

No. 42853-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Vonda Pritchard,**

Appellant.

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Clallam County Superior Court Cause No. 10-1-00387-7

The Honorable Judge Ken Williams

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. Ms. Pritchard's vehicular assault conviction violated her Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against her.
2. Ms. Pritchard's vehicular assault conviction violated her state constitutional right to notice of the charges against her, under Wash. Const. Article I, Sections 3 and 22.
3. The Information was deficient because it failed to properly allege a causal relationship between Ms. Pritchard's subpar driving and the harm inflicted.
4. The trial court erred by admitting Ms. Pritchard's statements to Trooper Ryan at the hospital.
5. The trial court failed to properly determine the voluntariness of Ms. Pritchard's statements.
6. The trial court erred by finding that Ms. Pritchard was not in custody for *Miranda* purposes when Trooper Ryan questioned her at the hospital.
7. The trial court applied the wrong legal standard in concluding that Trooper Ryan's interrogation of Ms. Pritchard was noncustodial.
8. The trial court erred by admitting blood test results in the absence of a proper foundation.
9. Ms. Pritchard's conviction was entered in violation of her Fourteenth Amendment right to due process because it was based in part on blood test evidence that was not demonstrably reliable.
10. The prosecution failed to introduce sufficient evidence to *prima facie* establish the validity and admissibility of Ms. Pritchard's blood test results.
11. The introduction of testimony from R.N. Peterson violated the nurse-patient privilege.
12. The introduction of testimony from R.N. Peterson violated the federal Health Information Portability and Accountability Act.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A criminal Information must set forth all essential elements of an offense. The Information charged Ms. Pritchard with vehicular assault, but failed to allege a causal relationship between her subpar driving and the harm inflicted. Did the Information omit an essential element of the offense in violation of Ms. Pritchard's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?
2. An accused person's involuntary statements may not be admitted at trial for any purpose. Here, the trial court failed to properly determine the voluntariness of Ms. Pritchard's statements (extracted from her shortly after she'd arrived at a hospital by ambulance, while she was strapped to a backboard and receiving medical attention shortly after a serious collision, and while she had a significant amount of alcohol in her blood). Did the trial court err by admitting Ms. Pritchard's statements without analyzing the totality of the circumstances to determine voluntariness, in violation of her constitutional privilege against self-incrimination?
3. A suspect is in custody for *Miranda* purposes when, considering all the circumstances, a reasonable person in the suspect's position would not feel free to terminate the conversation and leave. Here, Trooper Ryan entered a restricted area of the hospital to interrogate Ms. Pritchard while she was strapped to a backboard receiving medical care shortly after her arrival by ambulance. Did the trial court violate Ms. Ryan's constitutional privilege against self-incrimination by admitting her unwarned statements into evidence?
4. When seeking a conviction for Vehicular Assault, the prosecution must introduce sufficient evidence to make a *prima facie* case establishing the validity and admissibility of any blood test results upon which it hopes to rely. In this case, the prosecution failed to make a *prima facie* case that Ms. Pritchard's blood test results were valid and admissible. Was

her conviction for Vehicular Assault based on insufficient evidence that the blood test results were demonstrably reliable and admissible?

5. Under Washington law, a nurse may not provide testimony as to any information acquired in attending a patient, if the information was necessary to the patient's care. Here, the trial judge admitted the testimony of Nurse Peterson over Ms. Pritchard's objection. Did the trial judge fail to properly apply the nurse-patient privilege by admitting Nurse Peterson's testimony?
  
6. The federal Health Information Portability and Accountability Act (HIPAA) prohibits medical personnel from disseminating information from a patient's file, except under certain circumstances. Here, the trial judge permitted Nurse Peterson to testify from Ms. Pritchard's medical chart despite the absence of an exception to HIPAA's prohibitions. Did the trial judge erroneously overrule Ms. Pritchard's HIPAA objection to Nurse Peterson's testimony?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

A car driven by Len Holman collided with a car driven by Vonda Pritchard. RP (10/321/11) 65-69. Ms. Pritchard and Mr. Holman's passenger, his mother, were both injured. RP (10/31/11) 80, 83-91,

