IN THE
SUPREME COURT OF FLORIDA

CASE NO. 96,852

JOY FRIEDRICH,

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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STATEMENT OF THE CASE

The court below affirmed Joy Friedrich's convictions for DUI Manslaughter and DUI Serious Bodily 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?

Friedrich v. State, _____So.2d_____, 24 Fla. L. Weekly D2175 (Fla. 4th DCA 1999) (Appendix A). 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.

STATEMENT OF THE FACTS

On or about April 11, 1996 at approximately 8:00 p.m., the Petitioner, Joy Friedrich, was involved in a traffic accident at the intersection of Forest Hill Boulevard and Parker Avenue in the City of West Palm Beach (R-1). The Petitioner, Joy Friedrich, had a green light and right-of-way as she traveled westbound on Forest Hill Boulevard approaching the intersection (T-242). A pick-up truck traveling eastbound on Forest Hill Boulevard moved into the turn lane, waited for one car to pass, then turned northbound into the intersection (T-258-260). The Petitioner's vehicle, coming from the east, traveling west, made impact with the passenger's side of the pick-up truck (T-262). The

pick-up truck did not have a green arrow (T-278). The passenger of the pick-up truck was killed and the driver was injured, as well as a passenger in the Petitioner's car. Officer Rowe was the first police officer on the scene, and began a traffic accident investigation (T-298). After smelling an odor of alcohol coming from the Petitioner, Officer Rowe asked Sgt. Reed to draw a blood sample (T-296). Based on the fact that the Petitioner was injured and needed to be transported to St. Mary's trauma center, the blood sample was not drawn at Officer Rowe's request at the scene (T-297). For purposes of medical treatment, blood was taken from the Petitioner by hospital personnel.

At trial, the State called witness Laura Rastikin to testify. Her testimony was proffered outside the presence of the jury (T-396-400) and the Petitioner objected based on hearsay to the medical record the State was seeking to introduce through her (T-400). The trial court ruled that the medical record was admissible as a business records exception to hearsay (T-405). The medical record was received into evidence.

In the presence of the jury, Laura Rastikin testified that as the records custodian at St. Mary's Hospital, it is her responsibility to keep all medical records that relate to patients admitted to the hospital (T-407). The State asked Ms. Rastikin on direct whether the results were recorded at or near the time of the analysis (T-409, lines 15-17). Having already admitted during the proffer that she had no personal knowledge of this blood draw or the events related to it other than being the records custodian, the

defense/petitioner objected based on lack of personal knowledge (T-409, lines 18-19). Said objection was overruled and Ms. Rastikin answered yes. Ms. Rastikin identified the records she brought in regard to the Petitioner (T-410) and the records were admitted into evidence over defense objection and subject to the proffer (T-411). On cross-examination, Ms. Rastikin admits to having no personal knowledge of the blood draw, did not witness anyone analyzing the blood, did not talk to anyone associated with analyzing the Petitioner's blood (T-412). Ms. Rastikin was only able to testify that the medical record had the patient's name on it, the admission date of April 11, 1996, and when asked for the result she answered, "you would have to get that from a doctor" (T-411). When asked to read the number, she read 207 (T-411). The hospital record admitted in this case was not the instrument print out generated by the chemical analyzer used to test the Petitioner's blood. Ms. Rastikin was not the records custodian for the laboratory. The record admitted was a computer generated report.

The Chief Forensic Toxicologist for Palm Beach County, F. Thomas Carroll, testified for the purpose of converting the medical blood alcohol content to a legal blood alcohol content. Mr. Carroll testified that he did not know who drew the blood nor did he have any personal knowledge of the maintenance or quality control of the laboratory instrument the Petitioner's blood was analyzed on.

The jury returned a verdict on Count I of Guilty of DUI Manslaughter as charged

in the Information, as to Counts II and III, Guilty of DUI Serious Bodily Injury as charged in the Information.

