IN THE KING COUNTY DISTRICT COURT
RENTON DIVISION, STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	**NO. C0378716**
Plaintiff,)	
)	**COURT'S**
vs.)	**MEMORANDUM**
)	**OPINION**
LEO MITCHELL, ET. AL.[1])	**THERMOMETER**
)	**ISSUE**
Defendant.)	

THIS MATTER having come on regularly for hearing before the undersigned Judges of the King County District Court, Renton Division, en banc, the Plaintiff being represented by MYCHAL SCHWARTZ, King County Deputy Prosecutor, and JEFFREY TORREY, City of Bellevue Prosecutor's Office, and the various Defendants being represented by the law offices of HAYNE, FOX, BOWMAN & DUARTE (Stephen W. Hayne, Jon Scott Fox, Bill A. Bowman, and Francisco Duarte), witnesses having been sworn and having introduced evidence herein, and the Court having considered such evidence and the files and records herein, and being fully advised in the premises, now makes and enters the following:

I ISSUES PRESENTED:

A. Each of the defendants herein was at some point arrested by officers of the Washington State Patrol for driving while under the influence of intoxicants (DUI). Inasmuch as the State intends to offer each defendant's breath test into evidence at trial, Defendants seek to challenge the foundational sufficiency of the breath test administered in each case, arguing that the requisite foundation includes the mandate that the prosecution prove that the temperature of the simulator solution be between 33.8 and 34.2 degrees centigrade pursuant to WAC 448-13.040, and due to discrepancies in the accuracy of the simulator solution thermometer, the State will be unable, as a matter of law, from establishing the necessary foundation for admission of the BAC readings in each case.

B. Separately, Defendants move for dismissal of the prosecutions on the grounds that governmental agents engaged in conduct designed for, and/or resulting in, concealment and destruction of evidence, with knowledge that it was material, exculpatory, and potentially useful to the defense.

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[1] **Cases consolidated for hearing as part of this motion include: State v. Clark (Cs. No. C078506); State v. Johnson (Cs. No. C-0378536); State v. O'Tierney (Cs. No. C-0334245); and State v. Vanders (Cs. No. CQ-03848KC). In State v. Halpaus (Cs. No. C0328874), the parties have agreed to be bound by the rulings made herein.**

II. APPLICABLE LAW:

WAC 448-13-040 [Ex. 3]: Administration of breath test on the DataMaster.

"The following method for performing a breath test is approved by the state toxicologist pursuant to WAC 448-13-130 and includes the following safeguards to be observed by the operator prior to the test being performed. It must be determined that: (1) The person does not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test; and (2) the subject does not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen minute observation period. Such determination shall be made by either an examination of the mouth or a denial by the person that he or she has any foreign substances in mouth. A test mouthpiece is not to be considered a foreign substance for purposes of this section. If a subject is wearing jewelry or ornamentation pierced through their tongue, lips, cheek, or other soft tissues in the oral cavity, they will be required to remove this prior to conducting the breath test. If the subject declines, they will be deemed to have a physical limitation rendering them incapable of providing a valid breath sample and will be required to provide a blood sample under the implied consent statute, RCW 46.20.308.

"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. During the test the person will be required to provide at least two valid breath samples. A refusal to provide a valid breath sample at any point during the test will constitute a refusal. The results of the test will be provided in the form of a printout on a breath test document. These results will indicate the grams of alcohol per two hundred liters of breath."

WAC 448-13-060 [Ex. 2]: Validity and Certification of Test Results.

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

(1). The internal standard test results in the message "verified."

(2). In order to be valid, the two breath samples must agree to within plus or minus ten percent of their mean. This shall be determined as follows:

(a) The breath test results shall be reported, truncated to three decimal places.

(b) The mean of the two breath test results shall be calculated and rounded to four decimal places.