Ms. Pritchard was unconscious after the impact; when she awoke she was incoherent. RP (10/31/11) 18-19, 109. Trooper Ryan was first to contact her, and he immediately formed the opinion that she was highly intoxicated. RP (10/31/11) 112-114. This was due to her speech, red eyes, the smell of alcohol, and an open container of alcohol in the vehicle. RP (10/31/11) 22, 31, 111-114. Ms. Pritchard was strapped onto a backboard and taken to the hospital. RP (10/31/11) 20, 37. Once there, she remained on the backboard while treated. She received treatment in an area of the hospital that was not open to the public, and her bed was concealed by curtains. RP (10/31/11) 20-21, 36, 43. While there, she was approached by Trooper Ryan, who followed along as she was wheeled from one place to another for additional treatment and tests. RP (10/31/11) 39.

When Trooper Ryan entered the area, he told Ms. Pritchard he was there to investigate the collision. RP (10/31/11) 21. When she asked what had happened, he told her that she'd turned left, hit a yield, and crossed

into oncoming traffic, where she struck Holmans's car. RP (10/31/11) 21. Trooper Ryan questioned her, and she told him she'd just come from a local bar where she had three drinks, and that she'd had a beer earlier in the day. RP (10/31/11) 22. Ryan asked her to perform some tests, and she declined. RP (10/31/11) 23. He then formally arrested her. RP (10/31/11) 23. Ms. Pritchard declined to make further statements, and did not consent to any testing. RP (10/31/11) 26-28. Four hours after the accident, a blood sample was taken under the implied consent law. RP (11/1/11) 21-24.

The state charged Ms. Pritchard with Vehicular Assault. The Information included the following language:

...the Defendant did cause substantial bodily harm to another..., and did operate or drive a motor vehicle in a reckless manner and/or operate or drive a vehicle and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or while under the influence of or affected by intoxicating liquor or any drug; and/or while under the combined influence of or affected by intoxicating liquor and any drug, and/or operate or drive a vehicle with disregard for the safety of others...  
CP 18.

At trial, the prosecution sought to admit Ms. Pritchard's statements. At the CrR 3.5 hearing, testimony established that one officer at had said that Ms. Pritchard was arrested at the collision scene, prior to her transport to the hospital. That officer did not testify at the hearing. RP

(10/31/11) 31-32. Trooper Ryan stated that he did not arrest Ms. Pritchard until after she made statements at the hospital. RP (10/31/11) 30-34.

The trial court ruled that Ms. Pritchard was not under arrest until after she had made her statements, and admitted the statements. RP

(10/31/11) 53-56. The court opined:

Under those circumstances I think it's a close call. I think it's okay for the officer to ask a few questions and the questions he asked here were where are you coming from and had you been drinking, probably while boarding on interrogation to prove a crime were probably reasonable in order to confirm his suspicions before making an arrest. And frankly, rather have the officers not make an arrest and find out there are explanations under the totality of the circumstances, I don't believe Ms. Pritchard was formally under arrest and I had no information to indicate she felt she was formally under arrest. She was certainly not free to go but that was largely due to medical conditions and medical examinations. And so I will find her statements for at least purposes of 3.5 were voluntary. There's testimony she did understand the rights and additionally that her responses were appropriate as opposed to being incoherent and under all those circumstances then I'm going to find that they're voluntary for purposes of 3.5. They may not be admissible for other reasons, but for 3.5 analysis I will find them voluntary.

RP (10/31/11) 55-56.

Ms. Pritchard sought to exclude any testimony of nurse Tim Peterson, who attended her at the hospital. She argued that the testimony violated HIPAA and the nurse-patient privilege. RP (10/31/11) 7-10, 53; RP (11/1/11) 3-9; Defendant's Motions In Limine, Supp. CP. The court denied her motion, ruling that HIPAA did not apply because nurse

Peterson had been served with a subpoena, and that if the testimony did violate HIPAA, any violation was minimal RP (11/1/11) 9-10, 12.

Nurse Peterson brought Ms. Pritchard's medical records to court, and referred to them during his testimony. RP (11/1/11) 17. He established the time Ms. Pritchard arrived at the hospital, and told the jury that no fluids or medications were administered to Ms. Pritchard before the blood draw. RP (11/1/11) 21.

The defense also sought to exclude testimony about the blood test result without a proper foundation. RP (10/31/11) 10-11; Defendant's Motions In Limine, Supp. CP.