On February 6, 1998, the Petitioner was returned to the trial court for sentencing (T-595-617). The Petitioner was sentenced to 25 years in the Department of Corrections on Count I and 5 years in the Department of Corrections on Counts II and III each, all to run concurrent with each other. The Petitioner 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. In the absence of the laboratory instrument print out or testimony of a records custodian from the laboratory with knowledge of the acts or events of the laboratory has the State established the proper predicate under the business record statute, § 90.803(6)(a), Fla. Stat., for admissibility of a hospital business record report of a laboratory test by testimony of a records custodian with no knowledge of the acts or events of the laboratory?

III. Did the trial court impose an illegal sentence on the Petitioner when it sentenced the Petitioner to a term of imprisonment in excess of the statutory maximum

based on a guidelines scoresheet assessing victim injury points when the primary offense includes enhancement for death and victim injury as an element of the offense?

SUMMARY OF THE ARGUMENT

1. State v. Strong, 504 So.2d 760 (Fla. 1987), a DUI Manslaughter medical blood case, held that since the State is not pursuing the presumptive validity or meaning of the blood test in accordance with legal blood drawn according to § 316.1932(1)(f)(2), Fla. Stat., the medical blood must meet the traditional predicate for admissibility, including test reliability, the technician's qualifications and the test results' meaning. Without receding from Strong, Love v. Garcia, 634 So.2d 158 (Fla. 1994), a civil case, held that medical blood alcohol test reports are admissible as business records under § 90.803(6), Fla. Stat. In a criminal case in which the hospital business record is crucial evidence to prove the essential element of the offense, the well-established requirements of Strong provide the protection required to assure a fair proceeding. To allow Love to apply in criminal prosecutions this Court must recede from Strong which would allow the State to circumvent the established requirements for admitting medical blood alcohol evidence to prove an essential element of a crime and gain from all the statutory presumptions that are afforded legal blood when introduced showing substantial compliance with methods approved by the F.D.L.E.

If Love does apply to criminal prosecutions, it does not justify admissibility of the

hospital business records in this case, because the predicate to the admission of the hospital record was not sufficient to ensure reliability. In the present case, there was no link between the source of information contained in the document and the person who prepared the document, to the hospital records custodian as was the case in Love where the laboratory (Smith-Kline) records custodian and the hospital records custodian both testified.

2. If the hospital business record of the blood alcohol test is admissible and a new trial is not granted, the sentence should be reversed and the cause remanded to the trial court for resentencing because the Petitioner was sentenced to a term of imprisonment in excess of the statutory maximum based on the guidelines scoresheet inclusion of additional points for victim injury when the offenses charged include enhancement for victim injury as an element of the offense.

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

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING THE HOSPITAL BUSINESS RECORD - A COMPUTER REPORT OF A MEDICAL BLOOD ALCOHOL TEST

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

A blood sample drawn for medical purposes differs from a blood sample drawn for legal purposes. To admit the blood test results of legal blood, the State must comply with the methods approved by the Florida Department of Law Enforcement (FDLE). See generally, Fla. Admin. Code R. 11D-8.013. If there is substantial compliance with FDLE regulations, and a result of .08 or more is obtained, that fact shall be prima facie evidence that the person was under the influence of an alcoholic beverage to the extent that his or her normal faculties were impaired. § 316.193 Fla. Stat. (1997). See also Robertson v. State, 604 So.2d 783 (Fla. 1992). When dealing with medical blood the parties are not bound by the requirements of FDLE for blood test result admissibility. Strong v. State, 504 So.2d 758 (Fla. 1987).

In 1987, the Supreme Court, in State v. Strong, a DUI Manslaughter medical blood case, held that since the State is not pursing the presumptive validity or meaning of the blood test in accordance with legal blood drawn according to statute § 316.1932(1)(f)(2), Fla. Stat., the medical blood test results must meet the traditional predicate for admissibility, including test reliability, the technician's qualifications, and the test results' meaning. Strong, 504 So.2d at 760 (Fla. 1987).

