

83277-3

FILED
JUN 30 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN -1 AM 10:51

IN THE SUPREME COURT
STATE OF WASHINGTON

Court of Appeals Case No. 61679-0-1

THE HON. JUDGE GEORGE W. HOLIFIELD et al,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Appeal from the
Court of Appeals, Division One

PETITION FOR DISCRETIONARY REVIEW
OF PETITIONER MATTHEW JACOB
BY THE WASHINGTON STATE SUPREME COURT

Andrew Elliott, WSBA #35106
Joshua S. Schaer, WSBA #31491

Attorneys for Petitioner

605 First Ave., Suite 400
Seattle, Washington 98104
(206) 749-0333

ORIGINAL

TABLE OF CONTENTS

I. **INTRODUCTION**.....1

II. **ISSUES PRESENTED FOR REVIEW**.....1

III. **STATEMENT OF THE CASE**.....2

IV. **ARGUMENT**.....3

 A. The Court of Appeals, Division One, Erred in Finding that a Writ Could Lie to Correct Mere Errors of Law from an Interlocutory Suppression Decision.....3

 1. The Government’s Ability to Seek Higher-Court Review is Strictly Limited.....3

 2. A Statutory Writ Cannot be Issued Without Meeting the Requirements of RCW 7.16.040.....5

 a. Under the First Prong of RCW 7.16.040, The Lower Court’s Decision Must be So Patently Erroneous as to Equate with an Jurisdictional Excess.....6

 b. The Second Prong of RCW 7.16.040 Requires No Adequate Remedies, Including Appeal.....10

 B. There is a Conflict Between the Holding in This Case, and Rulings of the Supreme Court and Other Divisions of the Court of Appeals, as to Whether CrRLJ 8.3(b) Permits Suppression of Evidence.....14

 1. The Supreme Court and The Court of Appeals, Divisions Two and Three, Support Suppression as an Alternative Remedy Under CrRLJ 8.3(b)....14

 2. The Record in This Case Establishes Governmental Misconduct that Prejudices Mr. Jacob.....16

V. CONCLUSION.....18

VI. APPENDICES

TABLES OF AUTHORITIES

Table of Cases

Bridle Trails Community Club v. Bellevue, 45 Wn.App. 248,
724 P.2d 1110 (1986)..... 8

Bushman v. New Holland Div. of Sperry Rand Corp.,
83 Wn.2d 429, 518 P.2d 1078 (1974).....5, 7

Butts v. Heller, 69 Wn.App. 263, 848 P.2d 213 (1993).....11

City of Mount Vernon v. Mount Vernon Municipal Court,
93 Wn.App. 501, 973 P.2d 3 (1998).....3, 11, 12

City of Seattle v. Keene, 108 Wn.App. 630, 31 P.3d 1234,
amended on denial of reconsideration (2001).....7, passim

City of Seattle v. Orwick, 113 Wn.2d 823, 784 P.2d 161 (1989).....14

City of Seattle v. Williams, 101 Wn.2d 445, 680 P.2d 1051 (1984).....4, 10

City of Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991).....14, 17

Commanda v. Cary, 143 Wn.2d 651, 23 P.3d 1086 (2001).....1, 3, 9

Mattson v. Kline, 47 Wn.2d 538, 288 P.2d 483 (1955).....4

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), *cert. denied*,
516 U.S. 1121 (1996).....16

State v. Brooks, Slip Opin. No. 36171-0-II, March 24, 2009.....1, 15, 16

State v. Busig, 119 Wn.App. 381, 81 P.3d 143 (2003).....2, 15

State v. Chichester, 141 Wn.App. 446, 170 P.3d 583 (2007) 15, 16

<i>State v. DeVincentis</i> , 112 Wn.App. 152, 47 P.3d 606 (2002).....	9
<i>State v. Epler</i> , 93 Wn.App. 520, 969 P.2d 498 (1999).....	7, passim
<i>State v. Garza</i> , 99 Wn.App. 291, 994 P.2d 868 (2000).....	14
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	16
<i>State v. Johnson</i> , 24 Wash. 75, 63 P. 1124 (1901).....	4
<i>State v. Luivene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	16
<i>State v. Marks</i> , 114 Wn.2d 724, 790 P.2d 138 (1990).....	1, 14, passim
<i>State v. McReynolds</i> , 104 Wn.App. 560, 17 P.3d 608 (2000).....	14
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	16
<i>State v. Miller</i> , 82 Wash. 477, 144 P.2d 693 (1914).....	4
<i>State v. Whitney</i> , 69 Wn.2d 256, 418 P.2d 143 (1966).....	4, 6, passim
<i>State ex. rel. Gebinini v. Wright</i> , 43 Wn.2d 829, 264 P.2d 1091 (1953)....	6
<i>State ex rel. N.Y. Casualty Co. v. Superior Court for King County</i> , 31 Wn.2d 834, 199 P.2d 581 (1948).....	8

Table of Articles, Statutes, and Codes

Washington Constitution, Article 4, Section 6.....	8
RCW 7.16.....	3, passim

Table of Court and Evidence Rules

CrRLJ 8.3(b).....	1, passim
RALJ 2.2(c).....	4, 11
ER 702.....	13, 16

I. INTRODUCTION

The Petitioner Matthew Jacob, through co-counsel Andrew Elliott and Joshua Schaer, hereby petitions the Washington Supreme Court for review of the Court of Appeals, Division One, decision in *City of Seattle v. The Hon. George W. Holifield et al.*, Case Number 61679-0-I, filed and published May 26, 2009.

A statement of the issues, statement of the case, and argument is set forth below.

II. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals, Division One, err in finding that the government is entitled to a writ of review to correct mere “errors of law” in an interlocutory suppression decision, when the Supreme Court holds in *Commanda v. Cary*, that “a merely erroneous ruling is not in excess of the court’s jurisdiction?”¹

B. Did the Court of Appeals, Division One, err in finding that CrRLJ 8.3(b) does not allow for suppression of evidence as a less restrictive alternative than dismissal, when the Court of Appeals, Division Two, holds in *State v. Brooks*, that suppression is an adequate remedy under CrRLJ 8.3(b) and Supreme Court precedent in *State v. Marks*?²

¹ 143 Wn.2d 651, 23 P.3d 1086 (2001).

² *Brooks*, slip opin. No. 36171-0-II, filed March 24, 2009, citing *Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990).

III. STATEMENT OF THE CASE

The City of Seattle has charged Matthew Jacob with Driving Under the Influence. On March 11, 2008, the Hon. Judge George Holifield applied the findings of a prior ruling, *Seattle v. Kennedy*, Seattle Municipal Court case number 496912, to suppress the breath test in Mr. Jacob's case. The *Kennedy* ruling contains 96 findings of fact and 15 conclusions of law, including that the State Toxicology Lab engaged in "egregious" governmental misconduct of "the worst kind," and that the "sheer magnitude of the misconduct... leads the court to conclude... actual prejudice." The Court relied on CrRLJ 8.3(b) and *State v. Busig*³ to order suppression.

On April 25, 2008, the Hon. Judge Cheryl Carey of the King County Superior Court denied the City's Petition for a Writ of Review, finding that the City "failed to meet its burden."

On May 16, 2008, the City sought Discretionary Review in the Court of Appeals, Division One. On July 14, 2008, that request was granted, and the case proceeded to oral argument. A companion case, *City of Seattle v. Jacob Culley*, was also joined for purposes of appeal; that matter has been rendered moot by the Court of Appeals' decision to permit entry of a trial court disposition while the appeal had been pending.

³ 119 Wn.App. 381 (2003), 81 P.3d 143 (2003).

On May 26, 2009, the Court of Appeals, Division One, issued a published opinion in this case finding that: 1) the government may obtain a writ of review to correct “errors of law” made in an interlocutory trial court ruling, and 2) suppression of evidence is not an available remedy under CrRLJ 8.3(b).

IV. ARGUMENT

A. The Court of Appeals, Division One, Erred in Finding that a Writ Could Lie to Correct Mere Errors of Law from an Interlocutory Suppression Decision.

1. The Government’s Ability to Seek Higher-Court Review is Strictly Limited.

Writs fall within one of two categories, namely, “(1) the constitutional common law writ, and (2) the statutory writ.”⁴ A petition from a person in custody may give rise to the common law writ, while RCW 7.16 governs the statutory writ.⁵ The government has never been *entitled* to a writ, since a writ is, by definition, an exception to the entitlement of appeal.⁶

⁴ *Commanda v. Cary*, 143 Wn.2d 651, 23 P.3d 1086 (2001), citing *Bridle Trails Community Club v. Bellevue*, 45 Wn.App. 248, 724 P.2d 1110 (1986).

⁵ *Commanda*, 143 Wn.2d at 655.

