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

****

APPELLANT'S INITIAL BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
BUREAU CHIEF, WEST PALM BEACH
Florida Bar No. 0656879
RICHARD VALUNTAS
Florida Bar No. 0151084
Assistant Attorney Generals
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
(561) 837-5000

Counsel for Appellant

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court, the appellee before the circuit court, and was the respondent in the Fourth District Court of Appeal. Petitioner will be referred to herein as "petitioner" or "the State." Respondent, Bruce Belvin, was the defendant in the trial court, appellant before the circuit court, and was the petitioner in the Fourth District Court of Appeal. Respondent will be referred to as "respondent."

In this brief, the following symbols will be used:

R.E. = Response Exhibit (to State's 4th DCA response)

P.E. = Petition Exhibit (to 4th DCA cert. petition)

SUMMARY ARGUMENT

Point I The breath test affidavits provided for in section 316.1934(5) of the Florida Statutes do not fall within the "core class of testimonial statements" referred to in Crawford. The circuit court properly upheld the admission of the breath test affidavit into evidence because it is a nontestimonial public record, which is akin to a business record. Even if the breath test affidavit in this case was testimonial, it was properly admitted it into evidence because (1) Technician Smith was unavailable and (2) respondent had the "prior opportunity for cross-examination" via deposition (which he refused to utilize).

Point II The decision in this case involves certiorari review of a circuit court appellate decision. Under this "second tier" review, respondent was required to demonstrate the circuit court's decision violated a clearly established principle of law resulting in a manifest injustice. The Fourth District's conclusion was clearly erroneous because the application of the "principle of law" set forth in Crawford is anything but "clearly established," especially when the opinion expressly refrained from defining "testimonial statement."

STATEMENT OF THE CASE AND FACTS

On July 31, 1998, Officer Jonathan Lloyd of the Jupiter Police Department stopped respondent's vehicle in the early

morning hours for speeding and failing to maintain a single lane. (R.E. A, p. 8-11). Respondent gave a breath test sample, and the results of the tests measured 0.165, 0.144, and 0.150. Id. at 11-12; (R.E. B). At trial, a surveillance videotape from Officer Lloyd's vehicle was entered into evidence. (R.E. A, p. 16). The parties stipulated that respondent "gave the repair slip for the vehicle registration and insurance. Vehicle information requested twice. Defendant appeared dazed. Defendant had difficulty opening the car door. The door was open. The defendant locked the doors, then unlocked the doors again. The defendant had bloodshot and glassy eyes, his speech was slurred. The defendant was fumbling with the paper work. The defendant had two insurance cards." Id. at 17-18. There was a cool beer found in respondent's trunk. Id. at 18-20.

Respondent preserved his previous objections to the admission of the breath test results and asserted the breath test affidavit was inadmissible because Breath Test Technician Rebecca Smith was unavailable for deposition and/or subpoena. Id. at 19-20, 27-29. The trial court rejected resondent's argument and admitted the breath test affidavit into evidence. Id. at 40. At the conclusion of the non-jury trial, the county court found respondent guilty of DUI and sentenced him to the mandatory minimum. Id. at 63.

Respondent appealed his conviction and sentence to the circuit court. On appeal, respondent argued that "the unavailability of the breath technician at trial violates Appellant's right to confrontation." (R.E. C, p. 6). The State argued the trial court's ruling was proper under the Fourth District's decision in Gehrmann v. State, 650 So. 2d 1021 (Fla. 4th DCA 1995), and that respondent "has not shown that he did not have the opportunity to subpoena the technician." (R.E. D, p. iv-1, 5). The circuit court initially entered an opinion reversing respondent's conviction and sentence based upon Crawford v. Washington, 541 U.S. 36 (2004). (R.E. E). The State filed a Motion for Rehearing and Clarification (R.E. F), and the circuit court (1) granted the State's Motion, and (2) affirmed respondent's conviction and sentence. (R.E. G).

Respondent then filed a petition for writ of certiorari with the Fourth District Court of Appeal. The Fourth District entered a slip opinion granting respondent's petition for writ of certiorari in Belvin v. State, 30 Fla. L. Weekly D 1421 (Fla. 4th DCA Jun. 8, 2005). The State filed an exhaustive motion for rehearing/clarification, rehearing en banc, certification of conflict, and certification of a question of great public importance. The Fourth District subsequently considered the case en banc, affirmed its prior holding, and certified a

question of great public importance to this Court in Belvin v. State, 922 So. 2d 1046 (Fla. 4th DCA 2006).[1] The State then filed a notice to invoke discretionary jurisdiction with this Court. On April 28, 2006, this Court accepted jurisdiction over the instant case.

