	STATE OF WASHINGTON,) Case No.: No. CQ34146KC
	Plaintiff,)
) COURT'S MEMORANDUM OPINION
	VS.) THERMOMETER ISSUE
	 PATRICK JENKINS,)
	I THE OBNICINO,)
	Defendant)
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Other Cases Consolidated For Purposes of This Motion:

State	V.	David Good	CQ41561KC
State	v.	James Krolich	CQ40468KC
State	v.	Danny Hackler	CO230893
State	v.	James Howard	C406002
State	v.	Kurt Isop	CQ39418KC
State	v.	Donald Johnson	CQ41507KC
State	v.	Robert Jurgensen	CO312771
State	v.	Maxwell Kingry	CQ40458KC
State	v.	Gary Vandecar	C00377123
State	v.	Gregory Hubbard	C00295294

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These matters came on for hearing June 11, 2001, before the undersigned Judges of the King County District Court, Aukeen Division, en banc. King County Deputy Prosecutor Mychal Schwartz presented argument on behalf of the Plaintiff, and Francisco Duarte presented argument on behalf of all defendants. In addition to oral argument, the Court has reviewed the transcript of the proceedings in the Renton Division case number CO378716, State v. Leo Mitchell and all exhibits admitted, Defendants' Brief, and the State's Response and Supplemental Response Briefs.

 $^{^{\}mathbf{1}}$ In any case where a Judge has been disqualified either by recusal or due to an Affidavit for Change of Judge, that Judge is not rendering a holding in that particular case.

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Defendants seek suppression of the breath test in each of these DUI cases, contending that due to discrepancies in the accuracy of the simulator solution thermometer, the State will be unable, as a matter of law, to establish the foundational requirement under WAC 448-13.040 that the simulator solution was between 33.8 and 34.2 degrees centigrade when the test was administered.

2. Defendants also ask the Court to dismiss each case on the grounds that governmental agents engaged in conduct designed to conceal or destroy evidence, with knowledge that the evidence was material, exculpatory, and potentially useful to the defense.

FINDINGS OF FACT

The issues presented in each case are essentially identical. parties have agreed to submit the motion to the Court based upon the testimony and evidence admitted in the Renton District Court hearing March 13 and 14, 2001, with the addition of State's Exhibit 51, a Supplemental Affidavit of Trooper Elenbaas, dated May 11, 2001.

Having reviewed the transcript and exhibits, the Court hereby adopts and incorporates by reference the Findings of Fact as stated in the Renton District Court Memorandum Opinion in State v. Leo Mitchell, dated April 13, 2001, with the exception of Finding number 5, which is fact specific to the cases before that Court.

DECISION OF THE COURT

In RCW 46.61.506(3), the Legislature delegated authority to the State Toxicologist to set rules governing the testing of a person's

breath or blood under the DUI/Physical Control statutes. That provision requires that, "Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist...".

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In accordance with the Legislature's wishes, the State
Toxicologist promulgated the rules set out in WAC 448-13 and adopted
them as the approved method for performing a valid test. According to
those rules, "A test shall be a valid test and so certified, if the
requirements of WAC 448-13-040, 448-13-050, and 448-13-055 are
met...", WAC 448-13-060. At issue here is the provision of WAC 44813-040 which requires that, "The temperature of the solution in the
simulator prior to the start of the test must be thirty-four degrees
centigrade plus or minus 0.2 degrees centigrade."

The State contends that once the officer has made the determination that the thermometer reads within the accepted range, the foundational requirement as to the temperature of the solution has been met, regardless of the accuracy of the thermometer. While the State Toxicologist certainly could have adopted such a provision, the rule he adopted in WAC 448-13-040 mandates the standard for the temperature of the solution itself. The Court cannot take on a legislative role and rewrite the foundational requirements for a valid test.

Accordingly, this Court accepts the legal analysis set out in the Renton District Court Memorandum Opinion, and for the reasons stated therein, concludes that the State cannot, as a matter of law, meet the foundational requirements for admissibility of the breath test in the cases consolidated for the purposes of this Motion.

In regard to Defendants' Motion to dismiss, the Court does not find sufficient evidence of government misconduct or bad faith to

justify dismissal. Suppression of the breath test, rather than dismissal provides an appropriate remedy in these matters. HOLDING This Court holds that in the cases consolidated for purposes of this Motion and any other cases wherein the Prosecution is unable to provide proof that the actual temperature of the simulator solution was within the parameters required to meet the foundational requirements for a valid test, the breath test is suppressed. Defense Motion for dismissal is denied. Entered this 20th day of June 2001. Judge Linda Thompson Judge Darrell Phillipson Judge Rick Bathum

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