

No. 70043-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUAN PEDRO ORTIZ-VIVAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Michael E. Rickert

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

01/17/2009 11:00 AM
K

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 4

 1. THE STATE FAILED TO ESTABLISH THE
 NECESSARY FOUNDATION FOR THE
 ADMISSION OF THE BLOOD TEST
 RESULTS..... 4

 a. Evidence of the result of a blood test is not admissible
 absent proof of the necessary foundation. 4

 b. The State failed to present *prima facie* evidence that
 the vials into which the blood sample was placed
 contained the required enzyme poison and
 anticoagulant..... 5

 c. The blood tests were not otherwise admissible as
 “other evidence” for proving intoxication. 10

 2. THE TOXICOLOGIST’S TESTIMONY
 REGARDING THE VIAL MANUFACTURER’S
 CERTIFICATE OF COMPLIANCE VIOLATED
 MR. ORTIZ-VIVAR’S RIGHT TO
 CONFRONTATION 11

 a. Defendants have a constitutionally guaranteed right to
 confrontation..... 12

 b. Admission of the manufacturer’s certificate violated
 Mr. Ortiz-Vivar’s right to confrontation. 13

c. The error in admitting the certificate of compliance was not harmless.....	15
E. CONCLUSION	16

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI..... 2, 12

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22 2, 12

FEDERAL CASES

Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)..... 13

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)..... 15

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)..... 12

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)..... 12

Lily v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)..... 15

Melendez-Diaz v. Massachusetts, 577 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)..... 13

WASHINGTON CASES

City of Fircrest v. Jensen, 158 Wn.2d 384, 143 P.3d 776 (2006)..... 4

City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 93 P.3d 141 (2004)..... 4, 10

State v. Bosio, 107 Wn.App. 462, 27 P.3d 636 (2001)..... 5, 6

State v. Brown, 145 Wn.App. 62, 184 P.3d 1284 (2008), *review denied*, 165 Wn.2d 1014 (2009)..... 9, 13, 14, 15

State v. Clark, 62 Wn.App. 263, 814 P.2d 222 (1991)..... 4, 6

<i>State v. Garrett</i> , 80 Wn.App. 651, 910 P.2d 552 (1996).....	6, 7
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	15
<i>State v. Hultenschmidt</i> , 125 Wn.App. 259, 102 P.3d 192 (2004)	5, 6
<i>State v. Kronich</i> , 160 Wn.2d 893, 899, 161 P.3d 982 (2007), <i>overruled on other grounds by State v. Jasper</i> , 174 Wn.2d 96, 116, 271 P.3d 876 (2012).....	12
<i>State v. Morales</i> , 173 Wn.2d 560, 269 P.3d 263 (2012)	9
<i>State v. Shafer</i> , 156 Wn.2d 381, 128 P.3d 87, <i>cert. denied</i> , 549 U.S. 1019 (2006).....	15
<i>State v. Wicker</i> , 66 Wn.App. 409, 832 P.2d 127 (1992)	14
<i>State v. Wilbur-Bobb</i> , 134 Wn.App. 627, 141 P.3d 6765 (2006).....	8
STATUTES	
RCW 46.61.502	4, 9, 10
RCW 46.61.506	5, 10
REGULATIONS	
WAC 448-14-020	5, 6, 7

A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of the results of the blood test.

2. Admission of the manufacturer's certificate of compliance showing that the vials contained an enzyme preservative and anticoagulant as required by the Washington Administrative Code (WAC) violated Mr. Ortiz-Vivar's right to confrontation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a prosecution for vehicular assault, prior to the admission of a blood test result to prove that the defendant had a blood alcohol level in excess of 0.08 or was under the influence of intoxicating liquor, the State must establish the vials holding the blood sample contained an anticoagulant and enzyme poison before the blood was drawn from the defendant. Here, the trial court lacked evidence that the specific vials used contained the required chemicals, but still admitted the results of the blood test after finding the State had established *prima facie* evidence the vials contained the relevant chemicals. Did the trial court err when it admitted the results of the blood test absent evidence that the specific vials used contained the required chemicals, requiring this Court to reverse Mr. Ortiz-Vivar's conviction?

