

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 96,010

JAMES C. BABER, III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

On Discretionary Review of a Final Judgment
and Certified Question of Great Public Importance
from the Fourth District Court of Appeal

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This brief is typed using a Times New Roman 14-point font.

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STATEMENT OF THE CASE

The court below affirmed James Baber’s convictions for DUI manslaughter and DUI personal injury, but certified this 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?

Baber v. State, ___ So. 2d ___, 24 Fla. L. Weekly D1478 (Fla. 4th DCA 1999) (footnote omitted) (**Appendix A-2**). Love v. Garcia held, in a civil case, that a hospital record of a blood alcohol test report was admissible as a business record kept in the ordinary course of hospital business.¹

¹ Section 90.803(6), Fla. Stat., the business record exception to the hearsay rule, provides in relevant part:

(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

The hospital business record of the blood alcohol test, showing 274 mg/dl, was the heart of the State's case, which required proof of blood alcohol in excess of .20 g/dl.² The trial court, addressing defense counsel's objection to its admission, agreed that the record was "crucial," and said: "If you are correct, and I don't admit the report, the case is over." R7-585.

STATEMENT OF THE FACTS

In November 1995, Baber was driving in Palm Beach County around 7:45 p.m. He was heading north, and then turned left (west) onto a major east-west street, which was divided by a median. His turn took him into the eastbound lanes to the left of the median, where he collided, head on, with an eastbound car. The driver of that car was killed, and the passenger injured. R6-438- 439, 445, 465, 477-478, 493, 507; R9-780-781. While Baber was driving north, a couple had observed his car briefly go on the grass median of that road. R11-441, 464.

Baber was seriously injured in the accident and was attended by a police

profession, occupation, and calling of every kind, whether or not conducted for profit. (emphasis supplied).

² Blood alcohol results may be reported either in terms of "mg/dl," which is milligrams of alcohol per deciliter of the substance tested (whole blood or serum), or a "g/dl," which is grams per deciliter. ("dl" is an abbreviation for deciliter, which is 100 milliliters). Thus, 274 mg/dl is equivalent to .274 g/dl.

officer who spoke to Baber while he was still in his car. She smelled no alcohol on his breath (R7-513, 527), but a paramedic who came to Baber's aid did smell alcohol. R7-539-540. The police officer testified that Baber had identified himself and said he was "coming from the bar;" the paramedic asked Baber if he had been drinking, to which Baber replied "two beers." R7-509, 513, 526-527, 539-540.

Baber arrived at the St. Mary's Hospital emergency room at 8:45 p.m. R9-884. A blood sample was drawn by emergency room personnel and tested that evening by a laboratory technician, using an instrument called a DuPont ACA-IV. The instrument analyzes blood serum, not whole blood. R7-616; R8-644. The instrument provides a printout of the serum alcohol content of the analyzed blood, and that printout displays "error codes" if recognizable errors occur in the testing procedure. R7-654; R8-654, 724, 743-744.

The hospital record admitted in this case was not the instrument printout. It could not be located. R1-230, 232; R7-610; R8-724-725; R10-980-981, 997. Instead, the State's business record was a computer-generated "Cumulative Trend Report."

Q. Now that record is not the printout that comes from the machine that tests the blood, does it?
[sic]

A. [Hospital Laboratory Supervisor GEORGE CALASH]: Correct

* * *

Q. But that record is what somebody typed into a computer, not what the machine said necessarily, correct?

A. Right

R7-609-610.

The Cumulative Trend Report business record (State's Exhibit 8A) is attached as **Appendix B** to this Brief. Baber's blood serum alcohol was reported to be 274 mg/dl. Converted, that figure represented a whole blood alcohol level range of .232 to .251 g/dl. R8-705.

The jurors deliberated for eight hours over two days. During that time they sent a note asking for "a definition of DUI" and "a copy of what the State had to prove," and sent another note saying they could not reach a unanimous verdict. R12-1198, 1199. Ultimately they returned a verdict of guilty of DUI manslaughter and DUI with personal injury. R1-24.

Post-trial, Baber's counsel sought to interview the jurors, attaching copies of approximately 75 local newspaper articles, some of which reported Baber's prior DUI arrests, and a transcript and videotape of a newscaster's broadcast relating her interview with two jurors. Referring to those jurors, the reporter said: "they both told me that most of the jury knew nothing about Baber's previous DUI arrests" R3-399; R3-304-383; 396-399. The trial court denied the defense requests to interview the jurors. R3-393, 401.

