THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY **SUPERIOR COURT**

State of New Hampshire

v.

Kenneth Guilmette

Docket No.: 05-S-2214-2217

ORDER ON MOTION TO SUPPRESS

The defendant, Kenneth Guilmette, is charged with aggravated driving while intoxicated with serious bodily injury, in violation of RSA 265:82-a[1], and driving while intoxicated, subsequent offense, in violation of RSA 265:82[2]. Before the Court is the defendant's Motion to Suppress. A hearing occurred on November 10, 2008, and the parties were allowed additional time to file further written submissions. For the reasons set forth below, the defendant's Motion to Suppress is **DENIED**.

FACTUAL BACKGROUND

The parties agree to the following pertinent facts. On May 28, 2004, Trooper Christopher Vetter was dispatched to an automobile collision that had taken place on Route 107 in Kensington. It appeared to him, after investigation at the scene, that a green Mercury Sable had crossed "the double solid line" and collided with two vehicles in the opposite lane of travel. One of the struck vehicles yielded no injuries; the second vehicle's passengers suffered minor injuries. The driver of the Sable, subsequently identified as the defendant, was trapped in his vehicle. Medical personnel indicated to Trooper Vetter that the defendant appeared to have been drinking alcohol. When Trooper Vetter approached the Sable and the defendant he noticed the odor of alcohol.

[1] RSA 265:82-a was replaced by RSA 265-A:3 effective January 1, 2007.
[2] RSA 265:82 was replaced by RSA 265-A:2 effective January 1, 2007.

The defendant was extricated from the Sable and was transported by the Kensington Fire Department to Exeter Hospital for cuts and neck and back injuries. Trooper Vetter proceeded to the emergency room. He there acquired the defendant's identifying information. Dr. Joseph Mastromarino, the attending physician, informed Trooper Vetter that the medical personnel were uncertain of the extent of the defendant's injuries and would know more after X-rays were taken. Dr. Mastromarino also gave Trooper Vetter permission to speak with the defendant. Immediately upon approaching the defendant where he was situated, Trooper Vetter noticed the aroma of alcohol. Although the defendant denied consuming alcohol, Trooper Vetter perceived that the defendant's speech was slurred and his eyes were red and glassy. Trooper Vetter spoke again with Dr. Mastromarino, who indicated that he did not believe that the defendant had suffered serious bodily injury and that he would be treated for a head wound and released, pending X-ray results.

Trooper Vetter determined that the defendant was intoxicated and that he had caused the crash. Based on his knowledge that the two victims in the struck vehicles had not been seriously injured, Dr. Mastromarino's estimate of the gravity of the defendant's injuries, and the circumstance that the defendant had suffered no visible serious injuries, Trooper Vetter decided that the defendant's DWI did not amount to a felony level offense. He then advised the defendant that he was under arrest for DWI, and read him the misdemeanor ALS form. Trooper Vetter repeated the ALS warnings a couple of times because the defendant did not initially understand them. After being advised of his ALS rights, the defendant refused to take a blood test.

Dr. Mastromarino then came into the room where the defendant and the trooper were situated, and announced to both the defendant and Trooper Vetter that the

defendant had suffered a broken vertebra in his neck, information he learned from the just-developed X-rays. Dr. Mastromarino also informed Trooper Vetter, outside the presence of the defendant, that he believed this injury constituted serious injury.

Trooper Vetter then explained to the defendant that the extent of the defendant's injury, as now understood, changed how he would proceed with the arrest, and he read the defendant the felony level ALS form. The defendant again refused to take a blood test. Despite his refusal, and due to the felony level nature of the offense, Trooper Vetter ordered blood to be drawn. The defendant was restrained and blood was drawn, which tested at a 0.16 alcohol level. The defendant came to be released on a hand summons.