2. The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee a defendant the right to confront and cross-examine witnesses against him. Admission of testimonial hearsay statements made by a non-testifying declarant violate the right to confrontation. Here, the State introduced a copy of the blood sample vials' manufacturer's certification, which was created by the prosecution for the sole purpose of proving the vials contained the required chemicals prior to adding the blood sample. Did the admission of this certificate of compliance violate Mr. Ortiz-Vivar's right to confrontation requiring reversal of his conviction and remand for a new trial?

C. STATEMENT OF THE CASE

Based upon observations by a concerned citizen, and the observations of Mount Vernon Police Officer Aaron Cohen, Juan Ortiz-Vivar was arrested for driving while under the influence (DUI) of drugs and/or alcohol. RP 4-7, 38-40. Concerned about Mr. Ortiz-Vivar's accidental ingestion of a large amount of cocaine, the officers had him transported to the hospital. RP 41-43.

Once at the hospital, after being advised of the implied consent warnings, Mr. Ortiz-Vivar agreed to a blood test of his blood alcohol

level. RP 23, 29. Officer Cohen retrieved vials for the blood samples from Officer Walter Martinez's car. RP 46. Phlebotomist Jamie O'Donohue drew blood from Mr. Ortiz-Vivar according to the required protocol and placed the blood in the vials provided by the police officers. RP 62-63.

The blood sample was sent to the Washington State Patrol Crime Laboratory where it was analyzed, and based upon the results, Mr. Ortiz-Vivar was charged with driving under the influence under all three alternatives. CP 1; RP 77-93.¹ Following a jury, Mr. Ortiz-Vivar was convicted of driving while under the influence, but the jury made no finding as to which alternative(s) Mr. Ortiz-Vivar was guilty.

¹ Mr. Ortiz-Vivar was also charged with possession of cocaine. CP 1. The jury was unable to reach a verdict as to this charge and a mistrial was declared. CP 37.

D. ARGUMENT

1. THE STATE FAILED TO ESTABLISH THE NECESSARY FOUNDATION FOR THE ADMISSION OF THE BLOOD TEST RESULTS

a. Evidence of the result of a blood test is not admissible

absent proof of the necessary foundation. Driving while under the influence of intoxicating liquor may be proven in two different ways: by showing the defendant's blood alcohol level was at least 0.08 within two hours after driving; or by evidence tending to show the defendant was under the influence of alcohol and/or other drugs. RCW 46.61.502; *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141 (2004).

In order to admit blood alcohol test results, "the State must present *prima facie* proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results." *State v. Clark*, 62 Wn.App. 263, 270, 814 P.2d 222 (1991). *See also City of Fircrest v. Jensen*, 158 Wn.2d 384, 399, 143 P.3d 776 (2006) (due process places the burden on the State to satisfy the foundational requirements of whatever test is attempted to be admitted). "A blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC

requirements.” *State v. Hultenschmidt*, 125 Wn.App. 259, 265, 102 P.3d 192 (2004). The trial court abuses its discretion when it admits evidence of the blood test result in the face of insufficient *prima facie* evidence. *State v. Bosio*, 107 Wn.App. 462, 468, 27 P.3d 636 (2001).

Prima facie evidence is defined as:

evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved.

RCW 46.61.506(4)(b).

Mr. Ortiz-Vivar submits the State failed to present *prima facie* evidence the blood samples were obtained and tested pursuant to the Washington Administrative Code (WAC) chapter 448-14, thus it was error to present the test results to the jury.

b. The State failed to present *prima facie* evidence that the vials into which the blood sample was placed contained the required enzyme poison and anticoagulant. WAC 448-14-020(3)(b) requires:

Blood samples for alcohol analysis *shall be preserved* with an anticoagulant and an enzyme poison sufficient in amount to prevent and stabilize the alcohol concentration. Suitable preservatives include the combination of sodium fluoride and potassium oxalate.

(Emphasis added).²

² Copies of pertinent WACs are attached in the Appendix.

“The purpose of requiring the use of anticoagulants and enzyme poison in the blood sample is to prevent clotting and or loss of alcohol concentration in the sample.” *Clark*, 62 Wn.App. at 270. The requirements of WAC 448-14-020 (3)(b) are mandatory. *Bosio*, 107 Wn.App. at 468; *State v. Garrett*, 80 Wn.App. 651, 653, 910 P.2d 552 (1996).