On appeal, Baber raised the jury interview issue, but the district court of appeal decision focused solely on the admissibility of the hospital record. Finding it to be admissible as a business record hearsay exception under § 90.803(6)(a), Florida Statutes, the district court affirmed Baber's conviction, and certified the question giving rise to this Court's "jurisdiction over all issues" in this case. Feller v. State, 637 So. 2d 911, 914 (Fla. 1994) (citing Jacobson v. State, 476 So. 2d 1282 (Fla. 1985); Savoie v. State, 422 So. 2d 308 (Fla. 1982)); see Article V, § 3(b)(4), Fla. Const.

James Baber was sentenced to 15 years imprisonment (R3-508) and has been incarcerated since his October 10, 1997 conviction. He seeks reversal and a new trial.

STATEMENT OF THE ISSUES

The certified question of great public importance is:

- I. 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?

If the answer to the certified question is “yes,” the following issues are presented:

- II. Under the business record statute, § 90.803(6)(a), Fla. Stat., where the laboratory instrument printout of the blood alcohol test was not available as required by law, (1) is the hospital business record report of the test *per se* untrustworthy and thus inadmissible, or (2) is the business record inadmissible because without the printout, the sampled blood, or the technician, it was impossible for the opponent of the record to rebut its statutory presumption of trustworthiness?
- III. Did the trial court abuse its discretion in excluding the technician’s personnel record, which demonstrated a recent history of laboratory error?
- IV. Should a jury interview have been granted, where a post-verdict newscast reported that “most of the jury knew nothing” of inadmissible, prejudicial information about Baber’s arrest record?

SUMMARY OF ARGUMENT

1. Love v. Garcia, 634 So. 2d 158 (Fla. 1994), a civil case which held that medical blood alcohol test reports are admissible as business records under § 90.803(6), Fla. Stat., may apply in criminal prosecutions where blood alcohol tests are offered as proof of an element of the offense, but only if the Court recedes from State v. Strong, 504 So. 2d 758 (Fla. 1987). Strong provides the appropriate predicate for the admission of medical blood alcohol test results in a criminal case: (1) test reliability, (2) test meaning, and (3) technician's qualifications. But if Love does apply to criminal prosecutions, it does not justify admissibility of the hospital business record in this case, because the laboratory instrument printout leading to the business record of the test result was not maintained as required by law, and Baber had no meaningful opportunity to show the business record's lack of trustworthiness.

The business record introduced in this case was a hospital computer report purporting to represent the result of a blood alcohol test. (**Appendix B**). The original test result was contained on a printout generated by the testing instrument. Pursuant to Title 59, Florida Administrative Code, in order "to assure that accurate test results are reported," the "[r]ecords of patient testing, including, if applicable, instrument printouts, must be maintained for two years." Section 59A-7.028(4), Fla. Admin. Code. But the instrument printout was not maintained in this case. Since the State demands that an

instrument printout be retained to assure accuracy of medical laboratory reports, a hospital business record whose admissibility is challenged cannot be presumed trustworthy in the absence of the printout. Nor was there a blood sample available for duplicate testing. And, the technician who performed the test was unavailable. Thus, the business record should not have been admitted because (1) the unavailability of the legally required instrument printout rendered the business record untrustworthy *per se*, or (2) the impossibility of showing untrustworthiness without the printout or the blood or the technician turned the business record presumption of trustworthiness into an irrebuttable presumption of trustworthy proof of the essential element of the crime, in violation of due process of law.

2. If the hospital business record of the blood alcohol test was admissible, then a new trial is still required because the trial court refused to admit the technician's hospital personnel record. The personnel record showed that the technician who performed the laboratory test, and who presumably entered the result into the computer, had made a drug screen testing error ten weeks before testing Baber's blood, and had been warned that "repeated incidents will result in . . . firm disciplinary measures. . . ." R7-630-631. That evidence was relevant to the credibility of her work and the business record, and should have been admitted. The jurors deliberated for eight hours and at one point announced they were unable to reach a unanimous verdict. Given their difficulty,

the exclusion of this evidence – relevant to the reliability of the laboratory test and data entry performed by the technician – was not harmless.