ARGUMENT

POINT I

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)?

In Belvin, the Fourth District held the circuit court's opinion departed from the essential requirements of law based upon the United States Supreme Court's opinion in Crawford (which was decided more than two years after the trial in this case). In Crawford, the defendant (Crawford) was charged with assault and attempted murder for stabbing a man who allegedly attempted to rape Crawford's wife (Sylvia). Law enforcement

[1] The State would note the Honorable Fred A. Hazouri was a participating panel member in the original opinion in this case. Belvin v. State, 30 Fla. L. Weekly D 1421 (Fla. 4th DCA Jun. 8, 2005). However, Judge Hazouri was subsequently recused from the en banc decision. Belvin v. State, 922 So. 2d 1046 (Fla. 4th DCA 2006).

interrogated Crawford and Sylvia about the incident and obtained statements from both of them. Crawford's account of the attack varied from the description given by Sylvia. At trial, Crawford claimed he acted in self-defense, and Sylvia did not testify because of the state marital privilege.[3] The prosecution introduced Sylvia's tape-recorded statement into evidence under the hearsay exception for statements against one's penal interest. Crawford claimed the admission of Sylvia's statement violated his rights under the Confrontation Clause of the United States Constitution.

The trial court admitted Sylvia's statement into evidence because it bore "adequate indicia of reliability" under the United States Supreme Court's decision in Ohio v. Roberts, 448 U.S. 56 (1980). The jury convicted Crawford of assault. The Washington Supreme Court ultimately upheld Crawford's conviction, and the United States Supreme Court granted certiorari to determine whether the prosecution's use of Sylvia's statement violated the Confrontation Clause. Crawford, 541 U.S. at 42. The Supreme Court held that the admission of Sylvia's "testimonial" hearsay statements pursuant to the

[3] Washington's marital privilege generally bars a spouse from testifying without the other spouse's consent.

"adequate indicia of reliability" test espoused in Roberts violated the Confrontation Clause.

In Crawford, the Supreme Court differentiated between non-testimonial and testimonial hearsay and stated:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law - as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford, 541 U.S. at 68. The Supreme Court expressly chose not to comprehensively define testimonial hearsay finding only that "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. However, many post-Crawford decisions from other jurisdictions have analyzed whether certain hearsay statements, e.g., excited utterances, public records, laboratory reports, etc., remain admissible in the wake of Crawford.

The first step in conducting an analysis under Crawford is to determine whether the statements at issue are "testimonial" in nature. See Crawford, 541 U.S. at 68. If the statements are "non-testimonial" in nature, they are not precluded by the

Supreme Court's decision in Crawford. Id. The breath test affidavits provided for in sections 316.1934(5) and 90.803(8) do not qualify as, nor are they analogous to, the narrow list of "testimonial hearsay" specifically identified in Crawford, i.e., "prior testimony at a preliminary hearing," "prior testimony before a grand jury," "prior testimony at a former trial," or "prior testimony during police interrogations." Id. However, *dicta* in Crawford suggests that certain materials, such as "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine" etc., may constitute a "core class" of testimonial statements. Id. at 68.

Breath Test Affidavits Are Not Testimonial

The State asserts that the breath test affidavits provided for in section 316.1934(5), while technically bearing the name "affidavit," do not fall within the "core class of testimonial statements" referred to in Crawford. A close reading of Crawford reveals the principal evil the Confrontation Clause was directed toward was "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Crawford, 541 U.S. at 50. With this particular evil in mind, it is easy to see how the Supreme Court posited that certain statements, such as *ex parte* in court testimony, custodial examinations, prior testimony the defendant

was unable to cross-examine, and "affidavits" (in the general sense of the term),[4] can be considered "testimonial" in nature. A common thread in these examples of "testimonial" statements is that they all generally contemplate an examination of a declarant and the give-and-take of questions and answers. The breath test affidavits provided for in section 316.1934(5), however, simply involve a technician's observations regarding the administration of a breath test, not the examination of a declarant and the give-and-take of questions and answers. Accordingly, the breath test affidavits at issue in this case cannot properly be equated with the general meaning of the term "affidavit" as contemplated by Crawford. See State v. Matthews, 11 Fla. L. Weekly Supp. 923 (Fla. Sarasota Cty. Ct. July 30, 2004).[5]

