STATE OF WASHINGTON
SNOHOMISH COUNTY DISTRICT COURT
☒CASCADE ☒EVERGREEN ☒EVERETT ☒SOUTH

STATE OF WASHINGTON

Plaintiff,

vs.

MARK FLANIGAN, ET AL.

Defendants.

NO. 5303A – 15D

MEMORANDUM OPINION

I. INTRODUCTION

The Court designates the above-captioned matter as the 'lead case' for purposes of these consolidated motions. This case was selected because Defendant's Supplemental Discovery Demand (Demand) admitted as Defendants' Exhibit 5 for these consolidated motions bears that caption. Additional cases from all four of the Snohomish County District Court Divisions have been joined in this motion. Defendants' Exhibits 1, 2, 3, and 4 are the calendars for each of the four Divisions and contain a listing of the consolidated cases.

II. PROCEDURAL HISTORY

This matter comes before the Court on Defendants' motion to compel discovery contained within Defendants' Demand. On 2 November 2015, a panel of Judges representing Snohomish County District Court heard evidence and argument regarding Defendants' Motion. Presiding over the hearing were Judge Steve Clough from the Evergreen Division, Judge Jeffrey Goodwin from the South Division, Judge Anthony Howard from the Everett Division and Commissioner Rick Leo from the Cascade Division. Both parties were given leave to supplement the record with cut-off date of 6 November 2015. Defendants submitted additional pleadings. No additional pleadings were received from the State.

III. FACTS

The State has commenced the process of phasing in a new breath-alcohol instrument, the Draeger Alcotest 9510 (Draeger). Defendants seek discovery of the materials listed in Defendants' Supplemental Discovery Demand (Demand) admitted as Defendants' Exhibit 5. A copy is attached to this Memorandum Decision.

In support of the Demand, Defendants presented testimony from Samuel Felton. Mr. Felton has been retained by Defendants to evaluate the software utilized by the Draeger. Mr. Felton

presented substantial credentials in the area of embedded software design, engineering and architecture. His training and experience qualify him as an expert in those areas. Mr. Felton testified that the Draeger uses embedded software and operates with two separate microprocessors, both of which he is familiar with.

Scope of the Demand

At first blush, the Demand submitted by Defendants appears onerous. After establishing his credentials, Mr. Felton testified to the need for each of the items listed in the Demand. In a very thorough and compelling fashion, Mr. Felton addressed each and every component of the Demand and why that item was both reasonable and necessary to his analysis of the software and processes utilized by the Draeger.

Mr. Felton testified that he would not be able to assess the accuracy and reliability of the Draeger software with access solely to the embedded software source code. In order to make that assessment, Mr. Felton testified that he would need to understand the process involved in the creation of that software. According to Mr. Felton, the items requested in the Demand are necessary for that assessment to occur. Other than cross-examination of Mr. Felton, the State presented no evidence to rebut defense testimony supporting the Demand.

Upon direct inquiry from the panel, neither the Prosecutors nor Defense Counsel were able to conclusively state that an independent analysis of the Draeger software has been completed. In materials submitted by Defendants, the State initially sought an independent analysis prior to purchase, but for reasons unknown to this Court, apparently abandoned that plan. The fact that no independent evaluation of the software and operating systems of the Draeger has been completed is also important to our finding on the scope of the demand.

Mr. Felton also testified that, provided industry standard software engineering protocols were followed, the process of responding to the Demand is not labor intensive. According to Mr. Felton, all information sought in the Demand should be contained within a single database that would require from mere minutes to a few hours to produce.

The need for access to a Draeger machine

Defendants have requested access to two Draeger machines. As explained by Mr. Felton, access to the Draeger would allow for dynamic, as opposed to static, testing of the software. According to Mr. Felton, dynamic testing is a process of comparing what the embedded software code should do to what the machine actually does. Static testing is an assessment of what the machine might do based on the embedded software code and involves a component of speculation and each avenue as to what the might do needs to be analyzed. That speculation process is avoided entirely with dynamic testing.