3. If a new trial is not granted, then a jury interview is required. The trial and the defendant received substantial media coverage. Post-verdict, a newscaster interviewed two jurors, reporting that “they both told me that most of the jury knew nothing about Baber’s previous DUI arrests. . . .” R3-399. Since that statement establishes that some of the jurors had improperly learned of the defendant’s prior DUI arrests, Baber sought a jury interview. It should have been granted. The remedy is to “remand . . . to the trial court to reconvene the jury to ascertain whether any juror had read the newspaper . . . or had conducted himself or herself improperly in any other respect regarding outside influences.” Diaz v. State, 435 So. 2d 911, 912 (Fla. 4th DCA 1983).

For all the above reasons, the decision below should be reversed.

ARGUMENT

I.

THE HOSPITAL BUSINESS RECORD -- A COMPUTER REPORT OF A MEDICAL BLOOD ALCOHOL TEST -- SHOULD NOT HAVE BEEN ADMITTED

A. STATE V. STRONG REQUIRED EXCLUSION OF THE MEDICAL BLOOD ALCOHOL REPORT

This Court held in State v. Strong, 504 So. 2d 758 (Fla. 1987), that test results of blood drawn only for medical purposes may be admitted in a criminal case “on establishing the traditional predicate for admissibility, including test reliability, the technician’s qualifications, and the test result’s meaning.” Id. at 760. In this case, the State did not follow Strong; it successfully sought admission of the report of a test result under the business record exception used in Love v. Garcia, 634 So. 2d 158 (Fla. 1994), a civil case. The district court affirmed, distinguishing the criminal case traditional predicate decisions in Strong, State v. Bender, 382 So. 2d 697 (Fla. 1980), and Robertson v. State, 604 So. 2d 783 (Fla. 1992), because they “all predated Love.”

Appendix A-2.

By substituting Love for Strong, the court below has allowed the State to circumvent the well-established requirements for admitting medical blood alcohol evidence to prove an essential element of a crime. The State did not meet Strong’s

traditional requirements, because the reliability of *this* blood test and the qualifications of the technician were not established as a predicate to admissibility. Because the stakes are so high in a criminal case, the business record exception should not be allowed to so easily trump Strong where the business record is the proof of the essential element of the offense. Although hospital personnel may rely on their records for important medical purposes, their decisions also consider other diagnostic tests, the patient's medical history, and physical examination of the patient. In a criminal case in which the hospital business record is crucial evidence to prove the essential element of the offense, Strong, more than Love, provides the protection required to assure a fair proceeding.

B. LOVE V. GARCIA SHOULD NOT BE APPLIED IN THIS CASE

The certified question of great public importance is:

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?

Baber v. State, ___ So. 2d ___, 24 Fla. L. Weekly D1478 (Fla. 4th DCA 1999)

(**Appendix A-3**) (footnote omitted). Love v. Garcia, a civil case, sought to resolve the “[c]onfusion [that] surrounds the issue of medical and hospital records and their

admissibility under the business record hearsay exception.” 634 So. 2d at 159. The Court held that “[u]nder the business record exception, the trustworthiness of medical records is presumed,” and they are admissible if a person with knowledge establishes that the record was part of the regular practice and kept in the ordinary course of business. Id. at 160. The Court explained the evidentiary choreography:

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, 634 So. 2d at 160.

We understand the inclination to apply Love v. Garcia to criminal cases. It is fair to presume that hospital records reporting the results of blood alcohol tests administered by hospital personnel for medical treatment are generally trustworthy. Love stated: “such trustworthiness 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.” Love, 634 So. 2d at 160. Commentators concur: “[T]he safeguards of trustworthiness of records of the modern hospital are at least as substantial as the guarantees of reliability of records of business establishments generally.” McCormick on Evidence, Practitioner Treatise Series, Vol. 2, p. 279 (John W. Strong, ed., 4th ed. 1992) (footnote omitted). See also Charles W. Ehrhardt, Florida Evidence, § 803.6a, pp. 704-705 (1999 ed.) (footnote

omitted):

Usually the results of routine laboratory tests administered by the hospital are admissible under section 90.803(6) as a part of the hospital's business records The admissibility is based on the hospital record's strong presumption of trustworthiness.

The court below recognized that the courts of other states have allowed medical blood alcohol test result reports to be admitted in criminal cases under the business record exception. **Appendix A-3** (citing cases) Those decisions are based on the same foundation that led to the presumption of trustworthiness in Love: "The reason underlying Love is that where medical professionals generally rely on the test results, courts too are permitted to rely on the medical records trustworthiness." Brock v. State, 676 So. 2d 991, 996 (Fla. 1st DCA 1996) (allowing a defendant in a criminal case to introduce hospital reports under the business records hearsay exception).

