IN THE SUPREME COURT OF FLORIDA

DAVID R. CONNER,	:	
Petitioner,	:	
vs.	:	Case No. 92,835
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

In this Initial Brief on the Merits, Petitioner, David R. Conner, the Appellant at the district court level, shall be referred to as Petitioner or by name. The State of Florida, as Respondent, first represented by the State Attorney for the Tenth Judicial Circuit at the trial level and now represented by the Florida Attorney General's office at the appellate level, shall be referred to as Respondent or the state. Petitioner shall refer to the Elderly Person or Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), either by name or with the acronym EPDA. Citations to the record shall be designated by (V__, R__) referring to the volume number and record page number.

STATEMENT OF THE CASE AND FACTS

The State Attorney for the Tenth Judicial Circuit, the Respondent, filed a three-count information against David R. Conner, the Petitioner, on October 19, 1995, in case number CF95-5261A1-XX, charging him with armed burglary (§ 810.02(2)(b),Fla. Stat. (1995), § 775.087(2), Fla. Stat. (1995)); armed kidnapping (§ 787.01(2), Fla. Stat. (1995), § 775.087(2), Fla. Stat. (1995)); and armed robbery (§ 812.13(2)(a), Fla. Stat. (1995), § 775.087(2), Fla. Stat. (1995)). (V1, R1-3).

Prior to the trial, the state filed a notice of intent,

pursuant to § 90.803(24)(b), Fla. Stat. (1995), to use the statement of an elderly person, Earl Ford, against Mr. Conner at his trial. (V1, R5-7, 8-51). Pursuant to the requirements of § 90.803(24), Fla. Stat. (1995), herein after referred to as (EPDA), the Elderly Person or Disabled Adult hearsay exception, the trial court held two hearings for the purpose of determining that the time, content, and circumstances of the Mr. Ford's statements provided sufficient safeguards of reliability. (V1, R53-75, 79-124). At the second hearing, the trial court ruled that Mr. Ford met the requisites of the definition of an elderly person as set out in § 825.101(5), Fla. Stat. (1995). (V1, R98-99, 102, 120). The trial court reserved ruling on the circumstances surrounding the statement as to the trustworthiness of the statement as well as the condition of the declarant at the time of the statement. (V1, R102, 120). The trial court, however, advised the state that corroboration as to the substance of the hearsay statement would have to be presented at Conner's trial. (V1, R108).

Subsequently, the trial court filed a written order wherein the trial court made specific findings of fact as required by the statute. (V1, R126-27). Defense counsel for Mr. Conner filed a motion to have Florida's Elderly/Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), declared unconstitutional. (V1, R128-29). At the hearing on that motion, Mr. Conner argued that

the EPDA hearsay statute was unconstitutional, on its face and as applied, under both the United States and Florida Constitutions because the statute was void for vagueness, thereby, denying him due process. Further, Mr. Conner argued that the statute violated the confrontation clause of both the state and federal constitutions. (V1, R132-41, 143, 147-48, 150). The trial court denied the motion. (V1, R148, 153).

On April 15, 1996, Mr. Conner entered a negotiated plea of no contest, specifically reserving his right to appeal the denial of his motion to have the Elderly Person or Disabled Adult hearsay statute, § 90.803(24), Fla. Stat. (1995), declared unconstitutional on its face and as applied which the parties stipulated was dispositive as counts two and three, the armed kidnapping and armed robbery counts. (V1, R156). On June 20, 1996, the trial court adjudicated Conner guilty on three counts in case number CF95-5261A1-XX and one count in case number CF96-01514A-XX and pronounced sentence. (V2, R162-203).

A timely notice of appeal was filed in case number CF95-5261A1-XX on June 28, 1996, from which Mr. Conner appealed his judgment and sentence pursuant to Fla. R. App. P. 9.140. (V2, R204). On March 27, 1998, the Second District Court Appeal issued its decision with accompanying opinion in David R. Conner v. State, No. 96-03016 (Fla. 2d DCA March 27, 1998). See Appendix-1. On April 13, 1998, Mr. Conner filed with the Second

District Court of Appeal two copies of his notice to invoke discretionary review with the Florida Supreme Court. Pursuant to Fla. R. App. P. 9.120(d), Conner filed his brief on jurisdiction which was accepted by this Court. Thus, Petitioner's Initial Brief on the Merits now ensues.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error by not declaring § 90.803(24), Fla. Stat. (1995) unconstitutional. The Elderly Person or Disabled Adult hearsay statute, both on its face and as applied, violates the Confrontation Clauses of the United States Constitution, Amendment 6, and the Florida Constitution, Article 1, Section 16. Further, by its terms, the EPDA hearsay statute, § 90.803(24), Fla. Stat. (1995) is void for vagueness and denies due process as guaranteed by the United States Constitution, Amendments 5 and 14, and the Florida Constitution, Article 1, Section 9, again both on its face and as applied.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE STATEMENT OF ELDERLY PERSON OR DISABLED ADULT HEARSAY EXCEPTION STATUTE, § 90.803(24), FLA. STAT. (1995) WAS CONSTITUTIONAL?

Yes, the Second District Court of Appeal erroneously found that the trial court had not committed reversible error by denying Mr. Conner's Motion to Declare Florida's Elderly Person/Disabled Adult Hearsay Statute Unconstitutional, § 90.803(24), Fla. Stat. (1995), both on its face and as applied. Mr. Conner had argued that the Elder Person or Disabled Adult hearsay statute was unconstitutional because the statute; (1) was

violative of the Confrontation Clauses of the United States Constitution, Amendment 6, and the Florida Constitution, Article 1, Section 16; and (2) by its terms, was void for vagueness denying due process as guaranteed by the United States Constitution, Amendments 5 and 14, and the Florida Constitution, Article 1, Section 9. (V1, R128-29, 130-50). The trial court, after hearing argument, disagreed and denied the defense motion. (V1, R148, 153).

Consequently, Mr. Conner pleaded no contest but reserved the right to appeal the trial court's order denying the defense motion to have § 90.803(24) declared unconstitutional. (V1, R156). The state stipulated that the motion is dispositive as to counts II and III, involving armed kidnapping and armed robbery, respectively, but not as count I involving armed burglary. (V1, R156, V2, R198).

The Second District Court of Appeal, in Conner v. State, 709 So. 2d 170 (Fla. 2d DCA 1998), denied Mr. Conner's direct appeal of the trial court's order denying his motion to have the EPDA hearsay statute declared unconstitutional on its face and as applied, opining, in pertinent part:

> The central issue in this matter derives from the trial court's refusal to declare section 90.803(24), Florida Statutes (1995), commonly known as the Elderly Person or Disabled Adult hearsay exception, unconstitutional. Conner's claim of unconstitutionality is grounded on two notions, i.e., the exception offends the confrontation clause of the Sixth Amendment to the Constitution of the United States and its application

results in the denial of due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 9 of the Florida Constitution. We reject each of Conner's contentions...

The victim in this case, Mr. Ford, was an 84-year-old man who lived alone. He suffered from poor eyesight, some hearing loss, and occasional memory lapses. Conner broke into his home, tied him to a chair with his suspenders, and ransacked his house. Mr. Ford was robbed at gunpoint of money and several other items, including a telephone. The day after the incident he provided a statement to the police; he gave another statement about two weeks later. Conner was eventually apprehended by the police after information was received from a confidential informant. He was charged with armed burglary of a dwelling, armed robbery, and armed kidnapping.

Mr. Ford died before Conner's trial. At least ten days prior to trial, the State provided Conner with a notice of its intention to use Mr. Ford's statements at trial in accordance with section 90.803(24). Conner challenged the statute. [FN1] The court found that the statute did not violate Conner's rights of confrontation or due process under either the United States or Florida constitutions, Conner pleaded nolo contendere, specifically preserving the right to appeal the constitutional issues.

> FN1. (24) HEARSAY EXCEPTION; STATEMENT OF ELDERLY PERSON OR DISABLED ADULT.-
> (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 an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, 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 elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and
> 2. The elderly person or disabled adult either:
> a. Testifies; or
> b. Is unavailable as a witness provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s.90.804(1).
> (b) In a criminal action, the defendant shall be notified no later than 10 days before the 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 elderly person's or disabled adult'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.