As recently as 1997, the Fourth District Court of Appeal readdressed the issue of medical blood admissibility in a criminal case in State v. Sclafani, 704 So.2d 128 (Fla. 4th DCA 1997). Post Love, the Fourth District Court of Appeal held that the

reliability criteria as stated in Strong governs and with medical blood the State must demonstrate that the technician is qualified, the test is reliable, and demonstrate the test results' meaning. Sclafani, 704 So.2d at 129 (Fla. 4th DCA 1997)

The Second District Court of Appeal, in March of 1994, post Love, in Michie v. State, 632 So.2d 1106 (Fla. 2nd DCA 1994), a criminal case involving medical blood also required the same criteria as Strong. In Michie, the presumption afforded by § 316.1934(2)(c) was not available because a blood sample was medical blood as opposed to legal blood drawn according to statute. The Second District Court of Appeal in following Strong requires that when a blood sample is drawn for medical purposes by a qualified health care professional, the State is still required to establish the traditional predicate for admissibility; the test's reliability, the examiner's qualifications, and the meaning of the test results. Michie, 632 So.2d at 1108 (Fla. 2nd DCA 1994) citing Robertson v. State, 604 So.2d 783 (Fla. 1992).

In this case, the trial court did not follow Strong and allowed the 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 stating as it also stated in Baber v. State, 24 Fla. L. Weekly D1478 (Fla. 4th DCA, June 23, 1999) that they were "reasonably confident" Love applies to criminal cases; however, this is an issue best left for the Florida Supreme Court. Because we have concerns about applying the

principles set forth in Love, a civil case, to prove an element of a criminal offense. (Appendix A).

By substituting Love for Strong, the court below has allowed the State to circumvent the established requirements for admitting medical blood alcohol evidence to prove an essential element of a crime and gain from all the statutory presumptions that are afforded legal blood when introduced showing substantial compliance with methods approved by FDLE.

In the present case, 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. When the business record is the only proof of an essential element of an offense (the record does not contain any other evidence of impairment) a business record exception should not be allowed to so easily circumvent well-established requirements for admitting medical blood alcohol evidence as required by Strong. Recognizing that hospital personnel may rely on their records for medical purposes, it is done so with the support of additional diagnostic tools available to the hospital staff. Important medical procedures are rarely performed based on a single test reported by someone other than the clinician whose reliability and qualifications are known to the doctor making the diagnostic decision. In a criminal case in which the hospital business record is crucial evidence to prove the essential element of the offense,

the well-established requirements of Strong provide the protection required to assure a fair proceeding.

B. IN THE ABSENCE OF A PREDICATE SUFFICIENT TO ENSURE RELIABILITY, 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?

Friedrich v. State, _____So.2d_____, 24 Fla. L. Weekly D2175 (Fla. 4th DCA 1999) (Appendix A). Love v. Garcia, 634 So.2d 158 (Fla. 1994), a civil case involving medical blood arising out of the Fourth District Court of Appeal, held that the medical blood test results were admissible under the business records exception to hearsay. The introduction was based on a predicate which consisted of testimony by two records custodians, one from the laboratory (Smith Kline) and one from the hospital. The trial court, in Love, was concerned (and rightfully so) with the proper predicate of how the test was performed, what type of test was performed, and who drew the blood samples, all issues challenging the reliability and trustworthiness of the test results. Id. at 159. In Love, this Court held that the blood test results were admissible under a business records

exception to hearsay, finding that once the business records predicate is laid, the burden is one the party opposing the introduction to prove untrustworthiness of the records. Id. at 160. The Supreme Court's opinion in Love never mentions the standard imposed in the criminal medical blood case of Strong, or any recission from that decision or their rationale for receding from the requirements enumerated in Strong.

The inclination to apply Love v. Garcia to criminal cases is based on the presumption 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.

Love states that several districts have held that medical records are an exception to the hearsay rule and fall within § 90.803(6), Florida Statutes (1991) and cites to three civil cases. The Love opinion states: "This Court has not previously had the opportunity to rule on this issue and we do so now for the first time". Love, 634 So.2d at 160 (Fla. 1994). Recognizing that Strong, a criminal case, was decided by this Court in 1987, attention is drawn to the fact that this Court sees the Love facts as a different situation from the criminal case in Strong, therefore justifying the different opinions. Love therefore does not overrule or change in any way the criteria set forth in Strong.

This point is further emphasized by the Fourth District Court of Appeal's decision in Sclafani in 1997 (post Love) upholding the reliability criteria set forth in Strong.