Brock, following Love's lead, recognized the burden shifting that occurs once the proponent of the record lays the business record predicate for admissibility.

Quoting Love, the Brock court wrote:

Given the presumed trustworthiness of the medical records the state then had the burden to "prove the untrustworthiness of the records," such as by putting on laboratory technicians or experts to challenge the actual administration of the test. 634 So. 2d at 160.

Brock, 676 So. 2d at 996. The § 90.803(6)(a) opportunity to rebut the presumption of trustworthiness ameliorates the Confrontation Clause problem of admitting hearsay against a defendant by balancing the presumption of reliability with the opportunity to be heard to rebut the presumption. That balancing reflects the estimates of the probabilities: it is probable that business records kept in the ordinary course of business will be accurate, so the burden to rebut that presumption is placed “upon the party who contends that the more unusual event has occurred,” i.e., that the business record is untrustworthy. McCormick on Evidence, *supra* p. 430.

Thus, once the State laid the business record predicate for admissibility, Baber had the burden to show that the business record, which purported to reflect the results of his blood test, was not trustworthy. There were three ways to carry that burden: (1) re-test the blood sample; (2) inspect the instrument printout – the tape from the ACA-IV analyzer that showed the original test results; (3) question the technician to determine whether she properly performed the test and input the data into the hospital computer.

Baber could not do any of those things. No blood sample had been maintained, so there could not be a re-test. No instrument printout existed; the printout from the instrument had not been maintained, so the printout and the business record could not be compared. R1-229, 232; R7-610; R8-724-725; R10-997.

Baber had requested discovery of “Reports . . . including results of . . . scientific tests, experiments or comparisons” and “any tangible papers which the prosecuting attorney intends to use in the trial. . . .” R1-30. The instrument printout was not available, and Baber’s counsel filed a Motion in Limine to Exclude Blood Test Results, because, *inter alia*:

The contents of the paper print-out in this case are unknown; the paper print-out has been lost.

* * *

No matter how accurate the DuPont machine may or may not be, its accuracy is a moot point if Ms. Dass did not accurately record the results. Here, it is anyone’s guess what the actual machine reading was because the paper print-out reflecting that reading has not been preserved.

R1-229, 232. The State never denied that the instrument printout was not preserved. At trial, the defense expert testified that he could not find the instrument printout:

- A. [I] have not been able to find any other information other than that computer printout. I also verified it.
- Q. In other words, not the slip off the machine, just the hospital computer?
- A. No, just the hospital computer.

R10-980-981.³

It is undisputed that the business record that was introduced (**Appendix B** to this Brief) was not the instrument printout. The hospital's laboratory supervisor conceded that:

Q. Now, that record is not the printout that comes from the machine that tests the blood, does it?

A. Correct.

R7-610. Only that instrument printout could corroborate the validity of the data entry which created the business record. The laboratory supervisor admitted that the business record admitted at trial was not the original blood test result:

Q. The machine that tests the blood does have a

³ A State forensic toxicologist, Thomas Carroll, admitted that he, too, had only reviewed the typed-in computer printout, but not the actual printout from the instrument, although he claimed that the hospital told him "if it becomes necessary that they would retrieve them" from archival storage. R8-724-725. But because there was nothing to retrieve and the technician was unavailable, he had to concede that he merely assumed the computer printout business record was accurate:

Q. So you're — what you are saying is you would assume, because there is a computer printout and no individual here to talk to, you would assume that it's probably right. That's what you are saying.

A. Yes.

R8-727.

printout?

A. Correct.

Q. But that record [Exh. 8A] is what somebody typed into a computer, not what the machine said necessarily, correct?

A. Right.

R7-609-610.

Thus, there was no way for anyone to determine what the instrument “said,” because there was no instrument printout available. R7-610; R8-724-725; R10-980-981, 997. Nor was there any witness at trial who had ever seen the instrument printout.

The lack of the actual instrument printout made it impossible for Baber to know if the business record was accurate. Failing to retain the printout violated the Agency for Health Care Administration Regulations governing clinical laboratories, Section 59A -7.028 (Patient Test Management), which provides in relevant part:

(4) **Test records.** The laboratory must maintain a record system to ensure reliable identification of patient specimens as they are processed and tested to assure that accurate test results are reported. Records shall be retained in their original form or stored on microfilm, microfiche or other photographic record, magnetic tapes or other media in an electronic data processing system. These records must identify the personnel performing the testing procedure. Records of patient testing, including, if applicable, instrument printouts, must be

retained for at least two years.

