴ LAUREN MCLANE, CONFRONTING THE TWENTY-FIRST-CENTURY MARIAN EXAMINATION, 82 Alb. L. Rev. 949 (2019), at 953-54 (footnote omitted) (Discussing previous WSP crime and toxicology laboratories lack of credibility and competency allegations concerning alcohol breath tests resulting in resignation of a former Washington state toxicologist. See pp. 978-79.).

²⁵⁵ *Melendez-Diaz*, 129 S.Ct. at 2536.

²⁵⁶ *Id.* (citations omitted) (paragraphs added for ease of reading).

- 4.34 In Washington, self-certifying Dräger breath test machines and methods are approved, maintained, and administered within the Washington State Patrol under the watch of the state toxicologist and her staff.²⁵⁷ Analysis of a person’s breath for alcohol content to be considered valid “shall have been performed according to methods approved by the state toxicologist ...”.²⁵⁸
- 4.35 Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst.

Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that “[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.”²⁵⁹

- 4.36 The Confrontation Clause, however, does not require the prosecution to present as part of the prosecution’s case the testimony of every person who may have relevant evidence concerning the “accuracy of a testing device ...”.²⁶⁰

It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.²⁶¹

²⁵⁷ Findings of Fact 2.1.

²⁵⁸ RCW 46.61.506(3).

²⁵⁹ *Melendez-Diaz*, 129 S.Ct. 2536-37 (citations omitted) (emphasis added) (paragraphs added for ease of reading).

²⁶⁰ *Id.*, at 2532 n.1.

²⁶¹ *Id.* (italics in original).

Keller Cannot Be Convicted Of The Per Se DUI Prong Unless The Dräger Generated Breath Test Printout Is Admitted Into Evidence In the State's Case-In-Chief

4.37 For Keller to be convicted under the per se DUI prong of RCW 46.61.502(1)(a),²⁶² the State must prove beyond a reasonable doubt that Keller was driving a motor vehicle in Kitsap County and “had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of the defendant’s breath.”²⁶³ Jurors are instructed –

In determining the accuracy and reliability of a breath test, you may consider the testing procedures used, the reliability and functioning of a testing instrument, maintenance procedures applied to a testing instrument, and any other factors that bear on the accuracy and reliability of the test.²⁶⁴

4.38 The State cannot prove Keller is guilty of the per se DUI prong without the Dräger generated breath test printout being admitted into evidence. The whole point of the State seeking admission of the out-of-court Dräger generated breath test printout is to prove the printout’s truth as a basis for the jury to find Keller’s breath alcohol level was above the per se 0.08 limit within two hours after driving. Otherwise, the State would not bother to offer the printout into evidence.

4.39 Yet the Dräger machine alone is not responsible for Keller’s breath test results. Thousands and perhaps tens of thousands of human decisions were made when Dräger alcohol breath testing software was written. RCW 46.61.506 requires the Dräger software to be programmed (by humans) to perform an alcohol breath analysis according to methods approved by the state toxicologist.

4.40 Although the Dräger machine is self-certifying, Dräger generated breath test printouts are not self-admissible. RCW 46.61.506 requires the State to produce prima facie evidence through the testimony of witnesses to satisfy the statute’s foundational requirements before Dräger printouts are admissible in the State’s case-in-chief.

²⁶² RCW 46.61.502(1)(a) reads – “A person is guilty of driving while under the influence of intoxicating liquor, cannabis, or any drug if the person drives a vehicle within this state: (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506”.

²⁶³ WPIC 92.02 (emphasis added).

²⁶⁴ WPIC 92.16 (emphasis added).

Summary Of The Parties Positions Regarding The Rules Of Evidence

- 4.41 Keller in essence argues that his Dräger generated breath test printout and State expert witness opinion testimony concerning the Dräger offered in the State’s case-in-chief should be excluded under the rules of evidence even if – (1) Keller’s Dräger generated breath test printout is admissible under RCW 46.61.506; (2) the prosecution team has fully complied with their *Brady* constitutional duty to disclose to the defense favorable evidence including impeachment evidence concerning the Dräger machine and its software, and state toxicologist approved Dräger regulations and methods as required by RCW 46.61.506; and (3) the State satisfies its *Crawford* constitutional duty to call witnesses in its case-in-chief whom the defense will have the opportunity to fully cross-examine and impeach concerning the Dräger machine and its software, and state toxicologist-approved Dräger regulations and methods as required by RCW 46.61.506.
- 4.42 Keller does not challenge the State’s ability to present admissible witness testimony in its case-in-chief concerning some of the foundational requirements of RCW 46.61.506.²⁶⁵
- 4.43 Keller focuses on the expert witness opinion testimony the State will have to present in its case-in-chief regarding the Dräger machine and its software to satisfy the foundational requirements of RCW 46.61.506 for Keller’s Dräger generated breath test printout to be admitted into evidence.²⁶⁶

²⁶⁵ E.g. (1) That the Dräger breath test machine is approved by the state toxicologist, RCW 46.61.506(4)(a); (2) that Deputy Justin who performed the breath test is authorized to do so as an operator by the state toxicologist, RCW 46.61.506(4)(a)(i) and WAC 448-16-090; (3) that Keller did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test, RCW 46.61.506(4)(a)(ii); (4) that Keller did not have any foreign substances, not to include dental work or piercings, fixed or removable, in his mouth at the beginning of the fifteen-minute observation period, RCW 46.61.506(4)(a)(iii); and (5) that prior to the start of the test, the temperature of any liquid simulator solution utilized as an external standard, as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade, RCW 46.61.506(4)(a)(iv).

²⁶⁶ E.g. (1) That the Dräger’s analysis of Keller’s breath was performed according to methods approved by the state toxicologist, RCW 46.61.506(3); (2) that the external standard test resulted in the message “verified”, RCW 46.61.506(4)(a)(v); (3) that the two breath samples agree to within plus or minus ten percent of their mean as required by the method approved by the state toxicologist, RCW 46.61.506(4)(a)(vi); (4) that the result of the test of the liquid simulator solution external standard or dry gas external standard result did lie between .072 to .088 inclusive, RCW 46.61.506(4)(a)(vii); and (5) that all blank tests gave results of .000, RCW 46.61.506(4)(a)(viii).