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

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

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

(3). The simulator external standard result must lie between .090 and .110 inclusive for tests conducted prior to April 1, 1999, and .072 and .088 inclusive for tests conducted on or after April 1, 1999. This provision is remedial in nature and applies to any judicial or administrative proceeding conducted after April 27, 1999.

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

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

III. FINDINGS OF FACT:

1. That on or about November 1-3, 1999, the Washington State Patrol Breath Test Section became aware of potential discrepancies in the accuracy of the simulator solution thermometers. One such thermometer was approximately .5 degrees Celsius off. [Declaration of Trooper Jim Elenbaas, Ex. 1]. Upon inquiry to Guth Laboratories (manufacturer), it was later determined that there was a built-in tolerance or variance of up to one-tenth (1) degree Celsius in any thermometer [e.g. Ex. #29], and that such thermometers "can lose their accuracy over time". Most of the thermometers used by the State Patrol were over ten years old. [Ex. #1]. [2]

2. Upon discovery of this potential variance, the Breath Test Section purchased one or more digital "reference" thermometers. When the simulator thermometers were randomly checked by use of the reference thermometers in side-by-side tests, it was determined that "about thirty to forty percent [of the standard thermometers] were not accurate." [Declaration of Trooper Jim Elenbaas, Ex. 1].

3. It is unclear when Dr. Logan, State Toxicologist, affirmatively learned of the potential problems with existing DataMaster thermometers, but, clearly, he was advised of such facts not later than June 27, 2000, at a meeting at which most, if not all, of the members of the Breath Test Section attended. In response to information supplied by Trooper Elenbaas, Dr. Logan took the following actions:

> **a. BAC Technicians were ordered to conduct side-by-side tests of every simulator solution thermometer for accuracy and replace defective thermometers, if necessary.**[3]
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> **b. In the event that an existing thermometer was found to be defective, the BAC technicians were instructed to: (1) discard the "old" thermometer by placing it back with other discarded thermometers; (2) generate a new Thermometer Certification Record (482BTS) in lieu of filing a repair record form (209BTS),**

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[2] **In order to appreciate the significance of the problem, one must remember that the "simulator solution" is a mixture of ethanol and water contained in a jar attached to each DataMaster. When heated to 34 degrees centigrade, +/- .2 degrees centigrade, it produces a vapor with a predictable, "known" alcohol concentration value of 0.08. This known value is then used to "verify" that the DataMaster is in proper working order. The solution itself is heated by a thermostatically controlled element, which turns off and on as the temperature rises and falls. The temperature is critical because the device relies on Henry's law, an accepted law of physics that hold alcohol molecules will evaporate from a know solution at a predictable rate when heated to a specific temperature. As part of the procedure for administering a breath test required by the Washington Administrative Code, the solution vapor is tested between a DUI suspect's breath samples as a means of verifying the DataMaster is in proper working order, by demonstrating its ability to accurately test a "known" solution.**

[3] **Inexplicitly, rather than ordering all DataMaster thermometers to be immediately checked for accuracy and be replaced if found deficient, Dr. Logan ordered that this testing process be conducted over a period of <u>one year</u>.**

which would be filed in the Technician's records rather than at the State Toxicologist's office. [Ex. 15]. [4]

c. A new definition of "accuracy" was developed in which Dr. Logan declared that all Guth simulator solution thermometers would be deemed "accurate" if tested within one-tenth degree of a reference thermometer. [Ex.15].

4. The Washington State Patrol DataMaster Operator Information Manual Breath Test Section [EX. 4, pg. 3-1] requires the DataMaster operator to "confirm the simulator is on, the paddle is turning, and the temperature is 34 [degrees] C +/- .2 [degrees] C." In fulfilling this requirement, operators do not record the precise temperature, but simply note whether the thermometer registers *within* the required parameters. If it does, the operator enters "Y"; if it does not, the operator enters "N". If "Y" is entered (even if the thermometer were in fact outside the required range), the breath test proceeds. If "N" is entered (even if the thermometer were in fact within the required range), the test is aborted.

