IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 96,010

JAMES C. BABER III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 0656879

ROBERT R. WHEELER
Assistant Attorney General
Florida Bar No. 0796409
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Respondent

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Respondent herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecution in the trial court and Appellee in the Fourth District Court of Appeal below. Respondent will be referred to herein as “Respondent” or the “State”. Petitioner, James C. Baber III, was the defendant in the trial court and Appellant in the District Court below. Petitioner will be referred to herein as “Petitioner” or “Defendant”.

The following symbols will be used:

IB = Petitioner’s Initial Brief

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal subject to the additions and clarifications set forth below and in the argument portion of this brief which are necessary to resolve the legal issues presented on appeal:

Jeffrey Doss saw Petitioner driving recklessly and fast (T 441, 443-444) and on the wrong side of the road (T 446). Petitioner's car was trying to turn onto the wrong side of the median (T 451). He saw the impact which occurred while Appellant was turning (T 451). Art Cobb saw Petitioner's car going the wrong way on the street (T 476-477).

Officer Sara Dougher arrived on the scene and assisted the injured (T 505-509). She went to Petitioner's car first where she found Petitioner bleeding from the head (T 509). Petitioner stated: "I am Jim, I live on Steeplechase or Haverhill, and I am coming from the bar." (T 513). Dougher testified that she was unable to get a blood sample from Petitioner while at the hospital; Petitioner refused to give a sample (T 514, 531-532).

Patrick Kendrick, a paramedic, testified that at the scene of the accident, Petitioner's speech was slurred, and he was fumbling around and seemed confused (T 539, 542, 549-550). Kendrick smelled

alcohol on Petitioner's breath (T 539, 542). Kendrick asked Petitioner if he had been drinking, and Petitioner responded that he had consumed two beers (T 540, 548). Kendrick was of the opinion that Petitioner was under the influence of alcohol at the time of the accident (T 541, 548, 554).

The trial court determined that the prosecutor had laid a sufficient predicate for the business record admission of State's Exhibit 8-A, the blood alcohol report of Petitioner (Attached as Appendix B to Petitioner's Initial Brief)(T 633).

The lab technician who analyzed Appellant's blood at the hospital was unavailable for trial -- she was in Trinidad at the time (T 636).

Nurse Robin Story Powers was called as a defense witness out of turn (in the middle of the State's case) (T 874). Ms. Powers testified on cross-examination that she would rely on the blood alcohol report from the hospital lab (T 889), and that she did not find that lab report to be abnormal based on her observations (T 889).

SUMMARY OF THE ARGUMENT

The trial court properly admitted Petitioner's medical blood alcohol test results contained in the hospital business record. The holding in the personal injury case of Love v. Garcia, that a blood alcohol test report contained in a hospital record was admissible with no testimony other than that of the business record custodian qualifying the report as a business record, is equally applicable to all criminal cases. This holding has been applied to criminal cases under Florida law and in numerous other jurisdictions.

In the same vein, the holding in Love v. Garcia applies to the case at hand. Federal and state courts have found that the admission of hospital records under the business record exception to the hearsay rule does not violate the Confrontation Clause. The fact that the original instrument printout of Petitioner's blood alcohol test was unavailable did not violate his rights under the Confrontation Clause. Petitioner's claim that the unavailability of, and resulting inability to question, the technician who performed Petitioner's blood test violates the Confrontation Clause is unfounded.

It is Petitioner's burden to provide witnesses to rebut the presumption of trustworthiness accorded the business records.

Petitioner had numerous means of challenging the trustworthy presumption and employed a number of them. Petitioner was never foreclosed from challenging the trustworthiness of the blood alcohol report and cannot claim a violation of the Confrontation Clause on these grounds.

The trial court properly denied Petitioner's request to admit the personnel record of the laboratory into evidence. The record was irrelevant to any issue. Alternatively, if the record was admissible, the exclusion of it was not prejudicial to Petitioner and was harmless error.

The trial court did not abuse its discretion in denying juror interviews. Petitioner's mere inference and speculation of juror misconduct or impropriety, without more, fails to provide sufficient grounds for the court to permit juror interviews.

ARGUMENT

POINT 1

THE TRIAL COURT PROPERLY ADMITTED PETITIONER'S MEDICAL BLOOD ALCOHOL TEST RESULTS CONTAINED IN A HOSPITAL BUSINESS RECORD.

A. LOVE V. GARCIA APPLIES IN ALL CRIMINAL PROSECUTIONS

In Baber v. State, 24 Fla. L. Weekly D 1748 (Fla. 4th DCA, June 23, 1999), the Fourth District Court of Appeal concluded that this Court's decision in Love v. Garcia, 634 So. 2d 158 (Fla. 1994) applied in criminal cases.

> In Love v. Garcia, 634 So. 2d 158 (Fla. 1994), the Florida Supreme Court held in a personal injury case that a blood alcohol test report contained in a hospital record was admissible with no testimony other than that of the business record custodian qualifying the report as a business record. The court reasoned that if such a report is sufficiently trustworthy to be relied on for medical treatment, it is sufficiently trustworthy to be admissible in evidence as a business record, unless the party opposing the admission can show that it is untrustworthy.

Baber v. State, supra. The court held that in criminal cases, a blood alcohol report was properly admitted into evidence as a business record through the testimony of the hospital medical records custodian. Id. However, the court certified the following question as one of great public importance:

> DOES LOVE V. GARCIA, 634 SO. 2D 158 (FLA. 1994) APPLY IN CRIMINAL PROSECUTIONS WHERE

> BLOOD ALCOHOL TEST RESULTS ARE OFFERED AS PROOF TO ESTABLISH AN ELEMENT OF THE OFFENSE, IF THE BLOOD ALCOHOL TESTS WERE ADMINISTERED BY HOSPITAL PERSONNEL FOR MEDICAL TREATMENT PURPOSES?

