IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

vs.

BRUCE BELVIN,

Respondent.

CASE NO.: SC06-593

L.T. NO.: 4D04-4235

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

Respectfully submitted,

RICHARD W. SPRINGER, P.A.
Attorneys for Petitioner
3003 South Congress Avenue
Suite 1A
Palm Springs, FL 33461
(561) 433-9500

By:_____
Richard W. Springer, Esquire
Florida Bar No. 176285

_____
Catherine Mazzullo, Esquire
Florida Bar No. 752312

TABLE OF CONTENTS

APPENDIX

A. BELVIN V. STATE, 922 So2d 1046 (Fla. 4DCA March 8, 2006), rev. granted by State v. Belvin, 928 So2d 336 (Fla. 2006).

B. BELVIN V. STATE, (15th Judicial Circuit Appellate Decision, Case Number 02-11AC October 4, 2004)(unpublished opinion)

TABLE OF AUTHORITIES

Cases Cited **Page Number**

Constitutional Provisions

Statutes and Rules

PRELIMINARY STATEMENT

Respondent, BRUCE BELVIN, was the defendant in the trial court, Appellant before the Circuit Court, and was the Petitioner before the Fourth District Court of Appeal. Respondent will be referred to as "Respondent" or by name. Petitioner, State of Florida, was the prosecuting authority in the trial court, the Appellee before the Circuit Court and the Respondent before the Fourth District Court of Appeal. Petitioner will be referred to as "Petitioner" or "the State".

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, which can be found at Belvin v. State, 922 So2d 1046 (Fla. 4th DCA 2006), (en banc)(App. A):

Respondent was arrested and charged with Driving Under the Influence of Alcohol to the extent his normal faculties were impaired contrary to Section 316.193(1), Florida Statutes. Respondent was transported to a breath testing facility. There, he submitted to a breath test. Respondent's breath test results measured 0.165, 0.144 and 0.155. A trial by judge commenced on February 5, 2002 before the Honorable Paul D'Amico. At trial, the arresting officer testified that he made the traffic stop and

requested the breath samples. The breath test technician, Rebecca Smith, administered the breath test and prepared the breath test affidavit, but she did not testify at trial. Respondent objected to the introduction of the breath test affidavit without the breath test technician being present at trial and subject to cross-examination. Respondent argued that the affidavit was hearsay and that he had a statutory right to subpoena the technician for trial, pursuant to Section 316.1934(5), Florida Statutes. The Trial Court overruled Respondent's objection and admitted the affidavit into evidence. The Trial Court found Respondent guilty of DUI and sentenced him to the penalties mandated by statute.

Respondent appealed the conviction and sentence to the Circuit Court of the Fifteenth Judicial Circuit. On appeal Respondent argued that the confrontation clause under the Federal and Florida Constitutions and the statutory language of §36.1934(5), Florida Statutes, provided the Respondent the right to confront and cross examine at trial the breath technician who administered the breath test and prepared the breath test affidavit prior to the admission of the breath test results. The unavailability of the breath technician at trial violated the Respondent's right to confrontation.

The Circuit Court initially reversed the County Court conviction and ruled that the breath test affidavit is testimonial hearsay and therefore, inadmissible because Respondent did not have an opportunity to cross examine the breath test technician. Belvin v. State, 11 Fla.L.Weekly Supp. 792 (Fla. 15th Cir. Ct. July 2004). On rehearing, however, the Court affirmed Respondent's conviction holding that the breath test affidavit is not testimonial in nature, and therefore the confrontation clause does not apply. Belvin v. State, (Fla. 15th Judicial Circuit Appellate Decision, Case Number 02-11AC October 4, 2004)(unpublished opinion)(App. B).