Several cases illustrate circumstances where the State failed to sustain its burden of proof for the admission of the blood test results. In *Bosio*, both the trooper who arrested Ms. Bosio and the nurse who drew the blood sample testified they saw the anticoagulant white powder in the vials but failed to testify regarding the presence of the enzyme poison. *Id.* at 467. The Court of Appeals reversed Ms. Bosio’s conviction, finding the State failed to make a *prima facie* showing that the blood sample was properly preserved. *Id.* at 468.

Similarly, in *Hultenschmidt*, the State failed to prove the vials contained the enzyme poison. 125 Wn.App. at 266. The toxicologist testified at length about the anticoagulant but testified that an enzyme poison was not required. *Id.* Thus, similar to *Bosio*, the Court of Appeals reversed Mr. Hultenschmidt’s conviction based on the State’s

failure to meet its burden of proving the foundational requirements for the admission of the blood sample analysis. *Id.* at 267.

In *Garrett*, it was undisputed that an anticoagulant was not added to the blood sample and this Court affirmed the vacation of the defendant's conviction. *Garrett*, 80 Wn.App. at 653. Here, there was evidence that the anticoagulant was added to the blood sample. Officers Cohen and Martinez as well as Mr. Johnston saw the powder in the blood vial and the blood was not coagulated. However, there is no evidence that an enzyme poison was added to the blood sample as required by WAC 448-14-020(3), which unambiguously requires that both an anticoagulant and an enzyme poison be added to the blood sample.

Officer Martinez could only testify the vials he observed were “gray top vials” with powder inside, but he didn’t “know what kind of chemicals are inside there.” RP 30. Similarly, Officer Cohen could also only testify he retrieved “gray top vials” with powder inside from Martinez’s car. RP 46-47. The phlebotomist, Jamie Donahue, testified he received vials from the police and there was white powder inside. RP 63. Only Chris Johnston from the toxicology laboratory could

describe the vials with a little more detail, but still not enough to comply with the WAC requirements.

Johnston testified the vials “appeared” to contain anticoagulant, but could not testify as to the enzyme preservative. RP 83. Johnston further testified that he was aware of the WACs, the tests he conducted were done in accordance with the WACs and he followed the protocol approved by the state toxicologist. RP 82-83. Finally, Johnston testified that the certificate of compliance from the manufacturer of the vials specified that the vials contained enzyme preservative and anticoagulant. RP 85; CP Supp ___, Sub. No. 60, Exhibit 11.

Contrast the testimony of Mr. Johnston with that of the toxicologist in *State v. Wilbur-Bobb*, 134 Wn.App. 627, 141 P.3d 6765 (2006). There, the toxicologist testified that sodium fluoride is an enzyme poison that is used to prevent the creation or elimination of alcohol in the sample between the time it is taken and the time it is tested. *Wilbur-Bobb*, 134 Wn.App. at 631. At trial, the toxicologist brought a photograph of the vials that held the blood samples. *Id.* The trial judge looked at the pictures and determined that the labels on the vials stated they contained sodium fluoride. *Id.* The court reasoned the evidence revealed that sodium fluoride is an enzyme poison and the

labels on the vials showed that they contained sodium fluoride; therefore, the prima facie threshold had been met. *Id.*

Similarly, in *State v. Brown*, the toxicologist testified he read the vials' labels that contained Mr. Brown's blood and they indicated the appropriate chemicals were contained in the vials. 145 Wn.App. 62, 71, 184 P.3d 1284 (2008), *review denied*, 165 Wn.2d 1014 (2009). The *Brown* court held that this was "comparable to the photographs in *Wilbur-Bobb*" and found that the prima facie threshold had been met. *Id.* at 73.

Here, the trial court had no evidence before it regarding the vials actually used by Donahue in collecting the blood samples. At best the trial court had a generic statement from the manufacturer that its vials contained enzyme preservative and anticoagulant. This evidence differed markedly from the *Brown* and *Wilbur-Bobb* decisions, where the trial court had evidence regarding the actual vials used to collect the blood sample from the defendant.