At trial, the state presented testimony that the accident occurred at approximately 7:30 p.m., and that Ms. Pritchard's sample was taken at 11:40 pm. RP (10/31/11) 17, 63, 102; RP (11/1/11) 30. Because Ms. Pritchard is allergic to iodine, an alternative containing alcohol was used to sterilize her skin. RP (11/1/11) 27, 47, 98. A gray-topped vial was used; such tubes generally contain an anticoagulant and an enzyme poison. RP (11/1/11) 29, 41, 96. Ordinarily, the contents of a particular tube is checked by comparing the tube's lot number with a certification of compliance kept by the Washington State Patrol. That could not be done in this case, because the tube's lot number was covered by an evidence label. RP (11/1/11) 89-92, 96, 104. The laboratory staff testified that Ms.

Pritchard's blood alcohol concentration was 0.14. RP (11/1/11) 80, 110-112.

The jury voted to convict Ms. Pritchard. RP (11/1/11) 55. After sentencing, she timely appealed. CP 5, 6-17.

## **ARGUMENT**

### **I. MS. PRITCHARD'S CONVICTION VIOLATED HER RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH.CONST. ARTICLE I, SECTION 22.**

#### **A. Standard of Review**

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjørsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required; no particularized showing of prejudice is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

- B. The Information was deficient because it failed to properly allege a causal relationship between Ms. Pritchard’s subpar driving and the injuries inflicted.

The Sixth Amendment to the federal constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.<sup>1</sup> A similar right is secured by the Washington state constitution. Wash.Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992).

RCW 46.61.522 criminalizes Vehicular Assault. The statute provides (in relevant part) as follows:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle: (a) In a reckless manner and causes substantial bodily harm to another; or... (c) With disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.61.522. An additional nonstatutory element “requires proof of a proximate causal relationship between [the accident] and the driver’s impairment due to alcohol, reckless driving, or disregard for the safety of others.” *State v. Sanchez*, 62 Wash.App. 329, 331, 814 P.2d 675 (1991)

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<sup>1</sup> This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

(addressing vehicular homicide statute). This nonstatutory element must be included in the charging language. *Id.*

The Information in this case alleged in that Ms. Pritchard “did cause substantial bodily harm to another, to wit: Shirley Gene Holman, and did operate or drive a vehicle in a reckless manner and/or operate or drive a vehicle [while intoxicated] and/or operate or drive a vehicle with disregard for the safety of others...” CP 18. As can be seen, the charging document does not indicate a causal connection between the harm inflicted and Ms. Pritchard’s subpar driving. CP 18.

Because the Information failed to indicate any causal relationship between her driving and the harm inflicted, it did not include all essential elements of vehicular assault. Accordingly, the Information was deficient, and prejudice is conclusively presumed. *McCarty*, at 425. Ms. Pritchard’s conviction must be reversed and the charge dismissed without prejudice. *Id.*

**II. THE CONVICTION WAS OBTAINED IN VIOLATION OF MS. PRITCHARD’S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.**

**A. Standard of Review**

Constitutional violations are reviewed *de novo*. *E.S.*, at 702. A *Miranda* claim is an issue of law requiring *de novo* review. *State v.*

*Daniels*, 160 Wash.2d 256, 261, 156 P.3d 905 (2007). Whether or not a person is in custody is a mixed question of law and fact subject to *de novo* review. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The voluntariness of a person's statement is a legal question, subject to *de novo* review. *State v. McReynolds*, 104 Wash. App. 560, 575, 17 P.3d 608, 617 (2000); *Griffin v. Strong*, 983 F.2d 1540, 1541 (10th Cir. 1993).

Findings of fact are reviewed for substantial evidence.<sup>2</sup> *In re Marriage of Fahey*, 164 Wash. App. 42, 55-56, 262 P.3d 128 (2011), *review denied*, 173 Wash. 2d 1019, 272 P.3d 850 (2012). The absence of a finding on a particular topic must be interpreted as a finding against the party with the burden of proof on that topic. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash. 2d 514, 524, 22 P.3d 795 (2001).

B. Whether or not Ms. Pritchard was in custody for *Miranda* purposes, her statements were involuntary and should not have been admitted at trial.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against

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<sup>2</sup> Substantial evidence is “evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.* It is more than “a mere scintilla” of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wash. App. 470, 475, 131 P.3d 958 (2006).

himself.” U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Article I, Section 9 of the Washington State Constitution, provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. Article I, Section 9.

