IN THE
SUPREME COURT OF FLORIDA

CASE NO. 96,010

JAMES C. BABER, III,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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

BRUCE ROGOW
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Broward Financial Centre
500 East Broward Blvd., Ste. 1930
Fort Lauderdale, Florida 33394
(954) 767-8909

Counsel for James C. Baber III

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INTRODUCTION TO THE REPLY

The State either misunderstood or ignored Baber's primary argument, or perhaps we did not state it clearly. We try again.

Baber is not contending that the testimony of the technician was required in order for the State to introduce the hospital business record blood alcohol report. See State's Brief, pp. 12-17; 24-28.

Baber is not contending that the original instrument printout had to be introduced in order to introduce the hospital business record blood alcohol report. State's Brief, pp. 17-24.

Baber is saying that if Love v. Garcia, 634 So. 2d 158 (Fla. 1994), allows the admission of hospital business record blood alcohol reports as prosecution evidence in criminal cases, the business record in this case was not admissible because it was not trustworthy enough to be an exception to the guarantees of the Confrontation Clause. The record was not trustworthy enough, not because the original laboratory instrument printout from which it was made was not introduced, but because the printout was not retained and could not be compared to the business record.

Consequently, much of the State's argument misses the point. We acknowledge that business records are a firmly rooted exception to the hearsay doctrine. Davis v. State, 562 So. 2d 431, 433 (Fla. 1st DCA 1990). We accept that there are

reported opinions from other jurisdictions applying the business record exception to admit medical blood alcohol test results as prosecution evidence in criminal cases. We do not quarrel with the general concept that the Confrontation Clause is not offended by the proper admission of hospital business records. But we do disagree with the State's assertion that "Petitioner had the opportunity to prove the record was not trustworthy." State's Brief, p. 12.

As to the other two points on appeal, we disagree with the State's contention that the technician's personnel record was "irrelevant." State's Brief, p.33. And we disagree with the State's dismissive treatment of the basis for, and importance of, the jury interview request. State's Brief, pp. 36-43. This Reply explains why.

ARGUMENT

I.

THE BUSINESS RECORD EXCEPTION GUARANTEES AN OPPONENT A MEANINGFUL OPPORTUNITY TO SHOW UNTRUSTWORTHINESS

B. AGREEMENT ON THE LAW

A business record, properly authenticated as such, is admissible "unless the sources of information or other circumstances show lack of trustworthiness." Section 90.803(6)(a), Fla. Stat. (emphasis supplied). The opponent of the evidence has the burden "to prove the untrustworthiness of the record." Brock v. State, 676 So. 2d 991, 996 (Fla. 1st DCA 1996); Love v. Garcia, 634 So. 2d 158, 160 (Fla. 1994). If the opponent does not show untrustworthiness, "then the record will be allowed into evidence." Brock and Love, id.[1]

The corollary is that if untrustworthiness is shown, the record will not be allowed into evidence. Thus, the issue posed in this case is whether a hospital business record blood alcohol report should have been admitted to prove a DUI manslaughter

[1] We note that the Florida statute (§ 90.803(6)) uses the term "show lack of trustworthiness," (emphasis supplied) while the federal rule states that the record is admissible if "the source of the information . . . indicate[s] lack of trustworthiness." Fed.R.Evid. 803(6) (emphasis supplied). Thus, this exception to the hearsay rule is sensitive to the Confrontation Clause by allowing a modest showing by the opponent to negate the presumption of trustworthiness. Perhaps it is in this area that a trial court's discretion comes into play, since not all offered business record evidence has the same consequences. In this case, the business record led to a 15-year prison sentence.

charge when the only meaningful way for the defendant to show untrustworthiness was foreclosed by the unavailability of the underlying source document.

C. AGREEMENT ON THE FACTS

The State acknowledges that the business record "was not the original document evidencing Petitioner's blood alcohol level. . . ." State's Brief, p.21. There is no dispute that the "business record was not directly generated from the testing machine. . . ." Id. at 20. The machine's results were manually entered into a computer: "The technologist is the person who has the information, who transmits that." Id. at 19.

There is no dispute that the original test result – the DuPont ACA-IV printout – was not retained by the hospital. There is no dispute that the technician could not be found. Our disagreement with the State begins with its view that those undisputed facts are unimportant.

