IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 96,852

JOY FRIEDRICH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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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, Joy Friedrich, 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

Appellant was charged with one count of DUI Manslaughter and two counts of DUI with serious bodily injury arising from a traffic accident that occurred on April 11, 1996 at the intersection of Forest Hill Boulevard ("Forest Hill") and Parker Avenue ("Parker") in Palm Beach County. (R 1-2). The State's first witness, Rafael Marrero ("Marrero"), testified that he was driving westbound on Forest Hill at approximately 35 to 40 miles per hour. (T 229-230). About one to one and a half blocks east of Parker, Petitioner passed Marrero's "little S-10 pick-up" truck, shaking it in a manner similar to how a vehicle is shaken when passed on Interstate 95. (T 230-231). Marrero saw a truck turning north onto Parker and then witnessed a "big crash." (T 231). He never saw any brake lights being activated on Petitioner's car before the crash. (T 232).

Upon impact, the rear of Petitioner's car rose, swung clockwise, and came to rest facing east, but in the westbound lane. (T 233). Marrero stopped to render aid, and observed that the car which had passed him earlier was driven by a woman with a child in the front passenger seat. (T 234). In Marrero's estimation, Petitioner was traveling between 65 and 70 miles per hour as she passed him on Forest Hill; she passed him as though he "was sitting

still." (T 238,253).

Marrero testified that the traffic light was green for vehicles traveling east/west on Forest Hill. (T 242). Further, he stated there was nothing blocking the victim's view of the intersection or of Petitioner's car. (T 242). Recognizing Forest Hill is a narrow street, Marrero did not recall Petitioner swerving or hitting the curb as she drove past him. (T 245). Marrero was approximately a half to a quarter block from the intersection at the time of the crash, and Petitioner's car was not far from the intersection at the point the victim turned onto Parker. (T 247-249). Marrero did not recall Petitioner slowing as she passed him, but he did know she was speeding. (T 251).

Ramon Vega ("Vega") related that he was driving his pick-up truck traveling eastbound on Forest Hill, and as he turned onto Parker, he was struck by Petitioner. (T 258-260). Vega's brother-in-law, Ramon Gutierrez, was in the passenger seat. (T 259). They had been at Pedro Gutierrez's home where Vega had three or four beers over a three to four hour period; the last beer was consumed at approximately 4:00 p.m. that afternoon. (T 259,273-74,288). While Vega did not recall his blood was drawn at the hospital, the results of the test were admitted into evidence by agreement with the defense. (T 286-289). The results, published to the jury,

showed a blood alcohol level of zero. (T 20-21,286-89).

Describing the accident, Vega stated he stopped at the Forest Hill/Parker traffic light to await a vehicle to clear the intersection. (T 259-60). He could see another vehicle a block from the intersection on Forest Hill, but believed he had sufficient time to negotiate a safe turn. (T 260-61,283-84). Vega recalled the speed limit on Forest Hill is 35 miles per hour, and he remembered making his turn at seven to ten miles per hour. (T 261,284-85). It was in the middle of the intersection where Vega's truck was struck with such force that Ramon Gutierrez was thrown to the driver's side of the truck, causing the driver's door to open. (T 262,269,283-84). Vega "ended up almost hanging out the side door." (T 262,269,283-84). He was not ticketed. (T 285).

At approximately 8:00 p.m., while on patrol, Officer Rowe ("Rowe") heard the crash and responded to the scene. (T 289-91). The speed limit in that area was 30 to 35 miles per hour. (T 291). Rowe observed the pick-up truck had come to rest in a front yard on the northwest side of the intersection. (T 291-92). He also reported Petitioner was pinned in her Chevrolet Corsica. (T 292). When Rowe approached her, he "could smell the odor of an alcoholic beverage coming from her" and he "realized that it was a possibility that she may have been drinking prior to this

incident.” (T 293-95). Even though he requested blood to be drawn at the scene, this could not be accomplished because of the severity of Petitioner’s injuries and the need to get her to the hospital. (T 295-97).

William Cejmer (“Cejmer”) was one of the fire department medics called to the accident scene. (T 330-31). As Cejmer was attending to Petitioner, he detected “an odor of alcohol about her presence and could smell the alcohol when he leaned through the car window to treat her”. (T 332,336). However, Petitioner’s speech was not slurred and she gave the appropriate answers to his questions. (T 337). Cejmer also had the opportunity to be in close proximity with Vega and he detected no alcoholic odor emanating from him. (T 336).

