_____ COUNTY DISTRICT COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Plaintiff*, v. , *Defendant.*	)	Case No. MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS/DISMISS

"Preservation of the individual citizen's confidence in government is [of the highest] important[ce]." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407 (1978).

"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." *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 47 (2004) (*quoting* Ruling by District Court Panel).

"The most important consideration for [the Court] now is the preservation of the integrity of the criminal justice system. We must handle these [] cases now before us in such a fashion that the public, the defense bar, the prosecuting attorneys, and the courts of Washington will clearly understand that we will not tolerate criminal convictions based on tainted evidence, but will insist upon proper standards of conduct and procedure." *State v. Roche*, 114 Wn.App. 424, 446 (2002).

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II. BRIEF CHRONOLOGY[1]

A brief chronology of the Labs recent history will provide a context and a reference guide for the more detailed background sections which follow.[2]

January of 1998:

- Ann Marie Gordon was hired by the Washington State Toxicology Laboratory. She left a position at a private drug testing company in Los Angeles.

November 1, 2000:

- Gordon was promoted to manager of the Lab.

2001 – 2003:

- Gordon was the last or second to last simulator solution tester to sign most of the simulator solution worksheets. The delays caused by Gordon resulted in slower distribution of the solution and this was seen as unacceptable to Gordon and Formoso.

2003 – 2004:

- Ann Marie Gordon and Ed Formoso (a 32 year veteran of the Lab) began their fraudulent certification activities at the Lab. Formoso would test the solution and Gordon could just pretend that she had done the work.[3] Formoso was testing simulator solutions for Ann Marie Gordon and she would sign certifications under penalty of perjury that she did the testing.[4] It is unknown how many times they conducted their scheme over the last several years but, when reviewing a particular simulator solution worksheet, the probability of fraudulent records is high if her name falls next to his.[5] If their tests were

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[1] Chronology authored by Kevin Trombold. This chronology is necessarily rough and incomplete but it is offered as a guide to assist the Court. For a more complete and supplementary analysis the court should read the Facts and Background Section.

[2] DOL v. Olsen (Tr.O), DOL v. Arntson (Tr.A1&2), State v. Gilbert (Tr.S1&2&3). All transcripts and exhibits may be found at Washington DUI Center <www.washingtonduicenter.com> (Last visited November 6, 2007).

[3] Tr.S2, p. 151

[4] Tr.S2, p.150; Tr.S3, p.37

[5] In 2003, applying Formoso's analysis, it appears that Gordon signed false certification for at least eight solution batches numbered: 03008, 03009, 03025, 03027, 03028, 03029, 03034, and 03035. There are four other certifications signed by Gordon in 2003 but it is unclear if she signed them fraudulently or not. Those are batches numbered: 02045, 02046, and 03005, 3024, 03026. But lacking the chromatograms we can't check the data of those four. In 2004, applying Formoso's analysis, it appears that Gordon signed false certifications for at least twelve simulator batches: 03040, 04001, 04002, 04003, 04008, 04009, 04018, 04019, 04025, 04026, 04035, and 04036. Except for 03041 and 03046(both signed within 3 days), 04024, 04041 and 04042 (signed same day) on all batches Gordon and Formoso's names are next to each other. Washington State Patrol Discovery Website ("WebDMS") <http://breathtest.wsp.wa.gov/> (Last visited November 6, 2007).

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conducted on the same day it is possible.[6]

2004:

- Sergeant Langford, an Evidence Control Officer for the WSP issued an audit report with negative findings regarding the Labs ability to account for lost evidence, to avoid damaging and destroying evidence, and to document evidence status. She found that there were even problems recording the names of visitors to the secure facility. Her conclusion stated that "It is apparent that case management, case turn-around time, and successful case prosecutions are top priorities for the lab. WSP policies and required procedures appear to be of secondary concern to lab personnel…Accurate record keeping and quarterly auditing as required by Patrol Policies and CALEA standards is severely deficient."[7] In connection with that audit Gordon stated to Sgt. Langford that she did not have to follow the rules and regulations of the Patrol.[8] The same audit found the Lab to be "Non-compliant" with respect to proper record keeping procedures concerning "Simulator Solution Logbooks."[9]

2005:

- Applying Formoso's analysis, it appears that Gordon signed false certifications for at least twelve different simulator batches: 05001, 05006, 05008, 05010, 05015, 05016, 05022, 05023, 05028, 05029, 05035, and 05041. Additional possible problems are batch numbers 05009 and 05034 (same day) 05017 (9 days gap), and 05036 (4days gap). In all other batches Gordon and Formoso's names are next to each other on the worksheet. There is no chromatogram with batch 05017 to confirm the claim of her certification.[10]

- August, the Lab changed its Simulator Solution computer program but it was never reviewed or tested. There was no confirmation that it was functioning as intended. Two years later it would be discovered that it was faulty and that some breath test results in the field were affected.[11]

- December when conducting an unannounced spot check Sgt. Langford was met with a "not positive" response by Gordon.[12]

2006:

- Applying Formoso's analysis, it appears that Gordon signed false certifications for at least seventeen different simulator batches: 05042, 06001, 06002, 06003,

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[6] Tr.S2,p. 155
[7] Ex.S, # 37
[8] Tr.S1, p.20
[9] Ex.S, # 37
[10] WebDMS <http://breathtest.wsp.wa.gov/> (Last visited November 6, 2007).
[11] Ex.S, #14
[12] Tr.S1, p.26

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06009, 06018, 06019, 06020, 06025, 06026, 06027, 06029, 06030, 06031, 06041, 06043, and 06048. With all batches Gordon and Formoso's names are next to each other.[13]

2007:

- Applying Formoso's analysis, Gordon signed false certifications for at least five different simulator batches: 06049, 06054, 07001, 07006, and 07007. With all batches in 2007 Gordon and Formoso's names are next to each other on the worksheet.[14] On all batches she is purported to have certified in 2006 and 2007 her name is next to Formoso's on the worksheet and is therefore fraudulent.

- February 7, simulator external standard solution batch #07006 is prepared by Lisa Piquette. Formoso fraudulently tests the solution for Gordon, who later signs a fraudulent certification on February 28, 2007.[15]

- February 20, simulator external standard solution batch #07007 is prepared by Sarah Swenson. Formoso fraudulently tests the solution for Gordon, who later signs a fraudulent certification on March 19, 2007, two days after the first tip.[16]

- March 15, the first of two anonymous tips was called into the Chief of the WSP. It states that the "simulator solutions are being falsified as far as their certifications."[17] Logan fails to recognize the significance of the tip. Logan recently indicated he did not understand how someone could falsely certify results. [18] Logan is asked by the Chief of the WSP to investigate the tip.[19] He never filed a report nor reported back to the Chief regarding the first tip.[20]

- March 19, 2007, Formoso and Gordon both sign certifications for solution batch #07007.[21] This is the last solution her name appears on.

- March 23 -24 Logan speaks with Gordon about the tip.[22] Logan directs Gordon to stop testing and certifying simulator solutions.[23] Gordon and Formoso discuss the tip in Gordon's office. Gordon tells Formoso that she informed Logan of their fraud in the certification process when she (Gordon) spoke to him

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[13] WebDMS <http://breathtest.wsp.wa.gov/> (Last visited November 6, 2007).
[14] WebDMS <http://breathtest.wsp.wa.gov/> (Last visited November 6, 2007).
[15] WebDMS <http://breathtest.wsp.wa.gov/PDF_Documentation/BatchReviewed/07006.pdf> (Last visited November 6, 2007).
[16] WebDMS <http://breathtest.wsp.wa.gov/PDF_Documentation/BatchReviewed/07007.pdf> (Last visited November 6, 2007).
[17] Ex.S, #30
[18] Tr.S3, p.29; Tr. A1, p. 129
[19] Tr.S3, p. 33
[20] Tr.S3, p. 34
[21] WebDMS <http://breathtest.wsp.wa.gov/PDF_Documentation/BatchReviewed/07007.pdf> (Last visited November 6, 2007).
[22] Tr.S3, p. 28
[23] Tr.S2, p. 159-161, 164; Tr.S3, p. 78.

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regarding the first tip.[24]

- March 30 simulator external standard batch #07008, is prepared by Formoso.[25] Gordon did not participate in the certification of that batch – her first non fraudulent batch in 2007, with the exception of the QA solutions, which only use three lab technicians.[26]

- April 11 Gordon and Formoso submit their investigation of the simulator certification process initiated in response to the first anonymous phone call. Logan assigned them to investigate it. Gordon and Formoso fail to mention their fraudulent certifications in the report.[27] Logan indicates he and Gordon discussed Gordon not actually testing solutions for the first time and that he realized that this was likely the source of the complaint.[28] This is after Gordon and Formoso have presented the memorandum of investigation, which Logan allows to be released without correction. Logan is therefore aware that they have fraudulently conducted an investigation. He does nothing about it.

- April 13, Formoso participates in testing on a Quality Assurance solution #07009, just a day or two after Logan learns of Formoso's and Gordon's activities.

- July 9, the second anonymous tip arrives at the Chief of WSP stating that Gordon doesn't really certify all those simulator solutions.

- July 20, Gordon resigns. Logan now says that there are numerous calls to the Lab asking about the effect of withdrawing Gordon's numbers. He said this all finally prompted "a period of significant activity."[29]

- July 26, the WSP posts a statement on their website that Gordon's certifications have been removed but that the test results have not changed. Logan finally "checks" the results of the certifications himself.[30]

- August 9, the WSP posts an admission on their website that a calculation error had been discovered in the fourth decimal place (0.0001) on two batches of solution. The memo indicates that the error were enough to cause a group of Citizens whose BAC's were under .08 to be reported as greater than a .08, and another groups whose BACs were under a .15 to be over a .15.[31]

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[24] Tr.S2, p.160-1
[25] WebDMS <http://breathtest.wsp.wa.gov/PDF_Documentation/BatchReviewed/07008.pdf> (Last visited November 6, 2007).
[26] WebDMS <http://breathtest.wsp.wa.gov/> (Last visited November 6, 2007).
[27] Tr.S2, p. 160; Ex.S, #31
[28] Tr.S3, p. 44
[29] Tr.A1, p.135
[30] Tr.A1, p.133
[31] Ex.S, #14

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- August 14, Formoso tests simulator batch #07024 and signs the certification on September 27, 2007. According to the materials posted on the WSP website, this is the last test Formoso performs.

- August 7, 2007, simulator external standard solution batch #07025 was prepared by Asa Louis. This is the first external standard solution that neither Gordon or Formoso tested.

- September 10, Pemberton and Thatcher testify in DOL v. Olsen to False Swearing by signing certifications under oath to unqualified statements of fact that they did not know to be true. The Department of Licensing matters joined for that hearing are dismissed.[32]

- September 27, WSP begins a new review procedure for the simulator certifications. Batch #7025 is the first batch to be reviewed by Trooper Denton and retired Sgt. Gullberg.

- September 28, the WSP posts a notification that the procedures for preparation have changed and a data review of past solutions has begun. The issue of removing Gordon's test results is not addressed. But the tests falsely claimed by Gordon, were not removed from any reviews or recalculations.[33]

- October 1, Gullberg and Denton, in their review of certifications, encounter their first fraudulent batch.[34] They retain the fraudulent tests and certifications of Gordon and Formoso and fail to make any notations concerning this fact. Included to support the worksheet is the perjurious certificate of Gordon. This is the pattern throughout the 140 (as of this writing) reviews.

- October 8, Lab toxicologists Brian Capron and Justin Knoy testify that they didn't know if the calculations on the" corrected" certifications were correct even though they have signed them. They were asked in Skagit County District Court if they would swear that the 2007 simulator certifications reviewed and corrected by Gullberg and Denton and re-certified by Knoy and Capron were done correctly regarding the mean, standard deviation and the relative standard deviation. They said no.[35]

- October 8, Briana Peterson testified in Skagit County and performed a calculation of the relative standard deviation for the Court. She calculated a different value than Gullberg did in his reviews of the same batch.

- October 17, Logan and Gullberg testifiy that there is a second software issue in

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[32] Tr.O, p. 113
[33] Tr.A1, p. 144-145
[34] WebDMS <http://breathtest.wsp.wa.gov/PDF_Documentation/BatchReviewed/07007.pdf> (Last visited November 6, 2007).
[35] Tr.S1, p. 97-98, 134

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the calculation of precision. The software is failing to include the value for the fourth aliquot of the fourth analyst.[36]

- October 17, Logan testified that he was not able to neither define nor recognize other statistical methods other that the one used by the WSP. He additionally said he was not qualified to comment on the issue of weighed means.[37]

- October 26, Dr. Ashley Emery testified that the failure to utilize a weighted mean for solutions certified on multiple instruments violates accepted scientific principles and practice. All the means examined are for solutions Gullberg and Denton have corrected and they are found to be wrong. These shifting means cause trouble in the bias of BAC values.

III. FACTS AND BACKGROUND

A. THE ROLE OF SIMULATOR SOLUTIONS

An individual commits the crime of driving while under the influence of alcohol if they operate a motor vehicle: (1) with 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; and/or (2) while the person is under the influence of or affected by intoxicating liquor or any drug. RCW 46.61.502(1).

1. THE USE OF BREATH TESTS IN PROSECUTIONS FOR DUI

In order to commit the crime of driving under the influence of alcohol, an individual must have operated a motor vehicle while either having a BAC in excess of the per se limit or being under the influence of or affect by alcohol. *State v. Shabel*, 95 Wn.App. 469, 473 (1999); RCW 46.61.502(1). In this context, breath test evidence utilized to establish BAC is undeniably scientific in nature.[38] *City of Fircrest v. Jensen*, 158 Wn.2d 384, 397-9 (2006); *Clark-Munoz*, 152 Wn.2d at 47-8. "The major danger of scientific evidence is its potential to mislead the jury;

[36] Tr.A1, p. 63-65, 157196-197
[37] Tr.A1, p.146-149
[38] CANADIAN SOCIETY OF FORENSIC SCIENCE ALCOHOL TEST COMMITTEE, *Recommended Standards and procedures of The Canadian Society of Forensic Science Alcohol Test Committee*, 36(3) SOC. FORENS. SCI. J. 101, 101 (2003)("[T]he determination of blood alcohol concentrations (BAC) by means of breath tests is a scientific process.").

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an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." *Reese v. Stroh*, 74 Wn.App. 550, 558 (1994)(quotation omitted); *U.S. v. Addison*, 498 F.2d 741, 744 (D.C.Cir. 1974). "[G]iven the significant weight that a jury [in a prosecution for DUI] is likely to accord this type of evidence, the potential for prejudice…is high." Cf., *State v. Jayne*, 24 P.3d 920, 927 (Or.App. 2001)(urinalysis test).

Although a breath test's significance under the per se prong is evident, its practical effect on a finding pursuant to the "under the influence of or affected by" prong may be no less profound. It is well recognized that a positive breath alcohol test may create a strong "inference of intoxication." *South Dakota v. Neville*, 459 U.S. 553, 564, 103 S.Ct. 916 (1983). In a prosecution on the "under the influence" prong, "evidence of intoxication is far stronger where there is a positive blood (or breath) alcohol test." *State v. Cohen*, 125 Wn.App. 220, 225 (2005). In fact, most jurors "would conclude that a person with [a] reading [in excess of the per se limit] was intoxicated when it was taken, in the absence of substantial evidence to the contrary." *State v. McElroy*, 568 So.2d 1016, 1016-7 (La. 1990)(Dennis, J., concurring).

2. THE ROLE OF SIMULATOR SOLUTIONS IN PROSECUTIONS UTILIZING BREATH TESTS

The regulations governing breath testing are intended to identify "individuals who are to be examined for their competence to…maintain [breath testing] equipment and [also identify] certain aspects of the operation of that equipment, necessary for reliable testing." WAC 448-16-010. Pursuant to these regulations, the state toxicologist has approved "protocols of procedures and methods…required in the administration of the breath test program…These protocols will be updated as necessary to maintain the quality of the breath test program." WAC 448-16-070. The protocols explicitly recognize that "an accurate and reliable breath test requires a good

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instrument, program and protocol."[39] In this context, "the following are required for an accurate and reliable breath test…an instrument in proper working order [which has been] properly calibrated."[40]

"'Calibration' is the process of standardizing the DataMaster instrument to a known ethanol vapor concentration using a certified simulator solution. This allows for the quantitative measurement of the ethanol concentration in a person's breath."[41] The Toxicologist has promulgated a two page protocol detailing how a DataMaster is to be calibrated.[42] It requires the use of a "certified ethanol solution from the State Toxicology Laboratory."[43] Pursuant to the DataMaster Quality Assurance Procedure ("QAP"), every instrument is calibrated at least once a year.[44]

In addition to this standard calibration procedure, the DataMaster is checked for accuracy and reliability using simulator solutions at four different BAC levels during the annual QAP.[45] Just as with the standard calibration, during this process breath test technicians are to "[u]se only…simulators which contain a certified ethanol solution prepared and tested by the State Toxicology Laboratory."[46]

Together, the annual standard calibration and multi-level check of accuracy and

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[39] WASHINGTON STATE PATROL BREATH TEST SECTION, *Training Outline For DataMaster and PBT, Operator Basic*, 27 (2004).

[40] WASHINGTON STATE PATROL BREATH TEST SECTION, *Training Outline For DataMaster and PBT, Operator Basic*, 27 (2004). *See also*, Patrick Harding, *Methods for Breath Analysis*, *in* MEDICAL-LEGAL ASPECTS OF ALCOHOL 185, 187 (James Garriott ed., 4th ed. 2003)(Accurate calibration of breath test instrumentation is critical in the determination of the concentration of ethanol in breath) and *also*, KURT DUBOWSKI, *Alcohol Testing in the Workplace* at 428 *therein*; *Recommended Standards and procedures of The Canadian Society of Forensic Science Alcohol Test Committee*, 36(3) SOC. FORENS. SCI. J. 101, 113 (2003); NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, *NIST Standard Reference Materials Program , New Ethanol-Water SRMs to Support Blood- and Breath-Alcohol Testing* (September 2004) <http://ts.nist.gov/ts/htdocs/230/232/publicities/2891-2899.htm >.