Section 90.803(6), Florida Statutes (1997), governs the admission of blood alcohol test reports done in a hospital setting under the business records hearsay exception. That section states:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY --
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> (b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

In Love v. Garcia, 634 So. 2d 158 (Fla. 1994), the Florida Supreme Court ruled for the first time on the issue of medical and

hospital records, and the admissibility of two blood alcohol tests recorded in those hospital records under the business records hearsay exception. The Court noted that the medical record exception includes routine blood tests which disclose alcohol content if the tests are a component of the hospital or medical records. Love v. Garcia, 634 So. 2d 158, 159 n. 2 (Fla. 1994)(citing Andres v. Gilberti, 592 So. 2d 1250 (Fla. 4th DCA 1992)). Several district courts have held that medical records are an exception to the hearsay rule and fall within section 90.803(6)(a), Florida Statutes (1991): Phillips v. Ficarra, 618 So. 2d 312 (Fla. 4th DCA 1993); Grant v. Brown, 429 So. 2d 1229 (Fla. 5th DCA), review denied, 438 So. 2d 832 (Fla. 1983); Jaime v. Vilberg, 363 So. 2d 386 (Fla. 3d DCA 1978), cert. denied, 373 So. 2d 462 (Fla. 1979). Id.

This Court stated that once the predicate for section 90.803(6)(a) is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records. Id. at 160. If the opposing party cannot fulfill its burden, then the record will be allowed into evidence as a business record, if it is relevant. Id.

Under the business record exception, the trustworthiness of medical records is presumed. Id. The trustworthiness of medical

records is “based on the test’s general acceptance in the medical field and the fact that the test in question is relied upon in the scientific discipline involved.” Id.

In Brock v. State, 676 So. 2d 991 (Fla. 1st DCA 1996), a criminal case, the First District Court of Appeal admitted hospital records establishing blood alcohol levels under the business record exception. Brock sought to admit into evidence the hospital’s emergency record and a laboratory blood report to support his defense of voluntary intoxication. Id. at 993. The two reports showed the results of a blood alcohol test which had been ordered as part of his medical treatment. Id. at 994. The testimony of a nurse and the records custodian confirmed that these two reports qualified as business records. Id.

The State asserted that to admit the results of the blood alcohol test on the reports, “an adequate predicate would require the testimony of the laboratory technicians who had drawn and tested the blood, and persons who could establish the chain of custody of the blood, and others (as necessary) to establish the accuracy of the test.” Id. at 995. Relying on the holding in Love v. Garcia, supra., the appellate court disagreed and set forth the procedure to be followed to admit medical records under the business records exception.

> If a laboratory or hospital records custodian or other qualified witness establishes a proper predicate under section 90.803(6), Florida Statutes, "the burden is on the party opposing the introduction to prove the untrustworthiness of the records. If the opposing party is unable to carry this burden, then the record will be allowed into evidence as a business record" subject, of course, to the test of relevancy. Under the statutory hearsay exception, "the trustworthiness of medical records is presumed." (citations omitted)

Id. at 996. "Given the presumed trustworthiness of the medical records," the party opposing the admission has the burden to put on "laboratory technicians or experts to challenge the actual administration of the test." Id.

The court reiterated the reasoning behind admitting a hospital record under the business record exception: "The reasoning underlying Love is that where medical professionals generally rely on the test results, courts too are permitted to rely on the medical records trustworthiness." Id. "Additionally, the proponent of evidence such as a laboratory report is not necessarily required to produce an actual laboratory technician to testify. The supreme court held that a records custodian will suffice." Id.

As the district court noted, other states have admitted blood alcohol tests into evidence in criminal cases as business records.

In State v. Martorelli, 346 A. 2d 618, 622 (N.J. App. Div. 1975), the court held that in view of the simplicity and general reliability of a blood test, the results contained in a hospital report is admissible under the business record exception. In Dixon v. State, 489 S.E. 2d 532, 536 (Ga. App. 1997), the court found that "[t]he trial court did not err in finding a sufficient foundation for admission of the hospital record as a business record exception to the hearsay rule." In State v. Christian, 895 P. 2d 676 (N.M. Ct. App. 1995), the court held that the blood alcohol test results found in the state laboratory reports were properly admitted into evidence as a business record.

In State v. Garlick, 545 A. 2d 27, 33 (Md. 1988), the highest Maryland appellate court found hospital records admissible under the business records exception:

> Thus, once it is clear that the hospital record was made in "the regular course of business" and the recorded transactions are "pathologically germane to treatment" the record is admissible as an exception to the hearsay rule.

In State v. Todd, 935 S.W. 2d 55, 59-60 (Mo. Ct. App. 1996), the court, recognizing that properly prepared hospital records are admissible in the same manner as other business records, held that defendant's blood test recorded in those hospital records, was properly admitted as a business record. See also State v. Yates,

574 So. 2d 566 (La. Ct. App. 1991)(hospital records containing result of blood test admissible).

Petitioner's reliance on State v. Strong, 504 So 2d 758 (Fla. 1987) is misplaced. In Strong, this Court held that blood test evidence may be "admitted on establishing the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test results' meaning." Id. at 760. In the case at hand, the appellate court properly found that Strong, and other cases relied upon by Petitioner, predated Love v. Garcia, supra. Accordingly, the pre-dated cases were inapplicable to the application of the business record exception for hospital records.

This is not an attempt to "circumvent the well-established requirements for admitting medical blood alcohol evidence" as Petitioner suggests (IB 10). These out-dated "requirements" are inapplicable. For the logical reasons enunciated by this Court in Love v. Garcia, supra., the law evolved to include hospital records under the business records exception.

> Under the business record exception, the trustworthiness of medical records is presumed. Such trustworthiness is based in the test's general acceptance in the medical field and the fact that the test in question is relied upon in the scientific discipline involved. Actual reliance on the test in each course of treatment is not required. (emphasis

added)

Id. at 160. For these same reasons set forth in Love, the law has logically evolved to allow for this exception in criminal cases.[1]

B. LOVE V. GARCIA SHOULD BE APPLIED IN THIS CASE

Although Petitioner recognizes the "inclination to apply Love v. Garcia to criminal cases" (IB 12), Petitioner contends that it should not be applied in "this" case (IB 11). Essentially, Petitioner is asking this Court to carve out an exception for the facts of this case from the appellate court's holding that medical blood alcohol test result reports will be admissible in criminal cases under the business records exception.