The officer assigned to handle the traffic accident investigation was Ted Vache (“Vache”), a 22 year veteran in traffic accident investigations. (T 348). In addition to his on the job experience, Vache delineated he had taken several courses and seminars throughout the years and had qualified in other courtrooms to give expert testimony. (T 348-49). Vache estimated he did between 35 and 40 traffic accident investigations per month and possibly two to five serious bodily injury/fatality accidents per year during his tenure with the department. (T 349-50).

As part of Vache's investigation, he verified Petitioner's vehicle contained no mechanical defects. (T 350). A scaled drawing was prepared by Vache and included in his report which was entered into evidence over defense counsel's objection. (T 353). Over defense counsel's objection, Vache detailed the results of his investigation. (T 355-370).

Vache considered the original direction the vehicles were traveling, their point of impact, how the vehicles spun as they collided, and their final resting places. (T 356-57). He also considered the amount of damage sustained by each vehicle, both externally and within the passenger compartments, in order to help determine how the cars came to the resting points and the speed with which they collided. (T 360-65). Based upon his years of experience, Vache opined that Petitioner's car was traveling between 45 and 50 miles per hour at the time of the crash. (T 365). Based upon the photographs of the crash site, physical evidence, witness statements, and his training and experience in the field of accident reconstruction, Vache was able to conclude Petitioner was traveling "at least 50 to 55 miles an hour and she was going faster than the posted speed limit." (T 366-367). Vache stated he took into account the turning speed of Vega's truck. (T 379). That speed was estimated to be eight miles per hour. He added that the

cause of the accident was the excessive speed. (T 383).

Vache stated that Petitioner admitted to having been at the beach on the day of the accident. (T 386). She told Vache that after leaving the beach, she had stopped at the "Blue Cricket Lounge" and then proceeded home. (T 386-87). Vache reported the distance between the lounge and the accident scene was roughly a half mile. (T 387). Petitioner claimed she did not remember the exact amount of time she was at the lounge, but stated it was a "short period of time." (T 387-88).

The testimony of Laura Rastikin ("Rastikin") was proffered outside the jury's presence. (T 396-400). Defense counsel objected to the State's introduction of a medical report into evidence through the records custodian based upon lack of foundation. (T 400-01,404). Finding a sufficient basis presented under the "business records" exception to the hearsay rule, the trial judge ruled the record admissible. (T 404).

Rastikin testified before the jury that she was the records custodian responsible for the centralized medical records kept for each patient at St. Mary's Hospital. (T 407). The records maintained by the custodian include those created by the emergency room staff and the medical laboratories. (T 408). Rastikin affirmed it is the hospital's routine practice to make a record of

all procedures performed or contacts made with a patient, and these records are kept routinely by the hospital and made part of the patient's medical record. (T 408). It is a routine practice for the hospital to draw a patient's blood and to order it analyzed for drug or alcohol content. (T 408). Rastikin explained it was the hospital's routine to maintain the results of the blood analysis in the medical records of the patient and to use the test results to determine the appropriate course of treatment. (T 408-09).

Rastikin also testified that the lab technician was responsible for the testing of the blood and chronicling the results at or near the time of the analysis. (T 409). These reports became part of the patient's medical records which the hospital maintained. (T 410). Petitioner's medical records were produced by Rastikin and contained a record of the alcohol blood analysis. (T 410). That record was introduced into evidence as State's Exhibit 5 over Petitioner's objection. (T 410-11). Exhibit 5 contained Petitioner's name, her admission date of April 11, 1996, and listed the test result number as "2.07". (T 411).

Rastikin admitted she had no personal knowledge that Petitioner's blood was drawn, nor had she witnessed the analysis. (T 412). She had not spoken to the person who conducted the blood test. (T 412).

Thomas Carroll ("Carroll"), Chief Forensic Toxicologist for the Palm Beach County Sheriff and Medical Examiner since 1984, was the State's final witness. (T 413-14). He had testified as an expert in excess of 250 cases and analyzing blood to determine alcohol and drug content is part of a toxicologist's job. (T 417). Carroll had been analyzing blood for 33 years, 13 years with the Sheriff and 20 years at a medical school, and about 6,000 specimens passed though his laboratory each year. (T 417). These tests were performed on both medical and legal blood samples; "Medical blood is blood that is being drawn for the purposes (sic), for the diagnosis of drugs, whereas legal blood is being draw at the request of law enforcement to pursue possible criminal charges." (T 417-18).