⁶ See *City of Mount Vernon v. Mount Vernon Municipal Court*, 93 Wn.App. 501, 973 P.2d 3 (1998) [When a municipal court enters an order suppressing evidence, the City has no *right to a RALJ appeal* unless the trial court expressly finds that the practical effect of the order is to terminate the case. But the City *may apply* to the superior court for review of the lower court’s interlocutory ruling *by writ of review* [emphasis added].] A writ of certiorari is also discretionary upon a showing of the prerequisites under RCW 7.16.040, meaning that no automatic right to its issuance exists. *Commanda*, 143 Wn.2d 655.

Prior to adoption of the RALJ⁷, the government had a narrow common-law right to appeal.⁸ Under RALJ 2.2(c), the government's rights were expanded to include certain decisions from a court of limited jurisdiction, only if the appeal will not place a defendant in double jeopardy. But despite this broader scope of the government's right to obtain appellate review, the baseline remains that "appeals by the government in criminal cases are something unusual, exceptional, and not favored."⁹

The long-standing rule limiting the government's right to review also applies to writs. While RALJ 1.1(b) still retains statutory writs for decisions by court of limited jurisdiction, certiorari is considered "an extraordinary remedy."¹⁰

Interlocutory review by any litigant is also disfavored. As stated in *Mattson v. Kline*: "the law favors a trial on the merits and looks with disfavor

⁷ The RALJ rules were promulgated in 1980 and adopted in 1981, pursuant to the authority in RCW 3.02.020. But the current RALJ 2.2 was not adopted until 1987. See 108 Wn.2d 1142 (1987).

⁸ See *State v. Whitney*, 69 Wn.2d 256, 418 P.2d 143 (1966). [Appeal permitted only when the lower court set aside an indictment or information, arrested the judgment because the facts did not constitute a crime, or committed a material error in law not affecting acquittal on the merits.]

⁹ *Carroll v. United States*, 354 U.S. 394, 77 S.Ct. 1332 (1957); see also *State v. Miller*, 82 Wash. 477, 144 P.2d 693 (1914) [The Washington Constitution grants criminal defendants the right to appeal, but gives no corresponding right to the State]; *State v. Johnson*, 24 Wash. 75, 63 P. 1124 (1901) [Under the common law, the government could not appeal a lower court ruling in a criminal case.].

¹⁰ *Commanda*, 143 Wn.2d at 655, citing *Odegaard v. Everett School District*, 55 Wn.App. 685, 780 P.2d 260 (1989). *City of Seattle v. Williams*, 101 Wn.2d 445, 680 P.2d 1051 (1984).

on the trying of a case by piecemeal.”¹¹ Thus, when the government seeks a statutory writ concerning a pre-trial suppression order, an exceptionally high standard must be met to support its request.

2. A Statutory Writ Cannot be Issued Without Meeting the Requirements of RCW 7.16.040.

Before the court has jurisdiction to issue a statutory writ, the requirements of RCW 7.16.040 must be met:

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

A finding of two elements is necessary for issuance: one, an excess of jurisdiction or illegal act by the inferior tribunal, and two, no appeal or adequate legal remedy.¹² Once both prongs are satisfied, the court then has discretion to grant or deny the writ.¹³

¹¹ 47 Wn.2d 538, 288 P.2d 483 (1955).

¹² *Commanda, supra.*, citing *City of Seattle v. Williams*, 101 Wn.2d 445, 680 P.2d 1051 (1984).

¹³ *Bushman v. New Holland*, 83 Wn.2d 429, 518 P.2d 1078 (1974), citing *State ex. rel. Gebinini v. Wright*, 43 Wn.2d 829, 264 P.2d 1091 (1953).

- a. Under the First Prong of RCW 7.16.040, The Lower Court's Decision Must be So Patently Erroneous as to Equate with an Jurisdictional Excess.

As stated above, RCW 7.16.040 requires an excess of jurisdiction, an illegal act, an erroneous or void proceeding, or a proceeding not according to the course of the common law, to satisfy the statutory first prong before a writ may be issued.

In *State ex. rel Gebinini v. Wright*, the court held that a petition for a writ of prohibition was properly dismissed when the challenged action did not exceed statutory authority.¹⁴ A decade later, the Washington Supreme Court expanded its discussion of the first prong in *State v. Whitney*.¹⁵ In *Whitney*, the court recognized that the government could not appeal from an order excluding evidence.¹⁶

While the *Whitney* court granted the writ, it only did so because one, the review involved a “patently erroneous construction of a statute,” and two, the error was likely to reoccur in other courts.¹⁷ Since the State had no appeal right at the time of *Whitney*, the court based its reasoning only on the first prong of the requisite writ test.¹⁸

¹⁴ 43 Wn.2d at 833-834.

¹⁵ 69 Wn.2d 256, 418 P.2d 143 (1966).

¹⁶ 69 Wn.2d at 260.

¹⁷ *Id.* at 260-261. In *Whitney*, the trial judge committed obvious error by barring the use of fingerprint evidence in criminal cases, contrary to RCW 72.50.

¹⁸ *Id.* at 260.

The *Whitney* holding was reaffirmed in *Bushman v. New Holland Div. of Sperry Rand Corp.*, where the court found that a likely reoccurrence of a patently erroneous statutory interpretation justified issuance of a writ in extreme cases.¹⁹

In *State v. Epler*, Division Three held that,

[t]he threshold for a discretionary writ is not whether the district court committed error of law, but whether the court had jurisdiction to decide the motion.²⁰

The *Epler* court found that a statute conferred jurisdiction to the lower tribunal, and the trial judge acted with discretion, rather than in clear error of the law.²¹

Division One criticized the *Epler* decision in *City of Seattle v. Keene*.²² The *Keene* court applied the standard articulated in *Whitney* and *Bushman* to hold that patent errors of law may be reviewed by statutory writ.²³ *Keene* also distinguishes *Epler* as discussing the writ of prohibition.²⁴

While *Keene* states that the writ of prohibition has a different purpose, character, statute, and history than the writ of certiorari, that assessment does not negate *Epler*'s reasoning.²⁵ The superior court derives

¹⁹ 83 Wn.2d at 432.

²⁰ 93 Wn.App. 520, 969 P.2d 498 (1999).

²¹ *Id.* at 524-525.

²² 108 Wn.App. 630, 31 P.3d 1234, *amended on denial of reconsideration* (2001).

²³ *Id.* at 643.

²⁴ *Id.* at 637.

²⁵ *Id.*

its power to issue both writs of prohibition and certiorari from Article 4, Section 6 of the State Constitution. There is a separate statutory section defining the grounds for granting a writ of prohibition, but there is also a long line of case law detailing the factors necessary for its issuance.²⁶ As the Supreme Court held in *State ex rel. N.Y. Casualty Co. v. Superior Court for King County*,

We have repeatedly stated that *the writ of prohibition is available only where the court which is sought to be prohibited from further proceedings is acting without or in excess of its jurisdiction*, and then only in cases where there is no adequate remedy by appeal. [Emphasis added.]²⁷

This analysis is helpful because *Epler* provides an explanation of the necessary factors supporting an interlocutory writ.

Keene is correct that the writ of review lies to correct errors of law, but that review only occurs *after* the statutory test for issuance is satisfied. Based on the *Epler* holding, and the *Whitney* line of reasoning, the first prong of the test can only be met when the lower court decision is a patent error such that the ruling is so obviously against the course of common law as to essentially result in an excess of jurisdiction.²⁸

²⁶ See RCW 7.16.300.

²⁷ 31 Wn.2d 834, 199 P.2d 581 (1948) [citations omitted].

²⁸ [This rule is similar in the administrative law context, where review by certiorari “extends to administrative actions which may be deemed arbitrary and capricious or illegal, *the essence of exceeding one’s authority or jurisdiction.*” [Emphasis added.] *Bridle Trails Community Club v. Bellevue*, 45 Wn.App. 248, 724 P.2d 1110 (1986), *citing Williams v. Seattle School District*, 97 Wn.2d 215, 643 P.2d 426 (1982).]

A discretionary ruling that does not rise to the high level of patent error will not be reviewed by statutory writ.²⁹ In *Commanda v. Cary*, the Supreme Court cites *Epler* with approval for the proposition that:

[i]f the court has subject matter jurisdiction, a merely erroneous ruling is not an act in excess of the court's jurisdiction, and therefore no writ lies. The court's exercise of discretion is not reviewable by extraordinary writ.

Keene cannot be interpreted to hold that a mere allegation of a wrong ruling is sufficient under the first prong of RCW 7.16.040. Such an interpretation is inconsistent with the *Commanda* holding, and does not rise to the "patently erroneous" standard in *Whitney*. Moreover, any conflict between *Commanda* and *Keene* must be resolved in favor of the Supreme Court decision.³⁰

It was error for the Court of Appeals, Division One, to rely on *Keene*, and disregard *Commanda*, in this case. The lower court ruling here was not a patently erroneous act amounting to jurisdictional excess.