The breath test affidavits provided for in section 316.1934(5) do not constitute "affidavits" in the general sense because they do not involve an interrogation, or the give-and-take of questions and answers, as the generic term "affidavit"

[4] "An affidavit is by definition a statement in writing under an oath administered by a duly authorized person." Youngker v. State, 215 So. 2d 318, 321 (Fla. 4th DCA 1968).

[5] In Matthews, Judge LoGalbo sets forth an exhaustive analysis of this issue. The State submits that the well-reasoned order in Matthews aptly demonstrates that section 316.1934(5) is constitutional and does not run afoul of the United States Supreme Court's decision in Crawford.

does. A review of the breath test affidavit in this case reveals the document is simply a written record of observations made by a breath test operator who administered the test on a pre-printed form. (R.E. B). Since the breath test affidavit was obviously produced in the ordinary course of business, by a person with knowledge, at or near the time of the event, it seems the breath test affidavit is more akin to a "business record" or "public record" than it is to an "affidavit." Id.; § 90.803(6)(a), Fla. Stat. (2003); see also United States v. Cantellano, 430 F.3d 1142 (11th Cir. 2005)("warrant of deportation," which records facts about where, when, and how a deportee left the country, was not testimonial and did not violate the defendant's confrontation clause rights); United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005)(certificate of non-existence of record created by I.N.S. was properly admitted into evidence because it was akin to a business record); State v. Cutro, 628 S.E.2d 890, 896 (S.C. 2005)("A public record, very much like a business record, is not testimonial and its admission does not violate the defendant's confrontation rights."); State v. Kronich, 128 P.3d 119, 123 (Wash. Ct. App. 2006)("Considering the similarity between business records and public records and the Crawford reasoning, the trial court did not err in denying suppression [of a cover

letter from the Department of Licensing and an "Order of Revocation" regarding the defendant's license]."); State v. N.M.K., 118 P.3d 368 (Wash. Ct. App. 2005)(certified letter from Department of Licensing stating that no license had been issued to the defendant was properly admitted into evidence).

The majority opinion in Crawford declares that business records are not testimonial in nature. Crawford, 541 U.S. at 56. In addition, Chief Justice Rhenquist's concurrence notes that "the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records." Id. at 576 (Rhenquist, C.J., concurring). Sections 316.1934(5) and 90.803(8) clearly state that breath test affidavits are public records or reports, which are not "testimonial" statements under Crawford. Id. Thus, the circuit court properly concluded that respondent's Confrontation Clause rights were not violated in this case.

Contrary to respondent's argument below, certain records from law enforcement agencies have long been admissible as public records. See United States v. Union Nacional de Trabajadores, 576 F.2d 388, 390-391 (1st Cir. 1978)("At common law the sheriff's return of service was admissible under the 'official records' exception to the hearsay rule."; certified copy of marshal's return of service which stated he served the

applicable injunction on the defendant was admissible under the public record exception to the hearsay rule). The federal courts have recognized, even post-Crawford, that some records prepared by law enforcement personnel may properly be admitted into evidence at trial under the "public records" hearsay exception. For example, in United States v. Agustino-Hernandez, 14 F.3d 42, 43 (11th Cir. 1994), the Eleventh Circuit Court of Appeals held "that admission of routinely and mechanically kept I.N.S. records" does not violate the "law enforcement exception" to the "public records" exception to the hearsay rule. See also Cantellano, 430 F.3d at 1145 ("a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence."); United States v. Salazar-Gonzalez, 445 F.3d 1208 (9th Cir. 2006)(certificate of non-existence of record created by I.N.S. was properly admitted into evidence because it was a non-testimonial public record); United States v. Mendoza-Orellana, 133 Fed. Appx. 68 (4th Cir. 2005)(admission of certificate of non-existence of record created by I.N.S. should not be considered testimonial hearsay under Crawford); United States v. Brown, 9 F.3d 907, 911 (11th Cir. 1993)(admission of regularly kept property receipts did not violate "law enforcement exception" to the public records hearsay exception).