[41] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 22 (2005).

[42] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 22-3 (2005).

[43] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 22 (2005).

[44] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 24, 26 (2005).

[45] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 26-7 (2005).

[46] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 26 (2005).

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reliability help make up those procedures that "ensure[] the accuracy, precision and forensic acceptability of the DataMaster instrument for the purpose of quantitatively measuring the alcohol concentration of a person's breath."[47] Clearly, "[t]he simulator test is of particular significance in certification of the DataMaster machine." *State v. Straka*, 116 Wn.2d 859, 872 (1991). And, "[o]bviously, the simulator solution is key to simulator testing."[48] *Id*. at 873.

Proper use of a simulator also "relates to accuracy of breath testing" when employed in the field. *Straka*, 116 Wn.2d at 870. Assuming a QAP has been performed, when considering a particular test the "accuracy and proper working order of the instrument is best evaluated at the time of the test in question." *Id.* at 872 (Testimony of Sergeant Rod Gullberg). In this context, "[t]he simulator test is of particular significance…in the machine's self-testing of calibration which it goes through each time a breath alcohol analysis is performed." *Id*. In fact, it is "necessary to ensure accuracy, precision, and confidence in each test." WAC 448-16-050. And again, "[o]bviously, the simulator solution is key to simulator testing." *Straka* at 873. "Simulator solutions for field use are [also] to be prepared only by the State Toxicology Laboratory."[49]

The way a simulator works is actually quite simple:

> [T]he simulator is a device that contains a glass jar and the top portion has a thermometer, a motor and heating elements and ports. The purpose of it is to simulate a breath alcohol sample. And it contains a solution of alcohol and water that has been prepared. The solution is heated…And then it can produce a known vapor alcohol concentration [.08] and it can be used as a calibrating device and as a testing device when you are testing a breath test, any type of breath test instrument. Simulators are typically the standard for testing the calibration. The solutions are received from the state toxicology laboratory, and are used for certification purposes, they prepare and test [the] solutions then provide [them] to [the State Patrol].

[47] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 24 (2005).
[48] *See also*, R.Q. Thompson, *The Thermodynamics of Drunk Driving*, 74 J. CHEM. EDUC. 532-536 (1997) .
[49] WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 31 (2005).

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Straka, 116 Wn.2d at 872-3.

To be precise, the "[e]xternal standard test" requires "the use of a simulator containing a certified simulator solution [that] provide[s] a known alcohol vapor concentration." WAC 448-16-030(8). And the "[s]imulator" is "a device which when filled with a certified simulator solution…provides a vapor sample of known alcohol concentration." WAC 448-16-030(11).

Given the importance of the simulator solution in ensuring the accuracy and reliability of not only the State's DataMasters in general but the results of individual breath tests themselves, the Toxicologist has promulgated strict protocols for the preparation, certification and use of simulator solutions.[50] Certification of a simulator solution requires the following:[51]

1) An individual with a valid Blood Analyst Permit, authorized by the State Toxicologist, analyzes five separate aliquots of the simulator solution, by headspace gas chromatography.
2) Record the results of the testing in the solution certification database, including the date and the results of the contemporary external control. Enter the control lot number.
3) A minimum of three (3) analysts must certify the solution prior to its certification.
4) The average of the results from all of the analysts are computed (rounded to four decimal places). The standard deviation and relative standard deviation (CV) on all results are computed.
5) The solution is acceptable for use and therefore certified if it meets the following criteria:
   a. The average solution concentration is between 0.098 and 0.108g/100mL inclusive.[52]
   b. The CV is 5% or less.

"Once a solution is certified, it may be provided to the BAC technicians for use with the

[50] WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of .08 Simulator External Standard Solution For Use With A Breath Test Instrument* (2005); WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of Quality Assurance Solutions For Use With A Breath Test Instrument* (2004); WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, 31-3 (2005).

[51] WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of .08 Simulator External Standard Solution For Use With A Breath Test Instrument* (2005).

[52] Each QAP solution has a separate range it must satisfy. WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of Quality Assurance Solutions For Use With A Breath Test Instrument* (2004).

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breath test instruments."[53] "Any deviations from the procedure must be documented in writing and approved by the laboratory manager and/or the State Toxicologist."[54]

3. SIMULATOR SOLUTION CERTIFICATIONS

Simulator solution certification documentation has traditionally consisted of two components. The first is a simulator solution worksheet. The worksheet contains all of the data recorded by each of the analysts laid out in a spreadsheet format. Each column of data represents the values obtained for the five aliquots tested by each analyst as well as the value obtained for the external control. Each analyst enters his data from a chromatogram generated by the chromatograph the solution was tested on.

The worksheet also contains signature rows for each analyst to sign indicating that data contained in the corresponding column of the spreadsheet is an accurate representation of the data they collected. Next to an analyst's signature, the date they tested the solution is entered. In the upper right portion of the spreadsheet, the date the solution was originally created ("prepared") is listed as well as the statistical characteristics of the solution including its mean, standard deviation and relative standard deviation. The statistics are intended to supply the information necessary for an analyst to determine whether or not a solution complies with the protocols. The protocol requires that the values entered by every analyst be included in the calculation of these values.

The second component of the certification is a set of individual declarations for each analyst. Each declaration is signed and dated. For a field solution, each declaration states in

[53] WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of .08 Simulator External Standard Solution For Use With A Breath Test Instrument* (2005); WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of Quality Assurance Solutions For Use With A Breath Test Instrument* (2004).

[54] WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of .08 Simulator External Standard Solution For Use With A Breath Test Instrument* (2005); WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of Quality Assurance Solutions For Use With A Breath Test Instrument* (2004).

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relevant part that:

> I, [analyst's name], do certify under penalty of perjury that…The simulator solution Lot Number [#], was prepared…on [date]. I examined and tested this solution. It was found to conform to those standards established by the state toxicologist for the certification of simulator solution. It should not be used for evidential breath tests after [one year from the date of preparation].

For a QAP solution, each declaration states in relevant part that:

> I, [analyst's name], do certify under penalty of perjury that…The quality assurance solution Lot Number [#], was prepared…on [date]. I examined and tested this solution. The mean concentration of the alcohol was [mean value] grams per 100ml.

The certifications (worksheet + declarations) are posted on the Washington State Patrol Discovery Website ("WebDMS"). They are intended to be relied upon by the public, administrative hearing officers in proceedings pursuant to RCW 46.20.308, courts pursuant to CrRLJ 6.13 and prosecutors in complying with discovery requirements.

Recently, the Toxicology Lab (the "Lab"), also began including the chromatograms generated by each analyst during testing. In the upper left corner of the chromatogram the instrument the solution was tested on is identified. In the upper right corner, the analyst who tested the solution is identified. Each analyst's data should be accompanied by seven chromatograms containing the result of a test on either a control, a blank, or one of the five aliquots tested. The data in the chromatograms must match the analyst's worksheet entries or the worksheet is incorrect.

B. PERJURY, CONSPIRACY, COVER-UPS AND FALSE SWEARING

Whether by design, carelessness or simple ignorance, Logan, Gordon, Formoso and every toxicologist in the Lab has committed a crime of dishonesty in the performance of their official duties.

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1. PERJURY AND THE STATE'S ONGOING RELIANCE UPON IT

"A person is guilty of perjury in the second degree [a class C felony] if…with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law." RCW 9A.72.030. "The matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto, or otherwise." *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 772 (2000)(quotation omitted). "[W]ritten statements shall be treated as if made under oath if…It is a statement, declaration, verification, or certificate, made within or outside the state of Washington, which is certified or declared to be true under penalty of perjury as provided in RCW 9A.72.085." RCW 9A.72.010(2).

Ann Marie Gordon signed simulator solution certification worksheets indicating that she tested solutions and corresponding declarations "under penalty of perjury" stating that she "examined and tested th[ose] solution[s]." We now know that this was not true. Gordon has not examined or tested solutions in approximately two years. Clearly this statement was false and known to be so by Gordon. Nor did Gordon inform anyone (except Formoso) of her actions. Instead, after the first anonymous complaint that simulator solution certifications were being falsified, Gordon headed the investigation of the matter reporting that there were no problems concerning simulator solutions and concealing her actions. Thus, her intent to mislead is also evident.

In order to establish that Gordon intended to mislead "a public servant in the performance of his or her duty", we look to the purposes underlying the making of the simulator solution

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certifications. The primary purpose of having so many Toxicologists sign certifications was to establish the foundation for a particular toxicologist to testify in Court. In this context, if needed to testify, Gordon's declaration was aimed at deceiving a judge in the performance of his or her official duties concerning an issue that is obviously material, i.e., whether or not she personally tested a simulator solution. Similarly, if a defendant failed to request the testimony of a toxicologist, Gordon's declaration was intended to be relied upon by a court under CrRLJ 6.13 in place of live testimony. Clearly she intended to mislead a "public servant in the performance of his or her duty." There can be no doubt that Gordon's actions constitute perjury.

Even where Gordon's perjury was not directly considered by a Court, her deceit was nonetheless relied upon by public servants in the performance of their duties in several ways. First, in evaluating their cases and satisfying discovery requirements under both CrRLJ 4.7 and *Brady*, prosecutors around the State relied upon Gordon's representations (as well as those made by the rest of the toxicologists). None questioned the certifications nor informed defendants that there might be reason to do so because they relied upon the integrity of the toxicologists, including Gordon, when considering such matters. Accordingly, anytime information contained on the WebDMS system was requested, prosecutors uniformly directed defense counsel to go to the website to retrieve it.

Moreover, by signing off on the solution certifications, the measurements Gordon never made were considered in the calculation of the statistics required to establish compliance with the Toxicologist's protocols. In testifying, Toxicologists rely on these statistics in their determination of whether a solution complies with the protocols. Technicians and officers rely on them in testing, and testifying to, the accuracy and reliability of an instrument based both on its QAP and field simulator check. As breath test technician Beth McCourt testified, she relies

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completely on the information contained in the solution certifications. If they contain deceit, then she will be deceived. Thus, even where Gordon did not testify, her perjury was relied upon by other toxicologists and/or breath test technicians, both public servants, in the performance of their official duties.

The subject of deceit is obviously material going directly to the quantitative accuracy and reliability of a particular simulator solution which in turn helps to establish the accuracy and reliability of an individual's breath test.

What is most alarming about these later circumstances is that the perjurious data Gordon never actually tested is still being included in the calculation of the certification statistics. Rod Gullberg has testified that all of his recalculations include Gordon's perjurious data. Thus, Gordon's perjury is still being relied upon by public servants, whether in the Toxicology Lab, the Breath Test Lab, when giving sworn testimony in court or by prosecutors in satisfying discovery requirments. As a result, Gordon's deceptions and lies still taint any breath test evidence sought to be introduced in any court in this state.

2. CONSPIRACY TO COMMIT PERJURY

"A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement." RCW 9A.28.040. Although Formoso denied he knew that Gordon was signing declarations under penalty of perjury, he admitted to having performed Gordon's tests for her and entering the data into the certification worksheet under her name. Thus, at the very least, he knew that he was making entries into the certification while purposefully and knowingly making false representations concerning their origin. Moreover, as a 32 year veteran of the Toxicology

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Lab and a supervisor therein, he was undeniably aware that execution of a declaration was expected of each person who signed the certification worksheet. Thus, Formoso was certainly complicit in Gordon's continuing scheme of perjury and guilty of participating in a conspiracy to commit perjury.

3. THE COVER UP

According to Formoso, Gordon told him that she had advised Logan prior to March 2007 that Formoso was conducting simulator solution testing for her. On March 22, 2007, Logan received a message dated March 15, 2007 that had been left anonymously on a WSP tip telephone for employees. This message stated, "Simulator solutions are being falsified as far as the certification." In response, Logan assigned Gordon and Formoso the task of investigating this tip. On April 11, Gordon and Formoso reported that they had reviewed data from January through March 2007 as well as the protocol and found no problems needing correction. Logan admitted that he knew Gordon was not conducting her own testing of simulator solutions by April 15, 2007. Nonetheless, he informed no one of this nor did he make any attempt to correct the investigative findings reported by Gordon and Formoso.

As Director of the Toxicology Lab, Logan would have been aware of the procedures followed in the Lab. Given his knowledge that Gordon was not conducting her own testing, any claim by Logan that he did not consider that Gordon was signing Certifications is incredible. Thus, perhaps as early as march but in any event no later than April, Logan knew that Gordon was committing perjury with the help of Formoso. Clearly, whether it was before or after the fact, Logan either participated in a cover-up of Gordon's and Formoso's crimes or remained purposefully ignorant of them.

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4. FALSE SWEARING

"A person is guilty of false swearing [a gross misdemeanor] if he makes a false statement, which he knows to be false, under an oath required or authorized by law." RCW 9A.72.040. "[W]ritten statements shall be treated as if made under oath if…It is a statement, declaration, verification, or certificate, made within or outside the state of Washington, which is certified or declared to be true under penalty of perjury as provided in RCW 9A.72.085." RCW 9A.72.010(2). "The primary function of requiring witnesses to be sworn is to add an additional security for credibility by impressing upon them their duty to tell the truth, and to provide a basis for a charge of perjury." *Appeal of Nirk*, 30 Wn.App. 214, 218 (1981). Accordingly, the law treats "[e]very unqualified statement of that which one does not know to be true [as being] equivalent to a statement of that which he knows to be false." RCW 9A.72.080.

The evidence showed that every single Toxicologist for a period of at least two years failed to ever check whether the computations they were swearing to or testifying about were in fact correct. Incredibly, despite the fact that such calculations are simple to perform, as demonstrated by Brianna Peterson, some analysts never even took the time to know how the calculations they were swearing to were performed. Accordingly, for at least two years, every toxicologist was making an unqualified statement of fact they did not know to be true because they had failed to check computer calculations to see if they were correct.

That such blind faith in numbers generated by a computer is not reasonable in the realm of forensic toxicology is demonstrated by the standards accepted throughout this field of science. Those standards explicitly state that "[b]efore results are reported, each batch of analytical data should be reviewed by scientific personnel…At a minimum this review should include [checking

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the] validity of…calculations."[55] And the fact that the labs software was reporting incorrect statistics for at least two years is a clear example of why this requirement exists. This doesn't mean that individual analysts needed to check every calculation. Computers are regularly relied upon in science. What it does mean is that each should have determined whether the lab was making periodic checks of the software used so that they could reasonably put their faith in the numbers being spit out by this "black box".

Moreover, in signing certification worksheets or the accompanying declarations, not one of the analysts ever went back to check to see if what they were signing was correct. Despite the fact that they could have gone down the hall and checked a chromatogram or a worksheet, none of them considered this to be important enough to do. Accordingly, every time a toxicologist signed one of these certifications, they were again making unqualified statements of fact they did not know to be true because none of them considered insuring the accuracy of these documents important enough to take the time to do so. As a result, their certifications are full of errors in the recording and reporting of data as well as dates of preparation and testing.

That all of this was the result of carelessness, laziness or ignorance does not change the fact that each of these toxicologists repeatedly made unqualified statements of fact concerning things they did not know to be true. Unfortunately, all such statements are viewed by the law as equivalent to statements that each one knew to be false. RCW 9A.72.080. And because they were made under oath, each of these statements constituted the crime of false swearing.

C. SYSTEMIC CARELESSNESS WITHIN THE TOXICOLOGY LAB

Analysts certify between forty and sixty simulator solutions a year. Throughout the Lab, as a matter of routine and practice, analysts have failed to perform these duties in a diligent and

[55] SOCIETY OF FORENSIC TOXICOLOGISTS/AMERICAN ACADEMY OF FORENSIC SCIENTISTS, *Forensic Toxicology Laboratory Guidelines*, § 10.1 (2006).

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careful manner. As a result, the simulator solution certifications generated by the Lab are full of errors in the recording and reporting of data as well as dates of preparation and testing.

1. MISRECORDING AND REPORTING OF DATA

After all analysts have tested a solution and entered their data into the computer, the worksheet for a solution is printed up and passed around to each analyst to sign. The signature provided represents that the analyst has checked the worksheet and that the numbers recorded for his test are correct. Because of the number of analysts who typically test a solution, this may occur as much as three weeks after a given analyst has conducted his own testing. Despite the amount of time elapsed and the number of solutions tested every year, however, none of the analysts ever checked the worksheets in question against their chromatograms before signing them. As a result, there are examples scattered throughout where analysts not only recorded, but signed off on and reported, the wrong data.

While recognizing the importance of entering accurate data, Miranda admitted that he had made such a careless error in certifying solution 07010.[56] Naziha Nuwayhid made the same type of error in certifying QAP solution 06016.[57] Rebecca Flaherty made the same error in two different QAP solutions, 07012 and 07013.[58] And Hoff made this same type of error in certifying QAP solution 06015. In fact, even though Hoff's error was simply entering a .050 instead of a .051 in a single entry, a difference of only .001, it actually changed the equivalent vapor concentration reported by the lab for that solution. Logan and Gullberg have since testified that the misreporting of even a single data value (aliquot) can have "major consequences", changing the mean value of a solution enough to materially effect an individual's

[56] Exhibit 33.
[57] Exhibit 40.
[58] Exhibits 42 and 43.

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breath test results.[59] So far, at least 15 separate instances of incorrect data entry by 10 different analysts affecting 14 different solutions have been discovered.[60] That means at least 10% of the certification worksheets inspected by Gullberg had wrong data entered.

2. SIGNING OFF ON THE WRONG DATA

Peterson and Capron both signed off on the others data having been their own in certifying QAP solution 07019.[61] That is, Capron signed off identifying the data collected by Peterson to be his own while Peterson signed off that Capron's data was hers. Thus, both signed off indicating that their testing yielded particular results that in fact it had not. The results were those of somebody else and different from their own. Their failure further evidences the systematic lack of care exercised by Lab analysts in ensuring they are reporting data accurately.

3. SWEARING TO INCORRECT DATA

Analysts do not fill out their own declarations. Instead, their declarations are filled out by office staff, who are not scientists, and put in each analyst's mailbox. Each analyst then signs off on the declarations without ever checking to ensure that the information contained therein is true. This has resulted in several documented errors.