²⁹ See *Commanda*, 143 Wn.2d at 656.

³⁰ See *State v. DeVincentis*, 112 Wn.App. 152, 47 P.3d 606 (2002), affirmed 150 Wn.2d 11, 74 P.3d 119 (2003), citing *State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984) [once the Washington State Supreme Court decides an issue of state law, that interpretation is binding on all lower courts until overruled by the Supreme Court.] While *Keene* calls *Commanda*'s reliance on *Epler* "dicta," the *Commanda* holding clearly rejects the respondent's attempt to distinguish *Epler*, and thus that "reliance" is necessary to explaining the court's decision regarding the first prong.

b. The Second Prong of RCW 7.16.040 Requires No Adequate Remedies, Including Appeal.

The second prong of RCW 7.16.040 states there must be “no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law” before a writ *may* issue.³¹ Since “nor” functions as a conjunction, the requisites of “no appeal” and no “adequate remedy at law” are both necessary parts of the second prong for the writ to issue.³² As the court stated in *Commanda*, “the fact that an appeal will not lie directly from an interlocutory order is not a sufficient basis for a writ of review if there is an adequate remedy at law.”³³ Therefore, even without a RALJ appeal, the government may have other legal remedies that prohibit the issuance of a writ.

In *City of Seattle v. Williams*, Division One cited guidelines from *State v. Harris* to determine whether an adequate remedy at law exists:

[w]e are tempted to announce the rule that the remedy by appeal is inadequate whenever it appears inequitable to require the litigants to proceed through a lengthy, expensive trial which, if the present state of the case were allowed to continue, would mean an unquestioned reversal and termination of the entire litigation when appealed after the trial.³⁴

³¹ See also *Commanda*, *supra*.

³² *Commanda*, *supra*.

³³ *Commanda*, 143 Wn.2d at 656, citing *Epler*, 93 Wn.App. at 525.

³⁴ *Williams*, 101 Wn.2d at 455, citing *State v. Harris*, 2 Wn.App. 272, 469 P.2d 937 (1970). The term “unquestioned reversal” is similar to the rule that a decision must be “patently erroneous” before a writ lies.

Division Two cited this view with approval in *Butts v. Heller*, stating that a reviewable decision “must be such that the litigation will terminate once the error is corrected by means of interlocutory review.”³⁵

In *Keene*, the court remanded for a determination of adequate remedies, holding:

[t]he availability of appeals in other cases raising similar issues does not address the adequacy of the appeal remedy in this case. On this record, therefore, the availability of an adequate remedy other than the writ is unclear.³⁶

The *Keene* court also held that the likelihood of cross-appeal could not be discerned from the record, and therefore remand was proper to evaluate whether the City could proceed on the “under the influence” prong.³⁷

In *Mount Vernon v. Mount Vernon Municipal Court*, Division One stated that, “RAP 2.3(d)(3) provides that a writ of review is appropriate where a decision raises an issue of public interest.”³⁸ There is no indication that the *Mount Vernon* respondent supported the ruling to quash the writ. There is also no indication that the City of Mount Vernon was denied a RALJ 2.2 finding. The *Mount Vernon* court found “no tenable reason” to quash the writ, but did not analyze why no alternatives were

³⁵ 69 Wn.App. 263, 848 P.2d 213 (1993).

³⁶ 108 Wn.App. at 644-645.

³⁷ *Id.* at 644.

³⁸ 93 Wn.App. 501, 973 P.2d 3 (1998).

available. *Mount Vernon* still requires that the government possess no adequate remedy before a writ lies.³⁹

There are several alternatives to pursuing a writ of review for an interlocutory suppression decision, all of which must be foreclosed before the second-prong test is satisfied. Not all Driving Under the Influence charges are based on similar facts. In some cases, the loss of a breath test will severely impair the government's ability to secure a conviction. In other cases, there are still indicia of intoxication even without the breath test.

The government has been historically limited in seeking review of trial court decisions, especially those that, as *Whitney* noted, "inure to the benefit of the accused."⁴⁰ When a prosecution is able to continue under an alternative case theory, because the evidence is not material to securing a conviction, then an adequate remedy exists. Therefore, proceeding to trial under an alternative prong of the charge, without the suppressed evidence, is certainly justifiable.⁴¹

In this case, the Court of Appeals, Division One, holds that "without the breath test evidence, the City cannot show that the increased penalty is

³⁹ See *Keene*, 108 Wn.App. at 636.

⁴⁰ *Whitney*, *supra*. at 260.

⁴¹ [Furthermore, nothing prevents the City, as it did in the companion *Culley* case, from negotiating a pre-trial resolution when evidence is suppressed; this practice is routine for most criminal cases.]

warranted.”⁴² This conclusion not only speculates that the breath test will be admissible on other grounds, but that the City will obtain a conviction despite Mr. Jacob’s presumption of innocence.⁴³ The Court of Appeals, Division One, agreed with the City’s claim that the possibility of a cross-appeal was speculative; but then, certainly whether the trial court will ultimately need to consider an enhanced penalty at *sentencing* is equally unknown.

The substantial harm that occurs to the government’s case if an interlocutory patent error amounting to jurisdictional excess is not corrected must relate to the presentation of evidence at trial, not whether a penalty could be imposed in case of conviction. It was error for the Court of Appeals, Division One, to find “no scenario” where the City could possess an adequate legal remedy without a writ.

⁴² Slip Opin. No. 61679-0-I at 14.

⁴³ [The trial court has stated numerous times that, based on a different evidentiary hearing, the breath test in this case will be suppressed under ER 702 regardless of whether CrRLJ 8.3(b) applies. Moreover, trial courts routinely rely on suppressed breath tests as a factor at sentencing to determine the adequacy of substance abuse evaluation recommendations, and whether to exceed the mandatory minimum penalty.]

B. There is a Conflict Between the Holding in This Case, and Rulings of the Supreme Court and Other Divisions of the Court of Appeals, as to Whether CrRLJ 8.3(b) Permits Suppression of Evidence.

1. The Supreme Court and The Court of Appeals, Divisions Two and Three, Support Suppression as an Alternative Remedy Under CrRLJ 8.3(b).

For CrRLJ 8.3(b) to apply, two factors must be satisfied. First, there must be governmental misconduct. Second, that misconduct must give rise to prejudice affecting the defendant's rights to a fair trial.

In *Seattle v. Orwick*, the Supreme Court sets forth the general principle that suppression is the favored remedy over dismissal.⁴⁴ The Court articulates that, "dismissal is... unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused [by the government]."⁴⁵

Precedent in *State v. Marks*⁴⁶ and *Spokane v. Kruger*⁴⁷ apply the *Orwick* rationale directly to CrRLJ 8.3(b). In *Marks* and *Kruger*, the Court quotes from *Orwick* that "dismissal is not justified when suppression of evidence will eliminate whatever prejudice is cause by the

⁴⁴ 113 Wn.2d 823, 784 P.2d 161 (1989).

⁴⁵ *Id.* at 831.

⁴⁶ 114 Wn.2d 724, 790 P.2d 138 (1990).

⁴⁷ 116 Wn.2d 135, 803 P.2d 305 (1991). *See also State v. McReynolds*, 104 Wn.App. 560, 17 P.3d 608 (2000); *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000). [In *McReynolds* and *Garza*, The Court of Appeals, Division Three, also approves of the *Orwick* analysis with respect to CrRLJ 8.3(b).]

action or misconduct.”⁴⁸ And in *Marks*, the Court writes that, “[s]uppression of tainted evidence denies the government the “fruits of its transgression.”⁴⁹

In *State v. Busig*, the Court of Appeals, Division Three, analyzes the ramifications of an officer’s failure to include information in an affidavit, and states, “neither dismissal *nor suppression* of the evidence under CrR 8.3(b) was justified.”⁵⁰ The Court of Appeals, Division One, refers to this statement in *Busig* as dicta.⁵¹

In *State v. Brooks*, the Court of Appeals, Division Two, recently articulated several alternatives to dismissal under CrRLJ 8.3(b) that were recommended *by the government*. The Court writes that these alternatives, under CrRLJ 8.3(b), include: “(1) release of the defendant to extend the speedy trial time from 60 to 90 days... [citation omitted]; (2) exclusion of witness testimony under CrR 4.7(h)... [citation omitted]; or (3) *suppression of evidence under State v. Marks*.”⁵² The *Brooks* Court also relies on *State v. Chichester* for the rule that it is the government’s responsibility to suggest alternatives to dismissal when misconduct

⁴⁸ See *Marks, supra.* at 730; *City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991), *citing Orwick, supra.* at 831.

⁴⁹ *Marks, supra.* at 730, *citing United States v. Morrison*, 449 U.S. 361, 366, 101 S.Ct. 665, 66 L.Ed.2d 564, *rehearing denied*, 450 U.S. 960 (1981).