The State avers that to make its case here in regard to the felony DWI, it needs to elicit testimony or present evidence sufficient to show that the defendant had indeed suffered a broken vertebra in his neck, or a serious bodily injury. The State asserts, in this regard, that it needs access to the pertinent X-rays and the related hospital records because the injury could not be diagnosed by observations of the defendant alone.

In about December, 2004, a Grand Jury subpoena issued to Exeter Hospital for certain of the defendant's medical records. The hospital notified the defendant, who filed a Motion to Quash the subpoena. The Motion was granted on February 10, 2005 (Coffey, J.) because it had not been established that disclosure of any such medical records was appropriate given the defendant's physician-patient privilege.

Accordingly, in April 2005, Trooper Vetter came to conduct a follow-up investigation. He sent Trooper Marcus McLane to the Guilmette residence. It was believed that this premises actually belonged to the defendant's father. Nobody apparently was at home at that time. Trooper McLane spoke to one of the neighbors, who was unwilling to identify himself, stated that he was "scared" of the defendant, and further

stated that the police are always at “that residence.” He also told the Trooper that “no one” in the neighborhood would speak about the defendant because they are afraid of him. The neighbor also stated that he knew the defendant to be in the used car business, believed him to be then unemployed, and was not sure whether the defendant was still living with his father. He further stated that he did not know of the motor vehicle crash here at issue or of any injuries suffered by the defendant.

Trooper McLane then contacted Cpl. David Consentino, a Rockingham County Corrections officer and the son of the Atkinson Police Chief, a person familiar with the defendant. Although Cpl. Consentino indicated that he believed that the defendant was in the used car business and was possibly involved in some sort of organized crime enterprise, he also indicated that he was not aware of the defendant’s injuries, or of his friends or other contacts.

Trooper McLane’s next interviewee, Sgt. William Baldwin of the Atkinson Police, had had unpleasant dealings with the defendant, including at least one occurring after May 28, 2004. Sgt. Baldwin, however, had not discussed the crash or the defendant’s injuries with the defendant, and he did not have any other information regarding the defendant’s injuries. Sgt. Baldwin told Trooper McLane that he knew that defendant to be in the used car business, but believed that he was then unemployed. He also indicated that the defendant was very unpleasant to deal with, and that he was not surprised that a neighbor was afraid of him. Sgt. Baldwin undertook a check of police records to determine if they contained information about friends or acquaintances of the defendant who might have pertinent information, but was not able to supply any helpful information.

Based on this follow-up investigation, the State then asked the Court to pierce the physician-patient privilege and order Exeter Hospital to produce the defendant’s records

from his May 28, 2004 hospital stay for *in camera* review. The defendant did not object, and no hearing took place. The Court (Nadeau, J.) granted the State's Motion on May 27, 2005, and, after *in camera* review, released the May 28, 2004 hospital records to the State by order dated August 2, 2005.

On March 27, 2008, the defendant filed the Motion to Suppress here under consideration.

DISCUSSION

I. The Parties' Arguments

The defendant asserts that Dr. Mastromarino's disclosure of his injury to Trooper Vetter constitutes a violation of the physician-patient privilege set forth at RSA 329:26. Because the doctor violated the privilege, the defendant claims that he is entitled to suppression of the information and all evidence, including the results of the blood test that flowed therefrom, as fruit of the poisonous tree. The defendant further argues that the State Police, in acting on information unlawfully in their possession, created a state action sufficient to trigger a Fourth Amendment suppression remedy. In the alternative, the defendant contends that if the evidence is not suppressed in this fashion, the Court should issue an *in limine* exclusion preventing the State from any further use or discussion of the information obtained in violation of the physician-patient privilege, that is, any information relating to the defendant's fractured vertebra as a result of the 2004 accident. He claims that to permit the State to utilize this information in his prosecution would constitute an unlawful, repeated violation of the physician-patient privilege to which he is entitled.