Mr. Felton testified that dynamic testing could be completed in 6 – 8 weeks, while static testing would require approximately 5000 hours to complete. He further testified that access to the two Draeger machines requested by Defendants would allow for evaluation of consistency. Mr. Felton's testimony regarding the need for access to Draeger machines for dynamic testing of the embedded software is unchallenged by the State.

Findings regarding the scope of the Demand

Each component of the Demand has been explained to the Court. The only evidence before the Court is that, while the Demand appears onerous, the items listed within the Demand are both reasonable and necessary to Defendants' analysis of the Draeger software. Given the vast disparity between the time needed for dynamic and static analysis, the request for access to Draeger machines is reasonable and necessary. Additionally, the only evidence before the Court is that complying with the demand would not be unduly burdensome.

IV. ISSUES

4.1 Does RCW 46.61.506(7) and *State v. Straka,* 116 Wn.2d 859 (1991), preclude Defendants from access to the materials requested in the Demand?

4.2 Does CrRLJ 4.7(a) apply to the materials requested in the Demand?

4.3 Does CrRLJ 4.7(d) apply to the materials requested in the Demand?

4.4 Does CrRLJ 4.7(e) apply to the materials requested in the Demand?

V. ANALYSIS

Defendants have asserted that the information they seek in the Demand is discoverable pursuant to statute and court rule. Defendants argue that RCW 46.61.506(7) specifically provides for discovery of the Demand materials. Defendants also argue that the State has an affirmative discovery obligation under CrRLJ 4.7(a) which includes law enforcement agencies. Defendants further assert that, if the State does not possess the Demand materials, the State must 'attempt to make them available' under CrRLJ 4.7(d). Finally, Defendants argue that the Demand materials fall under the discretionary disclosure provision of CrRLJ 4.7(e). The State resists every channel through which Defendants seek access to a Draeger instrument and software.

5.2 RCW 46.61.506(7)

> *RCW 46.61.506(7) Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.*

As a preliminary matter, the State argues that under RCW 46.61.506(7) and *State v. Straka,* 116 Wn.2d 859 (1991), the State has no obligation to provide any of the materials requested in the Demand. The State takes the position that each Defendant is entitled only to the Draeger information specific to his/her individual breath test. This panel finds that the State's reliance on

the language from *Straka* in arguing that RCW 46.61.506(7) does not require anything other than information about each defendant's own test result is unsupported by the facts in *Straka* and the plain reading of RCW 46.61.506(7).

In *Straka,* the defense was seeking invalid sample information from Datamaster breath tests in general although no defendant in the *Straka* case alleged an invalid sample error message during his/her test. The software installed on the Datamaster in Washington at purchase did not record and store such data. In 1986, WSP Sgt. Gulberg requested a software update for the Datamaster that permitted the recording of the invalid sample messages. The State then experimented with multiple versions of the new Datamaster software on a limited number of instruments. Each of the updated software versions was apparently problematic, and at the time of the Straka Court's ruling, none of the updated software remained on any Datamaster instrument in Washington.

The Trial Court made a factual finding that technology existed to record and preserve invalid sample messages and that the effect of not proceeding with the new software was to suppress evidence that could be available to the defendant. Ultimately, the Trial Court suppressed Datamaster breath test results.

On appeal, the *Straka* Court ruled that RCW 46.61.506(6), "[b]y its terms ... requires information be disclosed about a defendant's own test. The statute does not require that other information about the instrument's operation be made available." The factual scenario presented here is much different. In *Straka,* the defense sought data which the DataMaster did not collect. When the Straka Court ruled that RCW 46.61.506(7) does not require information other than the defendant's own breath test be disclosed, they were addressing a request for data the DataMaster was not programmed to keep. The defendants here seek data that is currently within the possession of the manufacturer, if not the Washington State Patrol.