Section 825.101(6), Florida Statutes (1995), defines an "elderly person" as "a person sixty years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired." Like children, the elderly victims are particularly vulnerable because of the conditions enumerated in the statute. The hearsay exception is designed to insure that elderly victims will not suffer injustice at the hands of the legal system because their age-related infirmities render them unavailable to testify. Conner's argument, however, is that those very infirmities render the

elderly unreliable and untrustworthy as witnesses and, hence, incompetent to testify. Thus, Conner contends that allowing the admission of the hearsay statements violates his right to confrontation and forecloses witnesses who might offer opposing evidence.

Subjecting section 90.803(24) to the same analysis as the child victim hearsay exception of section 90.803(23), which it closely tracks, reveals that it, too, will pass the test of constitutionality. It was emphasized in State v. Townsend, 635 So. 2d 949 (Fla. 1994), that the reliability safeguards in the statute essentially assure its constitutionality. The Townsend court repeated its holding in Perez v. State, 536 So. 2d 206 (Fla. 1988), that the "specific reliability requirements in section 90.803(23) provided sufficient safeguards of reliability to meet the 'particularized guarantees of trustworthiness' standard set forth in Roberts." 635 So. 2d at 954 (referring to Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)). Furthermore, to assure that a defendant is not convicted solely on the basis of hearsay statements of an unavailable witness, the statute provides that, after determining that the hearsay statement is reliable and originates from a trustworthy source, the trial court must then find that other evidence corroborates the statement. If either element is missing, the statement is not admissible. Once the foregoing conditions are satisfied, the "procedural requisites of section 90.803(23) are sufficient to meet the constitutional concerns of the federal and Florida Constitutions." Townsend, 635 So. 2d at 957.

Conner's contention that an elderly person is per se incompetent to testify is simply not borne out by either the pertinent statute or common sense. Section 825.101(6) refers to impairment of an elderly person's ability to protect himself or to care for herself. Those limitations have nothing to do with the victim's ability to provide a reliable statement. Furthermore, to the extent that the infirmities of age--loss of sight, hearing, memory, or other abilities--adversely affect the elderly person's ability to discern what happened or to describe the events, those issues can be explored when the trial court receives evidence on the "time, content, and circumstances" of the statement associated with its reliability.

We cannot rule on the statute's constitutionality as applied because the trial court did not make full findings. It did find, however, that the victim met

> the definition of "elderly person" by virtue of advanced age and other infirmities and that the victim was "unavailable" because of death prior to trial. The trial court also determined that there was other corroborating evidence to support the victim's statement, such as the condition of the house after the incident and the recovery of the telephone taken from his home. Nevertheless, the police officers to whom the victim made his statements were not present at these hearings, and thus the trial court held that the State would be required to demonstrate that the "time, content, and circumstances" of the statements insured their reliability before the hearsay could be admitted.
>
> In sum, Conner has not pointed to any grave deficiencies in section 90.803(24) or its application that would cause this court to be concerned with constitutional questions; we affirm that aspect of the case.

Conner v. State, 709 So. 2d at 170-72.

The Second District Court of Appeal, misapprehended Mr. Conner's arguments, incorrectly concluding that Conner was asserting that an elderly person is per se incompetent to testify. Id. at 702. The Second District Court's analysis largely overlooked the basic thrust of Mr. Conner's argument. Simply put, Mr. Conner argued that by definition, see §§ 825.101(4) and (5), Fla. Stat. (1995), if a person qualified as either a "disabled adult" or an "elderly person," then, necessarily that person's statement(s) would be suspect in terms of not having the reliability normally associated with traditional hearsay statements. In order to qualify as a "disabled adult" or an "elderly person," for purposes of the Elderly Person or Disabled Adult hearsay exception, § 90.803(24), Fla. Stat. (1995), a person would have to be either "18 years of

age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living," § 825.101(4), Fla. Stat. (1995), or, "60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired," § 825.101(5), Fla. Stat. (1995). Under either definition, in more cases than not, albeit, not all cases, an acceptable indicia of reliability necessarily associated with traditional hearsay exceptions is missing by definition. Accordingly, the Elderly Person or Disabled Adult hearsay exception is unconstitutional because the statute; (1) is violative of the Confrontation Clauses of the United States Constitution, Amendment 6, and the Florida Constitution, Article 1, Section 16; and (2) by its terms, is void for vagueness denying due process as guaranteed by the United States Constitution, Amendments 5 and 14, and the Florida Constitution, Article 1, Section 9. (V1, R128-29, 130-50).

The language of the EPDA hearsay statute closely tracks the language in the child victim hearsay statute, § 90.803(23), Fla.

Stat. (1995). Mr. Conner, noting that previous constitutional challenges to that statute have been unsuccessful, nevertheless, argues that those decisions provide valuable insight into the rational underlying the Florida Supreme Court's decisions that § 90.803(23), Fla. Stat. (1995) did not violate the confrontation clauses contained in the United States and Florida constitutions. See Idaho v. Wright, 497 U.S. 805 (1990); State v. Townsend, 635 So. 2d 949 (Fla. 1994); and Perez v. State, 536 So. 2d 206 (Fla. 1988). Presumably, the EPDA hearsay statute, based on the similarity of its statutory language, would be found constitutional unless distinguishable in some material respect as argued by Mr. Conner at the hearing.

Specifically, the child victim hearsay statute deals with the child victims of sexual abuse, eleven years old and under, focusing on the age of the declarant. § 90.803(23), Fla. Stat. (1995). The EPDA hearsay statute deals with "elderly persons," § 825.101(5), Fla. Stat. (1995), and "disabled adults," § 825.101(4), Fla. Stat. (1995), focusing on the physical and mental infirmities that restrict the person's ability to perform normal activities of daily living. As neither statutory definition is found in a "firmly rooted" hearsay exception, trustworthiness and reliability cannot be inferred but rather must be determined by the trial court in a particular manner with specific record findings of fact. See Perez v. State, 536 So. 2d

at 208-09.

The Florida Supreme Court, in State v. Townsend, 635 So. 2d 949 (Fla. 1994), reaffirming an earlier decision in Perez, made the following observations in response to the federal Wright v. Idaho decision:

> In Perez, we specifically held that section 90.803(23) complied with the requirements of the confrontation clauses of both the federal and Florida constitutions. In rendering that decision, we noted that the United States Supreme Court, in Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), found that when a declarant is unavailable and the hearsay does not fall within a firmly rooted hearsay exception, the hearsay must be marked with particularized guarantees of trustworthiness in order to be admissible. In applying that holding in the Perez case, we determined that the specific reliability requirements in section 90.803(23) provided sufficient safeguards of reliability to meet the "particularized guarantees of trustworthiness" standard set forth in Roberts. Perez, however, was rendered before the United States Supreme Court issued its ruling in Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), under which Townsend now contends that section 90.803(23) is unconstitutional.
>
> In Wright, the United States Supreme Court determined that, in evaluating whether a hearsay statement contains sufficient guarantees of trustworthiness, a court must look to the totality of the circumstances surrounding the making of the statement. The Court noted, however, that in determining the reliability of such a statement, a court cannot look to corroborating evidence to show the truth of the statement to be admitted. Section 90.803(23)(a)(2)b. requires that other corroborating evidence must exist before the hearsay evidence of an unavailable witness can be admitted....
>
> To clarify, however, any possible inconsistencies between the United States Supreme Court's decision in Wright and the requirements of section 90.803(23), we hold that under section 90.803(23), the trial judge must adhere to the following procedure: First, the trial judge must determine whether the hearsay statement is

> reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible. Under this procedure, we specifically find that the procedural requisites of section 90.803(23) are sufficient to meet the constitutional requirements of both the federal and Florida Constitutions. The failure of a trial judge to follow this procedure would render this exception to the hearsay rule unconstitutional under the dictates of the United States Supreme Court's decision in Wright.
>
> Having determined that the procedural requisites of section 90.803(23) properly protect the constitutional rights of an accused, we address the second portion of Townsend's confrontation clause argument, i.e., whether in this case the trial judge properly adhered to the reliability requirements of that section in ruling on the admissibility of this child's hearsay statements. Clearly, both Roberts and Wright stand for the proposition that the reliability determination as to the admissibility of hearsay evidence is critical to the protection of an accused's rights under the confrontation clause. Accordingly, it is essential that the trustworthiness and reliability requirements of section 90.803(23) be strictly followed. In recognizing the importance of adhering to those requirements, this Court and a majority of the Florida district courts of appeal have consistently found trial courts to have committed reversible error when those courts have failed to place on the record specific findings indicating the basis for determining the reliability of a child's statements introduced as hearsay under that section.