Respondent sought certiorari review in the Fourth District Court of Appeal of the decision of the Circuit Court rendered in its Appellate capacity, affirming the conviction and sentence. On June 8, 2005 the Fourth District Court of Appeals issued an opinion granting the Writ of Certiorari and quashing the Circuit Court decision. Belvin v. State, 30 Fla.L.Weekly D1421(Fla. 4th DCA June 8, 2005). On rehearing, the June 8, 2005 opinion was withdrawn and substituted with the Fourth District's En Banc opinion dated March 8, 2006. The Fourth District affirmed its prior holding, and certified a question of great public importance to this Court in Belvin v. State, 922 So2d 1046

(Fla. 4th DCA 2006). (App. A). The Petitioner then filed a Notice to Invoke Discretionary Jurisdiction with this Court. On April 28, 2006 this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

Point One

The breath test affidavit is generated by law enforcement for use at a later criminal trial and when admitted into evidence establishes an essential element of Driving Under the Influence. The breath test affidavit falls into the "core class of testimonial statements" referred to in Crawford. Where testimonial hearsay is at issue, the Confrontation Clause bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross examination. Admission of the breath test affidavit without establishing the bright line test of unavailability and prior opportunity for cross examination violated Respondent's constitutional right to confront the witness.

POINT II

"Clearly established law" can be derived from recent controlling case law. At the time the Fourth District Court of Appeals decided Belvin v. State, 922 So2d 1046 (Fla. 4th DCA 2006), Crawford was controlling case law. The

Fourth District Court of Appeals was bound by Crawford and properly held that admission of the breath test affidavit at trial violated Respondent's constitutional right to confrontation.

ARGUMENT

POINT ONE

DOES ADMISSION OF THOSE PORTIONS OF THE BREATH TEST AFFIDAVIT PERTAINING TO THE BREATH TEST OPERATOR'S PROCEDURES AND OBSERVATIONS IN ADMINISTERING THE BREATH TEST CONSTITUTE TESTIMONIAL EVIDENCE AND VIOLATE THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE IN LIGHT OF THE UNITED STATES SUPREME COURT'S HOLDING IN CRAWFORD V. WASHINGTON, 541 U.S. 36 [124 S.Ct. 1354, 158, L.Ed.2d 177] (2004)?

The Trial Court accepted the breath test affidavit into evidence over Respondent's objection that the breath technician and author of the breath test affidavit was not present at trial and subject to cross examination, pursuant to the public records exception to hearsay. Sections 316.1934(5); 90.803(8), Florida Statutes. The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" This right to confrontation is applicable to the states through the Fourteenth Amendment, see Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (1990), and is

repeated in Article I, Section 16 of the Florida Constitution, which states: "In all criminal prosecutions the accused…shall have the right…to confront at trial adverse witnesses….". This right, the Fourth District Court held was violated in the instant matter. U.S. Const. Amend.VI; Florida Constitution Article I Section 16 (emphasis added). A District Court's decision declaring a State Statute unconstitutional is subject to a denovo standard of review. State v. Hosty, ____So2d____(Fla. 2006), 31 Fla.L.Weekly S369 (Fla. 2006); Fla. Department of Children and Families v. F.L. 880 So2d 602 (Fla. 2004).

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court overruled the reliability test previously established in Ohio v. Roberts, 448 U.S. 56 (1980), for determining the admissibility of testimonial hearsay. The Crawford Court examined the roots of the Confrontation Clause, a "bedrock procedural guarantee that applies to both federal and state prosecutions", and the evils it sought to prevent. Crawford, 541 U.S. 36 at 42. The Supreme Court also applied a textual analysis, explaining that the clause itself references "witnesses" against the accused and a "witness" is someone who "bears testimony... "testimony", in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving

some fact". Id at 51, (quoting 1 Noah Webster, an American Dictionary of the English Language (1828)). Using this definition, the Court distinguished between casual remarks and "formal statements to government officers". Id. The formal statements made to government officers encompass testimonial statements and are specifically the type of statements the framers intended to be subject to the Confrontation Clause. Id at 53-54. The Supreme Court in Crawford established a bright-line rule when testimonial hearsay is at issue by holding that the provision of the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross examination." Id at 53-54. Therefore, to answer the certified questions presented, this Court must first decide whether those portions of the breath test affidavit that pertain to the breath test operator's procedures and observations in administering the breath test, and presented at trial to establish an element of Driving Under the Influence is testimonial within Crawford.