⁵⁰ 119 Wn.App. 381, 390, 81 P.3d 143 (2003). [Emphasis added.]

⁵¹ *Seattle v. Hon. Holifield* slip opin. No. 61679-0-I at 7.

⁵² *Brooks*, slip opin. No. 36171-0-II, filed March 24, 2009, *citing Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). [Emphasis added.]

occurs.⁵³ In *Brooks*, the Court ultimately found severe governmental mismanagement affecting the defendant's right to a fair trial, and without adequate alternatives, dismissal was appropriate.⁵⁴

The *Brooks* opinion stands in contrast to this case, where the Court of Appeals, Division One, finds suppression is not "an alternative to dismissal under CrRLJ 8.3(b), without having an independent legal basis for suppressing the evidence."⁵⁵

2. The Record in This Case Establishes Governmental Misconduct that Prejudices Mr. Jacob.

Unchallenged findings of fact are verities on appeal.⁵⁶ Here, the trial court made 96 findings of fact outlining a pattern of governmental misconduct.⁵⁷ The City did not challenge any of those facts. All 96 facts are therefore considered verities in this case.

The trial court's decision based on these facts is subject to an abuse of discretion standard and is afforded deference.⁵⁸ As the Supreme Court notes in *State v. Luvene*, "[t]he trial court is in the best position to most

⁵³ See *State v. Chichester*, 141 Wn. App. 446, 448, 170 P.3d 583 (2007).

⁵⁴ *Brooks*, slip opin. At 21.

⁵⁵ *Seattle v. Hon. Holifield*, slip opin. No. 61679-0-I at 8. [As stated above, and as was argued to the Court of Appeals, Division One, the trial court has previously indicated a willingness to suppress the breath test under ER 702; however, review of this case is necessary due to the split of Division One from precedent in *Marks*, *Busig*, and *Brooks*.]

⁵⁶ *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

⁵⁷ See Appendix 2.

⁵⁸ See *State v. Brett*, 126 Wn.2d 136, 198-99, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). See also *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial."⁵⁹

Given the fact that a breath test above .08 g/mL makes a defendant *per se* guilty of Driving Under the Influence, introduction of breath test evidence tainted by governmental misconduct would invariably prejudice Mr. Jacob due to the strict liability nature of the alleged crime.⁶⁰

The Court of Appeals decision finding no basis for suppression under CrRLJ 8.3(b) and no prejudice to Mr. Jacob, means that the gross misconduct, and the "sheer magnitude" of errors that led the trial court to find "it is impossible to determine compliance with the methods approved" by the State Toxicologist, results in no admissibility problem for the government-proffered breath test at trial, unless a separate ground for suppression could be identified. This decision allows governmental misconduct to persist without a legal remedy. The trial court used a precise scalpel to remove the tainted evidence rather than the blunt hammer of dismissal, and the Court of Appeals, Division One, erred in finding CrRLJ 8.3(b) does not allow for that suppression decision.

⁵⁹ 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

⁶⁰ See *City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991). ["[s]uppression of any evidence acquired after a violation will serve as an effective deterrent to police misconduct. Because a Breathalyzer reading of 0.10 is conclusive proof of guilt in a DWI charge, police will want to ensure that the results of any Breathalyzer tests they administer will be admissible against the defendant."]

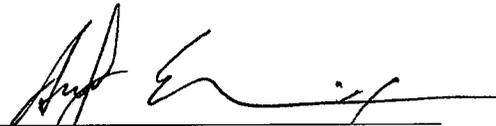
V. CONCLUSION

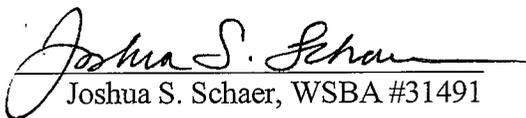
The Court of Appeals, Division One, was incorrect to hold that the government can receive interlocutory review of an claimed error of law, when such error is not patently erroneous and amounting to jurisdictional excess. The Court of Appeals continues to rely on the statement in *Keene* that the citation to *Epler* in *Commanda* is dicta. The Court of Appeals also erroneously finds that the government's need for a breath test due to the possibility of enhanced penalties after a conviction gives rise to suppression substantially harming the government's case.

The Court of Appeals, Division One, was also incorrect to hold that CrRLJ 8.3(b) does not allow for suppression as a less restrictive remedy to dismissal, when the Supreme Court holding in *Marks* permits suppression, as cited to by Divisions Two and Three. As such, Division One's ruling in this case creates a split of authority on this issue, requiring resolution in the Supreme Court.

In conclusion, Petitioner Matthew Jacob respectfully requests that the Supreme Court review the Court of Appeals decision reversing and remanding his case to the Seattle Municipal Court, for the reasons stated above.

Respectfully submitted this 1st day of June, 2009.


Andrew Elliott, WSBA #35106


Joshua S. Schaer, WSBA #31491

Attorneys for Petitioner Matthew Jacob

VI - a. APPENDIX I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE,)	NO. 61679-0-1
)	
Petitioner,)	DIVISION ONE
)	
v.)	
)	
THE HONORABLE GEORGE W.)	PUBLISHED OPINION
HOLIFIELD, SEATTLE MUNICIPAL)	
COURT; MATTHEW JACOB; JOHN)	
WRIGHT; and JACOB CULLEY,)	
)	
Respondents.)	FILED: May 26, 2009

LEACH, J. — This case addresses whether suppression of evidence is an available remedy under CrRLJ 8.3(b) and whether the prosecution may obtain a writ of review to correct errors of law made by a court of limited jurisdiction. We hold suppression of evidence is not an available remedy under CrRLJ 8.3(b). We also hold that the writ is available to correct errors of law and that the superior court erred in denying the writ. Therefore, we reverse.

Background

In 2008, respondents Matthew Jacob and Jacob Culley were each arrested and charged with driving while under the influence of alcohol (DUI). Each submitted to breath tests under RCW 46.20.308 and later moved to

suppress the breath test results because Ann Marie Gordon, the former manager of the Washington State Toxicology Laboratory, was listed as one of the toxicologists who tested and certified the simulator solution used in their breath tests. Respondents alleged that Gordon had signed false and misleading simulator solution certifications, certifying that she had tested simulator external standard solutions that she had not in fact tested.¹

The issue of misconduct in the state toxicology lab was litigated before the Seattle Municipal Court in City of Seattle v. Roger C. Kennedy.² Before a ruling was entered in Kennedy, the City and the respondents stipulated that the evidentiary ruling in Kennedy regarding Gordon's misconduct would apply to their cases.³

On March 11, 2008, the Honorable George W. Holifield entered an order in Kennedy on the defendants' motion, pursuant to CrRLJ 8.3(b), for an order dismissing their cases or, in the alternative, suppressing the results of their breath tests. This order suppressed all evidence of breath tests conducted with simulator solutions certified by Gordon. The municipal court concluded that the City could not establish compliance with RCW 46.61.506 for any breath test

¹ A simulator external standard solution is a solution containing a known alcohol vapor concentration; it is used as part of the breath test protocol to ensure the accuracy of the breath analysis instrument. WAC 448-16-030, -050. See also 13A SETH A. FINE & DOUGLAS ENDE, WASHINGTON PRACTICE: CRIMINAL LAW § 808, at 154-57 (1998 & Supp. 2008).

² Seattle Municipal Court, No. 496912.

³ Although the stipulation is not on the record before this court, the parties conceded this fact at oral argument.

using a simulator external standard solution allegedly tested by Gordon. The municipal court ruled that where suppression of evidence will eliminate the prejudice caused by governmental misconduct, suppression is an appropriate alternative remedy to dismissal under CrRLJ 8.3(b).

The City sought a statutory writ of review in King County Superior Court, arguing that suppression of evidence is not an available remedy under CrRLJ 8.3. The superior court held that the municipal court's ruling was "clear legal error" but denied the writ. On May 22, 2008, a commissioner of this court granted an emergency stay of the criminal proceedings pending a decision on the City's motion for discretionary review. On July 14, 2008, a commissioner of this court granted discretionary review of the superior court's order denying the writ and the municipal court's order suppressing evidence. In granting discretionary review, the commissioner ordered that the earlier stay remain in effect until further order of this court.

Suppression Under CrRLJ 8.3(b)

We review a lower court's interpretation of a court rule de novo.⁴ Court rules are interpreted using principles of statutory construction.⁵ Language that is clear does not require or permit any construction.⁶ Where there is no ambiguity in a rule there is nothing for the court to interpret.⁷

⁴ Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wn.2d 238, 244, 103 P.3d 792 (2004).

⁵ Specialty Auto, 153 Wn.2d at 249.

⁶ State v. Azpitarte, 140 Wn.2d 138, 140-41, 995 P.2d 31 (2000).