The rationale behind permitting some records prepared by law enforcement personnel to be admissible at trial was articulated by the Fifth Circuit Court of Appeals as follows:

> In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter (here, appellant's departure from the country), such records are, like other public documents, inherently reliable.

United States v. Quezada, 754 F.2d 1190, 1194 (5th Cir. 1985). The breath test affidavits provided for in section 316.1934(5) are "routine, objective observations, made as part of the everyday function of the preparing official" and involve a technician mechanically registering an "unambiguous factual matter." Id. Accordingly, breath test affidavits should be deemed admissible under Crawford because (1) they are not testimonial in nature, and (2) they qualify as "public records" under a "firmly rooted" hearsay exception. See id.; Crawford; Cantellano; Rueda-Rivera; Union Nacional de Trabajadores; Cordova v. State, 675 So. 2d 632, 637 (Fla. 3d DCA 1996)(return of service is admissible under the public records exception to the hearsay rule); Cotton States Mut. Ins. Co. v. Turtle Reef

Assocs., 444 So. 2d 595 (Fla. 4th DCA 1984)(federal decisions construing similar federal rules are persuasive authority).

Although the Crawford decision was rendered in 2004, numerous post-Crawford cases address issues analogous to the one before the Court in the instant case. For example, in State v. Thackaberry, 95 P.3d 1142, 1144 (Ore. Ct. App. 2004), rev. denied, 107 P.3d 27 (Ore. 2005), the defendant (who was convicted of driving under the influence of intoxicants) argued the trial court violated his Confrontation Clause rights by "'permitting the introduction of the laboratory report [confirming the presence of methamphetamine and amphetamine in defendant's urine] without the accompanying testimony of the expert who conducted the urinalysis and wrote the report.'" The Oregon Court of Appeals, while utilizing a standard of review similar to the one in the instant case, affirmed the defendant's conviction and specifically noted that:

> A laboratory report of a toxicology test performed on a urine sample neither qualifies as, nor seems analogous to, testimony at a preliminary hearing, before a grand jury, or at a former trial. Nor, at least in any obvious way, is it a statement made during a "police interrogation" or closely analogous to one. On the other hand, **a laboratory report may be analogous to--or arguably even the same as--a business or official record, which the Court in *Crawford* suggested *in dictum* would not be subject to its holding**.

Id. at 516(emphasis added).[6] Similarly, the breath test affidavit provided for in section 316.1934(5) is the same as an official or "public" record, which would not be subject to the holding in Crawford. Id.; Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005)(Crawford does not apply to certificates of chemical analysis, which merely state the results of a well-recognized scientific test determining the composition and quantity of the substance); Perkins v. State, 897 So. 2d 457, 464 (Ala. Crim. App. 2005)(autopsy report of murder victim was nontestimonial in nature); State v. Willis, 2006 Ohio App. LEXIS 2105 (Ohio Ct. App. May 9, 2006)(return of service documents admissible as nontestimonial public record); Felix v. State, 2005 Tex. App. LEXIS 9865 (Tex. Ct. App. Nov. 29, 2005)(results of a blood alcohol test do not fall within the categories of testimonial evidence described in Crawford); but see Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005)(admission of breath test affidavit violated Crawford, even when person who administered test testifies at trial, because persons who conducted routine maintenance on the instrument did not testify at trial).[2]

[6] The court in Thackaberry, however, refrained from deciding whether the laboratory report was testimonial in nature because the case was resolved upon a "plain error" analysis.

[2] The State would note that nearly every other court addressing the "maintenance issue" of breath test instruments has ruled contrary to the First District's decision in Shiver. See, e.g.,

Technician Smith's Breath Test Affidavit In This Case Was Admissible Under Crawford

Even if the breath test affidavits provided for in section 316.1934(5) are considered testimonial in nature, which they are not, they would still be admissible under Crawford in the instant case. In Crawford, the Supreme Court held "[w]here testimonial evidence is at issue, however, the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination." Crawford, 541 U.S. at 68. The decision in Crawford did not render all testimonial hearsay evidence inadmissible at trial; instead, Crawford held that testimonial hearsay is inadmissible unless (1) the declarant is unavailable and (2) the defendant is given a prior opportunity for cross-examination. Thus, under Crawford, breath test affidavits would undoubtedly be admissible if (1) the declarant is unavailable, and (2) the defendant is given a prior opportunity for cross-examination. Crawford, 541 U.S. at 68. In this case, Technician Smith was unavailable, so the "unavailability" requirement under Crawford has been met.