In the consolidated cases before this panel, Defendants seek the opportunity to analyze the software and processes the Draeger utilizes to generate the analysis of their individual breath tests. Unlike in *Straka* where the request was for something the instrument was not programmed to do, this request is to investigate the software and processes the instrument is designed to do. The State's reliance on the language from *Straka* to argue that defendants are not entitled to full information concerning tests is misplaced and ignores the plain language of RCW 46.61.506(7), which requires disclosure of "full information concerning the test or tests" be provided to the defendants.

CrRJL 4.7

The scope of criminal discovery is within the trial court's discretion. The appellate courts will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. *State v. Yates,* 111 Wash.2d 793, 797, 765 P.2d 291 (1988). Under CrRLJ 4.7(e), the burden resides with the

moving party. *State v. Boyd*, 160 Wash. 2d 424 (2007). There is less clarity regarding the burden for CrRLJ 4.7(a) and (d). For the reasons set forth below, this panel finds that burden in regard to 4.7(a) and (d) rests with the party opposing disclosure. In this case that is the State.

In our analysis of CrRLJ 4.7(a), *infra,* we reviewed a number of Washington cases discussing the broad purposes favoring disclosure which underlie our criminal discovery rules. We also consider that the resources available to the State generally outweigh those available to defendants. We also note that CrRLJ 4.7(e) specifically provides that the moving party has the burden, while the remaining rules are silent as to the burden. One conclusion to be drawn is that 4.7(e) is an exception rather than the general rule.

The civil rules can provide guidance when the criminal rules are silent. *State v. Gonzalez,* 110 Wn.2d 738 (1988); *State v. Hackett,* 122 Wn.2d 165 (1993). Under the civil rules, the burden of establishing entitlement to nondisclosure rests with the party resisting discovery. *Fellows v. Moynihan*, 175 Wash. 2d 641, 649, (2012); *Anderson v. Breda,* 103 Wash. 2d 901, 905, (1985). The party resisting discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting objections. *Everest Indem. Ins. Co. v. QBE Ins. Corp.*, 980 F. Supp. 2d 1273, 1277 (W.D. Wash. 2013).

CrRLJ 4.7(a)

Defendants assert that the materials requested in their Demand should be made available by the Prosecuting attorney pursuant to CrRLJ 4.7(a). The State makes two assertions in response. First, the State asserts that, because the materials requested by Defendants are not specifically listed within CrRLJ 4.7(a), the State has no obligation to provide any such materials that it might possess. Second, the State asserts that they must only locate and turn over materials which are with the possession of the Snohomish County Prosecuting Attorney's Office. Accordingly, the Prosecuting Attorney takes the position that, because they possess none of the materials demanded, they have no duty under CrRLJ 4.7(a).

Are the Supplemental Discovery Demand materials discoverable under CrRLJ 4.7(a)?

Defendants assert that the materials sought pursuant to the Demand are discoverable under CrRLJ 4.7(a). The State asserts that their discovery obligations under 4.7(a) fall solely within the four corners of the rule and, because software is not specifically enumerated, the State has no 4.7(a) discovery obligation regarding the Demand. In reviewing CrR 4.7 and CrRLJ 4.7, there are no significant differences relevant to the analysis before this panel. Several Washington cases discuss our Courts' approach to Criminal Rule 4.7 and the scope of its intended purpose.

From *State v. Duniven*, 65 Wn. App. 728 (1992):

It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process ..." *State v. Yates,* 111 Wash.2d 793, 797, (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub. Co. ed. 1971)). To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

From *State v. Yates*, 111 Wn.2d 793 (1988):
The principles underlying CrR 4.7 have been stated as follows: In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security. Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub'g Co. ed. 1971). Guidance in construing the criminal discovery rule is also found in CrR 1.2: These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.

From *State v. Boehme,* 71 Wash.2d 621, 632–33, (1967), cert. denied, 390 U.S. 1013 (1968):
[T]the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a 2–way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.

Utilizing an outlook consistent with important criminal procedure discovery cases from our Courts, we turn to CrRLJ 4.7(a) to determine whether, under any of the enumerated provisions, the Snohomish County Prosecuting Attorney should be required to turn over materials listed in the Demand that are within their possession or control. Given the broad purpose of criminal discovery identified above, several provisions of CrRLJ 4.7(a) are potentially applicable.