THE PORTIONS OF THE BREATH TEST AFFIDAVIT PERTAINING TO THE BREATH TEST OPERATOR'S PROCEDURES AND OBSERVATIONS IN ADMINISTERING THE BREATH TEST ARE TESTIMONIAL EVIDENCE

Breath testing operators are required to follow certain procedures to ensure the reliability of the breath test results, including maintaining a breath test log, observing the defendant for a fixed period of time and analyzing the requisite number of samples within a specified time frame. The affidavit has several components and includes information pertaining to the procedures followed and the observations made during the breath testing process as well as documentation regarding the maintenance and inspection of the breath test instrument. The affidavit is generated by law enforcement for use at a later criminal trial and when admitted into evidence establishes a critical element of Driving Under the Influence. (See Belvin v. State, 922 So2d 1046 at 1050-1051(Fla. 4th DCA 2006).

The Crawford Court provided a generic definition of testimonial in the textual analysis of the Confrontation Clause, explaining that the clause itself references "witnesses" against the accused and a "witness" is someone who "bears testimony… "testimony", in turn, is typically "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford 541 U.S. 36,

51 (2004). Declining to spell out a comprehensive definition of testimonial the Court stated, “whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations”. Id at 67. In discussing interrogations by police officers, the Court stated in a footnote, we use the term “interrogation” in its colloquial, rather than any technical legal sense. Cf. Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of “testimonial” exist, one can imagine various definitions of “interrogation” and we need not select among them in this case. The Court further commented that Sylvia Crawford’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition. Crawford, 541 U.S. 36, 53 (2004). As recent as June 2006 the United States Supreme Court in Davis v. Washington, considered police interrogations during a 911 call and in Hammon v. Indiana, considered police interrogations when responding to a domestic disturbance call. 547 U.S. _____, 126 S.Ct, 2266, 165 L.Ed2d244(2006). Without classifying all conceivable statements as either testimonial or non-testimonial the Court held that statements are non-testimonial when made in

the course of police interrogations under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. Id. The Court held that statements are testimonial when the circumstances objectively indicated that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id. As applied to the breath test affidavit in the instant case, the fact that the breath test affidavit prepared post arrest in a non-emergency setting, for the primary purpose of establishing or proving a defendant's blood alcohol content for future presentation in a criminal trial qualifies the breath test affidavit as testimonial hearsay.

The Confrontation Clause is concerned with testimonial hearsay and the definition of testimonial set forth in Crawford includes interrogations by law enforcement officers as statements falling squarely within that class. The breath test affidavit is a series of structured questions developed by law enforcement and answered by the breath technician who administers the breath test and records specific observations made at the time of testing the accused. This affidavit is made for the purpose of

proving an element of the crime at trial. The breath test affidavit is testimonial hearsay by definition.

While the United States Supreme Court declined to provide a complete definition of testimonial hearsay, its partial definition clearly encompasses the breath test affidavit.

> Various formulations of this core class of "testimonial" statements exit: "ex parte in-court testimony or its functional equivalent that is, material such as **affidavits**, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar **pretrial statements that declarants would reasonably expect to be used prosecutorially,**" brief for Petitioner 23; "**extrajudicial statements….contained in formalized testimonial materials, such as affidavits**, depositions, prior testimony or confessions," White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

Crawford v. Washington, 541 U.S. 364, 51-52, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177,(2004)(emphasis supplied). The breath test affidavit is by its very nature an affidavit.

It is a formalized extrajudicial statement. Additionally, even if it were not an affidavit, it clearly contains "pretrial statements that the declarants would reasonably expect to be used prosecutorially." As such, the breath test affidavit is clearly testimonial in nature. A finding required by Crawford.

Recent decisions post Crawford provide illustrative support to conclude that the breath test affidavit is testimonial evidence. In Shiver v. State, 900 So2d 615 (Fla. 1st DCA 2005), the First District concluded a breath test affidavit was testimonial hearsay because "the only reason the affidavit was prepared was for admission at trial". In Sobota v. State,____So2d____(Fla. 2nd DCA July 28, 2006), 31 Fla.L.Weekly D2012 (Fla. 2nd DCA 2006) the Second District held that the test results from a legal blood draw admitted through a toxicologist who was not involved with the testing was testimonial hearsay and because the State did not establish the unavailability of the toxicologist who performed the test, admission of the test results violated the Confrontation Clause. The Second District Court certified the question as one of great public importance. In Williams v. State,____So2d____ (Fla. 2nd DCA July 28, 2006), 31 Fla.L.Weekly D2013(Fla.2nd DCA 2006)the Second District with regards to Williams' DUI

conviction, on the identical issue as the instant case, reversed the DUI conviction that was the result of the introduction of the breath affidavit by a person other than the person actually administering the test and also certified the question and an issue of great public importance.