In addition to unavailability, the Supreme Court's decision in Crawford states the Confrontation Clause requires that a

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Commonwealth v. Walther, 2006 Ky. LEXIS 108 (Ky. Apr. 20, 2006)("Every jurisdiction but one that has considered this issue since Crawford has concluded that maintenance and performance test records of breath-analysis instruments are not testimonial, thus their admissibility is not governed by Crawford."

defendant be afforded an "opportunity for cross-examination" before a testimonial hearsay statement can be entered into evidence. Crawford, 541 U.S. at 68. The Fourth District's analysis in Belvin regarding the "opportunity for cross-examination" prong of the Crawford test is flawed because respondent waived his "opportunity for cross-examination" by failing to depose Technician Smith under Florida Rule of Criminal Procedure 3.220(h)(1)(D). Blanton v. State, 880 So. 2d 798 (Fla. 5th DCA 2004); State v. Causey, 898 So. 2d 1096 (Fla. 5th DCA 2005); Corona v. State, 31 Fla. L. Weekly D1183 (Fla. 5th DCA Apr. 28, 2006).[3] Respondent could have cross-examined Technician Smith in this case prior to the admission of the breath test affidavit into evidence by seeking to depose her under Rule 3.220(h)(1)(D) at some time between July 31, 1998 and when the issue was raised at trial on February 5, 2002. (R.E. A., p. 29). There is no evidence in the record indicating that respondent ever set Technician Smith for a deposition in this case.

[3] The cases the Fourth District relied upon to reach its erroneous conclusion, Lopez v. State, 888 So. 2d 693 (Fla.1st DCA 2004) and Contreras v. State, 910 So. 2d 901 (Fla. 4th DCA 2005), are currently pending before this Court. The Fifth District's decision in Blanton is also currently pending before this Court, and oral argument on all three cases was held before this Court on May 4, 2006.

Respondent cannot complain about his purported inability to cross-examine Technician Smith when he ever attempted to cross-examine her prior to trial.[4] Nothing in Crawford requires the "opportunity for cross-examination" provided to a defendant be contemporaneous with the "direct examination," i.e., the testimonial statement. Blanton, 880 So. 2d at 801. Crawford simply requires that a defendant be afforded a prior opportunity for cross-examination before a testimonial hearsay statement is admissible. Respondent was afforded the "opportunity for cross-examination" in this case because he could have cross-examined Technician Smith by seeking to depose her under Rule 3.220(h)(1)(D). (R.E. A., p. 29). Respondent, however, failed to exercise his "opportunity for cross-examination" of Technician Smith via Rule 3.220(h)(1)(D). Thus, the circuit court properly held the breath test affidavit in this case was admissible under Crawford because (1) Technician Smith was purportedly unavailable, and (2) respondent had the opportunity to cross-examine her (which he waived by failing to do so). Blanton, 880 So. 2d 798 at 801 ("as Crawford points out, the primary goal of the Confrontation Clause is to prevent the use of statements not previously tested through the adversarial

[4] The specific argument regarding the inability to depose Technician Smith was not raised on direct appeal to the circuit court; respondent's argument on direct appeal was that he was unable to call Technician Smith as a witness at trial.

process. This goal is ordinarily met when an accused is provided with notice of the charges, a copy of the witness's statement, and a reasonable opportunity to test the veracity of the statement by deposition."). Accordingly, the Fourth District's decision in Belvin should be reversed because the requirements for the admission of testimonial hearsay were satisfied in this case.