As to the State's follow-up investigation and the subsequent release of the defendant's hospital records by the Court (Nadeau, J.), the defendant avers that the order is deficient under In re Grand Jury Subpoena (Medical Records of Payne), 150 N.H. 436,

444 (2004), in that the Court's brief order following *in camera* review did not "make explicit findings and rulings on each dispositive prong of its decision to either grant or deny access to privileged medical records."[3]

The State counters that there is no state action here involved, that the physician-patient privilege protects only confidential communications between physician and patient, and that the communication regarding the defendant's serious bodily injury was not confidential because it was made in the presence of a third party not associated with treatment, namely, Trooper Vetter. The State argues that, because Trooper Vetter heard the communication as a non-treating third party, thereby destroying the confidentiality, the communication was not privileged and may be used by the State in this action.

The State further maintains that the seizure of the defendant's blood was not in violation of RSA 329:26 because RSA 329:26 includes a specific exception for "blood samples and the results of laboratory tests for blood alcohol content taken from a person who is under investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors . . . ." (2004).[4]

As to the follow-up investigation, the State alleges that it met the requirements set forth in Payne, and that it had established that the information contained in the defendant's hospital records was "essential" sufficiently to justify the Court's piercing the physician-patient privilege. The State reasons that, because the defendant strikes fear into the hearts of those around him, it is unlikely that anyone would voluntarily give testimony against him even if they had any to give. In addition, since no person could convincingly testify regarding the defendant's serious bodily injury absent the X-rays, the State asserts

[3] The defendant initially also contended that he had not been provided a report of the blood test within the time specified by statute, but withdrew this contention.

[4] The legislature amended this statute in 2008 in a way that is not material here. The Court will refer to the version of the statute that was in effect at the time of the events at issue.

that there is no way to establish this element of the charge without allowing access to the defendant's pertinent hospital records.

At the outset, the Court does not consider that the pertinent circumstances in this case implicate a "state action" as the defendant contends, but certainly do raise questions respecting the physician-patient privilege.

II. Applicability of the Physician-Patient Privilege

A. Protection of the Diagnosis In General Under Physician-Patient Privilege

"The physician-patient privilege did not exist at common law." State v. Elwell, 132 N.H. 599, 603 (1989) (citing State v. Kupchun, 117 N.H. 412, 416 (1977)). "It was created in our State by statutory enactment in 1969, Laws 1969, ch. 386, and has been incorporated into the rules of evidence, N.H. R. Ev. 503. The privilege is intended to encourage patients to fully disclose information for the purpose of receiving complete medical treatment." Id. (citing Kupchun, 117 N.H. at 415). It protects the confidentiality of relations and communications between physician and patient. Id. (citing Kupchun, 117 N.H. at 415).

"Statutory privileges should be strictly construed[.]" Id. (citing In re Brenda H., 119 N.H. 382, 385 (1979)). "The legislature designed the privilege not to exclude relevant evidence but simply to facilitate activities which require confidence." Payne, 150 N.H. at 440 (quotation and citation omitted).

RSA 329:26 provided at pertinent times here:

> The confidential relations and communications between a physician or surgeon licensed under provisions of this chapter and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or

> surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon. . . . This section shall also not apply to the release of blood samples and the results of laboratory tests for blood alcohol content taken from a person who is under investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs. The use and disclosure of such information shall be limited to the official criminal proceedings.

RSA 329:26 (2004).

"[The physician-patient] privilege belongs to the patient, who may prevent the physician from revealing statements whose confidentiality the patient wishes to preserve." Nelson v. Lewis, 130 N.H. 106, 109 (1987). "Communications between a physician and a patient are privileged. This includes information, such as medical reports or test results, generated by a physician as a consequence of the confidential relationship with his patient." Elwell, 132 N.H. at 604-05.

The State does not contest that the defendant and Dr. Mastromarino had a physician-patient relationship. The X-rays that led to the discovery of the defendant's fractured vertebra in his neck were generated during the physician's examination of his patient, the defendant. The Court therefore finds, and the State does not contest, that Dr. Mastromarino's pertinent communications here pertaining to the defendant's vertebra injury in his neck fall within what would be covered by "communications" subject to the physician-patient privilege.

