

6-26  
D/A 10-7-87

IN THE SUPREME COURT OF FLORIDA

PAUL PEREZ, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FILED  
JUN 9 1987  
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By \_\_\_\_\_  
CASE NO. 70-027  
Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

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SEVENTH JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

On September 3, 1985, the state filed an information charging the Petitioner with lewd assault upon a child in violation of Section 800.04, Florida Statutes (1985). (R188)

On December 3, 1985, Petitioner filed a motion to exclude the testimony and hearsay statements of the victim. (R180-181)

On January 16, 1986, the state filed a motion to videotape the child's testimony pursuant to Section 90.90, Florida Statutes (1985). (R176) A hearing was held on this motion on January 21, 1986, and continued on January 30, 1986. (R80-122)

On January 28, 1986, the state filed a notice of intent to use hearsay statements of the child at trial. (R175) A hearing was also held on this motion. (R115-121) On that same date, the state filed a pleading which contained the

circumstances showing the alleged reliability of the hearsay statement of the child. (R174)

On February 4, 1986, Petitioner filed a motion for discharge alleging a violation of his speedy trial rights. (R173)

Petitioner also filed a motion to declare the child available and to compel the child's testimony. (R171-172) The trial court ruled that this motion was an unauthorized pleading. (R65-66)

Petitioner filed a motion to suppress his statements to law enforcement personnel. (R165-166) This motion was denied. (R72,94-95)

Petitioner filed a motion to exclude hearsay statement made by the child as well as a motion to compel the child to testify. (R160-162) The court ruled that the hearsay statements were admissible and ruled that the child was unavailable due solely to the probability of severe emotional and mental harm to the child. (R27,75-76) The court also determined the hearsay statements to be reliable and made certain findings on the record. (R73-76)

On February 2, 1986, Petitioner entered a plea of nolo contendere to a reduced charge of attempted lewd assault. Petitioner specifically reserved his right to appeal the denial of all pretrial motions and all parties agreed that these issues were dispositive of the case. (R140-142) Following a plea colloquy, the trial court accepted the plea. (R143-145) A sentencing guidelines scoresheet was prepared resulting in a

recommended sentence of any nonstate prison sanction. (R124-126,158-159) The trial court withheld adjudication and placed the Petitioner on probation for a period of three years with certain applicable conditions. (R134-136,156-157)

Following an appeal to the Fifth District Court of Appeal, the District Court affirmed the action of the trial court and, in so doing, declared Section 90.803(23), Florida Statutes, (1985) constitutional. Perez v. State, 500 So.2d 725 (Fla. 5th DCA 1987).

STATEMENT OF THE FACTS

On August 12, 1985, J [REDACTED] E [REDACTED] overheard her two children who were talking in the tub. She overheard her son, C [REDACTED], who was three and one half years old, tell his younger sister, "this is what Paul does." In so stating, C [REDACTED] was "fooling with himself." (R29,84) Ms. E [REDACTED] dropped the laundry that she was carrying at the time and stormed into the bathroom. She demanded that C [REDACTED] tell her "what Paul does?" She praised C [REDACTED], but demanded an account of his activity with Paul. C [REDACTED] then stated that, "Paul sucked my peepee," and demonstrated using his finger. Ms. E [REDACTED] immediately had two other available adults come into the bathroom at which time C [REDACTED] repeated the story to each adult in turn. The police were immediately summoned. (R29-30)

Ms. E [REDACTED] testified that her ex-husband's brother was named Paul. This Paul lived in Massachusetts and Ms. E [REDACTED] claimed that C [REDACTED] had never met him. Ms. E [REDACTED] insisted that the Petitioner was the only Paul that C [REDACTED] was regularly around. (R30-31) The [REDACTED] [REDACTED] who babysat C [REDACTED] E [REDACTED] a regular basis. (R52-53) During this two month time period, [REDACTED] had problems with C [REDACTED] marking up the walls of her home. She would occasionally catch him in the act and confront him with these accusations. C [REDACTED] would usually lie and deny his actions. The only time that he would eventually tell the truth would be when [REDACTED] would tell him that she saw the act and that he could not deny it. (R53-55) [REDACTED] also caught C [REDACTED]



fondling his penis on several occasions. (R55-56) In fact, ██████  
██████ had told Ms. E█████ that she was going to have to stop  
sitting for C█████ because of his behavioral problems.

(R55-56) Ms. E█████ admitted that she had had some problems with  
C█████ in the past prior to the incident. This consisted of  
behavioral problems which included fondling himself. Ms. E█████  
had been investigating the possibility of seeking professional  
help for C█████ in Gainesville prior to this incident.