No post-Love Florida case has approved the use of the business records exception as a means of avoiding Strong/Sclafani requirements for admission of medical blood results in a criminal case. (In Brock v. State, 676 So.2d 991 (Fla. 1st DCA 1996), the court held, based on Love, that the defendant should have been permitted to try to lay a proper predicate for the admissions of an emergency room report containing references to blood alcohol results and intoxication as a business records exception. Those facts are distinguishable from this case, in which it is the State seeking to avoid having to prove the traditional admissibility predicate of Sclafani and Strong).

Section 90.803(6)(a), Fla. Stat., 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 profession, occupation, and calling of every kind, whether or not conducted for profit.

If the business record exception allows the State to avoid the Strong/Sclafani medical blood predicate the computer generated report introduced at trial should not be admissible as the "sources of information or other circumstances showed lack of trustworthiness". § 90.803(6)(a). The State introduced a computer generated report through the hospital records custodian who testified that it was her job to keep the records for the hospital (T-407-413). The information contained on the report was generated in a laboratory from a chemical blood analyzer operated by a technician and transferred from the print out of the analyzer into a computer. The laboratory has a separate record keeper responsible for the input of data from the chemical analyzer into the hospital computer system. There was no link between the source of the information contained in the document and the person who prepared the document, to the hospital records custodian as was the case in Love where the laboratory (Smith-Kline) records custodian and the hospital records custodian both testified. While the document itself may have been kept by the hospital records custodian, the source of the information (the laboratory personnel who generated the initial blood analysis report and the person responsible for recording the results) and the circumstances surrounding the ultimately generated report show a lack of trustworthiness. In the present case, the source of the information contained in the blood test results document was the person who performed the analysis on the blood sample. If that person is not available to testify and the hospital

records custodian testifies regarding the source of the information contained in the document, then not only is the document hearsay, the information contained in the document is hearsay. If the data entry is not correct, the report would not be correct, no matter how trustworthy the hospital records custodian is on keeping the document. The State seeks to bypass the integrity of the entire process starting with collecting the specimen, analyzing the specimen, and reporting the results by calling a witness with no connection to the laboratory. Therefore, if any business record could be used in a criminal case without a Strong predicate, it is not in the present case as the "sources of information or other circumstances" cannot insure the reported test result is trustworthy.

II.

ARGUMENT

THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE ON PETITIONER WHEN IT SENTENCED PETITIONER TO A TERM OF IMPRISONMENT IN EXCESS OF THE STATUTORY MAXIMUM BASED ON A GUIDELINES SCORESHEET ASSESSING VICTIM INJURY POINTS WHEN THE PRIMARY OFFENSE INCLUDES ENHANCEMENT FOR DEATH AND VICTIM INJURY AS AN ELEMENT OF THE OFFENSE.

In the present case, a sentencing guidelines scoresheet was prepared (T-68-69). The sentence guidelines scoresheet reflects 74 points for DUI Manslaughter, a level 8

offense, and 56 points for two counts of DUI Serious Bodily Injury, a level 7 offense. § 921.0022(3)(g) and (h), Fla. Stat. (1997). In addition, 200 points were assessed for victim injury, 120 points for the death associated with the DUI Manslaughter and 80 points assessed for severe injury associated with the two counts of DUI Serious Bodily Injury. The Petitioner was sentenced to a term of imprisonment of twenty-five (25) years based on the sentencing guidelines scoresheet (R-64-66), for the second degree felony of DUI Manslaughter. A second degree felony is punishable by a term of imprisonment not to exceed 15 years. Fla. Stat. § 775.082(3)(c). The Petitioner's sentence was based on a sentencing guidelines scoresheet that was improperly enhanced with points for victim injury when the offenses charged include enhancement for victim injury as an element of the offense.