D. DISAGREEMENT

None of the cases offered by the State involve situations where the opponent of the hospital business record was unable to rebut the presumption of

trustworthiness because the data upon which the business record was based had not been retained. Indeed, those cases, collected at pages 9-10, 14-17 of the State's Brief, prove only what we have acknowledged: that the technician's testimony is not a predicate for business record admissibility. The State relies extensively on State v. Garlick, 545 A.2d 27 (Md. 1988), posing the Garlick 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?" State's Brief, p. 15. We agree that the answer to that question is "no." But Garlick and the other offered cases do not answer the question posed here: Is the record admissible if the source of the record – the only means of confirming or refuting its trustworthiness as to the reported blood alcohol concentration – was not available? The answer to that question is "no." The "no" is reinforced by the fact that Florida law requires that the source of the business record be available.

The key to showing untrustworthiness was the printout tape from the blood analyzer instrument. Florida law requires that the "instrument printouts. . . must be retained for at least two years," in order "to assure that accurate test results are reported." Agency for Health Care Regulations, § 59A-7.028, Fla. Admin. Code. No matter what the technician might have remembered, the printout was, as a matter of fact and law, the key to trustworthiness. The printout was the "source" of the business record. If it did not

contain the same blood alcohol level that appeared on the business record hospital report, then the business record would not have been trustworthy, and would not have been admissible. Similarly, the absence of the printout rendered the report untrustworthy under the business record hearsay exception, because without it there could be no meaningful inquiry as to trustworthiness. See § 90.803(6): "unless the sources of information . . . show lack of trustworthiness," the business record will be admitted. If there is no source, there is no trustworthiness. [2] [3]

The State seeks to avoid the consequences of the missing source, saying, "A comparison of the laboratory report with the original machine tape was not the only means of challenging the trustworthiness of the results." State's Brief, p. 21. But the State confuses admissibility with weight. The issue we pose is whether, under the circumstances of this case, the business record was admissible, not whether Baber had

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[2] The Agency for Health Care regulation requiring retention of the "source" is reprinted at page 18 of Baber's Initial Brief in this Court. We do not understand how the State can say that the regulation does not require retention of instrument printouts "for the purpose of assuring that accurate test results are reported." State's Brief, p. 24. The only reason for retaining the printouts is to assure the accuracy of reporting. § 59A-7.028, Fla. Admin. Code. How else could one cross-check the later hospital business record?

[3] The State suggests that "the allegation of error in regard to these agency regulations" was not preserved. State's Brief, p. 23. But the error was not the violation of the regulation, it was the admission of the business record when the tape had been lost: "Here it is anyone's guess what the actual machine reading was because the paper print-out reflecting that reading has not been preserved." R2-232 (Defendant's Motion in Limine to Exclude Blood Test Results). The objection was precise and preserved.

ammunition to attack the weight the jury should give to the business record. The attacks on the test and the testing suggested by the State (Initial Brief, pp. 28-29) do not address the admissibility question: was the record an accurate reflection of the test result tape, *i.e.*, trustworthy? Baber's Motion in Limine to Exclude the Blood Test Report accurately stated "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." R2-232.

When the State writes that Baber could challenge the trustworthiness of the results "by cross examining the witnesses who testified," and "by contesting the method of testing," and when the State quotes the "flaws in the test" enumerated in Baber's District Court of Appeal Brief (State's Brief, pp.21, 28-29), the State misses the point. The business record already had been admitted. At that point, Baber was left only with a challenge to the weight of the evidence, trying to dissuade the jury from relying on it. But whether it was trustworthy enough to qualify for admission as a business record exception to the hearsay doctrine was the threshold statutory decision that the trial court had to make. The decision to admit or exclude the evidence required consideration of untrustworthiness, if raised by the opponent of the evidence. Since Baber had no meaningful opportunity to discharge his burden to show untrustworthiness, the hearsay exception should not apply. Otherwise, the business record hearsay exception would be an irrebuttable presumption of admissibility.

The statutory balancing of interests – the business record presumption of reliability, countered by the facts showing untrustworthiness – requires more. "Affording defendants a right to confront their accusers . . . acts as a safeguard of the reliability of criminal proceedings." Conner v. State, 24 Fla. L. Weekly S428, ___ So. 2d ___ (Fla. 1999). The firmly rooted business record exception permits dispensing with confrontation only if, as § 90.803(6) provides, one has an opportunity to show untrustworthiness prior to admission of the evidence.