In Crawford's dicta it is noted that certain hearsay statements are by their nature non-testimonial-such as business records. Crawford 541 U.S. 36 at 56 (2004). Petitioner argues that the breath test affidavit falls within the public records exception to hearsay. (Petitioners Initial Brief p. 16). Only "firmly rooted" hearsay exception can survive scrutiny against the confrontation clause contained in Article I, Section 16(a) of the Florida Constitution. Connor v. State,748 So2d 950 (Fla. 1999). For an exception to be "firmly rooted", it must have been in existence for centuries and be recognized by the vast majority of jurisdiction. Connor. Any attempt by the Petitioner to claim that the admission of the breath test affidavit is a "firmly rooted" hearsay exception cannot withstand scrutiny. If the public records exception to hearsay is considered firmly rooted, equally firmly rooted is the exception to the exception, the criminal case exclusion. Records of law enforcement agencies that have

long been excluded from the public records exception and but for the breath test affidavit, law enforcement records are still excluded. Prior to the enactment of the 1991 amendment to Section 316.1934 with subsection (5), a cold affidavit from a breath technician was not considered a "firmly rooted" hearsay public record exception against a person's confrontation rights. In 1991, when the Florida Legislature created the breath test affidavit, it decided that the firmly rooted criminal case exclusion should not apply to the affidavit. Ch. 91-255 §4, 12, Laws of Fla. Therefore, this public records hearsay exception as applied to breath test affidavits is not deeply rooted as to permit admission of the test results through mere affidavit of the technician in violation of their respective confrontation rights.

In Johnson v. State, 929 So2d 4(Fla. 2nd DCA 2005),rev. granted by State v. Johnson, 924 So2d 810 (Fla. March 6, 2006) the State sought to introduce the results of an FDLE lab test through the supervisor of the person who actually performed the test. The supervisor did not perform the test however, was able to testify regarding general procedures used by FDLE in preparing the reports. Although the lab report is a record kept in the regular course of business, by its nature, it is intended to bear

witness against the accused. The Johnson case was distinguished from the pre Crawford case of Baber v. State, 775 So2d 258 (Fla. 2000) explaining under the pre Crawford analysis, that hospital records of blood test taken for medical purposes qualifies as a business record and does not violate the Confrontation Clause because the "hospital….did not have an interest in the outcome of the future criminal case lodged against the defendant. Baber at 262. Therefore, despite Crawford's suggestion that business records are non-testimonial, the Second District held that an FDLE lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record. The Second District points out that the business records exception may have been the vehicle for admitting the report, but the vehicle does not determine the nature of the out of court statement. The nature of the statement is one that is intended to lodge a criminal accusation against a defendant-in other words, it is testimonial. The out of court statement does not lose its testimonial nature merely because it is contained in a business record. Johnson is currently before this Court on the certified question of great public importance.

Post Crawford this Court considered the mentally disable adult exception to the hearsay rule in State v. Hosty, ____So2d ____(Fla. 2006). This Court held that the mentally disabled adult exception to the hearsay rule is not a firmly rooted exception to the hearsay rule. Id at 5. Two separate victims statements were considered, one statement made to law enforcement and one statement made to a teacher. Following Crawford this Court concluded that the victim statement to law enforcement could not be admitted because that statement was clearly testimonial. Id at 4. The statement the victim made to the teacher was non-testimonial and admission required the declaration to meet certain qualifications of reliability under the framework provided in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597(1980).

THE BREATH TEST AFFIDAVIT IN THE INSTANT CASE IS INADMISSIBLE UNDER CRAWFORD

Examining the history of hearsay objections and the rights of confrontation the Supreme Court in Crawford ultimately came to the conclusion that the Framers of the Constitution would not have allowed admission of testimonial statements of a witness who did not appear at trial unless they were unavailable to testify, and the

defendant had a prior opportunity for cross examination. "Where testimonial evidence is at issue […] the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross examination." 124 S.Ct. at 1374. The Supreme Court found there is no substitute for cross examination as the cornerstone of the right of confrontation.