5. The breath tests administered to the various defendants in the cases before this Court were administered on Instrument #949242 (Maple Valley Precinct) and #949216 (City of Renton Police Dept.).

a. The listing of the individual defendants, DataMaster machine identification numbers, and dates of individual BAC tests involved in the cases before the court are provided as follows:

NAME	DATE	INSTRUMENT NO.
VANDERS	12/11/99	#949216
JOHNSON	6/10/00	#949216
O'TIERNEY	6/23/00	#949216
MITCHELL	8/19/00	#949216
CLARK	8/22/00	#949242

b. With respect to Instrument #949242, the evidence shows that on or about January 30, 2001, Thermometer #78157 was removed from Simulator #G1418, that Thermometer #B2000821 was then installed, and the technician then adjusted the Simulator Temperature to 34c +/- .2c. [Repair Record/Trp. Bowers. Ex. 20]. In direct testimony, Trooper Bowers testified that he found the thermometer to be more than .2 degrees centigrade off and replaced same. [Ex. 34].

[4] **The practical result of this policy was threefold: (a). The new procedure insured that no record of the problem would be included in normal discovery; (b). No record was kept of the extent of the inaccuracy of the "old" thermometer, and (c). No record was made to identify the "old" thermometer for possible future testing.**

c. With respect to Instrument #949216, Trooper Bowers testified that he tested the simulator thermometer on January 26, 2001 and found that it was not more than .1 degree centigrade off. [Ex. 35]. That thermometer was not replaced. The "old" thermometer was therefore left in the machine.

6. The foundational requirements for admission of a breath test under WAC 448-13-040 and 448-13-060 require proof that the *actual* temperature of the simulator solution is 34 degrees centigrade, plus or minus .2 degrees centigrade.[5] Given the built-in tolerance/variance of the standard simulator thermometers, which indicate that the standard thermometer is potentially off by up to .1 degree centigrade, an operator would have to be able to testify that the simulator solution read between 33.9 and 34.1 degrees centigrade in order to meet the foundation requirements of WAC 448-13-040. Given the failure of the operator to record the *precise* temperature of the thermometer, it is entirely possible for a test result to be obtained even though there is no proof that the simulator solution reads between 33.9 and 34.1 degrees centigrade. [i.e., the operator could look at the simulator thermometer and verify that it read 33.8 or 34.2 (within the range permitted by WAC 448-13-040) and still be unable to certify that the *actual* temperature was within that range, since the thermometer could be off by as much as .1 degree in every instance]. Without such evidence, the Court finds that the State could not provide sufficient foundation for admissibility.[6]

7. Beginning January 24, 2001, breath test technicians have been directed to begin documenting the accuracy of the thermometers, the serial numbers for later identification, and to prepare repair records that are disclosed to defense in discovery.

8. Based on the foregoing, the relevant facts of any given case will fall into one of the following three categories:

a. The defendant provided two samples of his/her breath on a BAC DataMaster Verifier (BAC) machine, whose simulator solution thermometer has not been checked for precise calibration. This would include any tests conducted prior to December 4, 1999, when the potential error problem was discovered, and any tests conducted after that date but before a particular thermometer was checked by a digital thermometer for precise calibration.

b. The defendant provided two samples of his/her breath on a BAC DataMaster Verifier (BAC) machine, whose simulator solution thermometer has been checked

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[5] **In questioning of Sgt. Gullberg, counsel agreed that it wouldn't matter whether it was 34.0 degrees centigrade as long as it were a known number, i.e., the number of 34.0 is not scientifically required, it's only WAC required. [Colloquy between counsel and the Court during questioning of Sgt. Gullberg, Transcript of Proceedings, pg. 7-8].**

[6] **If the officer recorded a temperature on the simulator thermometer that registered between 33.9 and 34.1, then, presumably, the foundation requirements for admissibility could be met.**

for precise calibration, with such calibration certifying that such thermometer was, in fact, reading within .1 degree Centigrade.

c. The defendant provided two samples of his/her breath on a BAC DataMaster Verifier (BAC) machine, whose simulator solution thermometer was checked for precise calibration and found to be off by more than .1 degree centigrade and was then replaced by a new, certified thermometer.