4.44 Keller summarizes his motion to exclude his Dräger generated breath test printout under the rules of evidence as follows –

As has been shown, the errors, improper decisions, untruthful testimony, methodology and practices of non-compliance by the State Toxicologist and the WSP Breath Test Program with their own rules and regulations that are based on scientifically recognized principles for breath testing mandates suppression. ER 104(b), ER 402, ER 702. ...

This court must not condone the errors, improper decisions, lack of transparency, untruthful testimony and concerns with the methodology and practices by the State Toxicologist, the WSP Impaired Driving Section, and the WSP Breath Test Program. The breath test results in this case must be suppressed.²⁶⁷

4.45 In response, the State cites to *Crawford* and argues that exclusion of Keller’s Dräger generated breath test printout is not required under the rules of evidence. The State asserts Keller can “fiercely” challenge the Dräger printout during the State’s case-in-chief through cross-examination by impeaching the State’s expert witness opinion testimony concerning the Dräger, its software, and Dräger regulations and methods as permitted by RCW 46.61.506(4)(c).

The State does not argue that the toxicologist is blameless and has acted perfectly. However, there are sufficient protections here for the defendant to raise concerns about the toxicologist at trial without the evidence being suppressed. The finder of fact can then determine the credibility they wish to lend to the results based on all the evidence presented to them.²⁶⁸

State Expert Witness Opinion Testimony Regarding The Dräger And Its Software – ER 702

4.46 Alcohol breath test machines and the breath test results they generate are scientific evidence.²⁶⁹ As scientific evidence, breath test results must pass the *Frye*²⁷⁰ test.²⁷¹ Our Supreme Court has recognized that the self-certifying DataMaster alcohol breath test machine produces scientifically accurate and reliable alcohol breath test results when the eight criteria of RCW 46.61.506(4)(a) are met, thus satisfying *Frye*.²⁷²

²⁶⁷ Supplemental Memorandum To Suppress Breath Test Results [Arbitrary and Capricious Approval of Software] (filed Jan. 26, 2022), at 39.

²⁶⁸ Supplemental Memorandum of Authorities Opposing Suppression of Breath Tests (filed Feb. 25, 2022), at 12-13.

²⁶⁹ *State v. King County District Court West Division*, 175 Wn.App. 630, ¶10, review denied, 179 Wn.2d 1006 (2013).

²⁷⁰ *Frye v. United States*, 293 F.1013, 1014 (D.C.Cir. 1923).

²⁷¹ *King County District Court, supra* (citing *State v. Baity*, 140 Wn.2d 1, 10 (2000)).

²⁷² *State v. Ford*, 110 Wn.2d 827, 833 (1988).

- 4.47 Keller does not challenge whether Dräger generated breath test results meet the *Frye* standard. The Court, therefore, will assume that Dräger generated breath test printouts satisfy *Frye*.
- 4.48 Scientific evidence admissible under *Frye* must also satisfy ER 702, which reads –
- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
- 4.49 ER 702 requires satisfaction of a two-part test before scientific opinion testimony is admissible –
- (1) whether the witness is qualified as an expert; and (2) whether the expert testimony is helpful to the trier of fact. *State v. Copeland*, 130 Wn.2d 244 (1996).²⁷³
- 4.50 Keller does not challenge whether the State’s expert witness is qualified as an expert to offer an opinion about Dräger machines and its software including state toxicologist approved Dräger regulations and methods as required by RCW 46.61.506.
- 4.51 Keller vociferously challenges, however, whether the State’s expert witness opinion testimony is helpful to the trier of fact.
- 4.52 Scientific evidence is helpful to the trier of fact if the evidence concerns matters beyond the common knowledge of a layperson and does not mislead the jury.²⁷⁴ Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases.²⁷⁵
- 4.53 The “ultimate concern” of the judiciary concerning machine generated alcohol breath test results is whether “a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content.”²⁷⁶
- 4.54 When deviations from testing procedures or machine protocols are so serious as to render breath test results unreliable, a trial court has discretion to exclude them in accordance ER 702 because the test results are “not helpful to the jury”.²⁷⁷ A trial court may exclude otherwise admissible breath test evidence pursuant to its gatekeeping function in individual cases, but

²⁷³ *King County District Court*, 175 Wn.App. at ¶11.

²⁷⁴ *Id.* (citation omitted).

²⁷⁵ *Id.* (citation omitted).

²⁷⁶ *Ford*, 110 Wn.2d at 809-10.

²⁷⁷ *See Jensen*, 158 Wn.2d at ¶¶18,21; and *State v. Copeland*, 130 Wn.2d 244, 270 (1996) (test results may be excluded under ER 702 as “not helpful to the jury” when laboratory error renders the results unreliable).

not issue a blanket exclusion.²⁷⁸ Ordinarily, however, such deviations go to the weight, not the admissibility of the test results under the rules of evidence.²⁷⁹

- 4.55 The challenge here concerns – (1) anticipated false and misleading testimony by the State’s expert witness in its case-in-chief concerning the Dräger generated breath test printout; (2) state toxicologist and her office inaccurate information, misleading information, and/or omissions; and (3) whether these actions affected the Dräger generated breath test results in Keller’s case.

*State Expert Witness Opinion Testimony Suggesting Keller’s Dräger Breath Test Complied With WAC 448-16-060*²⁸⁰

- 4.56 WAC 448-16-060 requires the Dräger to round the mean of Keller’s breath test results before conducting the plus or minus 10 percent calculations. The Dräger has never rounded the mean because the state toxicologist bid specifications require the Dräger to truncate the mean.
- 4.57 The state toxicologist approved method requires the self-certifying Dräger to never generate a breath test printout and instead to display a “Samples Outside 10%” message and abort the breath test when WAC 448-16-060 criteria are not satisfied.
- 4.58 The Dräger should not have generated a breath test printout in Keller’s case because the WAC 448-16-060 criteria were not satisfied.
- 4.59 For Keller’s Dräger generated breath test printout to be admissible under RCW 46.61.506(3)²⁸¹ and RCW 46.61.506(4)(a)(vi),²⁸² the State’s expert witness must offer opinion testimony that the plus or minus 10 percent of the mean calculation was conducted by the self-certifying Dräger machine in accordance with the method approved by the state toxicologist in WAC 448-16-060 as required by RCW 46.61.506.