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Id. As such, a two prong test of current unavailability and the opportunity for prior, adequate cross-examination are a prerequisite for the admission of testimonial hearsay.

The first prong to be considered is whether the breath technician was unavailable for trial. Crawford 541 U.S. 36(2004) did not disturb the meaning of unavailability from its prior precedent; therefore, whether a witness is considered unavailable is according to the pre-Crawford decision. According to Roberts, before a witness can be deemed unavailable, the State must make a good faith showing of attempting to secure the witness. Although the State is not required to perform a futile act, if there is

any "remote" chance the witness may be procured, it must go to reasonable lengths to procure the witness. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed2d 597(1980); Johnson v. State, 929 So2d 4 (Fla. 2nd DCA 2005). Further, the subjective method of determining unavailability does not survive Crawford. These are the type of "vague standards" that Crawford criticizes as "manipulable". 541 U.S. at 68. The Sixth Amendment is a "categorical constitutional guarantee" requiring more stringent standards for determining when a witness is unavailable so that out of Court testimony may be utilized. Contreras v. State, 910 So2d 901 (Fla. 4th DCA 2005) review granted.

In the instant case there is no factual guidance as to what steps if any the State took to procure the breath technicians attendance at trial. The opinion Belvin v. State, 922 So2d 1046 (Fla. 4th DCA 2006) addresses only the State's argument that "if the breath test affidavit is deemed testimonial in nature, the Petitioner (Respondent here) could have cross-examined the technician prior to trial…." Id at 1053. The question begs to be asked, if the witness could be located for a deposition why then could she not be located for trial?

In Johnson v. State, 929 So2d 4(Fla. 2nd DCA 2005) the State's position was that it was "an unreasonable expense

and inconvenience" to fly the witness in for trial. Id at 5. The Johnson court concluded that the State did not establish that the witness was unavailable. In Contreras v. State, 910 So2d 901 (Fla. 4th DCA 2005) in a child victim sexual battery case, the Fourth District stated: We do not believe the Trial Court's finding of unavailability satisfies the Confrontation Clause requirement of physical unavailability. Generalized "harm" from testifying does not make a witness unavailable within the meaning of the Sixth Amendment. The Court further stated: The essential attribute of our accusatory system established by the Confrontation Clause is the right of the defendant to confront the testimony of live witnesses in Court. If witnesses are unavailable for Confrontation Clause purposes merely because of subjective mental anguish and emotional scarring from testimony, this protection would cease to have the certainty and categorical effect that Crawford holds it was designed to have. Id at 907.

The record does not support that the State established that breath technician Rebecca Smith was unavailable. It merely showed she was not present, clearly not the standard set forth in Crawford.

The second prong to be considered is whether the Respondent had a prior meaningful opportunity to cross-examine the witness.

Florida Rules of Criminal Procedure do not provide for depositions in misdemeanor or criminal traffic offenses. Fla.R.Crim.P. 3.220(h) (1) (D). Therefore, the Petitioner is not automatically granted the opportunity for prior adequate cross-examination. The Petitioner did not have the right to depose the breath technician in the present case prior to trial.

Respondent recognizes the conflict in decisions regarding the issue of prior opportunity to cross examine. Under Blanton v. State, 880 So2d 798 (Fla. 5th DCA 2004) the defendant's discovery deposition is a satisfactory substitute for the right to confront at trial. However, Lopez v. State, 888 So2d 693 (Fla. 1st DCA 2004) draws a distinction between discovery depositions and adversarial testing of the evidence holding that the taking of a deposition cannot be treated as a proceeding that affords an opportunity for cross examination. In drawing a distinction between a discovery deposition and a deposition to perpetuate testimony under Rule 3.190(j) the Court explained that the former is a discovery tool not intended for cross-examination. The defendant is not entitled to be

present at a discovery deposition, as he or she would be during cross examination at trial.