B. Effect of Presence of Third Party Upon Physician-Patient Privilege and Waiver

The Court must determine whether the presence of Trooper Vetter in the room with the defendant rendered the pertinent communications from Dr. Mastromarino to the defendant regarding his medical circumstances not "confidential" and therefore not subject to the protections of the physician-patient privilege. Similar questions have been

addressed in courts throughout the country, with varying results (see, e.g., People v. Covington, 19 P.3d 15 (Colo.2001); Secrest v. State, 679 A.2d 58 (Del. 1996)), but the New Hampshire Supreme Court has not specifically ruled on this issue in connection with this state's physician-patient privilege.

In State v. LaRoche, 122 N.H. 231 (1982), the New Hampshire Supreme Court held, among other things, that an EMT present in an emergency room out of curiosity could testify to the communications that he overheard between doctor and patient, because the patient/defendant "failed to put into the record any facts that would prevent the application of [the general] rule" that "[o]rdinarily, the presence of an extraneous third party to a privileged conversation destroys the privilege." LaRoche, 122 N.H. at 233. The Court suggested that "facts that would prevent the application of this rule" included "that the presence of the third party was required by the police," (citing People v. Decina, 138 N.E.2d 799, 806-07 (1956)), or "that the information was wrongfully disseminated by the doctor," (citing Branch v. Wilkinson, 256 N.W.2d 307, 312-15 (Neb.1977)), or "that either the physician or [the EMT] misrepresented [the EMT]'s role in the emergency room." Id.

While, as observed in LaRoche, "[o]rdinarily, the presence of an extraneous third party to a privileged communication destroys the privilege," (122 N.H. at 233) nonetheless, "if the communication was intended to be confidential, the fact that it may have been overheard by a third person does not necessarily destroy the privilege[.]" Decina, 138 N.E.2d at 807 (citing People v. Cooper, 120 N.E.2d 813, 816 note 3 (1954); Erlich v. Erlich, 104 N.Y.S.2d 531, 533 (N.Y.A.D. 1 Dept. 1951); Richardson on Evidence (8th ed.) § 438).

Several cases addressing this issue have determined that the patient intended to retain his doctor-patient confidentiality despite the presence of a police officer. The New

York Court of Appeals ruled in Decina that "the presence of the police guard, pursuant to the orders of the district attorney, in or about the doorway of the hospital room, where he could overhear the conversation between [the treating physician] and defendant" did not vitiate the defendant/patient's physician-patient privilege, and that the defendant was entitled to a new trial after the trial court erroneously admitted the evidence in violation of the defendant's privilege. Id. at 806-807.

In Secrest v. State, 679 A.2d 58 (Del. 1996), the Delaware Supreme Court ruled that the patient/defendant did not meaningfully acquiesce to the officer's presence in his treatment room, where the patient was disoriented and not originally aware of the officer's presence, and where he stopped speaking upon realizing an officer was present, and that, in those circumstances, the admission of the evidence, as provided both by the doctor and the officer, over an objection asserting the physician-patient privilege, constituted reversible error. Secrest, 679 A.2d at 63. The Court distinguished Secrest's case from the those following the general rule permitting a third person to testify to privileged information that the third person overhears, stating, "The rule vitiating the privilege makes sense in situations where the patient is reasonably lucid and able to control access to the setting."

In State v. Deases, 518 N.W.2d 784 (Iowa 1994), the Iowa Supreme Court ruled that a prisoner's statement to a prison nurse retained his physician-patient privilege, despite the fact that the statement was made in the presence of three prison guards who were present to protect the medical personnel. The Court stated:

> We hold that the presence of a third person during an otherwise confidential communication does not automatically destroy the privilege. If the third person is present to assist the physician in some way or the third person's presence is necessary to enable the defendant to obtain treatment, then the privilege protects confidential communications made in the presence of the third person.