The most alarming of these is that all of the declarations for QAP solutions 07002, 07003, 07004, 07005, signed by Swenson, Long and Miranda, reported wrong mean concentrations for those solutions.[62] For 07002, the problem was that instead of reporting the mean of .0473 out to four decimal places as required, the administrative staff recorded the mean as .04. Given that the protocols clearly require the mean to be reported to four decimal places, this should have been detected by at least one of the analysts regardless of whether or not the

[59] Tr.A1, p.63-4, 169-70, 188. For example see solution 6015 (Exhibit 56).
[60] Solution #s: 05001, 05032, 05036, 05042, 06003, 06009, 06015, 06016, 06026, 06041, 06049, 07010, 07012 and 07013.
[61] Exhibit 45.
[62] Exhibits 19-22, 24-27.

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value was correct. This is more than a clerical error, however. If the breath test lab relied upon this value to determine the equivalent vapor concentration, the value arrived at would have been wrong by a BAC of .0159.[63] Given that Logan has already admitted that an error as small as .0001 in the mean can materially effect an individual's breath test (due to rounding), clearly a value as large as this is significant enough to affect an individual's breath test results.

As for the other three solutions, not only did the office staff use the same incorrect number of significant digits, but they recorded the completely wrong quantity. Instead of inputting the mean alcohol concentration as was being sworn to, they inserted the value for the equivalent vapor concentration. Again, the office staff's failure to record the value as required by the protocols should have been a red flag to any analyst who actually took the time to even look at the declaration. And if they had, the fact that staff had reported values for the wrong quantities would have been easily discovered. Whether the analysts simply didn't read the declarations or simply never took the time to find out what the protocols required, the result is the same. If the breath test lab relied upon these values to determine the equivalent vapor concentrations, the values arrived at would have been wrong by BACs of .0161, .0235 and .0323 respectively.

Although these instances have been admitted to by the Lab, there are an additional 15, committed by 4 different analysts in certifications for 5 different solutions that have been overlooked.[64] Despite the fact that these errors are apparent on the face of the declarations, each of the toxicologists on these newly discovered errors has already gone in and resigned their declarations a second time without having made the appropriate corrections.

[63] Equivalent Vapor Concentration = Average solution concentration/1.23.
[64] Solution #s: 06042, 06044, 06045, 06046 and 06047.

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4. WRONG VAPOR CONCENTRATIONS

The equivalent vapor concentration is the value relied upon by breath test technicians during QAPs and DataMasters in the field when using a simulator solution as a reference or control. A toxicologist determines this value by dividing the mean solution concentration calculated by the software by 1.23 and rounding to four decimal places.[65] The result is then included in the worksheet for a particular solution.

In certifying QAP solution 06037, Akins, Johnston and Swenson signed off on a worksheet reporting the wrong value for the equivalent vapor concentration of the solution.[66] The value they signed to was .0400. The true value was .0395. Thus, any DataMaster adjusted against this solution during a QAP would therefore automatically be set to read BACs .0005 higher than their actual value. This is 5 times greater than the error noted in the August 2007 memo which falsely pushed Citizens' BACs over the .08 and .15 thresholds. Moreover, this can't simply be blamed on some software error or office staff. The value is calculated by the analysts and is easily checked by dividing the mean solution concentration, clearly printed on the worksheet, by 1.23. Thus, all it would take for an analyst signing the worksheet to detect the error would be a check of the worksheets internal consistency. They would not need a fancy computer, to retrieve their chromatograms or even more than ten seconds to do so. Just the worksheet and a calculator. And none of these individuals took the time to simply divide one number by another to check the internal consistency of the values being reported in the worksheet.

5. PHYSICAL IMPOSSIBILITIES

Peterson, Capron and Knoy all certified that they had tested QAP solutions 07019, 07020,

[65] Exhibits 3-6.
[66] Exhibit 41.

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07021 and 07022 before those solutions had been prepared.[67] Both Nuwayhid and Gruendell did the same in certifying solution 06003. Because a solution is created during the process of preparation, this means these analysts certified that they had all tested these solutions before they existed. As common sense dictates, and every witness acknowledged, this is a physical impossibility and clearly absurd. In addition to these errors, there are at least 35 other instances, involving 13 analysts and 30 solutions, where analysts certified to a wrong date of analysis.[68]

6. WASHINGTON'S CLAIRVOYANT TOXICOLOGISTS

In certifying QAP solutions 05043, 05044, 05045 and 05046, Knoy, Marshall, Gruendell, Capron and Formoso all signed declarations stating that they had "examined and tested this solution" which were dated prior to the date the solutions had actually been tested.[69] Unless one is clairvoyant, however, swearing to an event that has not yet occurred is also physically impossible. Moreover, although none of the solutions had actually been tested by the date indicated on the declarations, each declaration ironically enough contained the correct value for the solutions mean concentration. This is an even greater feat of sorcery and clearly absurd. As to this last point, Knoy admitted that he may be signing declarations where that number has not yet been filled in when he signs.[70]

7. KITTENS RUNNING THE KENNEL

Just as one would naturally expect the veterinarian to be in charge of the kittens in the kennel, one would also expect the scientists in the Lab to be charge of the science. Unfortunately for the Citizens of Washington, often times it is the kittens running the kennel in

[67] Exhibits 7-10, 15-18.
[68] Solution #s: 05010, 05022, 05031, 05036, 05037, 05038, 05039, 05040, 05042, 06002, 06003, 06006, 06007, 06010, 06011, 06012, 06013, 06019, 06025, 06026, 06027, 06031, 06041, 06043, 07001, 07006, 07008, 07010, 07016.
[69] Exhibits 11-13.
[70] Tr.S1, p.83.

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the State Toxicology Laboratory.

Logan "[doesn't] consider [him]self to have any great expertise in statistics."[71] And Gullberg testified that he does not have the experience to know what statistical methodologies would be appropriate or acceptable within a toxicology lab and that he had no input into the adoption of the methodologies the Lab chose to utilize. So then who wrote and implemented the statistical methodology utilized by the Lab? Their IT person, Sandra Destefano, who is neither a statistician nor a scientist. And although she is neither a scientist nor a statistician, did anybody check to insure that the methodology she implemented was scientifically and mathematically sound? No.

And in fact, even before the August 2005 software alteration that caused the error everyone is now aware of, the failure of anyone to check up on Destefano's original work resulted in a prior software error referred to as the "mysterious second precision error" in the Skagit proceedings. The error was mysterious because none of the analysts who testified had a clue what it was, whether it existed or whether it had been fixed. And while truly representing a second, separate and unrelated software issue, it did precede the other in time. What was this error? When Destefano originally wrote the software, she did it in such a manner that when calculating the precision, the software would never include the fourth data point from the fourth analyst in a worksheet.[72] Not a single scientist ever checked the work of this nonscientist to insure that it was functioning as required.

Then there's the well known August 2005 change to the software, altering it with the intention of expanding the software's capabilities of analyzing data from just 12 analysts to a maximum of 16. And again Destefano was put in charge and again not a single scientist ever

[71] Tr.A1, p.146.
[72] Tr.A1, p.157.

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checked her work to insure that it was functioning as required. By now the result is well known.[73] For more than two years, because not a single scientist ever bothered checking to see if the software implementation or alteration by this nonscientist was functioning as required, two separate and distinct software errors infected every breath test administered in this State.

When the errors were finally discovered, Logan, without hesitation placed the responsibility for correcting these errors in the hands of Destefano. And although this time Gullberg was brought in to insure the calculations were including all analysts' data as was required by the protocol, Gullberg simply accepted the algorithms as written by Destefano without ever subjecting them to scientific or statistical scrutiny. In essence, it was an IT staff person, without expertise in physical science, statistics or metrology, who determined what algorithms would be used by scientists in analyzing measurement data.

As the story often goes in such organizations, disease at the top infects the roots at the bottom. While Logan and later Gullberg were relying on the "expertise" of a nonscientist in the implementation and testing of software to be utilized by the Lab in the scientific analysis of measured data, so to were the rest of the analysts relying on administrative staff to insure that the measurement process and certain data were accurately documented. Every analyst relied on administrative staff to fill in dates of solution preparation and measured concentration values in certification declarations. And not a single one of these analysts ever went back to check to see if what the administrative staff recorded was accurate or even scientifically reasonable. As a result, these declarations are peppered with claims of physical impossibilities, instances of clairvoyance, values for wrong physical quantities and values for the correct quantities but incorrectly reported. Once again, the Citizens of the State of Washington were left to rely on the "expertise" of nonscientists (secretaries) to insure the scientific validity of claims made by

[73] Exhibit 14.

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nonscientists.

D. SYSTEMIC PATTERN AND ROUTINE OF SCIENTIFICALLY UNACCEPTABLE PRACTICES

The Toxicology Labs systemic, habitual and routine failure to adhere to even the most basic and well accepted scientific principles in certifying simulator solutions removes the results of any such certifications from the realm of scientific validity.

1. FAITH IN BLACK BOXES

The Lab relies on software to calculate the statistics necessary for establishing compliance with protocols. The protocols require that the data from every analyst entered into the worksheet be utilized in computing these values.

Prior to August 2005, the software was set up to accept and process data from twelve analysts. In August 2005, the software was altered with the purpose of expanding its capabilities so that it would accept and process data from sixteen analysts.[74] The altered software obviously accepted data from as many as sixteen analysts. But during the next two years the Lab never checked to see if all that data being entered was being utilized in the computation of statistics as required by the protocol. In fact, during an April 2007 investigation into the solution certification process, neither Gordon nor Formoso ever checked the software but nonetheless reported that:[75]

> this laboratory has prepared simulator solutions for over 20 years. No solution has ever left this laboratory with an incorrect concentration.

Unfortunately for the State, in science just because someone says something's so doesn't make it so.

In August 2007, while trying to minimize the negative impact of Gordon's and Formoso's criminal misconduct on prosecutions around the State, the Lab accidentally

[74] Exhibit 14.
[75] Exhibit 31.

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discovered that the software was not doing what the protocols required it to do. The first error discovered was that the software was only including data from the first twelve analysts in its calculations. This meant that regardless of the computations being done, they were not being performed as required by the protocols. Because of the failure of the Lab to check the software after altering it, the statistics establishing compliance with the protocols, including the concentration referred to in the Gordon/Formoso investigation, were incorrectly calculated and reported for a period of two years.

Perhaps even more significantly, not once prior to August 2007 had the lab ever performed even a periodic-routine QA check of the software to determine whether or not it was calculating the statistics properly under the protocols. This is significant because the error resulting from the 2005 change in the software was not the only problem with its calculations. There was a second error in the software's calculation of precision as indicated, but not identified, by the August 2007 notice.[76] Logan has since testified that in every calculation of the standard deviation, the software was not including some of the data entered by the fourth analyst on the worksheet.[77] Because this is not related to the 2005 software alteration and no QA check had ever been performed on the software calculations prior to August 2007, no one knows how long this error has been occurring. In fact, it may be the case that the statistics being relied upon by the lab for determination of the precision (CV) had never been calculated in compliance with the protocols.

It is an accepted minimum requirement in the field of forensic science that "[a] quality assurance program must be established" in every lab.[78] In particular, valid forensic breath

[76] Exhibit 14.
[77] TR.A1,p.184.
[78] THE AMERICAN SOCIETY OF CRIME LABORATORY DIRECTORS, *Guidelines For Forensic Laboratory Management Practices*, 4 (1994).

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testing requires adherence to a comprehensive quality assurance program that extends beyond testing protocols and includes all aspects of the care and use of a breath test machine.[79] Use of certified simulator solutions in the standard calibration and multi-level checks of accuracy and reliability that are performed during every annual Quality Assurance Procedure is one of the safeguards that "ensures the accuracy, precision and forensic acceptability of the DataMaster instrument for the purpose of quantitatively measuring the alcohol concentration of a person's breath."[80]

"Quality assurance encompasses all aspects of the analytical process [including] data review and reporting of results."[81] "Before results are reported, each batch of analytical data should be reviewed by scientific personnel…At a minimum this review should include [checking the] validity of…calculations."[82]

When software is being relied upon, validation testing is an ongoing process to ensure that application software is operating as intended.[83] Thus, periodic checks of calculations done by software are required to insure that the software is performing as intended.[84] This is of particular importance when software changes have been made. "Procedures for validation after modifications are necessary…Change impact analysis (examination of impact of changes) is a

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[79] PATRICK HARDING, *Methods for Breath Analysis*, *in* MEDICAL-LEGAL ASPECTS OF ALCOHOL 185, 189 (James Garriott ed., 4th ed. 2003); Kurt Dubowski, *Quality Assurance in Breath-Alcohol Analysis*, 18 J. ANAL. TOXICOL. 306-311(1994).

[80] WASHINGTON STATE PATROL BREATH TEST SECTION, *Training Outline For DataMaster and PBT, Operator Basic*, 27 (2004).

[81] SOCIETY OF FORENSIC TOXICOLOGISTS/AMERICAN ACADEMY OF FORENSIC SCIENTISTS, *Forensic Toxicology Laboratory Guidelines*, § 9.1.1 (2006).

[82] SOCIETY OF FORENSIC TOXICOLOGISTS/AMERICAN ACADEMY OF FORENSIC SCIENTISTS, *Forensic Toxicology Laboratory Guidelines*, § 10.1 (2006).

[83] David Brodish, *Computer Validation in Toxicology: Historical Review for FDA and EPA Good Laboratory Practice*, 6 QUALITY ASSURANCE 185, 194 (1999).

[84] Tr. D1, p.38-9, 47; David Brodish, *Computer Validation in Toxicology: Historical Review for FDA and EPA Good Laboratory Practice*, 6 QUALITY ASSURANCE 185, 194 (1999).

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key task to ensure appropriate tests after modifications."[85] This is generally accepted throughout the scientific community.[86] In this context, it is well known that many problems encountered in software use in the lab can arise from changes to data input criteria so that data input and handling requirements must be carefully checked after such changes are made.[87]

Had the Lab adhered to these universally recognized scientific requirements, and performed either a routine periodic QA check of the software or one directly aimed at testing the August 2005 changes, the errors resulting from the 2005 alterations would have been discovered.[88] Based on the ease with which the second error relating to precision was also discovered, adherence to these scientific safeguards would likely also have revealed it. Thus, according to Logan himself, "the appropriate level of checking was not done when [the Lab] made those changes in 2005.[89] Every current toxicologist who addressed the issue indicated that they now also realized that such checks should have been done.[90] In short, scientifically acceptable reliance on computer calculations requires, at a minimum, periodic QA checks of software calculations and targeted checks after any changes are made to such software.[91]

2. OUTLIERS AND THE DISCARDING OF VALID DATA

Each of the analysts who testified indicated that, if during the test of their five aliquots they notice that any of the values returned falls outside of the .098 – .108 range (for a field test) indicated by the protocols, then they do not record any of the five values obtained in the

[85] NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY (NIST), *Reference Data: Software Fault and Failure Characteristics – Fault Handbook – Quality Assurance* <http://hissa.ncsl.nist.gov/effProject/handbook/failure/QA.htm> (last visited 10/03/07).
[86] Tr.S1, p.38-9.
[87] Tr.S1, p.38-9, 44; NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY (NIST), *Reference Data: Software Fault and Failure Characteristics – Fault Handbook – Data* <http://hissa.ncsl.nist.gov/effProject/handbook/failure/Data.htm> (last visited 10/03/07), - *Change Impact* <http://hissa.ncsl.nist.gov/effProject/handbook/failure/Impact.htm> (last visited 10/03/07), *Other* <http://hissa.ncsl.nist.gov/effProject/handbook/failure/Other.htm> (last visited 10/03/07).
[88] Tr.S1, p.43.
[89] Tr.S3, p.57.
[90] Tr.S1, p.130 (Capron); Tr. D1, p.88 (Knoy); Tr. D2, p.47 (Thatcher); Tr. D2, p.160 (Pemberton)
[91] Tr.S1, p.38-9, 43-4, 47.

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worksheet.[92] Instead, they prepare five new aliquots with the solution and retest it. If all of these values return within the range indicated in the protocol, they are entered into the worksheet and used to determine compliance with the protocols. The analysts do the same with QAP solutions which have a set of different ranges for each required solution concentration. For a calibrator (.08 vapor concentration), the solution concentration range is .092 – .102.

The protocol, however, does not require that any individual values actually fall within the ranges in question. Instead, all that is required is that the mean of all the analysts' data combined fall within the range. Thus, there is no justification within the protocols for discarding data simply because the values themselves fall outside the proper range. In point of fact, this is simply common sense. If all data falling outside this range were to be discarded for no other reason than that it fell outside this range, there would be no reason to engage in the certification process at all. Our mean would always fall within the accepted range because the only measurements we chose to consider would themselves always lie within that range.

Analyst Piquette-Noble provides an example of why data falling outside the range should not be arbitrarily excluded in her certification of QAP calibrator solution 06028. The data she collected testing the solution which was included in the worksheet was:[93]

.096, .097, .096, .097, .097

When combined with the data supplied by the rest of the analysts, a classical-arithmetic mean[94] of .0975 is arrived at. This falls well within the range of the protocols. As a result, the solution was approved and sent to the breath test section for use in QAPs of DataMasters.

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[92] Tr.S2, p.138. Under the protocols the average solution concentration is determined out to four decimal places. In this context, values such as .04 are to be interpreted as .0400. In the same way .08 and .108 would be interpreted as and .0980 and .1080.

[93] WebDMS <http://breathtest.wsp.wa.gov/PDF_Documentation/BatchReviewed/06028.pdf> (Last visited November 7, 2007).

[94] See next section discussing calculation of mean.

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This was not Piquette-Noble's first data run, though. The first set of data she collected for solution 06028, which she discarded and chose not to include in the worksheet, was:

.091, .090, .091, .092, .091

Of these, every single data point except one falls outside the acceptable range. This data was generated on the same chromatograph as her second set of data. As part of testing, the chromatograph measured the .10 control perfectly at .100 and the blank as .000. Moreover, absolutely no instrumental or equipment failures were reported as is required if they are the basis for rejecting a set of measurements. In fact no reason is given at all for the rejection of these measurements. Had they been included as they should have been with the data supplied by the rest of the analysts, the classical-arithmetic average solution concentration for the entire batch turns out to be .0957. Although significantly less than the original value, this is still well within the acceptable range for a QAP solution even though most of Piquette-Noble's data fell outside that range.