Carroll stated he was familiar with the reliability of the testing procedures used by hospitals. (T 419). This was based upon his numerous studies comparing both the legal results and the hospital results, as well as reviewing multiple surveys which compared gas chromatography analysis with alcohol dehydranaze method and found no statistical difference between the tests. (T 419-20). Noting there were about 20 different chemistry analyzers on the market, Carroll added he was familiar with the instruments that St. Mary's Hospital uses. (T 420-21).

St. Mary's analyzer is automated; after the technician installs the appropriate reagent pack, biological sample, and proper code, the machine performs the analysis and prints the results. (T 421-22). In order to ensure valid results, the machine had to be standardized at least once a day. (T 422). The correlation coefficient between the two testing methods is .997, "which is almost perfect correlation." (T 422).

Carroll reviewed the St. Mary's Hospital lab report (State's Exhibit 5) which listed Petitioner's alcohol analysis as "207 milligrams per hundred milliliters of serum." (T 425). Carroll attested there was a calculation that could be performed to convert the "207" to a whole blood value suitable for presentation to the court. (T 426). The "207" figure became ".18 blood alcohol." (T 428). However, this represented the alcohol content at the time the blood was drawn, thus, requiring further calculations (retrograde extrapolations) to determine the alcohol content at the time of the accident. (T 428,439). Carroll opined that after the calculations, the highest possible blood alcohol level of Petitioner at the time of the accident that he could predict was .22. (T 430). He stated:

> So, we just take 50% absorption of the total amount that she drank. We have … already calculated the high at .22. The lowest would be .11. So even now, the range is very high;

.11 or .22. She would still fit there.

(T 436-37). Based on his pharmacology and toxicology expertise, Carroll attested that blood alcohol levels between .03 and .04 decrease a person's inhibitions; levels between .05 and .06 begin to affect the brain; those near .07 start to affect the eye so tracking the distance of objects becomes difficult and the eyes become dysfunctional; at levels of .15 to .17 a person starts to lose peripheral vision. (T 450-53).

The jury returned a verdict of guilty as charged for each count (T 587). A presentence investigation report was completed which included a notation that Petitioner had two prior DUI convictions from out-of-state courts. (T 608-10,613). The sentencing guidelines scoresheet called for a 25 year prison term. (R 68-9). This scoresheet included victim injury points for both the death and the serious bodily injuries. (R 68-9). No objection was raised to the inclusion of these points.

On February 6, 1998, Petitioner was adjudicated guilty and sentenced to 25 years for Count I, DUI Manslaughter, and five years each on Counts II and III, DUI serious bodily injury, with all counts running concurrently. (R 64-7,74,T 615). Petitioner did not file a motion to correct her sentence.

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.

The holding in Love v. Garcia is applicable in the case at hand. The trial court properly found that there was sufficient predicate to admit the blood alcohol report through the business record exception.

The trial court properly sentenced Petitioner. Florida law mandated the trial court's assessment of victim injury points when sentencing Petitioner for the offenses of DUI manslaughter and DUI with serious bodily injury.

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 D1748 (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?

In Friedrich v. State, 24 Fla. Law Weekly D2175 (Fla 4th DCA, September 17, 1999), the Fourth District Court of Appeal again concluded that this Court's decision in Love v. Garcia, supra. applied in criminal cases. It found that a blood alcohol report is properly admitted into evidence through the testimony of the hospital medical records custodian. Id. The court again certified the same question as in Baber as one of great public importance.

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 are 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. As the Fourth District Court of Appeal properly found in Baber v. State, supra., State v. Strong, 504 So. 2d 758 (Fla. 1987) predated Love v. Garcia, supra. Accordingly, that case is inapplicable to the application of the business record exception for hospital records.

Petitioner's reliance on State v. Scalafani, 704 So. 2d 128 (4th DCA 1997) and Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994) is equally misplaced. These cases from the district courts

of appeal have no precedential value for this Court (as opposed to Love v. Garcia, supra. which is an opinion authored by this Court and has direct precedential value). Additionally, both cases are factually distinguishable.