Deases, 518 N.W.2d at 788. In support of its holding, which constituted one ground for the reversal of the conviction, the Court pointed out that "[a]ny attempt by Deases to ask the guards to step outside would have been futile[,]" and he therefore did not meaningfully consent to the guards' presence. Id. As for the policy reasons underlying its holding, the Deases Court stated, "We believe this interpretation of the statute promotes its intended purpose of allowing free and full communication between the doctor and patient as needed for adequate treatment. Any other interpretation would unfairly require a prisoner to risk inadequate treatment or surrender his doctor-patient privilege." Id.

Likewise, in State v. Gibson, 476 P.2d 727 (Wash. App. 1970), it was concluded that a prison guard who overheard communications between a physician and the inmate patient was "necessarily present," rather than present with the consent of the inmate. Gibson, 476 P.2d at 729. "The officer may be deemed to be an agent of the physician, present for the physician's protection as well as the detention of the prisoner," and thus, under Decina, the patient did not have the opportunity to deny consent to the officer's presence, and the communication with the physician remained privileged. Id. at 730. The Gibson Court reversed Gibson's conviction and remanded for a new trial. Id.

In State v. George, 575 P.2d 511 (Kan. 1978), the Kansas Supreme Court held the same for a patient who was not a prisoner, but who was in custody at the time of his treatment and the officer's observation thereof. The Court reversed George's conviction and remanded for a new trial where the trial court had erroneously admitted the testimony of the doctor under a belief that the officers' presence destroyed the privilege. George, 575 P.2d at 517. While the Court, in determining that the privilege applied, gave weight to the fact that no information had been communicated from the physician to the police, the

Court also reasoned, "A patient who is in custody can hardly be expected to ask the arresting officers to leave the jail so that he may be alone with his physician." Id. at 516.

In People v. Covington, supra, the victim's, not the defendant's, physician-patient privilege was at issue. The police officer, who was in the emergency room and had requested photographs of the victim's injuries, was there for the purpose of doing investigative work. He was not present for the protection of medical personnel or to maintain custody over the patient. Nonetheless, the Colorado Supreme Court concluded that the doctor-patient privilege applied as to the photographs, stating, among other things, that "[t]he record does not clarify whether the victim consented to the taking of the photographs," and that "[a]lthough the victim was coherent, the record does not establish whether she even knew that the physican assistant took the photographs, let alone whether anyone asked permission to take the photographs. Therefore . . . the officer's possible presence in the emergency room does not waive the physician-patient privilege in this case." Covington, 19 P.3d at 20. The Covington Court also observed that while the presence of a third party would result in a waiver of the physician-patient privilege, when "the information . . . [is] readily discernable to everyone present," this was not the case there. Id. The Court, however, did ultimately find its state's reporting statute to be applicable, rendering the pertinent disclosure permissible, and the photographs admissible into evidence.

Consistent with the authority discussed above, the Court concludes that the defendant here did not waive his physician-patient privilege either by consent, meaningful acquiescence, or by virtue of the presence of Trooper Vetter. The defendant had no real ability to object to the revelations of Dr. Mastromarino, or to halt or prevent them. Nor did he acquiesce in any way in regard to Dr. Mastromarino's actions. Further, he had no real

ability to oust the trooper from where the trooper was positioned inasmuch as the trooper was there effectuating his arrest and was discussing this with him when the doctor proceeded, without any warning, to reveal the pertinent information. Finally, the Court observes that the doctor did not transmit at that time information that was readily discernible to everyone present.[5]

C. Layperson Observation Doctrine

As already noted to some degree, precedent reveals that the physician-patient privilege may yield in a criminal case, through the layperson observation doctrine. This provides that certain observations are not deemed privileged where the information gleaned by the physician during treatment is nothing beyond that which a layperson could have obtained through an observation of the patient.