²⁷⁸ *King County District Court*, 175 Wn.App. at ¶6.

²⁷⁹ See *Copeland, supra*; *State v. Kalakosky*, 121 Wn.2d 525, 541 (1993); and *State v. Cauthron*, 120 Wn.2d 879, 890 (1993).

²⁸⁰ Findings of Fact 3.5 – 3.12; Findings of Fact 5.15 – 5.16, 5.20 – 5.22.

²⁸¹ “Analysis of the person’s ... breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist”.

²⁸² “The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist”.

- 4.60 This expert witness opinion testimony would be without any factual basis and thus false and misleading because the WAC 448-16-060 criteria and ultimately RCW 46.61.506 were not satisfied.
- 4.61 State expert opinion testimony suggesting Keller’s Dräger breath test complied with WAC 448-16-060 is not admissible.

State Expert Witness Opinion Testimony Suggesting Keller’s Dräger Breath Test Complied With WAC 448-16-050 And Has Accuracy, Precision, And Confidence²⁸³

- 4.62 WAC 448-16-050 requires Keller’s Dräger generated breath test printout to satisfy a 10-step protocol. Successful compliance with each step of this protocol is determined solely from an inspection of the printout. When all 10 steps are satisfied based upon an inspection of the printout, the printout results will “ensure accuracy, precision, and confidence in each test.”
- 4.63 For Keller’s Dräger generated breath test printout to be admissible under RCW 46.61.506(3),²⁸⁴ RCW 46.61.506(4)(a)(v),²⁸⁵ RCW 46.61.506(4)(a)(vii),²⁸⁶ and RCW 46.61.506(4)(a)(iii),²⁸⁷ the State’s expert witness must offer opinion testimony that – (1) a review of Keller’s Dräger generated breath test printout shows successful compliance with all 10 steps of WAC 448-16-050; and (2) Keller’s breath test is thereby ensured accuracy, precision, and confidence.
- 4.64 This expert witness opinion testimony would be without any factual basis and thus false and misleading because there should not have been a breath test printout generated by the Dräger in Keller’s case from which the State expert could offer an opinion about compliance with WAC 448-16-050 and ultimately compliance with RCW 46.61.506. Instead, the Dräger was required by the state toxicologist to display a “Samples Outside 10%” message and abort Keller’s test because the WAC 448-16-060 criteria were not satisfied.
- 4.65 State expert opinion testimony suggesting Keller’s Dräger breath test complied with WAC 448-16-050 and has accuracy precision, and confidence is not admissible.

²⁸³ Findings of Fact 3.5 – 3.12; Findings of Fact 5.15 – 5.16, 5.20 – 5.22.

²⁸⁴ “Analysis of the person’s ... breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist”.

²⁸⁵ “The internal standard test resulted in the message ‘verified’”.

²⁸⁶ “The result of the test of the liquid simulator solution external standard or dry gas external standard result did lie between .072 to .088 inclusive”.

²⁸⁷ “All blank tests gave results of .000.”

Inaccurate Information, Misleading Information, And/Or Omissions²⁸⁸

- 4.66 The state toxicologist has known since publishing her 2008 bid specifications that the Dräger machine software truncates the mean before conducting the plus or minus 10 percent calculation in non-compliance with the rounding requirement she promulgated in WAC 448-16-060.
- 4.67 The state toxicologist has known since she approved the Dräger machine and its software in 2010 that the Dräger should never generate a breath test printout and instead should always display a “Samples Outside 10%” message and abort the breath test because the WAC 448-16-060 criteria are not satisfied by the Dräger software truncating the mean instead of rounding the mean before conducting the plus or minus 10 percent calculation as required by WAC 448-16-060.
- 4.68 The state toxicologist testified by declaration in a false and misleading manner in tens of thousands of DOL cases that the self-certifying Dräger machine conducts the plus or minus 10 percent of the mean calculation in accord with WAC 448-16-060. As of March 8, 2022, the date of the *en banc* hearing, the state toxicologist has not corrected her testimony.
- 4.69 The state toxicologist testified by declaration in a false and misleading manner in tens of thousands of DOL cases that the self-certifying Dräger machine will not generate a breath test printout if a breath sample does not comply with WAC 448-16-060. The Dräger has generated tens of thousands of breath test printouts in non-compliance with WAC 448-16-060. As of March 8, 2022, the date of the *en banc* hearing, the state toxicologist has not corrected her testimony.
- 4.70 The state toxicologist office, with knowledge by the state toxicologist, has provided inaccurate, incomplete, and/or false or misleading information to the Washington Association of Prosecuting Attorneys concerning the failure of the self-certifying Dräger to ever comply with WAC 448-16-060. As of March 8, 2022, the date of the *en banc* hearing, neither the state toxicologist nor her office has corrected this inaccurate, incomplete, and/or false or misleading information.

²⁸⁸ Findings of Fact 3.5 – 3.12, 5.15 – 5.17, 5.20 – 5.22, 6.4 – 6.13, 6.17 – 6.21, and 7.17 – 7.18.