⁷ State v. Hutchinson, 111 Wn.2d 872, 877, 766 P.2d 447 (1989).

CrRLJ 8.3(b) authorizes a court of limited jurisdiction to dismiss a criminal prosecution where governmental misconduct prejudices the rights of an accused:

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. The court shall set forth its reasons in a written order.

CrRLJ 8.3(b) is clear and unambiguous. Dismissal is the sole remedy authorized by CrRLJ 8.3(b) for governmental misconduct.

Respondent Matthew Jacob argues that suppression is an available remedy for governmental misconduct under CrRLJ 8.3(b) despite the fact that the rule does not expressly allow it. However, none of the cases he cites holds that CrRLJ 8.3 or its superior court counterpart, CrR 8.3, authorizes suppression of evidence where there is no independent legal authority for suppression.

Jacob argues that suppression rather than dismissal is appropriate in all cases where suppression of evidence will eliminate any prejudice caused by governmental misconduct. In City of Seattle v. Orwick,⁸ the defendant was denied access to counsel for approximately 12 hours, in violation of former court rule JCrR 2.11.⁹ The trial court granted dismissal under CrR 8.3(b) based on governmental misconduct.¹⁰ Our Supreme Court reversed because the defendant was not prejudiced by the governmental misconduct.¹¹ In dicta, the

⁸ 113 Wn.2d 823, 784 P.2d 161 (1989).

⁹ Orwick, 113 Wn.2d at 831-32.

¹⁰ Orwick, 113 Wn.2d at 826.

¹¹ Orwick, 113 Wn.2d at 831-32.

Court went on to say that “[d]ismissal is also unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by an infringement of the right of access to counsel.”¹² However, suppression is not authorized by CrR 8.3(b), but rather it is a common law remedy for denial of access of counsel.¹³

Our Supreme Court has also held that dismissal under CrRLJ 8.3(b) was not warranted where suppression was available to exclude evidence obtained by the government during an illegal search. In State v. Marks,¹⁴ police officers exceeded the authorization in search warrants, conducting an illegal search in which they confiscated money and hundreds of items of property. Citing Orwick, the court stated that “[d]ismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct.”¹⁵ However, the authority to suppress evidence in Marks did not derive from CrRLJ 8.3 but from the common law remedy of “denying the prosecution the fruits of its transgression” where an illegal search or seizure has been conducted.¹⁶ Thus, Marks does not support Jacob’s argument that CrRLJ 8.3(b) provides an independent basis for suppression.

¹² Orwick, 113 Wn.2d at 831 (citing United States v. Morrison, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)).

¹³ See Orwick, 113 Wn.2d at 831; City of Spokane v. Kruger, 116 Wn.2d 135, 146-47, 803 P.2d 305 (1991) (holding that the proper remedy for violation of the right to counsel under former court rule JCrR 2.11 was suppression of any evidence obtained after the violation).

¹⁴ 114 Wn.2d 724, 790 P.2d 138 (1990).

¹⁵ Marks, 114 Wn.2d at 730.

¹⁶ Marks, 114 Wn.2d at 730 (quoting Morrison, 449 U.S. at 366).

The common lesson from Orwick and Marks is that where suppression is available as a remedy and will eliminate the prejudice caused by governmental misconduct, dismissal under CrRLJ 8.3(b) is inappropriate. However, these cases do not hold that suppression is an alternative remedy to dismissal under CrRLJ 8.3(b). In promulgating CrRLJ 8.3(b), the Supreme Court could have provided that a court may fashion an appropriate remedy to eliminate prejudice from governmental misconduct. However, the Supreme Court instead provided only that a court may dismiss a case if the accused has been prejudiced by governmental misconduct.¹⁷

Jacob further argues that State v. Busig¹⁸ approves suppression as a remedy under CrRLJ 8.3(b). There, the defendant brought a pretrial motion under CrR 3.6 to suppress evidence because officers submitted a pretextual application for a search warrant, and the trial court denied the motion.¹⁹ On appeal, the defendant also argued that her case should have been dismissed under CrR 8.3(b) due to governmental misconduct because a police officer gave misstatements and incomplete information in the affidavit of probable cause.²⁰ Division Three of this court held that a search conducted pursuant to a valid warrant could not be challenged as pretextual.²¹ In addressing the defendant's argument that her case should have been dismissed due to governmental

¹⁷ CrRLJ 8.3(b).

¹⁸ 119 Wn. App.381, 81 P.3d 143 (2003).

¹⁹ Busig, 119 Wn. App. at 386.

²⁰ Busig, 119 Wn. App. at 389.

²¹ Busig, 119 Wn. App. at 388-89.

misconduct, the court concluded that “neither dismissal nor suppression of the evidence under CrR 8.3(b) was justified,” because the warrant was supported by probable cause.²² However, Busig did not address whether suppression was an available remedy for governmental misconduct under CrR 8.3(b) but rather addressed two separate issues: (1) whether suppression was appropriate under CrR 3.6 and the state and federal constitutions and (2) whether dismissal was appropriate under CrR 8.3(b). To the extent any statement in Busig purports to recognize suppression as a remedy under CrRLJ 8.3(b), it is dicta and not a correct statement of the law.

As discussed above, existing case law is consistent with our conclusion that dismissal should not be used as a remedy if suppression is available and will eliminate any prejudice caused by the misconduct. However, the ground for suppressing evidence must be an independent common law or statutory ground; it is not available under CrRLJ 8.3(b). Here, no independent ground for suppressing the breath test evidence was argued.

While this court may affirm on any ground supported by the record, we find no basis for affirming the municipal court’s ruling in this case. The admissibility of breath test evidence is governed by RCW 46.61.506(4), which provides that breath test evidence is admissible if the prosecution produces prima facie evidence of eight factors regarding the accuracy of the test, delineated in subsection (4)(a). After this prima facie showing is made, all other

²² Busig, 119 Wn. App. at 390.

challenges to the breath test evidence go to the weight of the evidence, not its admissibility.²³ Although the municipal court concluded that “the plaintiff cannot establish compliance with RCW 46.61.506 for any breath test which used a simulator external standard solution allegedly tested by” Gordon, its findings of fact do not support this conclusion. Moreover, Jacob does not argue that the City failed to make a prima facie showing under RCW 46.61.506(4).

A trial court may exclude breath test evidence if it fails to comply with rules of evidence.²⁴ However, Jacob does not argue that the breath test failed to comply with the rules of evidence. Jacob’s only argument is that suppression was appropriate under CrRLJ 8.3(b). In its order, the municipal court relied only on CrRLJ 8.3(b) and Busig to suppress all breath tests conducted with simulator solutions allegedly tested by Gordon. We hold that the municipal court erred when it ordered suppression as an alternative to dismissal under CrRLJ 8.3(b) without having an independent legal basis for suppressing the evidence.

Moreover, for Jacob to be entitled to any remedy, he must show prejudice. In Orwick, our Supreme Court held that the defendant was not entitled to dismissal or suppression because he was not prejudiced by the governmental misconduct.²⁵ The municipal court’s findings do not support a conclusion that Jacob was prejudiced by the misconduct. The order simply concludes that “[t]he

²³ RCW 46.61.506(4)(c).

²⁴ City of Fircrest v. Jensen, 158 Wn.2d 384, 398-99, 143 P.3d 776 (2006). See also City of Seattle v. Ludvigsen, 162 Wn.2d 660, 681-82, 174 P.3d 43 (2007) (Madsen, J., concurring).

²⁵ Orwick, 113 Wn.2d at 831.

sheer magnitude of the misconduct in this case leads this court to conclude that the defendants' [sic] have demonstrated actual prejudice." However, the municipal court found that the practice in the state toxicology lab is to have every available analyst test each and every simulator solution so the analyst can testify in court about the preparation and certification of the simulator solution. The court also found that a minimum of three analysts must certify the solution. But the municipal court did not find that fewer than three analysts actually tested and certified the solution but only that Gordon and certain other employees in the toxicology lab had falsified simulator solution certifications. The findings of fact do not support the legal conclusion that Jacob was materially prejudiced by Gordon's failure to comply with protocols established by the state toxicologist. In order to show prejudice, Jacob must show that the simulator solution was not adequately certified. He has not.

In summary, suppression is not expressly authorized by CrRLJ 8.3(b) as an alternative to dismissal for governmental misconduct that materially prejudices a defendant. Here, the trial court erred by ordering suppression as an alternative to dismissal under CrRLJ 8.3(b) without having an independent legal basis for doing so.