Despite the fact that this solution still complies with the protocols when the original valid data is used, however, there is a problem. The vapor concentration reported by the Lab for this solution, and relied upon by the breath test section to calibrate, and perform QAPs of, breath test instruments, was .0793 "BAC". But using Piquette-Noble's original valid data, the vapor concentration was actually .0778 "BAC". This is a difference of .0015, or 15 times greater than the error referenced in the August 2007 memo that changed the results of Citizen's breath tests in Spokane. This solution was used in the QAP of 35 instruments on the following dates:

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Instrument	Date	Instrument	Date	Instrument	Date
949011	08/24/06	949174	09/06/06	140082	10/19/06
949021	11/01/06	949179	10/06/06	140083	10/18/06
949042	08/23/06	949201	11/01/06	140087	12/05/06
949053	11/02/06	949202	11/01/06	140095	11/09/06
949067	03/05/07	949238	03/07/07	140102	11/02/06
949070	12/25/07	949253	11/10/06	140103	11/01/06
949127	08/22/06	140019	10/17/06	140104	02/07/07
949132	03/13/07	140023	12/28/06	140106	11/02/06
949144	04/09/07	140026	03/06/07	140114	11/17/06
949154	09/12/06	140056	03/05/07	140118	12/27/07
949170	10/10/06	140072	08/29/06	140119	11/01/06
949173	12/05/06	140073	11/23/06		

Setting this aside, remember that another one of the purposes of certification is to determine the degree of certainty we have in the value of a solution by recording the precision (spread) in the values measured. In this context, the natural uncertainty attendant to any measurement would necessarily lead to scientifically valid measurements that deviate more than others from the mean. And these values are critical in determining precision. If one wants to get an accurate measure of the precision, one cannot blindly discard data without first investigating the source of variation.

None of this means that all such values are acceptable. In collecting data from measurements, it is well recognized that sometimes we will encounter individual values that vary so much from the rest of the data that they should be discarded. Such values are known as outliers. Throughout the scientific community, whether or not a particular value is an outlier is determined by its relationship to the data and the standard deviation of the data. The most widely used measure is the ratio of the difference between the suspected outlier and the mean of the data to the standard deviation:[95]

$$C = \left| X_{ol} - M \right| / SD$$

[95] Tr.A2, p.48-9.

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Of course, before one can apply such criteria to determine whether a value is an outlier, the suspected value must be included in the determination of the standard deviation. To blindly discard a value before performing this calculation renders the determination scientifically invalid.[96]

Although the outlier algorithm is well defined, it leaves as a matter of discretion to a particular lab what values of C will be used to define an outlier for their purposes. According to Thatcher, a former QA Manager, "anything outside of three standard deviations you can consider an outlier and that can be dropped from your calculations."[97] Logan testified that he would use a value of 2.[98] And in fact either value can be chosen, but everyone throughout the Lab must use the same predetermined value.[99] If they fail to so, data is treated differently by individual analysts and there is no way to determine what data is scientifically valid and which is not. Of course every individual analyst will have their reasons for discarding a value as an outlier, but absent compliance to some standard criteria, the decision becomes somewhat arbitrary. And without well defined criteria, no one outside of the lab would be able to determine whether or not values were being discounted or eliminated according to scientifically acceptable criteria.

The Lab has not adopted or identified any criteria for the determination of outliers.[100] Hence, absent a problem in the measurement process itself such as a gas chromatograph unable to accurately measure a control value, a stuck needle, cracked vial or some other physical problem, there is no basis for discarding a value as an outlier. Certainly the mere fact that a value does not correspond to an analyst's preconceived notion of what the true value of a solution should be can not justify blindly discarding data. The whole point of certification is to

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[96] Tr.A2, p.45-6, 58-9.
[97] Tr.S2, p.17.
[98] Tr.A1, p.168.
[99] Tr.A2, p.50.
[100] Tr.A2, p.92.

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check to see if that preconceived notion is accurate. By itself, the fact that the Lab has failed to adopt any scientifically valid way of identifying or discarding outliers renders all such determinations suspect and outside of acceptable scientific practice.

This is not the only factor that renders all outlier determinations made by the Lab suspect and outside of acceptable scientific practice, however. In certifying Solution 07023, Gross discarded the following set of data:[101]

.101, .101, .108, .101, .102

For this run, the chromatograph measured a .10 control as .099, almost spot-on and well within acceptable parameters. Moreover, there is no indication of any problem with the instrument or measurement process as would be required for purposes of documentation if such were the case. And in fact, Gross explicitly indicates that the only reason she discarded the data was "due to a .108 result."[102] But was this a scientifically valid determination?

The first thing to notice is that even if one wanted to assume for the sake of argument that any individual measurements falling outside the range of the protocols was to be discarded, .108 does not fall outside of that range. The protocols explicitly define the range as "between 0.098 and 0.108g/100mL *inclusive*."[103] Hence, although the value is at the boundary of the range, it is still within the range of proper values defined by the protocol. Nothing in the protocols justifies Gross' decision not to include her data in the worksheet. As an example of this, in certifying solution 06009, Katie Hoff appropriately considered readings of.108, .108, .108, .107 and .108 to be valid and included them in the worksheet for that solution as did Gullberg upon his reinspection.

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[101] Exhibit 72.
[102] Exhibit 46.
[103] Each QAP solution has a separate range it must satisfy. WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of Quality Assurance Solutions For Use With A Breath Test Instrument* (2004).

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The only other possibility would seem to be that Gross determined the .108 to be an outlier. Setting aside for the moment the fact that the Lab has adopted no criteria for identifying outliers, and that Thatcher and Logan gave different values that should be used in determining whether a measurement falls into this category, let's evaluate this claim. Logan identified a value of C = 2 as the criteria he would utilize in identifying outliers. This will benefit the State more than Thatcher's C = 3 because it will identify a greater number of values as constituting outliers and be more likely to justify Gross' determination. Given Logan's criteria, Gross' determination will have been correct if:

$$2 \leq \left| .108 - M \right| / SD$$

The mean and standard deviation of Gross' data are easily found to be:[104]

M = .1026
SD = .0030496

So that:[105]

$$\left| .108 - M \right| / SD = \left| .108 - .1026 \right| / .0030496 = 1.77$$

Because 1.77 is less than 2, under the criteria accepted by Logan this value should not have been discarded. According to the State Toxicologist's own "expert opinion" then, the .108 was not an outlier and the determination to disregard it was not scientifically valid. That Logan would not be alone in this determination is verified by data actually included in other worksheets. For example, in certifying solution 07007, Capron included the following data in the worksheet:[106]

.106, .100, .099, .100, .099

[104] Tr.A2, p.56.
[105] Tr.A2, p.56.
[106] Exhibit 64.

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The mean and standard deviation of Capron's data are easily found to be:[107]

M = .1008
SD = .0029496

So that:[108]

$$\left| .106 - M \right| / SD = \left| .106 - .1008 \right| / .0029496 = 1.76$$

Because 1.76 is less than 2, under the criteria accepted by Logan this value should have been entered into the worksheet and, in fact, was. Moreover, given the values obtained for each ratio (Groos' and Capron's), each set of data should have been treated identically. In other words, both sets should have either been discarded as containing an outlier or both should have been entered into the worksheet.[109] But there is no scientific basis for treating the data sets differently. After being confronted with Dr. Emery's analysis, Gullberg was forced to admit that based on the evidence before him, Gross' discarded data should have been entered into the worksheet.[110] There was no apparent scientific reason for it to have been discarded.

Gullberg estimates that over ten percent of the simulator certifications completed in the past two years involve data which has been stuffed in folders by analysts and not included by them in the related worksheets.[111] Moreover, Gullberg has not checked a single instance to insure that it was scientifically acceptable for the analyst to ignore this data.[112] Instead, he simply assumed each had a valid reason and never bothered looking into it.[113]

3. THE PROBLEM OF MEANS ACROSS MACHINES

Back in algebra, we all learned that if you want the mean of a particular set of numbers, you simply add them all up and then divide by the number of values:

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[107] Tr.A2, p.50-1.
[108] Tr.A2, p.51.
[109] Tr.A2, p.57-8.
[110] Tr.A2, p.90-1.
[111] Tr.A2, p.86.
[112] Tr.A2, p.87.
[113] Tr.A2, p.90.

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$$M = (\sum_i X_i) / n$$

This is simply a classical arithmetic mean. Whenever we are concerned merely with numbers and not what they may represent in reality, this operation is appropriate. The situation is different, however, when we are working with values that are the result of physical measurements. In this context, we need to take into account the circumstances surrounding the measurement environment. When all of our data is collected on a single instrument over a period of time for which the precision of the instrument is stable, the mean of the data is simply its classical-arithmetic mean. This is why Gullberg can rely upon a classical-arithmetic mean when performing a QAP on a particular DataMaster. Since only one instrument is being used to collect data (the DataMaster undergoing the QAP) and it would be expected to be stable over the short time period of the QAP, a classical-arithmetic mean is appropriate.

On the other hand, when data collected on independant instruments is sought to be combined to determine an average value of measurements, the precision of each instrument, as determined by the data collected thereon, must be incorporated into the determination of a mean. This is where the calculation of the mean during DataMaster QAPs and simulator solution certifications differs. The latter are conducted by obtaining measurements across several independent instruments over 93% of the time.

It is actually quite easy to understand why the precision of each instrument must be taken into account when calculating a mean. If the precision on one instrument is better than the precision on a second instrument, then we have a little bit more confidence in the values reported by the first instrument than we do in those reported by a second instrument. As a result, when we combine the values obtained on the two instruments, we give a little extra weight to the values obtained on the first instrument. By so doing, we are insuring that our calculations give

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more weight to the values that are more reliable. Such means are referred to as consensus values or weighted means.[114] In order for the calculation of a mean based on data obtained from different instruments to be scientifically valid, it must be a weighted mean. The reason, according to both Dr. Ashley Emery and materials provided by Rod Gullberg, is that although under special circumstances a classical-arithmetic mean and a consensus value may be equal, in general they will not be.[115]

In order to determine a weighted mean, we calculate the classical-arithmetic mean of the data obtained from each instrument separately, then determine the weight to be given each of those means and then combine them. The consensus value (weighted mean) is given by the following expression:

$$WM = \sum_i (w_i M_i) \,/\, \sum_i w_i$$
where the weighting factor $w_i = n_i \,/ SD_i$

The protocols do not specify how the mean concentration of a solution is to be calculated from the analysts' data. The software utilized, however, calculates the mean in only one way: it determines the classical-arithmetic mean. Where all of the analysts' data is collected on a single instrument, the classical-arithmetic mean is a scientifically appropriate procedure for determining the mean concentration from the data. When more than one chromatograph is utilized, however, the precision of each instrument must be taken into account and a weighted mean (consensus value) determined. Utilization of the classical-arithmetic mean in this context is not a scientifically acceptable methodology.[116]

Over the past two years, 97 solutions have been certified. Of those, 91 were certified

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[114] Robert Paule, et. al., *Consensus Values and Weighting Factors*, 87 J. RESEARCH, NAT'L BUREAU OF STANDARDS, 377, 378 (1982).
[115] Robert Paule, et. al., *Consensus Values and Weighting Factors*, 87 J. RESEARCH, NAT'L BUREAU OF STANDARDS, 377, 380 (1982).
[116] Tr.A2, p.17-8.

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using multiple instruments. Moreover, the solution concentration of each of these 91 solutions was determined using the classical-arithmetic mean as opposed to the weighted mean. Accordingly, the mean reported for every one of these solutions, 93.8% of all solutions certified, was determined using a scientifically invalid and unacceptable methodology. As a result, the values reported cannot, in general, be expected to be accurate.

In an attempt to show that there would be no impact on solution statistics due to the use of multiple machines, Gullberg put together several data plots for solution 07007 and provided several publications, including some from NIST, discussing the issue. Contrary to Gullberg's apparent expectations, however, each of the publications explained the need to take into account the characteristics of separate instruments when multiple instruments are being used to certify a quantity. One in particular actually set forth the very methodology testified to by Dr. Ashley Emery.[117] Moreover, even using Gullberg's best case scenario, solution 07007, Dr. Emery showed that, had the scientifically acceptable weighted mean been utilized, the equivalent vapor concentration of the solution would have changed by .0002,[118] an error twice as large as the one referenced in the August 2007 memo that changed the results of Citizen's breath tests in Spokane. Similarly, Dr. Emery showed that had the scientifically acceptable methodology been employed for QAP solutions 07004[119] and 06012[120], the equivalent vapor concentration of the solutions would have changed by .0002 and ,0003 respectively, two to three times greater than the error referenced in the August 2007 memo that changed the results of Citizen's breath tests in Spokane.

[117] Robert Paule, et. al., *Consensus Values and Weighting Factors*, 87 J. RESEARCH, NAT'L BUREAU OF STANDARDS, 377-385 (1982).
[118] Exhibit 73.
[119] Exhibit 69.
[120] Exhibit 70.

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E. FALLACY OF THE FIX

After the initial software error was discovered in August 2007, Logan relied upon his IT person, Sandra Destefano, to fix it. Destefano is the same individual who was responsible for making the original changes to the software in 2005 that resulted in the error requiring correction in 2007. Thereafter, Trooper Ken Denton and retired Trooper Sgt. Gullberg were brought in to go through all simulator solution certifications to insure all were corrected. Unfortunately, as the above narrative demonstrates, errors due to software were not all that they found. In addition, Gullberg and Denton have documented at least 90 independent and unrelated errors, committed by 15 different analysts and affecting at least 52 solution certifications over the past 3 years. In this process, Denton acted primarily as an assistant to Gullberg. Despite their best efforts, however, the work done by Destefano, Gullberg and Denton has failed to "fix" the Lab's problems.

1. CONTINUING PROBLEM OF MEANS ACROSS MACHINES

As discussed above, the Lab has always utilized a classical-arithmetic mean, as opposed to a weighted mean, in determining compliance with the solution protocol. The Lab has failed to identify whose decision it was to utilize this method. Logan has admitted that he is not an expert in statistics or their application to the measurement process. Based on all of the testimony, it appears that this was left to Destefano who is neither a statistician nor a scientist.

Gullberg was recruited by Logan in part because the former trooper obtained a Master's degree in statistics approximately four years ago. Ironically, however, Logan did not ask Gullberg to examine the Lab's statistical methods to determine whether or not they were appropriate. Logan left that to Destefano. Accordingly, Gullberg never performed any such analysis. Instead, without question, Gullberg simply applied the methodology implemented by

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Destefano because Logan told him that was the way the Lab had always done it. All of Gullberg's "corrections" are the result of doing nothing more than taking the data contained in the worksheets and plugging it into the same algorithms implemented by Destefano. Thus, even assuming Gullberg's Masters Degree qualified him as an expert in statistics, his expertise was not utilized in "correcting" the software's calculations. His role in this context was little more than that of a data entry technician.

Even had Logan asked Gullberg to examine the Lab's statistical methodology to determine its scientific validity, it would have made no difference. Gullberg is not an expert in the science of measurement (a metrologist). Nor, he testified, does he know what statistical methods are generally accepted within the field of forensic toxicology so that he is not an expert with respect to that specific area either. Thus, he was forced to rely upon the methodology provided to him by the Toxicology Lab. As a result, despite the fact that the very materials relied upon by Gullberg in his testimony dictated that a weighted mean must be utilized, he employed the classical-arithmetic method implemented by Destefano instead.

This is why Gullberg's "corrections" to the certification statistics have failed to fix anything for the 93.8% of solutions certified on multiple chromatographs. No one knew, or took the time to determine, what the scientifically appropriate methodology was. If anyone had, they would have discovered that every such mean is required to be calculated as a weighted mean. Because none were, the mean reported for every one of these solutions is still being determined using a scientifically invalid and unacceptable methodology. Accordingly, even the "corrected" values cannot, in general, be expected to be accurate.

2. THE OSTRICH AND THE OUTLIERS

Acting as if it never existed or could be cause for concern, Gullberg never analyzed any

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of the discarded data to determine whether the decision not to include it in the worksheets was scientifically appropriate. In particular, he never analyzed any of it to determine whether it consisted of outliers. Instead, he simply assumed every analyst who chose not to include a set of data in the worksheet had a good reason for doing so. Whether or not they did, he has no idea whatsoever. Thus, Gullberg's review has not solved the problems surrounding discarded data and potential outliers either.

3. THE UNRAVELING QUILT

Despite the efforts of Destefano, Gullberg and Denton, given the hundreds of errors discovered (software and non-software) some of the Lab's own analysts have begun to jump ship. Neither Knoy nor Capron would swear that the statistics on even the certifications that had been "corrected" and subsequently resigned by them were correct.[121] Capron actually indicated that before he would swear to their correctness, he "would want to go back and…learn how to do all the calculations and do it [himself] to make sure."[122] Thus, some of the State's own experts refuse to rely on the "corrections" as actually having fixed anything.

4. PROTOCOLS AND THE INTRUSION TROUBLESOME REALITY

The State has repeatedly pointed out that the Destefano/Gullberg corrections failed to result in a single solution being taken outside the parameters of the protocol. This may be true. As we learned from the August 2007 memo, however, errors as small as one-ten-thousandth BAC (.0001) affected at least 8 Citizen's breath tests to the point that their liberties were negatively and unjustly threatened, even though the solutions remained in compliance with the protocols. Nor are these the only errors discovered where solutions still compliant with the protocols carry significant potential for threatening citizens' liberties. Remember, had Piquette-

[121] Tr.S1, p.97-8, 134, 136.
[122] Tr.S1, p.134.

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Noble's first set of data been properly utilized in the calculations for QAP solution 06028, the solution would have remained in compliance with the protocols. Nonetheless, the error which resulted from not utilizing the data was .0015 BAC, 15 times greater than the error that caused the problems referenced in the August 2007 memo. And this solution was shipped out and used to calibrate and perform QAPs on DataMasters around the State.