Finally, the Fourth District's opinion in Belvin ignores the fact that all breath test affidavits are not created at the behest of law enforcement officers. Section 316.1932(1)(d) of the Florida Statutes allows a driver to demand a breath test if an arresting officer does not request one. In fact, when a driver requests a breath test "the arresting officer shall have the test performed." § 316.1932(1)(d), Fla. Stat. If a breath test is conducted when a driver exercises his right under section 316.1932(1)(d), how can the subsequent admission of a breath test affidavit violate a driver's confrontation clause rights? The simple answer is that a driver's confrontation clause rights cannot be violated under these circumstances, and the Fourth District's decision in Belvin overlooked this situation when it held, without qualification, that the "portions of the breath test affidavit pertaining to the breath test technician's procedures and observations in administering

the breath test constitute testimonial evidence." Belvin, 922 So. 2d at 1054. Therefore, the Fourth District's decision in Belvin should be reversed because the results of a breath test requested by a driver cannot logically constitute "testimonial" statements.

POINT II

IN LIGHT OF THE UNCERTAINTY REGARDING THE ADMISSIBILITY OF BREATH TEST AFFIDAVITS AND OTHER OUT-OF-COURT STATEMENTS CAUSED BY THE DECISION IN CRAWFORD V. WASHINGTON, DID THE FOURTH DISTRICT IN BELVIN ERRONEOUSLY CONCLUDE THAT THE CIRCUIT COURT'S DECISION VIOLATED "A CLEARLY ESTABLISHED PRINCIPLE OF LAW?"

The State respectfully requests the Court entertain this issue due to its great public importance and wide-ranging implications, especially in DUI cases. Although this issue did not form the basis of this Court's jurisdiction, the law is clear that "once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court." State v. T.G., 800 So. 2d 204, 210 n.4 (Fla. 2001). Due to the constitutional nature of the issue raised, and the split among the courts that have addressed the subject, this Court should resolve whether the circuit court's ruling in this case violated "a clearly established principle of law."

In Belvin, the Fourth District concluded the circuit court's decision violated "a clearly established principle of law," i.e., a defendant's confrontation clause rights under the decision in Crawford. The Fourth District's conclusion was clearly erroneous because the application of the "principle of law" set forth in Crawford is anything but "clearly established," especially when the opinion expressly refrained from defining "testimonial statement." Chief Justice Rhenquist recognized this problem in his concurring opinion in Crawford. Crawford, 541 U.S. at 69 (Crawford decision "casts a mantle of uncertainty over future criminal trials in both federal and state courts."); see also Baird, Charles F., Judge & Jury Symposium: The Confrontation Clause: Why Crawford v. Washington Does Nothing More Than Maintain The Status Quo, 47 S. Tex. L. Rev. 305 (2005)("With its most recent opinion, Crawford v. Washington, the Supreme Court's Confrontation Clause jurisprudence 'lurched' once again. Unfortunately, rather than providing clarity in this confused area, Crawford is a critically flawed opinion which guarantees Confrontation Clause jurisprudence will remain unsettled for years."). The fact that the United States Supreme Court has already heard two oral arguments regarding Crawford issues this year demonstrates the holding in Crawford cannot be considered "a clearly established

principle of law" by any stretch of the imagination.[5] Accordingly, the Fourth District's decision in Belvin should be reversed because the circuit court did not violate "a clearly established principle of law" in this case. See Commonwealth v. Walther, 2006 Ky. LEXIS 108 (Ky. Apr. 20, 2006)("Every jurisdiction but one that has considered this issue since Crawford has concluded that maintenance and performance test records of breath-analysis instruments are not testimonial, thus their admissibility is not governed by Crawford.").

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and hold that breath test affidavits are admissible as public records under Crawford because they are not testimonial in nature.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
Tallahassee, Florida

[5] On March 20, 2006, the U.S. Supreme Court held oral arguments regarding Hammon v. State, 829 N.E.2d 444 (Ind. 2005) (considering application of the Confrontation Clause to statements made to officers responding to a crime scene), cert. granted, 126 S. Ct. 552 (2005), and State v. Davis, 111 P.3d 844 (Wash. 2005)(considering application of the Confrontation Clause to excited utterances made in 911 calls), cert. granted, 126 S. Ct. 547 (2005).

_____
CELIA TERENZIO
Assistant Attorney General
Bureau Chief
Florida Bar No.: 0656879

_____
RICHARD VALUNTAS
Assistant Attorney General
Florida Bar No.: 0151084
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: Richard W. Springer and Catherine Mazzullo, Attorneys for Respondent, 300 South Congress Avenue, Suite 1A, Palm Springs, FL 33461 on June __, 2006.

_____
RICHARD VALUNTAS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____

RICHARD VALUNTAS
Assistant Attorney General