IN THE SUPREME COURT OF FLORIDA

DAVID RICHARD CONNER, PETITIONER, v. STATE OF FLORIDA, RESPONDENT.	Case No. 92,835

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the following additions:

At the hearing on the admissibility of the victim's hearsay statements, the prosecutor explained that the police officer in question was not present to testify because she (the prosecutor) had intended to rely on the police report and the officer's deposition regarding what the victim had told the officer and had not anticipated a need for the officer's testimony (V 1 R 100-101, 111). Defense counsel did not object—at that hearing, at the hearing on Petitioner's motion to declare Section 90.803(24), Florida Statutes (1995), unconstitutional, or at Petitioner's plea hearing—to waiting until the trial for the hearing on the issue of the reliability of the victim's statements to the officer.

Regarding the issue of the constitutionality of Section 90.803(24), the trial court made the following comments to defense counsel:

> To the extent that the statute, and we don't have this here, suggests that somebody that has organic brain damage would be incompetent to testify in a court in person, becomes competent because they later die, I would agree with you [that such a result should not be permitted].
>
> But in a criminal law, I understand the

> right of confrontation, but that can be dealt with in many ways....The problem is trustworthiness of the statement and always has been....I never have liked the idea if you threaten and tell someone you're going to kill them, and then the hearsay statement can't come in [if your victim tells someone of your threat and you subsequently kill them, where-as, if you subsequently unsuccessfully attempt to kill them, they can testify concerning your threat (V 1 R 106-107)].
>
> ...[The Legislature] attempted to address this problem [by adding the hearsay exception found in Section 90.803(24)]. I think there is a credibility problem of any witness and that's equally true of a hearsay statement and I think those matters are subject to argument and there may be appropriate instructions that should be given...
>
> (V 1 R 117-118)

At the hearing on Petitioner's motion to declare Section 90.803(24) unconstitutional, the trial court asked the following questions of defense counsel:

> Suppose, rather than under this exception, the victim had made these statements when he was dieing [sic], known to be dieing [sic], meeting all the dieing [sic] declaration criteria, wouldn't you have the same problems about being unable to confront?
>
> (V 1 R 141)
>
> * * *
>
> And let's take this reasoning a little further.
>
> As I recall, if you go back all the way back to Blackstone and forward, the reason for the dieing [sic] declaration is the common law, case law, rather than statute, found indicia of reliability, somebody is dieing [sic], they're going to meet their maker,

> they're going to heaven or to burn in hell and no one is going to lie at that point in time.
>
> And that of course evolved a couple hundred years ago when most people felt exactly that way. Now, probably half the populace doesn't think they're going anyplace.
>
> Where is your indicia of reliability in today's culture? Where people -- and even people who believe in heaven and hell don't believe that it's necessarily one of flames and paradise, etcetera [sic], that people thought 200 years ago. What happened to the indicia of reliability? And if that analysis is correct, if there is no indicia of reliability does that not violate the due process, then?

(V 1 R 142)

SUMMARY OF THE ARGUMENT

Section 90.803(24), Florida Statutes (1995), is not unconstitutional. It does not violate the right of an accused to confront the witnesses against him and is not void for vagueness. Neither does it work a denial of due process, either on its face or as applied to Petitioner.

ARGUMENT

> WHETHER THE DISTRICT COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF SECTION 90.803(24), FLORIDA STATUTES (1995).

The United States Supreme Court has held that, although "the absence of proper confrontation at trial 'calls into question the ultimate "integrity of the fact-finding process,"'...competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial" so long as the declarant is unavailable.

Ohio v. Roberts, 448 U.S. 56, 64, 100 S. Ct. 2531, 2538, 65 L. Ed. 2d 597 (1980) (citations omitted). As early as *Mattox v. United States*, 156 U.S. 237, 243, 15 S. Ct. 337, 340, 39 L. Ed. 409 (1895), the U.S. Supreme court stated that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox* went on to note that admission of dying declarations has been permitted from time immemorial because "the sense of impending death is presumed to remove all temptation to falsehood." 156 U.S. at 244, 15 S. Ct. at 340.