The State has claimed, however, that only errors in QAP solutions could have such an impact, minimizing the importance of field solutions. This contradicts their own expert, Gullberg, who made clear that the accuracy of the value reported for a field solution is "very important to ensure accuracy…in the field test."[123] Both Gullberg and Breath Test Technician Elizabeth McCourt[124] have testified that even when fully satisfied, the QAP requirements usually result in some residual bias in DataMasters sent into the field. Moreover, the bias of these instruments may vary over time and when subject to different environmental conditions. Accordingly, the bias of a DataMaster may be best determined after its placement in the field.

The "field bias" of one of these machines may be determined by its first 5 to 10 field tests of the field simulator solution. With an accurate value for the solution, it can be determined whether a particular machine has a particular bias. With the bias, a Citizen can then get a better idea of what their true BAC was regardless of what appears on a breath test ticket. In particular, both Gullberg and McCourt have testified on a number of occasions that despite the fact that a breath test may yield two samples in excess of .08, the true value may in fact be more likely than not less than .08.[125]

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[123] Tr.A2, p.106.

[124] Technician McCourt testified in Snohomish County District Court on October 31 in the matter of State v. Michael Lang, C616184WSP (2007)

[125] See, for example, *DoL v. Herrmann*, # HERRMJP299BJ (2004). Motorist had test results of .080 and .081. Using measurements of the field solution found in the DataMaster database, Gullberg testified that the instrument in question had a field bias and that it was actually more likely than not (56.75% likelihood) that the motorist's true BAC was below a .08. The DataMaster and solution were all in compliance with the protocols. This simply

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For a Citizen to be able to check his result in this manner, he needs to have an accurate value for the field simulator solution. Without an accurate value for the field simulator solution, even if an individual's true BAC is below a .08, or even a .15, they may have no way of demonstrating that. Significantly, the calculational errors identified by Gullberg range as high as five ten thousandths BAC, five times greater than those discussed by Logan in his August 2007 memo. The only way anybody can know whether or not these errors have impacted other tests is to go out and check those tests. Yet not a single analyst, Logan or Gullberg[126] have checked a single breath test. None of them can testify truthfully that not a single Citizen's breath test result has been negatively and unjustly affected until they have gone through and actually looked at every single breath test in light of the corrections made.[127]

The true significance of this becomes apparent when we remember that even now the Lab is not determining means in a scientifically acceptable manner. Until the means are determined by a scientifically acceptable methodology, the certifications do not permit a Citizen to rely upon the posted calculations to determine his/her true BAC (whether field or QAP solutions). And given the fact that all the errors due to utilization of an improper mean that have been discovered to date are larger than the errors identified in Logan's August 2007 memo, Gullberg has admitted that they pose an even greater possibility of an incorrect deprivation of a Citizen's liberty.[128] The point is this: regardless of whether or not the solutions are in compliance with the protocols, the Labs errors can significantly affect a Citizen's test results and liberties.

5. UNCLEANSED SINS

Even if everything else were ignored, all of Gullberg's corrections still include the data

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demonstrates that despite whether or not all the protocols have been followed, small error can have serious consequences for Citizens.

[126] Tr.A2, p.99-100.

[127] Tr.A2, p.99, 102.

[128] Tr.A2, p.100, 102.

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Gordon falsely claimed to have tested. Hence, the taint of perjury has not yet been removed. Both Gullberg and Logan have clearly indicated that the removal of a full set of data may significantly change the value of the mean solution concentration and hence the results of an individual's test. Until Gordon's perjured data is removed, Gullberg's "corrections" cannot possibly be considered fixes as they are not an honest determination of the mean of any solution Gordon's perjury is still being relied upon to compute. The affect of her deceit remains.

IV. ARGUMENT

"Preservation of the individual citizen's confidence in government is [of the highest] important[ce]." *Bellotti*, 435 U.S. at 789.

"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." *Clark-Munoz*, 152 Wn.2d at 47.

"The most important consideration for [the Court] now is the preservation of the integrity of the criminal justice system. We must handle these [] cases now before us in such a fashion that the public, the defense bar, the prosecuting attorneys, and the courts of Washington will clearly understand that we will not tolerate criminal convictions based on tainted evidence, but will insist upon proper standards of conduct and procedure." *Roche*, 114 Wn.App. at 446.

A. DUE PROCESS FORBIDS THE USE OF FALSE EVIDENCE AND PERJURY

"No person shall be deprived of life, liberty, or property, without due process of law." WASH. CONST. art. 1, § 3; U.S. CONST. amend. XIV. Due Prcoess represents "a profound attitude of fairness between man and man, and more particularly between the individual and government." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624 (1951). In fact, "fair play…is the essence of due process." *Galvan v. Press*, 347 U.S. 522,

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530, 74 S.Ct. 737 (1954). "A citizen has the right to expect fair dealing from his government." *S & E Contractors, Inc. v. U. S.*, 406 U.S. 1, 10, 92 S.Ct. 1411 (1972). Accordingly, "[d]ue process requires governments to treat citizens in a fundamentally fair manner." *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 636 (1987); *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 312, 112 S.Ct. 1904 (1992). Even simple indifference to such fairness may offend due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 850-2, 118 S.Ct. 1708 (1998).

Securing an individual's due process rights is an undertaking "inescapably involving the exercise of judgment by [the judiciary] whom the Constitution entrusted with the unfolding of the process." *McGrath*, 341 U.S. at 163 (Emphasis added).

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. People of State of California*, 314 U.S. 219, 236, 62 S.Ct. 280 (1941). This encompasses those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *U. S. v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044 (1977)(*citations omitted*); *Brown v. State of Mississippi*, 297 U.S. 278, 286, 56 S.Ct. 461 (1936). In making this determination, the Court looks "not only to historical practice, but also to the logical implications of a basic principle of fairness." Jerold Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303, 423 (2001)(citing, *Medina v. California*, 505 U.S. 437, 445-6, 112 S.Ct. 2572 (1992)). "That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 55 S.Ct. 340 (1935).

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"A fair trial in a fair tribunal is a basic requirement of due process." *State v. Moreno*, 147 Wn.2d 500, 507 (2002). This "requirement [however] cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Holohan*, 294 U.S. at 112. The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. U.S.*, 405 U.S. 150, 153, 92 S.Ct. 763 (1972).

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit in any concept of ordered liberty." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959). "It is fundamentally unfair for a prosecutor to knowingly [do so]." *U.S. v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000). "Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Holohan*, 294 U.S. at 112. "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269; *Franks v. Delaware*, 438 U.S. 154, 169, 98 S.Ct. 2674 (1978); *Alcorta v. State of Tex.*, 355 U.S. 28, 31-2, 78 S.Ct. 103 (1957).

"The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. In fact:

> A prosecutor's "responsibility and duty to correct what he knows to be false and elicit the truth," requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.

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Commonwealth of Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1117-8 (9th Cir. 2001); *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006); Cf., *U. S. v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)(duty attaches where prosecutor "should have known" of possibility).

Even if not discovered by the parties until after the fact, when "false testimony" forms part of the basis for a conviction, it "cause[s] the defendants' trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness." requiring the conviction to be reversed. *Curran v. State of Del*, 259 F.2d 707, 713 (3rd Cir. 1958); *U.S. v. Snoddy*, 862 F.2d 1154, 1156 (5th Cir. 1989); *Sanders v. Sullivan*, 863 F.2d 218, 225 (2nd Cir. 1988).

"It is well settled that the presentation of false evidence violates due process." *Phillips v. Woodford*, 267 F.3d 966, 984-5 (9th Cir. 2001).

Gullberg and Denton crossed out any data in the worksheets that they found to be incorrect. For some reason, however, neither "removed" (crossed out) any of Gordon's data. Because it was all based on perjury and deceit, however, it was required to have been "removed" (whether or not Formoso's results must also be ignored is an open question which the defense may raise in oral argument). Instead, all of Gordon's data remains in every certification she perjured herself in without notation or correction. Thus, absent anything else, the worksheet data is still tainted by perjury and constitutes impermissible false evidence.

Despite this shortcoming, it might be argued that given the fact that the Court and the defense have been informed of the perjured content, the documents have been cleansed. Even if the Court were to accept this argument, at most it might not prevent another toxicologist from testifying based upon any other untainted data contained in the worksheet. It still would not open the door for the introduction of the certifications themselves. Assuming, without conceding, that this is correct, any certification containing Gordon's signature is still prohibited

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from being introduced or relied upon in testimony for another reason.

Because Gullberg failed to "remove" Gordon's perjured data, all his recalculations of solution statistics in certifications where Gordon's name appears were actually performed by including the perjured data. This means that every statistical calculation in every certification with Gordon's name on it is still tainted by perjury. Since due process forbids reliance upon such false evidence, the inclusion of Gordon's data in the calculations was impermissible. Although Gullberg's oversight was done without ill intent, it has the affect of failing to remove the taint of Gordon's perjury from what are now being represented as the correct statistical values in these certifications. Accordingly, they constitute false evidence which cannot be introduced.

More importantly, remember that none of the toxicologists in the lab perform the statistical calculations on their own. Each has always and continues to rely upon the statistical figures recorded on the worksheet. This includes the value listed for the mean vapor concentration which is relied upon to determine the equivalent vapor concentration. None can give independent testimony on this subject because none has actually done the calculations. In this context, it is beyond dispute that any testimony based on the tainted calculations is then also necessarily tainted by perjury. Moreover, since no toxicologist knows what the correct statistical values are, any testimony based on the tainted figures would at the very least constitute the crime of false swearing. The only way that these documents can be cleansed of taint is to excise Gordon's data completely (and perhaps that of Formoso as well). Otherwise, nether the certifications themselves or any testimony based thereon may be proffered as evidence at trial.

Significantly, if no testimony or evidence can be introduced concerning the "certified" value of the solution, then no testimony or evidence concerning the external standard test can be

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introduced. This result requires suppression of breath test results for two reasons. First, since such testimony or evidence is required as a matter of foundation under RCW 46.61.506(4)(a)(vii), preclusion of such testimony or evidence prevents satisfaction of this provision. This in turn precludes the admissibility of breath test results.

Second, at trial "the State always has the burden of proving beyond a reasonable doubt to the jury that the [breath test] reading was a correct one." *State v. Franco*, 96 Wn.2d 816, 828 (1982). In this context, the external standard test is "necessary to ensure accuracy, precision, and confidence in each test", WAC 448-16-050, and "the simulator solution is key to simulator testing", *Straka*, 116 Wn.2d at 873. Accordingly, introduction of the breath test at trial requires introduction of testimony or evidence concerning the "certified" value of the associated simulator solution. But if such testimony or evidence is tainted by perjury, then the vehicle requiring its introduction, an individual's breath test, is of necessity equally tainted. This, then, also precludes the admissibility of breath test results.

The result is clear. All certifications containing Gordon's name are still tainted by, and purposefully relying upon, Gordon's perjured data. Accordingly, every breath test that has utilized such a solution must be discarded.

B. THE USE OF FALSE EVIDENCE AND PERJURY CONSTITUTES PROSECUTORIAL MISCONDUCT

"The court, in the furtherance of justice after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrRLJ 8.3(b). "The purpose of the rule is to ensure that, once an individual is charged with a crime, he or she is fairly treated." *State v. Boldt*, 40 Wn.App. 798, 801 (1985). It "is intended to protect against governmental misconduct or arbitrary action." *State v. Wilke*, 28 Wn.App. 590,

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596 (1981).

"Normally misconduct does not require dismissal absent actual prejudice to the defendant." *State v. Granacki*, 90 Wn.App. 598, 604 (1998). "Where the behavior is egregious," however, and strikes at the core of "fundamental" protections, "the trial court does not abuse its discretion by presuming there was prejudice to the defendant's [associated] right." *Id*. Even where prejudice has been found, "the trial court may [still] properly choose to impose a lesser sanction because this is a classic example of trial court discretion." *Id*. In this context, "[d]ismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct." *State v. Marks*, 114 Wn.2d 724, 730 (1990).

"A lawyer shall not knowingly…make a false statement of fact or law to a tribunal[,] fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[, or]…offer evidence that the lawyer knows to be false." RPC 3.3(a)(1) & (4); see also, RPC 8.4(c)-(d). "A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal." *State v. Talley*, 134 Wn.2d 176, 183 n.6 (1998)(quotation omitted). In fact, it is the affirmative "constitutional obligation of the State and its representatives…to prevent fraud upon the court." *Bowie*, 243 F.3d at 1117. Where the potential use of false or perjured evidence is at question, "[t]he prosecutor is an officer of the court whose duty is to present a…truthful case to the jury." *Shih Wei Su v. Filion*, 335 F.3d 119, 126 (2nd Cir. 2003)(emphasis added); Cf., *State v. Charlton*, 90 Wn.2d 657, 664-665 (1978).[129]

[129] "The prosecutor, in the interest of justice, must act impartially, and his trial behavior must be worthy of the position he holds…some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions…(i)f prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means…Such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims." *Charlton*, 90 Wn.2d at 664-665.

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> The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our Constitution. This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation.

Bowie, 243 F.3d at 1114-6.

As discussed above, the use of false evidence or testimony to obtain a tainted conviction is "fundamentally unfair" and antithetical to "any concept of ordered liberty." *Napue*, 360 U.S. at 269; *LaPage*, 231 F.3d at 491. Subsequent resort to "perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap…Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates." *Franks*, 438 U.S. at 169. Thus, when impacting a Citizen's ability to receive a fair trial, it is well recognized that prosecutorial misconduct involving the use of evidence at trial necessitates dismissal. *State v. Martinez*, 121 Wn.App. 21, 35-6 (2004). Where suppression of improper evidence can prevent such misconduct, though, suppression is the appropriate remedy. *Marks*, 114 Wn.2d at 730; *Granacki*, 90 Wn.App. at 604.

The State knows, or should know, that the solution certifications containing Gordon's name are still tainted by, and purposefully relying upon, Gordon's perjured data. The State knows, or should know, that Formoso participated in a conspiracy to facilitate the use of Gordon's perjured data. The State knows, or should know, that Logan participated in a cover up, either before or after the fact, or was willfully ignorant of, the perjury and conspiracy in order to conceal these actions. The misconduct of Logan, Gordan and Formoso is easily enough addressed by suppression of breath results obtained using certifications infected by their misconduct. This would permit the State to go forward with prosecutions, but simply without

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breath tests.

On the other hand, if the State knowingly goes forward utilizing these perjury tainted tests, it has now embraced, and cloaked itself in, the deceits perpetrated by Logan, Gordan and Formoso. Reliance upon false evidence in this manner now constitutes prosecutorial misconduct. Moreover, it is conduct that could easily be avoided by voluntarily refusing to succumb to the enticement of easy conviction in reliance upon lies. Given the State's knowledge, this is the most egregious sort of misconduct as it is neither inadvertent nor simple carelessness. It is the result of a conscious and knowing choice of action. And it is a choice of action that strikes at the heart of every Citizen's right not to have perjury and false evidence used as a tool to deprive them of their liberty. Because of the egregiousness of the prosecutor's actions, and the fact that they strike at the core of Citizens' fundamental constitutional rights, the trial court must presume prejudice.

Even if, given the egregiousness of the State's actions, the Court refuses to presume prejudice, prejudice can be easily established. As discussed above, an accurately reported value for the concentration of a solution is necessary so that a Citizen accused of DUI may determine his true BAC despite the numbers spit out on a breath test ticket. This means that a Citizen must be able to rely upon the mean value reported for QAP solutions in order to determine if there was bias introduced during the QAP. It also means that a Citizen must be able to rely upon the mean value reported for the field solution utilized in their test in order to determine if there is any apparent field bias. But since Gordon's (and Formoso's) data have not been removed from the calculations of the means, Citizen's do not have access to accurate mean values for these solutions. Thus, they are prevented from determining what the machine should have reported as their true BAC. This is overwhelmingly prejudicial.

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The question may legitimately be asked as to whether or not Citizens can remove the taint by simply redoing the calculations themselves. The most obvious retort to this is that the burden to fix errors in the State's evidence, caused by purposeful deceit, should rest with the government, not the Citizens the government exists to serve. If the State wants to attempt to obtain conviction through the use of false evidence and lies, then it is the State that must bear the burden of removing the effect of its deceit and misconduct when discovered. That is what the Citizens of this State rely upon the Lab and prosecutors around the State to do. And that is the job of the Lab and prosecutors around the State. In today's "convict 'em all and let God sort 'em out" political environment, it is hard to imagine that a single court would permit a Citizen charged with a crime to introduce perjured or false evidence with the retort that if the State wants to it can fix the deceit on its own. But with this in mind:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution.

Olmstead v. U.S., 277 U.S. 438, 468, 48 S.Ct. 564 (1928)(BRANDEIS, J. *dissenting*).

But even ignoring principle, as one must do in order not to find that such egregious conduct does not require the State to be responsible for fixing the effects of its own misconduct, prejudice is clear. Most of the perjury laden certifications are field solutions containing data from 12 or more analysts. That means that each of these solutions was certified using multiple instruments. Accordingly, the only scientifically acceptable method for determining the appropriate means is to utilize a weighted average. As demonstrated by Dr. Emery, this

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calculation is nowhere near as straightforward as calculating a classical-arithmetic mean. Instead, it takes rather more complicated analysis involving independent analysis of several sets of data collected on several different instruments before all the data is finally recombined using the determined weighting factors. And where sets of data on individual instruments show no variation (this may occur where a particular instrument was utilized by a single analyst only for her 5 aliquot test), then one must justify and utilize even more complicated techniques because the weighting factor applied to such a set of data becomes infinity, a scientifically unacceptable and unreasonable result.

