IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, vs. JOSE ABREU, Appellee.	)	CASE NO. SC01-2596 DCA No. 4D99-2765

ANSWER BRIEF

On Appeal from the District Court of Appeal, Fourth District, State of Florida

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PRELIMINARY STATEMENT

In this brief, appellee, Jose Abreu, will be referred to by name, and appellant, State of Florida, will be referred to as State or appellant.

There are two sets of transcripts in the appellate record: a four-volume set contains a transcript of the first trial (this was filed as supplemental record in the district court), and a ten-volume set contains a transcript of the second trial (the trial that ended in conviction), as well as transcripts of sentencing and some other pre-trial hearings (this was the original transcript contained in the appellate record). The clerk's record on appeal consists of three volumes. The following abbreviations will be used:

(R) - Clerk's Record on Appeal

(T) - Transcript pages from the ten-volume trial transcript

(ST) - Transcript pages from the four-volume trial transcript

STATEMENT OF THE CASE AND FACTS

Mr. Abreu was charged with burglary of a dwelling, and he proceeded to jury trial (R 3-4). The State's critical eyewitness was Jeffrey Eckman, a lawyer who had moved to Philadelphia since the date of the offense, and who flew to Fort Lauderdale for the trial (T 7, 59; ST 233-92). Mr. Eckman testified that on February 19, 1998, he and his roommate saw a man run out the back door of their home (ST 237). Mr. Eckman identified Mr. Abreu, who was afterward seen walking in the neighborhood, as that man (ST 237-38, 250). The first trial ended in jury deadlock, and the trial court declared a mistrial (ST 686, 694; R 490-91).

At a subsequent hearing, the prosecutor asked the trial court for permission to read Mr. Eckman's trial testimony to the jury (in lieu of his live testimony) pursuant to § 90.803(22), Fla. Stat. (1998), the recently passed hearsay exception for former testimony (T 246, 254-56). This new hearsay exception dispenses with the unavailability requirement for former testimony under § 90.804(2)(a), Fla. Stat. Although Mr. Eckman had melanoma and was ill during the first trial, the prosecutor did not claim that Mr. Eckman was unavailable to testify at the second trial (T 6-7, 246, 254-56). Instead, the record indicates that Mr. Eckman was tired of the case and reluctant to cooperate with the state any longer (T 688; ST 120). (Even at the first trial, Mr. Eckman would appear only if he could stay at the beach (T 578).)

Over Mr. Abreu's objection, the trial court allowed the prosecutor to read Mr. Eckman's prior trial testimony to the jury at Mr. Abreu's second trial (T 341-43, 398-420).[1]

Mr. Abreu was found guilty, and he was sentenced to 359 months and 1 day in state prison (T 760, 788). He appealed the judgment and sentence to the Fourth District Court of Appeal (R 537). The Fourth District Court of Appeal held § 90.803(22), Fla. Stat. (1998), unconstitutional in criminal cases, and it reversed and remanded for new trial. *Abreu v. State*, 804 So.2d 442 (Fla. 4th DCA 2001). The state has appealed to this Court pursuant to article V, § 3(a)(1), Fla. Const.

[1] Mr. Abreu made repeated objections to the trial court's ruling (T 341-43, 385, 392-93, 394, 405, 421-23, 693). His grounds included the Confrontation Clause (T 341, 343).

SUMMARY OF THE ARGUMENT

Mr. Abreu's first trial ended in jury deadlock. At Mr. Abreu's second trial, the State read into evidence a transcript of the critical eyewitness's trial testimony pursuant to the recently passed hearsay exception for former testimony. § 90.803(22), Fla. Stat. (1998). This exception dispenses with the requirement that the declarant be unavailable. The Fourth District Court of Appeal held § 90.803(22) unconstitutional in criminal cases. This holding is correct. The United States Supreme Court has made it clear that, under the Confrontation Clause, former testimony is admissible only if the declarant is unavailable to testify. Here, the State did not establish that Mr. Eckman was unavailable to testify. Therefore, the Fourth District correctly reversed Mr. Abreu's conviction and remanded for new trial.

POINT ON APPEAL
(RESTATED)

WHETHER THE DISTRICT COURT CORRECTLY HELD THAT § 90.803(22), FLA. STAT. (1998), IS UNCONSTITUTIONAL IN CRIMINAL CASES?

Jeffrey Eckman, the alleged victim, was the State's critical eyewitness, and he testified at Mr. Abreu's first trial. That trial ended in jury deadlock. At Mr. Abreu's second trial, the prosecutor was allowed to read Mr. Eckman's former trial testimony to the jury pursuant to § 90.803(22), Fla. Stat. (1998). This new hearsay exception dispenses with the unavailability requirement for former testimony under § 90.804(2)(a), Fla. Stat. Mr. Abreu was found guilty as charged and he appealed. The Fourth District Court of Appeal held § 90.803(22) unconstitutional in criminal cases, and it reversed and remanded for new trial. *Abreu v. State*, 804 So.2d 442 (Fla. 4th DCA 2001). The district court's decision is correct in all respects and should be affirmed.[2]

Section 90.803(22), Fla. Stat., was amended in 1998 to read:

> [T]he following [is] not inadmissible as evidence, even though the declarant is available as a witness:
>
> * * *
>
> **(22) Former testimony.**--Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding ... if the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the

[2] The constitutionality of a statute is a question of law; therefore, the standard of review is *de novo*. *City of Jacksonville v. Cook*, 765 So.2d 289, 291 (Fla. 1st DCA 2000).

