IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. LORENZO CEPHUS JOHNSON, Respondent.	Case No. SC06-86

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

REPLY BRIEF OF PETITIONER

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Florida Department of Law Enforcement lab reports are admissible under Florida Rule of Evidence Rule 90.803 because they fall within a "firmly rooted" exception to the hearsay rule. Trustworthiness of laboratory tests is based on the fact the test is commonly used and relied upon by the scientific discipline involved. Actual reliance on the test in the course of treatment, though, is not required to find the test reliable. Therefore, contrary to Respondent's argument, it is not the person (or institution) who conducts the test that makes the test reliable; rather, it is the nature of the test itself and its acceptance in the scientific community.

Cross examination of the specific analyst who conducted the tests is not required by the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Respondent argues a lab report is the functional equivalent of an affidavit. A lab report is not the type of affidavit with which the Framer's were concerned. Crawford did not provide a comprehensive list of all statements that are considered testimonial; but, the Court did provide certain examples that can be used by way of comparison to determine whether a statement is testimonial. Similarly, affidavits be viewed with an eye toward the types of statements the Confrontation Clause

was meant to address.

Furthermore, if a criminal defendant seeks to challenge testing procedures or the integrity of a state laboratory or its employees, the defendant bears the burden of producing evidence establishing a probability of the existence of error, fraud, or evidence tampering. Nothing in the Constitution requires that such challenges arise by virtue of cross examination.

ARGUMENT

THE ADMISSION OF A FLORIDA DEPARMTENT OF LAW ENFORCEMENT LAB REPORT GENERATED BY A NON-TESTIFYING ANALYST DOES NOT VIOLATE THE CONFRONTATION CLAUSE OR CRAWFORD V. WASHINGTON, 541 US. 36 (2004).

A Florida Department of Law Enforcement Lab Report falls within a Firmly Rooted Hearsay Exception and is Admissible as a Business Record.

Florida Department of Law Enforcement lab reports are admissible under Florida Rule of Evidence Rule 90.803 because they fall within a "firmly rooted" exception to the hearsay rule. See, Barber v. State, 775 So. 2d, 1359 (8th Cir. 1998)(holding admission of a lab report identifying a controlled substance falls within a "firmly rooted" hearsay exception.); United States v. Roulette, 75 F. 3d 418 (8th Cir. 1996)(lab reports are admissible as business records).

Section 90.803(6), Fla. Stat. (2004), permits the introduction of business records, and reads in part:

> 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, or as shown by a certification or declaration that complies with paragraph (c)

> and s. 90.902(11), 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.

Business records are presumed accurate because they are relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of business activities. See, Hawthorn v. State, 399 So. 2d 1088 (Fla. 1st DCA 1981); See also, Charles W. Earhardt, Florida Evidence, § 803.6, West Publishing 2004 Ed.

Additionally, § 893.105, Fla. Stat. (2005) provides:

> (1) Any controlled substance or listed chemical seized as evidence may be sample tested and weighed by the seizing agency after the seizure. Any such sample and the analysis thereof shall be admissible into evidence in any civil or criminal action for the purpose of proving the nature, composition, and weight of the substance seized. In addition, the seizing agency may photograph or videotape, for use at trial, the controlled substance or listed chemical seized.

Respondent cites this Court's holding in Barber in support of his proposition a lab report is unreliable hearsay. Barber dealt with the admission of a hospital blood test showing the defendant's blood alcohol level. In holding such reports are admissible as business records, this Court noted the basis of the exception is the recognition that "adversarial testing would

do little to add to [the evidence's] reliability. Id. at 260. This Court also noted that the business records exception to the hearsay rule is among the "safest of the hearsay exceptions." 775 So. 2d at 261, quoting, Ohio v. Roberts, 448 U.S. 56, 66 (1980). In specifically discussing hospital blood tests, and laboratory analysis of controlled substances, this Court noted:

> Federal courts have noted the practical reality that cross-examination of technicians who perform these tests is unlikely to yield meaningful information since the tests are routine and repeatedly performed, such that it is unlikely that a technician would specifically remember the performance of one of among many identical tests performed months (if not years) before trial. (internal citation omitted).

775 So. 2d at 261, n4.

Although this Court did note that the fact the blood was drawn by a hospital for purposes of medical treatment added to its reliability, that was not the determinative factor in this Court's decision. In fact, this Court acknowledged that the trustworthiness is based on the fact the test is commonly used and relied upon by the scientific discipline involved. Actual reliance on the test in the course of treatment, though, is not required to find the test reliable. 775 So. 2d at 260, citing, Love v. Garcia, 634 So. 2d 158, 160 (Fla. 1994). Therefore, contrary to Respondent's argument, it is not the person (or

institution) who conducts the test that makes the test reliable; rather, it is the nature of the test itself and its acceptance in the scientific community. Id.