Respondent relies on the reasoning set forth in Contreras v. State, 910 So2d 901 (Fla. 4th DCA 2005). In Contreras where a deposition had been taken but not introduced into evidence with the statement at issue, the Court reasoned that the State had the burden of proof, not the defendant, and not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, he has the right to stand silent during the State's case in chief, all the while insisting that the State's proof satisfy constitutional requirements. Contreras concluded that the burden is on the State to move for the perpetuation of testimony to satisfy the constitutional requirements. To hold a defendant responsible for introducing the deposition is to suppose that the accused has some responsibility to clean up the State's evidence against him at a criminal trial. Id at 908.

Crawford said: "the principle evil at which the [confrontation] clause was directed was the civil-law mode of criminal procedure, [and] particularly the use of ex-parte examinations as evidence against the accused". Contreras at 908 citing Crawford at 50. While Section 316.1934(5), Florida Statutes gives a defendant the right

to subpoena the breath test operator as an adverse witness at trial, this provision does not adequately preserve a defendant's Sixth Amendment right to confront. According to Contreras the burden of proof lies with the State, not the defendant. Contreras 910 So2d at 908. Therefore, if a statement is "testimonial" under Crawford, a "prior opportunity for cross examination" under the Sixth Amendment requires face-to-face confrontation of a defendant and a witness against him. Contreras at 909.

There is nothing in the record satisfying the Respondent's right to prior meaningful opportunity to cross-examine the breath technician.

POINT II

THE FOURTH DISTICT COURT OPINION BASED ON THE CONTROLLING LAW OF CRAWFORD V. WASHINGTON PROPERLY HELD THAT THE ADMISSION OF THE BREATH TEST AFFIDAVIT AT RESPONDENT'S CRIMINAL TRIAL VIOLATED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION, THEREFORE THE CIRCUIT COURT SITTING IN ITS APPELLATE CAPACITY AFFIRMED RESPONDENT'S CONVICTION IN VIOLATION OF A "CLEARLY ESTABLISHED PRINCIPLE OF LAW".

Respondent's objection to the breath test affidavit was based on the unavailability of the technician who administered the test and the Respondent's right to cross examine the technician pursuant to F.S. §316.1934(5). Respondent's objection at Trial did not cite Crawford as

that decision had not been rendered. However, Respondent's objection was specific to the issues decided in Crawford. The Final Order of the Circuit Court acting in its Appellate capacity reviewed by the Fourth District Court cites the Crawford opinion in affirming Petitioner's conviction. The Crawford decision was controlling law when the Circuit Court sitting in its Appellate capacity rendered its opinion dated October 4, 2004.

For purposes of certiorari review "clearly established law" can be derived from recent controlling case law. Allstate Insurance Company v. Kaklamanos, 843 So2d 885 (Fla. 2003). See also Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)(all of Supreme Court's decisions applying or announcing rules of criminal law must be "applied retroactively to all cases, State or Federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past."); see also Smith v. State, 598 So2d 1063, 1066 (Fla. 1992)(adopting Griffith rule for decisions made by the Florida Supreme Court provided defendant timely objected at trial if an objection was required to preserve the issue for appellate review).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable Court affirm the decision of the Fourth District Court of Appeal and hold that those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constituted testimonial evidence and violated the Sixth Amendment's Confrontation Clause in light of the holding in Crawford v. Washington.

Respectfully submitted,

RICHARD W. SPRINGER, P.A.
Attorneys for Petitioner
3003 South Congress Avenue
Suite 1A
Palm Springs, FL 33461
(561) 433-9500

By:_____
Richard W. Springer, squire
Florida Bar No. 176285

_____
Catherine Mazzullo, Esquire
Florida Bar No. 752312

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished to Celia Terenzio, Assistant Attorney General Bureau Chief and Richard Valuntas, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, by mail, this 16th day of August, 2006.

_____
Richard W. Springer, Esquire
Florida Bar No. 176285

_____
Catherine Mazzullo, Esquire
Florida Bar No. 752312

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point style and complies with the font requirements of Rule 9.210.

_____
Richard W. Springer, Esquire
Florida Bar No. 176285

_____
Catherine Mazzullo, Esquire
Florida Bar No. 752312