9. It is conceded by both parties that the issue before the court is NOT the scientific "correctness" of the individual defendant's BAC test result, but, rather, the admissibility of such test result under the WACs. There is no suggestion that the "inaccuracy" in the simulator solution thermometer in any way affects the subject sample.

IV. MEMORANDUM OPINION:

A. FOUNDATIONAL REQUIREMENTS:

The basic foundational requirements for admission of breath-test results were first established in State v. Baker, 56 Wn.2d 846, 852 (1960), where the Supreme Court held:

> **"It should be made clear at the outset that appellant does not contend that results of breathalyzer tests, in general, are not admissible in evidence. He does contend that four basic requirements must be shown by the state before the results of such tests may be admitted in evidence, to-wit: (1) That the machine was properly checked and in proper working order at the time of conducting the test; (2) that the chemicals employed were of the correct kind and compounded in the proper proportions; (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test; (4) that the test be given by a qualified operator and in the proper manner."**
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> **"The expert testimony introduced by the state in this case pertaining to the breathalyzer and its operation shows *that unless the above four requirements are satisfied, the result of the test is wholly unreliable.* We therefore hold that before the result of a breathalyzer test can be admitted into evidence, the state must produce *prima facie* evidence that each of the four requirements listed above have been complied with." (Emphasis supplied).** [7]

When the Breathalyzer machine was replaced by the DataMaster machine, a similar set of foundational requirements were adopted, ultimately codified in WAC 448-12, the precursor of the current WAC regulations set forth in WAC 448-13.

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[7] **It must be remembered that, in Baker, the Court noted that "Appellant argues that the temperature checks should have been made with a thermometer other than the one used in the machine itself, *as the machine thermometer could be faulty*." Id. at 853. The Court acknowledges that the thermometer being referenced in Baker was an internal machine thermometer, as the simulator solution thermometer only came into existence as part of the BAC DataMaster Verifier machine.**

The new machine, and its supporting protocols, were challenged and upheld in State v. Ford, 110 Wn.2d 827 (1988) and State v. Straka, 116 Wn.App. 859 (1991).

In Straka, the Court went to great lengths to emphasize the importance of the simulator solution in the total breath-testing package, stating:

> **[p.871-873]: "Correlating procedures under these WAC's and the approved protocols, the testimony in the record establishes that accuracy and reliability in general are assured if both the WAC's and the protocols are followed.**
>
> **"The state toxicologist testified that if two breath measurements are taken with the simulator solution run between them, as required, the results should be good. [fn5-omitted]. Sergeant Gullberg emphasized the importance of the breath testing procedure:**
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> > **I think that accuracy and proper working order of the instrument is best evaluated at the time of the test in question. Not at some prior date. And I think that the breath test protocol that we have that the instrument goes through, and it conducts testing on a particular individual, is adequate to insure accuracy and precision and proper working order. . . .Blank tests, duplicate breath tests, *external standard tests*, internal standard tests, 15 minute observation. That gives me confidence that at that time, that's an accurate result of their breath alcohol concentration.**
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> **Verbatim Report of Proceedings, at 105.**
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> **The *simulator test is of particular significance* in certification of the DataMaster machine, and in the machine's self-testing of calibration which it goes through each time a breath alcohol analysis is performed in accordance with procedures in the WAC's.**
>
> > **[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 to a certain temperature and thermostatically regulated to stay at that certain temperature. And then it can produce a known vapor alcohol concentration 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 us [the State Patrol].**
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> **Verbatim Report of Proceedings, at 89." [Emphasis supplied].**

Accordingly, in Straka, the DataMaster machine was deemed to have been working properly *because* it could be checked through the use of a simulator solution to get a reading of a known alcohol content. Although not precisely on point to the issues raised in this motion, this historical context is important when we evaluate the extent to which precision is required in utilizing a simulator solution thermometer.