The blood alcohol test results "obviously infected the charge of 'driving while under the influence of intoxicating liquor.'" *State v. Morales*, 173 Wn.2d 560, 577, 269 P.3d 263 (2012), *quoting* RCW 46.61.502(1). This is so because the test results were *per se* evidence

that Mr. Ortiz-Vivar drove under the influence of alcohol, which requires reversal of the conviction. *Id.*³ Mr. Ortiz-Vivar's conviction must be reversed and remanded for a new trial.

c. The blood tests were not otherwise admissible as "other evidence" for proving intoxication. It may be argued that even if the test results were inadmissible for showing that Mr. Ortiz-Vivar's blood alcohol level exceeded 0.08 under RCW 46.61.502 (1)(a), the test could still be used as "other competent evidence" of Mr. Ortiz-Vivar's driving while intoxicated under RCW 46.61.502(1)(b). RCW 46.61.506 (2).

The Washington Supreme Court has rejected this argument as it applied to non-conforming breath tests. *Clark-Munoz*, 152 Wn.2d at 48-49. The Court ruled that breath *and blood tests* that do not conform to the standards of RCW 46.61.506 may not be used as "other competent evidence" for proving intoxication as that term is defined in RCW 46.61.506(2). *Id.* Thus, since the blood test results here were invalid for failure to prove the vials contained either an anticoagulant or enzyme poison as required, the test result may not be used for any

³ Mr. Morales was also charged with all three alternatives as here, and the jury made a similarly generic finding of guilt.

purpose for proving Mr. Ortiz-Vivar was intoxicated at the time the police stopped him. *Id.*

2. THE TOXICOLOGIST'S TESTIMONY
REGARDING THE VIAL MANUFACTURER'S
CERTIFICATE OF COMPLIANCE VIOLATED
MR. ORTIZ-VIVAR'S RIGHT TO
CONFRONTATION

In order to prove that the vials contained the required enzyme preservative and the anticoagulant, over defense objection, the State moved to admit a certificate of compliance from the manufacturer of the vials. CP Supp ____, Sub No. 60, Exhibit 11:

Q: What is that document?

A: It's a certificate of compliance from the manufacturer of the gray top tubes that we use from our lab. They have specified that it contains an enzyme preservative and anticoagulant.

Q: How is that document tied to this particular case?

A: It's tied through the specific lot number. The lot number is documented by the evidence custodian that receives the tubes. It's also kept on record. This is a matter of normal business as to specific compliance in which lot numbers we received certificates from.

A: So that's a business record that shows the vials are certified?

A: Correct.

Q: And the vials in this particular case?

A: That is correct.

RP 85. The court admitted the exhibit. *Id.*

a. Defendants have a constitutionally guaranteed right to confrontation. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross examine witnesses.⁴ The Confrontation Clause “applies to ‘witnesses’ against the accused - in other words, those who ‘bear testimony.’ ” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It also “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’ ” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), *quoting Crawford*, 541 U.S. at 53-54.

The United States Supreme Court has ruled that a lab technician’s certification prepared in connection with a criminal

⁴ Although Mr. Ortiz-Vivar did not object in the trial court on confrontation grounds, a confrontation clause challenge is a constitutional challenge that he may raise for the first time on appeal. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007), *overruled on other grounds by State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876 (2012).

prosecution was “testimonial” and its admission at trial violated the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 577 U.S. ___, 129 S.Ct. 2527, 2537-40, 174 L.Ed.2d 314 (2009). “A document created solely for ‘an evidentiary purpose,’ made in aid of a police investigation ranks as testimonial.” *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 2705, 2717, 180 L.Ed.2d 610 (2011), quoting *Melendez-Diaz*, 129 S.Ct. at 2532.

b. Admission of the manufacturer’s certificate violated Mr. Ortiz-Vivar’s right to confrontation. To the extent that this Court finds that the manufacturer’s certificate of compliance was sufficient evidence that the vials contained the required enzyme poison and anticoagulant, then the admission of the certificate of compliance violated Mr. Ortiz-Vivar’s right to confrontation.