Keller's Dräger Generated Breath Test Printout Is Excluded Under ER 702

- 4.71 The United States Supreme Court in *Melendez-Diaz* has recognized that government forensic evidence is hardly infallible. Such evidence is not immune from the risk of manipulation for a variety of reasons including fraud, incompetence, or pressure or incentive a government forensic actor might feel to alter evidence in a manner favorable to the prosecution.²⁸⁹
- 4.72 In Keller's case, no breath test printout should have been generated by the self-certifying Dräger machine into which he submitted his breath samples because the WAC 448-16-060 criteria were not satisfied. Without the printout being admitted into evidence, the State cannot prove Keller guilty of the per se DUI prong.
- 4.73 Yet, the self-certifying Dräger machine did generate a breath test printout in Keller's case because of either intentional or negligent actions by the state toxicologist who required Dräger software to conduct the plus or minus 10 percent of the mean calculation by truncating the mean while promulgating WAC 448-16-060 requiring the Dräger to round the mean. Truncating and rounding are terms of art concerning alcohol breath machines the differences of which the state toxicologist certainly understood and understands.
- 4.74 Instead of generating a breath test printout in Keller's case, the state toxicologist approved method required the self-certifying Dräger software to display a "Samples Outside 10%" message and abort Keller's test upon recognition of non-compliance with WAC 448-16-060.
- 4.75 Additionally, the state toxicologist testified by declaration in a false and misleading manner in tens of thousands of cases that Dräger software complies with WAC 448-16-060. As of March 8, 2022, the date of the *en banc* hearing, the state toxicologist has failed to correct her testimony, and failed to correct the state toxicologist office dissemination of incorrect, inaccurate, and/or false or misleading information about the Dräger machine.
- 4.76 The Legislature has delegated to the state toxicologist the authority to determine the scientific methods necessary to ensure alcohol breath test machines will generate accurate and reliable breath test results to convict drivers whose breath alcohol results exceed Washington's per se DUI prong. Our Supreme Court agreed that –

²⁸⁹ *Melendez-Diaz*, 129 S.Ct. at 2537.

If the citizens of the State of Washington are to have any confidence in the breath-testing program, that program has to have some credence in the scientific community as a whole.²⁹⁰

4.77 The above discussed actions and omissions by the state toxicologist and the state toxicologist office have completely undermined their credibility concerning the Dräger machine analysis of Keller’s breath for alcohol. State toxicologist approved Dräger breath test machine methods exist and knowingly were not followed. False or misleading testimony by declaration about the Dräger compliance with WAC 448-16-060 have not been corrected. False or misleading statements about the Dräger were issued and not corrected.

4.78 The State acknowledges these concerns, but argues that “fierce” defense cross-examination and impeachment of the State’s Dräger expert witness is sufficient rather than exclusion of the State expert witness opinion testimony about the Dräger machine under ER 702.

4.79 For Keller’s Dräger generated breath test printout to be admitted into evidence in the State’s case-in-chief under RCW 46.61.506, State expert witness opinion testimony about the Dräger machine will have to include two statements which would be false and misleading because the opinion testimony is without any factual basis –

(1) that the WAC 448-16-060 plus or minus 10 percent of the mean calculation was conducted by the self-certifying Dräger machine’s analysis of Keller’s alcohol breath results in accordance with the method approved by the state toxicologist in WAC 448-16-060; and

(2) that a review of Keller’s Dräger generated breath test printout shows successful compliance with all 10 steps of WAC 448-16-050 and therefore Keller’s breath test is ensured accuracy, precision, and confidence even though the Dräger should not have generated a breath test printout in Keller’s case under the methods approved by the state toxicologist because the self-certifying Dräger failed to comply with WAC 448-16-060.

4.80 The State argues that the Court of Appeals holding in *King County District Court* prohibits the Court here from excluding State expert witness opinion testimony under ER 702 concerning the Dräger machine, its software, and Keller’s Dräger generated breath test printout. The Court disagrees with this premise.

²⁹⁰ *Clark-Munoz*, 152 Wn.2d at 47-48 (agreeing with Ruling by District Court Panel).

- 4.81 In *King County District Court*, the trial court entered a blanket exclusion of breath machine alcohol test results unless the State introduced an uncertainty statement presented as a confidence interval for each breath test. The Court of Appeals held that by requiring an uncertainty statement, the trial court erred because the court lacked the authority to impose “a new foundational requirement for [breath test] admissibility, beyond that required by *Frye* or RCW 46.61.506(4).”²⁹¹ In Keller’s case, the Court has not imposed a new breath test foundational requirement for the admissibility of a Dräger generated breath test printout.
- 4.82 The Court of Appeals also held in *King County District Court* that the trial court there erred by its blanket exclusion of breath machine alcohol test results under ER 702 because a trial court’s exercise of its discretion to exclude expert scientific opinion testimony under ER 702 may only be ordered on a case-by-case basis.²⁹²
- 4.83 Today’s decision concerning the rules of evidence only excludes the State expert witness opinion testimony under ER 702 in Keller’s case concerning the Dräger machine, its software, and the Dräger generated breath test printout. Unlike the trial court in *King County District Court*, today’s decision under ER 702 is not a blanket exclusion of State expert witness opinion testimony in other Dräger breath test cases in Kitsap County District Court. *King County District Court* is distinguishable.
- 4.84 The State argues the Court should admit Keller’s Dräger generated breath test printout and allow State expert witness opinion testimony subject to defense cross-examination and impeachment, and leave it to the jury to decide whether the State expert witness opinion testimony about the Dräger machine, its software, and Keller’s Dräger generated breath test printout is credible.
- 4.85 The State expert witness opinion testimony necessary for Keller’s Dräger generated breath test printout to be admitted would be without any factual basis and thus false and misleading to the jury. As a result, the Court lacks confidence in the reliability and accuracy of the Dräger machine and its software.
- 4.86 If the trial court’s gatekeeping function under the rules of evidence is to have any meaning at all, a court cannot allow State expert witness false and misleading opinion testimony to

²⁹¹ *King County District Court*, 175 Wn.App. at ¶18.

²⁹² *Id.*, at ¶¶15,18.

mislead the trier of fact that Keller’s Dräger generated breath test printout complies with Washington law when it does not.

[Scientific] evidence is helpful [under ER 702] if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury.²⁹³

4.87 The false or misleading actions taken by the state toxicologist and the state toxicologist office concerning the Dräger machine are so serious²⁹⁴ in Keller’s case that false opinion testimony by the State expert witness concerning the Dräger machine, its software, and Keller’s Dräger generated breath test printout is misleading and not “helpful to the finder of fact” as required by ER 702.

4.88 In *Wittenbarger*,²⁹⁵ the majority found the self-certifying DataMaster machine accurate and reliable because unlike the Breathalyzer machine, the DataMaster possessed “the technical capability of monitoring its own performance at each breath test”. A breath test printout thus becomes crucial in determining the accuracy and reliability of breath test results –

The breath test ticket, then, is a crucial document in determining whether the DataMaster was operating properly during a particular test.²⁹⁶

4.89 The Dräger machine and its software were not “operating properly” during Keller’s breath test. For the above reasons, Keller’s Dräger generated breath test printout is unreliable. The State expert witness opinion testimony concerning Keller’s Dräger generated breath test printout is excluded pursuant to ER 702.