CrRLJ 4.7(a) - Prosecuting Authority's Obligations.
(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting authority shall, upon written demand,

disclose to the defendant the following material and information within his or her possession or control concerning:

. . .

(iii) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(iv) any books, papers, documents, photographs, or tangible objects which the prosecuting authority intends to use in the hearing or trial or which were obtained from or belonged to the defendant;

. . . .

This appears to be case of first impression in Washington. Neither this panel nor the parties have been able to locate a Washington criminal case addressing a discovery demand for software pursuant to Rule 4.7. For the reasons set forth above, we find that the State, as the party opposing discovery, has failed to support its objection with any objective facts and has failed to meet its burden that discovery should not be allowed. Given the broad purpose our Courts have outlined for discovery, the statutory obligation placed upon the State by RCW 46.61.506(7), and the State's failure to meet its burden opposing discovery, this panel finds that the materials requested in Defendants' Demand are discoverable under CrRLJ 4.7(a), sections iii and iv.

Defendants assert that a mirror image copy of the software used by the Draeger is essential to their analysis. Mr. Felton testified that, absent an exact copy of the materials utilized by the Draeger, the Defendants' analysis would be speculative. Defendants' mirror image request is supported by Washington case law. *State v. Boyd,* 160 Wn.2d.424 (2007) (exact duplicate is required). *State v, Grenning,* 169 Wn.2d 47 (2010) (State must produce mirror image for defendant to analyze with their own expert). "Under CrR 4.7(a) the burden is on the State to establish, not merely claim or allege, the need for appropriate restrictions. The defendant does not have to establish that effective representation merits a copy of the very evidence supporting the crime charged." *Boyd at 433.*

Does CrRLJ 4.7(a) include entities other than the Prosecuting Attorney?

CrRLJ 4.7 - Discovery

(a) Prosecuting Authority's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting authority shall, upon written demand, disclose to the defendant the following material and information within his or her possession or control concerning:

. . . .

(4) The prosecuting authority's obligation under this section is limited to material and information within the actual knowledge, possession, or control of members of his or her staff.

Defendants encourage this Court to adopt a reading of CrRLJ 4.7(a) that would make the Prosecuting Attorney responsible for materials within the possession or control of law enforcement agencies. For the reasons set forth below, this Court declines the invitation for such an expansive reading of CrRLJ 4.7(a).

Both parties have cited cases to this panel in support of their respective positions on whether such materials are within the possession or control of the Prosecuting Attorney. In *State v. Blackwell,* 120 Wn.2d 822 (1993), cited by the State, the Court held that personnel files of the Tacoma Police Department were not with the possession or control of the Pierce County Prosecutor for purposes of CrR 4.7(a).

Defendants cite to *State v. Mullen,* 171 Wn.2d 881 (2011), *Kyles v. Whitley*, 514 US 419 (1995), and *State v. Davila,* 183 Wn.App. 154 (2014), for the proposition that materials in possession of a law enforcement agency are constructively in the possession of the Prosecuting Attorney's office. The *Mullen, Kyles* and *Davila* cases all involve allegations of *Brady* violations. *Brady v. Maryland,* 373 U.S. 83 (1963). "Under the U.S. Supreme Court's current jurisprudence, to establish a *Brady* violation, a defendant must demonstrate the existence of each of three necessary elements: "(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, (1999)." *Mullen @ 895.*

The *Brady* cases cited by Defendants are of limited value. A *Brady* analysis is an after the fact, post-trial remedy that requires the Court to determine, among other things, whether prejudice ensued as a result of any alleged violation. The cases before this Court are all in a pre-trial posture and a *Brady* analysis is premature. Neither party has provided this Court with any case authority to suggest that CrRLJ 4.7(a) should be read as broadly as suggested by the Defendants.