Petitioner acknowledges that the medical reports are presumed trustworthy, and that the party in opposition to the records has the opportunity to rebut this presumption (IB 14). In the case at hand, after the State laid the proper predicate to admit the blood alcohol test record into evidence under the business records exception, Petitioner had the opportunity to prove the record was not trustworthy. Petitioner asserts that he had three ways to prove the record was not trustworthy: (1) to re-test the blood

[1] Indeed, Petitioner "understands the inclination to apply Love v. Garcia to criminal cases (IB 12). Petitioner has fairly presented several authorities that support the proposition that medical blood alcohol test result reports should be admitted in criminal cases under the business records exception (IB 12-3).

sample; (2) to inspect the original instrument printout and compare it to the hospital record; or (3) question the technician who performed the test (IB 14). He contends that based on the facts of this case, he could not rebut the presumption of trustworthiness by any of these three means, and consequently, his due process and Confrontation Clause rights under the Florida and federal constitutions were violated (IB 20-21). Petitioner's argument is without merit.

1. Admission of Hospital Records under Business Records Exception does not violate Confrontation Clause.

As the Fourth District Court of Appeal found, a Confrontation Clause challenge to the admission of reports under the business records exception to the hearsay rule, in a criminal case, has been rejected by the federal courts. Baber v. State, 24 Fla. L. Weekly D 1748 (Fla. 4th DCA, June 23, 1999). The Sixth Amendment's Confrontation Clause provides that all criminal defendants shall have the right to confront witnesses against him. However, the Clause is not an absolute bar to the admission of evidence under the exceptions of the hearsay rule. Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 3145-46, 111 L.Ed.2d 638 (1990). The basic rule against hearsay is riddled with exceptions that do not offend the Confrontation Clause, one of which is the business record

exception.

The Confrontation Clause operates to restrict admissible hearsay in two ways: (1) if a declarant is not present for cross-examination for trial, the Clause requires a showing that he is unavailable; and (2) once unavailability is shown, the statement is admissible only if it bears an "indicia of reliability". Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2538-39, 65 L.Ed.2d 597 (1980). However, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 100 S.Ct. at 2539. The business record exception is such a firmly rooted hearsay exception. Id. at 2539 n. 8.

It is not necessary under the firmly rooted business hearsay exception to prove either the unavailability of the witness or an independent indicia of reliability. U.S. v. Norton, 867 F. 2d 1354, 1363 (11th Cir. 1989). "[W]e find the business records exception to the hearsay rule to be 'firmly enough rooted in our jurisprudence' to satisfy the requirements of the Confrontation Clause where, as here, the document was properly admitted under the exception." Id. Indeed, this Court has recently recognized that "firmly rooted" hearsay exceptions do not violate the Confrontation Clause:

> "Firmly rooted" hearsay exceptions include exceptions such as excited utterances, dying declarations, and statements made to obtain a medical diagnosis. See White v. Illinois, 502 U.S. 346, 354-56 (1992). The United States Supreme Court has reasoned that these "firmly rooted" exceptions have existed for centuries and are recognized by the vast majority of jurisdictions. See id. at 355 n.8. "[T]he Framers of the Sixth Amendment 'obviously intended to . . . respec[t]' the certain unquestionable rules of evidence in drafting the Confrontation Clause." Lilly v. Virginia, 119 S.Ct. 1887, 1894 (1999)(quoting Mattox, 156 U.S. at 243)(alteration in original).

Conner v. State, ___ So. 2d ___ (Fla. Sept. 16, 1999)(slip op.).

Other jurisdictions have similarly found that the admission of hospital records under the business record exception to the hearsay rule does not violate the Confrontation Clause. In Dixon v. State, 489 S.E. 2d 532, 533 (Ga. App. 1997), the defendant was in a motor vehicle accident after which his blood was tested for alcohol content and the results entered into his hospital record. The hospital record was admitted into evidence, and on appeal, the defendant challenged the admission of the hospital record alleging evidence of the blood alcohol test results violated his rights under the Confrontation Clause. Id. at 535.

The court noted that the admission of the hospital record under the business record exception, without giving the defendant the opportunity to confront and cross-examine the person who

performed the test, "would appear on its face to violate the Confrontation Clause guarantee." Id. at 536. The court reiterated the analysis of a firmly-rooted hearsay exception as stated in Ohio v. Roberts, supra., and "found that the results of blood tests to determine a defendant's alcohol concentration level administered by a hospital to provide medical treatment for the defendant were admissible . . . upon proper foundation testimony, as business record exceptions to the hearsay rule without testimony from the persons performing the tests." Id.

The court found that the Confrontation Clause is satisfied when hearsay is sufficiently guaranteed reliable to come within a firmly rooted exception to the hearsay rule. Id. at 537. "Because the hospital record showing [the defendant's] blood test results was properly admitted pursuant to the [the evidentiary rules] as a business records exception to the hearsay rule, it bore an 'indicia of reliability' sufficient to satisfy the Confrontation Clause." Id.

In State v. Garlick, 545 A. 2d 27, 28 (Md. 1988) the court addressed the question: "Is the constitutional right of confrontation violated by the admission into evidence of a hospital record containing laboratory test results unless the technician who conducted the test is produced as a witness?" Blood tests were run

on the defendant that showed the presence of PCP. Id. These results were recorded on a laboratory report and on the emergency room report. Id. The defendant argued "that admitting the hospital record without producing the hospital technician as a witness violated these rights of confrontation." Id. at 29.

The court stated that the business records exception is solidly grounded on concepts of reliability. Id. at 30.