Neither Garlick; State v. Martorelli, 346 A.2d 618 (N.J.App. 1975); Dixon v. State, 489 S.E.2d 532 (Ga. App. 1997); State v. Christian, 895 P.2d 676 (N.M. Ct. App. 1995); State v. Todd, 935 S.W.2d 55 (Mo. Ct. App. 1996); nor Love v. Garcia, 634 So. 2d 158 (Fla. 1994), supports the use of a hospital blood alcohol report business record to prove the essential element in a criminal case where the defendant cannot examine the source tape to confirm or attack the trustworthiness of the business record, particularly where the source tape is required to be available, and where the defendant does not even have access to the technician.[4]

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[4] The State says that while the business record "exception may 'guarantee' an opportunity to rebut [trustworthiness] (Initial Brief, 21), it does not guarantee that the State must provide the witnesses to do this." State's Brief, p. 27. The State continues: "The State fulfilled its legal obligations by providing Petitioner with the most specific location of the technician it had. The state is required to do no more." State's Brief, p. 27. The "specific location" was Trinidad. See State's letter responding to Defendant's Demand for Better Address. R1-66-67.

Love v. Garcia was a civil case. The confrontation interests are different in a criminal case. Cf. Conner v. State, *supra* at n. 11 ("We decline to reach the constitutionality of this statute as it applies to disabled adults or as it applies generally to civil cases because these issues are not squarely presented in this case."). If the "critical importance of a defendant's `constitutional right to confront and cross-examine witnesses against him,'" Conner, quoting Brown v. State, 471 So. 2d 6, 7 (Fla. 1985), gives way to the business record hearsay exception, and if Love v. Garcia applies to prosecution evidence in criminal cases, the exception should not be applied where the defendant has no access to the machine tape source of the business record, or the technician. Compare, State v. Strong, 504 So. 2d 758 (Fla. 1987) (making proof of trustworthiness part of the state's predicate for introducing medical blood alcohol test results); State v. Sclafani, 704 So. 2d 128 (Fla. 4th DCA 1997) (same).

Business records are business records. But where the liberty stakes are so high, and the constitutional commands are so strong, the statutory balancing of interests – the presumption of reliability tempered by the opportunity to show untrustworthiness

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At trial the State was candid: "we are not able to contact her, nor get her here. . . . She is unavailable to us as well as she's unavailable to Mr. Lubin." R7-636 (emphasis supplied). So the statutory hearsay exception guarantee of the right to be heard to rebut trustworthiness was meaningless as to the technician. And as to the tape, the State, having brought the case, and offered the business record as evidence, cannot escape the consequences of the fact that its offer was flawed by the unavailability of the record source.

– should be strictly enforced. See Williams v. State, 734 So. 2d 1149, 1150-51 (Fla. 5th DCA 1999) (Antoon, J., concurring).

II.

THE TECHNICIAN'S PERSONNEL RECORD SHOULD HAVE BEEN ADMITTED

The State contends that the technician's "alleged mistake made during a drug test" was properly excluded from jury consideration because it "was not relevant to show that the technician's results were not trustworthy." State's Brief, p. 32.

First, the mistake was not "alleged." The State stipulated to the error (mistaking cocaine for marijuana) and to the fact that she was warned by the hospital to "please take extra care in reporting results; repeated incidents will result in . . . firm disciplinary measures. . . ." R7-630-631.

Second, the State says the technician's unavailability did not hinder Baber's ability to show untrustworthiness of the business record because "[t]he technician probably would not have any independent recollection of this single blood test." State's Brief, p. 17. That is mere supposition. But our focus is different. Assuming *arguendo* that her unavailability was irrelevant to the admissibility of the business record, her work history was critically relevant to the jury's determination of how much weight to give to the business record that was made from her data entry. See Martorelli, *supra*, 346 A.2d

at 622: "The weight which is to be accorded to the test is still subject to attack by one who questions either the qualifications of, or the results reached by the person who performs same." If the business record was admissible despite the absence of the tape and the technician, then Baber was entitled to show the jury that the technician's qualifications and work were not completely reliable.