Before an accused person’s statements can be admitted into evidence, the government must establish admissibility under the due process “voluntariness” test, which “takes into account the totality of the circumstances to examine ‘whether a defendant’s will was overborne by the circumstances surrounding the giving of a confession.’” *United States v. Gamez*, 301 F.3d 1138, 1144 (9<sup>th</sup> Cir. 2002) (quoting *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotations and citation omitted)). The privilege against self-incrimination absolutely precludes use of any involuntary statement against an accused person for any purpose whatsoever. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

This restriction is “equally applicable to [an alcohol or] drug-induced statement.” *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), *overruled on other grounds by Keeney v. Tamayo-*

*Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). If, by reason of extreme intoxication, a statement is not “the product of a rational intellect and a free will... it is not admissible and its reception in evidence constitutes a deprivation of due process.” *Gladden v. Unsworth*, 396 F.2d 373, 380-381 (1968) (citing *Townsend v. Sain, supra*). This is so whether the statement is spontaneous or obtained through interrogation. *Gladden*, at 380.

The burden of establishing voluntariness rests with the prosecution. *United States v. Jenkins*, 938 F.2d 934, 937 (9th Cir. 1991). Here, the state failed to sustain its burden.

Trooper Ryan questioned Ms. Pritchard not long after the accident. RP (10/31/11) 20-22, 33-34, 118-124. She was in the hospital, strapped to a backboard, receiving medical care. RP (10/31/11) 37, 39, 43. She had not received any pain medication. RP (11/1/11) 21. The prosecution did not introduce evidence to prove that she had recovered from the shock of the accident, or that her pain levels were manageable. She was described as “highly intoxicated,” and had a blood alcohol content of .14 more than four hours after the accident occurred. RP (10/31/11) 22; RP (11/1/11) 80, 114. Trooper Ryan testified that he was in uniform, following along as medical staff wheeled Ms. Pritchard around within the hospital. RP (10/31/11) 39.

The prosecution failed to show that Trooper Ryan's decision to question Ms. Pritchard under these circumstances resulted in statements that were voluntarily and freely given. Accordingly, the state failed to meet its heavy burden. *Jenkins*, at 937. The fact that she gave semi-coherent statements has no bearing on whether or not her decision to talk was voluntary. *See Townsend v. Sain*, at 320 (rejecting the coherency standard).

The trial court did not enter written findings and conclusions. In his oral ruling, the judge focused on whether or not Ms. Pritchard was under arrest. RP (10/31/11) 53-56. He did not address her shock, pain, or intoxication; nor did he comment on the effect of her restraints, or the fact that she was receiving medical care in a restricted area of the hospital not open to the public. RP (10/31/11) 53-56. The court's determination that her statements were voluntary "at least [for] purposes of [CrR] 3.5" did not rest on any specific facts other than his finding that she was not under arrest and that she understood her rights when they were read to her (following the initial questioning).<sup>3</sup> Because the burden rested with the prosecution, the court's failure to address the facts relevant to

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<sup>3</sup> The court also noted that she spoke coherently. RP (10/31/11) 55-56. However, the Supreme Court has made clear that coherency has no bearing on voluntariness. *Townsend v. Sain*, at 320.

voluntariness must be interpreted as a finding against the state. *Ellerman*, at 524.

The state did not establish the voluntariness of Ms. Pritchard's statements. Her conviction must be reversed, the statements suppressed, and the case remanded for a new trial. *Townsend v. Sain*, *supra*.

C. Ms. Pritchard's statements should have been excluded because they were the product of custodial interrogation without benefit of *Miranda*.

Whether or not a person is "in custody" for *Miranda* purposes requires examination of the totality of the circumstances, and depends on whether or not a reasonable person would have felt free to terminate the interrogation and leave. *J.D.B. v. N. Carolina*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011). The analysis is an objective one, and must include any circumstance that would have affected how a reasonable person in the suspect's position would perceive her or his freedom to leave. *Id.*

At the time she was interrogated, Ms. Pritchard was receiving treatment while strapped to a backboard in a restricted area of the hospital, shortly after the accident. RP (10/31/11) 21, 37-38. To gain admittance to this restricted area, Trooper Ryan had to accompany hospital personnel through a locked door; the area was inaccessible to members of the general public. RP (10/31/11) 37-38. Furthermore, according to at least

one officer's report, she had already been placed under arrest. RP (10/31/11) 31-34.

