

IN THE SUPREME COURT OF FLORIDA

DAVID R. CONNER,                               :  
  Petitioner,                               :  
vs.   :  
STATE OF FLORIDA,                               :  
  Respondent.                               :  
\_\_\_\_\_:

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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FLORIDA BAR NUMBER 365610

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STATEMENT OF THE FACTS

Regarding his understanding of the EPDA statute, § 90.803(24), Fla. Stat. (1995), with respect to the definition of an elderly person or disabled adult, contained in § 825.101, Fla. Stat. (1995), the trial court commented:

THE COURT: Let me interrupt you. It seems to me that I don't know how you would ever qualify someone that had organic brain damage as a witness, because part of what the statute -- I think there is a problem here, because 825, I'm not sure the definition of disabled adult or elderly person --

(V1, R103-04).

Later, at the hearing on Mr. Conner's Motion To Declare Florida's Elderly/Disabled Adult Hearsay Statute Unconstitutional, the trial court further commented:

THE COURT: Then you -- part of proving the disability is to prove bad eyesight, hearing problems, etcetera. Have you not kind of set yourself up for a reliability problem when the time comes that the Court has to deal with reliability?

MS. SCARBOROUGH (For the state): Just because he has bad eyesight and bad hearing doesn't mean that he was no, in fact, burglarized, tied to a chair and robbed. He did not identify the --

THE COURT: Well, that may be. That's certainly -- wait a minute. That's a circular argument. I'm not even sure what kind of argument it is.

(V1, R146).

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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?

Petitioner, David R. Conner, relies on his arguments presented in his initial brief on the merits as to the Elderly Person or Disabled Adult hearsay exception, § 90.803(24), Fla. Stat. (1995), being unconstitutional on its face and as applied since 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. Nevertheless, Mr. Conner briefly replies to Respondent's assertions that Mr. Conner is precluded from making various arguments which Respondent contends were not preserved.

As to Respondent's complaints regarding Mr. Conner's failure to preserve arguments presented in his initial brief on the merits, first, Respondent complains that Mr. Conner is precluded from challenging the constitutionality of § 90.803(24), Fla. Stat. (1995) as applied because the trial court failed to make the required findings as to the "particularized guarantees of

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trustworthiness" and sufficient specific findings regarding "safeguards of reliability." Mr. Conner, clearly reserved the right to appeal the constitutionality of § 90.803(24), Fla. Stat. (1995) on its face and as applied. (V1, R156, V2, R185-86, 198-200). The issues underlying the constitutional challenge are those generally articulated in Mr. Conner's motion challenging the statute's constitutionality and those argued during the hearing on that motion as well as any other fundamental constitutional issues involving the denial of due process which may be brought to this Court's attention for the first time on direct appeal. (V1, 128-51). See Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983).

The constitutionality of § 90.803(24), Fla. Stat. (1995) as applied was attacked according the facts contained in the record regarding application of the statute in Mr. Conner's case to the extent shown by the record, including the trial court's order (V1, R126-27). See also Cantor v. Davis, 489 So. 2d 18 (Fla. 1986), wherein this Court observed:

Prudence dictates that issues such as the constitutionality of a statute's application to specific facts should normally be considered at the trial level to assure that such issues are not later deemed waived. Once this Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case. Trushin v. State, 425 So. 2d 1126 (Fla. 1982); Savoie v. State, 422 So. 2d 308 (Fla. 1982); Negron v. State, 306 So. 2d 104 (Fla. 1974).

Cantor v. Davis, 489 So. 2d at 20. Thus, Respondent's contention that Mr. Conner is not in a position to challenge the

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constitutionality of § 90.803(24), Fla. Stat. (1995) as applied is also without merit at least to the extent that this Court, in its discretion, chooses to consider those issues affect this case.

Also without merit are Respondent's complaints that the issues relating to burden of proof, delayed ruling regarding "guarantees of trustworthiness," lack of corroboration, and failure to make definitive ruling, were not preserved for appeal. In attacking the constitutionality of the statute on its face and as applied, Mr. Conner put the trial court on notice that the statute was considered to be facially defective as well as defective as applied. Thus, to the extent that the issues complained of by Respondent impact § 90.803(24), Fla. Stat. (1995) in terms of its construction or application, they necessarily related, directly or indirectly, to the denial of Mr. Conner's United State's and Florida constitutional rights to confrontation and due process. Alternatively, the issues relating to burden of proof, delayed ruling regarding "guarantees of trustworthiness," lack of corroboration, and failure to make definitive ruling constituted fundamental errors that were "basic to the judicial decision under review and equivalent to a denial of due process. D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988); Ray v. State, 403 So. 2d 956 (Fla. 1981)." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993).

CONCLUSION

Mr. Conner, based on the arguments included herein as well as in his initial brief, 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 CF95-05261A1-XX, and remand his case for resentencing.

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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