

**FILED**

✓ SID J. WHITE

APR 27 1998

IN THE SUPREME COURT OF FLORIDA

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

92, 835

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

Case No. \_\_\_\_\_  
DCA No. 96-03016

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN  
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this jurisdictional brief, 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.

Citations to the record shall be designated by (V\_\_, R\_\_) referring to the volume number and record page number. Aware that the record has not yet been transmitted, nevertheless, Petitioner includes record citations for the benefit of the Court and Respondent recognizing the record will be transmitted later should the Court exercise its discretionary jurisdiction.

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), § 775.087(2), Fla. Stat. (1995)), armed kidnapping (§ 787.01(2), § 775.087(2), Fla. Stat. (1995)), and armed robbery (§ 812.13(2)(a), § 775.087(2), Fla. Stat. (1995)). (V1, R1-3).

Prior to the trial, the state filed a notice of intent, pursuant to Section 90.803(24)(b), Florida Statutes (1995), to use the statement of an elderly person, Earl Ford, against Mr. Conner at his trial. (V1, R6-51). Pursuant to the requirements of Section 90.803(24), Florida Statutes (1995), herein after referred to "elderly person/disabled adult" hearsay exception (EPDA), 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, R52-76, 77-125). 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 Section 825.101(5), Florida Statutes (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). Also, the trial court advised the state that corroboration as to the substance of the hearsay statement would have to be presented at Mr. 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 statute was unconstitutional 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, R131-51). 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 Florida's Elderly/Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), declared unconstitutional 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 Mr. 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 Florida Rule Appellate Procedure 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, Petitioner filed with the Second District Court of Appeal two copies of his notice to invoke discretionary review with the Florida Supreme Court. Pursuant to Florida Rule Appellate Procedure 9.120(d), Petitioner's brief on jurisdiction now ensues.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal, in the instant case, held that Section 90.803(24), Florida Statutes (1995) was constitutional on its face. Accordingly, Petitioner seeks to invoke the discretionary review of that decision pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i) contending that the Elderly Person/Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), is unconstitutional on the grounds that, on its face, the EPDA hearsay statute unfairly deprives a defendant of the Sixth Amendment right of confrontation and violates due process.



## ARGUMENT

### ISSUE

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY DECLARED STATE STATUTE, SECTION 90.803(24), FLORIDA STATUTES (1995) CONSTITUTIONAL SUCH THAT THE SUPREME COURT, PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(i), HAS DISCRETIONARY JURISDICTION?

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i), provides that this Court has discretionary jurisdiction to review decisions of district courts of appeal which expressly declare valid a state statute. The Second District Court of Appeal in David R. Conner v. State, No. 96-03016 (Fla. 2d DCA March 27, 1998) expressly found that the Florida Elderly Person/Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), was constitutional. In so doing, the court opined:

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.

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.

David R. Conner v. State, No. 96-03016 at slp op. 1-3. See Appendix-1. The Second District Court's opinion misidentified the citation for the "Elderly Person" definition properly cited as Section 825.101(5), Florida Statutes (1995).

While the Second District Court of Appeal failed to rule on the constitutionality of Section 90.803(24), Florida Statutes (1995) as applied, the court did, as shown above, rule that the Elderly Person/Disabled Adult Hearsay Statute was constitutional on its face. As such, the court ruled, contrary to Petitioner's arguments submitted in support of his direct appeal, that the Elderly Person/Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), on its face, was neither violative of the Confrontation Clauses of the United States Constitution, Amendment 6, and the Florida Constitution, Article 1, Section 16; nor 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.

Accordingly, Petitioner argues that this Court, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i), has discretionary jurisdiction to review the decision of the Second District Court of Appeal rendered in Petitioner's case below. Therefore, this Court should exercise that jurisdiction to consider the merits of Petitioner's arguments which Petitioner continues to believe have legal merit, albeit, the Second District Court of Appeal ruled otherwise.

### CONCLUSION

This Court has discretionary jurisdiction, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i), to review the decision of the Second District Court of Appeal rendered in Petitioner Conner's case below and should exercise that jurisdiction to consider whether the Florida Elderly Person/Disabled Adult Hearsay Statute, § 90.803(24), Fla. Stat. (1995), is constitutional on its face, as expressly ruled upon by the Second District Court of Appeal.

APPENDIX

PAGE NO.

1. Copy of Second District Court of Appeal decision in David R. Conner v. State, No. 96-03016 (Fla. 2d DCA March 27, 1998) 4, 8

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 22 day of April, 1998.

Respectfully submitted,



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