Under these circumstances, a reasonable person would not have felt free to terminate the interrogation and leave. Indeed, Ms. Pritchard was physically unable to leave because (1) she was strapped to a backboard, (2) she was in a place where she was receiving medical care; had she tried to get away from Trooper Ryan, she would not have continued to receive care, (3) Trooper Ryan told her he was there investigating the accident, and (4) she may have been told at the scene that she was under arrest.

The trial court's conclusion—that she was not in custody for *Miranda* purposes—is erroneous. Because she was subjected to custodial interrogation without benefit of *Miranda*, her statements should have been suppressed. *J.D.B.*, at \_\_\_\_\_. Accordingly, her conviction must be vacated, the statements suppressed, and the case remanded for a new trial. *Id.*

**III. MS. PRITCHARD'S CONVICTION WAS BASED IN PART ON BLOOD TEST RESULTS THAT WERE NOT DEMONSTRABLY RELIABLE.**

**A. Standard of Review**

A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Newport Yacht Basin*

*Ass'n of Condo. Owners v. Supreme Nw., Inc.*, \_\_\_ Wash. App. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2012).

B. Blood test results may not be admitted in a vehicular assault trial unless the prosecution introduces sufficient evidence to make a *prima facie* showing of their validity and admissibility.

Blood test results are invalid and inadmissible unless they are obtained in compliance with RCW 46.61.506, which provides that “[a]nalysis of the person’s blood or breath to be considered valid...shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose.” RCW 46.61.506(3). The Washington State Toxicologist has promulgated regulations outlining techniques and methods for testing as directed by RCW 46.61.506(3). WAC 448-14-020. Failure to prove compliance with the regulations requires reversal of any conviction that rests in part on a blood test result. *See State v. Bosio*, 107 Wash.App. 462, 27 P.3d 636 (2001).

The toxicologist’s regulations require that the sample

shall 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.

WAC 448-14-020(3)(b). These uniform procedures help to ensure that the test results will be accurate and reliable. *Bosio*, at 467. Where the state

fails to make a *prima facie* case that the sample was properly preserved and tested, the conviction must be reversed. *Bosio*, at 468.

For example, in *Bosio* the state failed to introduce any evidence establishing that the mandatory enzyme poison was added to the sample. Because of this, the conviction was reversed and the case remanded for a new trial. *Bosio*, at 468. Similarly, in *State v. Garrett*, 80 Wash.App. 651, 910 P.2d 552 (1996), the state failed to make a *prima facie* case that the blood sample was properly preserved with an anticoagulant. Because of this, the defendant's conviction was reversed. *Id.*

C. The prosecution failed to introduce sufficient evidence to make a *prima facie* case establishing that Ms. Pritchard's blood test results were valid and admissible.

In this case, the prosecution did not establish that Ms. Pritchard's blood sample had been properly preserved with an enzyme poison and anticoagulant, as required by WAC 448-14-020(3). Indeed, the prosecution was unable even to produce a certificate of compliance, establishing that the tube belonged to a batch manufactured and tested to meet these requirements.<sup>4</sup> RP (11/1/11) 89-92. Instead, the technician admitted that her initial testimony (that the required chemicals were

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<sup>4</sup> Furthermore, such a certificate would likely be inadmissible as testimonial hearsay. See, e.g., *State v. Jasper*, \_\_\_ Wash.2d \_\_\_, 271 P.3d 876 (2012); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

present in the tube) had been based on an assumption predicated on the color of the tube's stopper. RP (11/1/11) 91, 96. Furthermore, she provided no testimony about the quantity of anticoagulant and enzyme poison, and whether the amount in the tube was sufficient to prevent clotting and to stabilize the alcohol concentration. RP (11/1/11) 69-96.