The result of all of this is that in order for a Citizen or their attorney to be able to determine accurate solution means so that they can even begin to determine their true BAC, they must retain an expert. A typical fee for such an expert is $180 an hours to conduct the analysis and $360 an hour to testify. This can easily cost a typical Citizen in excess of $1,000. This is a tax upon each Citizen for the State's misconduct. In other words, although it is the state that is guilty of misconduct, it is each individual Citizen the State attempts to use this false evidence against that must first pay the penalty for that misconduct before they even begin to have the opportunity for a fair trial free of official deceit. And for those represented by public defenders, retention of an expert is either unrealistic or will be costly to the public. According to Jay Ames, supervising attorney of the Spokane County Public Defender's Office misdemeanor department:

> At this time, attorneys in the misdemeanor department represent clients on approximately 245 pending DUI cases…I expect that the majority of those cases involve breath tests. Paying for an expert to assist with the toxicology lab issues on each individual's case would be virtually impossible. We would exhaust the money in our budget allocated for expert fees very quickly. If necessary we would then request that the court pay the expert expenses on each case.

Given that the Sixth Amendment right to effective assistance of counsel includes the right of every Citizen to public funds to retain a necessary expert if they cannot afford one, a court

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would be required to provide such funds. *State v. Punsalan*, 156 Wn.2d 875 (2006). The same holds for those with private counsel who could not afford to retain such an expert. *Id*. Thus, the alternatives we have are either that: (1) each Citizen charged will have to pay for an expert to overcome the State's misconduct before they can receive a fair trial; (2) each Citizen will have to begin paying for experts for the accused to overcome the State's misconduct before a fair trial can be conducted; or (3) some Citizens charged will be prevented from retaining an expert so that they will be unable to overcome the State's misconduct or receive a fair trial. The first and third alternatives demonstrate real and serious prejudice to any Citizen charged. The second shows the externality imposed upon all Citizens of this State because of the prosecutions choice to proceed with perjured and false evidence. The egregiousness of the State's actions and shamelessness with which it is willing to ignore responsibility for them, content to allow everybody else shoulder the cost, is unbelievable.

Whether presumed or demonstrated, the State's misconduct requires proper relief. The Court can preserve the State's prosecutions by simply suppressing these breath tests. And this is all the defense requests. On the other hand, if the court is to decide that such obvious and blatant deceit and the willingness to rely upon it to brutalize the rights of the Citizens of this State will be permitted in proceedings before it, then every conviction so obtained will be required to be reversed on appeal. And, just as important, the Citizen's of this State will no longer be able to trust that this Court can be relied upon to ensure that the search for truth and justice will be carried out in a manner consistent with this Nation's most basic conceptions of fairness. Instead, the Court will have become a rubber stamp for the misconduct engaged in by both the Lab and misguided, overzealous prosecutors. In the words of Justice Brandeis:

> When these unlawful acts were committed they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal

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> official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes…and if this court should permit the government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker.

Olmstead, 277 U.S. at 483.

C. SOLUTIONS AND BREATH TESTS FAIL THE REQUIREMENTS OF ER 702 AND ER 703

Even where the provisions of RCW 46.61.506 have been satisfied, "[t]he statute is permissive, not mandatory…There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude [breath] test results under the rules of evidence." *Jensen*, 158 Wn.2d at 399. Under ER 702, "the trial court is given broad discretion in determining whether an expert's testimony is admissible." 5B, K. TEGLAND, WASH. PRAC., EVIDENCE, §702.15 (5th Ed. 2007). Likewise, ER 703 grants the Court the necessary discretion needed to apply it. TEGLAND, §703.2.

When issues within the court's discretion are raised by a defendant, the categorical refusal of a court to make a determination "is effectively a failure to exercise discretion." Cf., *State v. Grayson*, 154 Wn.2d 333, 342-3 (2005); *State v. Gronnert*, 122 Wn.App. 214, 225 (2004). The failure to exercise discretion under such circumstances is an abuse of discretion. Cf., *State v. Perdang*, 38 Wn.App. 141, 144-6 (1984); *State ex rel. Reilly v. Civil Service Com'n of City of Spokane*, 8 Wn.2d 498, 501-2 (1941). Accordingly, not only does the Court have the power to apply and make a determination of admissibility under ER 702, ER 703 and ER 403, it would be an abuse of discretion for the Court to refuse to apply and make a determination under those rules. In the end, the Court's analysis must be guided by the principle that "[i]f the citizens of the State of Washington are to have any confidence in the breath-testing program, that

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program has to have some credence in the scientific community as a whole." *Clark-Munoz*, 152 Wn.2d at 47.

1. ER 702 – THE LACK OF EXPERTISE AND HELPFULNESS

"Once the *Frye* standard is satisfied…the trial court resumes its role as gatekeeper and may exclude otherwise admissible evidence by applying the rules of evidence." *Jensen*, 158 Wn.2d at 397. At that point, "application of the science to a particular case is a matter of weight and admissibility under ER 702." *State v. Gregory*, 158 Wn.2d 759, 829 (2006)(*emphasis added*). In this context, "ER 702 has independent force and effect [and plays] a significant role in admissibility of scientific evidence aside from *Frye.*" *State v. Copeland*, 130 Wn.2d 244, 259-60 (1996).

According to the Rule, "[i]f 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…may testify thereto in the form of an opinion." ER 702. "The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact." *State v. Cauthron*, 120 Wn.2d 879, 890 (1993); *State v. Cheatam*, 150 Wn.2d 626, 645 (2003)(*citations omitted*). In no circumstance will such testimony be admissible if it would "mislead the jury to the prejudice of the opposing party." *State v. Guilliot*, 106 Wn.App. 355, 363 (2001).

Under the first prong, the subject matter upon which an expert gives an opinion must lie within his actual area of expertise. *Dobias v. Western Farmers Ass'n*, 6 Wn.App. 194, 197 (1971). That is, "the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise." *State v. Farr-Lenzini*, 93 Wn.App. 453, 461 (1999); *Esparza v. Skyreach Equipment, Inc.*, 103 Wn.App. 916, 924 (2000). This holds

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because when a witness strays "beyond his field of expertise…he lack[s] the factual 'knowledge, skill, experience, training, or education' required by ER 702" rendering his testimony little more than "conjecture and speculation." *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 104 (1995); *Farr-Lenzini*, 93 Wn.App. at 461.

Even when testifying within his/her area of expertise, however, "[i]f there is a precise problem identified by the defense which would render [a scientific] test unreliable, then [expert] testimony might not meet the requirements of ER 702 because it would not be helpful to the trier of fact." *Cauthron*, 120 Wn.2d at 890. This determination "requires the trial court to assess 'whether the reasoning or methodology underlying the testimony is scientifically valid and...whether that reasoning or methodology properly can be applied to the facts in issue.'" *Stroh*, 74 Wn.App. at 560.

"Under ER 702, if [] lab error or error rates are so serious that results are not helpful to the jury, the trial court may in its discretion rule the evidence inadmissible." *Copeland*, 130 Wn.2d at 270. In general, "challenges…concerning laboratory error rates, the size, quality, and randomness of [a lab's] data bases, and [a lab's] methodology and practices…involve questions of admissibility under ER 702." *State v. Cannon*, 130 Wn.2d 313, 325 (1996). A proper foundation [should also] include…a showing that [a] test was properly administered." *State v. Baity*, 140 Wn.2d 1, 18 (2000). Where an expert opinion requires an appropriate statistical foundation, the State must demonstrate that the "empirical evidence utilized…is valid." *Cauthron*, 120 Wn.2d at 909. Finally, "the admissibility of computer-generated [evidence] as substantive proof…is conditioned upon a sufficient showing that (1) the computer is functioning properly [and] (2) the input and underlying equations are sufficiently complete and accurate." *State v. Sipin*, 130 Wn.App. 403, 415 (2005).

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a. THE LACK OF EXPERTISE

Several issues arise under this provision in the case at bar. First, every toxicologist who has testified, aside from Logan, has indicated that they have not been trained in breath testing, have never actually administered a breath test and are not experts in breath testing. Accordingly, since by their own admissions none is an expert in breath testing, none can be permitted to give any opinion as to whether any breath test anywhere in this State is accurate.

Logan has admitted that he is not an expert in statistics. Likewise, most of his toxicologists have demonstrated their lack of expertise in statistics by being unable to calculate a simple standard deviation, while some readily admitted they didn't even know what statistical algorithms were being utilized by the Lab. Even Gullberg, who although he has a Masters Degree in statistics is not a metrologist (expert in the science of measurement), eventually confessed to not being familiar with what methodology would be generally acceptable within a toxicology lab. Accordingly, none of these individuals is an expert in the identification of scientifically acceptable statistical methodologies for the analysis of measured data and cannot testify that the methodology utilized by the Lab is scientifically acceptable.

b. THE LACK OF HELPFULNESS

The shear number of errors admitted by the Lab is astounding. Including errors both related and unrelated to software issues, there are hundreds. Had some anonymous hero not stepped forward to expose Gordon, the software errors never would have been discovered. And if it hadn't been for curious defense attorneys, almost none of the other 100 plus non-software issues ever would have been detected. This Lab has an alarmingly high error incidence rate and an apparent inability to discover such errors on its own. Despite all their QA procedures, warnings from internal audits that the Lab was "Non-compliant" with respect to proper record

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keeping procedures concerning "Simulator Solution Logbooks"[130] and supposed scientific expertise, the work produced by the lab was incompetent and riddled with errors capable of materially effecting Citizen's breath tests around the State. Before all this broke, there was even the smugly arrogant conclusion in an official investigation of simulator solutions that:[131]

> this laboratory has prepared simulator solutions for over 20 years. No solution has ever left this laboratory with an incorrect concentration.

It is not simply the shear number of errors, but the Lab's inability to discover them on its own, without some anonymous voice blowing a whistle or defense attorney conducting an investigation, that must be considered. Remember many of the errors already discovered were apparent as absurdities on the face of the certifications themselves. Declarations signed evidencing clairvoyant powers and physical impossibilities. Data obviously incorrectly reported that had even one analyst looked into they would have discovered the values themselves were actually wrong. And despite the claim that Gullberg allegedly "fixed" everything, errors identical to these remained unidentified in the certifications of at least 5 different solutions Gullberg signed off on as having been corrected. And analysts signed off a second time on these certifications without ever looking close enough to realize that they still contained clear and obvious errors.[132] Whether it's more alarming that the individual brought in to "correct" all the Lab's errors missed these or that the toxicologists themselves did is hard to determine. What is it that the Lab is blissfully unaware of now that the Citizens of this State must await the arrival of some anonymous whistleblower or defense attorney to discover?

Nor was any of this the result of diligent but honest mistakes. It was utter carelessness. Analysts too lazy to insure that the data they included in worksheets was correct or even their

[130] Ex.37, p.6.
[131] Exhibit 31.
[132] Solution #s: 06042, 06044, 06045, 06046 and 06047.

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own. Too busy to check to insure that the information contained in documents being testified to in Court and signed under penalty of perjury for use by the courts and public was correct. Blind reliance on secretarial staff to insure the scientific validity of reported results. Blind faith in the numbers being spit out of a computer whose software had never been checked to insure that it was operating correctly. This is latter fact is made even more astounding by the fact that the statistical methodology to be used was determined and deployed by an individual who was neither a scientist nor a statistician.

As a result, at least 10% of the worksheets used to calculate the statistics contained wrong data. Every single calculation of the CV by the software since it was first implemented, through August 2007, was done incorrectly. All calculations of the mean, standard deviation, CV and equivalent vapor concentration for certifications with more than 12 analysts were not in compliance with the protocols for the period from August 2005 to August 2007. And although we know that at least 8 Citizen's liberties were unjustly threatened, Gullberg admits that there is no way of knowing how many others were affected without actually checking every individual breath test. And to date, no one has done that.

It was not only careless to fail to ever do any kind of a QA check on the software, it violated one of the most basic and widely accepted scientific principles: all instruments, including software, must be checked on a regular basis to insure that they are functioning properly. This is especially so when someone makes a change to an instrument or software. A simple calculation check is all that would have been required.

Nor is this the only scientifically unacceptable practice engaged in by the Lab. There is the practice of blindly discarding data that doesn't agree with what analysts want it to be. In this context, such data is ignored and shoved into folders and never entered into a worksheet for use

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in determining whether a solution satisfies the requirements of the protocol. Gullberg, found that 10% of the certifications he reviewed contained instances of this conduct. As we proved above, ignoring such data and shoving it in a file can have a significant effect. Remember that the valid data which was ignored for QAP solution 06028 resulted in a solution being sent out to breath test labs where it was used in the QAP of at least 35 instruments around the State even though it would have caused instruments to report BAC results .0015 higher than their true values. This error was 15 times greater than the error referenced in the August 2007 memo that changed the results of Citizen's breath tests in Spokane. Yet because no one ever checked to see if the data being discarded was scientifically valid or not, including Gullberg, the Lab has never discovered the error. This practice is not acceptable in a freshman lab course, not to mention any actual scientific community.

Finally, there is the Lab's practice of utilizing arithmetic means for certification data collected on multiple instruments. Although to a lay person this might seem somewhat obscure, scientifically it is critical. Unless the characteristics of the different instruments being utilized are accounted for, the data collected from each cannot be compared to each other. As the saying goes, it's apples to oranges. Only once the characteristics of each instrument have been accounted for, in particular the precision of each, do we gat apples to apples and oranges to oranges. In science, this is basic. Even Gullberg's own materials confirmed this.

The fact that Gullberg or others utilize an arithmetic mean in the breath test Lab is perfectly consistent with this. As Dr. Emery testified, when you are using a single instrument to collect data, the arithmetic mean is fine. And that is what occurs in the breath test lab when a QAP is performed, a single instrument is utilized. But when you use multiple instruments, as was done on 93.8% of the certifications, only a weighted mean is scientifically acceptable. And

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this practice, along with the discarding of data without reconsideration, continues to this day.

What do we have then? Serious lab error rates, questions concerning the quality and validity of data, methodology and practices not acceptable in any scientific community, calculations that were not properly performed and empirical data of questionable validity (this includes Gordon's perjured data). By itself, this enough to exclude consideration of any evidence concerning simulator solutions. Just as significant, though, is the fact that: (1) the software relied upon to determine compliance with the protocols has for its entire lifetime, until at least August 2007 (and perhaps thereafter), not functioned properly; and (2) the input and underlying equations within the software are neither complete nor accurate.

c. INADMISSIBILITY OF SOLUTIONS AND BREATH TESTS

It is beyond dispute that any evidence concerning simulator solutions must be excluded under ER 702.

As discussed above, if no testimony or evidence can be introduced concerning the "certified" value of the solution, then no testimony or evidence concerning the external standard test can be introduced. This result requires suppression of breath test results for two reasons. First, since such testimony or evidence is required as a matter of foundation under RCW 46.61.506(4)(a)(vii), preclusion of such testimony or evidence prevents satisfaction of this provision. This in turn precludes the admissibility of breath test results.

Second, at trial "the State always has the burden of proving beyond a reasonable doubt to the jury that the [breath test] reading was a correct one." *Franco*, 96 Wn.2d at 828. Unfortunately, it is well accepted that forensic breath "test results are 'virtually dispositive of guilt or innocence.'" *Mack v. Cruikshank*, 2 P.3d 100, 104 (Ariz.App. 1999).[133] This is so even

[133] *See also*, *Jayne*, 24 P.3d at 926 ("[G]iven the significant weight that a jury is likely to accord this type of evidence (urinalysis test) the potential for prejudice…is high.").

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where the state is not prosecuting under the *per se* prong of a DUI statute because most jurors "would conclude that a person with [a] reading [in excess of the *per se* limit] was intoxicated when it was taken, in the absence of substantial evidence to the contrary." *McElroy*, 568 So.2d at 1016-7. Absent countervailing evidence, "[a] citizen's right to drive, and sometimes to liberty, will depend on the verdict of a machine."[134] *State v. Garthe*, 678 A.2d 153, 158 (N.J. 1996).

In this context, however, Washington recognizes that an accurate solution is "necessary to ensure accuracy, precision, and confidence in each [breath] test." WAC 448-16-050; *Straka*, 116 Wn.2d at 873. Thus, absent any evidence concerning the simulator solution, the State cannot prove that the test was accurate. The only reason for the State to introduce the test, however, is to have the jury consider it as an accurate measurement of an individual's BAC. This is plainly misleading and, hence, under ER 702 not helpful to the trier of fact. *Guilliot*, 106 Wn.App. at 363. Accordingly, the breath test must be suppressed under ER 702.

2. ER 703 – THE ABSENCE OF A BASIS FOR REASONABLE RELIENCE

An expert may rely on facts and data as the basis for his opinion on a subject if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 703. "Under [this rule], expert testimony must be based on sufficient foundational facts to support the expert's opinion." *State v. Pittman*, 88 Wn.App. 188, 198 (1997). This "permits the trial judge to assess the reliability of the underlying facts or data upon which the expert's opinion is based" and determine the admissibility of such testimony based on that assessment. *State v. Maule*, 35 Wn.App. 287, 295-6 (1983). In this context:

> it is not sufficient to show that the particular expert in question customarily relies upon such material. The proponent must show that person's in the expert's profession, in general, reasonably rely upon such material in the practice of their

[134] "Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power." *State v. O'Key*, 899 P.2d 663, 672 (OR. 1995). In fact "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen." *Addison*, 498 F.2d at 744.

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> own profession…Whether the expert's reliance is reasonable is determined by the judge.

TEGLAND, §703.5.

In making its determination, "the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert."[135] *Miller v. Likins*, 109 Wn.App. 140, 148 (2001). In this vein, one commentator has noted that in the context of a jury trial, "evidence is of three degrees: convincing, very convincing and statistical." Weinstein, THE POWER AND DUTY OF FEDERAL JUDGES TO MARSHALL AND COMMENT ON THE EVIDENCE IN JURY TRIALS AND SOME SUGGESTIONS ON CHARGING JURIES, 118 FRD 161, 176 (1988).