(emphasis supplied).⁴ That was not done here. The blood test was performed on November 11, 1995, and Baber was tried in October 1997. R1-126. Since Florida law required the retention of the printout “to assure that accurate test results are reported,” that requirement had to be met in order to assure the trustworthiness of the hospital business record. The laboratory’s failure to comport with the administrative requirement rendered the business record untrustworthy and inadmissible under the § 90.803(6)(a) statutory exception to hearsay. Since the State demands that an instrument printout be retained to assure accuracy of medical laboratory reports, a hospital business record cannot be presumed trustworthy in the absence of the printout.⁵

If the absence of the printout did not make the record untrustworthy *per se*, the printout’s absence, the absence of the blood and the technician should have precluded the application of the hearsay exception statute. The technician could not be found:

[THE PROSECUTOR]: [S]he’s [the technician]
not here by our choice; she’s not here because

⁴ The Florida Administrative Code was not presented or addressed below. The decision below, by allowing a business record to replace the previous State v. Strong predicate for admissibility, makes the Administrative Code requirement important for this Court’s consideration.

⁵ Retaining original test results is an important quality assurance measure. Had a forensic blood alcohol test been used, “the actual charts that come out of [the] gas chromatograph are saved.” R8-738-739 (State forensic toxicologist Thomas Carroll).

we can't obtain her presence; we know where she is, she's in Trinidad. We are not able to contact her nor get her here.

* * *

[S]he is unavailable to us as well as she's unavailable to Mr. Lubin.

R7-636.

During discovery, the defense had attempted to depose the technician, Ms. Lall Dass, but the State made it clear that there was no way to find her, and that in the State's view, she was unnecessary. Baber's counsel filed a "DEMAND FOR BETTER ADDRESS" for Candy V. Lall Dass (R1-55-56), and an Assistant State Attorney responded:

I can only speculate that this motion must involve the medical blood taken from defendant Baber in light of the fact that the nurse who drew the blood and the lab tech who analyzed the blood have not been located. I am sure you know the law in reference to this matter (Love v. Garcia, Brock v. State), that I simply do not need these witnesses A request was made for better addresses on both of the missing witnesses by Mr. T.G. Brown on 8/26/96. We have been diligently searching, but have been unable to locate these people thus far.

R1-66 (emphasis supplied).

The district court mistakenly wrote that Baber argued the hospital report was

not admissible “where the technician who performed the test did not testify.” **Appendix A-1.** But that was not, and is not, Baber’s argument. His argument is that because the technician was not available at all, Baber did not have a meaningful opportunity to question the reliability of her work. Her qualifications were unknown; her work load that evening was unknown; any distractions or delays were unknown. The business record exception to the hearsay doctrine guarantees an opportunity to rebut the presumption of trustworthiness prior to a decision on admissibility. Because the statutory standard – the presumption of trustworthiness tempered by an opponent’s opportunity to rebut the presumption – was rendered meaningless by the violation of state administrative law governing clinical laboratories, and the impossibility of repeating the test on the sample of blood, and the inability to question the technician – the business records hearsay exception should not have been permitted in this case.

Any other conclusion would make the Love / Brock / § 90.803(6)(a) burden shifting formula a hollow promise to the party opposing the introduction of a business record. And it would violate the Due Process and Confrontation clauses of the Florida and federal constitutions by creating an irrebuttable presumption that the hearsay evidence of the essential element of the crime was trustworthy.

“The fundamental requisite of due process of law is the opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed.2d 1363

(1914). That principle has led to procedural safeguards to guarantee “the right to be heard before being condemned to suffer grievous loss of any kind” Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed.2d 817 (1951) (Frankfurter, J., concurring). Here, Baber lost his right to confrontation without being heard, because as applied, the hearsay exception statute created an irrebuttable presumption.

“[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.” Vlandis v. Kline, 412 U.S. 441, 446, 93 S.Ct. 2230, 2233, 37 L.Ed.2d 63 (1973) (internal citations omitted). Section 90.803(6)(a) is not facially unconstitutional because it provides an opportunity to rebut the presumption of trustworthiness. But it is unconstitutional to apply the hearsay exception statute in this case, because there was no fair opportunity for rebuttal. Cf. Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1254 (Fla. 1996) (“In Straughn v. K & K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976), we stated: “The test for the constitutionality of statutory presumptions is twofold. First there must be a rational connection between the fact proved and the ultimate fact presumed. Second, there must be a right to rebut in a fair manner.”). (emphasis added by the Court). There is a rational connection between a hospital business record and the presumption of its trustworthiness.