As recent as June 1996, the Second District Court of Appeal in Thornton v. State of Florida, 683 So.2d 515 (Fla. 2nd DCA 1996) considered the issue of victim injury points when the primary offense had already been enhanced due to injury or death as an element of the offense. In Thornton, the defendant entered an open plea of no contest to two counts of leaving the scene of an accident with injury or death. Id. In an order denying further relief upon rehearing the trial court conceded that it was error to include 48 points on the scoresheet for victim injury, stating the primary offense had already been enhanced because injury or death is an element of the offense. Thornton, 683 So.2d 515

(Fla. 2nd DCA 1996). In its order, the trial court found the error to be harmless. Id. The Second District Court of Appeal held the trial court to be mistaken, and addressed the fact that when Thornton's score is reduced by 48 points, the corrected scoresheet places him in a different sentencing cell. Id. at 1396 (emphasis added). The court further stated that this error cannot be presumed to be harmless unless the record conclusively demonstrates the trial court would have given the same sentence had it known the correct score. Id. (emphasis added). While the Second District in its written opinion speaks to the error the trial court made in considering the error harmless, the Second District does not disagree with the trial court's concession that it was error to include 48 points for victim injury when the primary offense had been enhanced because of injury or death as an element of the offense. Id. By choosing not to comment or address the trial court's decision to eliminate the 48 points for victim injury, it is apparent the Second District agrees with the trial court's holding, and accepts the rationale that injury to the same victim should not be scored twice.

The Second District in April of 1998 in a rather unusual decision, receded from its position in Thornton in Wendt v. State, 711 So.2d 1166 (Fla. 2nd DCA 1998). As the Appellant in Wendt relied on Thornton in making the argument, the Second District Court of Appeals merely said without explanation we recede from Thornton and elect to follow the Third District Court of Appeals. Wendt, 711 So.2d at 1167 (Fla. 2nd DCA

1998).

As recently as June and July of 1998, this Court has addressed cases based on a similar concept involving additional sentencing points for a firearm when the offense charged requires a firearm as an essential element. Asbell v. State, 715 So.2d258 (Fla. 1998), White v. State, 714 So.2d 440 (Fla. 1998). This Court's position is that it is error for the trial court to assess additional sentencing points for possessing a firearm where the sole underlying crime is carrying a concealed firearm or possession of a firearm by a convicted felon. This Court held that Florida Rule of Criminal Procedure 3.702(d)(12) does not contemplate the addition of sentencing points for carrying or possessing a firearm where the carrying or possession of a firearm is the essential element of the underlying offense.

As recently as June of 1999, the First District Court of Appeal in Ackerman v. State, 24 Fla. L. Weekly D1505 (Fla. 1st DCA 1999) decided in accord with the decisions of Wendt v. State, 711 So.2d 1166 (Fla. 2nd DCA 1998), Martinez v. State, 692 So.2d 199 (Fla. 3rd DCA 1997), State v. Barber, 24 FLW D321 (Fla. 2nd DCA 1999), and Ganey v. State, 24 FLW D1663 (Fla. 2nd DCA 1999), which directly conflicts with this Court's decision in White and Asbell. The First District Court of Appeal attempts to draw a distinction between the wording of Fla.R.Crim.P. 3.702(d)(12) as it applies to firearms and the wording of section (d)(5) as it applies to victim injury.

In the charge of DUI Manslaughter, death is an essential element. In the charge of DUI Serious Bodily Injury, the serious bodily injury is an essential element. In the present case, the Appellant was charged with DUI Manslaughter and two counts of DUI Serious Bodily Injury. The charge of DUI Manslaughter, which specifically takes into account that a death is involved, is a level 8 offense for which 74 points were assessed. The victim injury points of 120 added on because of the death is redundant. In addition, the charge of DUI Serious Bodily Injury is a level 7 offense for which 28 points are assessed, for two counts 56 points are assessed. The victim injury points for two counts of DUI Serious Bodily Injury are 80 and once again are redundant for they take into account that which was already accounted for. Accordingly, because the Petitioner was essentially twice penalized by the scoresheet's inclusion of 200 points for victim injury, the Petitioner contends that her sentence should be reversed and the cause remanded to the trial court.

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. Alternatively, the Petitioner, Joy Friedrich, seeks a remand for

sentencing based on the imposition of an illegal sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished to the Attorney General's Office, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida, by mail, this_____day of _____, 1999.

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