The protocols required for acceptability mandate 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 [WAC 448-13-040, emphasis

supplied], and that the "simulator external standard result *must lie* between ….072 and .088 inclusive…" [WAC 448-13.060]. There could be no clearer standard; there is no ambiguity. In both WAC provisions, the standard is mandatory. The State argues that the Court should not read into WAC 448-13-040 an impossible scientific standard and thereby create an absurd result. The Court suggests, however, that the State Toxicologist sets the standard that must be met---it is not up to the Court to craft some other set of rules if the standards are deemed to be too stringent.

That the simulator solution temperature *must* meet certain requirements is no different from the other requirements that must be met for admissibility, viz., 15-minute observation period, qualified operator, etc. One would certainly not argue that 14 minutes and 45 seconds would suffice. Likewise, a simulator solution temperature of 33.79 or 34.21 would not suffice. How then can we say that 33.80 and 34.20 are okay, even with the allowed variance that is present in each and every thermometer?

The State argues that they are only required to present a prima facie showing that relevant provisions of the Washington Administrative Code and protocols relating to the breath test have been followed. State v. Watson, 51 Wn.App. 947 (Div. III. 1988). One could also cite Baker, supra, for the same proposition. The difficulty with the State's argument is that, as a matter of law, they CANNOT present a prima facie case when there is no way to determine whether the simulator solution thermometer is, or is not, able to read within 34 degrees centigrade, plus or minus .2 degrees centigrade. If there is a built in variance of up to .1 degree in every thermometer, and if the officer makes no record of the *actual* reading obtained by looking at the thermometer, then the Court cannot certify the test result as being in compliance with WAC 448-13-040 and 448-13-060. That's totally aside from the possibility that the simulator solution thermometer is off by more than .1 degree, since the "old" thermometers were discarded and cannot be retested.

In State v. Garrett, 80 Wn.App. 651 (1996), the Court of Appeals addressed a very similar situation involving the admissibility of a blood sample under WAC 448-14-020(3)(b) where, notwithstanding that the vial used to collect [defendant's] blood sample did not contain an anticoagulant, the state argued admissibility on the basis that it could present a prima facie case that the sample was free of adulteration. The Court rejected that proposition, holding:

> **"The language of WAC 448-14-020(3)(b) is mandatory. Therefore, because the vial used to collect [defendant's] blood sample did not contain an anticoagulant, the trial court properly vacated the conviction."**
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> *** * * ***
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> **"We are mindful of the State's concern that strict compliance with the administrative regulation may, on occasion, exclude accurate and relevant blood evidence. But we may not attribute to the words used in RCW 46.61.506 and WAC**

448-14-020(3)(b) a meaning different than that which was obviously intended." (Citations Omitted).

As with Garrett, the Court is constrained to rule that the language of WAC 448-13-040 and 448-13-060 are mandatory; this court may not attribute to the words used in the WACs a meaning different than that which was obviously intended. Accordingly, the Court is constrained to rule that under each of the existing scenarios presented above, the State is unable, as a matter of law, to make a prima facie showing that the foundational requirements of WAC 448-13-040 and 448-13-060 have been met.

B. REMEDY: SUPPRESSION OR DISMISSAL:

Under the Due Process clause of the Fourteenth Amendment and Article I, Section 3 of the Washington State Constitution, criminal prosecutions must comport with prevailing notions of fundamental fairness. State v. Wittenbarger, 124 Wn.2d 647 (1994); California v. Trombetta, 467 US 479, 104 S.Ct. 2528, 81 LEd2d 413 (1984). To comport with due process, the prosecution has a duty to both disclose to the defense and to preserve material exculpatory and potentially useful evidence. Wittenbarger, at 475.