4.90 Accordingly, Keller’s Dräger generated breath test printout is also excluded because the State is unable to lay the necessary foundation for admissibility as required by RCW 46.61.506.

Keller’s Dräger Generated Breath Test Printout Is Excluded Under ER 401 And ER 402

4.91 Keller also challenges the admissibility of his Dräger generated breath test printout under ER 401 by asserting the printout and the foundational scientific expert opinion testimony necessary for the printout to be admissible should be excluded because the evidence is not relevant.

²⁹³ *King County District Court*, 175 Wn.App. at ¶11 (citation omitted) (emphasis added).

²⁹⁴ *Id.*, at ¶17 (Breath machine error rates go to weight, not admissibility “unless errors rates are so serious as to be unhelpful to the trier of fact ...”).

²⁹⁵ *State v. Wittenbarger*, 124 Wn.2d 467, 483 (1994) (emphasis added).

²⁹⁶ *Id.*

- 4.92 ER 401 provides that relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”²⁹⁷ Relevant evidence is generally admissible. Evidence which is not relevant is not admissible.²⁹⁸
- 4.93 Relevant evidence must have both a probative value and be of consequence (have materiality).
- The rule requires only a showing of minimal logical relevance – any tendency to make the existence of a fact more or less probable.
- Facts that are of consequence include facts that offer direct evidence of an element of a claim or defense. Also included are facts that imply an element of a claim or defense (circumstantial evidence), as well as facts bearing on the credibility or probative value of other evidence ...
- The question of whether particular evidence is of consequence is often determined by reference to applicable substantive law.²⁹⁹
- 4.94 The State cannot convict Keller under the per se DUI prong of RCW 46.61.502(1)(a) without Keller’s Dräger generated breath test printout being admitted into evidence. The printout thus is of consequence and material under ER 401.
- 4.95 The question becomes under ER 401 whether Keller’s Dräger generated breath test printout and the foundational scientific expert opinion testimony necessary for the printout to be admissible have “any tendency to make the existence of a fact [that Keller “had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test” of his breath³⁰⁰] more or less probable?
- 4.96 For Keller’s Dräger generated breath test printout to be admitted into evidence in the State’s case-in-chief under RCW 46.61.506, State expert witness opinion testimony about the Dräger machine will have to include two statements which would be false because the opinion testimony is without any factual basis –

²⁹⁷ Emphasis added.

²⁹⁸ ER 402.

²⁹⁹ 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE §401:2-401:3, at 131-32 (2021-2022 ed.) (citations omitted).

³⁰⁰ WPIC 92.02.

(1) that the WAC 448-16-060 plus or minus 10 percent of the mean calculation was conducted by the self-certifying Dräger machine's analysis of Keller's alcohol breath results in accordance with the method approved by the state toxicologist in WAC 448-16-060; and

(2) that a review of Keller's Dräger generated breath test printout shows successful compliance with all 10 steps of WAC 448-16-050 and therefore Keller's breath test is ensured accuracy, precision, and confidence even though the Dräger should not have generated a breath test printout in Keller's case under the methods approved by the state toxicologist because the self-certifying Dräger failed to comply with WAC 448-16-060.

4.97 Such expert witness opinion testimony would be without any factual basis and thus false and misleading because the Dräger plus or minus 10 percent of the mean calculation was not conducted in accordance with WAC 448-16-060 which means no printout should have been generated by the Dräger to be inspected by the State expert witness under WAC 448-16-050. Instead, the Dräger was required by the state toxicologist to display a "Samples Outside 10%" message and abort Keller's test upon WAC 448-16-060 criteria not being satisfied.

4.98 The State Dräger expert witness opinion testimony would not make it "more or less probable" that Keller had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of his breath because the testimony would be without a factual basis and thus would be false and misleading.

4.99 False and misleading testimony is not relevant under ER 401. The State expert witness opinion testimony concerning Keller's Dräger generated breath test printout is excluded pursuant to ER 402 because the evidence is not relevant.

4.100 Accordingly, Keller's Dräger generated breath test printout is also excluded because the State is unable to lay the necessary foundation for admissibility as required by RCW 46.61.506.

Keller's Dräger Generated Breath Test Printout Is Excluded Under ER 403

4.101 Finally, Keller challenges the admissibility of his Dräger generated breath test printout under ER 403 by asserting the printout and the foundational scientific expert opinion testimony necessary for the printout to be admissible should be excluded even if relevant.

4.102 ER 403 establishes “the principle that evidence, even though relevant, may be excluded if its relevance is outweighed by its negative effect upon the fact-finding process.”³⁰¹ ER 403 reads –

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

4.103 Exclusion of relevant evidence under ER 403 is considered an extraordinary remedy and the burden is on the party seeking exclusion to show that the evidence’s probative value is substantially outweighed by the “undesirable characteristics” of the evidence.³⁰²

4.104 Keller argues that the probative value in admitting Keller’s Dräger generated breath test printout and the State Dräger expert witness opinion testimony in the State’s case-in-chief is substantially outweighed by the danger of misleading the jury to believe that the state toxicologist and the state toxicologist office “follow their own rules, regulations and scientifically recognized principles” concerning Dräger machine analysis of Keller’s breath samples.

4.105 The State responds that Keller’s Dräger generated breath test printout is highly probative of his violation of Washington’s per se DUI prong and suggests that Keller’s concerns can be raised through either cross-examination and impeachment of State witnesses in the State’s case-in-chief or by presenting witnesses Keller chooses to call in his case-in-chief. The State writes –

The defendant can also assuage any concerns he has about the jury being misled by presentation of the breath samples by presenting evidence to the jury of all the issues he has listed.³⁰³

4.106 The Court agrees with the State that Keller’s Dräger generated breath test printout is highly probative evidence. The State cannot convict Keller under the per se DUI prong of RCW 46.61.502(1)(a) without Keller’s Dräger generated breath test printout being admitted.

4.107 As previously discussed, the State acknowledges Keller’s concerns about inappropriate actions and omissions taken by the state toxicologist concerning Dräger machines and Dräger software –

³⁰¹ 5D TEGLAND, §403:1, at 157.