Many factors may lead to the conclusion that a particular set of "facts or data" are not reasonably relied upon. These include where an expert: (1) does "not verify the accuracy" of the underlying facts and data, *State v. Acosta*, 123 Wn.App. 424, 436 (2004); (2) is relying upon "facts and data [that] are critically inaccurate or incomplete" or "plainly untrustworthy", *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1114-5 (5th Cir. 1991); (3) fails to "demonstrate his competence" with the materials or the materials are based "on unsupported assumptions and ignore[] distinctions crucial to arriving at a valid result", *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806-7 (9th Cir. 1988); or (4) cannot cite to "studies or other scientific evidence" supporting reliance upon such materials, *Pittman*, 88 Wn.App. at 198;

For purposes of the matter *sub judice*, two special cases require separate mention. First, utilization "of computer-generated [evidence]…as the basis for expert testimony regarding matters of substantive proof is conditioned upon a sufficient showing that (1) the computer is

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[135] Jurors believe scientists. In a nationwide survey of 800 people who served on civil and criminal juries, eighty-nine percent of the juror reported that paid experts were believable. Among criminal jurors, sixty-eight percent thought experts were very believable and fifty percent of the civil jurors found experts to be very believable.((From "*Expert Witnesses Found Credible by Most Jurors*, Nat'l L.J., Feb. 22, 1993, cited in "*A Critical Examination of the Post-Daubert Scientific Evidence Landscape*," (Jay P. Kesan, Ph.D.) , Georgetown Law J. Volume 85, No.5, 1996.))

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functioning properly [and] (2) the input and underlying equations are sufficiently complete and accurate." *Sipin*, 130 Wn.App. at 415. Second, statistical data does not provide a reasonable basis for testimony when based upon improper methodology, *Oliver v. Pacific Northwest Bell Telephone Co., Inc.*, 106 Wn.2d 675, 682-3 (1986), or where they are "unrealistic and contradictory…[and]…riddled with errors", *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2nd Cir. 1984).

Finally, ER 703 "allows admission of expert opinion based on data interpreted by another when certain requirements…are met." *State v. Nation*, 110 Wn.App. 651, 662 (2002). Nonetheless, this testimony may not simply be a "conduit" for the opinion of another. *State v. Towne*, 453 A.2d 1133, 1135 (Vt. 1982)(accord, *Nation* at 662). Instead, the opinion testified to by an expert must be his/her own. *State v. Ecklund*, 30 Wn.App. 313, 318 (1981). "[A]bsent an exception to the hearsay rule, hearsay statements of the opinions of third parties are inadmissible." *Nation* at 662. In particular, "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by non-testifying experts." *People v. Campos*, 32 Cal.App.4th 304, 308 (Cal.App. 1995)(accord, *Nation* at 662). Moreover, the State is prohibited from relying upon such hearsay as "substantive evidence…to prove [the] truth" of the matters asserted. *State v. Martinez*, 78 Wn.App. 870, 879 (1995). In short:

> While Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.

Martinez at 880 (*quoting*, 3 D. LOUISELL & C. MUELLER, *Federal Evidence* § 389, at 663)(accord, *State v. DeVries*, 149 Wn.2d 842, 848 n.2 (2003)).

That the simulator solution certifications do not constitute "facts or data reasonably relied upon" by an expert is easy to establish. First, there is the fact that the Lab and the certifications

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produced therein are hopelessly riddled with purposeful and carelessly perpetrated deceit. Perjury, conspiracy to commit perjury, cover-ups and false swearing have all been established with respect to the testing and certification of the simulator solutions. That perjury, conspiracy to commit perjury and a subsequent attempt to cover it up would cause any expert hesitation in relying upon the facts or data infected thereby is obvious.

Whether Logan's actions were purposeful or the result of incompetence matters little. Either he purposefully attempted to conceal deceit or he was too incompetent to understand the procedures in the Lab he is ultimately responsible for. In either event, his actions lend no confidence to any work done in the Lab. As for the rest of the analysts, over the course of two years each repeatedly signed declarations swearing to facts they did not know to be true because they were too lazy, careless and/or incompetent to simply check. No good faith argument can be made that any expert would rely upon "facts or data" generated by a lab engaged in such a widespread and systemic practice of misrepresentation.

Even setting misrepresentation and deceit aside, the "science" conducted by the Lab, if anyone would dare even call it such at this point, itself precludes its consideration as the basis of testimony under ER 703. None of the analysts takes the time to verify the facts, data or statistics being testified to. They just sign off on documentation as it passes by their desks. As is clear by now, the facts and data are critically inaccurate, incomplete and plainly untrustworthy (10% of the certifications contain incorrect data, another 10% have had data discarded for unknown reasons, et…). Only one of the analysts has demonstrated any level of competence at all with respect to the statistics utilized by the Lab, but even there, considering that 93.8% of the solutions are certified on multiple instruments, the analysis is based on unsupported assumptions and ignores distinctions crucial to arriving at a valid result. Finally, neither Logan, Gullberg nor

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anybody else in the Lab has yet to point to a single treatise supporting reliance upon their statistical methodology. In fact, the materials provided by Gullberg all supported Dr. Emery's testimony concerning the scientific necessity of utilizing a weighted mean when conducting measurements on multiple instruments.

In particular, as discussed in the previous section: (1) the software relied upon to determine compliance with the protocols has for its entire lifetime, until at least August 2007 (and perhaps thereafter), not functioned properly; and (2) the input and underlying equations within the software are neither complete nor accurate. In this context, none of the Lab's statistical calculations provide a reasonable basis for testimony because not only are they based upon improper methodology, but they are riddled with errors.

Based on all of this, some of the analysts in Lab itself have refused to swear to facts in court in reliance upon these documents. Both Knoy and Capron refused to swear that the statistics on even the certifications that had been "corrected" and subsequently resigned by them were correct.[136] Capron actually indicated that before he would swear to their correctness, he "would want to go back and…learn how to do all the calculations and do it [himself] to make sure."[137]

Given all of this, and the fact that even some of the Lab's analysts themselves will no longer rely on these documents, it is beyond dispute that no solution certifications could be reasonably relied upon as a basis for testimony under ER 703. As a result, for the same reasons discussed in the previous section, breath tests must be suppressed under ER 703 as well. See supra, Section C-1-c.

[136] Tr.S1, p.97-8, 134, 136.
[137] Tr.S1, p.134.

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D. BREATH TESTS FAIL TO SATISFY THE DUE PROCESS STANDARD OF RELIABILITY

DUI "defendants are entitled to much more than protection against perjury" under the Fourteenth Amendment. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984). "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087 (1985). Accordingly, "a primary function of legal process is to minimize the risk of erroneous decisions." *Mackey v. Montrym*, 443 U.S. 1, 7, 99 S.Ct. 2612 (1979); *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042 (1978). Practices that directly threaten the accuracy of the fact-finding process betray these concerns and generally run afoul of due process requirements.[138] *See e.g.*, *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241 (1943); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935). Due process requires that evidence be excluded wherever it is "essential to safeguard the integrity of the truth-seeking process."[139] *Brewer v. Williams*, 430 U.S. 387, 425, 97 S.Ct. 1232 (1977)(Burger, J., dissenting); *Moore v. Illinois*, 434 U.S. 220, 227, 98 S.Ct. 458 (1977).

"State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." *U.S. v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261 (1998). In fact, Washington Courts "deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *State v. Bartholomew*, 101 Wn.2d 631, 640 (1984)(rev'd on other grounds, *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7 (1995)). The reason is that "[t]he integrity of the

[138] *State v. Ferguson*, 2 S.W.3d 912, 914 n.3 (Tenn. 1999)("As a general rule…a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome.").

[139] *State v. Michaels*, 642 A.2d 1372, 1381 (N.J. 1994) (To satisfy due process, "[C]ourt has a responsibility to ensure that evidence admitted at trial is sufficiently reliable."); *State v. Haley*, 689 A.2d 671, 674 (N.H. 1997)("The private interest affected by a pretrial hearing on the admissibility of evidence is important because…a conviction may hinge on the admission or exclusion of certain evidence.").

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adversary process depends both on the presentation of reliable evidence and the rejection of unreliable evidence."[140] *Taylor v. Illinois*, 484 U.S. 400, 414-5, 108 S.Ct. 646 (1988). As a result, "reliability is the linchpin in determining the admissibility" of evidence under the Fourteenth Amendment.[141] *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243 (1977). Due process does not permit a conviction based on evidence lacking the requisite degree of reliability. *California v. Green*, 399 U.S. 149, 163 n.15, 90 S.Ct. 1930 (1970); *Green,* 399 U.S. at 186 n.20 (Harlan, J., concurring). Exclusion of evidence is appropriate where it serves the legitimate interest of "ensuring that only reliable evidence is introduced at trial." *Scheffer*, 523 U.S. at 309.

Forensic breath "test results are 'virtually dispositive of guilt or innocence.'" *Cruikshank*, 2 P.3d at 104.[142] This is so even where the state is not prosecuting under the *per se* prong of a DUI statute because most jurors "would conclude that a person with [a] reading [in excess of the *per se* limit] was intoxicated when it was taken, in the absence of substantial evidence to the contrary." *McElroy*, 568 So.2d at 1016-7. "Since the presentation of countervailing evidence would be necessary to dissuade the fact-finder of the defendant's guilt, the effect of introducing [breath test] evidence [is that] The burden of proof is shifted to the defendant." *Id*. Absent countervailing evidence, "[a] citizen's right to drive, and sometimes to liberty, will depend on the verdict of a machine."[143] *Garthe*, 678 A.2d at 158. Accordingly,

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[140] *Bolden v. State*, 967 S.W.2d 895, 899 (Tex.App. 1998)(In determining whether a state's rule of evidence violates due process, "[T]he social interest involved…requires consideration be given to the integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process."). *Bellotti*, 435 U.S. at 789 ("Preservation of the individual citizen's confidence in government is [of the highest] important[ce].").

[141] *State v. Michaels*, 642 A.2d 1372, 1381 (N.J. 1994)("Competent and reliable evidence remains at the foundation of a fair trial, which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk.").

[142] *See also*, *Jayne*, 24 P.3d at 926 ("[G]iven the significant weight that a jury is likely to accord this type of evidence (urinalysis test) the potential for prejudice…is high.").

[143] "Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power." *O'Key*, 899 P.2d at 672. In fact "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen." *Addison*, 498 F.2d at 744.

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"[i]n order for the results of a blood alcohol test to be admissible, the state must prove that the reliability of the test satisfies due process and fairness." *State v. Honeyman*, 560 So.2d 825, 829 (La. 1990).

By this point it is hard to say anything without repeating oneself. Deceit, incompetence, carelessness, failure to follow the most rudimentary of scientific safeguards or adhere to generally accepted scientific methodology…how much worse could it possibly get? The question is not if, but how seriously the evidence produced in this manner threatens the accuracy and integrity of the truth-seeking process? Would you allow someone to operate on your child, spouse or other loved one with instruments prepared and certified in such a manner? Then how can one justify putting a Citizen's liberty under the knife of such evidence. Clearly, any evidence from the Lab concerning simulator solutions lacks the requisite degree of reliability to satisfy the constraints of due process. And since an accurate solution is "necessary to ensure accuracy, precision, and confidence in each [breath] test", WAC 448-16-050, *Straka*, 116 Wn.2d at 873, each breath test also necessarily lacks the degree of reliability required by due process. Accordingly, due process requires that the breath test in the matter before the court be suppressed.

E. BREATH TEST INADMISSIBILITY UNDER RCW 46.61.506(4)(a)(vii)

1. AS APPLIED TO THE FACTS SUB JUDICE RCW 46.61.506(4)(b) IS VIOLATIVE OF DUE PROCESS

RCW 46.61.506(4)(b) states that, in determining the admissibility of a breath test:

> For purposes of this section…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.

RCW 46.61.506(4)(b).

By its plain language, this directive applies only to determinations under RCW 46.61.506

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and has no application to any determination made pursuant to any other provision or Rule.[144] Strictly in the context of RCW 46.61.506 determinations, though, it requires the court to assume the truth of the prosecution's evidence in assessing whether the evidence is sufficient to establish the admissibility of a breath test. Enforcement of this command under the facts before the Court would be fundamentally unfair and violate the requirement for the appearance of fairness.

a. AS APPLIED CHALLENGES TO THE CONSTITUTIONALITY OF A STATUTE

"A statute constitutional on its face may violate constitutional rights in its application." *Hontz v. State*, 105 Wn.2d 302, 305 (1986). "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions…is unconstitutional." *City of Redmond v. Moore*, 151 Wn.2d 664, 668-9 (2004); *Washington State Republican Party v. Washington State Public Disclosure Com'n*, 141 Wn.2d 245, 282 n.14 (2000). Finding a statute unconstitutional as-applied does not render it inoperable, it simply "prohibits…application of the statute in [that particular] context." *Moore*, 151 Wn.2d at 669; *In re Detention of Turay*, 139 Wn.2d 379, 417 n.27 (1999).

b. ASSUMING THE TRUTH OF KNOWN PERJURY AND FALSE AND MISLEADING EVIDENCE

"The Fourteenth Amendment…operates to extend to the citizens and residents of the states…protection against arbitrary state legislation affecting life, liberty, and property." *Hibben v. Smith*, 191 U.S. 310, 325, 24 S.Ct. 88 (1903). In this context, "[i]t is manifest that it was not left to the legislative power to enact any process which might be devised. [Due process] is a restraint on the legislative…powers of the government, and cannot be so construed as to leave

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[144] "In judicial interpretation of statutes, the first rule is 'the court should assume that the legislature means exactly what it says.'" *State v. McCraw*, 127 Wn.2d 281, 288 (1995). "The number of each section of [the RCW] is made up of three parts, in sequence as follows: Number of title; number of chapter within the title; number of section within the chapter. Thus RCW 1.04.020 is Title 1, chapter 4, section 20." *City of Kent v. Beigh*, 145 Wn.2d 33, 38, 32 P.3d 258 (2001)(*quoting* PREFACE TO REVISED CODE OF WASHINGTON at iii (2000)).

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[the legislature] free to make any process 'due process of law,' by its mere will."[145] *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276, 15 L.Ed. 372 (1855); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457, 82 S.Ct. 1380 (1962)("Congress…does not have the final say as to what constitutes due process under the Fourteenth Amendment."). "Every procedure which…might lead [a judge] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437 (1927).

"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government…and that…it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including [those pertaining to] evidence.'" *Patterson v. New York*, 432 U.S. 197, 201, 97 S.Ct. 2319 (1977)(*citations omitted*). Nonetheless, all phases of criminal proceedings in state courts are still subject to the guarentee of due process contained in the Fourteenth Amendment. *Bartkus v. People of State of Ill.*, 359 U.S. 121, 124, 79 S.Ct. 676 (1959).[146] Accordingly, although Washington is free to adopt and enforce rules of evidence, by statute or decision, such rules and their enforcement are not exempt from the requirements of Due Process. [147] *Lisenba*, 314 U.S. at 236; *See also*, *Holmes v. South Carolina*, 547 U.S. 319, 324-5, 126 S.Ct. 1727 (2006); *Dutton v. Evans*, 400

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[145] *Smith, Kline & French Laboratories v. State Tax Commission*, 403 P.2d 375, 378 (Or. 1965)("Congress cannot change the requirements of the Due Process Clause.").

[146] Investigatory phase – *Stovall v. Denno*, 388 U.S. 293 (1967); *Rochin v. California*, 342 U.S. 165 (1952). Scientific analysis of evidence – *Arizona v. Youngblood*, 488 U.S. 51 (1988). Charging phase – *Blackledge v. Perry*, 417 U.S. 21 (1974); *U.S. v. Marion*, 404 U.S. 307 (1971). Discovery phase – *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *U.S. v. Agurs,* 427 U.S. 97 (1976); *Wardius v. Oregon*, 412 U.S. 470 (1973); *Brady v. Maryland,* 373 U.S. 83 (1963). Pretrial motion to suppress phase – *Lego v. Twomey*, 404 U.S. 477 (1972); *Jackson v. Denno*, 378 U.S. 368 (1964). Trial phase – *U.S. v. Gagnon*, 470 U.S. 522 (1985); *Estelle v. Williams*, 425 U.S. 501 (1976); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Illinois v. Allen*, 397 U.S. 337 (1970). Plea phase – *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Henderson v. Morgan*, 426 U.S. 637 (1976); *Santobello v. New York*, 404 U.S. 257 (1971); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969).

[147] "The only way to contest the validity of [statutorily approved scientific test is] to argue that the statutes violate one's right to due process of law." 5 Lynn McLain, *Maryland Evidence* § 401.4(c), 278 (1987).

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U.S. 74, 97 and n.4, 91 S.Ct. 210 (1970)(Blackmun, J., concurring); *Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241 (1943).

It is well "established that the fourteenth amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'" *Blackburn v. State of Ala.*, 361 U.S. 199, 206, 80 S.Ct. 274 (1960) (*citing*, Lisenba, 314 U.S. at 236)). The aim is not necessarily to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence regardless of its truth value. *Id*.; *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774 (1964). As discussed above, the use of false evidence or testimony to obtain a tainted conviction is "fundamentally unfair" and antithetical to "any concept of ordered liberty." *Napue*, 360 U.S. at 269; *LaPage*, 231 F.3d at 491. In this context it must be remembered that "[t]he most formidable abridgment of due process guarantees…occurs where 'lip service' is paid to certain rights of the accused as a mere formality, with the consequence that any substantive protection is woefully lacking." *Quesnell v. State*, 83 Wn.2d 224, 233-4 (1973). Thus, where the Government relies upon such evidence in an action against a Citizen, "[o]ur law must not become so caught up in procedural niceties that it fails to sort out simple instances of right from wrong and give some redress for the latter." *ABF Freight System, Inc. v. NLRB,* 510 U.S. 317, 325, 114 S. Ct. 835, (1994)(KENNEDY, J. concurring).

Deceit, incompetence, carelessness, failure to follow the most rudimentary of scientific safeguards or adhere to generally accepted scientific methodology. This is what has been proved so far. The prosecution wants the Court to believe its okay for the Court to close its eyes and call lies the truth simply because an ill-conceived statutory provision says so. And perhaps someday the Legislature will enact a law that calls for the sentencing of Citizens prior to the returning of verdicts just as the Red Queen in Alice's Wonderland called for. But regardless of what the

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Legislature may desire, the "courts…have a constitutional obligation to safeguard personal liberties." *Stone v. Powell*, 428 U.S. 465, 493 n.35, 96 S.Ct. 3037 (1976)(citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344, 4 L.Ed. 97 (1816)). "Here…the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws…[it being the] inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice." THE FEDERALIST NO. 78 (Alexander Hamilton). This is not accomplished by slavish adherence to laws which require the Court to presume the truth of that which it knows to be false.