In *Idaho v. Wright*, 497 U.S. 805, 822, 110 S. Ct. 3139, 3150, 111 L. Ed. 2d 638 (1990), the U.S. Supreme Court listed several factors that state and federal courts had identified that the Supreme Court thought properly related to whether hearsay statements made by a child witness in child sexual abuse cases are reliable and bear "particularized guarantees of trustworthiness" under the Confrontation Clause, including: spontaneity and consistent repetition, the mental state of the declarant, and lack of a motive to fabricate. At the same time, however, the Court held that the U.S. Constitution does not require "a fixed set of procedural prerequisites to the admission" of hearsay evidence. 497 U.S. at 818, 110 S. Ct. 3148.

The statute involved in *Wright*, Idaho's residual hearsay exception, provided:

> "Rule 803. Hearsay exceptions; availability of declarant immaterial.—The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> . . . . .
>
> "(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Idaho Rule Evid. 803(24).

497 U.S. at 811-812, 110 S. Ct. at 3144-3145. The constitutionality of this statute was not in issue in *Wright*, but nothing in the *Wright* opinion suggests that the Supreme Court considered it to be constitutionally infirm. The U.S. Supreme Court merely agreed with the Idaho Supreme Court that, under the circumstances of that case, insufficient guarantees of the trustworthiness of the particular statements in question had been shown.

As Petitioner recognizes, the challenged statutory subsection, Section 90.803(24), is substantially similar to Section 90.803(23), the constitutionality of which was upheld by this Court in *Perez v. State*, 536 So. 2d 206 (Fla. 1988), *cert. denied*, 492 U.S. 923, 109 S. Ct. 3253, 106 L. Ed. 2d 599 (1989), and reaffirmed in *State v.*

Townsend, 635 So. 2d 949 (Fla. 1994). Accordingly, this Court should follow *Perez* and *Townsend* and uphold the constitutionality of Section 90.803(24).

Although he has striven mightily to do so, Petitioner has failed to demonstrate that Florida's hearsay exception for elderly persons and disabled adults, or, as Petitioner has dubbed it, EPDA, has insufficient guarantees of trustworthiness.

In attempting this demonstration, Petitioner first argues that "an acceptable indicia [sic] of reliability necessarily associated with traditional hearsay exceptions is missing [from Section 90.803(24)] by definition" (Petitioner's brief at p. 9). He bases this contention on the fact that the definition of "elderly person" contained in Section 825.101, Florida Statutes (1995), contains no indicia of reliability. However, Petitioner overlooks the fact that Section 90.803(24) itself requires a hearing by the trial court and a finding "that the time, content and circumstances of the statement provide sufficient safeguards of reliability" before a hearsay statement by an elderly person can be admitted under this statutory exception to the hearsay rule.

Petitioner further argues, in essence, that, by definition, an elderly person or disabled adult within the meaning of the challenged statute can never be mentally competent enough that his or her hearsay statements are trustworthy or reliable. Indeed, at one point in his initial brief filed in the Second District, Petitioner expressly stated that "the 'elderly person' is, by

definition, an unreliable, untrustworthy witness" (at p. 17). Petitioner has softened that language somewhat in his initial brief on the merits filed in this Court, now stating at pp. 22-23:

> "elderly persons," by definition, more likely than not, will be unreliable, untrustworthy witnesses, in the legal competency sense, to the extent that..."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.

Respondent, however, continues to strongly disagree. An individual's inability to physically care for all of his or her own needs does not necessarily impact upon his or her mental competence to any degree whatsoever—it can hardly be seriously contended that the fact of being legally blind or hearing impaired, even to the point of total blindness of deafness, adversely affects one's memory or renders him or her a liar! Obviously, a blind person will not be able to describe the perpetrator's appearance, and a deaf person will not be able to identify the perpetrator's voice, but an individual with some sensory disability may well be able to supply information gleaned by use of his or her remaining senses. And it is certainly true that some elderly persons, by virtue of their disability, such as the poor memory with which some are afflicted and of which Petitioner complains, may be unreliable,

untrustworthy witnesses, but, in such cases, the defendant's remedy is to challenge the reliability and trustworthiness of their statements, which the statute contemplates.