(R19-22,86)

On August 12, 1985, Pamela Massie, an investigator with  
the Kissimmee Police Department, talked to C█████ E█████  
about his previous statement. C█████ told Massie that Paul  
had "licked his peepee," and illustrated using some dolls.

(R37-38)

Detective Massie first came into contact with the  
Petitioner at approximately 9:45 p.m. that same day. The  
Petitioner initially denied the accusations. Since Detective  
Massie had recently completed interrogation school, she continued  
questioning the Petitioner after first building up a rapport with  
him. Massie made it clear that she was in no hurry and had no  
plans that evening. Therefore, she had plenty of time to talk to  
the Appellant. (R44-51) At approximately 10:45 p.m., after  
being advised of his Miranda rights, the Petitioner told Massie  
that he took C█████ into his room, put him on the bed,  
pulled down his pants, played with him, and sucked on his penis.  
The Petitioner stated that this occurred only on one occasion

about midday on August 8, 1985. The episode lasted approximately two minutes. (R38-43)

Jine Raschiale, coordinator of forensic services with the Osceola County Mental Health Department, interviewed C [REDACTED] E [REDACTED] February 5, 1986. The interview occurred at the request of the state. (R8-9) Raschiale concluded that testifying in open court would cause substantial likelihood of severe emotional and mental harm to C [REDACTED] E [REDACTED]. (R13) Raschiale admitted that she only attempted several tests during the test. These attempts failed due to C [REDACTED]'s resistance and lack of attention. He exhibited certain anxiety symptoms when he became aware of the nature of the questions. This was due in part to the fact that his mother had attempted to train him to stop talking about the incident. C [REDACTED] had a habit of telling everyone about the incident shortly after it came to light. (R14) Raschiale also estimated C [REDACTED]'s behavioral level as being equivalent to age three. (R17)

C [REDACTED]'s mother admitted that he talked about the incident every day. She was of the opinion that he would suffer emotional or mental stress if he had to testify in open court. This conclusion was based upon her discussions with and observations of him. Ms. E [REDACTED] admitted that her conclusion was based more on her preference for the videotaped procedure than a proceeding in open court. (R86-94) Part of her concern was the after-effects with which she would have to deal. She was also concerned about C [REDACTED]'s effect on his younger sister. Ms. E [REDACTED] finally admitted that C [REDACTED]'s reaction would probably

be the same whether he testified on videotape or in open court.

(R93)

SUMMARY OF ARGUMENT

In Perez v. State, 500 So.2d 725 (Fla. 5th DCA 1987) the District Court of Appeal, Fifth District, upheld the constitutionality of Section 90.803(23), Florida Statutes (1985). Although recognizing that other jurisdictions have upheld similar provisions even with the hearsay exception in child sexual battery cases, Petitioner urges this Court to prevent the further erosion of a defendant's right to confront his accuser. Petitioner submits that the Florida Statute does not provide sufficiently specific guidance for a trial judge to determine reliability of hearsay statements. Petitioner also argues that the statute was unconstitutionally applied in his case where the trial court refused to examine the child prior to finding that the statements had sufficient indicia of reliability. This was clearly error.

ARGUMENT

SECTION 90.803(23), FLORIDA STATUTES  
(1985) IS UNCONSTITUTIONAL AND WAS  
UNCONSTITUTIONALLY APPLIED.

Section 90.803(23), Florida Statutes (1985) reads as follows:

(23) HEARSAY EXCEPTION: STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.-

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to §90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

In Perez v. State, supra, the District Court of Appeal, Fifth District, found the above cited statute to be constitutional. The Court held that the above provisions met the requirements of the Confrontation Clause of the Federal Constitution (U.S. Const. amend. VI) as interpreted by the United States Supreme Court in Ohio v. Roberts, 448 U.S. 56 (1980), and of the Florida constitution (Art. I, §16, Fla. Const.). The District Court of Appeal, Second District, has also upheld the constitutionality of the same statute. Glendening v. State, 12 FLW 317 (Fla. 2d DCA, January 14, 1987). Comparable statutes providing for the admissibility of out-of-court statements by child abuse victims have been held constitutional in other jurisdictions. State v. Myatt, 697 P.2d 836 (Kan. 1985); State v. Bellotti, 383

N.W.2d 308 (Minn. Ct. App. 1986); State v. Ryan, 691 P.2d 197 (Wash. 1984). <sup>1/</sup>

The Sixth Amendment to the United States Constitution and Section 16, Article 1, Florida Constitution, guarantee an accused the right to confront adverse witnesses. There is a two-fold purpose that underlies the confrontation clause. It affords a defendant an opportunity to cross-examine the witness, thereby allowing the defendant to test that witnesses' memory and possibly elicit information that might aid in his defense. Secondly, it gives the jury an opportunity to observe the witness' demeanor and make an independent determination of credibility. Mattox v. United States, 156 U.S. 237 (1895).