If the Court wishes to, it will be easy enough to pay lip service to these principles, and casually defer to the strict application of the statutory provision in question. Relying on mere formalities, it will have divested Citizens of those fundamental substantive protections guaranteed by our State and Federal Constitutions. On the other hand, it may take courage for the Court to divorce itself from slavish obedience to procedural niceties, and perform the sacred duty it exists to perform. But no law degree is needed to understand that to assume what is obviously false to be true is wrong. And to do justice, this Court must be able to make the simple distinction between that which is right and that which is wrong and prohibit the latter. Nothing less can preserve Citizens' rights to fundamental fairness in these proceedings.

Application of RCW 46.61.506(4)(b) to the facts of these cases is wrong, fundamentally unfair and violative of due process.

c. THE APPEARANCE OF FAIRNESS DOCTRINE

Next in importance to the duty of rendering a fair judgment is that of doing it in such a manner that will not cause suspicion of the fairness and integrity of the proceedings. *State ex rel. Barnard v. Board of Educ. of City of Seattle*, 19 Wn. 8, 18 (1898)(*quotation omitted*). "To

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perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623 (1955). Accordingly, "[t]he United States Supreme Court has stated that…procedural due process requires the appearance of fairness [in addition to] fairness in fact." *Westside Hilltop Survival Committee v. King County*, 96 Wn.2d 171, 181 (1981) (ROSELLINI, J. *concurring*)(citing, *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456 (1975)). "Under the appearance of fairness doctrine, [Washington Courts] require[] that the decision making process 'not only (be) fair in substance, but fair in appearance as well.'" *Harris v. Hornbaker*, 98 Wn.2d 650, 658 (1983); *Smith v. Skahit County*, 75 Wn.2d 715, 739 (1969); *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260, 267 (D.C.Cir. 1962).

Application of the doctrine under Washington law "provides procedural protections beyond the minimum requirements of the federal due process clauses." *Washington State Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 478 (1983). The rule is "stringent" and may "bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Moreno*, 147 Wn.2d at 507 (quoting, *Murchison*, 349 U.S. at 136). "Every procedure which…might lead [a judge] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey*, 273 U.S. at 532.

> [T]he evil sought to be remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate.

Harris, 98 Wn.2d at 658.

Again, deceit, incompetence, carelessness, failure to follow the most rudimentary of scientific safeguards or adhere to generally accepted scientific methodology. This is what has

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been proved so far. No law degree is required to understand that to assume the truth of something the Court knows to be false has, at the very least, the appearance of being wrong, of being fundamentally unfair. How is the common Citizen to interpret this? No reasonably prudent and disinterested observer could conclude that Citizen's being prosecuted under this provision had obtained a fair, impartial, and neutral hearing. Accordingly, application of RCW 46.61.506(4)(b) to the facts of these cases would violate the appearance of fairness doctrine encompassed by due process.

2. BREATH TEST INADMISSIBILITY UNDER RCW 46.61.506(4)(a)(vii)

"A breath test…shall be admissible at trial…if the prosecution…produces prima facie evidence [that]…The simulator external standard result did lie between .072 to .088 inclusive." RCW 46.61.506(4)(a)(vii). "'External standard test' means the use of a simulator containing a certified simulator solution, to provide a known alcohol vapor concentration." WAC 448-16-030(8). The critical part of this definition for our purposes is the requirement of a "certified simulator solution [that] provide[s] a known alcohol vapor concentration." "'Simulator' means a device which when filled with a certified simulator solution, maintained at a known temperature, provides a vapor sample of known alcohol concentration." WAC 448-16-030(11). The critical part of this definition for our purposes is again the requirement of "a certified simulator solution [that] provides a vapor sample of known alcohol concentration." Without "a certified simulator solution [that] provides a vapor sample of known alcohol concentration", compliance with RCW 46.61.506(4)(a)(vii) cannot be established.

The certification of field solutions is accomplished by making measurements on multiple instruments. Accordingly, calculation of these solutions' alcohol vapor concentrations by way of a classical-arithmetic mean is not scientifically accepted. Moreover, the classical-arithmetic

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mean cannot, in general, be expected to provide the correct value for the alcohol vapor concentration. Since all alcohol vapor concentrations are determined utilizing a classical-arithmetic mean, then, none of the solutions has ever "provided a vapor sample of known alcohol concentration" because the vapor concentration of these solutions has not yet been accurately determined. Accordingly, not a single test has been performed in compliance with the requirements of RCW 46.61.506(4)(a)(vii). Moreover, until the alcohol vapor concentrations of field solutions are determined in the scientifically accepted manner, through application of a weighted mean, no test can satisfy the requirement that a "simulator external standard test" be performed because no solution can provide "a vapor sample of known alcohol concentration."

F. BREATH TEST INADMISSIBILITY UNDER RCW 46.61.506(3)

Under RCW 46.61.506(3), "[a]nalysis of the person's blood or breath to be considered valid…shall have been performed according to methods approved by the state toxicologist." RCW 46.61.506(3). The provisions defining a valid test are made up of the regulations and protocols promulgated by the State Toxicologist. *Straka*, 116 Wn.2d at 867-70; WAC 448-16-010; WAC 448-16-070. The regulations "are intended to implement the direction of the statute by…identifying classifications of individuals who are to be examined for their competence to conduct such tests, and operate or maintain that equipment, and []identifying certain aspects of the operation of that equipment, necessary for reliable testing." WAC 448-16-010. The "protocols will be updated as necessary to maintain the quality of the breath test program." WAC 448-16-070. In addition to the explicit requirements of RCW 46.61.506(3) itself, the "regulations and protocols…must be followed in order for a breath test to be considered valid." *State v. Wittenbarger*, 124 Wn.2d 467, 487 (1994).

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1. REQUIREMENT OF COMPLIANCE UNDER RCW 46.61.502

RCW 46.61.502 states that in order for a Citizen to be guilty of a *per se* violation, she must have 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." RCW 46.61.502(1)(a). Accordingly, the Legislature has defined the *per se* crime in RCW 46.61.502 and delegated to the state toxicologist, through RCW 46.61.506(3), the duty of establishing the measurement procedures required by that definition. *State v. Melcher*, 33 Wn.App. 357, 361 (1982). Taken together, these provisions delegate to the state toxicologist the "power to determine some fact or state of things [a valid test under RCW 46.61.506(3)] upon which the law [RCW 46.61.502] makes, or intends to make, its own action depend.'" *Id*. Absent a valid test, the *per se* provisions of RCW 46.61.502 cannot even be applied. "[T]he legislature did intend that breath tests conducted *under* the statute and regulations must *comply* with the statute and regulations." *Clark-Munoz*, 152 Wn.2d at 48. Where the evidence in question is a state administered breath test, there is no distinction concerning its use whether the offense charged is under the *per se* or the "under the influence of or affected by" prong. *Id*. at 48-50.

2. REQUIREMENT OF COMPLIANCE UNDER RCW 46.20.308

a. COMPLIANCE BASED ON STATUTORY LANGUAGE

"Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test…of his…breath…for the purpose of determining…alcohol concentration." RCW 46.20.308. By its plain language, RCW 46.20.308 makes itself subject to the provisions of RCW 46.61.506. *Dept. of Licensing v. Cannon*, 147 Wn.2d 41, 52 (2002). Because RCW 46.20.308 is subject to the provisions of RCW 46.61.506, "under RCW 46.20.308 a test must be a *valid* test-an invalid test does not

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satisfy RCW 46.20.308. No test occurs until a valid test occurs." *State v. Brokman*, 84 Wn. App. 848, 852 (1997).

b. COMPLIANCE BASED ON CONTRACT

"An exercise of the initiative power is an exercise of the reserved power of the people to legislate." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204 (2000). It is "the power to propose bills [and] laws, and to enact or reject the same at the polls, independent of the legislature." WASH. CONST. art. 2, § 1. "[T]he people in their legislative capacity are superior to all other branches of government." *State v. Superior Court In and For Thurston County*, 92 Wn. 16, 26 (1916). "[D]eliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court." *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn.2d 339, 351 (1983).

The State can constitutionally force a defendant to submit to a breath alcohol test. *State v. Bostrom*, 127 Wn.2d 580, 590 (1995). The citizens of the State of Washington prohibited this as a general practice, though, by approving section 1 of Initiative 242 in 1969. Initiative Measure No. 242, Laws of 1969, ch. 1, s 5. Through this provision, codified at RCW 46.20.308, Washington citizens gave themselves the right to refuse to submit to a breath test. *State v. Parker*, 16 Wn.App. 632, 634 (1976). Known as the Implied Consent Statute, it also provided that:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of RCW 46.61.506, to a chemical test or tests of his Breath or blood for the purpose of determining the alcoholic content of his blood.

Former RCW 46.20.308 (1968).[148]

[148] Current RCW 46.20.308 is nearly identical. It reads in part: Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration…

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Read in context with RCW 46.61.506(3) then, after divesting the State of the authority to compel breath tests the statute can be seen as an exchange of obligations: (1) an agreement by the citizens of Washington that should they operate a motor vehicle upon the public highways of Washington their consent to submit to a breath test is, by so doing, explicitly implied; In return for (2) a promise that the State Toxicologist will approve "satisfactory techniques or methods" for the administration of those breath tests.

The fact that these provisions were adopted through initiative is crucial. The Legislature did not impose these terms on the citizens of Washington. Instead, the citizens, acting in their capacity as legislators, made the following offer to the citizens, acting in their capacity as the electorate: we will divest the State of the power to compel breath tests and require that the State Toxicologist approve "satisfactory techniques or methods" for breath testing if you agree to have your consent to a breath test implied any time you operate a motor vehicle upon the public highways of Washington. The citizens accepted this offer when they approved the initiative by vote.

The benefit conferred by this agreement upon Washington Citizens is that when a valid test under RCW 46.61.506(3) has been performed, the "satisfactory techniques or methods" approved by the Toxicologist would insure that breath tests will be "scientific," *Parker* at 635, and "reliable," *Cannon*, 147 Wn.2d at 47. The benefit to the State is that a motorist's implied consent to a breath test provides "law enforcement officers with an efficient means of gathering evidence." *Fritts v. Dept. of Motor Vehicles*, 6 Wn.App. 233, 241 (1971). This is important because, while the State can no longer compel submission to breath tests, "all drivers have consented *in advance* to testing for the presence of alcohol." *State v. Krieg*, 7 Wn.App. 20, 23 (1972).

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Under any other circumstances, the offer and acceptance of such obligations would evidence a meeting of the minds upon exchange of mutual consideration and thus constitute an express, binding contract. *Flower v. T.R.A. Industries, Inc.*, 127 Wn.App. 13, 26-30 (2005).

Supporting this contention is the fact that when a measure voted on and approved by the electorate creates mutual contingent obligations between the citizens and the State, that measure is to be construed as contractual in nature. *Sane transit v. Sound Transit*, 151 Wn.2d 60, 69 (2004). When determining the obligations owed by the parties, in this case the citizens and the State of Washington, "[t]he question is one of construction of contract, and that contract is expressed in the original ordinance." *Id*. (quoting *Hayes v. City of Seattle,* 120 Wn. 372, 375 (1922)). Where actions by the State violate its obligations, they are prohibited "regardless of the advantages which might result." *Id*.

It is clear then that when seeking to deprive Citizens of their liberty, the State has a contractual obligation to utilize only valid tests under RCW 46.61.506(3). This is a benefit conferred by law and enjoyed by all motorists who operate a motor vehicle upon the public highways of Washington. Failure to do so would constitute a material breach.

When a motorist fails to perform under RCW 46.20.308 by withdrawing his consent to submit to a breath test, the law prevents him from receiving the benefit he contracted for. It does this by allowing for the revocation of his license regardless of whether the test would have been valid or admissible. *Cohen*, 125 Wn.App. at 223-5. The same must hold for a breach by the State. Failure to perform under RCW 46.20.308, by failing to comply with RCW 46.61.506(3), should therefore prevent it from deriving the benefit contracted for. That is, under such circumstances, the State must be denied use of breath tests obtained from Citizens who performed under the terms of this contract.

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Even if the Court were to find that an express contract did not exist, the circumstances present support an implied-in-fact contract. An implied-in-fact contract is one that may be inferred wholly or partly from conduct. See RESTATEMENT (2d) OF CONTRACTS § 4 and comment a (1979); 1 WILLISTON ON CONTRACTS § 1:5 (Lord ed., 4th ed.1990). It is no different from an express contract in legal effect; the only distinction between an express contract and an implied-in-fact contract is the manner of manifesting assent. See RESTATEMENT (2d) OF CONTRACTS § 4, comment a.

"Like an express contract, 'it grows out of the intentions of the parties to the transaction, and there must be a meeting of minds.'" *Heaton v. Imus*, 93 Wn.2d 249, 252 (1980). Its existence is determined from the actions and conduct of the parties viewed in the light of surrounding circumstances. *Industrial Electric-Seattle, Inc. v. Bosko*, 67 Wn.2d 783, 792 (1966). Its terms are those "within the contemplation of the parties when making the contract, or else necessary to carry their intention into effect." *Mill & Logging Supply Co. v. West Tenino Lumber Co.*, 44 Wn.2d 102, 112 (1954).

Given the history of RCW 46.20.08 and RCW 46.61.506(3), it is clear that it was meant to impose mutual obligations on the State and its citizens as described above. By trafficking upon Washington's public highways, motorists will consent to State administered breath tests and the State will only rely solely and strictly upon valid tests under RCW 46.61.506(3). Viewed in the light of surrounding circumstances, it is undeniable that the intent of these obligations was to be binding. Accordingly, a contract implied in fact was created by the conduct and intentions of the parties and, for the reasons stated above, any breach of this contract by the State requires suppression of breath test results so acquired.

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3. COMPLIANCE BASED ON DUE PROCESS

Even if RCW 46.61.502 and RCW 46.20.308 did not expressly make themselves subject to RCW 46.61.506(3), the requirement of compliance with its provisions to obtain a "valid" test is demanded by due process. WASH. CONST. art. 1, § 3; U.S. CONST. amend. XIV. The rules and protocols are recognized as being "necessary for reliable testing," WAC 448-16-010, -070, so that when followed they "produce[] scientifically reliable results." *Straka* at 870. Each of the steps set forth in the regulatory definition of a breath test, including the requirement of an "[e]xternal standard simulator solution test [with results] between .072 and .088" "are necessary to ensure accuracy, precision, and confidence in each test." WAC 448-16-050. In particular, the "'[e]xternal standard test' [is utilized] to test the accuracy and proper working order of the instrument." WAC 448-16-030(8). And as discussed earlier, proper calibration and QAP of each instrument is equally critical to its accuracy and reliability.

These are the basic scientific Standards recognized and developed by the State itself. This is what removes the current matter from the realm of issues that go to weight as opposed to admissibility. When considering scientific standards that have been explicitly recognized by both the State and a defendant, there is no question of fact regarding their applicability for a jury to decide. Each of the provisions discussed above comes directly from pronouncements of the State Toxicologist in the Washington Administrative Code and approved protocols. Hence, with respect to these Standards there is no question of weight. The State already knows application of the Standards "are necessary to ensure accuracy, precision, and confidence in each test." WAC 448-16-050. Where a failure to comply with these standards can be demonstrated, permitting the State to introduce such a test in order to deprive a Citizen of their liberty would raise grave "concerns regarding the reliability of evidence and affect the integrity of the truth-seeking

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process."

Due Process and simples fairness require that, at a minimum, the State complies with procedures *it knows* "are necessary to ensure accuracy, precision, and confidence in each test" under RCW 46.61.506(3) before depriving an individual of their driver license. Cf., *McElroy*, 568 So.2d at 1016; *Com. v. Lucarini*, 8 Pa. D. & C.3d 679, 684 (Pa.Com.Pl. 1977); *State v. Dilliner*, 569 S.E.2d 211, 224 (W.Va. 2002)(Starcher, J., concurring).

4. BREATH TEST INADMISSIBILITY UNDER RCW 46.61.506(3)

Analogous to RCW 46.61.506(4), under the Toxicologist's regulations every test requires an "[e]xternal standard simulator solution test [and] The result of this test must be between .072 and .088 inclusive." WAC 448-16-050. As demonstrated earlier, the definition of both an "[e]xternal standard test" and "[s]imulator" require "a certified simulator solution [that] provides a vapor sample of known alcohol concentration." WAC 448-16-030(8); WAC 448-16-030(11). Without "a certified simulator solution [that] provides a vapor sample of known alcohol concentration", compliance with WAC 448-16-050 cannot be established.

As discussed above, the certification of field solutions is accomplished by making measurements on multiple instruments. Accordingly, calculation of these solutions' alcohol vapor concentrations by way of a classical-arithmetic mean is not scientifically accepted. Moreover, the classical-arithmetic mean cannot, in general, be expected to provide the correct value for the alcohol vapor concentration. Since all alcohol vapor concentrations are determined utilizing a classical-arithmetic mean, then, none of the solutions has ever "provided a vapor sample of known alcohol concentration" because the vapor concentration of these solutions has not yet been accurately determined. Accordingly, not a single test has been performed in compliance with the requirements of WAC 448-16-050. Moreover, until the alcohol vapor

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concentrations of field solutions are determined in the scientifically accepted manner, through application of a weighted mean, no test can satisfy the requirement that a "simulator external standard test" be performed because no solution can provide "a vapor sample of known alcohol concentration."

V. CONCLUSION

"Preservation of the individual citizen's confidence in government is [of the highest] important[ce]." *Bellotti*, 435 U.S. at 789.

"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." *Clark-Munoz*, 152 Wn.2d at 47.

"The most important consideration for [the Court] now is the preservation of the integrity of the criminal justice system. We must handle these [] cases now before us in such a fashion that the public, the defense bar, the prosecuting attorneys, and the courts of Washington will clearly understand that we will not tolerate criminal convictions based on tainted evidence, but will insist upon proper standards of conduct and procedure." *Roche*, 114 Wn.App. at 446.

DATED this 7th day of November,2007.

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