In State v. Scalafani, supra., the defendant moved in limine to exclude blood sample evidence in trial, which the trial court granted. The appellate court held that medical blood was admissible as long as it could be shown to be reliable under the reliability criteria stated in Strong. Id. at 129. The court relied on the regulations of the Department of Health and Rehabilitative Services and §316.1933, Florida Statutes (1995) -- the implied consent law -- in making this determination.

In the case at hand, the applicable statute at issue is §90.803, Florida Statutes (1997); §316.1933 is not and never was at issue. The State was required to establish a foundation for the admissibility of medical records pursuant to §90.803. The State never attempted to get the blood alcohol test results into evidence under the implied consent law -- the subject of §316.1933. Instead, the State relied solely upon the business records hearsay exception statute -- §90.803 -- to gain admission of Petitioner's medical blood alcohol results into evidence.

Similarly, the case of Michie v. State, supra., addresses the

requirements of introducing into evidence medical blood evidence pursuant to §316.1933, Florida Statutes (1991). This case does not address the issue presented here, the admissibility of medical blood evidence under the business record exception pursuant to §90.803, Florida Statutes (1997). Additionally, even if Michie v. State was applicable, it pre-dated Love v. Garcia: Michie was issued on March 2, 1994 and Love, which was originally issued on February 10, 1994, was not final until after the court denied a motion for rehearing on April 4, 1994.

The trial court's admission of medical blood alcohol evidence pursuant to the well-recognized business record exception is not an attempt to "circumvent the established requirements for admitting medical blood alcohol evidence" as Petitioner suggests (IB 9). 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.

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

Although Petitioner recognizes the "inclination to apply Love v. Garcia to criminal cases" (IB 11), Petitioner contends that it should not be applied in this case. Petitioner asserts that there is insufficient predicate to admit the blood alcohol records even under the business records exception because the testimony of the records custodian was not "trustworthy" (IB 11-15). Petitioner contends that the predicate was sufficient in Love, because there was testimony from two records custodians -- one from the laboratory and one from the hospital (IB 11,14). Petitioner's claim makes a distinction without a difference.

Medical records can be admitted into evidence under the business records exception if they are "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity" and if it was the regular practice to keep that record, as shown by the testimony of the custodian. §90.803(6)(a), Florida Statutes (1991). Certainly, the evidence in the case at hand meets these requirements of admissibility -- the State laid the proper predicate.

The testimony of Rastikin provided that she was the records custodian responsible for the centralized medical records kept for each patient. (T 407). The records maintained by the custodian include those created by the emergency room staff and the medical laboratories. (T 408). Rastikin affirmed it was the hospital's routine practice to make a record of all procedures performed or contacts made with a patient and that these records are kept routinely by the hospital and made part of the patient's medical record. (T 408). Further, it is a routine practice for the hospital to draw a patient's blood and to order it be analyzed for drug or alcohol content. (T 408). Again, Rastikin explained it was the hospital's routine to maintain the results of the blood analysis in the medical records of the patient and to use the test results to determine the appropriate course of treatment. (T 408-409). She testified that the lab technician was responsible for the testing of the blood and chronicling the results at or near the time of the analysis. (T 409). She reiterated that these reports became part of the patient's medical records which the hospital maintained for each patient. (T 410). Appellant's medical records were produced by Rastikin and contained a record of the alcohol blood analysis. (T 410).

This testimony established the reliability of the medical

records pursuant to Love and section 90.803(6)(a), Florida Statutes (1997). The fact that in Love, this testimony was provided by two records custodians is a distinction without a difference to the case at hand, where one record custodian could provide the necessary predicate to admit records under the business record exception. Additionally, in Love, it is apparent that the two records custodians were used because the blood had been analyzed by a firm outside of the hospital, SmithKline, therefore, it was necessary to obtain testimony from the records custodian from that firm as well as the hospital. Id. at 159-60. This is markedly different from the case at hand, where the blood remained in the hospital and was analyzed by hospital staff. It was necessary to call only the hospital's record custodian when the blood remained in-hospital and the results were reported directly into the hospital's records.