Motion to Vacate Culley's Prosecution Disposition

On December 29, 2008, respondent Culley appeared for a pretrial hearing in municipal court. At that time, the City entered into a stipulation and order with Culley to continue his case for 24 months and to reduce the DUI charge to first

degree negligent driving if Culley met certain conditions described in the agreement during that time. The stipulation and order was entered by Judge E. Durham in municipal court. A week later, on January 6, 2009, the City requested, and the municipal court granted, a hearing on its motion to vacate the agreement because it was a wrongful entry of a disposition contrary to the stay of proceedings. The motion to vacate was heard by the municipal court on January 22, 2009, and denied. On January 28, 2009, the City filed a motion in this court to enforce the May 22, 2008, stay of proceedings, which would effectively relieve the City from performing its agreement with Culley.

The City argues that the municipal court lacked authority to enter the December 29, 2008, order because of the stay of proceedings ordered by this court. RAP 7.2(a) provides:

Generally. After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3.

Furthermore, RAP 7.2(e) applies to the authority of the trial court to modify a judgment or a motion after the appellate court has accepted review.²⁶ It provides in part:

If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.

²⁶ State ex rel. Shafer v. Bloomer, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999).

The municipal court's entry of the stipulation and order continuing the prosecution and amending the charges made this court's review of Judge Holifield's order moot as to Culley.

The City entered an agreement with Culley to continue his case and amend the charges in exchange for Culley stipulating to certain conditions, including the admissibility of all evidence against him. The City asserts that the order incorporating its agreement should be vacated because the attorney who appeared on behalf of the City at the pretrial hearing and made the agreement with Culley was not the attorney of record and was not authorized to make the agreement with Culley. In our view, it would not promote justice to allow the City to rescind an agreement it reached with a defendant who negotiated in good faith with an attorney representing the City at a hearing the defendant was required to attend. Whether a prosecutor appearing on behalf of the City negotiates an agreement with a particular defendant is entirely within the City's control.

We agree that one of the parties should have obtained permission from this court before the trial court formally entered the stipulation and order. However, we construe the Rules of Appellate Procedure liberally to promote justice and may waive or alter those rules in order to serve the ends of justice.²⁷

Under these circumstances, we do not believe the ends of justice are served by relieving the City from its obligations under the agreement it made with

²⁷ RAP 1.2(a), (c).

Culley. We therefore deny the City relief from the stipulation and order, which is dispositive of Culley's case.

Availability of Writ of Review

The City argues that the superior court erred in denying its petition for a writ of review. We agree.

The writ may be granted only when an inferior tribunal has exceeded its jurisdiction or acted illegally and there is no adequate remedy at law. RCW 7.16.040 provides:

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

The superior court may grant a writ of review only if (1) the municipal or district court exceeded its jurisdiction or acted illegally and (2) there is no appeal or adequate remedy at law.²⁸ Unless both elements are present, the superior court has no jurisdiction for review.²⁹

Here, the superior court's ruling denying the writ is ambiguous. The court stated, "Motion for Writ of Review is Denied. The Court finds that trial court's ruling is a clear legal error. The City has failed to meet its burden." It is unclear what burden the superior court believed the City failed to meet. Either the

²⁸ RCW 7.16.040.

²⁹ Commanda v. Cary, 143 Wn.2d 651, 655, 23 P.3d 1086 (2001).

superior court erroneously believed the trial court's clear legal error was insufficient to satisfy the first prong of RCW 7.16.040 or the superior court believed that the City failed to show it did not have another adequate remedy at law.

As discussed above, the trial court acted illegally when it ordered suppression under CrRLJ 8.3(b). Thus, the first element of RCW 7.16.040 has been met. Jacob argues that under Commanda v. Cary,³⁰ the writ was properly denied because the trial court's error was a "merely erroneous ruling . . . not an act in excess of the court's jurisdiction."³¹ However, as we stated in City of Seattle v. Keene,³² our Supreme Court in Commanda made this statement in the context of describing the City's arguments against the writ, and the court did not address the question of reviewability of errors of law.³³ Rather, Commanda held that the writ did not lie because a RALJ appeal was an adequate remedy at law. In Keene, we addressed the issue squarely and held that a statutory writ of review is available to the prosecution to correct errors of law.³⁴ Indeed, in Keene we held that the sole purpose of a writ of review is to correct errors of law.³⁵

Jacob also argues that the City has other remedies at law and thus fails to satisfy the second prong of the writ statute. He first argues that the City failed to

³⁰ 143 Wn.2d 651, 23 P.3d 1086 (2001).

³¹ Commanda, 143 Wn.2d at 656 (citing State v. Epler, 93 Wn. App. 520, 524, 969 P.2d 498 (1999)).

³² 108 Wn. App. 630, 31 P.3d 1234 (2001).

³³ Keene, 108 Wn. App. at 643.

³⁴ Keene, 108 Wn. App. at 639-40.

³⁵ Keene, 108 Wn. App. at 639-40.

pursue an available remedy of direct appeal under RALJ 2.2. However, a direct appeal under RALJ 2.2 was not available here because the City concedes that it could have proceeded to trial without the breath test evidence. RALJ 2.2(c)(2) allows direct appeal from “[a] pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.” Here, as in Keene, the City could not have sought a finality ruling under RALJ 2.2 in good faith because the City could proceed to prosecute respondents without the breath test evidence.³⁶ Thus, direct appeal under RALJ 2.2 was not an available remedy.

Jacob next argues that to go forward without the breath test evidence is a “plain, speedy, and adequate remedy” available to the City. However, going forward with the prosecution is not a remedy because it affords the City no opportunity to correct the trial court’s error of law. If the City were to prevail, it would have no right to appeal the trial court’s error because a party has no right to directly appeal from a favorable verdict.³⁷ If the City were not to prevail, it still could not appeal because it has no right to appeal a verdict of not guilty.³⁸ Furthermore, at oral argument the City asserted that, if admitted, the breath test evidence would show that Jacob had a blood alcohol level of more than 0.15, warranting an enhanced penalty under RCW 46.61.5055(b). Without the breath test evidence, the City cannot show that the increased penalty is warranted.

³⁶ See Keene, 108 Wn. App. at 644.

³⁷ RALJ 2.1, 2.2.

³⁸ RALJ 2.2(c)(1).

Finally, Jacob argues that there are other adequate remedies available to the City that cannot be ascertained on the record before this court, although he fails to suggest what those remedies may be. In Keene, the superior court held that the City was not without a remedy because it could cross-appeal the trial court's evidentiary rulings if the defendant were to be found guilty and appeal.³⁹ We held that the likelihood of an opportunity for cross-appeal could not be discerned on the record before us because we could not evaluate the strength of the City's case on the alternate prong referenced by the court, and the availability of an adequate remedy other than the writ was unclear.⁴⁰ Here, however, even that remedy would not address the enhanced sentencing issue raised by Jacob's alleged elevated breath test result. Therefore, no scenario has been hypothesized where the City can be afforded an adequate remedy if a writ of review is denied.

Because the writ of review is the only speedy and adequate mechanism for reviewing the trial court's error that is available to the City, we hold that the superior court erred in denying the writ.

³⁹ Keene, 108 Wn. App. at 644.

⁴⁰ Keene, 108 Wn. App. at 644-45.

Conclusion

The stay of proceedings previously ordered by this court is lifted and this matter is reversed and remanded for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Schindler, CJ

Appelwick, J

VI-b. APPENDIX II

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

IN RE: *City of Seattle*
Petitioner/Plaintiff

NO. *08-2-11198-9SEA*

ORDER ON CIVIL MOTION

v.
The Hon. George W. Holifield, Seattle Municipal Court
Respondent/Defendant
MATTHEW JACOB
JOHN WRIGHT
JACOB COLLEY

CLERK'S ACTION REQUIRED

THIS MATTER *HAVING COME BEFORE THIS COURT*
AND THE COURT HAVING REVIEWED ALL
RECORDS AND HAVING HEARD
ARGUMENT

IT IS HEREBY ORDERED:
Motion for Writ of Review is
Denied. The Court finds that Trial Court's
Ordering is a clear legal error. The City has
failed to meet its burden

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DONE this 25 day of April, 2008.



CHERYL B. CAREY
Superior Court Judge | Chief Criminal

VI.-c. APPENDIX III

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

IN THE SEATTLE MUNICIPAL COURT
KING COUNTY, STATE OF WASHINGTON

CITY OF SEATTLE,

Plaintiff,

vs.

ROGER C. KENNEDY,

Defendant.

NO. 496912

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
DEFENDANT'S MOTION TO
SUPPRESS BAC TEST RESULTS

INTRODUCTION

Pursuant to CrRLJ 8.3(b) the defendants moved the court for an order dismissing their cases, or in the alternative suppressing the results of their breath tests. The court hereby makes the following findings of fact and conclusions of law in support of its order denying the defendants' motion to dismiss and granting the defendants' motion to suppress the results of the defendants' breath tests.

