

**14 Fla. L. Weekly Supp. 28a**

**Licensing -- Driver's license -- Suspension -- Driving under influence -- Evidence -- Breath test -- Low sample volume test -- No error in validating license suspension as result of low sample volume breath test where licensee attempted to cast doubt on reliability of test result by offering curriculum vitae and testimony of expert in another case stating that low sample volume test result is unreliable and taints reliability of allegedly valid breath test, but offered no other testimony regarding factors suggesting licensee's breath test was unreliable -- Breath test affidavit -- Case law in criminal cases prohibiting use of breath test affidavit without offering live testimony from officer that performed test has no effect on use of affidavits in administrative license suspension cases**

JESUS CABALLERO, Petitioner(s), vs. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent(s). Circuit Court, 13th Judicial Circuit (Appellate) in and for Hillsborough County, Civil Division. Case No. 06-5649, Division C. November 28, 2006. Counsel: Eilam Isaak, Tampa. Jason Helfant, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Miami.

*ORDER DENYING PETITION FOR WRIT OF CERTIORARI*

(JAMES M. BARTON, II, J.) THIS MATTER comes before the Court on a Petition for Writ of Certiorari, seeking review of a Final Order of License Suspension, dated May 30, 2006. The Court, having reviewed the Petition, Response, written arguments on “low sample volume” and the court file, and having heard argument of counsel, and being otherwise fully informed in the premises, finds as follows:

In his written argument concerning “low sample volume”, Petitioner contends that the “low sample volume” breath test result taints the reliability of the allegedly valid breath test. Petitioner relies on [State v. Moody](#), 4 Fla. L. Weekly 787a (Fla. 2nd Circuit 1997) to support his contention. Further, Petitioner contends that recent case law prohibits reliance on the breath test affidavit without live testimony from the officer conducting the breath test.

In *State v. Moody, supra*, the Court suppressed a breath test based on “low sample volume” because evidence was submitted by the petitioner indicating the likely presence of mouth alcohol during the breath test due to the fact that the petitioner was a heavy smoker, was easily fatigued and had extensive dental work. These factors, taken in consideration with the petitioner's expert testimony and the absence of contradictory evidence led the Court to question the initial test as well as the “low sample volume” test. The Court distinguished its case from a series of other cases upholding “low sample volume” tests. As the *Moody* Court noted, “low sample volume” tests are admissible unless the petitioner presents sufficient facts to rebut the

presumption that the tests are reliable. *See State v. Moody*, 4 Fla. L. Weekly 787a (Fla. 2nd Circuit 1997), citing [State v. Roland](#), Case No. 94-4 AC AO2 (Fla. 15th Cir. March 30, 1995) [3 Fla. L. Weekly Supp. 151a]; [State v. Sloan](#), 2 Fla. L. Weekly Supp. (Fla. 15th Cir. 1995); [State v. Conyers](#), 2 Fla. L. Weekly Supp. (Dade County 1994).

In the instant case, Petitioner attempted to cast doubt on the reliability of the breath test by offering the curriculum vitae of Rick Swope and testimony provided by Mr. Swope in another action stating that a “low sample volume” breath test result is unreliable and taints the reliability of an allegedly valid breath test. Petitioner offered nothing more in the form of live testimony regarding any factors that suggested the breath test was unreliable.

There is nothing in the record that suggests Respondent deviated from the essential requirements of law in validating Petitioner's license suspension as a result of a "low volume sample" breath test. Moreover, it is clear from the record that the State adhered to the applicable regulations in maintaining and administering the breath tests.

With respect to Petitioner's contention that recent case law prohibits the use of the breath test affidavit without offering live testimony from the officer that performed the test, each of the cases cited by Petitioner are criminal prosecutions. The State properly notes that the decisions in [\*Shiver v. State\*](#), 900 So. 2d 615 (Fla. 1st DCA 2005), [\*Belvin v. State\*](#), 2005 WL 1336497 (Fla. 4th DCA June 8, 2005) [30 Fla. L. Weekly D1421b], and [\*Crawford v. Washington\*](#), 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) have no effect on the use of breath test affidavits in administrative hearings regarding driver license suspensions.

It is therefore ORDERED AND ADJUDGED that the Petition of Writ of Certiorari is hereby DENIED.

\* \* \*