Additionally, reading CrRLJ 4.7(a) as expansively as requested by Defendants would ignore the plain meaning of the language within the rule and would render CrRLJ 4.7(d) meaningless. Court rules should be interpreted similarly to statutes, giving effect to the plain meaning as an expression of the drafters' intent. *State v. Chhom,* 162 Wn.2d 451 (2007). Court rules must be read as a whole and separate provisions of the rule should be harmonized. *State v. Williams*, 158 Wn.2d 904 (2006).

A plain reading of CrRLJ 4.7(a)(1) and (4) limits the obligations of that rule to materials within the possession or control of the Prosecuting Attorney as set forth in *Blackwell.* If discoverable material is in the possession or control of persons other than the Prosecuting Attorney, CrRLJ 4.7(d) applies.

CrRLJ 4.7(d)

CrRLJ 4.7(d) Material Held by Others.
Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority, the prosecuting authority shall attempt to cause such material or information to be made available to the defendant. If the prosecuting authority's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

Because this panel has determined that the materials requested by Defendants in their Demand to be discoverable under CrRLJ 4.7(a), we find that the State must comply with CrRLJ 4.7(d) and attempt to cause such materials or information to made available to Defendants. Based upon the assertions from the State regarding the scope of contacts with the Draeger manufacturer, the State has not yet made efforts sufficient to constitute an attempt to make available the information sought in Defendants' Demand.

CrRLJ 4.7(e)

CrRLJ 4.7(e) Discretionary Disclosures.
(1) Upon a showing of materiality and if the request is reasonable, the court in its discretion may require disclosure of the relevant material and information not covered by sections (a) and (d).
(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

CrR 4.7(e) is a catch-all provision that gives trial courts the discretion to grant or deny reasonable requests for material and relevant evidence and the authority to condition disclosure to protect against certain risks. *State v. Grenning*, 169 Wn.2d 47 (2010). Under CrRLJ 4.7(e), the moving party must establish (1) that the evidence is relevant, (2) that the items sought are material, and (3) that the request is reasonable. Significantly, it places the burden of showing reasonableness and materiality on the defendant. *State v. Boyd*, 160 Wn.2d 424 (2007).

CrRLJ 4.7(e) - Relevance

ER 401 – Definition of Relevant Evidence
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence to an issue before the Court (materiality). *State v. Rice*, 48 Wn. App 7, (1987).

In these consolidated cases, the information sought by Defendants has probative value. The fact at issue is whether the software in the Draeger will produce an accurate and reliable breath test result. The State seeks to admit into evidence each of the Defendant's breath test results at trial and prove that the results are accurate and reliable. Defendants have presented evidence of errors attributed to the Draeger software. The material sought by Defendants has a tendency to prove or disprove the accuracy and reliability of the Draeger breath test results. The information sought by Defendants is also material under ER 401. Whether the Draeger operates to provide an accurate and reliable breath test result is of consequence to an issue before the Court. Accordingly, the information sought by Defendants is relevant.

A discovery request under CrR 4.7(e)(1) must then meet two additional threshold requirements before the court may exercise its discretion in granting the request: (1) the information sought must be material, and (2) the discovery request must be reasonable. 'Materiality' under 4.7(e) requires more than speculation that the information could be material. *Blackwell* at 829-30.

An unsupported claim that the discovery sought may lead to material information does not justify automatic disclosure of the documents. *Id.* A defendant must advance some factual predicate which makes it reasonably likely the requested file will bear information material to his or her defense. A bare assertion that a document "might" bear such fruit is insufficient. *Id.* If these two requirements are met, the trial court has the discretion to condition or deny the disclosure request if it finds the disclosure's usefulness is outweighed by a substantial risk of harm or unnecessary annoyance to any person. CrR 4.7(e)(2). *State v. Norby*, 122 Wn.2d 258 (1993).

CrRLJ 4.7(e) – Materiality

Defendants have asserted several issues regarding the Draeger software. The State has not presented any information to this panel to rebut or dispel the issues raised by Defendants. Defendants' first assertion involves a fuel cell component of the Draeger. Defendants claim that the Draeger software adjusts a value attributed to the fuel cell based on the age of that component. According to Defendants, the Draeger software adjusts the value of the subject's breath test result as the fuel cell ages.