The watershed case regarding the relationship between the Confrontation Clause and the hearsay rule with its many exceptions is Ohio v. Roberts, 448 U.S. 56 (1980). The United States Supreme Court held that the introduction of preliminary hearing testimony did not violate the Confrontation Clause of the Sixth Amendment, since (1) the witness' prior testimony bore sufficient indicia of reliability, and (2) the witness was constitutionally unavailable for purposes of trial. In so holding the Court concluded that the trier of fact had a

<sup>1/</sup> Additionally, excellent discussions of this issue can be found in Graham, Indicia of Reliability and to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions, 40 U.Miami L.Rev. (1985); and Comment, The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of Practical Analysis, 14 Fla.St.U.L.Rev. 949 (1987).

satisfactory basis for evaluating the truth of the prior statement, since defense counsel's questioning of the witness, although occurring on direct examination, comported with the principal purpose of cross-examination to challenge the declarant's truth-telling, perception, memory, and meaning.

Reliability of the statement can be inferred without more in cases where the evidence falls within a "firmly rooted" hearsay exception. Ohio v. Roberts, 448 U.S. 56, 57 (1980). The United States Supreme Court recited four hearsay exceptions it considered to be "firmly rooted": Dying declarations; cross-examined prior testimony, and the business and public records exceptions." 448 U.S. at 66 n.8. The Court did not intimate that the list was exhaustive and no further guidance has been forthcoming.

Federal courts that invoke Roberts apply the unavailability prong more uniformly than the reliability prong. This is due to disagreement over what constitutes a "firmly rooted" exception. See e.g. United States v. Lurz, 666 Fd.2 69 (4th Cir. 1981), cert. denied 445 U.S. 1005 (1982); and United States v. Ordonez, 737 Fd.2 793 (9th Cir. 1983). Williams v. Melton, 733 Fd.2 1492 (11th Cir.), cert. denied, 469 U.S. 1073 (1984), quoted the language in Roberts indicating that reliability can be inferred when the evidence falls within a firmly rooted hearsay exception. The Eleventh Circuit then pointed out that this portion of Roberts was dicta since the Roberts court did not find a firmly rooted hearsay exception in its facts. The Eleventh Circuit also noted that it would be



possible to apply Georgia's firmly rooted res gestae exception in an unconstitutional manner. Id. at 1495.

In Florida Roberts has been interpreted as requiring either a firmly rooted exception or (if none is present) an analysis to determine the trustworthiness of the statement. See e.g. Maugeri v. State, 460 So.2d 975 (Fla. 3d DCA 1984).

Recently, in United States v. Inadi, 106 S.Ct. 1121 (1986), the United States Supreme Court explained that Roberts had not sought to map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions. Inada apparently limits Roberts Confrontation Clause analysis to hearsay offered under the former testimony exception. The Court definitely decided that evidence under the co-conspirator exception need not satisfy the unavailability requirement. The question after Inadi seems to be: When the reliability of the testimony sought to be introduced under a hearsay exception can be presumed and when the proponent must show particularized guarantees of trustworthiness? Undoubtedly, the "firmly rooted" exception analysis in Roberts must be considered in answering such a question. Inadi implies that the Confrontation Clause has very limited applicability once the requirements of hearsay exceptions are satisfied.

The District Court of Appeal, Fifth District, held in Perez v. State, 500 So.2d 725 (Fla. 5th DCA 1987) that Section 90.803(23), Florida Statutes (1985) met constitutional muster under Ohio v. Roberts analysis. Certainly, Section 90.803(23) is not within the category of firmly rooted hearsay exceptions. See

State v. Ryan, 691 P.2d 197 (Wash. 1984). The statute attempts to set parameters to establish reliability of the statement. Petitioner submits that the statute fails to establish sufficiently specific guidelines in this respect.

Petitioner respectfully submits that this statute, as written, simply does not provide any safeguards to guarantee an accused defendant that the declarant's out-of-court statements bear sufficient indicia of reliability. Regardless of the legislative intent, the language of Section 90.803(23), Fla.Stat. (1985) is so vague that it allows a judicial officer to give whatever interpretation that he desires to the statute as written rather than being required to follow strict legislative mandates as to when the trial court should admit out-of-court statements and when the trial court should not. In determining the reliability of the statement, the court may consider under the statute the mental and physical age and maturity of the child, nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate. §90.803(23)(a)(1), Fla.Stat. (1985). Petitioner submits these considerations are so vague and uncertain that the statute is rendered meaningless. Using these considerations, a trial court could determine that any statement was reliable. Petitioner submits that the newly enacted hearsay exception is based on the presumption that a child is not going to lie about sexual abuse. In addition to pointing out the fallacy of such a presumption, Petitioner submits that the sanctions provided for a

life felony should not be imposed without allowing a defendant to face his accuser.