In *Brown, supra*, admission of the manufacturer’s certificate, as here, was held to be a violation of Mr. Brown’s right to confrontation. 145 Wn.App. 73-75. Over the defendant’s objection, the manufacturer’s certificate was admitted into evidence to prove that the required chemicals were present in the vials before the blood sample was taken. *Id.* The Court of Appeals held that this was error:

The toxicologist’s testimony in conjunction with the certificate, showed that the certification officer *agreed*

with his conclusion that the chemicals were present in the vials.

...

There is also no testimony that others outside of the crime lab rely upon the certificate for purposes other than litigation. The toxicologist did not refer to the certificate to assist the jury in understanding his forensic conclusions regarding the evidence he tested.

Brown, 145 Wn.App. at 74-75 (emphasis in original).

In reaching this conclusion, the *Brown* Court relied on this Court's decision in *State v. Wicker* in determining the admission of the manufacturer's certificate violated the Confrontation Clause. 66 Wn.App. 409, 413 fn.7, 832 P.2d 127 (1992). In *Wicker*, the defendant was charged with burglary. The fingerprint identification technician testified he matched defendant's prints with evidence at the scene. *Id.* at 411. The technician further testified that it was standard procedure in the office for the results to be verified by another technician. *Id.* The technician testified that his identification was verified by another senior technician he named but who did not testify at trial. *Id.* The trial court admitted the fingerprint identification match results. *Id.* On appeal, this Court held that the verifying technician's initials on the fingerprint card verifying the results was an out-of-court statement that amounted to an assertion by the senior technician that the two sets of prints matched. 66 Wn.App. at 411-12.

Thus, similar to the decision in *Brown, supra*, there was no evidence that others outside the lab relied on the certificate of compliance for purposes other than litigation. The sum total of the testimony by the toxicologist was that the certificate proved the vials contained the required chemicals. The admission of the certificate violated Mr. Ortiz-Vivar's right to confrontation.

c. The error in admitting the certificate of compliance was not harmless. Confrontational clause errors are subject to a harmless error analysis. *Lily v. Virginia*, 527 U.S. 116, 140, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87, *cert. denied*, 549 U.S. 1019 (2006). Constitutional error is presumed to be prejudicial and the State bears the burden of proving beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Here, in light of the fact the witnesses failed to testify that the vials contained both of the required chemicals, the only evidence meeting this mandate was the manufacturer's certificate of compliance. Since admission of that certificate violated Mr. Ortiz-Vivar's right to confrontation and must be excluded, there is no remaining evidence to

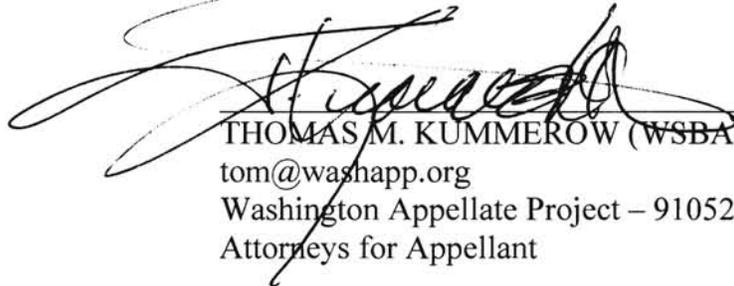
substantiate the WAC requirements. Thus, the admission of the manufacturer's certificate of compliance was not a harmless error and Mr. Ortiz-Vivar's conviction must be reversed.

E. CONCLUSION

For the reasons stated, Mr. Ortiz-Vivar asks this Court to reverse his conviction and remand for a new trial.

DATED this 30th day of September 2013.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

APPENDIX A

Washington Administrative Code Currentness

Title 448. State Toxicologist

Chapter 448-14. State Toxicologist Standards for Analysis of Blood Samples for Alcohol

➔448-14-010. Criteria for approved methods of quantitative analysis of blood samples for alcohol.

Any quantitative blood alcohol analysis method which meets the following criteria is approved by the state toxicologist and may be used in the state of Washington. Analysis of urine for estimation of blood alcohol concentrations is not approved by the state toxicologist in the state of Washington.

The blood analysis procedure should have the following capabilities:

(1) Precision and accuracy.

(a) The method will be capable of replicate analyses by an analyst under identical test conditions so that consecutive test results on the same date agree with a difference which is not more than 3% of the mean value of the tests. This criterion is to be applied to blood alcohol levels of 0.08 grams of alcohol per 100 mL and higher.