> The trustworthiness and reliability of any business record arises from the fact that entries recording an act or event are made in the "regular course of business" and it is the "regular course of business" to record those entries at the time of that act or event or soon thereafter. "Ordinarily, hospital records satisfy these criteria and the information they contain is admissible as long as it is pathologically germane." So events that are "pathologically germane" to that treatment are within the regular course of the hospital's business and the recordation of those events are admissible under a business record exception. (citations omitted)

Id. at 33. Thus, if the record was made in the regular course of business and is germane to the treatment, it is admissible as a business record exception to the hearsay rule. Id.

The testimony of the technician who performed the test is not necessary. Id. at 35.

> The examining doctor relied on these objective scientific findings for [the defendant's] treatment and never doubted their trustworthiness. Neither do we. This high

> degree of reliability, as we explained early on, permits introduction of the test results contained in the hospital records presented in this case without any need for showing unavailability of the technician without producing the technician. Under these circumstances the constitutional right of confrontation is not offended.

Id.

In State v. Christian, 895 P. 2d 676 (N.M. Ct. App. 1995), the court discussed whether the admission of the defendant's blood-alcohol report into evidence under the business records exception violated his rights under the Confrontation Clause. Although the technician who analyzed the blood did not testify, a doctor with knowledge about the testing procedure and how the information is compiled was available for cross-examination. Id. at 683. Because the technician would probably have no independent recollection of this particular blood testing, there was no violation of the Confrontation Clause. Id.

These cases are directly on point with the case at hand. The blood alcohol test record was a business record made in the regular course of business and was necessary for Petitioner's treatment. The record was inherently reliable because it came within a firmly-rooted exception to the hearsay rule -- the business record exception. The technician probably would not have any independent recollection of this single blood test. There is no violation of

the Confrontation Clause.

2. Unavailable Original Instrument Printout does Not Violate Confrontation Clause.

The fact that the original instrument printout of Petitioner's blood alcohol test was unavailable did not violate his rights under the Confrontation Clause. The testimony confirms that the report generated from the hospital computer was a business record generated in the course of regularly conducted business activity. F. Thomas Carroll was the chief of forensic toxicology for the Palm Beach County Sheriff's Office and the medical examiner at the time of the trial (T 680). He testified as to the accuracy of the results logged into the computer by the technician who performed the test. He stated that the original printout of the machine would state no more than what the technician would put down in the quality control log (T 742). He opined that the technician who performed the test correctly input the results of the test into the computer, basing his opinion on his review of the daily quality control charts from that input (T 742). Any errors in the testing that was on the original machine tape would be noted on the daily log that is right next to the machine (T 744). The machine has an internal check so that if the test is abnormal, the machine will prohibit an invalid result from coming out (T 744).

George Calash was the head of the chemistry department at the hospital and maintained control over the chemistry laboratory (T 601, 603). The chemistry laboratory performs the blood tests for the hospital (T 603). He supervised the technician who performed the test of Petitioner's blood (T 603). It was normal practice to maintain records of what they do (T 603). It is a normal course of business for the chemistry laboratory to create records based upon the tests that they perform (T 603).

Calash testified that he recognized State's Exhibit 8; he printed one of the reports from the computer system for alcohol analysis on Appellant (T 604). Calash recognized the exhibit as a report that the hospital keeps (T 604). According to Calash, the technologist will, after performing the test, enter the results in the computer. Then at a specific time, the front office will print those reports and take them to the floor. It then goes to the charts, but they are available in the computer, and the staff can print them at any time (T 604-605). The State's exhibit is a printed copy that was taken from the hospital's computer (T 605). The exhibit is part of the chart that is maintained on the patient (T 605). The test was done on November 11, 1995, and the report (exhibit) was printed on November 14, 1995 (T 605).

Calash testified that after the technologist finishes the

testing, they put it into the computer, enter the results, and automatically the computer will put the time and date on it (T 605-606). The technologist is the person who has the information, who transmits that (T 605-606). Once you enter in the computer log, the name will go in the record that they performed the testing (T 606). According to Calash, those reports are generally kept in the regular course of business at St. Mary's Hospital (T 606). The report is kept on the patient's chart (T 606). It is a regular practice at the hospital to make those particular reports (T 606). Calash testified that the physicians at St. Mary's Hospital rely on the results of the tests done at the witness's lab (T 624).

Lori Rustin, an employee for Smart Corporation, works at St. Mary's Hospital as a records custodian (T 590). She is the custodian of medical records at the hospital (T 590). Rustin stated that laboratory reports are normally kept as part of the medical records at St. Mary's (T 591). The records are the kind normally kept in the course of regularly conducted business activity at St. Mary's (T 591-592). The records are under Rustin's control (T 592).

Based on the testimony of Carroll, Calash, and Rustin, it is obvious that the laboratory report of Petitioner's blood was a business record in and of itself, fitting under the exception to

the hearsay rule. Although the laboratory report was not directly generated from the testing machine, the results from that machine were directly entered into this report by the performing technician. There were quality controls to assure that the results were properly entered. This laboratory report was relied upon by the physicians in their treatment and diagnosis of the patients. Certainly, this laboratory report was a business record, open for challenge by the Petitioner as to its trustworthiness, as with any other business record.

A comparison of the laboratory report with the original machine tape was not the only means of challenging the trustworthiness of the results. Petitioner challenged the trustworthiness of the results by cross-examining the witnesses (Carroll, Calash, and Rustin) who testified as to the trustworthiness of the blood alcohol report. Petitioner also challenged the trustworthiness by contesting the method of testing -- use of the DuPont ACA-IV machine -- and the reliability of the results compared to other methods of testing. In fact, Petitioner alleged that a Frye hearing was necessary because use of this machine to test blood alcohol was not an accepted method within the scientific community. Undoubtedly, there were other ways to challenge the trustworthiness of the blood alcohol test, and

Petitioner employed them. Only because of the failure of those challenges, does Petitioner now contend that the only manner to challenge the trustworthiness of the laboratory document was to compare it to the original.

Even though the laboratory report was not the original document evidencing Petitioner's blood alcohol level, it was a business record in and of itself, which could be challenged as untrustworthy as any business record could. Certainly, there are numerous tests where the computer does not generate a report, and the results of those tests, which have to be entered into some form of a report by a technician, can be challenged as to their trustworthiness. Indeed, laboratory test results manually entered into hospital records by technicians are business records entitled to a presumption of trustworthiness, subject to attack as untrustworthy, and not offensive to the Confrontation Clause.