³⁰² *Id.*, §403:2, at 157.

³⁰³ Supplemental Memorandum of Authorities Opposing Suppression of Breath Results (filed Feb. 25, 2022), at 20.

While the state acknowledges that the defendant's concerns about the Toxicologist's decision-making are not without some merit³⁰⁴

While the defendant certainly does list a background of admittedly questionable actions by the State Toxicologist, none of the evidence provided calls into question the reliability of the breath samples collected by the Draeger 9510³⁰⁵

- 4.108 State toxicologist and state toxicologist office inaccurate information, misleading information, and/or omissions to Washington prosecutors, defense counsel, and courts about the self-certifying Dräger machine and its software are not trivial. They are extreme.³⁰⁶ Also not trivial is the admission of expert witness opinion testimony which lacks any factual basis and thus would be false and misleading.
- 4.109 The State's solution is for the Court to admit Keller's Dräger generated breath test printout, permit the State expert witness to offer opinion testimony in support of the printout, and then require Keller to turn the trial into a multiple day mini-trial concerning state toxicologist and her office Dräger actions and omissions.
- 4.110 If the Court were to adopt the State's solution by allowing the jury to hear the evidence as described in Conclusions of Law 4.108 and 4.109, the danger is exceptionally high the jury will be confused and misled into incorrectly believing Keller's self-certifying Dräger generated breath test printout is accurate and reliable because state toxicologist Dräger machine regulations and methods were followed when those regulations and methods were not followed.
- 4.111 It would be a waste of time to permit the State's solution of delegating to the jury the confusing task based upon false and misleading evidence of deciding whether state toxicologist Dräger regulations and methods were followed and whether state toxicologist and her office actions and omissions support a conclusion that the Dräger generated an accurate and reliable breath test printout in Keller's case.

³⁰⁴ *Id.*, at 14-15.

³⁰⁵ *Id.*, at 16.

³⁰⁶ Findings of Fact 3.5 – 3.12, 5.15 – 5.17, 5.20 – 5.22, 6.4 – 6.13, 6.17 – 6.21, and 7.17 – 7.18.

- 4.112 Keller has met his ER 403 burden of showing that the probative value of Keller's Dräger generated breath test printout and State expert witness opinion testimony necessary for the printout to be admitted into evidence is substantially outweighed by the "undesirable characteristics" of this false, misleading, confusing, and waste of time evidence.³⁰⁷
- 4.113 The State expert witness opinion testimony concerning Keller's Dräger generated breath test printout is excluded pursuant to ER 403 because the probative value of the evidence is substantially outweighed by the danger of confusion of the issues, misleading the jury and a waste of time.
- 4.114 Accordingly, Keller's Dräger generated breath test printout is also excluded under ER 403 because the State is unable to lay the necessary foundation for admissibility as required by RCW 46.61.506.

The Court Declines To Create A New "Lack Of Prejudice To The Defense" Rules Of Evidence Exception For Dräger Breath Tests

- 4.115 The State also argues Keller's Dräger generated breath test printout and State Dräger expert witness opinion testimony should be allowed under the rules of evidence because Keller has not been prejudiced by the Dräger truncation of the mean of his breath test results rather than rounding the mean before conducting the plus or minus 10 percent of the mean calculations required by WAC 448-16-060.
- 4.116 The State reasons that since truncation of the mean is to the benefit of the person submitting to a breath test, the State has met the RCW 46.61.506 breath test admissibility requirements because Keller is not prejudiced by the Dräger truncation of the mean instead of rounding the mean. The State also asserts Keller is not prejudiced because upon the State's expert witness inspection of Keller's Dräger generated breath test printout, the expert will offer opinion testimony there is no fifth decimal place to truncate or round after the mean of Keller's four breath test results is calculated.

³⁰⁷ 5D TEGLAND, §403:2, at 157.

4.117 In *Wittenbarger*,³⁰⁸ the majority found the self-certifying DataMaster machine accurate and reliable because unlike the Breathalyzer machine, the DataMaster possessed “the technical capability of monitoring its own performance at each breath test”. A breath test printout thus becomes crucial in determining the accuracy and reliability of breath test results –

The breath test ticket, then, is a crucial document in determining whether the DataMaster was operating properly during a particular test.³⁰⁹

4.118 The Dräger machine and its software were not operating properly when it analyzed Keller’s breath test results and improperly generated a breath test printout. State toxicologist approved Dräger regulations and methods were not followed by the Dräger machine as required by RCW 46.61.506.

4.119 The State postulates that “[s]trict compliance to the WAC is not required for admissibility” of Dräger breath test results pursuant to RCW 46.61.506.³¹⁰

4.120 No authority was produced or could be found that the Court can or should ignore breath test regulations promulgated by the state toxicologist or methods approved by the state toxicologist pursuant to RCW 46.61.506 when determining whether a breath test is “valid” under the statute.

4.121 Under RCW 46.61.506, the State either meets its burden of producing prima facie evidence of compliance with the breath test foundational requirements in the statute or it does not. Substantial compliance with RCW 46.61.506 is not sufficient for a Dräger generated breath test printout to be admissible under the statute.³¹¹

³⁰⁸ *State v. Wittenbarger*, 124 Wn.2d 467, 483 (1994) (emphasis added).

³⁰⁹ *Id.*

³¹⁰ Supplemental Memorandum of Authorities Opposing Suppression of Breath Results (filed Feb. 25, 2022), at 8.

³¹¹ *Clark-Munoz*, 152 Wn.2d at 48 (Since the State has not met its foundational burden for admissibility of a breath test result, there is no need for the court to reach whether substantial compliance would be sufficient.).

4.122 The issues Keller raises in this case are a direct result of the state toxicologist decisions –

(1) in her bid specifications and approval of the Dräger machine and its software to require the Dräger to truncate the mean of Keller’s breath test results before conducting the plus or minus 10 percent of the mean calculations;

(2) in promulgating WAC 448-16-060 to require the Dräger machine and its software to round the mean instead of truncating the mean;³¹² and

(3) in approving methods to require the Dräger to display a “Samples Outside 10%” message, abort the test and not generate a breath test printout when WAC 448-16-060 criteria are not satisfied.

