IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: [redacted]
DIVISION: [redacted]

VS.

[redacted]
_____/

Defendant's Motion Requesting *Richardson* Inquiry and to Exclude Testimonial Hearsay

Pursuant to Fla. R. Crim. P. 3.220(b) and 3.220(j)., *Crawford v. Washington*, 541 U.S. 36 (2004), *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), and *State v. Evans*, 770 So. 2d 1174 (Fla. 2000), defendant moves this Court to:

a. Conduct a *Richardson* inquiry and determine (1) whether the discovery violation was willful or inadvertent; (2) whether the discovery violation was trivial or substantial; and (3) whether the discovery violation had a prejudicial effect on defendant's trial preparation – then determine the appropriate sanction; and
b. Prohibit introduction of testimonial hearsay contained in the Department Inspection documents as (1) violating the Confrontation Clause; or (2) a lack of proper predicate to admit such hearsay under an exception to the hearsay rule; or both.

In support, defendant states:

Richardson Inquiry

On November 19th, 2019, the State provided the discovery exhibits attached as Exhibit "A" **after** the Jury was selected and sworn. Clearly, this production is untimely. This case has been set for trial for several months and the State has sought continuances based on the unavailability of their breath test operator. Counsel acknowledges there have been several changes in prosecutor. Accordingly, counsel does not assert the violation was **intentional**, but due to negligence. However, the violation is substantial because without this new evidence, the State would not be able to admit the breath test results. The defense's prejudice is, at least, that the State could not, absent this "new" evidence, admit the breath test results. The appropriate sanction would be to exclude this untimely produced evidence. *See Richardson v. State*, 246 So. 2d 711 (Fla. 1971); *State v. Evans*, 770 So. 2d 1174 (Fla. 2000).

Inadmissible Hearsay

If the Court does not exclude the evidence contained in Exhibit "A" and to the extent the State may seek to introduce other FDLE documents, such documents should not be admitted in trial:

1. First, the Department Inspection is testimonial in that it is prepared for use at trial. Defense counsel concedes the 4th DCA has addressed a very similar issue and ruled that Agency Inspection Reports are not testimonial but designed to ensure accuracy. *See Pflieger v. State*, 952 So. 2d 1251 (Fla. 4th DCA 2007); *see also State v. Buttolph*, 969 So. 2d 1209 (Fla. 4th DCA 2007). However, *Shiver v. State*, 900 So. 2d 615 (Fla. 1st DCA 2005) held a breath test affidavit to be testimonial hearsay subject to the Confrontation Clause. Also, these cases involve the Intoxilyzer 5000 and a prior iteration of forms and procedures. Therefore, this Court is free to, and should, hold that these types of inspections are done to facilitate prosecution and for use in litigation so are testimonial in nature. Some courts focus on whether the document is accusatory or prepared solely for trial – all these breath test documents are designed to be facilitate prosecution. Considering the purpose of the document is to verify whether a machine is working and then to offer a "short cut" to conviction using a breath test result and a presumption it is hard to imagine the documents are not designed for criminal prosecution and should be placed in the crucible of cross examination.
2. Even if the Court disagrees with this argument and rules the documents are not testimonial, this does not end the inquiry and the document are still not properly admitted in this case because the State still must show an applicable exception to the hearsay rule either a business record or a public record i.e. §§ 90.803(6) or 90.803(8), Fla. Stats. (2019). The State must also then satisfy the evidentiary predicates for either of these hearsay exceptions -- e.g., by providing notice of its intent to proceed by way of certification or declaration under §§ 90.803(6)(c) and 90.902(11), Fla. Stats. (2019), or by having a records custodian testify to the relevant predicates. The public record exception is largely unavailable in criminal prosecutions.

Accordingly, the defendant requests this Court prohibit the State from using the inadmissible hearsay evidence in this trial and grant any further relief deemed necessary and just.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service via the Florida Courts E-Filing Portal, in accordance with Administrative Order No. AOSC13-49, to the Office of the State Attorney, eservicevolusia@sao7.org this 20th day of November, 2019.

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