Defendants also assert that the Draeger software collects data which is not made available to Defendants. Specifically, Defendants point to a graph showing breath volume for a breath test. Defendants assert breath volume is directly correlated to a breath-alcohol result. Defendants have been told that the requested information was not available, but then one defendant

subsequently received that data. Defendants argue that there may be other data collected by the Draeger software which has not been made available to Defendants.

Defendants also argue that correlation studies between inputted PBT results and breath test results show significantly higher breath test readings from the Draeger. Finally, Defendants argue that the Draeger reports breath test refusals at a 10% higher rate than the Datamaster and that the Draeger software has a role in whether a defendant is refusing by conduct.

Accordingly, Defendants have provided this panel with more than mere speculation that the information sought in the Demand is material. Having met their burden regarding materiality, Defendants must also establish the reasonableness of the request.

CrRLJ 4.7(e) - Reasonableness

Defendants devoted several hours of testimony from Mr. Felton regarding the scope of the Supplemental Discovery Demand. As stated above, this panel finds Mr. Felton well qualified to testify and offer opinions in the area of software engineering. Over the course of the testimony, Mr. Felton explained why each of the requested items and their sub-parts were necessary to his investigation. Mr. Felton also testified that, provided Draeger used practices generally accepted by software engineers as a standard, all of the software information requested should be contained within a single file computer file that would require no more than a few hours to produce.

The Prosecuting Attorney cross examined Mr. Felton but raised no significant challenges to the reasonableness of the information requested in Defendants' Supplemental Discovery Demand. The only evidence before this panel is that each of the items requested in the Supplemental Discovery Demand are reasonable. This finding is further supported by the statutory requirement that "full information concerning the test or tests shall be made available to him or her or his or her attorney." RCW 46.61.506(7).

VI. ORDER

6.1 RCW 46.61.506(7) and *State v. Straka,* 116 Wn.2d 859 (1991), do not preclude Defendants from receiving the materials identified in their Demand.

6.2 The materials sought in Defendants' Demand are discoverable under CrRLJ 4.7(a).

6.3. The State's obligation under CrRLJ 4.7(a) is limited to those materials within the possession or control of the Snohomish County Prosecuting Attorney's Office.

6.4 The Prosecuting Attorney shall provide to Defendants all of the materials listed in Defendants' Demand that are within their possession or control.

6.5 The State shall make available to Defendants two Draeger Alcotest 9510 instruments for a period of 60 days subsequent to Defendants receiving the materials requested in the Demand, or such other time and duration as ordered by the Court.

6.6 Because the Demand materials are discoverable under CrRLJ 4.7(a), the State must attempt to make such materials available to Defendants pursuant to CrRLJ 4.7(d).

6.7 The State shall make further effort pursuant to CrRLJ 4.7(d) to make Defendants' requested Demand materials available.

6.8 Defendants have met their burden pursuant to CrRLJ 4.7(e) to demonstrate relevance, materiality and reasonableness of the materials requested in their Demand.

6.9 Defendants request for discovery pursuant to CrRLJ 4.7(e) is granted. This panel will hear requests for relief by any aggrieved party pursuant to CrRLJ 4.7(e)(2) on 14 December 2015 at 9:00 am.

6.10 This panel will review compliance with the Court's Orders on 14 December 2015 at 9:00 am. at the South Division of the Snohomish County District Court.

DATED this 17th day of November, 2015.