4.123 The Legislature has delegated to the state toxicologist, the government-designated scientific expert, the decision-making authority concerning when an analysis of a person’s breath for alcohol content is considered valid.

In applying our narrow and limited scope of review to the decision of the district court, we must remember that the Legislature has mandated that the analysis of breath or blood is valid if it is performed “*according to methods approved by the state toxicologist*”. RCW 46.61.506(3).

The ultimate concern of the judiciary is that the methods approved result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content.³¹³

4.124 The State asks the Court to admit Keller’s Dräger generated breath test printout and State Dräger expert witness opinion testimony by revising state toxicologist approved Dräger regulations and methods as well as RCW 46.61.506 to include a new “lack of prejudice to the defense” exception to the rules of evidence. The State in essence is asking the Court to abandon its evidence gatekeeping function by delegating to the jury the obligation to

³¹² On January 20, 2022, the state toxicologist approved the Dräger software truncation of the mean before calculating the plus or minus 10 percent limitations. Finding of Fact 5.36.

The state toxicologist truncation approval was by her testimony through a declaration. The state toxicologist is required to “approve” breath testing protocols but is not required to promulgate the approval in the Washington Administrative Code. *State v. Straka*, 116 Wn.2d 859, 862-63 (1991).

As of May 18, 2022 (Finding of Fact 5.37), the state toxicologist has not repealed rounding the mean as the method required by WAC 448-16-060(2). While Dräger truncation of the mean is now approved, the state toxicologist through WAC 448-16-060(2) still requires the Dräger to round the mean as the method approved “[p]ursuant to RCW 46.61.506” for “determining whether the two breath samples agree to within plus or minus ten percent of their mean.”

Accordingly, the January 20, 2022 state toxicologist Dräger truncation approval has no impact on the Court’s analysis because the WAC 448-16-060(2) Dräger rounding requirement is still mandated by the state toxicologist for a breath test to be “valid” under RCW 46.61.506.

³¹³ *State v. Ford*, 110 Wn.2d 827, 833 (1988) (italics in original) (paragraph added for ease of reading).

determine the admissibility of Keller's Dräger generated breath test printout under Washington statute and state toxicologist regulations.

- 4.125 The construction of an agency promulgated rule is entitled to great weight.³¹⁴ Courts give great deference to an agency's interpretation of its own rules.³¹⁵ It is not the Court's function to substitute its judgment for that of the state toxicologist.

Thus, as we turn to the record here, we are mindful that it is not our function to substitute our judgment for that of the state toxicologist, nor was such the function of the trial judge.³¹⁶

- 4.126 The parties have not provided an explanation to the Court why the state toxicologist approved the apparently contradictory Dräger breath test machine regulations and methods concerning truncation and rounding of the mean before conducting the plus or minus 10 percent of the mean calculations. The Court should not speculate as to the state toxicologist's reasons.
- 4.127 The Legislature enacted alcohol breath test machine foundational requirements in RCW 46.61.506. The state toxicologist approved Dräger machine regulations and methods as authorized by the Legislature in RCW 46.61.506.
- 4.128 The Court will not substitute its judgment over the decisions made by the state toxicologist concerning Dräger machines and software.
- 4.129 The Court declines the State's invitation to rewrite these legislative and administrative Dräger breath machine requirements by creating a new "lack of prejudice to the defense" exception under the rules of evidence.
- 4.130 The decision whether to create a "lack of prejudice to the defense" exception concerning Keller's Dräger generated breath test printout is left to the Legislature through statute, the state toxicologist through regulation and approved methods, and/or the Supreme Court through the rules of evidence.
- 4.131 For the reasons discussed, evidence of Keller's Dräger generated breath test printout is excluded under the rules of evidence.

³¹⁴ *Barrington v. Eastern Washington University*, 41 Wn.App. 259, 263-64, *review denied*, 104 Wn.2d 1019 (1985) (citations omitted).

³¹⁵ *Schons v. State Department of Transportation*, 43 Wn.App. 160, 165 (1985) (citation omitted).

³¹⁶ *Ford*, 110 Wn.2d at 832 (emphasis added).

5. KELLER HAS FAILED TO ESTABLISH STATE TOXICOLOGIST APPROVAL OF THE DRÄGER IS ARBITRARY AND CAPRICIOUS

Summary Of The Parties' Positions Regarding Arbitrary And Capricious

- 5.1 Finally, Keller challenges the state toxicologist approval by regulation³¹⁷ of the Dräger machine and software asserting the decision was arbitrary and capricious. Keller argues the state toxicologist decision to require in bid specifications that the Dräger software truncate the breath test results mean before conducting the plus or minus 10 percent calculations while simultaneously requiring by another regulation³¹⁸ that the Dräger software round the mean or display a “Samples Outside 10%” message, abort the test, and not generate a breath test printout when not in compliance with the rounding regulation was a willful and unreasoning action in disregard of facts and circumstances.³¹⁹
- 5.2 While not disagreeing with the conflict in state toxicologist regulations and methods concerning the Dräger truncation versus rounding issue, the State argues under CrRLJ 8.3(b)³²⁰ that Keller is unable to show “prejudice to the rights of the accused which materially affect the accused’s right to a fair trial” due to “arbitrary action or governmental misconduct”.³²¹

Arbitrary And Capricious Caselaw

- 5.3 The right to be free from an arbitrary and capricious government agency action is a fundamental right.³²² Accordingly, all courts have inherent judicial power under Article IV of the state constitution to review an agency action to ensure the action is not arbitrary and capricious, or contrary to law.³²³ Included within this inherent judicial power is a review of state toxicologist approval of alcohol breath testing methods.³²⁴

³¹⁷ WAC 448-16-020(1)(c) (effective December 31, 2010).

³¹⁸ WAC 448-16-060 (effective December 31, 2010).

³¹⁹ Supplemental Memorandum To Suppress Breath Test Results [Arbitrary and Capricious Approval of Software] (filed Jan. 26, 2022), at 5-6, 28-31; Defense Response To Prosecutor’s Supplemental Memorandum Of Authorities (filed Mar. 2, 2022), at 8-12.