In Arizona v. Youngblood, 488 US 51, 109 S.Ct. 333, 102 LEd2d 281 (1988), the United States Supreme Court promulgated two standards of review, one for "exculpatory" evidence and the other for "potentially useful" evidence. "Material exculpatory" evidence is that which (1) possesses an exculpatory value before it was destroyed and (2) is of a nature that comparable evidence cannot be obtained by other means. State v. Wittenbarger, supra; Arizona v. Youngblood, supra, California v. Trombetta, supra.

There are a wide variety of cases and circumstances in which Washington courts have discussed the rules governing the State's obligation to preserve material exculpatory evidence. In State v. Straka, supra, the Court held that due process did not require the State to generate and preserve records of invalid message codes on the DataMasters, since the invalid sample messages were not material exculpatory evidence in that they do not confirm or deny the accuracy of a particular breath test, and, thus, are not directly related to the guilt or innocence of an individual charged under the DWI statute. Straka, 116 Wn.2d at 885. In State v. Wittenbarger, supra, the Court considered whether the destruction of breath test machine maintenance and repair records constituted the destruction of "material exculpatory" evidence, concluding that it did not. It reasoned that the maintenance and repair records sought by the defendants did not possess a known exculpatory value at the time they were destroyed, because they did not relate to the accuracy of a particular breath test. Instead, the records were only tangentially related to whether the machine was functioning properly on a given day. Wittenbarger, 124 Wn.2d at 476. In State v. Smith, 130 Wn.2d. 215 (1996), the Court ruled that the

failure to preserve the results of a PBT test were not "material" since Smith failed to show that the PBT methodology would have been acceptable under the *Frye/Cauthron* test, and was not necessarily "exculpatory" since Smith could not testify as to the actual PBT reading obtained in that case. Smith, at 225-26. In State v. McReynolds, 104 Wn.App. 560 (2000), Division III of the Court of Appeals held that the failure to retain original witness statements that apparently had made no incriminating statements about the defendant, because it was unclear whether those statements were truly exculpatory. Inasmuch as the apparent inaccuracy of the simulator solution thermometer DOES NOT affect the subject sample, this Court is constrained to rule that the failure to preserve such evidence is NOT exculpatory. This is really not significantly different from the challenge made in Wittenbarger; this evidence is only tangentially related to whether the machine was functioning properly on a given day.

In State v. Hanna, 123 Wn.2d 704 (1994), the Supreme Court addressed the State's failure to preserve evidence of skid marks that might have been relevant to the issue of the defendant's speed in a prosecution for vehicular homicide and vehicular assault. The Court held that the State's failure to preserve evidence does not require dismissal of a criminal prosecution if the defendant fails to establish either (1) bad faith on the part of the police or (2) a reasonable possibility that the missing evidence affected the defendant's ability to present a defense. In setting forth the rules to be followed, the Court held:

> **[p. 713-14]: "In Youngblood, the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58. In Vaster, we articulated a 2-part balancing test. "[A] court should first consider whether there exists a reasonable possibility that the missing evidence would have affected the defendant's ability to present a defense." Vaster, 99 Wn.2d at 52. The defendant bears the burden of establishing that reasonable possibility. Vaster, 99 Wn.2d at 52. Then, "the court must balance the consideration of 'reasonableness' against the ability of the prosecution to have preserved the evidence." Vaster, 99 Wn.2d at 52.**
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> **"We decline to adopt either standard in this case because the trial court's denial of Hanna's motion to dismiss would be affirmed under either approach."**

In State v. Lewellyn, 78 Wn.App. 788 (1995), Division Three of the Court of Appeals held that the State's failure to preserve evidence violates the defendant's due process rights only if the evidence was material and exculpatory, i.e., only if the evidence would have exonerated the defendant, possessed an exculpatory value that was apparent before it was destroyed, and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. The Court held:

> **[p. 797]: "Notwithstanding the court's finding, in State v. Ortiz, supra, a plurality of the court adopted the federal test for determining whether a defendant's right to due process was violated when evidence was not preserved, citing Arizona v.**

