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IN THE KING COUNTY DISTRICT COURT, SOUTH DIVISION  
BURIEN COURTHOUSE, STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

\_\_\_\_\_

Defendant.

NO.

DEFENDANT'S PRETRIAL  
MOTIONS AND ORDERS THEREON

**NOTE FOR MOTION HEARING**

1. **Motions to Suppress Evidence**<sup>1</sup>

To suppress evidence based on a violation of RCW 46.64.015, RCW 46.61.021 and Art. 1, § 7 of the Washington State Constitution in that there was a lack of lawful authority to stop, detain, or arrest the defendant herein. Terry v. Ohio, 392 U.S. 1 (1968); State v. Thornton, 41 Wn.App. 506 (1985); State v. Michaels, 60 Wn.2d 638 (1962); CrRLJ 3.6.

**Factual Declaration:** The factual assertions below were taken from the sworn narratives of Trooper Cadet Armstrong and Trooper Triplett. These sworn narratives were provided to the defense in discovery. Those declarations, from Cadet Trooper Armstrong and Trooper Triplett establish the following basic facts:

On November 17, 2007, Trooper Cadet Armstrong was working alone at the Fauntleroy ferry directing traffic. At that time he heard what sounded like a collision and eventually he

1 approached two vehicles that were involved in a collision. Cadet Armstrong detained the  
2 defendant under authority of law and called Washington state patrol dispatch requesting that a  
3 trooper arrive on the scene. Cadet Armstrong's declaration is attached hereto.

4 Eventually, Trooper Triplett arrived. Trooper Triplett arrested Mr. \_\_\_\_\_ on suspicion  
5 of DUI and requested that he submit to a breath test. The substance of Trooper Triplett's sworn  
6 statement relating to the administration of the breath test is as follows:

7 *I set up the machine and after waiting the necessary time I clearly explained how to blow into the tubes  
8 and he attempted to blow. The first sample was accepted but he had trouble blowing into the mouth  
9 piece. He kept placing his tongue over the hole and stopping the breath from coming out; but the  
10 machine accepted it. The second sample was "incomplete" and a printed ticket came out of the  
11 machine. I set up the machine again and the third sample he submitted was an Invalid Sample. He  
12 was so intoxicated that he was hanging onto the counter and slouching down while drool was coming  
13 out his mouth while trying to blow. I must have changed the tube 5 times at this point.*

14 *At 1857 hrs I began my observation period again due to the Invalid Sample. After showing him several  
15 more times how to blow he got very emotional again. I told him that he needed to pay close attention to  
16 keep his tongue out of the way.*

17 *While waiting the necessary time before he could submit another sample he talked about his days as a  
18 hockey player at Michigan and how he made the team. At one point he was talking and just stopped,  
19 he looked directly at me for about 10-20 seconds with a blank stare and then he asked me "what was I  
20 saying". It was as if his brain froze and then thawed out in a few seconds. All the while he is talking  
21 with very slurred speech.*

22 *I set up the machine after waiting the necessary time and he blew a good sample and then on the  
23 second one he blew another Invalid Sample.*

*I advised Hedden that it was obvious to me that after all the instructions and attempts that he was  
physically unable to provide me two breath samples due to his intoxication and I was requesting blood  
from him to determine his intoxication level. I told him I was going to transport him to Highline Hospital.*

As the trooper's affidavit reveals, there were two accepted breath samples, but not on  
the same breath test sequence. Also, there were invalid samples and an incomplete sample was  
given. At one point it appeared to the trooper that the defendant had his tongue over the  
mouthpiece, blocking the air. Despite the fact that Mr. \_\_\_\_\_ had shown himself to be  
capable of providing adequate breath samples, Trooper Triplett decided that Mr. \_\_\_\_\_ was

1 “incapable” of providing breath samples and invoked the Implied Consent law, requesting that  
2 Mr. \_\_\_\_\_ provide a blood sample. Mr. \_\_\_\_\_ was transported to the hospital and a blood  
3 sample was taken.