But in this case there was no opportunity to rebut in a fair manner.

The irrebuttable presumption that arose here unfairly turned the hearsay into irrebuttable proof of the essential element of the crimes charged. Conclusive presumptions occur when “a party is not given a reasonable opportunity to disprove either the predicate fact or the ultimate fact presumed. City of Coral Gables v. Brasher, 120 So. 2d 5, 9 (Fla. 1960); Chandler v. Department of Health and Rehabilitative Services, 593 So. 2d 1183 (Fla. 1st DCA 1992.” Hall v. Recchi America, Inc., 671 So. 2d 197, 200 (Fla. 1st DCA 1996), aff’d 692 So. 2d 153, 154 (1997) (“we agree with the reasoning and result of the majority opinion below and adopt it in its entirety”). Baber had no meaningful opportunity to disprove either the presumed predicate fact of trustworthiness or the ultimate fact of the report of his blood alcohol level. As applied here, the irrebuttable hearsay denied Baber his constitutional right of confrontation.

It is no answer to say, as did the court below (**Appendix A-3**), that Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2538 n. 8, 65 L.Ed.2d 597 (1980), resolves the Confrontation Clause issue. In Ohio v. Roberts the testimony of a witness who was unavailable at trial was admitted as reliable because “defense counsel . . . tested [her] testimony with the equivalent of significant cross examination” in a pre-trial preliminary hearing. 448 U.S. at 70. Ohio v. Roberts does not hold that exceptions to the hearsay doctrine are immune to due process requirements that an opponent of the offered

evidence must have a fair opportunity to rebut its reliability. Indeed, Roberts underscores the principle that a meaningful opportunity to be heard must precede the admission of a hearsay statement — even if the hearsay is a firmly rooted exception to the hearsay doctrine.

II.

THE TECHNICIAN'S PERSONNEL RECORD SHOULD HAVE BEEN ADMITTED

The technician had made a drug screen error ten weeks before she tested Baber's blood, mistaking cocaine for marijuana, and the hospital warned her that "repeated incidents will result in . . . firm disciplinary measures. . . ." R7-630-631. The State stipulated to that proffered fact. Id. The trial court refused to admit the personnel record reflecting the error and the warning. R10-1011.

Given the fact that Baber had no other way to test the credibility of the business record or the competency of the technician, the exclusion of the evidence relevant to those issues was an abuse of discretion and prejudiced Baber's substantial rights, warranting a new trial. See § 90.402, Fla. Stat. ("All relevant evidence is admissible, except as provided by law.").

The State, even with its business record blood alcohol report, did not easily

convince the jury. The jury deliberated for approximately eight hours over two days, and at one point sent a note saying they could not reach a unanimous verdict. R12-1199. Reasonable doubt means that one “wavers or vacillates” on guilt. R11-1171. The jury should have been able to review the absent technician’s error record before deciding whether there was a reasonable doubt about her work and the resulting report that was, in the trial court’s view, “crucial” to the State’s case. R7-585.

III.

**THE REFUSAL TO ALLOW JUROR INTERVIEWS
WAS AN ABUSE OF DISCRETION AND REQUIRES
THAT THE CASE BE REMANDED FOR SUCH INTERVIEWS
AND A NEW TRIAL IF THERE WAS JUROR MISCONDUCT,
OR IF SUCH INTERVIEWS CANNOT BE CONDUCTED**

Post-trial, Baber’s counsel filed a Notice of Intention to Interview Jurors and Motion for Enlargement of Time to File Post-Verdict Motions. R3-304-383. The Motion was prompted by concerns about jury contamination based on the extensive pre-trial and trial publicity. The Notice included copies of approximately 75 newspaper articles from the Palm Beach Post and Sun Sentinel, many of which referred to Baber’s prior DUI arrests. Id. The trial court denied the motion, and warned defense counsel that “[a]ny attempt to interview the jurors without permission of this Court will be dealt with accordingly.” R3-393.