State v. Townsend, 635 So. 2d at 956-57. Further, Judge McDonald, concurring, opined:

> I write only to emphasize that the admission of hearsay statements of small children must be carefully reviewed under a strict scrutiny test. An "adequate indicia of reliability" required to allow the admission of out of court statements of a child is an exacting test. All of the criteria set forth in Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), must be met. As stated therein "Evidence possessing 'particularized guarantees of trustworthiness' must be so trustworthy that adversarial testing would add little to its

> reliability." Because this evidence is an exception to the hearsay, the burden is on the party moving for its admission to clearly and convincingly demonstrate its reliability.

State v. Townsend, 635 So. 2d at 960. Because Mr. Ford was an "elderly person," in this case, Mr. Conner focused his argument on that aspect of the EPDA hearsay statute, albeit, both definitions of an "elderly person" and a "disabled adult" share the same inherent lack of trustworthiness and reliability by virtue of each respective definition. Plainly, the trial court, in Mr. Conner's case, failed to follow the procedures set out above by this Court in State v. Townsend, 635 So. 2d at 957, in that the trial court failed to determine whether the hearsay statement was reliable and from a trustworthy source without regard to corroborating evidence and, further, failed to determine whether other corroborating evidence was present. Instead, the trial court put off these determinations until the trial, thereby, unfairly prejudicing Mr. Conner in his ability to adequately prepare for trial. The Second District Court of Appeal apparently found no inconsistency with this procedure and application of the EPDA hearsay statute under the procedure set out in State v. Townsend, 635 So. 2d at 956-57 , ruling that Mr. Conner's constitutional attack on the EPDA hearsay statute was somehow premature since the trial court had not yet made full findings, full findings which the trial court had postponed until the trial. Conner v. State, 709 So. 2d at 172. Despite the Second District Court of Appeal's ruling regarding the

EPDA hearsay statute as applied, Mr. Conner continues to argue that the trial court applied the EPDA hearsay statute in an unconstitutional manner for the reasons set out below.

Point 1: The EPDA hearsay exception is unconstitutional on its face violating the Confrontation Clause of both state and federal constitutions on its face.

Mr. Conner argued that the distinction between the two statutes, given their similar language, could be found by focusing on the victim intended to be protected by overriding societal interests. In the child victim hearsay statute, the child under the age of eleven years was the victim. Even if the child was found incompetent to testify and, thus, unavailable, a showing that the circumstances surrounding the making and reporting of the hearsay statement did not lack trustworthiness, § 90.803(23)(a), Fla. Stat. (1995), considered together with other safeguards of reliability, § 90.803(23(a)(1), Fla. Stat. (1995), could insure an acceptable indicia of reliability similar to that found in "firmly rooted" hearsay exceptions, thus satisfying the federal and state constitutional concerns of their respective Confrontation Clauses.

The same cannot be said for the Elderly Person or Disabled Adult hearsay statute, § 90.803(24), Fla. Stat. (1995), because the victim sought to be protected is an "elderly person" or "disabled adult" as defined in §§ 825.101(5) and (4), Fla. Stat. (1995), respectively. The EPDA hearsay statute focuses on "elderly

persons" and "disabled adults" as victims sought to be protected by overriding societal interests and, in so doing, by definition, requires the particular class of individuals suffer from infirmities, physical and mental, that cause the "elderly person" or "disabled adult" to fail in meeting even minimal standards of competency in more cases than not. No amount of "particularized guarantees of trustworthiness" can make hearsay statements so trustworthy or reliable when the declarant must be found to have suffered from physical, physiological, or psychological infirmities to the extent that he was unable to adequately perform the normal activities of daily living such as caring for or protecting himself at the time the statement was made. An "elderly person" is "a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for his or her own care or protection is impaired." § 825.101(5), Fla. Stat. (1995). A "disabled adult" is "a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living." § 825.101(4), Fla. Stat. (1995).

Under the EPDA hearsay exception involving an "elderly person," as in Mr. Conner's case, the trial court initially must find that the hearsay statement was made by an "elderly person" as defined above in § 825.101(5), Fla. Stat. (1995), meaning that the person must be suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired. The age-related infirmity, whether physical, physiological, or psychological, once found to exist, must be so significant that the ability of the person to provide adequately for the person's own care or protection is significantly impaired.

In Florida, every person is competent to be a witness, except as otherwise provided by statute. See § 90.601, Fla. Stat. (1995). According to Charles Ehrhardt:

> Section 90.604 provides that a witness have a personal knowledge of the matters about which he or she testifies. The testimony must be based on matters perceived by the senses of the witness. A witness who has actually perceived and observed a fact is the most reliable source of information. Under section 90.604 the foundation necessary to show the witness's personal knowledge may be introduced by testimony of the witness. Included within the requirement that a witness have a personal knowledge is the ability of the witness to have perceived the facts of which he or she has personal knowledge and to remember them when testifying.

Ehrhardt, Florida Evidence, (1996 ed.) § 604.1. By definition, see § 825.101(5), Fla. Stat. (1995), an elderly person under the EPDA

hearsay exception is a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for his or her own care or protection is impaired. The sensory perceptions of an "elderly person," by definition, are significantly impaired by age-related infirmities and, by logical inference, an elderly person's competency is diminished accordingly, to the extent of the severity of the infirmity of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning.

The EPDA hearsay statute deals with this threshold issue of the elderly person's competence by allowing the trial court to find the "elderly person" unavailable. "Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1)." § 90.803(24)(a)2b, Fla. Stat. (1995). In pertinent part, § 90.804(1), Fla. Stat. (1995) states:

> (1) Definition of unavailability.--"Unavailability as a witness" means that the declarant:
>
> ....
>
> (c) Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
>
> (d) Is unable to be present or to testify at the hearing

> because of death or because of then-existing physical or mental illness or infirmity; or

§ 90.804(1)(c),(d), Fla. Stat. (1995). Thus, if the "elderly person" has died, has suffered a lack of memory, has a then-existing physical or mental illness or infirmity, the "elderly person" is unavailable. If the proponent of the "elderly person" hearsay statement can prove that the statement has the "particularized guarantees of trustworthiness," then, the statement may be found so trustworthy and reliable as to render any adversarial questioning meaningless, and nonviolative of the Confrontation Clauses in both state and federal constitutions. In such circumstances, the hearsay statement of the "elderly person" would be admissible under § 90.803(24), Fla. Stat. (1995).

The United States Supreme Court, in Idaho v. Wright, 497 U.S. 805 (1990), stated the following with respect to "particularized guarantees of trustworthiness:"

> We agree that "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. This conclusion derives from the rationale for permitting exceptions to the general rule against hearsay:
>
> "The theory of the hearsay rule ... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of

cross-examination would be a work of supererogation." 5 J. Wigmore, Evidence § 1420, p. 251 (J. Chadbourn rev. 1974).

[497 U.S. 820**]** In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. See, e.g., 6 Wigmore, supra, §§ 1745-1764; 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01] (1988); Advisory Committee's Note on Fed. Rule Evid. 803(2), 28 U. S. C. App., p. 778. Likewise, the "dying declaration" and "medical treatment" exceptions to the hearsay rule are based on the belief that persons making such statements are highly unlikely to lie. See, e.g., Mattox, 156 U.S., at 244, 15 S. Ct., at 340 ("[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath"); Queen v. Osman, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L.J.) ("[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips"); Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N. C. L. Rev. 257 (1989). "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." Huff v. White Motor Corp., 609 F.2d 286, 292 (CA7 1979).

We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Our precedents **[**497 U.S. 821**]** have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. See Green, 399 U.S., at 161, 90 S. Ct., at

> 1936 (examining "whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"); see also Mattox, supra, 156 U.S., at 244, 15 S. Ct., at 340; Evans, 400 U.S., at 88-89, 91 S. Ct., at 219-220 (plurality opinion); Roberts, 448 U.S., at 65, 73, 100 S. Ct., at 2538, 2542. Because evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, see Roberts, supra, at 66, 100 S. Ct., at 2539, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability. See Lee v. Illinois, 476 U.S., at 544, 106 S. Ct., at 2063 (determining indicia of reliability from the circumstances surrounding the making of the statement); see also State v. Ryan, 103 Wash. 2d 165, 174, 691 P. 2d 197, 204 (1984) ("Adequate indicia of reliability [under Roberts] must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act"). Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.