Respondent also cites Rivera v. State, 917 So .2d 210 (Fla. 5th DCA 2006). There, the Fifth District Court of Appeal held an FDLE lab report was not admissible under the business record exception to the hearsay rule. First, the state respectfully suggests the Fifth District Court of Appeal's interpretation of this Court's decision in Barber, as well as its interpretation of the business records exception is incorrect. Second, Rivera is distinguishable.

Like Respondent, the court in Rivera focused on the who and not the what. The Rivera court agreed that "drug and alcohol tests performed in the usual course of hospital business are admissible in a criminal case under the business records exception." Id. at 211, citing, Baber, 775 So. 2d at 260-61. The court then goes on to state:

> However, extending this exception to a FDLE lab records custodian in a criminal proceeding would threaten Rivera's right under the Confrontation Clause to question the witness to ensure a fair trial. *Julian, under cross-examination, could not have answered questions concerning chain of custody, methods of scientific testing, and analytical procedures regarding the contraband at issue.* Here, the chemist's report lacks the indicia of reliability

> characteristic of hospital record cases. The hospital tests a patient's blood alcohol for the benefit of the patient's treatment; in contrast, the State tests alleged drug samples to incriminate and convict the accused.

917 So. 2d at 212 (emphasis added).

Respondent cites the same language in his Answer Brief at page 7. The Rivera court was seemingly concerned with the defendant's ability to ask questions regarding the chain of custody of the substance, and the methods of scientific testing and analytical procedures used in determining the nature of the substance. Interestingly, a hospital medical records custodian is generally not a doctor, or scientist, or involved in anyway with the chain of custody or testing of substances; they are, generally, administrative personnel in charge of properly filing and maintaining the voluminous medical records in the hospital's possession. In contrast, FDLE Chemistry Lab supervisors are chemists who *are* knowledgeable about the scientific methodologies and analytical procedures used to determine the quantity and quality of controlled substances. Quality assurance is part of their job in that they review the case file of the chemists under their supervision before the results are released.

Yet, the Rivera court would admit incriminating hospital

records based solely on the records custodian's testimony the records are kept in the regular course of the hospital's business – an assertion with which the state does not disagree – even though the records custodian has no knowledge about the scientific procedures and methods used to reach the test's results. Nor can the hospital records custodian testify as to the chain of custody of the substance tested. The state, therefore, suggest Rivera does not properly interpret this Court's ruling in Baber or Florida Rule of Evidence 90.803.

Secondly, while it is unclear from the court's opinion in Rivera whether the supervisor was ever asked about chain of custody and methodology issues,(although the use of the phrase "could not have" seem to indicate those questions were not asked), it is clear in this case that FDLE Chemistry Lab Supervisor Silbert could, and did answer those questions. Therefore, Rivera is arguably distinguishable.

The majority of the other cases cited by Respondent are similarly distinguishable. For example, Respondent cites, McElroy v. Perry, 753 So. 2d 121 (Fla. 2d DCA 2000). McElroy dealt a personal injury suit arising out of an automobile accident. The plaintiff was alleging permanent injury in the nature of nerve damage. The defense introduced two medical reports, one of which was conducted at the request of the

plaintiff's personal injury protection carrier, and one of which was an independent medical examination done at the request of the defense. The Second District Court of Appeal held this type of medical report has questionable reliability because it is done in anticipation of litigation and not in the typical doctor-patient relationship.

Further, the reports dealt with the central issues of permanency and causation. The court noted:

> Addressing Federal Rule of Evidence 803(6), which is identical to section 90.803(6), Florida Statutes, McCormick on Evidence states that the specific "inclusion of opinions or diagnoses within the [business record exception] rule only removes the bar of hearsay. In the absence of the availability of the expert for explanation and cross-examination, the court may conclude that probative value of this evidence is outweighed by the danger that the jury will be misled or confused. This concern is particularly significant if the opinion involves difficult matters of interpretation and a central dispute in the case, such as causation." McCormick on Evidence § 293, at 445 (John W. Strong ed., 5th ed. 1999)(footnote omitted).

Id. at 126, n2.

Medical diagnosis of injuries involving nerve damage rely almost entirely on the doctor's *interpretation* of the patient's reported symptoms. They are entirely dissimilar to laboratory

tests that are generally accepted in the scientific community.

