

**STATE OF WASHINGTON  
SNOHOMISH COUNTY DISTRICT COURT**

CASCADE EVERGREEN EVERETT SOUTH

**STATE OF WASHINGTON**

Plaintiff,

vs.

**MARK FLANIGAN, ET AL.,**

Defendants.

**No. 5303A – 15D**

**ORDER DENYING CrRLJ 3.1(F)  
FUNDS**

**I. PROCEDURE**

This matter comes before the court at the request of Snohomish County Public Defenders' Office for the release of public funds pursuant to CrRLJ 3.1(f) for analysis of the Draeger AlcoTest 9510 (Draeger) software source code.

**II. FINDINGS**

2.1 The State of Washington has selected and commenced purchase of Draeger breath testing instruments to replace the DataMaster.

2.2 In the purchase agreement for the Draeger, the State of Washington specifically excluded an independent test of the instrument's software source code to determine the accuracy and reliability of the Draeger.

2.3 The primary rationale advanced by the State of Washington for excluding an independent software test is a belief that criminal defense attorneys would likely wish to conduct their own independent assessment regardless of any software evaluations procured by the State.

2.4 The only party presenting scientific testimony to the court regarding the Draeger is the consolidated defendants.

2.5 The uncontroverted evidence from defense expert, Mr. Felton, is that an evaluation of the Draeger software source code must be completed in order to determine the accuracy and reliability of the instrument.

2.6 This court has previously entered a finding that expert evaluation of the Draeger software source code is necessary to determine the accuracy and reliability of the instrument.

2.7 Consolidated defendants have secured, through previous court orders, two Draeger instruments and a copy of the software source code for evaluation.

2.8 Consolidated defendants have employed Mr. Felton to conduct the independent assessment of the Draeger software source code. However, that work has stopped due to lack of funding from the private bar to complete the assessment.

2.9 The Snohomish County Public Defender Association has sought funds pursuant to CrRLJ 3.1(f) to assist in paying for the independent assessment of the Draeger software source code.

2.10 To date, the State has not secured an independent assessment of the Draeger software source code.

2.11 An independent assessment of the Draeger software source code is a necessary predicate to any finding regarding the accuracy and reliability of the instrument.

2.12 No Draeger breath tests will be admitted into evidence over objection of the non-moving party until the moving party has established the accuracy and reliability of the instrument.

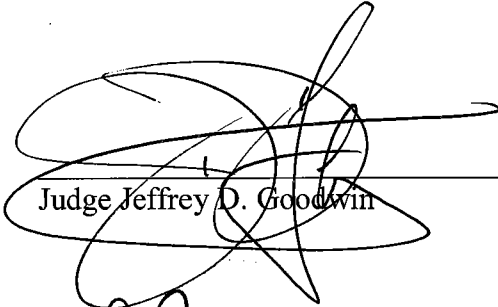
2.13 CrRLJ 3.1(f) public funds should not be used to evaluate evidence which has not been deemed admissible.

2.14 Until such time as the State establishes accuracy and reliability of the Draeger instrument, CrRLJ 3.1(f) public funds are not necessary.

### III. ORDER

The request for CrRLJ 3.1(f) public funds for defense assessment of the Draeger software source code is denied without prejudice because the moving party has not demonstrated that such funds are necessary.

**DATED** this 12th day of October, 2016.

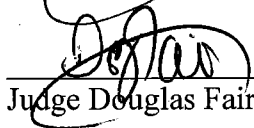


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Judge Jeffrey D. Goodwin

Concurring in the Result:

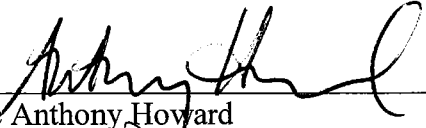


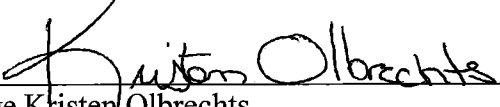
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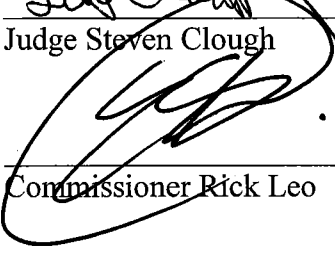
  
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Judge Tam Bui

  
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Judge Anthony Howard

  
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Judge Kristen Olbrechts

  
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Judge Steven Clough

  
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Judge Patricia Lyon

  
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Commissioner Rick Leo