Idaho v. Wright, 497 U.S. at 819-21. In finding the hearsay statement of the "elderly person" to have the requisite "particularized guarantees of trustworthiness," the trial court is required to find the circumstances surrounding the statement, i.e., the source of the statement or the method by which the statement was reported, do not show a lack of trustworthiness. Moreover, the trial court must find that the circumstances of the hearsay statement provide sufficient "safeguards of reliability." While not mandated, however, the trial court may consider the mental and physical age and maturity of the elderly person or disabled adult,

the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate. The trial court must consider the totality of circumstances surrounding the elderly person's statement and must find that the evidence possesses "particularized guarantees of trustworthiness" so trustworthy that adversarial testing would add little to its reliability.

After doing this, the trial court must find independent corroborating evidence of the abuse or offense. In so finding, the trial court may not bootstrap onto its previous findings regarding the "particularized guarantees of trustworthiness." Regarding corroboration, the Supreme Court, in Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990), made the following observation concerning the interplay between the Sixth Amendment's Confrontation Clause and hearsay statements not firmly rooted in jurisprudence such as Florida's child victim hearsay exception, § 90.803(23), Fla. Stat. (1995) and, arguably, the EPDA hearsay exception, § 90.803(24), Fla. Stat. (1995):

> [T]he use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.

Idaho v. Wright, 497 U.S. at 823.

Finally, the trial court, as basis for its ruling, must make record findings as to these issues; (1) "elderly person" or "disabled adult," (2) "particularized guarantees of trustworthiness," (3) "safeguards of reliability," and (4) corroboration of the offense. See § 90.803(24), Fla. Stat. (1995).

Also important and underlying all these determinations and record findings is the concept of notice. In criminal proceedings, the statute requires the proponent of the use of the EPDA hearsay exception must provide ten day notice prior to the trial regarding intent to use the hearsay statement. The notice must provide a written statement of the content of the elderly person's or disabled adult'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. See § 90.803(24)(b), Fla. Stat. (1995). Further, the proponent of the hearsay statement has the burden of proof regarding the "particularized guarantees of trustworthiness," must meet the exacting test of strict scrutiny, i.e., meaning that proof of must be by clear and convincing evidence, according Judge McDonald's concurring opinion. See State v. Townsend, 635 So. 2d at 960.

The relevant distinction between the EPDA hearsay exception and the child victim hearsay exception, as previously asserted,

lies in the intended victim sought to be protected by societal interests that override the protections guaranteed to the defendant of the constitutional right to confrontation. The child victim hearsay statute applies to statements of children eleven years old or younger. The EPDA hearsay statute applies to statements of "disabled adults" and "elderly persons" as defined under §§ 825.101(4) and (5), Fla. Stat. (1995). In seeking to protect the interests of elderly persons and disabled adults who find themselves victims of abuse and violent offenses, the legislature attempted to incorporate and reconcile competing interests into the statutory language of the EPDA hearsay statute. Those competing interests, i.e., the interests in protecting the elderly and disabled and the interests of the defendant to the constitutional right to confrontation, cannot be reconciled because "disabled adults" and "elderly persons," by definition, more likely than not, will be unreliable, untrustworthy witnesses, in the legal competency sense, to the extent that "disabled adults" suffer from a "condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living," § 825.101(4), Fla. Stat. (1995), or "elderly persons" suffer "from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional

dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired," § 825.101(5), Fla. Stat. (1995). To suggest otherwise ignores the practical consequences and effects of the physical, mental, and emotional infirmities inherent in the definitions.

The EPDA hearsay statute, under the guise of showing a "lack of untrustworthiness" combined with "safeguards of reliability," purports not to violate the constitutional guarantees of the Confrontation Clauses of both the federal and state constitutions because the trial court has determined that the hearsay statement of a "disabled adult" or "elderly person" has "particularized guarantees of trustworthiness" that are so trustworthy and reliable that adversarial testing would add little. The contradiction inherent in the EPDA hearsay statute is readily apparent on the face of the statute with respect to these competing and irreconcilable interests sought to be protected by the legislature. An "elderly person," by definition, in more cases than not, is likely to be incompetent to testify, as measured by both medical and legal standards, at least to the extent that the "elderly person" necessarily, by definition, suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for his or her own care or protection is impaired. The first finding of fact that

the trial court must make, when noticed by a party seeking to use an "elderly person's" hearsay statement, under § 90.803(24), Fla. Stat. (1995), is that the declarant is a person 60 years of age or older who is suffering from the debilitating infirmities of age, i.e., poor hearing, poor sight, poor memory, or worse, organic brain damage, to an extent that the person's ability to care and protect himself is impaired.

As the Court observed in Townsend:

> As previously indicated, the child's hearsay statements in this case were admitted based on the district court's ruling in Townsend I that the child was "unavailable" under section 90.804(1)(d) due to incompetency. In Townsend II, however, the district court reversed itself, finding that incompetency was not the equivalent of unavailability for purposes of admitting the child's statements under section 90.803(23), and, as such, that the child's statements should not have been admitted at trial. The district court reached this conclusion by determining that the reference in section 90.804(1) to " 'then existing ... mental ... infirmity' " requires that the mental condition of the declarant must have arisen after the purported hearsay statement was made. The district court also noted that incompetency is not a specifically enumerated definition for unavailability under section 90.804(1). In making these findings, the district court distinguished this Court's discussion of competency and unavailability in Perez.
>
> In Perez, we specifically stated that a child need not be found competent to testify before that child's out-of-court statements could be found to bear sufficient safeguards of reliability to enable admission of that statement at trial.
>
> > The fact that a child is incompetent to testify at trial according to section 90.603(2) does not necessarily mean that the child is unable to state the truth. The requirement that the trial court find that the time, content, and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of

> trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth.

Perez, 536 So. 2d at 211. In Perez, however, we did not specifically address whether incompetency fell within any of the definitions of unavailability set forth in section 90.804(1). It was on that issue that the district court distinguished Perez from the instant case. Consequently, we now address that issue.

> As noted by the district court, section 90.804(1)(d) provides that a declarant is unavailable if the declarant cannot testify because of a "then existing physical or mental illness or infirmity." Although the "then existing" language of the statute does refer to an infirmity existing at the time the witness is to testify, we find, contrary to the district court's interpretation, that an infirmity under that section need not arise after a hearsay statement was made in order for the declarant to be "unavailable." The district court's evaluation of the statute assumes that the witness must have been competent at the time the hearsay statements were made; however, as we stated in Perez, it is the particularized guarantees of trustworthiness that ensure the reliability of a statement, not the competency of the witness making the statement. Federal and other state courts that have considered similar statutory provisions overwhelmingly agree....We agree with the majority position and find that an incompetent witness is an unavailable witness within the meaning of section 90.804(1)(d)'s existing mental infirmity requirement. We conclude that a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfies the "testify or be unavailable" requirement of section 90.803(23). This does not mean, however, that a trial judge should not look to the competency of the child in determining whether the hearsay statements of the child are otherwise admissible. To the contrary, as explained in the discussion that follows, the competency of the child is a factor that should be considered in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable to the child.

State v. Townsend, 635 So. 2d at 954-56 (citations omitted).

Similarly, in Mr. Conner's case, the competency of the "elderly

person" is a factor that should be considered in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable to the "elderly person." Id. at 956. Accordingly, to the extent that the declarant of a hearsay statement is an "elderly person," or a "disabled adult," by definition, the declarant's lack of competency undercuts any "particularized guarantees of trustworthiness" or "safeguards of reliability" later found by the trial court to exist.