Her serious reporting error ten weeks earlier, established by the hospital's personnel record, was probative of the unreliability of her work. The personnel record could have established a reasonable doubt as to the reliability of the business record. The law of this State is that it is error to deny the admission of relevant "evidence [that] tends in any way, even indirectly, to establish a reasonable doubt of [a] defendant's guilt. . . ." Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (1997). "[W]hat is relevant to show a reasonable doubt can invoke different considerations from the question of what is relevant to prove the commission of the crime." Washington v. State, 737 So. 2d 1208 (Fla. 1st DCA 1999). One of the considerations here should have been the fact that the personnel record was the only available substitute for the absent technician.

Once the hospital business record was admitted, a material fact in issue was the weight to be given to it. "If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its

admissibility." Vannier v. State, 714 So. 2d 470, 472 (Fla. 4th DCA 1998). The technician's recent reporting error was relevant evidence and should have been admitted. It was not harmless error to exclude the record. See State's Brief, pp. 33-35. The only evidence that was overwhelming was the business record report that Baber's blood serum alcohol level was 274 mg/dl or .232 to .251 g/dl. R8-705. The trial judge said that the business record was "crucial," and that without it, "the case is over." R7-585. The other evidence – that Baber said he had been at a bar and had "two beers," that a police officer smelled no alcohol while a paramedic did, and a nurse on rebuttal saw signs of intoxication (R7-509, 513, 526-527, 539-540; R10-1028) was not sufficient to convince the jury. In fact, even with the business record report before it, the jury took eight hours to return a verdict, noting at one point that they could not reach a unanimous verdict and that they were unsure about what the State had to prove. R12-1198-1199.

On this record, there can be no reasonable doubt but that the exclusion of the personnel record affected the verdict. See 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. The burden to show the error was harmless must remain on the state."). Once the hospital blood alcohol report was admitted, the work history of the technician who entered the machine data became relevant and highly important. Precluding the jury from hearing her history was not harmless beyond a reasonable doubt.

III.

A JURY INTERVIEW SHOULD HAVE BEEN PERMITTED

The State argues that Baber "failed to allege sufficient grounds to substantiate [a jury] interview" and that "the allegations are too speculative." State's Brief, p. 40. The State does acknowledge that jury interviews are proper in "limited situations." Id. This is one of those situations.

The published news report supported only one conclusion: some of the jurors had learned of Baber's previous DUI arrests. The reporter interviewed two jurors and reported: "they both told me that most of the jury knew nothing about Baber's previous DUI arrests . . . ." R3-399 (emphasis supplied). If "most . . .knew nothing," then at least two knew something about this inadmissible information while they were deliberating.

The State complains that there were "no sworn affidavits from any of the jurors," nor any "evidence that any of the jurors had read of the newspaper accounts . . . or listened to the trial accounts either from the television or radio reports." State's Brief, pp. 41-42. That is right. But the lack of affidavits or actual testimony was the product of the trial court's preclusion of the requested juror interviews. The State's argument presents a "Catch 22." Baber could not secure juror affidavits or testimony without court permission. He asked for permission, but the court forbade contact with jurors. R3-401.

The videotape and the transcript of the reporter's remarks were sufficient to support the interview request. The State's cases do not support a contrary conclusion. In Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991), the juror's exposure to a newspaper article came after the juror had rendered a verdict and been dismissed. In Harbour Island Security Co., Inc. v. Doe, 652 So. 2d 1198 (Fla. 2d DCA 1995), an anonymous letter was too flimsy a basis for a jury interview. Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2d DCA 1996), involved an anonymous telephone call. All the State's comparison cases are inapposite.

The State's acknowledgment of the extensive "unfavorable publicity" occurring during Baber's trial (State's Brief, p. 43) supports the need for the jury interview. We agree that unfavorable publicity does not equal juror misconduct. But the evidence that some of the jurors knew of inadmissible, prejudicial information is highly credible in light of the pervasiveness of the publicity surrounding this case.

The juror interview should have been granted.

CONCLUSION

For the foregoing reasons, and those advanced in the Initial Brief, this Court should reverse the decision of the Fourth District Court of Appeal, and remand for a new

trial. Alternatively, a jury interview should be ordered.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
BRUCE S. ROGOW, P.A.
BEVERLY A. POHL
Florida Bar No. 907250
Broward Financial Centre, Suite 1930
500 East Broward Boulevard
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530

By:_____
BRUCE ROGOW

By:_____
BEVERLY A. POHL

Counsel for James C. Baber III

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 6th day of December, 1999.

BRUCE ROGOW