The prosecution's failure to prove compliance with the regulation should have resulted in exclusion of the evidence, because the state did not *prima facie* establish the validity and admissibility of the test results. *Bosio*, at 468. Accordingly, Ms. Pritchard's conviction must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. *Id.*

**IV. THE TRIAL COURT SHOULD NOT HAVE ALLOWED THE PROSECUTION TO INTRODUCE TESTIMONY IN VIOLATION OF MS. PRITCHARD'S NURSE-PATIENT PRIVILEGE AND HER RIGHT TO PATIENT CONFIDENTIALITY UNDER FEDERAL LAW.**

A. Standard of Review

The interpretation of a testimonial privilege is an issue of law, reviewed *de novo*. "*Jane Doe*" v. *Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 122 Wash. App. 556, 563, 90 P.3d 1147 (2004).

- B. Nurse Peterson’s testimony was introduced over objection in violation of the nurse-patient privilege and the federal Health Information Portability and Accountability Act (HIPAA).

Washington’s nurse-patient privilege prohibits a registered nurse from providing testimony “in a civil or criminal action as to any information acquired in attending a patient in the registered nurse’s professional capacity, if the information was necessary to enable the registered nurse to act in that capacity for the patient,” absent consent from the patient.<sup>5</sup> RCW 5.62.020. The purpose of the privilege is twofold: (1) to promote proper treatment by facilitating full disclosure of information, and (2) to protect the patient from embarrassment which may result from revelation of intimate details of medical treatment. *Smith v. Orthopedics Int’l, Ltd., P.S.*, 170 Wash. 2d 659, 667, 244 P.3d 939 (2010) (addressing physician-patient privilege).

Similarly, the federal Health Information Portability and Accountability Act (HIPAA) is a federal statute that restricts covered health care entities from disclosure of protected health information. *State*

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<sup>5</sup> The statute also provides an exception where “[t]he information relates to the contemplation or execution of a crime in the future, or relates to the neglect or the sexual or physical abuse of a child, or of a vulnerable adult..., or to a person subject to proceedings under chapter 70.96A, 71.05, or 71.34 RCW.” RCW 5.62.020(2). The privilege is also “subject to the same limitations and exemptions contained in RCW 26.44.060(3) [relating to mandatory reporters of child abuse and neglect] and 51.04.050 [relating to industrial insurance claims] as those limitations and exemptions relate to the physician/patient privilege of RCW 5.60.060.” RCW 5.62.030.

*v. Wise*, 148 Wash. App. 425, 444, 200 P.3d 266 (2009). In fact, it is a federal crime for a covered entity to disclose individually identifiable health information in violation of the Act's provisions. 42 U.S.C. 1320d-6. The act and its attendant regulations provide exceptions for judicial proceedings and law enforcement, but only under certain conditions and only when certain procedures are followed. *See* 45 C.F.R. 164.512(e) and (f).

In this case, the trial court admitted the testimony of R.N. Tim Peterson over Ms. Pritchard's objection.<sup>6</sup> RP (11/1/11) 3-21. Testifying from Ms. Pritchard's medical chart, Peterson helped fix the time of Ms. Pritchard's arrival at and departure from the hospital, and told the jury that no medication or fluids had been provided before blood was drawn from the patient. RP (11/1/11) 10-21.

This testimony violated Ms. Pritchard's rights under the nurse-patient privilege. It also violated Ms. Pritchard's rights under HIPAA, since the prosecution failed to follow the correct procedures in securing Peterson's testimony.<sup>7</sup> Although the subject matter of the testimony may

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<sup>6</sup> In his objection, defense counsel erroneously referred to the doctor-patient privilege; however, the prosecutor correctly identified the issue as relating to the nurse-patient privilege. RP (11/1/11) 3-4, 9-10.

<sup>7</sup>

seem trivial, it permitted the prosecution to clarify the timeline (from collision to blood draw), and to argue the accuracy of the expert's retrograde extrapolation without the complicating factor of fluid transfusions or medications.

Accordingly, Ms. Pritchard's conviction must be reversed and the case remanded for a new trial, with instructions to exclude Nurse Peterson's testimony. RCW 5.62.020.

### **CONCLUSION**

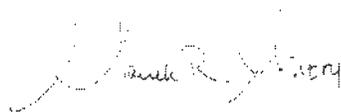
For the foregoing reasons, Ms. Pritchard's conviction must be reversed and the case dismissed without prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on May 24, 2012,

### **BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Vonda Pritchard  
513 E 3rd St  
Port Angeles, WA 98362

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clallam County Prosecuting Attorney  
lschrawy@co.clallam.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 24, 2012.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

May 24, 2012 - 1:07 PM

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