Petitioner goes on to argue that the trial court's findings in the instant case rendered the statute in question unconstitutional as applied because, Petitioner argues, "[t]he trial court's findings were clearly insufficient to insure the 'particularized guarantees of trustworthiness' had been met" (Petitioner's brief at p. 30). To the contrary, Respondent would submit that the trial court did an excellent job of setting forth its findings, which were not intended and did not purport to be complete, keeping in mind that it did not make the ultimate ruling as to whether the victim's statements would be admissible, ruling that the State would have to lay a predicate as to the reliability and trustworthiness of the victim before the victim's statements could be admitted. Thus, the trial court did not make its final ruling on this issue and may have ended up ruling in Petitioner's favor.

However, Petitioner chose not to find out and instead pled nolo contendere, specifically reserving his right to appeal only the denial of his motion to declare Section 90.803(24) unconstitutional. Inasmuch as the trial court made no finding on the issue of the trustworthiness of the victim's statements or on the ultimate issue of the reliability of either statement by the victim, Petitioner is not in a position to challenge the constitutionality of Section 90.803(24) as applied.

As far as burden of proof is concerned, Petitioner cites no case law requiring a statute that concerns an evidentiary matter to specify the burden of proof to be applied, and undersigned counsel knows of none. Furthermore, given the fact that a preponderance of the evidence standard has been upheld in some criminal law contexts, such as either consent or waiver of one's Miranda rights in the absence of illegal action by law enforcement, *State v. Boyd*, 615 So. 2d 786 (Fla. 2d DCA 1993); *Balthazar v. State*, 549 So. 2d 661 (Fla. 1989), it is unclear how the absence from the challenged statute of a specified standard of proof would render the statute unconstitutional. If Petitioner had wished to argue on appeal the issue of whether the State had met its burden of proving that the victim in this case met the statutory definition of an elderly person and what standard of proof is applicable thereto, he could and should have reserved the right to appeal that issue. Having failed to do so, he may not argue it now. Fla. R. App. P. 9.140-(b). It must also be emphasized that Section 90.803(23) suffers from the same "infirmities" regarding burden of proof as Section 90.803(24)—except for Petitioner's claim that it shifts the burden of proof regarding whether the declarant meets the statutory definition of an elderly person, which is unsupported by the statutory language or by anything else other than the sheer and unexplained speculation of opposing counsel—and its constitutionality has been upheld.

Petitioner goes on to complain about the trial court's

decision not to make a final ruling on the admissibility of the victim's statements until the State had attempted to lay a proper predicate showing their reliability and trustworthiness. Again, having failed to reserve this issue for appeal, Petitioner is not entitled to raise it. Moreover, it is Petitioner who prevented an ultimate ruling from being made by deciding to plead nolo contendere and to reserve for appeal only the denial of his motion to declare Section 90.803(24) unconstitutional instead of going to trial. Again, Petitioner cites no legal authority that would suggest any impropriety in the trial court's handling this situation in the way that it did, and undersigned counsel knows of none. Furthermore, because the trial court made no final ruling, Petitioner is not in a position to fault the trial court's rulings as to whether the victim's statements were either reliable or trustworthy, since the trial court made *no* ruling on the trustworthiness issue and ruled only as to limited aspects of the reliability issue.

As to Petitioner's complaint that the trial court referred to corroboration of the victim's *statement* rather than of the *offense*, again, this argument has nothing to do with the constitutionality of the statute, the only issue Petitioner preserved for appeal, and he may therefore not be heard to make it. In any event, it is without merit inasmuch as such a complaint about the trial court's choice of words is a matter of mere form over substance—the statements in question related to the offenses charged.