Judge Jeffrey Goodwin
Snohomish County District Court
South Division

We Concur:

By Approved For Entry

Judge Steve Clough
Evergreen Division

Judge Anthony Howard
Everett Division

Commissioner Rick Leo
Cascade Division

IN THE DISTRICT COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH
SOUTH DIVISION

STATE OF WASHINGTON, Plaintiff, VS. MARK P FLANIGAN, Defendant.	) Case No.: 5303A-15D)) DEMAND FOR SUPPLEMENTAL) DISCOVERY))))

TO: THE CLERK OF THE COURT
AND TO: PROSECUTING ATTORNEY

COMES NOW the defendant by and through his attorney of record, Sullivan Law Group, PLLC, and hereby makes the following supplemental demand for discovery pursuant to RCW 46.61.506(7) where "upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney" and CrRLJ 4.7(a) and, specifically, (d) whereupon "material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting authority" is discoverable upon the defendant's request:

This is a formal demand for the following papers, documents and items relating to the Draeger Alcotest 9510 breath test machine and the Draeger Alcotest 9510 Measurement System Software Version 8322798 0.7; Configuration File Software Version 8322796 2.3 as used in the State of Washington, viz:

1. Two Draeger Alcotest 9510 breath testing machines as would be delivered to the Washington State Patrol (WSP) according to the specifications/customization outlined in the most recent contract between Draeger and the State of Washington which would be ready for use in the field by WSP with the most recent version of the WSP software installed not to precede the following:
   i. Windows CE 5.5 8322797
   ii. Measurement System Software 8322798 0.7 (aka Renesas M16 Binary)
   iii. Configuration File Software 8322796 2.3
   iv. Bootloader 1.5 8323536

Sullivan Law Group, PLLC
3209 Rockefeller Avenue
Everett, WA 98201
Ph: (425) 322-1076 – Fx: (425) 609-3760

2. A complete set of tagged and labeled build-tree snapshots, as one would find on a Draeger developer's workstation or build machine, of all sources including any and all of the following:
   a. Textual (Human-Readable) objects, to include but not limited to:
      i. files of source code, written in high-level languages such as C++, C#, mid-level languages such as IL or JVM, and/or assembler languages such as Renesas M16;
      ii. Make files (files used to command the compilers and linkers in the build/compile/link process), script files used to link executable code objects, Platform Builder files used to direct the process of image creation for Windows CE, and/or layout files to provide memory mapping/allocation for the created image.
   b. Binary objects, to include but not limited to:
      i. Pictorial images, such as icons, photographs, pictographs, background/desktop patterns, logos, scanned documents, video clips;
      ii. Pre-compiled binaries (as often provided by third-party Independent Software Vendors), such as device drivers, encryption keys, BLOBs, data store files, digital signatures, font files;
      iii. Sample data for calibration or sensor pre-compensation.
   c. The aforementioned Textual and Binary objects are to include all components necessary to build, compile and/or assemble all of the following software images or their functionally equivalent current versions:
      i. Windows CE 5.5 8322797
      ii. Measurement System Software 8322798 0.7 (aka Renesas M16 Binary)
      iii. Configuration File Software 8322796 2.3
      iv. Bootloader 1.5 8323536

   All of the aforementioned items are to be the same items as used to build the released software as provided to the State of Washington or any sub-entity thereof, in computer readable, high level language on CD ROM media for DOS/Windows or Linux based systems or in any computer readable form, if it exists in such a form, or may be converted to such a form, otherwise in such form as it currently exists, together with any instructions on the method for building the system to produce the images as required to use the software in the Draeger 9510.

3. A labeled, loadable, executable copy of the software as provided to the State of Washington or any sub-entity thereof in the form and on the medium used to load or install it into a Draeger 9510 device (e.g., USB stick, flash drive, etc.), along with instructions on the methods of use, analysis, verification, upgrading, and installation as well as the system requirements to use that software outside the Draeger 9510 device.

4. The brand and model of the device used to create, build, compile, and assemble the source code into machine language deployable images and the brand, title and revision level of the software used to create, compile, and assemble the source code into a machine executable binaries.

Sullivan Law Group, PLLC
3209 Rockefeller Avenue
Everett, WA 98201
Ph: (425) 322-1076 – Fx: (425) 609-3760

5. The functional specifications of the software program (to include but not limited to, the architecture, diagrams, user interface, specifications, error identification, handling specifications and hardware requirements).