In State v. Garlick, 545 A. 2d at 34, the defendant's test results were reported via computer terminal and then recorded in an emergency services chart which was relied upon for treatment of the defendant. The emergency services chart, which was not the original document of the defendant's test results generated by a machine but was a business document created from information retrieved from the original document, was admissible under the

business record exception to hearsay, and did not offend the Confrontation Clause. Id. at 35.

In Dixon v. State, 489 S.E. 2d at 535, the business document was a computer printout of the test results that were electronically stored in the hospital's computer. The blood test had been completed by the hospital laboratory and entered into the hospital computer system in the normal course of business. Id. This document, generated from the hospital computer as in the case at hand, was admitted under the business record exception to the hearsay rule, subject to attack as untrustworthy, and sufficient to satisfy the Confrontation Clause. Id. at 536-37.

In State v. Christian, 895 P. 2d at 680, the chemist tested blood alcohol levels on a gas chromatograph and prepared a report from those test results. Although the report was not a direct print out from the machine and had been prepared by the chemist, there was no Confrontation Clause violation. Id. at 682-83. See Brock v. State, 676 So. 2d 991 (Fla. 1st DCA 1996)(hospital's "emergency record" from which the results of a laboratory blood test had been entered were presumed trustworthy and were subject to challenge as untrustworthy).

Petitioner contends that the hospital's failure to retain the original printout violated the Agency for Health Care Regulations,

Section 59A-7.028 requiring that these printouts be retained for at least two years (IB 18). He asserts that this failure makes the record "untrustworthy *per se*" (IB 19). As Petitioner concedes, this issue was not raised below, and cannot be brought before this Court for the first time on appeal. It is well-established that an appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved, or if not properly preserved would constitute fundamental error. Florida Statute §924.051(3). An issue is properly preserved if the legal argument or objection to evidence was timely raised before, and ruled on by, the trial court, and was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor. Florida Statute §924.051(1)(b). Petitioner's allegation of error in regard to these agency regulations was not timely raised before the court below and are not properly preserved for review by this Court.

If preserved, Petitioner misconstrues the regulation. It does not say that instrument printouts must be retained in order to assure accurate test results (IB 18). It states that a "record system" to identify patient specimens must be maintained in order to assure accurate results. Obviously, this "record system" requirement is to prevent one patient's specimen from being mixed

up with another. The segment of the regulation requiring that instrument printouts be retained is clearly not in conjunction with or for the purpose of assuring that accurate test results are reported.

Additionally, any violation of this regulation is irrelevant to any trustworthy analysis. The State has an interest in maintaining instrument printouts for the benefit of the patient, but this has no relation to the trustworthiness of a hospital business record created from that printout. The hospital record created from that printout is a business record in and of itself, subject to all the trustworthiness presumptions and attacks as any business record would be. To claim that an independent business record cannot be presumed trustworthy because the data from which it is composed is lost or destroyed is wrong. The independent business record is presumed trustworthy based on its own merits.

3. Unavailability of Technician Does Not Violate Confrontation Clause.

Petitioner's claim that the unavailability of, and resulting inability to question, the technician who performed Petitioner's blood test violates the Confrontation Clause is unfounded. The fact that the technician was not available to the State or Petitioner does not create a Confrontation Clause issue. The whole

reasoning behind the business records exception to hearsay is to admit into evidence records kept in the regular course of business through the testimony of the records custodian instead of requiring the technician who actually performed the blood test to testify. Florida law permits the testimony of a records custodian instead of the testimony of a technician who actually performed the blood test. See Brock v. State, supra.; Love v. Garcia, supra.

The fact that there is no need to question the technician who performed the blood test is the crux of the business records exception.

> Defendant's articulated objection to the effect that the failure to produce the physician or technician who performed the test deprived him of the ability to cross-examine as to his qualifications and as to the nature and reliability of the particular test which he utilized is an assertion which, it recognized, would run counter to the entire rationale underlying the business records exception to the hearsay rule. This rule was designed to eliminate the necessity of producing employees of an organization to establish a fact which experience has demonstrated to be trustworthy.

State v. Martorelli, 346 A. 2d at 621. Because there is an "indicia of reliability" of the information in the business record, there is no need to confront the technician. The proper foundation from the record custodian, which was provided in this case (T 590-92), is all that is needed to admit these records into evidence.

Petitioner contends that the technician's unavailability led to him not having an opportunity to question the reliability of her work (IB 20). However, Petitioner is not afforded this opportunity because the records are admitted under the business records hearsay exception. Under this exception, only the records custodian needs to lay the foundation for the admission of the records -- the technician does not have to be available or testify.

> This high degree of reliability, as we explained early on, permits introduction of the test results contained in the hospital records presented in this case without any need for showing unavailability of the technician and without producing the technician. Under these circumstances, the constitutional right of confrontation is not offended.

State v. Garlick, 545 A. 2d at 35.

Petitioner claims that his ability to rebut the presumption of trustworthiness is meaningless without the opportunity to question the technician (IB 21). However, the law is clear that after the records are presumed trustworthy through the business record exception, the party opposing their admission has the "burden to prove the untrustworthiness of the records, such as by putting on the laboratory technicians or experts to challenge the actual administration of the test." Brock v. State, 676 So. 2d at 996 (emphasis added).

> Once this predicate is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records. If the opposing party is unable to carry this burden, then the record will be allowed into evidence as a business record.

Love v. Garcia, 634 So. 2d at 160.

It is not the State's burden to provide the witnesses for Petitioner. Although the exception may "guarantee" an opportunity to rebut (IB 21), it does not guarantee that the State must provide the witnesses to do this. The State fulfilled its legal obligations by providing Petitioner with the most specific location of the technician that it had. The State is required to do no more. It is Petitioner's burden to provide the technician's testimony or any other expert to rebut the presumption of trustworthiness. Certainly, Petitioner had the burden and the opportunity to rebut the presumption of trustworthiness, and there was no violation of the Confrontation Clause.