Petitioner contends that "the laboratory personnel who generated the initial blood analysis report and the person responsible for recording the results" -- the lab technician -- needed to testify for the results to be trustworthy (IB 14-5). This requirement would defeat the whole purpose of the business record exception. The 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 396-412), is all that is needed to admit these records into evidence.

Under this business records 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.

Contrary to Petitioner's assertion in her Initial Brief (IB 12), Florida case law does authorize the business record exception to establish blood alcohol levels. (See discussion of Brock v. State, 676 So. 2d 991 (Fla. 1st DCA 1996) in Part A). The fact that it was the defendant seeking to admit the blood alcohol report into evidence as opposed to the State does not preclude that applicability of Brock. The business records hearsay exception is equally applicable to all parties, and regardless of what party is attempting to admit evidence under this exception, the proper predicate remains the same.

Love v. Garcia, supra., is properly applied in criminal cases, and medical blood alcohol results are admissible through the testimony of the hospital medical records custodian. The trial court properly admitted Petitioner's medical blood alcohol test

results contained in the hospital’s business records.

POINT 2

THE TRIAL COURT PROPERLY SENTENCED PETITIONER.

Petitioner claims it was improper for victim injury points to be assessed for the death of Ramon Gutierrez and serious bodily injuries to Ramon Vega and Petitioner's son because the crimes include enhancement for victim injury as an element of the offense. (IB 16). The court properly assessed victim injury points on Petitioner's scoresheet.

Petitioner failed to preserve this issue at the trial court level. The Fourth District Court of Appeal could have considered the issue only if it found the sentence imposed to be fundamental error. Romano v. State, 718 So. 2d 283, 284 (Fla. 4 DCA 1998)(sentencing errors which were not raised below either through a timely objection or by filing a Rule 3.800 motion are unpreserved and will not be addressed on direct appeal unless such sentencing error is fundamental); Hyden v. State, 715 So. 2d 960, 961 (Fla. 4th DCA 1998)("In order for a sentencing error to be raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct sentence under Florida Rule of Criminal Procedure 3.800(b)). The Fourth District Court of Appeal did not address this issue, but simply affirmed Petitioner's convictions

and sentences "in all respects". The appellate court did not find fundamental error.

Petitioner urges this Court to rely upon Thornton v. State, 683 So. 2d 515 (Fla. 2d DCA 1996) and to strike the victim injury points. As acknowledged by Petitioner (IB 17), the Second District Court of Appeal receded from it's decision in Thornton in Wendt v. State, 711 So. 2d 1166 (Fla. 2d DCA 1998). In an en banc opinion, the Second District Court of Appeal affirmed a trial court's inclusion of victim injury points for injuries arising out of the crimes of DUI serious bodily injury and DUI manslaughter and elected to follow the reasoning in an opinion out of the Third District Court of Appeal, Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA), review denied, 697 So. 2d 1217 (Fla. 1997). Wendt v. State, supra. See State v. Barber, 727 So. 2d 996 (Fla. 2d DCA 1999)(Second District receded from Thornton and held that victim injury points properly assessed on scoresheet for DUI manslaughter and DUI serious bodily injury).

In Martinez v. State, 692 So. 2d 199 (Fla. 3d DCA), review denied, 697 So. 2d 1217 (Fla. 1997), the court included victim injury points in addition to points awarded for a vehicular homicide conviction. The court criticized Thornton as decided

wrongly, finding the case law upon which Thornton was based inapplicable to the issue before the court. While conflict was certified, this Court denied review.

A trial court can impose a proper guidelines sentence even though it exceeds the statutory maximum for a second degree felony. Mays v. State, 717 So. 2d 515, 516 (Fla. 1998)(under chapter 921, if true recommended guidelines sentence exceeds the statutory maximum, guidelines sentence must be imposed). The Fourth District Court of Appeal recognized the propriety of assessing victim injury points for the death of a victim when the defendant was convicted and sentenced for DUI manslaughter. See Johnson v. State, 543 So. 2d 1289, 1292 (Fla. 4th DCA 1989)(victim injury was properly scored for each victim of the primary offense of DUI manslaughter). "The fact that appellant was charged with points for the manslaughter offense, which included victim injury, does not preclude a factoring in of additional points for victim injury." Id. at 1292-93. This conclusion was based upon the court's interpretation of Rule 3.701(d)(7) Florida Rules of Criminal Procedure.