4 Mr. \_\_\_\_\_ now moves to suppress all evidence herein as the product of an illegal  
5 detention and further moves to suppress the blood test on grounds that taking blood was not  
6 authorized under RCW 46.20.308.

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8 Summary of Arguments:

9 **A. UNLAWFUL DETENTION/ARREST**

10 Evidence obtained as the result of an unlawful arrest must be excluded. State v.  
11 Kennedy, 8 Wash.App. 633, 636, 508 P.2d 1386 (1973). *See Also* Wong Sun v. United  
12 States, 371 U.S. 471, 484-85, 83 S.Ct. 407, 415-16, 9 L.Ed.2d 441 (1963); State v.  
13 Mathe, 102 Wash.2d 537, 544-45, 688 P.2d 859 (1984); State v. Bonds, 98 Wash.2d at  
14 24, 653 P.2d 1024 (Utter, J., dissenting); State v. White, 97 Wash.2d 92, 104, 640 P.2d  
15 1061 (1982).

16 Where an officer has no jurisdiction to stop an individual for a presumed  
17 violation of the traffic code, the subsequent arrest is presumptively unlawful. “The  
18 concept of reasonableness embodied in the Fourth Amendment, and article 1, section 7  
19 of the Washington Constitution presupposes an exercise of lawful authority by a police  
20 officer. When a law enforcement official acts beyond his or her jurisdiction, the  
21 resulting deprivation of liberty is just as unreasonable as an arrest without probable  
22 cause. *See* United States v. Di Re, 332 U.S. 581, 595, 68 S.Ct. 222, 228-29, 92 L.Ed.  
23 210 (1948). *See Also*, State v. Bonds, 98 Wash.2d 1, 8, 653 P.2d 1024 (1982), *cert.*

1 *denied*, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983).” City of Wenatchee v.  
2 Durham, 43 Wash.App. 547, 550, 718 P.2d 819, 821 (1986).

3 It is axiomatic that the State always has the burden of proving a lawful arrest,  
4 once the authority to arrest is challenged. In this case the detention of the defendant by a  
5 Trooper Cadet was unlawful and the fruits of that arrest must be suppressed.

6 **B. SUPPRESSION OF BLOOD TEST:**

7 Washington law is clear that tests to determine an individual’s alcohol content pursuant to  
8 RCW 46.20.308 must be by breath only except in very explicit circumstances.<sup>2</sup> The request  
9 for blood in this case was premised on the trooper’s determination that Mr. \_\_\_\_\_ was  
10 “physically incapable” of providing a breath sample. This conclusion, however, is  
11 contradicted by Trooper Triplett’s own affidavit that reported Mr. \_\_\_\_\_ as giving (and  
12 therefore not “incapable” of giving) adequate breath samples into the machine. At one point  
13 the trooper indicates that Mr. \_\_\_\_\_’s tongue was covering the mouthpiece. This action  
14 could constitute a refusal to submit to a breath test but it would not be evidence that Mr.  
15 \_\_\_\_\_ was incapable of blowing.

16 WAC 448-16-040 provides as follows:

17 Foreign substances, interference, and invalid samples.

18 (1) A determination as to whether a subject has a foreign substance in his or her mouth  
19 shall be made by either an examination of the mouth or a denial by the person that he or she  
20 has any foreign substances in their mouth. A test mouthpiece is not considered a foreign

21 <sup>2</sup> RCW 46.20.308(3) states: “except as provided in this section, the test administered shall be of the breath  
22 only.” (2) reads in part: “...in those instances where the person is incapable due to physical injury, physical  
23 incapacity, or other physical limitation, of providing a breath sample...a blood test shall be administered by a  
qualified person as provided in RCW 46.61.506(5)...”

1 substance for purposes of RCW 46.61.506.

2 (2) If a subject is wearing jewelry or ornamentation pierced through their tongue, lips,  
3 cheek, or other soft tissues in the oral cavity, they will be required to remove this prior to  
4 conducting the breath test. If the subject declines to remove the jewelry or ornamentation,  
5 they will be deemed to have a physical limitation rendering them incapable of providing a  
6 valid breath sample and will be required to provide a blood sample under the implied  
7 consent statute, RCW 46.20.308.