Petitioner cross-examined the records custodian, Rustin, as well as Calash, who headed the chemistry lab at the hospital. Rustin's cross-examination was sufficient to inquire into the trustworthiness of the record itself. The cross-examination of Calash was sufficient to inquire into the means and methods of testing and reporting the test results. Any meaningful information regarding the trustworthiness of the blood alcohol testing and the

reporting of the results was garnered from these two witnesses.

Any attempt to question the technician as to her workload that evening, delays, or distractions most likely would have been fruitless. Given the number of tests that the technician performs, any specific or independent recollection of this test would be extremely doubtful. See State v. Christian, 895 P. 2d at 683 (given great number of tests chemist performed, doubtful of recollection of specific test). The testimony of Rustin and Calash was sufficient for any attempt to challenge the trustworthiness of the test and the reporting of the results, therefore it satisfied any requirements under the Confrontation Clause.

4. Petitioner had Numerous Means of Rebutting the Trustworthy Presumption.

Petitioner claims that there were only three ways to carry the burden of proving that the blood alcohol record was not trustworthy: (1) re-test the blood sample; (2) inspect the instrument print-out; and (3) question the technician (IB 14). He contends that because he was foreclosed from employing any of these three means, this created an irrebuttable presumption of trustworthiness in violation of the Confrontation Clause (IB 21). This argument is without merit.

Petitioner had numerous other ways to challenge the

trustworthiness, and employed several of them as evidenced by Petitioner's arguments in his Initial Brief in the Fourth District Court of Appeal:

> Here, the evidence showed the opposite; the flaws in the test were many: (1) it was not the generally accepted and utilized standard for forensic alcohol analysis - gas chromatography - but an alcohol dehydrogenase method; (2) it was not performed in duplicate, a standard safeguard for forensic tests; (3) it was not performed on whole blood, as required by Florida forensic labs, but rather with blood serum which yields a higher result; (4) no chain of custody of the specimen was established by record evidence or testimony; (5) neither the original test result tape from the DuPont ACA-IV nor the technician were available for examination by defense counsel; (6) the technician had an undisputed recent history of reporting an erroneous test result for a controlled substance; (7) the hospital procedures were not designed for forensic testing and indeed forbade forensic use of its own test results; and (8) DuPont itself does not recommend it ACA machine for forensic alcohol analysis.

Petitioner's Initial Brief in Fourth Dist. Ct. of Appeal, p. 14. Additionally, Petitioner rebutted the trustworthiness by attacking the quality control, maintenance, and accuracy of the blood testing machine (DuPont ACA), through the cross-examination of the State's witnesses Carroll and Calash.

Although Petitioner contends that he has only three means of rebutting the trustworthiness presumption of the blood alcohol test

(IB 14), Petitioner's own brief in the lower court clearly sets forth six other ways to carry that burden. Certainly, Petitioner cannot claim that he was foreclosed from asserting these other means of rebuttal when he alleges that there is evidence supporting them and asserts them in the court below.

Petitioner was never foreclosed from challenging the trustworthiness of the blood alcohol report and cannot claim a violation of the Confrontation Clause on these grounds. His opportunity to rebut the presumption was not "meaningless" or a "hollow promise" (IB 21) -- Petitioner had numerous means of rebuting the presumption of trustworthiness. Petitioner's claim of an "irrebuttable presumption" in violation of the Confrontation Clause is clearly dispelled by the fact that Petitioner, by his own admission, had numerous means of attacking the presumption of trustworthiness.

POINT 2

THE TRIAL COURT PROPERLY DENIED THE ADMISSION OF THE TECHNICIAN'S PERSONNEL RECORD.

"The trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion." Heath v. State, 648 So. 2d 660, 664 (Fla. 1994); Hardwick v. State, 521 So. 2d 1071, 1073 (Fla. 1988). A trial court is given broad discretion when making a determination as to whether to admit evidence and that decision will not be overturned absent showing of an abuse of discretion. Triana v. State, 657 So. 2d 1227 (Fla. 4th DCA 1995); Taylor v. State, 640 So. 2d 1127, 1133 (Fla. 1st DCA 1994). A trial court has wide discretion concerning the admissibility of evidence, and a ruling on admissibility will not be disturbed unless there has been an abuse of discretion. Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981) cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

The admission of evidence is within the sound judicial discretion of the trial judge, whose decision in such regard must be viewed in context of the entire trial. Forester v. Norman Roger Jewell & Brooks Intern., Inc., 610 So. 2d 1369 (Fla. 1st DCA 1992). A trial court's ruling on a motion is presumed correct, and a reviewing court should interpret the evidence and reasonable

inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court's ruling. Medina v. State, 466 So. 2d 1046 (Fla. 1985); Johnson v. State, 438 So. 2d 774, 776 (Fla. 1983). A reviewing court should not substitute its judgment for that of a trial court, but, rather, should defer to the trial court's authority as a factfinder. Perez v. State, 536 So. 2d 359, 360 (Fla. 3d DCA 1988).

It was well within the trial court's discretion to deny the admission of the technician's personnel record into evidence. Petitioner contends that the only way to test the credibility of the business record or the competency of the technician was to get the technician's personnel record into evidence (IB 24). At trial, Petitioner asserted that the personnel report of the technician would be relevant to impeach Mr. Carroll's testimony that he never heard of a mistake being made in the hospital laboratory (T 1010), and also to show the technician's professional level (T 1010-1011). The trial court determined that the personnel report was not relevant, because Mr. Carroll would not have heard of a mistake having taken place at the hospital, and that the personnel report did not address Mr. Carroll's comment (T 1011).

Further, the personnel record referred to an alleged mistake made during a drug test, and not a blood alcohol test. The tests

were not similar enough to establish proper impeachment evidence. The fact that the technician had made a mistake 2 1/2 months prior to the blood alcohol test that is at issue in the case at hand, was not relevant to show that the technician's results were untrustworthy (T 1633). This was clearly improper, and as such, the trial court did not abuse its discretion by not allowing the jury to hear such evidence.