Even more recently, the First District Court of Appeals concluded that "the statutory scheme requires scoring sentencing points on account of the victim's death, even though the death of the victim is an element of DUI Manslaughter - Leaving the Scene."

Ackerman v. State, 737 So. 2d 1145, 1148 (Fla. 1st DCA 1999). The court specifically acknowledged its accord with its sister courts in Wendt (Second District) and Martinez (Third District). It held that the Legislature did not intend for a person convicted of DUI Manslaughter to receive points solely for the offense and none for "victim injury". Id. See also Ganey v. State, 24 Fla. L. Weekly D1663 (Fla. 2d DCA, July 16, 1999)(victim injury points properly included for offenses of DUI manslaughter and DUI serious bodily injury).

With the Second District Court of Appeal's opinion in Wendt v. State, 711 So. 2d 1166 (Fla. 2d DCA 1998), which receded from Thornton, there is no longer conflict between the district courts. Victim injury points are appropriate and required where the primary offense is DUI manslaughter or DUI serious bodily injury.

Florida law mandates the inclusion of victim injury points. Pursuant to §921.0011(7), Florida Statutes (1995), "victim injury means the physical injury or death suffered by a person as a direct result of the primary offense, or any offense other than the primary offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense . . . ." There is nothing in Chapter 921, Florida Statutes to indicate that the Legislature did not intend to increase the

sentencing points for those offenses where the victim died. The sentencing guidelines contemplate points for both DUI Manslaughter and the injury; in this case, death of one victim and serious injury to two other persons. There is nothing in the statute to indicate the base point assessment for the DUI charges included an assessment of points for victims's death or serious bodily injury. Johnson v. State, 543 So. 2d at 1292.

In the case at hand, Petitioner was charged and convicted of one count of DUI manslaughter and two counts of DUI serious bodily injury stemming from her April 11, 1996 accident in which Ramon Gutierrez was killed and Ramon Vega and Petitioner's son were injured seriously. "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction, and for each count resulting in such injury whether there are one or more victims." Rule 3.701(d)(7) Florida Rules of Criminal Procedure (1996). Hence, the trial court correctly included such points in its calculation of Petitioner's sentence where one person died and two others were injured seriously as a direct result of Petitioner's actions.

The cases of Asbell v. State, 715 So. 2d 258 (Fla. 1998) and White v. State, 714 So. 2d 440 (Fla. 1998), which Petitioner claims are analogous to the case at hand, are inapplicable and do not

"directly conflict" with any of the previously discussed cases. These two cases address enhancement for the specific crime of possession of a firearm and are clearly distinguishable from cases where victim injury points are assessed for the offense of DUI manslaughter. This distinction is clearly set out in a recent First District Court of Appeal opinion:

> Mr Ackerman also argues by analogy to the rule that points cannot be scored for possession of a firearm where such possession is an element of the offense. But this rule arises from the statutory language that does not pertain here. §921.0014(1)(b), Florida Statutes (1997), authorizes additional points when a defendant commits a felony, not by virtue of, but simply "while having in his or her possession [] a firearm where such possession is an element of the offense. Our supreme court has applied the rule of lenity and drawn the inference that this statutory language does not contemplate adding points for possession of a firearm where such possession is an element of the offense.
>
> On the other hand, "[v]ictim injury shall be scored for each victim physically injured and for each offense resulting in physical injury whether there are one or more victims." Fla. R. Crim. P. 3.702(d)(5). "'Victim injury' means the physical injury or death suffered by a person as a direct result of the primary offense, or an additional offense, for which the offender is convicted and which is pending before the court for sentencing at the time of the primary offense." §921.0011(7)(a), Florida Statutes (1997). (citations omitted).

Ackerman v. State, 737 So. 2d at 1149.

The trial court properly assessed victim injury points when sentencing Petitioner for DUI manslaughter and DUI serious bodily injury. Petitioner's sentence must be affirmed.

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 trial court properly assessed victim injury points when sentencing Petitioner. The trial court's judgment and sentence, affirmed by the Fourth District Court of Appeal, should be affirmed by this Court.

Respectfully submitted,

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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: Richard W. Springer, Esq. and Catherine Mazzullo, Esq., 3003 South Congress Avenue, Suite 1A, Palm Springs, FL 33461 on January 24, 2000.

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