8 (3) If during a breath test, interference is detected, this will invalidate the test. The subject  
9 will be required to repeat the test. A subject whose breath registers the presence of  
10 interference on two or more successive breaths shall be deemed to have a physical limitation  
11 rendering them incapable of providing a valid breath sample and will be required to provide  
12 a blood sample under the implied consent statute, RCW 46.20.308.

13 (4) In the event that the instrument records an "invalid sample" result at any point during  
14 the subject's test, that subject's test should be readministered, after again determining that the  
15 subject has no foreign substance in their mouth as outlined in WAC 448-16-040(1), and  
16 repeating the fifteen minute observation period.

17 The only scenario in the Washington Administrative Code that would have justified  
18 the conclusion that Mr. \_\_\_\_\_ was incapable of providing a breath sample is in subsection  
19 (3) referring to "interference." This is not the scenario presented in the case at bar.

20 The trooper had the choice of either continuing the breath test process or determining  
21 that by conduct, Mr. \_\_\_\_\_ was refusing to submit to a breath test. An individual may be  
22 deemed to have refused the breath test where by his words or actions he indicates an  
23 unwillingness to cooperate in the test procedure. Woolman vs. Department of Motor  
Vehicles, 15 Wash.App. 115, 547 P.2d 293 (1976). This scenario at bar, however, did not  
authorize the request to take blood in lieu of a breath test.

In City of Kent vs. Beigh, 145 Wn.2d 33, 32 P.2d 258 (2001), the Washington  
Supreme Court addressed the circumstances under which an officer may request a blood test  
pursuant to RCW 46.20.308. There, the parties agreed that Mr. Beigh had no physical defect

1 to his respiratory system, but the breath testing machine registered “interferent detected”  
2 upon several breath attempts. The Court held that the officer had no authority to require or  
3 permit an evidentiary blood test in lieu of the breath test.<sup>3</sup> In other words, the fact that the  
4 breath test machine registered “interferent detected” did not render Mr. Beigh physically  
5 incapable of providing a breath sample. The Washington Administrative Code was amended  
6 after the Beigh decision and although it now specifically states that repeated “interferent  
7 detected” samples deem the subject to be incapable of providing a breath sample, there was  
8 no amendment of the WAC to permit this finding if there is an invalid sample. Instead, the  
9 WAC requires the taking of another breath sample. (WAC 448-16-040(4) *infra.*) When a  
10 statute specifically designates the things or classes of things upon which it operates, an  
11 inference arises that the legislating body intended all omissions. In re Pers. Restraint of  
12 Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). It must therefore be presumed that the  
13 invalid sample scenario was intentionally excluded from the list of scenarios in breath testing  
14 that the WAC considers to deem a subject incapable of providing a breath sample.

15 The analysis of the court in the case of Rockwell vs. Department of Licensing, 94  
16 Wash.App. 531, 972 P.2d 1276 (1999) is helpful to this analysis. There, the Court of Appeals  
17 upheld the Grant County Superior Court’s determination that Mr. Rockwell was unwilling to  
18 provide the requisite breath sample despite his assertions of physical incapacity. There Mr.  
19 Rockwell verbally agreed to submit to the breath test, however according to the police officer  
20 he did not blow properly and was ultimately processed as a refusal. Mr. Rockwell argued  
21 that medical conditions, including low lung capacity caused by emphysema, rendered him

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23 <sup>3</sup> This should be distinguished from the circumstance where an individual requests an *additional* blood test to  
be used as exculpatory evidence, which is *not* performed in lieu of the evidentiary breath/blood test.

1 unable to comply with the test. The Superior Court determined that Mr. Rockwell failed to  
2 establish that any medical condition existing at the time of the test prevented him from  
3 producing breath samples, and found it particularly persuasive that one of his breath samples  
4 was in fact accepted by the machine. It upheld the finding that Mr. Rockwell had refused to  
5 submit to a breath test. The Court did not find him to have a physical limitation rendering him  
6 incapable of providing a breath test in part because he was able to provide a breath sample  
7 that was accepted. In the case at bar Mr. \_\_\_\_\_ provided two samples that were accepted by  
8 the machine during the course of the entire testing process.