(b) Except for gas chromatography, the method should be calibrated with water solutions of ethyl alcohol, the strength of which should be determined by an oxidimetric method which employs a primary standard, such as United States National Bureau of Standards potassium dichromate.

(c) The method will give a test result which is always less than 0.005 grams of alcohol per 100 mL when alcohol-free living subjects are tested.

(2) Specificity.

(a) On living subjects, the method should be free from interferences native to the sample, such as therapeutics and preservatives; or the oxidizable material which is being measured by the reaction should be identified by qualitative test.

(b) Blood alcohol results on post-mortem samples should not be reported unless the oxidizable substance is identified as ethanol by qualitative test.

Statutory Authority: RCW 46.61.506. WSR 10-24-067, S 448-14-010, filed 11/30/10, effective 12/31/10; Order 4, S 448-14-010, filed 7/9/70; Emergency and Permanent Order 3, S 448-14-010, filed 9/23/69.

Washington Administrative Code Currentness
Title 448. State Toxicologist
Chapter 448-14. State Toxicologist Standards for Analysis of Blood Samples for Alcohol
➔448-14-020. Operational discipline of blood samples for alcohol.

(1) Analytical procedure.

(a) The analytical procedure should include:

(i) A control test

(ii) A blank test

(iii) Duplicate analyses that agree to within plus or minus ten percent of their mean.

(b) All sample remaining after analysis should be retained for at least three months under suitable storage conditions for further analysis if required.

(c) Each analyst will engage in a proficiency test program in which some blood samples containing alcohol are exchanged with other laboratories and tested so that the proficiency of each analyst and the precision and accuracy of the test method can be evaluated no less than one time per year.

(2) Reporting procedure.

(a) The results should be expressed as grams of alcohol per 100 mL of whole blood sample.

(b) The analysis results should be reported to two significant figures.

(c) Blood alcohol results on living subjects of 0.009 grams of alcohol per 100 mL or lower will be reported as negative. Blood alcohol results on post-mortem samples of 0.019 grams of alcohol per 100 mL or less will be reported as negative. (See WAC 448-14-010 (2)(b))

(3) Sample container and preservative.

(a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper will be used.

(b) Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

Statutory Authority: RCW 46.61.506. WSR 10-24-067, S 448-14-020, filed 11/30/10, effective 12/31/10; Order 4, S 448-14-020, filed 7/9/70; Emergency and Permanent Order 3, S 448-14-020, filed 9/23/69.

Washington Administrative Code Currentness

Title 448. State Toxicologist

Chapter 448-14. State Toxicologist Standards for Analysis of Blood Samples for Alcohol

➔448-14-030. Qualifications for a blood alcohol analyst.

(1) Minimum qualifications for the issuance by the state toxicologist of a blood alcohol analyst permit will include college level training in fundamental analytical chemistry with a minimum of five quarter hours of quantitative chemistry laboratory or equivalent, with a passing grade.

(2) The state toxicologist will issue a blood alcohol analyst permit to each person found to be properly qualified, and will hold written, oral or practical examinations to aid the state toxicologist in judging qualifications of applicants. Such permits will bear the signature or facsimile signature of the state toxicologist and be dated.

(3) The blood alcohol analyst permits are subject to cancellation by the state toxicologist if the permittee refuses or fails to obtain satisfactory results on samples periodically distributed to the permittees by the state toxicologist.

Statutory Authority: RCW 46.61.506. WSR 10-24-067, S 448-14-030, filed 11/30/10, effective 12/31/10; Order 4, S 448-14-030, filed 7/9/70; Emergency and Permanent Order 3, S 448-14-030, filed 9/23/69.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70043-0-I
v.)	
)	
JUAN ORTIZ-VIVAR,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-----|--|-------------------|-------------------------------------|
| [X] | ERIK PEDERSEN, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | JUAN ORTIZ-VIVAR
C/O ICE
NORTHWEST DETENTION CENTER
1623 EAST J ST. STE 2
TACOMA, WA 98421 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2013.

X _____
Jmt

STATE OF WASHINGTON
CLERK OF COURT
2013 SEP 30 PM 4:40