"Some jurisdictions . . . define privileged information to include both oral communications and observational information; however, they exclude 'facts observed [that] would be obvious to laymen.'" Covington, 19 P.3d at 20 (quoting In re Application of D'Agostino, 695 N.Y.S.2d 473 (N.Y.Sup.Ct. 1999)). The Court in People v. Marquez, 692 P.2d 1089, 1095-96 (Colo.1984) sustained the admission into evidence of the testimony of medical personnel involved with the removal of a bullet from the defendant where two officers witnessed the removal in the emergency room while the defendant was conscious. In ruling that this testimony's admission did not violate the defendant's physician-patient privilege, the Court noted, among other things, that the defendant/patient's "gunshot wounds to the arm and chest . . . were readily discernible and apparent to everyone present[,]" and that the testimony of the medical personnel was limited to information acquired through observation and examination, and did not include any statements by the

[5] See in this regard the later discussion concerning the layperson observation doctrine.

defendant to them for the purpose of treatment—and that any observer could have made the same observations about the defendant's wounds as the medical personnel had made. Id. at 1096; see Covington, 19 P.3d at 20-21 (interpreting Marquez, 692 P.2d at 1096). The Court in Covington indicated that, at least in Colorado, this layperson observation exception is "limited . . . to situations where third parties were actually in the room, rather than situations where the information would have been obvious to a layperson if she or he had been present." Id. (citing Marquez, 692 P.2d at 1096).

As already discussed, the facts of the defendant's injury would not be readily discernable to any layperson, even one in the room with the defendant. Even the physician who examined the defendant believed that the defendant had not suffered any "serious bodily injury" until after the X-rays revealed the vertebra fracture. Where a physician could not have diagnosed the injury without advanced tools and tests, the injury is certainly not one that "would have been obvious to a layperson" observing the defendant. Id. The Court therefore finds that any layperson observation exception would not apply in this case.

III. Statutory Exception to Physician-Patient Privilege

RSA 631:6 provides:

> [A] person is guilty of a misdemeanor if, having knowingly treated or assisted another for a gunshot wound or for any other injury he believes to have been caused by a criminal act, he fails immediately to notify a law enforcement official of all the information he possesses concerning the injury.

RSA 631:6, I (2007). The language of this statute has remained unchanged since 1994, and the statute was therefore in effect in 2004 when Dr. Mastromarino was treating the defendant. Unlike the statute at issue in Covington, which specifically came to provide, through amendment, that it was intended "to abrogate the physician-patient privilege as it

applied to the description of the wounds, not verbal communications between the physician and the patient" (Covington, 19 P.3d at 21), New Hampshire's statute does not contain any such explicit language.

In interpreting RSA 631:6, however, the New Hampshire Supreme Court has ruled, "The [reporting] statute imposes an obligation upon treating and assisting medical providers which, if breached, can result in criminal liability. This obligation may require medical providers to divulge information otherwise privileged under RSA 329:26." Payne, 150 N.H. at 441. The Court deems the reporting statute here, like the one involved in Covington, to abrogate the privilege in a limited fashion so as to allow physicians like Dr. Mastromarino to report and describe, as he did, his crime-related injury observations and information.

Here, Dr. Mastromarino "knowingly treated" the defendant for an "injury he believe[d] to have been caused by a criminal act," specifically, the criminal act of driving while intoxicated. Dr. Mastromarino perceived Trooper Vetter investigating the crime in the hospital. The aroma of alcohol was present on the defendant so strongly that it was reported to be apparent upon entering the defendant's hospital room or area. Accordingly, when Dr. Mastromarino disclosed to Trooper Vetter "all the information he possesse[d] concerning the injury[,]" including his diagnosis and his conclusion that the fractured vertebra constituted "serious bodily injury," he was complying with the reporting statute and avoiding eligibility for a misdemeanor. RSA 631:6, I (2007).

The Court observes that this case does not involve any police misconduct. The parties agree that Trooper Vetter did not coerce the physician to make his disclosure, nor was he deliberately present for the defendant's diagnosis to intrude upon the privilege.