As to Petitioner's claim that the statute is void for vagueness based on the asserted vagueness of the statutory definition of "elderly person," Respondent maintains that the definition contained in Section 825.101 is *not* unconstitutionally vague. It should initially be noted that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 714, 42 L. Ed. 2d 706 (1975); *State v. Barnes*, 686 So. 2d 633 (Fla. 2d DCA 1996). Additionally, "[t]here is a presumption of constitutionality inherent in any statutory analysis." *Scullock v. State*, 377 So. 2d 682, 683-684 (Fla. 1979); *Barnes*.

The test for vagueness of a statute is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice," *Zachary v. State*, 269 So. 2d 669, 670 (Fla. 1972), or whether "the statute 'is so vague and lacking in ascertainable standards of guilt that, as applied [to him], it failed to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden...."' *Palmer v. City of Euclid, Ohio*, 402 U.S. 544, 545, 91 S. Ct. 1563, 1564, 29 L. Ed. 2d 98 (1971) (quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954))." *Barnes, supra* at 636.

The definition in issue here makes clear that, to meet the definition, a person must both be 60 years old or older and have

some mental or physical disability that impairs his or her ability to adequately care for or protect him- or herself. This definition is sufficiently precise.

Respondent would agree with Petitioner that the competency of the elderly person at the time any statement sought to be admitted under Section 90.803(24) was made may be a factor to be considered in determining the reliability or trustworthiness of the statement. However, the need for the trial court to consider the elderly declarant's competency in determining the trustworthiness and reliability does not create a need for any more "guidance" within the statute itself than is contained therein or this Court would have so held in *Townsend* regarding Section 90.803(23), which gives the identical "guidance," including making permissive the list of factors given for consideration. The same goes for Petitioner's claim that Section 90.803(24)'s failure to state the standard of proof renders this subsection unconstitutionally vague.

As to the trial court's decision to postpone its decision on whether to admit the hearsay statements of the victim until the trial itself, Respondent would reiterate that the statute requires "a hearing conducted outside the presence of the jury," but it does *not* require that that hearing be held prior to trial. Similarly, the statute requires 10 days advance notice to the defense, but that 10 days is in relation to the *trial*, not to a *pre*trial hearing. Additionally, the statute requires findings on the record, Section 90.803(24)(c), but it does *not* require a written

order. Ergo, the trial court committed no error in its treatment of the hearsay issue.

Furthermore, Petitioner did not object below to the procedure followed by the trial court and is therefore in no position to now suddenly complain that his trial preparation was unfairly prejudiced thereby. The contemporaneous objection rule requires that a timely objection be made, *e.g.*, *Terry v. State*, 668 So. 2d 954 (Fla. 1996); *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979), and that the specific grounds for the objection relied upon on appeal be stated to the trial court. *E.g.*, *Terry*; *Tillman v. State*, 471 So. 2d 32 (Fla. 1985). Accordingly, this argument was not preserved for appeal and hence should not be considered by this Court either.

To the extent that Petitioner is arguing that he is entitled to a ruling on this issue prior to trial, there is no authority for this proposition. The State of Florida has very liberal discovery rules, and the requirement of Section 90.803(24)(b) that the defendant be given notice at least 10 days prior to trial of the content of any hearsay statement sought to be admitted under Section 90.803(24), the time it was made, and the circumstances surrounding the statement which indicate its reliability are in keeping with our liberal discovery philosophy. Nothing in this statute abrogates or purports to abrogate any right Petitioner may have under Rule 3.220, Florida Rules of Criminal Procedure, or under the U.S. or Florida Constitution. The defendant is entitled

to know what evidence of this nature the prosecution *has*, not whether or not the prosecutor will ultimately elect to use it at trial. The prosecutor is not obligated to adduce such evidence merely because the trial court has ruled it admissible.

In sum, Petitioner has fallen woefully short of demonstrating that Section 90.803(24) is unconstitutional on *any* basis. The trial court and the Second District Court of Appeal correctly upheld the constitutionality of this statute, and this Court should approve those rulings.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the opinion of the district court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard P. Albertine, Jr., Assistant Public Defender, Criminal Justice Center, 12450 49th Street N., Clearwater, Florida 33762, this 27th day of August, 1998.

COUNSEL FOR RESPONDENT