Additionally, United States v. Oates, 560 F. 2d 45 (2d Cir. 1977), as this Court noted in Baber, dealt with admissibility of lab reports under the public records exception to the Federal Rules of Evidence, which exclude from public records reports made pursuant to an investigation. Further, Oates, again as this Court noted, is in the minority with respect to the interpretation of the admissibility of lab reports pursuant to the business records exception. Finally, Oates was decided prior to Ohio v. Roberts, 448 U.S. 56 (1980), which allowed for admissibility of certain hearsay evidence where the evidence bears adequate indicia of reliability. See also, State v. Henderson, 554 S.W. 2d 117 (Tenn. 1977). Similarly, People v. McDaniel, 670 N.W. 659 (Mich. 2003); State v. Sandoval-Tena, 71 P. 2d 1055 (Idaho 2003); and, Cole v. State, 839 S. W. 2d 798 (Tex. Crim. App. 1992) all represent the minority opinion with regard to the admissibility of lab reports as a business record.

Based on the foregoing, an FDLE lab report is admissible under the business records exception to the hearsay rule.

A Florida Department of Law Enforcement Lab Report is not "testimonial" and therefore cross examination of the analyst is not required.

But for the following, Petitioner relies on the arguments made in the Initial Brief with regard to this issue.

Respondent argues a lab report is the functional equivalent of an affidavit. A lab report is not the type of affidavit with which the Framer's were concerned. Crawford v. Washington, 541 U.S. 36 (2004), did not provide a comprehensive list of all statements that are considered testimonial; but, the Court did provide certain examples that can be used by way of comparison to determine whether a statement is testimonial. The Court stated, that whatever else the term means, it applies, at a minimum, to the following: 1) prior testimony at a preliminary hearing; 2) prior testimony before a grand jury; 3) prior testimony at a former trial; and, 4) statements made during a police interrogation. 541 U.S. at 68. AThese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.@ Crawford, 541 U.S. at 61.

The Court mandated that the Clause be interpreted with a focus on these types of statements, which are the principle evil the Clause was meant to address. Similarly, the Court noted the Clause should be read with reference to exceptions to the hearsay rule that were well established at the time of the founding – specifically noting the business records exception. Id. at 56. Similarly, affidavits be viewed with an eye toward the types of statements the Confrontation Clause was meant to address.

While Respondent argues the lab report is a memorialization of the analysts' "opinion" regarding the nature of the substance tested, it is not the type of "opinion" testimony with which the Clause is concerned. It is not the personal opinion of the analyst, rather it is a result reached through scientific testing. Therefore, cross examination of the analyst would do little to test the "opinion" rendered.

Indeed, Respondent has never identified what, if any, cross examination he would have conducted of the analyst. While Respondent argues to this Court that confrontation and cross examination is required due to instances or crime lab error or fraud, Respondent fails to assert there was any such error or fraud in this case. The State of Florida does not argue that a criminal defendant is not permitted to establish for the benefit of the jury that there was error or fraud in the analysis of the substance; rather, the state points out that the Confrontation Clause is not the vehicle for this type of challenge. "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

Cross examination is not to be used as a "fishing

expedition." Should a criminal defendant have legitimate concerns regarding errors or fraud in the testing of the substance he or she is free to fully investigate such claims and present them to the jury by way of independent testing, hiring of an expert, or testimony from persons with knowledge of the error or fraud. If the specific analyst's testimony is necessary to establish the probability of error or fraud, the defendant has the same subpoena power as the state and can compel the analyst's presence. See, e.g., Murray v. State, 838 So. 2d 1073, 1082 (Fla. 2002)(holding relevant physical evidence is admissible unless *the defendant* establishes there is an indication of probable tampering.); Nimmons v. State, 814 So. 2d 1153, 1155 (Fla. 5th DCA 2002)(stating in order to bar the introduction relevant laboratory urine tests due to a gap in the chain of custody *the defendant* must show there was a probability of tampering.); Jordan v. State, 707 So. 2d 816, 818 (Fla. 5th DCA 1998)(holding in order to exclude blood tests *the defendant* must show there is a probability, [as opposed to a mere possibility] of tampering.); State v. Taplis, 684 So. 2d 214 (Fla. 5th DCA 1996), rev. dismissed, Taplis v. State, 703 So. 2d 453 (Fla. 1997)(holding the trial court erred in excluding evidence based on a "possibility" of tampering. "While the weight the jury should give this evidence because of the matters

raised by *the defense* is certainly subject to argument, the evidence should not be ruled inadmissible merely because there is a possibility that tampering might have occurred."[emphasis added]).

The State of Florida agrees that a criminal defendant does not bear the burden of proof. That burden stays with the state throughout the trial. Nonetheless, if a criminal defendant seeks to challenge testing procedures or the integrity of a state laboratory or its employees, the defendant bears the burden of producing evidence establishing a probability of the existence of error, fraud, or evidence tampering. Nothing in the Constitution requires that such challenges arise by virtue of cross examination.

CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the decision of the Second District Court of Appeal and reinstate Respondent's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to WILLIAM SHARWELL, Assistant Public Defender, Office of the Public Defender, P.O. box 9000 – Drawer PD, Bartow, Florida 33830, this 5th day of June, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
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