The physician later spoke with Trooper Vetter outside the defendant's presence about the seriousness of the defendant's injury, as he was entitled to do under the reporting statute.

Because Dr. Mastromarino's disclosures, although falling within the realm of physician-patient privilege, also fell within the statutory abrogation of that privilege as contained in RSA 631:6, they were appropriate and not violative of the defendant's rights. Trooper Vetter's use of Dr. Mastromarino's disclosures as the basis for his charge of felony level DWI as opposed to misdemeanor level DWI was therefore proper.

IV. Blood Draw

Under the statutory scheme in place at the time of the defendant's treatment, RSA 265:92 provided:

> If a person under arrest for any violation or misdemeanor under RSA 265 refuses upon the request of a law enforcement officer to submit to physical tests or to a test of blood, urine, or breath designated by the law enforcement officer . . . none shall be given . . .

RSA 265:92 (2004). Accordingly, when Trooper Vetter had no reason to believe that any serious bodily injury had resulted from the defendant's accident, he correctly read the defendant his ALS rights associated with a misdemeanor, and correctly accepted the defendant's refusal to submit to a blood test. See id.

However, Dr. Mastromarino's revelation of the extent of the defendant's injury, which the Court has already determined constituted permissible compliance with the reporting statute, removed the applicability of RSA 265:92 and called for the application of RSA 265:93. That statute provided:

> When a collision results in death or serious bodily injury to any person, all drivers involved, whether living or deceased . . . shall be tested for evidence of alcohol or controlled drugs. A law enforcement officer shall request a licensed physician, registered nurse, certified physician's assistant, or qualified medical technician or medical technologist to withdraw blood from each driver involved if living . . . for the purpose of testing for evidence of

> alcohol content or controlled drugs; provided that in the case of a living driver the officer has probable cause to believe that the driver caused the collision.

RSA 265:93 (2004).

Trooper Vetter had probable cause to believe that the defendant caused the motor vehicle collision involved with the criminal charges here, based on his investigation of the pertinent circumstances. Once he learned from Dr. Mastromarino that the X-rays showed that the defendant had sustained a broken vertebra in his neck, that is, a "serious bodily injury," the trooper obtained proper basis to have that medical personnel withdraw a blood sample.

Because Trooper Vetter acted in accordance with the law on the facts before him, including the defendant's serious bodily injury and the probable cause to believe that the defendant was responsible for the crash, the required blood draw is admissible in evidence.

V. Follow-Up Investigation and Compliance with *Payne*

This Court previously ruled, following *in camera* review, that the State had shown essential need sufficient to pierce the privilege and obtain release of the defendant's hospital records. (Nadeau, J.). However, the defendant objects to this Court's prior order as it does not set forth an analysis in regard to its application of the facts in the present case to the tests set forth in Payne. The Court now supplements its earlier order as follows.

> Our case law supports disclosure of privileged and relevant medical records when: (1) a statute specifically authorizes disclosure, see In re Brenda H., 119 N.H. 382, 384-86, 402 A.2d 169 (1979) (superseded on other grounds as recognized by In re Tracy M., 137 N.H. 119, 624 A.2d 963 (1993)); (2) a sufficiently compelling countervailing consideration is identified, see Elwell, 132 N.H. at 606; In re Kathleen M., 126 N.H. at 382, 385; or (3) disclosure is

> essential under the specific circumstances of the case, see In re Kathleen M., 126 N.H. at 385.

Payne, 150 N.H. at 440-41. While Dr. Mastromarino's disclosures were authorized under statutory law, the State seeks to go beyond them to use the defendant's pertinent medical records at trial to prove the "serious bodily injury" element of felony DWI. The State argues that "disclosure is essential under the specific circumstances of the case." Id.