The trial court, following procedures similar to those set out in Townsend, must also apply the exacting test of strict scrutiny and determine, by clear and convincing evidence, that the elderly person's hearsay statement is so trustworthy that adversarial testing would add little to its reliability. See State v. Townsend, 635 So. 2d at 960. Rhetorically, Mr. Conner asks what about the statements of the "elderly person:" (1) who suffers from poor eyesight to the extent that he could not see at the time he supposedly observed the events described in his hearsay statement; or (2) who suffers from poor hearing to the extent that he could not have possibly heard what he said he did; or (3) who suffers from poor memory to the extent that he could not possibly remembered the quantity and quality of detail contained in his hearsay statement; or (4) who suffers from organic brain damage, i.e., Alzheimer's disease, to the extent all of his sensory and memory functions are impaired? These type of "elderly persons" or

"disabled adults" are exactly the type of persons that are best tested by adversarial questioning. See §§ 90.601 and 90.608(1)(d), Fla. Stat. (1995). The jury must be allowed, through cross-examination, to determine the weight to be accorded to the testimony of a man, legally blind, as to whether he could see that the criminal perpetrator carried a firearm or not, and, if he did, could he have recalled that fact two weeks later with any degree of certainty. Under the EPDA hearsay statute, physical and mental infirmities of the "elderly person" or "disabled adult" MAY, BUT NOT MUST, be considered. The trial court, in making its determination as to the "safeguards of reliability" of an "elderly person's" or a "disabled adult's" hearsay statement(s), MAY, BUT NOT MUST, consider the mental and physical age and maturity of the elderly person or disabled adult; MAY, BUT NOT MUST, consider the reliability of the elderly person or disabled adult. See § 90.803(24)(a)1, Fla. Stat. (1995). To the extent that the EPDA hearsay statute allows for an elderly person's or a disabled adult's physical and mental infirmities not to be considered, any "particularized guarantees of trustworthiness" or "safeguards of reliability" are clearly insufficient as to be so trustworthy and reliable that adversarial testing would add little. Accordingly, the EPDA hearsay statute, on its face, violate's the Confrontation Clauses of both state and federal constitutions thereby denying any criminal defendant of his right to confront his accuser. See U.S.

const., amend VI; Art. 1, § 16, Fla. Const.

As the EPDA hearsay statute is presently written, an "elderly person" must be so physically, mentally, and/or emotionally dysfunctional, even to the extent of suffering organic brain damage, as to be unable to adequately care for or protect himself and, yet, still be considered competent to make a hearsay statement so trustworthy and reliable as to not trample the Confrontation Clauses of the state and federal constitutions. See U.S. Const., amend. VI, and Art. 1, § 16, Fla. Const. Merely finding the "elderly person" unavailable does not overcome the competing pressures that the Confrontation Clauses demand in order to ensure the criminal defendant has due process. Under the rationale of Townsend, the very age-infirmities that serve to qualify the "elderly person" under §§ 825.101(4) and (5), Fla. Stat. (1995) for consideration of his hearsay statement under § 90.803(24), Fla. Stat. (1995) also serve to disqualify the hearsay statement because the competency of the "elderly person" is a factor that should be considered in determining the trustworthiness and reliability and, thus, the admissibility of hearsay statements attributable to the "elderly person." Townsend answered the question of incompetency due to the witness's inability to recognize the duty and obligation to tell the truth and whether that circumstance meant that the child victim was unavailable. As yet unaddressed is the issue of the inherent incompetency that the "elderly person," by definition,

must be found to possess such that an "elderly person" lacks, in varying degrees, the ability to perceive and have personal knowledge because his senses, powers of sight, hearing, touch, smell, and his ability to remember due to organic brain damage are so defective or impaired due to infirmities of aging as to preclude the "elderly person" from having reliable, trustworthy first hand knowledge of the matters contained in his hearsay statement.

The societal interest in protecting the elderly or disabled victims of abuse and violent crime is noble and worthy but not to the exclusion of a defendant's constitutional right of confrontation as guaranteed under the federal and Florida constitutions. See U.S. Const., amend. VI, and Art. 1, § 16, Fla. Const. The two competing societal interests are not necessarily irreconcilable, only irreconcilable as now contained in the EPDA hearsay statute which relies on §§ 825.101(4) and (5), Fla. Stat. (1995) for the definitions of "disabled adults" and "elderly persons." Amending the EPDA hearsay statute to mandate consideration of an elderly person's or a disabled adult's physical and mental infirmities, together with other factors deemed appropriate would provide sufficient "particularized guarantees of trustworthiness" or "safeguards of reliability" as to be so trustworthy and reliable that adversarial testing would add little. Thus, this Court should find that the EPDA hearsay statute, § 90.803(24), Fla. Stat. (1995), on its face, as presently written,

is violative of the Confrontation Clauses of the United States Constitution, Amendment 6, and the Florida Constitution, Article 1, Section 16.

Point 2: The EPDA hearsay exception is unconstitutional as applied violating the Confrontation Clause of both state and federal constitutions.

In addition to being unconstitutional on its face, the EPDA hearsay statute was unconstitutional as applied in Mr. Conner's case, albeit, the Second District Court of Appeal sidestep this aspect of Mr. Conner's argument saying that the trial court did not make full findings. See Conner v. State, 709 So. 2d at 172. The trial court, in its written order, nevertheless, did make specific findings of fact that illustrate how the EPDA hearsay statute, as applied, denied Mr. Conner his constitutionally protected right of confrontation. According to the trial court, in its written order:

> 1. As to whether or not the circumstances in which the statement was made indicate a lack of trustworthiness, the Court is reserving ruling. The State will have to lay an appropriate predicate before the statement would be admissible.
>
> 2. The declarant meets the criteria of an elderly person as defined in § 825.101. The declarant was 85 years old, had bad sight, bad hearing and trouble breathing, which are affirmations of age. The declarant was able to use the telephone and grocery shop up until the time of this incident. However, a couple of weeks afterwards the declarant began to have good days and bad days mentally.
>
> 3. A. Concerning the time, content and circumstances of the statement providing sufficient safeguards of reliability, at this time the Court finds that the statement was made to law enforcement officer who had no interest in the case.
>
> B. ----------Struck-through and initialed.

C. The nature and duration of abuse was short term.

D. There was no relationship between the declarant and the defendant.

E. The State will have to lay a predicate as to the reliability of the declarant.

4. The declarant is unavailable under 90.803(24).

5. There is sufficient corroboration of the declarant's statement.

(V1, R126-27). Close scrutiny of the trial court's order and the findings of fact that served as the basis for his ruling lead to the inevitable conclusion the statute was unconstitutionally applied. The trial court's findings were clearly insufficient to insure the "particularized guarantees of trustworthiness" had been met so that the state could use the hearsay statements of Mr. Ford pursuant to § 90.803(24), Fla. Stat. (1995) without affording Mr. Conner his constitutional right to confrontation.

In paragraph 2 of the trial court's order, in ruling that the declarant, Mr. Ford, met the criteria of an elderly person as defined in § 825.101, Fla. Stat. (1995), the trial court found that Mr. Ford, 85 years old, had affirmations of old age; bad sight, bad hearing, and trouble breathing but was able to use the telephone and grocery shop. (V1, R126). Also, a couple of weeks after the incident, Mr. Ford had good days and bad days, mentally, whatever that means. (V1, R94-95, 126). Apparently, since the order did not so state, the trial court ruled that these findings were sufficient to find that Mr. Ford was unable to provide adequate care for or protection of himself. (V1, R102-05). Mr. Conner argued that Mr.

Ford was capable of caring for and protecting himself. (V1, R103). After all, prior to the incident, Mr. Ford lived alone and was able to perform the normal activities of daily living, i.e., he bathed and dressed himself, prepared dinner for himself, shopped for himself, picked out his own groceries, and used his own telephone. (V1, R82, 103). Only after the alleged criminal incident did Mr. Ford's condition deteriorate to the point where he was unable to provide for his care and protection, not before or at the time of his first statement. As for his second statement, the trial court found that Mr. Ford was having good and bad days mentally around the time he made that statement. Mr. Ford was able to provide adequate care and protection for himself at the time of the first statement given the day after the alleged incident but may not have been at the time of the second statement. The only evidence regarding Mr. Ford's condition at the time of his second statement given seventeen days after the incident was testimony to the effect that he had good and bad days mentally. According to testimony, "he would be clearly out of it." (V1, R95). The trial court's finding that Mr. Ford was an "elderly person," under § 825.101(5), Fla. Stat. (1995), failed to distinguish between Mr. Ford's ability to care for and protect himself at the time to the two different statements sought to be introduced against Mr. Conner and as such was wholly insufficient. Accordingly, in finding that the declarant, Mr. Ford, met the definition of an "elderly person," the

trial court applied the EPDA hearsay statute in an unconstitutional manner.