Certainly, the statute was unconstitutionally applied in the instant case. The statute clearly states that the reliability of the child victim is one factor for the trial court to consider. The District Court of Appeal, Fifth District, dealt with Petitioner's argument related to this consideration on appeal. Petitioner made a pre-trial motion to exclude the child victim's hearsay statements from admissibility into evidence at trial and to compel the child to testify, arguing that this action was necessary to protect his constitutional right to confront his accuser. The trial court denied Petitioner's motions and determined that the child's hearsay statements were reliable and admissible and found that the child was "unavailable" to testify solely upon the substantial likelihood of severe mental harm to the child if it were required to testify in open trial proceedings. The trial court did not examine the child prior to making this determination although the Petitioner contended that the court was required to do so in order to determine the child's competency. The Fifth District Court of Appeal implicitly approved of the trial court's decision not to examine the child regarding his competency by affirming the trial court's rulings. Perez v. State, supra.

Petitioner contends that the trial court must make an independent determination of the declarant's competency before concluding that sufficient safeguards of reliability are present to allow introduction of the statement. One of the bases for

finding a child incompetent is their inability to receive just impressions of the facts concerning the event. If the trial court had examined the child and found him incompetent on this basis, Petitioner submits that the hearsay statements could not have been admitted.

The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the qualifications of a witness . . . in regard to knowledge and the like.

(Footnote omitted). 5 J. Wigmore, Evidence § 1424, at 255 (Chadbourn rev. 1974).

If the declarant was not competent at the time of making the statements, the statements may not be introduced by hearsay repetition. 5 J. Wigmore, supra at 304.

A review of the subject indicates that cases involving an indecent assault upon a child seem to receive rather special treatment. The courts quite frequently have admitted hearsay statements of a child tending to incriminate the defendant. Usually such statements are justified on the basis of res gestae, or because they tend to show the condition of the child at the time of the statement. However, some cases leave the impression that the testimony was allowed purely because of abhorrence of the crime involved. The better-reasoned cases seem to require that, with the exception of res gestae utterances, all hearsay statements introduced under any exception to the rule should be made by someone competent as a witness at the time the statement was made.

(Footnotes omitted.) C. Stafford, The Child As A Witness, 37 Wash.L.Rev. 303 at 307 (1962). The trial court did not determine whether the child was competent when the statement was made. If he was not, the statement must be excluded as being unreliable. Hence, Petitioner submits that the statute was unconstitutionally applied in his case.

As confrontation challenges rise through the judicial system, courts should carefully consider the damaging consequences that could result from further weakening of the confrontation clause. Due process protections are jeopardized whenever the right of confrontation is diminished. Courts should ensure that the values embodied in the unavailability requirement are not subordinated simply to facilitate judicial efficiency.

Inadi stops perilously short of holding that no confrontation issue exists once evidence satisfies the hearsay exception requirements. In addressing the possibility of equating the confrontation clause with the hearsay rule, one comentator noted: The obvious difficulty with this construction is that it permits the law of evidence to dictate the reach of a parallel constitutional provision. The resulting anomaly is that the scope of constitutional protection is placed in the hands of judges and legislators who fashion the hearsay exception."

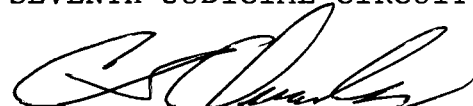
Lilly, Notes on The Confrontation Clause and Ohio v. Roberts, 36 U.Fla.L.Rev. 207, 210 (1984). Equating the constitutional right of confrontation with the hearsay rules would render a significant portion of the Sixth Amendment superflous. Such a result would be tantamount to eliminating one of our most cherished constitutional rights.

CONCLUSION

Based upon the cases, authorities and policies, Petitioner respectfully requests that this Honorable Court declare Section 90.803(23), Florida Statutes (1985) to be facially unconstitutional or, at least, declare that section unconstitutional as applied to the Petitioner under these facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, in his basket at the Fifth District Court of Appeal and mailed to Mr. Paul Perez, 1112 Mabbette St., Kissimmee, Fla. 32741 on this 1st day of June 1987.



CHRISTOPHER S. QUARLES  
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