6. Written design specifications for the software, to include but not limited to Software Requirement Specification, Software Design Specification, User Stories, Task Lists, Traceability Matrices

7. Written critical design reviews for the software to include but not limited to results of code reviews and/or formal Fagan inspections, Pair Reviews/Pair Programming changelogs.

8. Draeger-created and/or implemented acceptance testing scripts and results for the software, to include but not limited to Unit Test modules and/or Mock modules
   a. Draeger-created and/or implemented system test scripts and results for software and hardware error codes, such as but not limited to those described in the document "Draeger Alcotest 9510 Software Status and Hardware Error Codes"
   b. Draeger-created and/or implemented system test scripts and results for any and all error codes which may not appear in official company documentation, along with any description of said codes' significance with respect to system function and/or dysfunction

9. Any and all written information regarding the design, construction and testing of the software.

10. Any and all information/documentation on standards as it relates to acceptance procedures for Draeger 9510s before shipping said devices to customers to include but not limited to any and all information and/or documentation of traceability of acceptance standards to the National Bureau of Standards, compliance testing as per international requirements for diagnostic equipment, physiometric standards.

11. Any and all documentation detailing or including algorithms and/or formulas submitted to the software engineer or persons responsible for the development of the source code that were implemented into the current software versions operating within the Draeger 9510.

12. Any and all design, implementation and/or specification documents pertaining to the following, at the current revision level to match the devices currently in use by the State of Washington or any sub-entity thereof, in computer-readable format (such as DXF, DWG, SCH, SCM files), or in human-readable format (e.g., hard copy printout),to include but not limited to:
   a. Electrical schematics, parts lists, printed circuit board diagrams and/or bills of materials, for all electronic circuitry.
   b. Detailed specifications for all third-party componentry or sub-systems to include but not limited to fuel-cell modules, electrochemical detectors, spectrographic modules, sample pumps, flow meters, barometric pressure sensors, sample chamber temperature sensors, and/or infrared pyroelectric detectors in either computer readable format (e.g., PDF) or human-readable format (e.g. hard copy printout).

Sullivan Law Group, PLLC
3209 Rockefeller Avenue
Everett, WA 98201
Ph: (425) 322-1076 – Fx: (425) 609-3760

c. Certification documentation for any/all third party components as to Infrared, UV, R/F, ionizing or magnetic radiation levels associated with both static- and dynamic-state characteristics of all third-party componentry which may emanate any of the aforementioned radiation types. Said documentation to be delivered in either computer readable (e.g., PDF) or human readable (e.g., hard copy printout) format.

d. Documented and certified results of independent testing of the following, but not limited to:

   i. Effects, measurement and content of sample contaminants taken from tests with both positive and negative internal standards-type samples

   ii. Effects, measurement and type of RF interference on the individual sensors and the 9510 device as a whole

   iii. Test results as but not limited to those required by other State and/or Government agencies, e.g. Department of Transportation Testing Guidelines.

13. Copies of any and all independent testing of the Draeger Alcotest 9510 software and/or source code, to include, but not limited to:

   a. Testing by TUV;

   b. Testing by Germany's National Institute of Metrology (PTB);

   c. Testing by the European Technical Monitoring Association according to IEC 61508;

   d. Testing for compliance with WELMEC standards;

   e. Testing by OIML;

   f. Testing by Volpe National Transportation System Center (VNTSC); and

   g. Testing by the National Highway Traffic Safety Administration (NHTSA).

14. A list of the specific design issues and work-product which Draeger considers to be trade-secret.

YOU ARE HEREBY NOTIFIED that failure to comply with the demands contained herein will result in defendant moving for appropriate relief at time of hearing or trial under CrRLJ 4.7.

Respectfully submitted October 2, 2015.

Brian M. Sullivan, WSBA #38066
Attorney for Defendant

Sullivan Law Group, PLLC
3209 Rockefeller Avenue
Everett, WA 98201
Ph: (425) 322-1076 – Fx: (425) 609-3760