Further, the EPDA hearsay statute is unclear regarding the burden of proof required to be met by the proponent of the hearsay statement. Presumably, Judge McDonald's strict scrutiny test required that the "particularized guarantees of trustworthiness" be shown by clear and convincing evidence. See State v. Townsend, 635 So. 2d at 960. That same standard of proof should likewise apply to the trial court's determination of whether Mr. Ford was an "elderly person" as defined by § 825.101(5), Fla. Stat. (1995). Mr. Conner argued that the state failed to prove that Mr. Ford fit within the definition of an "elderly person." (V1, R102-05, 133-35). Also, the EPDA hearsay statute appears to unconstitutionally shift the burden of proof by placing a burden on the defense in this case to come forward with competing evidence regarding the issues of whether the person meets the statutory definition of an elderly person, § 825.101(5), Fla. Stat. (1995), and whether the "particularized guarantees of trustworthiness" and "safeguards of reliability" are sufficiently established. (V1, R91).

In paragraph 1 of the trial court's order, the trial court made no finding of fact regarding whether the circumstances surrounding the making of Mr. Ford's statements or the method as to how the statements were taken or recorded. Instead, the trial court deferred, finding that the state would have to lay an

appropriate predicate before the statement could be admitted. This type of finding thwarted the rational underlying the need for "particularized guarantees of trustworthiness" to be so strong as to meet the reliability requirements of other firmly rooted hearsay statements and the necessity that a record finding of such be made prior to the admission of the hearsay statement. There already had been two hearings on the matter of the admissibility of Mr. Ford's hearsay statements and yet the trial court still made no specific finding of fact as required by the statute as to any "guarantees of trustworthiness." This procedure employed by the trial court, plainly, did not comport with the procedures outlined by this Court in State v. Townsend, 635 So. 2d at 957.

In paragraph 3 of the trial court's order, the trial court made findings of fact regarding the "safeguards of reliability" in terms of the time, content, and circumstances of the statement. According to the trial court, Mr. Ford's two statements, made at a time when he had bad sight, bad hearing, trouble breathing, and good and bad days mentally, were, nevertheless, reliable because; the statements were made to a law enforcement officer who had no personal stake in the case, the nature and duration of the abuse was short-term; and there was no relationship between Mr. Ford and Mr. Conner. Also, the trial court found that the state would have to lay a predicate as to the reliability of the defendant. These findings of fact were patently inadequate "particularized

guarantees of trustworthiness" and "safeguards of reliability" to demonstrate an indicia of reliability so great as to negate any need for adversarial questioning. See State v. Townsend, 635 So. 2d at 960. The "particularized guarantees of trustworthiness" are found in the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. While the duration of the crime and relationship between the alleged perpetrator and the alleged victim are factors to be considered under § 90.803(24)(a)1, Fla. Stat. (1995), these factors, i.e., findings, were wholly insufficient "safeguards of reliability" to override Mr. Conner's right of confrontation as envisioned under Perez, Townsend, or Wright, particularly, when considered under the circumstances of the present case. See Mathis v. State, 682 So. 2d 175, 178-79 (Fla. 1st DCA 1996) regarding insufficiency of trial court's findings of reliability in child victim hearsay statement, § 90.803(23), Fla. Stat. (1995).

Mr. Ford had bad eyesight and was legally blind. Moreover, according the testimony of Mr. Ford's relative, Mr. Ford had good days, meaning when he was physically, mentally, and emotionally well and he had bad days, meaning when he was not physically, mentally, and emotionally well. (V1, R94-95). What possible relevance with respect to "safeguards of reliability" did the facts have that the offenses charged in this case were of short duration or that Mr. Ford and Mr. Conner did not know each other? To meet

the "safeguards of reliability," the exacting strict scrutiny test required clear and convincing proof of evidence possessing "particularized guarantees of trustworthiness" so trustworthy that adversarial testing would add little to its reliability. The trial court's order contained no specific finding of fact to suggest that Mr. Ford's hearsay statement, given his poor sight, regarding what he saw, was reliable to the degree necessary, i.e., that it contained the "particularized guarantees of trustworthiness," to make cross-examination futile.

As in Wright, unless an affirmative reason, arising from the circumstances in which the statement was made, provided a basis for rebutting the presumption that Mr. Ford's hearsay statement was not worthy of reliance at trial, the Confrontation Clause required exclusion of the out-of-court statement. See Idaho v. Wright, 497 U.S. at 819-21. The trial court's findings, in this respect, plainly did not set out any affirmative reason to rebut the presumption that Mr. Ford's statement was not worthy of reliance at trial. Mr. Ford had bad eyesight and he was legally blind. Further, Mr. Ford had good and bad days, mentally and physically. Constitutionally, Mr. Conner was entitled to explore Mr. Ford's physical limitation regarding his sight in front of the jury, not to mention the issue of whether he was having a good day or bad day mentally, particularly, considering the fact that the most incriminating aspect of Mr. Ford's hearsay statements were

regarding what Ford said he observed and what he recalled. See U.S. Const., amend. VI, and Art. 1, § 16, Fla. Const. His first statement was given the next day and his second statement was made seventeen days after the incident. If Ford was having mentally good and bad days, his memory and ability to recollect may have been so impaired at the time of the statements that they must be considered unreliable and, thus, inadmissible. The trial court made no specific finding regarding Ford's competence that would suggest that trial court even considered the issue as part of the determination of whether Ford's hearsay statements possessed the requisite "guarantees of trustworthiness" envisioned by the EPDA hearsay statute and applicable case law.

Also, in paragraph 3, the trial court found one of the factors that belied the reliability of Mr. Ford's hearsay statements was that the statements had been given to law enforcement officer who had no interest in the incident. Should the hearsay statements be admitted, likely they will be admitted through the testimony of law enforcement officer which may unfairly bolster Mr. Ford's credibility. Regarding the potential impropriety of this type of bolstering effect, this Court, in Rodriguez v. State, 609 So. 2d 493 (Fla. 1992), observed:

> [W]e take this opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statements which are not properly admissible. Particular care must be taken to avoid such testimony by law enforcement officers. As noted by the district courts:

> The rationale prohibiting the use of prior consistent statements is to prevent "putting a cloak of credibility" on the witness's testimony. When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave.
>
> Carroll v. State, 497 So. 2d at 256-57 (quoting Perez v. State, 371 So. 2d at 716-17).

Rodriguez v. State, 609 So. 2d at 500. While dissimilar to the extent that Mr. Ford does not testify other than his hearsay statements, the prejudicial effect to Mr. Conner is no less unfair if the Mr. Ford's statements are allowed to be bolstered and corroborated by the law enforcement officer while at the same time denying Mr. Conner his constitutional right to confront the witness. Neither the trial court nor the jury should be allowed to be improperly influenced by the fact that the statement was given to a law enforcement officer. That fact has little bearing on whether Mr. Ford's statements are reliable, only that Mr. Ford's statements may have been taken down or recorded under circumstances that do not show lack of trustworthiness. As the court observed in Edwards v. State 662 So. 2d 405 (Fla. 1st DCA 1996):

> In Quiles, the Second District appears to hold that a statement given to the police by a witness who was directly involved in the crime--there a victim--is per se inadmissible, because a police investigation of the crime implicitly gives rise to a motive to falsify. Although Keller and Bianchi cite this holding from Quiles with approval, the language in both cases is dicta, because in each the appellate court determined from a reading of the record that the defendant during cross-examination had not made a charge of recent fabrication; therefore, the

prior consistent statements were improperly admitted to bolster the credibility of the witness.

Edwards v. State 662 So. 2d at 406 (citing Keller v. State, 586 So. 2d 1258 (Fla. 5th DCA 1991); Bianchi v. State, 528 So. 2d 1309 (Fla. 2d DCA 1988); and Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988). Although the Edwards court, dealing with prior consistent statements, ultimately found the mere fact that police are conducting an investigation into the crime did not automatically establish a motive to falsify on the part of the witness, the question of reliability, nevertheless, remains open. Also, in this case, the second hearsay statement corroborates the first and vice versa. Typically, prior consistent statements are inadmissible as hearsay unless offered, pursuant to § 90.801(2)(b), Fla. Stat. (1995), to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication.