³²⁰ Supplemental Memorandum Of Authorities Opposing Suppression Of Breath Tests (filed Feb. 24, 2022), at 13-15.

³²¹ Keller’s arbitrary and capricious argument is brought pursuant to the inherent judicial power of a court to review an agency action to ensure the action is not arbitrary and capricious. Keller does not seek dismissal nor allege arbitrary action or governmental misconduct under CrRLJ 8.3(b)

³²² *Pierce County Sheriff v. Civ. Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 693-94 (1983).

³²³ *State v. MacKenzie*, 114 Wn.App. 687, 695-96 (2002) (citing *State v. Ford*, 110 Wn.2d 827, 828-30 (1988)).

³²⁴ *Ford*, 110 Wn.2d at 829.

5.4 Where administrative rules adopted pursuant to a legislative grant of authority are “reasonably consistent with the statute being implemented”, the rules are presumed to be valid and should be upheld on judicial review.³²⁵

[A]n agency rule must stem from an express or necessarily implied statutory grant of authority, i.e., delegation. The court reviews such rules to ascertain statutory authority and a reasonable consistency with the statute being implemented.³²⁶

5.5 An agency action exercised honestly and upon due consideration of the facts and circumstances “where there is room for two opinions” is not arbitrary and capricious.³²⁷

An unwise or even erroneous decision arrived at pursuant to the legislative duty delegated, upon facts which motivated a rational decision is not arbitrary and capricious. That the toxicologist might have used a methodology more precise or might have used a different procedure of evaluation reflects upon his administrative judgment, but does not make his action arbitrary and capricious.³²⁸

5.6 A court does not review a state toxicologist action to determine whether the state toxicologist acted beyond statutory authority, but rather whether the state toxicologist –

[A]cted in disregard of the facts and circumstances before him. The very nature of the inquiry is what the toxicologist did, what facts he relied upon, whether he acted without any rational relation to the facts before him. Conclusions about the action of the toxicologist are based upon what he did or did not do. These are events, occurrences, realities as to what took place. They are facts.³²⁹

5.7 An agency action is arbitrary and capricious only when it is “willful and unreasoning or taken without consideration and in disregard of the facts.”³³⁰ Where there is “no support in the record for the action” taken by the administrative body, the action is arbitrary and capricious.³³¹ Court review of an agency action is “limited to the record of the administrative tribunal.”³³²

³²⁵ *Barrington v. E. Washington Univ.*, 41 Wn.App. 259, 265, review denied, 104 Wn.2d 1019 (1985).

³²⁶ *Ford*, 110 Wn.2d at 831 (citation omitted) (emphasis added).

³²⁷ *Id.*, at 830 (citation omitted).

³²⁸ *Id.*, at 832.

³²⁹ *Id.*, at 831 (citation omitted).

³³⁰ *State v. Wittenbarger*, 124 Wn.2d 467, 486 (1994) (citing *Ford*, 110 Wn.2d at 830-31).

³³¹ *Hayes v. Yount*, 87 Wn.2d 280, 286 (1976) (citation omitted).

³³² *Barrington*, 41 Wn.App. at 262-63.

Keller Failed To Establish Dräger Approval Is Arbitrary And Capricious

- 5.8 Keller challenges state toxicologist approval of the Dräger. The legislature delegates to the state toxicologist the authority to approve alcohol breath test machines.³³³ In 2010, the state toxicologist approved the Dräger machine for the “quantitative measurement of alcohol in a person’s breath”.³³⁴
- 5.9 State toxicologist approval of the Dräger machine is “reasonably consistent with the statute being implemented”³³⁵ because the legislative intent behind RCW 46.61.506 is that alcohol breath test machine results be used as evidence in Washington prosecutions involving driving under the influence charges.³³⁶ Since the state toxicologist approval of the Dräger is reasonably consistent with RCW 46.61.506, WAC 448-16-020(1)(c) is presumed valid.³³⁷
- 5.10 Keller focuses his arbitrary and capricious challenge on the Dräger software which truncates the mean before conducting the plus or minus 10 percent of the mean calculations rather than rounding the mean as required by WAC 448-16-060.
- 5.11 Keller offers some bid information available to the state toxicologist which she considered during the Dräger approval process. Keller offers little else of the record before the state toxicologist for this Court to review which would explain why the state toxicologist approved the Dräger machine and its software which truncates rather than rounds the mean before conducting the plus or minus 10 percent calculations.
- 5.12 The Court does not know why the state toxicologist approved truncation of the mean Dräger software when she approved the Dräger in WAC 448-16-020(1)(c) and approved the rounding of the mean requirement in WAC 448-16-060.

³³³ RCW 46.61.506(4)(a).

³³⁴ WAC 448-16-020(1)(c).

³³⁵ *Ford*, 110 Wn.2d at 831.

³³⁶ Finding of Fact 4.16.

³³⁷ *Barrington*, 41 Wn.App. at 265.

5.13 Based upon the record presented here, Keller has failed to meet his burden of proving that the “record of the administrative tribunal”³³⁸ shows the state toxicologist approval of the Dräger is “willful and unreasoning or taken without consideration and in disregard of the facts”³³⁹ as opposed to an “unwise or even erroneous decision arrived at pursuant to the legislative duty delegated.”³⁴⁰

5.14 The Court is unable to conclude from the record presented here that the presumptively valid state toxicologist approval of the Dräger breath test machine in WAC 448-16-020(1)(c) is arbitrary and capricious. Accordingly, the Court declines to suppress Keller’s Dräger generated breath test printout for this reason.

DATED – JUNE 13, 2022

/s/ Signed Electronically

JEFFREY J. JAHNS
JUDGE

/s/ Signed Electronically

CLAIRE A. BRADLEY
Presiding Judge

/s/ Signed Electronically

KEVIN P. KELLY
Assistant Presiding Judge

/s/ Signed Electronically

MARILYN G. PAJA
Judge

[Note – Use of an electronic signature is an acceptable means for any Washington judicial officer or clerk to sign any document requiring a judicial or clerk signature.]

³³⁸ *Id.*, at 262-63.

³³⁹ *Wittenbarger*, 124 Wn.2d at 486.

³⁴⁰ *Ford*, 110 Wn.2d at 832.