Contrary to Petitioner's claim that there is "no other way to test the credibility of the business record or the competency of the technician" (IB 24), Petitioner attacked the technician's lab analysis in numerous ways. Petitioner attacked the method of the blood analysis, the accuracy and maintenance of the machine, and the hospital's procedures in creating the blood alcohol level report. Certainly, the court did not abuse its discretion by correctly concluding that Petitioner could attack the accuracy of the lab analysis without bringing forth the irrelevant personnel record of the technician.

Alternatively, even if the trial court erred in not allowing the jury to view the personnel record, Petitioner has failed to sufficiently establish prejudice. The trial court's error in admitting or rejecting evidence does not necessarily constitute harmful error, and only when it appears that such errors

injuriously affect substantial rights of the complaining party will the judgment be reversed. Forester v. Norman Roger Jewell & Brooks Intern., Inc., supra.

> In a direct appeal or collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Florida Statute §924.051(7).

The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id.

In the case at hand, it is clear that the court's denial of the admission of the technician's personnel record was harmless and did not affect the verdict. The prior error noted on the

technician’s personnel record was clearly different from any error that Petitioner can assert in the case at hand. Petitioner challenged the credibility of the record and the accuracy of testing by other means. Additionally, given the overwhelming evidence of Petitioner’s intoxication at the time of the accident, failure to admit the personnel report was not prejudicial, and thus it did not vitiate the entire trial.

One cannot speculate that the length of jury deliberations proves that the admission of this irrelevant piece of evidence would have made a difference in the verdict. Jury deliberations vary from case to case taking into account a wealth of factors including the complexity of the case, number of counts, and even the personalities of the jurors. Even if the jury at one point could not reach a unanimous verdict, matters that are inherent in the verdict are not relevant in a harmless error analysis. This Court must look to the actual evidence presented, and not to obscure and cryptic factors such as the length and unknown content of jury deliberations, to make a determination on harmless error. It is clear, with all of the evidence proving Petitioner’s guilt, that the denial of the admission of the technician’s personnel record, if error, was harmless.

POINT 3

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO ALLOW JUROR INTERVIEWS.

The jury began deliberations on October 9, 1997 at 4:56 P.M. (T 1181). The jury was sent home for the day sometime after 6:30 P.M. (T 1186-1188). Before allowing the jury to leave for the day, the trial court instructed the jurors to "not read, watch, listen to any types of reports regarding this case and, in addition, I know that it's very tempting because you now heard all the case and it's inappropriate for you to discuss the case with anyone at this point." (T 1187). The jury was instructed to report back to the court room the next day at 8 A.M., when they would continue their deliberations (T 1187-1188).

The jury did so, and the next day, at approximately 12:20 P.M., the jury sent the judge a note, that they "had a problem". (T 1192). The judge, upon approval of all parties, in a note, asked the jury to explain their problem (T 1192-1196). The message was delivered to the jury, and at 12:50 P.M., court reconvened (T 1198). The jury's response to the judge's inquiry was "One. Can we get a definition of DUI? Two. Also can we get a copy of what the State had to prove in this case? The prosecutor had it on a foam board." (T 1198). This indicated that the jury was not deadlocked, but that they had questions about some of the evidence and sought

some instruction.

The court sent written instructions back to the jury and court recessed and then reconvened at 2:20 P.M. (T 1199). At that time, the jury sent the court a note that they could not make a unanimous decision (T 1199). Court recessed and reconvened again, at 2:45 P.M. (T 1200). At that point in time, the jury indicated that they had reached a verdict (T 1200-1201). The jury found Appellant guilty of driving under the influence, manslaughter on count one, and guilty of driving under the influence causing personal injury, count two (T 1201). The trial court polled the jury as to their verdict (T 1202-1203). All stated that this was their verdict. It was not until October 17, 1997 that Appellant filed a notice of intent to interview the jurors, approximately one week after the jury had entered its verdict (R 304).

Petitioner alleges that the trial court abused its discretion by not allowing him to interview the jurors after trial (IB 25). The trial court was well within its discretion to order Appellant and his counsel to not interview the jurors after the verdict had been entered. Petitioner failed to allege sufficient grounds for allowing him to conduct a post-verdict interview of the jury.

The Florida Supreme Court has established guidelines with respect to the propriety of jury interviews:

> ...[A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that of a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

Devoney v. State, 717 So. 2d 510 (Fla. 1998)(quoting Marks v. State Road Dept., 69 So. 2d 771, 774-775 (Fla. 1954)(quoting Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195, 210 (1866)(emphasis omitted).

There is no rule under criminal law in regard to moving for permission to interview the jury after a verdict is returned. Seeking guidance from the Civil Rules of Procedure, under Rule 1.431(g), Florida Rules of Civil Procedure, an interview of jurors will be allowed where grounds are demonstrated which would subject the jury's verdict to challenge prior to the interview. Schofield

v. Carnival Cruise Lines, Inc., 461 So. 2d 152, 154 (Fla. 3d DCA 1984). "If a verdict is pronounced in the presence of all jurors which presumptively has satisfied the enlightened conscience of each of them it is against public policy to inquire into the motives and influences by which their deliberations were governed. This rule is founded on the sound policy of preventing litigants or the public from invading the privacy of the jury room." Id. Where the record does not reveal any misconduct or irregularity on the part of any juror, the case is fairly and impartially tried, and each juror is polled and announces the verdict to be his, it is improper to allow jurors to be interviewed. Id.; Cummings v. Sine, 404 So. 2d 147 (Fla. 2d DCA 1981).