FINDINGS OF FACT

1. Dr. Barry K. Logan ("BKL") was appointed State Toxicologist in July 1990.
2. BKL was appointed as Director of the Washington State Patrol's Forensic Laboratory Services Bureau in July 1999.
3. In July 1999 the Washington State Toxicology Laboratory ("Tox Lab") became part

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 1

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

- 1 of the Washington State Patrol.
- 2 4. Ann Marie Gordon ("AMG") was hired by the Tox Lab in 1998.
- 3 5. AMG became the manager of the Tox Lab in 2000.
- 4 6. One function of the Tox Lab is to prepare and certify simulator external standard
- 5 solutions used in the administration of the Washington State Patrol breath testing
- 6 program.
- 7 7. Simulator external standard solutions are water and ethanol mixtures formulated to
- 8 provide a standard ethanol vapor concentration when used in a breath alcohol
- 9 simulator at 34 ± 0.2 degrees Centigrade, of between 0.072 and 0.088 grams of
- 10 ethanol per 210 liters of air, inclusive.
- 11 8. To allow for depletion of alcohol from the solution during its use, the target starting
- 12 concentration is 0.082 g/210L.
- 13 9. Simulator external standard solutions are used as controls during the administration
- 14 of a breath test to ensure the BAC DataMaster, or BAC DataMaster CDM, is
- 15 operating correctly.
- 16 10. A properly administered breath test consists of a blank test, the verification of an
- 17 internal standard, a subject sample, a blank test, a test of an external standard
- 18 simulator solution, a blank test, a subject sample and a blank sample.
- 19 11. A properly administered breath test can yield an accurate and reliable measure of a
- 20 person's breath alcohol concentration ("BAC").
- 21 12. The testing of a simulator external standard solution is an essential requirement of a
- 22 properly administered breath test.
- 23 13. These simulator external standard solutions are prepared and certified in accordance
- with BKL's "procedure for the preparation of 0.08 simulator external standard
- solution for use with a breath test instrument."
14. This procedure for the preparation of the 0.08 simulator external standard solutions
- for use with a breath test instrument was promulgated by BKL as directed by RCW
- 46.61.506(3).
15. Exhibits 3, 4, 5, & 6, which were admitted in the Skagit County proceeding and
- stipulated to in this proceeding, are copies of the procedure for the preparation of
- 0.08 simulator external standard solutions.
16. A simulator external standard solution is not fit for use unless it meets all of the
- requirements promulgated by BKL.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 2

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

1 17. The Tox Lab prepares and certifies up to forty or more simulator external standard
2 solutions a year.

3 18. The certification of an simulator external standard solution requires the following:
4 (1) An individual with a valid Blood Analyst Permit, authorized by the State
5 Toxicologist, analyzes five separate aliquots of the simulator solution, by headspace
6 gas chromatography; (2) Record the results of the testing in the solution certification
7 database, including the date and the results of the contemporary external control; (3)
8 A minimum of three analysts must certify the solution prior to its certification; (4)
9 The average of the results from all of the analysts are computed (rounded to four
10 decimal places). The standard deviation and relative standard deviation (CV) on all
11 results are computed. (Freedman et al., 1978); (5) The solution is acceptable for use
12 and therefore certified if it meets the following criteria. The average solution
13 concentration must be between 0.098 and 0.108g/100mL inclusive. The CV must
14 be 5% or less; (6) The reference vapor concentration is calculated by dividing the
15 solution concentration by 1.23 and rounding to four decimal places; (7) A solution is
16 valid for use for a period of one year following its preparation.

17 19. It is the custom and practice of the Tox Lab to have every available analyst certify
18 each and every simulator external standard solution so the analyst can testify in
19 court about the preparation and certification of the simulator external standard
20 solution.

21 20. It is the custom and practice of the Tox Lab to have every analyst who certified a
22 simulator external standard solution to sign a worksheet with the results of their
23 analysis located thereon.

24 21. It is the custom and practice of the Tox Lab to have every analyst who certified a
25 simulator external standard solution to sign a BAC Verifier DataMaster 0.08
26 Simulator Solution Certification.

27 22. This certification, in part, says the signor personally examined and tested the
28 solution in question.

29 23. This certification is signed under penalty of perjury.

30 24. AMG was the Tox Lab Manager but she was also an analyst.

31 25. Every analyst employed in the Tox Lab was aware of these customs and practices.

32 26. AMG was aware of these customs and practices.

33 27. BKL was aware of these customs and practices.

28. Every analyst in the Tox Lab knew that AMG was participating in the certification
of the simulator external standard solutions because they saw her name on the

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 3

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

worksheets used to record the results of the testing of the simulator external standard solutions.

29. Every analyst in the Tox Lab knew, or had reason to know, that AMG was signing BAC Verifier DataMaster 0.08 Simulator Solution Certifications.
30. Sometime prior to becoming lab manager, AMG and BKL discussed the testing of simulator external standard solutions. This discussion arose because AMG told BKL that the former lab supervisor Dave Predmore did not do his own testing of simulator external standard solutions and she thought this was wrong.
31. During that discussion BKL told AMG that everyone would be required to conduct their own tests.
32. Sometime in 2003 Ed Formoso ("EF") became responsible for sending out simulator external standard solutions to breath test technicians for use in the WSP breath testing program.
33. EF noticed that it was difficult to send out simulator external standard solutions on a timely basis because AMG would take so long to certify the solutions.
34. Therefore, in 2003 EF started drawing and testing the five aliquots that were reportedly tested by AMG.
35. Beginning in 2003, AMG would sign the worksheet and sign the BAC Verifier DataMaster 0.08 Simulator Solution Certification.
36. Between February 5, 2004, and February 28, 2007, AMG signed forty-eight BAC Verifier DataMaster 0.08 Simulator Solution Certifications under penalty of perjury even though she did not test each of those solutions.
37. The clear and convincing evidence clearly shows that between February 5, 2004, and February 28, 2007, AMG signed BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury, which were false and misleading.
38. The clear and convincing evidence clearly shows that EF knew that AMG signed BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury, which were false and misleading.
39. The testimony of Estuardo Miranda ("EM") makes it clear that the fact that EF was testing simulator solutions for AMG was generally known in the Tox Lab.
40. EM testified that he knew of this for more than a year before he testified in Skagit County in October 2007.

- 1 41. Melissa Pemberton ("MP") testified that she knew this as far back as June 2005,
- 2 when EF asked her to run AMG's samples him.
- 3 42. MP tested simulator solution batch number 05017 for EF and AMG.
- 4 43. MP knew that AMG did not test this solution and from that point on she knew, or
- 5 had reason to know, that AMG was not testing the 0.08 simulator external standard
- 6 solutions herself.
- 7 44. MP and EM knew, or had reason to know, that AMG was not testing 0.08 simulator
- 8 external standard solutions herself.
- 9 45. MP and EM knew, or had reason to know, that AMG was signing BAC Verifier
- 10 DataMaster 0.08 Simulator Solution Certifications, under penalty of perjury, which
- 11 were false and misleading.
- 12 46. EM testified that it was generally know that AMG was not testing 0.08 simulator
- 13 external standard solutions herself.
- 14 47. The evidence showed that all analysts employed by the Tox Lab knew that AMG
- 15 would be signing BAC Verifier DataMaster 0.08 Simulator Solution Certifications,
- 16 under penalty of perjury.
- 17 48. The evidence showed that for at least a year, and possibly longer, it was generally
- 18 know, or should have been known, by the analysts employed in the Tox Lab that
- 19 AMG signed BAC Verifier DataMaster 0.08 Simulator Solution Certifications,
- 20 under penalty of perjury, which were false and misleading.
- 21 49. No analyst employed by the Tox Lab took any steps to terminate AMG's
- 22 misconduct during this time.
- 23 50. Analysts employed by the Tox Lab continued to rely on the worksheets to testify in
- court even though it was generally known that AMG did not test the simulator
- external standard solutions.
- 51. The actions of AMG, EF, MP, BKL and the remaining analysts in the Tox Lab
- demonstrate a disregard for the truth and a propensity to mislead.
- 52. On Thursday, March 15, 2007, at approximately 4:59 pm, the Washington State
- Patrol received a "tip" that "simulator solutions are being falsified as far as the
- certification."
- 53. This "tip" was received by the office of the Chief of the WSP on March 16, 2007.
- 54. The "tip" was routed to BKL for investigation.
- 55. On or about March 22, 2007, this complaint was received by BKL's office.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 5