Finally, in paragraph 5 of the trial court's order, the trial court found that there was sufficient corroboration of the declarant's statement, not sufficient corroboration of the offense as required by the EPDA hearsay statute. See § 90.803(24)(a)2b, Fla. Stat. (1995). Again, this type of finding by the trial court thwarted the rational underlying the need for corroboration and the necessity that a record finding of such be made prior to the admission of the hearsay statement. As argued by the defense during one of the hearings, the issue of corroboration presented a Catch-22 situation for the state. (V1, R68-69). The state appeared

unable to corroborate the offenses without admitting Mr. Conner's statement recorded by a confidential informant's electronic bug. Yet, Mr. Conner's statement was inadmissible until the corpus delicti of the crimes had been established. The state could not establish the required corpus delicti with respect to the crimes charged until the EPDA hearsay statements of Mr. Ford were admitted. Thus, the state appeared caught in a Catch-22, with proof of either the corroboration or corpus delicti contingent upon proof of the other.

Based on the argument and authorities above, the EPDA hearsay statute, as applied in Mr. Conner's case, was unconstitutional and constituted reversible error. The findings underlying the trial court's order were either wholly insufficient or improperly postponed to the trial. Additionally, these types of record findings which effectively deferred any specific finding of fact until the trial thwarted the notice provision and impact on the lack of due process to be afforded to the defendant, Mr. Conner.

Point 3: The EPDA hearsay exception, by its terms, is void for vagueness, denies due process, and is unconstitutional on its face.

Beside being violative of the confrontation clause, Mr. Conner argued that the EPDA hearsay statute also was void for vagueness and, as such, denied him constitutional due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 9 of the Florida constitution. Again, Mr.

Conner focused on the definitions of "disabled adult" and "elderly person" as set out in §§ 825.101(4) and (5), Fla. Stat. (1995).

In Perez v. State, 536 So. 2d 206 (Fla. 1988), the Florida Supreme Court made the following observations regarding a similar constitutional due process attack on the child victim hearsay statute, § 90.803(23), Fla. Stat. (1995):

> We also reject Perez' argument that the factors set forth in the statute for the court to consider in determining the reliability of the child victim's statements are too vague to guarantee an accused defendant that the statements bear sufficient indicia of reliability. The reliability of a hearsay declaration is a question to be determined by the court. See § 90.803(23)(a)(1), Fla. Stat. (1985). Accord State v. Superior Court, 149 Ariz. 397, 403, 719 P. 2d 283, 289 (Ct. App. 1986). The statute sets forth the factors to be considered in determining reliability: time, content, and circumstances. These factors are sufficient to enable the court to determine whether the hearsay is marked with such trustworthiness that " 'there is no material departure from the reason of the general rule' " excluding hearsay. Ohio v. Roberts, 448 U.S. at 65, 100 S. Ct. at 2538 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107, 54 S. Ct. 330, 333, 78 L. Ed. 674 (1934)).
>
> Although the legislature provided a list of various elements that the court may consider in determining whether the time, content, and circumstances of the child victim's statement provide sufficient safeguards of reliability, section 90.803(23)(a)(1), Florida Statutes (1985), the list is not exhaustive, as demonstrated by that portion of the subsection which provides that the court may also consider "any other factor deemed appropriate." Indeed, there could be no exhaustive list of elements to be considered. Each declaration, factually, will present varying elements relevant to the factors of time, content, and circumstance and the determination of reliability cannot rest upon any specific calculation.

Perez v. State, 536 So. 2d at 210. Under the rational of Perez, a totality of circumstances test, similar to that outlined in Wright

and Townsend, appeared to overcome attack that the child victim hearsay statute, § 90.803(23), Fla. Stat. 1995), was void for vagueness and, therefore, not unconstitutional. Unlike the child victim hearsay statute, Mr. Conner argues that the factors set forth in the EPDA hearsay statute for the trial court to consider in determining the reliability of the elderly or disabled victim's statements are too vague to guarantee an accused defendant that the statements bear sufficient indicia of reliability. A totality of circumstances test for determining sufficient "safeguards of reliability" for the hearsay statement of an "elderly person" or "disabled adult" MUST, NOT MAY, include consideration of the elderly person's or disabled adult's physical and mental infirmities. Under the EPDA hearsay statute, however, as presently written, the trial court, in making its determination as to the "safeguards of reliability" of an "elderly person's" or a "disabled adult's" hearsay statement(s) MAY, BUT NOT MUST, consider the mental and physical age and maturity of the elderly person or disabled adult; MAY, BUT NOT MUST, consider the reliability of the elderly person or disabled adult. See § 90.803(24)(a)1, Fla. Stat. (1995). To the extent that the EPDA hearsay statute allows for an elderly person's or a disabled adult's physical and mental infirmities not to be considered, any totality of circumstances test for determining "particularized guarantees of trustworthiness" or "safeguards of reliability" is vague and clearly insufficient as

to be so trustworthy and reliable that adversarial testing would add little. Accordingly, the EPDA hearsay statute, on its face, violate's the due process clause of both state and federal constitutions. See U.S. const., amend V and XIV; Art. 1, § 9, Fla. Const.

Moreover, as pointed out above, the trial court, in applying the statute, must initially determine whether the person or adult fits within the definition of a "disabled adult" or an "elderly person." As argued at Mr. Conner's hearing on his Motion to Declare Florida's Elderly Person/Disabled Adult Hearsay Statute Unconstitutional, the statute provides no guidance for that determination other than the explicit language contained §§ 825.101(4) and (5), Fla. Stat. (1995), respectively. (V1, R132-35). An elderly person is "a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired." § 825.101(5), Fla. Stat. (1995). To the degree that the phrase "to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired" is undefined, the statue is constitutionally vague, particularly, when considered in relation to "particularized guarantees of trustworthiness" and "safeguards

of reliability." Without knowing what the phrase "to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired" means, the trial court cannot determine whether a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning fits within the definition of an "elderly person," pursuant to § 825.101(5), Fla. Stat. (1995) such that the EPDA hearsay statute is unconstitutionally vague.

The trial court, as well as the parties, in attempting to qualify or disqualify an elderly person's hearsay statement under the EPDA hearsay exception, must reconcile the contradictions inherent in the statute. First, the trial court must find the person to be an "elderly person," i.e., "a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired." Second, the trial court must find "safeguards of reliability" characterized by "particularized guarantees of trustworthiness" that are so trustworthy that adversarial testing would add little to its reliability." See State v. Townsend, 635 So. 2d at 960. The "elderly person" must both suffer from the outlined infirmities of age to the extent that

the ability to provide adequately for the person's own care or protection is impaired, while at the same time, making a statement which is characterized by the "particularized guarantees of trustworthiness" and "safeguards of reliability" such that adversarial testing, i.e., cross-examination, would add little. How does the trial court treat the issue of the "elderly person's" competency? When applying the test for meeting the definition of "elderly person," the trial court must find that age-related infirmities so debilitating that the "elderly person's" ability to care for and protect himself are impaired. At the same time, the trial court must apply a totality of circumstances test that includes the issue of the "elderly person's" competency to insure "particularized guarantees of trustworthiness." In Townsend, the Florida Supreme Court observed:

> We conclude that a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfies the "testify or be unavailable" requirement of section 90.803(23). This does not mean, however, that a trial judge should not look to the competency of the child in determining whether the hearsay statements of the child are otherwise admissible. To the contrary, as explained in the discussion that follows, the competency of the child is a factor that should be considered in determining the trustworthiness and reliability, and thus the admissibility, of hearsay statements attributable to the child.

State v. Townsend, 635 So. 2d at 956. Presumably, the competency of the "elderly person" is a factor to be considered in cases involving hearsay statements under § 90.803(24), Fla. Stat. (1995).

The EPDA hearsay statute, however, provides no guidance as to how the trial court makes this determination and, as such, is constitutionally vague on its face.