Baber's counsel sought reconsideration of the no-interview Order (R3-396-399), attaching a transcript and a videotape of a newscaster's report that she had interviewed two jurors and: "they both told me 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." R3-399. Despite that report establishing that some of the jurors *were* improperly aware of prior DUI arrests, the trial court denied the Motion for Reconsideration. R3-401. Thus, the jurors could not be interviewed.

This case generated an extraordinary amount of press coverage. Indeed, during voir dire, one of the potential jurors said, "Well, everything I read in the paper is that they've already hung him." R5-323. Therefore, given the reported post-trial statements of certain jurors, a jury interview should have been permitted.

Florida courts have recognized the importance of juror interviews in appropriate cases:

When a motion to interview a juror or jurors sets forth allegations that the movant has reasonable grounds to believe that the verdict may be subject to legal challenge, such as a reasonable belief that a juror has been guilty of misconduct, then the trial court should conduct such an interview, limiting it as narrowly as possible to determine if such grounds exist.

Sconyers v. State, 513 So. 2d 1113, 1117 (Fla. 2d DCA 1987). Roland v. State, 584 So. 2d 68 (Fla. 1st DCA 1991), echoes Sconyers:

When the motion alleges juror misconduct and the trial court determines that a prima facie showing of juror misconduct has been made, the motion to interview the juror or jurors should be granted. Sconyers, 513 So. 2d at 1115.

Roland, 584 So. 2d at 70. The court noted that “Sconyers instructs that a motion may be granted solely on the basis of the allegations contained in the motion itself; no other evidence need be submitted.” Id. at 1170, n. 5.

The remedy for an erroneous decision precluding interviews is a remand:

Rather than reverse for a new trial on the juror interview issue, we remand this matter to the trial court to reconvene the jury to ascertain whether any juror had read the newspaper article or had conducted himself or herself improperly in any other respect regarding outside influences. If a juror admits to improper conduct appellant must be awarded a new trial. . . . If the required inquiry cannot be accomplished, the defendant should be granted a new trial.

Diaz v. State, 435 So. 2d 911, 912 (Fla. 4th DCA 1983). That remedy is required here.

Early on in this case, the court recognized the potential problem from the expected television and newspaper coverage:

[B]ut I caution you, if you watch TV, be aware that sometimes they blurt out things about upcoming news or there may be something in

the evening news or something in the newspapers. Avoid all of that please because you are going to be under those very special instructions during the course of this trial.

R6-409.

Several days into the trial, Baber's counsel asked that the jury be polled about its compliance with the court's first day admonition. There had been continuing "inadmissible and inflammatory" reports in the press which raised the specter of juror knowledge of inadmissible evidence. R10-958. But the court refused:

THE COURT: [F]or the record there has been daily publicity in each of the two local papers as well as, I believe, all four of the local television newscasts, as well as some of the radio stations, so unless there is anything in particular I see no reason to poll them today any more than I would have on Tuesday or Wednesday, so your request is denied.

R10-955.

There is no question that press coverage threatened a fair trial. The post-trial refusal to allow a jury interview, in light of the continuing concerns about jury exposure to media reports, and the evidence that some jurors had learned of inadmissible information, was erroneous. Based on this record, there should be a remand for a jury interview, if a new trial is not ordered on other grounds. Diaz v. State, *supra*.

CONCLUSION

The certified question should be answered in the negative. The State v. Strong traditional predicate for admissibility of medical blood alcohol test reports should be reaffirmed and a new trial ordered. Even if the Court answers the certified question in the affirmative, a new trial should be ordered in this case because the business record was improperly admitted, or because the laboratory technician's hospital personnel record was improperly excluded. Alternatively, Baber seeks a remand for a jury interview. If juror misconduct is shown, or if any of the jurors are unavailable to be interviewed, a new trial should be granted on that basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished to (1) Assistant Attorney General ROBERT WHEELER, OFFICE OF THE ATTORNEY GENERAL, 1655 Palm Beach Lakes Blvd., 3rd Floor, West Palm Beach, FL 33401, and (2) JOHN C. FISHER, PUBLIC DEFENDER'S OFFICE, P.O. BOX 9000, BARTOW, FL 33831-9000 (Counsel for Amicus Florida Association of Criminal Defense Lawyers) by U.S. Mail this 16th day of September, 1999.

BRUCE ROGOW

APPENDIX

- A. June 23, 1999 Decision of the
Fourth District Court of Appeal App. A-1-4

- B. Exhibit 8(A) (Hospital Blood Alcohol Report) App. B