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

- 1 56. Sometime in March 2007, BKL asked AMG to investigate this tip.
- 2 57. AMG and EF met sometime in March to decide how to investigate this matter.
- 3 58. When AMG and EF met, AMG told EF that AMG told BKL that EF was testing simulator external standard solutions for her.
- 4 59. AMG informed EF that she would no longer be required to test simulator external standard solutions and therefore EF would no longer be required to run tests for AMG.
- 5
- 6 60. The testimony of EF and Mark Larson make it clear that this fact was relayed to BKL when AMG and BKL first discussed the allegations of this complaint.
- 7
- 8 61. As AMG told ML, AMG told BKL this because it was the only thing she could think of that was wrong.
- 9
- 10 62. When EF and AMG met to discuss the investigation of the March 15, 2007, "tip" they intentionally decided not to reveal that EF was testing simulator external standard solutions for AMG.
- 11 63. This was a conscious decision made by EF and AMG and it revealed their intent to hide this fact from revelation.
- 12
- 13 64. EF and AMG then produced the April 11, 2007, interoffice communication revealing the results of their investigation.
- 14 65. Both EF and AMG signed the April 11, 2007, interoffice communication.
- 15 66. Neither EF nor AMG admit drafting the April 11, 2007, interoffice communication.
- 16 67. ML's testimony indicated that AMG said that EF drafted the April 11, 2007, interoffice communication.
- 17 68. EF's testimony, and the transcript of his interview with Sgt. Penry and Det. Moate, both with the WSP, indicates that AMG drafted the April 11, 2007, interoffice communication.
- 18
- 19 69. The evidence clearly established that the April 11, 2007, interoffice communication did not address the allegations of the complaint made on March 15, 2007. In fact, BKL admitted this in his testimony in Skagit County.
- 20
- 21 70. This April 11, 2007, interoffice communication was an attempt to hide the actions of AMG and EF.
- 22
- 23 71. BKL knew this and he did nothing to reveal the actions of EF and AMG.

- 1 72. After March 15, 2007, AMG stopped testing simulator external standard solutions at
2 the direction of BKL. The only inference that can be drawn is that BKL knew that
EF was testing simulator external standard solutions for AMG.
- 3 73. BKL knew, or should have known, that everyone who tested simulator solutions
4 signed a BAC Verifier DataMaster 0.08 Simulator Solution Certifications, under
penalty of perjury.
- 5 74. In March 2007, BKL knew that AMG was signing BAC Verifier DataMaster 0.08
6 Simulator Solution Certifications, under penalty of perjury, which were false and
misleading.
- 7 75. BKL, AMG and EF kept this wrongdoing quiet until after July 9, 2007.
- 8 76. On July 9, 2007, the WSP received a second "tip".
- 9 77. This "tip" said, "AMG doesn't really certify all those simulator solutions. If you
10 look in the file you'll find a grammatagram with her name on it, but if you also
check over the years of where she really was on the days that those things were
11 certified you'll find once in a while she was in DC or Alaska, or somewhere else.
She had somebody else do it and then she'll sign the forms that says, under penalty
12 of perjury I analyzed this. If you don't think that's a big deal just think what
Francisco Duarte would think of that."
- 13 78. On July 10, 2007, Deputy Chief Paul Beckley assigned this second "tip" to BKL for
investigation.
- 14 79. BKL then revealed the actions of AMG and EF. This revelation led to a criminal
15 investigation into the actions of AMG and EF.
- 16 80. The evidence clearly shows that AMG, EF and BKL engaged in an attempt to keep
these activities from becoming know.
- 17 81. The Defendants have established that there was governmental misconduct and an
18 attempt to cover up this governmental misconduct.
- 19 82. As MP testified during the Seattle Municipal Court evidentiary hearing, the signing
of the BAC Verifier DataMaster 0.08 Simulator Solution Certifications is part of the
20 certification process used in the Tox Lab.
- 21 83. The investigation into these allegations resulted in ML interviewing AMG.
- 22 84. ML testified about this interview and a copy of his notes of that interview was
admitted into evidence.
- 23 85. AMT told ML that other people in the lab were not conducting their own tests.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 7

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

- 1 86. To this day we do not know who else is falsifying their BAC Verifier DataMaster
2 0.08 Simulator Solution Certifications, under penalty of perjury.
- 3 87. The court finds that BKL was evasive and deceptive during his testimony.
- 4 88. The court finds that MP was evasive and deceptive during her testimony.
- 5 89. The court finds that EF was evasive and deceptive during his testimony.
- 6 90. The court finds that the evidence clearly shows that the analysts at the Tox Lab
7 knew that AMG was falsely signing BAC Verifier DataMaster 0.08 Simulator
8 Solution Certifications, under penalty of perjury.
- 9 91. The court finds that it is impossible to determine when AMG tested her own
10 solutions.
- 11 92. The court finds that a properly certified simulator external standard solution must
12 comply with the procedures created by BKL.
- 13 93. The court finds that it is impossible to determine compliance with the methods
14 approved by BKL for any simulator external standard solution allegedly tested by
15 AMG.
- 16 94. The court finds that the plaintiff cannot establish compliance with RCW 46.61.506
17 for any breath test which used a simulator external standard solution allegedly tested
18 by AMG.
- 19 95. There were numerous errors made by the Tox Lab calling into question the quality
20 of the work of the Tox Lab.
- 21 96. These errors are too numerous to list however they include; the signing
22 certifications for simulator external standard solutions before the solutions were
23 created; using software to perform calculations that was not working properly;
signing certifications for simulator external standard solutions that contained
misstatements; and worksheets that contained erroneous data.

CONCLUSIONS OF LAW

- 19 1. CrRLJ 8.3(b) authorizes a trial court to dismiss any criminal prosecution in the
20 furtherance of justice, and to ensure that an accused person is treated fairly.
- 21 2. A court may dismiss under CrRLJ 8.3 when the defendant shows: (1)
22 governmental misconduct; and (2) prejudice affecting the defendant's rights to a
23 fair trial. State v. Michielli, 132 Wn.2d 229 (1997).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 8

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

- 1 3. The underlying purpose of CrRLJ 8.3(b) is fairness to the defendant. State v
2 Stephans, 47 Wn. App. 600, 603 (1987).
- 3 4. The actions of the Tox Lab analysts, BKL, EF, MP and AMG amount to
4 governmental misconduct.
- 5 5. The misconduct here is egregious and considered by the court to be the worst kind
6 of governmental misconduct imaginable.
- 7 6. Where a state agent in a case against a criminal defendant has falsely declared
8 under penalty of perjury that they faithfully administered their duties, as a
9 predicate to securing admissible evidence at trial, then the resulting misconduct
10 eviscerates the defendant's rights to due process and a fair trial. See, State v.
11 Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990).
- 12 7. The defendant's must also show that they have been prejudiced as a result of the
13 governmental misconduct.
- 14 8. The sheer magnitude of the misconduct in this case leads this court to conclude
15 that the defendants' have demonstrated actual prejudice.
- 16 9. The court is left in a difficult position. The testimony of the government's
17 witnesses was so evasive and deceptive that the court does not believe them.
18 Therefore, to rely upon those witnesses would be prejudicial to the defendants'
19 rights to a fair trial.
- 20 10. CrRLJ 8.3(b) allows the court to dismiss under these circumstances.
- 21 11. However, the court may, in the alternative, suppress evidence if doing so would
22 eliminate the prejudice and allow the defendants' to have a fair trial. (see State v.
23 Busig, 119 Wn. App. 381(2003), where the court said, "Consequently, the
officer's failure to include this information in the affidavit did not prejudice Ms.
Busig and neither dismissal nor suppression of the evidence under CrR 8.3(b) was
justified." Although the court did not dismiss or suppress it included suppression
as one of the available remedies.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING DEFENDANT'S MOTION TO SUPPRESS BAC
TEST RESULTS - 9

FOX BOWMAN & DUARTE
Attorneys at Law
1621-114th Ave. S.E. Suite 210
Bellevue, Washington 98004
(425) 451-1995

1 12. When analyzing the remedies available under CrRJL 8.3(b) our Court of Appeals
 2 has held, "[a] court's decision under this rule is reviewed for abuse of discretion.
 3 State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). To support dismissal,
 4 a defendant must show arbitrary action or governmental misconduct. Id. at 239.
 5 Dismissal is not justified when suppression of evidence will eliminate whatever
 6 prejudice is caused by the action or misconduct. City of Seattle v. Orwick, 113
 7 Wn.2d 823, 831, 784 P.2d 161 (1989)." State v. McReynolds, 104 Wn. App. 560,
 8 17 P.3d 608 (2000).

9 13. In this particular set of cases suppression will eliminate the prejudice to the
 10 defendants'.

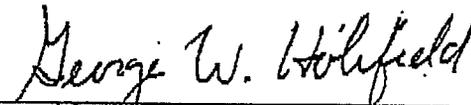
11 14. Therefore, it is the ruling of this court that the breath tests will be suppressed.

12 15. All breath tests conducted with simulator solutions allegedly tested by AMG are
 13 hereby suppressed.

14 **ORDER**

15 It is therefore ORDERED, ADJUDGED AND DECREED that the results of the
 16 Defendants' breath tests will be suppressed.

17 Dated this 11th day of March, 2008.

18 
 19 _____
 20 The Hon. George W. Holifield