9 Because the facts in this case do not support the application of an exception to the  
10 administration of a breath test to Mr. \_\_\_\_\_, the blood test was not authorized under RCW  
11 46.20.308 and should be suppressed.

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13 2. **Defendant's Statements**

To suppress all statements attributed to the defendant at the time of arrest.  
14 Edwards v. Arizona, 451 U.S. 477 (1981); State v. Johnson, 48 Wn.App. 681 (1987), and for a  
15 pretrial hearing pursuant to CrRLJ 3.5.

16 Motion is: granted \_\_\_\_\_  
denied \_\_\_\_\_  
reserved \_\_\_\_\_

1 **II. DISCOVERY MOTIONS**

2 1. **Widmark's Formula**

3 To compel disclosure of whether or not the prosecution intends to offer  
4 testimony regarding "retrograde extrapolation," or "Widmark's Formula," and, if so, to compel  
5 disclosure of the name(s) of the expert witness(es), his/her credentials, qualifications,  
6 education, training and experience, and disclosure of any documents, studies, reports, or other  
7 materials relied on or material to any aspect of such testimony, and for a summary of their  
8 testimony. RCW 46.61.506, CrRLJ 4.7(d).

6 Motion is: granted \_\_\_\_\_  
7 denied \_\_\_\_\_  
8 reserved \_\_\_\_\_

8 2. **Identity of Experts**

9 To compel disclosure of the identity of the specific breath test technician,  
10 simulator solution changer, and state toxicology lab technician the prosecution intends to call  
11 at trial, the subject of their testimony, the basis of their expertise, including qualification,  
12 education, training and experience, and disclosure of any reports, documents, or studies upon  
13 which they intend to rely or make reference to in any aspect of their testimony. CrRLJ 4.7.

11 Motion is: granted \_\_\_\_\_  
12 denied \_\_\_\_\_  
13 reserved \_\_\_\_\_

14 3. **Expert - Blood Test**

15 For discovery of the identity of any state expert witness concerning evidence  
16 of the defendant's alleged breath concerning evidence of the defendant's alleged breath or  
17 blood alcohol concentration. U.S. Constitution, Fourth and Fourteenth Amendments,  
18 Washington Constitution, art. 1 § 3. State v. Dunnivan, 65 Wn.App. 728 (1992), CrRLJ 4.7.

17 Motion is: granted \_\_\_\_\_  
18 denied \_\_\_\_\_  
19 reserved \_\_\_\_\_

19 4. **Expert - Physiological Effects**

20 For discovery of the identity of any state expert witness concerning evidence  
21 of the physiological effects of alcohol or any drug on the defendant's ability to operate a motor  
22 vehicle. U.S. Constitution, Fourth and Fourteenth Amendments; Washington Constitution, art.  
23 1 § 3, State v. Dunnivan, 65 Wn.App. 728 (1992), CrRLJ 4.7.

22 Motion is: granted \_\_\_\_\_  
23 denied \_\_\_\_\_  
reserved \_\_\_\_\_



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**DECLARATION OF COUNSEL IN SUPPORT OF MOTIONS:**

Jon Scott Fox declares as follows:

I am counsel for the defendant herein. The factual allegations made herein in support of the defendant's motions are based upon counsel's investigation and information and belief based upon information received by me from the defendant and upon information provided by the prosecution herein. I believe that there is a factual basis for the motions herein, that they are made in good faith, and that an evidentiary hearing regarding the motions is merited.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. (RCW 9A.72.085)

Presented by:

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JON SCOTT FOX  
Attorney for Defendant  
WSBA# 14785

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

,  
Plaintiff,

vs.

,  
Defendant.

NO.

DISCOVERY ORDER

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the prosecution shall comply with all granted discovery motions no later than 4 p.m. on the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

**DONE IN OPEN COURT** this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
JUDGE