"The physician-patient privilege may be abrogated in certain narrow circumstances when disclosure of privileged information is essential." Id. at 442 (citing Elwell, 132 N.H. at 605). "To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure." Id. (citing In re Kathleen M., 126 N.H. at 385; McGranahan v. Dahar, 119 N.H. 758, 764 (1979)). "The investigation of felonies and the search for relevant evidence constitute a compelling justification to support invasion of the privilege." Id.

"Having established a compelling justification . . . , the State must still show that it has no reasonably available alternative sources it can use at trial to prove the 'serious bodily injury' element of felony aggravated driving while intoxicated." Id.

> In determining whether a reasonable alternative source of information is available to the State for it to pursue criminal prosecution of . . . [a defendant] without access to . . . [his] medical records, we consider: (1) whether the alternative evidence is admissible at trial; (2) whether the alternative evidence is sufficient to overcome a motion for directed verdict; and (3) whether the State has made adequate efforts to investigate alternative sources.

Id. at 442-43.

The only alternative evidence that the State could present to support a finding of serious bodily injury would be the testimony of Dr. Mastromarino in regard to his finding

that the defendant had suffered a fracture of a cervical vertebra. While that testimony may be admissible at trial, the Court is doubtful that it alone, without the underlying pertinent hospital records upon which it is based (that is, the materials that would make it complete), would suffice to make the State's case, or clearly be enough for the State's case to survive a motion for a directed verdict.

After all, prior to examining the defendant's X-rays, Dr. Mastromarino was of the view that the defendant had not suffered any serious bodily injury as a result of the accident. Indeed, his fractured vertebra in the neck diagnosis depended entirely on the X-ray results, and could not have been reached without them. Therefore, the Court concludes that the X-rays and related hosptial records are essential to explain to the fact-finder in a complete fashion how Dr. Mastromarino came to alter his opinion to come to his diagnosis of a broken vertebra in the neck, a serious injury. It would certainly be the case that, without the availability of these records, the doctor's testimony may well lack necessary support, and would appear artificially incomplete. The Court accordingly finds that consideration of the first two prongs of the Payne essential need analysis supports the production, and use here, of the defendant's pertinent medical records relating to his 2004 diagnosis and treatment.

In this regard, the Court further observes that Dr. Mastromarino's disclosures per the physician reporting statute encompassed discussions of the X-ray results, so it is hardly a further intrusion upon the defendant's privilege rights to allow the production and use of the X-rays here.

As to the third prong of the essential need test, "[t]he adequacy of the State's investigative efforts . . . the State must make an offer of proof demonstrating substantial, good faith efforts to discover alternative sources of competent evidence." Id. at 444.

Here, the State established that Trooper McLane went to the Guilmette residence in order to see what information could be obtained from the people who knew the defendant. No one was then at this premises, although it is safe to believe that they would be unlikely to voluntarily turn over to the police information that would be adverse to the defendant's interest during his trial. The Trooper next attempted to speak to neighbors. The neighbor that spoke with him did so on condition of anonymity and expressed his fear of the defendant. The State's argument that, because the defendant strikes fear into the hearts of those around him, it is unlikely that anyone would voluntarily give testimony against him even if they had any to give, has force. In addition, the investigating Trooper next spoke with the people least likely to be intimidated by the defendant, law enforcement officers who were familiar with the defendant, and these persons could not provide Trooper McLane with any information relating to the defendant's injury or recovery.

Because the State interviewed several potential witnesses, none of whom was able to shed light on the defendant's injury, and because there was reason to believe that no other witnesses would be available due to fear of the defendant, the State has shown sufficient effort to locate alternative sources of evidence.

The State has thus established its entitlement to the production and use of the pertinent hospital records to establish the "serious bodily injury" element of the felony level DWI charges against the defendant arising from the 2004 motor vehicle crash.

VI. Conclusion

For the reasons discussed above, the defendant's Motion to Suppress is **DENIED**.

So Ordered.

Date: FEBRUARY 10, 2009

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JOHN M. LEWIS
PRESIDING JUSTICE