Also, the EPDA hearsay statue is silent, i.e., vague, as to the required burden of proof that the proponent of the "elderly person's" hearsay statement must overcome prior to the statement's admission at trial. According to Judge McDonald's concurring opinion in Townsend, the trial court shall require clear and convincing proof of "particularized guarantees of trustworthiness" which must be found to be so trustworthy that adversarial testing would add little to its reliability. See State v. Townsend, 635 So. 2d at 960. Arguably, the same standard of proof, i.e., clear and convincing evidence, would be required from the proponent of the EPDA hearsay statement in attempting to provide a basis for rebutting the presumption that the "elderly person's" hearsay statement is not worthy of reliance at trial. Otherwise, the Confrontation Clause would require exclusion of the out-of-court statement.

In addition to the due process concerns regarding the EPDA hearsay statute's vagueness, fundamental fairness and the right to an adequately prepared defense require consideration of the notice provision. The EPDA hearsay statute requires ten day notice. Further the notice is required to provide a written statement of the content of the elderly person's or disabled adult'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. See § 90.803(24)(b), Fla. Stat. (1995). Presumably, the notice requirement as written puts the opponent of the statement and the trial court on notice of the reasons and circumstances underlying why the proponent of the statement believes that the "elderly person" hearsay statement has the requisite "particularized guarantees of trustworthiness" to override the defendant's, i.e., the opponent's, constitutional right of confrontation. In those circumstances where those "particularized guarantees of trustworthiness" are susceptible to attack by the opponent, the ten day notice provides time to investigate and respond at the hearing mandated by the statute. Inherent in the right to counsel, is the right to an adequate defense, properly investigated and prepared in a timely fashion. If the trial court enters its record findings in a written order prior to the trial, then, arguably, the defendant has an opportunity to adequately prepare a full and complete defense. If the trial court, however, does not make specific record findings of fact as required regarding the determination of the issues presented in the statute, then, the defense has been denied the opportunity to prepare a full and complete defense.

According to the Florida Supreme Court in Valle v. State, 394

So. 2d 1004 (Fla. 1981):

> It is a basic due process right and essential to a fair trial that defense counsel in a criminal case be afforded a reasonable opportunity to prepare his case. The United States Supreme Court has made this clear:
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> > We have many times repeated that not only does due process require that a defendant, on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel, ... but that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.
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> White v. Ragen, 324 U.S. 760, 763-64, 65 S. Ct. 978, 980, 89 L. Ed. 1348 (1945) (citations omitted). Accord, Hawk v. Olson, 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 (1945); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).
>
> This Court has also set forth this basic premise:
>
> > Justice requires, and it is the universal rule, observed in all courts of this country, it is most sincerely to be hoped, that reasonable time is afforded to all persons accused of crime in which to prepare for their defense. A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime, without permitting him the privilege of examining the charge and time for preparing his defense. It is unnecessary to dwell upon the seriousness of such an error; it strikes at the root and base of constitutional liberties; it makes for a deprivation of liberty or life without due process of law; it destroys confidence in the institutions of free America and brings our very government into disrepute.
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> Coker v. State, 82 Fla. 5, 7, 89 So. 222, 222 (1921).

Valle v. State, 394 So. 2d at 1007.

Does the trial become a farce when, for example, the defendant

in unable to structure voir dire questioning to deal with the "elderly person's" hearsay statement, or unable to use opening statement to touch on the issue because no determination has been made regarding the admissibility of the "elderly person's" hearsay statement. If the trial court postpones or, otherwise delays making the required findings of fact until the trial, as in Mr. Conner's case, the defendant has been substantially prejudiced in preparation of an adequate defense and due process right to a fair trial has been violated. Fundamental fairness, inherent in due process, demands otherwise.

Point 4: The EPDA hearsay exception, by its terms, is void for vagueness, denies due process, and is unconstitutional as applied.

As occurred in Mr. Conner's case, the defense, as the opponent of the victim's hearsay statement, was forced to argue that Mr. Ford was not an "elderly person" under the statute, while at the same time arguing that the statement lacked the sufficient indicia of reliability or surrounding circumstances of trustworthiness, i.e., "the particularized guarantees of trustworthiness" or "safeguards of reliability," to overcome the need for face-to-face confrontation in the form of cross-examination. In arguing that Mr. Ford was not an "elderly person," no definition was available to guide the defense as to what the phrase "to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired" meant, such that the

unconstitutionally vague definition of "elderly person" prevented the defense from demonstrating that Ford was not an "elderly person" under the EPDA hearsay statute. More important, however, the trial court was without guidance to make the determination as to whether Mr. Ford was an "elderly person," pursuant to § 825.101(5), Fla. Stat. (1995), a necessary determination in applying the EPDA hearsay statute.

Plainly, the trial court was caught in this legislatively created double-bind of having to find that the victim was suffering from age-related infirmities to impair his ability to provide adequate care and protection for himself, while at the same time finding that the state had proven, by clear and convincing evidence, that Mr. Ford's hearsay statement had the requisite "particularized guarantees of trustworthiness" for the statement to be admitted at Mr. Conner's trial. The quandary for the trial court was even more difficult in Mr. Conner's case because Mr. Ford made two statements, one, right after the alleged offenses, when he was not only capable of, but was providing adequate care and protection for himself, and one, given two weeks later, when he was far less capable of providing the same care and protection, i.e., when Mr. Ford was experiencing good and bad days, mentally.

To make matters worse for Mr. Conner, the trial court's written order deferred on the issues relevant to the determination of whether Mr. Ford's hearsay statements possessed the

"particularized guarantees of trustworthiness" required by the statute. The trial court reserved ruling on issue of whether the circumstances surrounding the making of the statement indicated a lack of trustworthiness as required by § 90.803(24)(a), Fla. Stat. (1995). Instead, the trial court required the state to lay an appropriate predicate before the statement would be admissible. The reserved ruling neglects to indicate the burden of proof required for the predicate. Since the determination of whether the hearsay statement was made under circumstances which do not lack trustworthiness, the issue is part of the trial court's finding of "particularized guarantees of trustworthiness" and should require proof by clear and convincing evidence. Also, by delaying the determination, the trial court substantially prejudiced Mr. Conner's preparation of an adequate defense as argued above. Finally, the written order failed to inform Mr. Conner whether that determination as to an appropriate predicate would be made outside of the jury's presence at a hearing prior to the start of the trial or at a hearing during the trial, with the jury, waiting in the juryroom, outside the courtroom.

Similarly, the trial postponed determination of the reliability of the declarant, one of the "safeguards of reliability" and an integral aspect as to the "particularized guarantees of trustworthiness." The delay again has due process considerations as argued. How could Mr. Conner prepare an adequate

defense without knowing whether Mr. Ford's hearsay statements, one or both, would be admissible against him at trial? The answer was that he could not and, at a minimum, would have been required to prepare for two trials, one with the statements and one without. Fundamental fairness requires the defendant not be required to defend against more than one set of accusations. Due process requires that Mr. Conner know prior to trial, what specific facts against which he must be prepared to defend, those accusations should not be in the alternative, as appeared to be the case according the trial court's written specific findings of fact.

Thus, based on the arguments presented herein, Mr. Conner urges this Court to find that the Second District Court of Appeal erred by finding that trial court had not committed reversible error by denying the defense motion to have the Florida Elderly Person or Disabled Adult hearsay statute declared unconstitutional. This Court should declare the EPDA statute unconstitutional either, on its face, or, alternatively, as applied. Since, the state has stipulated the issue is dispositive as to the armed kidnapping and armed robbery charges, the adjudications of guilt as to those counts in case number CF95-5261A1-XX must be vacated and his case remanded for resentencing within the guidelines, including consideration as to whether Mr. Conner would qualify for sentencing as a youthful offender.

CONCLUSION

Mr. Conner, based on the arguments included herein, respectfully, requests that this Court quash or reverse that portion of the Second District Court of Appeal's decision finding that the trial court's properly denied the defense motion to find Florida's Elderly Person or Disabled Adult hearsay statute unconstitutional, order that the adjudications of guilt and sentences be vacated as to the armed kidnapping and armed robbery counts in case number CF95-5261A1-XX, and remand his case for resentencing.

TABLE OF CITATIONS (continued)

APPENDIX

1. Copy of Second District Court of Appeal decision in David R. Conner v. State, No. 96-03016 (Fla. 2d DCA March 27, 1998)

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (727) 873-4739, on this _____ day of September, 1999.

Respectfully submitted,

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