> **Youngblood. The right to due process is, however, limited; for purposes of applying the due process analysis, the evidence must be "material exculpatory evidence." State v. Wittenbarger. The defendant must show not only that the evidence would have exonerated him, but the evidence must "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Wittenbarger (citing California v. Trombetta). Mr. Smith has not demonstrated the evidence would be exculpatory. A subsequently administered breath test indicated Mr. Smith's blood alcohol content was .12. The probable test would likely have been more inculpatory than exculpatory. Wittenbarger. The decision of the Superior Court holding that the District Court erred in refusing to admit the results of the portable breath test is error." (Citations omitted).**

As noted above, that ruling was affirmed by the Washington State Supreme Court. State v. Smith, 130 Wn.2d 215 (1996). If the test is evidence that might exonerate a defendant, then duty to preserve evidence does not apply to the evidence we are discussing in these motions.

In deciding whether suppression or dismissal is the proper remedy, this Court is mindful of the recent decision in State v. McReynolds, supra, in which the Court of Appeals held:

> **"CrR 8.3(b) provides in part:**
>
> > **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[s] the accused's right to a fair trial.**
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> **"A court's decision under this rule is reviewed for abuse of discretion. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). To support dismissal, a defendant must show arbitrary action or governmental misconduct. *Id.* at 239. *Dismissal is not justified when suppression of evidence will eliminate whatever prejudice is caused by the action or misconduct.* City of Seattle v. Orwick, 113 Wn.2d 823, 831, 784 P.2d 161 (1989)." Id. at 579. (Emphasis supplied).**

The Court suggests that if the results of the DataMaster test results are suppressed, the loss of any evidence related thereto is no longer relevant and no longer material.

In State v. Copeland, 130 Wn.2d 245 (1966), the Court held that the failure of the State to preserve certain DNA materials for testing did not violate *Brady/Wittenbarger*. It drew a careful distinction between *potentially useful* evidence and *material exculpatory* evidence, ruling that, in the absence of bad faith, there is no denial of due process in failing to preserve the former. Defendants in the cases before the court argue "bad faith". While the State's actions in this instance may be misguided, this Court does not find that the State's actions in and of themselves constitute bad faith. More than that, the evidence we are talking about, viz.,

destruction of evidence relating to the *admissibility* of the breath-test result, is neither material nor exculpatory once the breath test result is suppressed, nor is it relevant to any remaining issue in the case. Under such circumstances, dismissal is not warranted---suppression resolves every issue presented in defendant's motion.

V. CONCLUSIONS OF LAW:

Based on the foregoing Findings of Fact, the Court now makes and enters its Conclusions of Law as follows:

1. The foundational requirements for admission of a breath test under WAC 448-13-040 and 448-13-060 require proof that the *actual* temperature of the simulator solution is 34 degrees centigrade, plus or minus .2 degrees centigrade. Given the built-in tolerance/variance of the standard simulator thermometers, which indicate that the standard thermometer is potentially off by up to .1 degree centigrade, an operator would have to be able to testify that the simulator solution read between 33.9 and 34.1 degrees centigrade in order to meet the foundation requirements of WAC 448-13-040. Given the failure of the operator to record the *precise* temperature of the thermometer, it is entirely possible for a test result to be obtained even though there is no proof that the simulator solution reads between 33.9 and 34.1 degrees centigrade. [i.e., the operator could look at the simulator thermometer and verify that it read 33.8 or 34.2 (within the range permitted by WAC 448-13-040) and still be unable to certify that the *actual* temperature was within that range, since the thermometer could be off by as much as .1 degree in every instance]. Without such evidence, the Court finds that the State could not provide sufficient foundation for admissibility.

VI. RULING:

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court now enters its Ruling/Order on Defendant's Motion as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Suppress is granted; Defendants' Motion to Dismiss is denied.

Done in open court this 13th day of April, 2001.

ROBERT E. McBETH,
JUDGE

CHARLES J. DELAURENTI II,
JUDGE