Although Rule 1.431(g) provides that jury interviews shall be allowed under appropriate circumstances, the decision to allow a jury interview is within the discretion of the trial court. Id.; Kasper Instruments, Inc. v. Maurice, 394 So. 2d 1125 (Fla. 4th DCA 1981). The standard of review for the appellate court is whether the trial court abused its broad discretion. Id.; Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981). The decision to permit or deny the juror interview is entrusted to the sound discretion of the trial court. Odom v. State, 403 So. 2d 936 (Fla. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); Kasper

Instruments, Inc. v. Maurice, supra. A court should exercise its discretion and permit a party to interview a juror where "a miscarriage of justice will result if the jurors are not permitted to be interviewed or interrogated." National Indemnity Co. v. Andrews, 354 So. 2d 454, 456 (Fla. 2d DCA), cert. denied, 359 So. 2d 1210 (Fla. 1978). A trial court's "discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)(quoting Delno v. Market Street Railway, 124 F.2d 965, 967 (9th Cir. 1942)).

There is strong public policy against juror interviews. Nationwide Mutual Fire Insurance Co. v. Tucker, 608 So. 2d 85 (Fla. 2d DCA 1992). Interviews of jurors are proper only in those limited situations involving matters extrinsic to the verdict, such as arrival at verdict by lot or quotient, improper contact with a juror, or the misconduct of a juror. Id. The defendant has the initial burden of establishing a prima facie case that the conduct is potentially prejudicial. Id.; Amazon v. State, 487 So. 2d 8 (Fla. 1986).

Where a defendant failed to provide affidavits demonstrating personal knowledge of misconduct by any juror, and defendant failed to establish a prima facie case of any juror's exposure to an

allegedly prejudicial newspaper article or story, the defendant was not entitled to conduct post-verdict interviews of the jury. Gilliam v. State, 582 So. 2d 610 (Fla. 1991). Interviewing the jurors after trial requires a showing of something more than conjecture and speculation by the movant as to what went wrong. Dover Corp. v. Dean, 473 So. 2d 710 (Fla. 4th DCA 1985).

Not only has Petitioner failed to allege sufficient grounds to substantiate such an interview, but the allegations are too speculative. See Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2d DCA 1996)(order for jury interview was error as motion was too speculative, where unidentified female called moving attorney's officer three weeks after verdict was rendered and said to tell attorney's secretary that jury spoke before voir dire and verdict was averaged, and when asked to identify herself, the caller hung up); Harbour Island Security Co., Inc. v. Doe, 652 So. 2d 1198 (Fla. 2d DCA 1995)(post-verdict juror interviews not warranted by purely speculative grounds of possible failure of one or two jurors to disclose prior lawsuits and vague anonymous letter indicating possibility of juror bias in favor of one party, absent prima facie showing that prejudice had resulted or that jury misconduct raised presumption of prejudice).

Petitioner failed to establish sufficient grounds or a prima

facie case to permit a post-verdict interview of the jury. Petitioner alleged in his notice to seek interview of the jury that there was a newscast in which the reporter mentioned that two jurors she spoke with told her that “most of the jury knew nothing about Baber’s previous DUI arrests that were inadmissible in this case and there were quite a few, five to be exact.” Assuming this was accurately reported by this reporter, this was merely an inference, that perhaps one or two of the jurors knew about Petitioner’s previous DUI arrests. There were no sworn affidavits from any of the jurors that they had knowledge about the Appellant’s previous DUI arrests. There was no evidence that any of the jurors had read any of the newspaper accounts of the trial or listened to the trial accounts either from the television or radio reports. This one brief newscast excerpt fails to establish any impropriety on the part of the jurors.

In the notice to interview the jury, Petitioner alleged that there was some “improper influence” “brought to bear on the jury’s deliberations” because the jury reached a unanimous verdict soon after the jury had sent a note to the judge that there was a problem and that no unanimous verdict could be reached. This “inference” was not enough proof to require the trial judge to allow defense counsel to interview the jury. Petitioner failed to

substantiate any claim of juror misconduct with documentation. Petitioner merely had a one paragraph excerpt from a television report in which the reporter mentions that “most” of the jurors were not aware of the Petitioner’s previous DUI arrests. The inference that possibly two of the jurors knew about the previous DUI arrests was not sufficient to warrant a post-trial interview of the jurors. Such an allegation was too vague and uncertain to compel the trial judge to allow defense counsel to invade the private sanctum of the jury room. The trial court did not abuse its discretion in not allowing Petitioner to interview the jurors after the jury had dispersed. Petitioner failed to establish and substantiate any juror misconduct.

The fact that there was much publicity in the press about Petitioner’s trial was not sufficient evidence of any wrongdoing on the part of the jurors. Such publicity is normal where a person of great wealth is on trial for wrongdoing, especially where the person is well-known in the local community. As such, unfavorable publicity is not a sufficient reason to allow an attorney to interview the jurors after the jurors have found that person guilty of the crime charged. Much more is needed before the trial court allows the defense attorney to invade the privacy of the jury after the guilty verdict has been entered. Since Petitioner failed to

provide any affidavits as to any misconduct or impropriety and merely infers and speculates that some impropriety has occurred, the trial court did not abuse its discretion by denying Petitioner’s request for a post-verdict jury interview.

CONCLUSION

The certified question should be answered in the positive -- the holding in Love v. Garcia is applicable to all criminal cases and to the case at hand. The personnel record of the laboratory technician was properly excluded from evidence as irrelevant. The court did not abuse its discretion by denying Petitioner's request for jury interviews. The trial court's judgment and sentence, affirmed by the Fourth District Court of Appeal, should be affirmed by this Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

_____
CELIA TERENZIO
Assistant Attorney General
Bureau Chief

_____
ROBERT R. WHEELER
Assistant Attorney General
Florida Bar No. 0796409
1655 Palm Beach Lakes Blvd., #300
West Palm Beach, FL 33401-2299
(561) 688-7759
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by U. S. Mail to: (1) Bruce Rogow, Esq. and Beverly A. Pohl, Esq., Broward Financial Centre, 500 East Broward Blvd., Suite 1930, Fort Lauderdale, FL 33394, and (2) John C. Fisher, Public Defender's Office, P.O. Box 9000 -- Drawer PD, Bartow, FL 33831-9000 on November 10, 1999.

_____
CELIA TERENZIO
Assistant Attorney General

_____
ROBERT R. WHEELER

Assistant Attorney General