> testimony by direct, cross, or redirect examination....

This Court has already reviewed this statute and rejected it as a rule of practice and procedure in Florida Courts.[3] *See In re Amendments to Fla. Evid. Code,* 782 So.2d 339 (Fla. 2000); art. V, § 2(a), Fla. Const. In doing so, this Court noted the myriad objections to the statute: it violates a defendant's constitutional right to confront adverse witnesses; it precludes the fact-finder from evaluating witness credibility; it strips § 90.804(2)(a) of its "unavailability" requirement and makes that statute obsolete; it is inconsistent with several rules of procedure; and it will shift the expense burdens of litigation to the party against whom the former testimony is offered. *Id.* at 341.

In addition to those objections, this Court determined that § 90.803(22) "is an unacceptable change to a long-standing rule of evidence"; that it "is not based on well established law; nor is it modeled after the Federal Rules of Evidence"; and that no other jurisdiction had "a similarly broad former-testimony exception to

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[3] The State argues that this statute is substantive, not procedural. *Initial Brief* at pp. 7-10. If this were true, there would be an additional reason to reverse Mr. Abreu's conviction: violation of the *ex post facto* clause. Mr. Abreu's offense date, February 19, 1998, is before the March 11, 1998, effective date of the statute. *See* Ch. 98-2, Laws of Fla. But the State is incorrect: rules relating to the admission of evidence are considered procedural, not substantive. *See Glendening v. State,* 536 So.2d 212, 215-216 (Fla. 1988), *cert. denied,* 492 U.S. 907 (1989); *Windom v. State*, 656 So.2d 432, 439 (Fla. 1995).

the hearsay rule." *Id.* at 342. This Court found most significant "the grave concerns about the constitutionality of the statute." *Id.* This Court's concerns were wholly justified; the statute clearly violates the Confrontation Clause of the United States and Florida Constitutions.

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." This right to confront one's accusers is a fundamental right and is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). In addition, article I, § 16(a) of the Florida Constitution provides: "In all criminal prosecutions the accused ... shall have the right ... to confront at trial adverse witnesses...."

This Court is no stranger to Confrontation Clause analysis. In *Conner v. State,* 748 So.2d 950 (Fla. 1999), this Court held unconstitutional § 90.803(24), Fla. Stat., the elderly person hearsay exception, on the ground that it was not a "firmly rooted" hearsay exception, and there was no showing of "particularized guarantees of trustworthiness." *Id.* at 957 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). In *Harrell v. State*, 709 So.2d 1364 (Fla. 1998), this court held that satellite testimony does not violate the Confrontation Clause if it is justified by necessity or

some other important state interest, and it satisfies the three essential elements of confrontation: oath, cross-examination, and observation of the witness's demeanor. *Id.* at 1369 (citing *Maryland v. Craig,* 497 U.S. 836, 849-51 (1990)). *See also State v. Ford*, 626 So.2d 1338, 1345-47 (Fla. 1993)(videotaped testimony of child witness violated defendant's Confrontation Clause rights); *Baber v. State*, 775 So.2d 258, 259-61 (Fla. 2000)(admissibility of medical records).

Former testimony has long been excepted from the hearsay rule, and its admission into evidence does not violate the Confrontation Clause, *if the declarant is unavailable to testify*. *See* § 90.804(2)(a), Fla. Stat.; *Richardson v. State*, 247 So.2d 296 (Fla. 1971). As this Court noted, no other jurisdiction has a former testimony hearsay exception that dispenses with the unavailability requirement. *In re Amendments to Fla. Evid. Code,* 782 So.2d at 342. Such an exception, therefore, is not "firmly rooted," and there is a good reason why: United States Supreme Court precedent forbids it.

In *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the state introduced into evidence the prior testimony of a witness who, at the time of trial, was serving a federal sentence in another state. The prosecution argued that it had no constitutional obligation to produce the witness because, as a federal prisoner residing outside its territorial boundaries, he

was not subject to its ordinary subpoena powers. The United States Supreme Court disagreed, and held that it violated the Confrontation Clause of the Sixth Amendment to introduce former testimony without establishing that the witness is unavailable to testify. The Court stated:

> [A] witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

Barber, 390 U.S. at 724-25.

In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court held that preliminary hearing testimony could be introduced into evidence at a state criminal trial *if* the unavailability of the witness is established:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Roberts, 448 U.S. at 66.

In subsequent cases, criminal defendants asked the Court to apply the unavailability requirement to other hearsay exceptions. Although the Court rejected these efforts in *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)(co-conspirator hearsay exception), and *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)(excited utterance and medical diagnosis exceptions), the Court was careful to explain why the Confrontation Clause did require declarant unavailability for the former testimony exception to the hearsay rule:

> There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. ... If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

Inadi, 475 U.S. at 394. In *Illinois v. White*, the Court again emphasized that unavailability analysis is a necessary part of the Confrontation Clause inquiry when the challenged out-of-court statements were made in the course of a prior judicial proceeding.

White, 502 U.S. at 354.

The cases that establish an unavailability requirement for former testimony do so because of a defendant's valued right to live testimony. In *Barber v. Page*, the Court stated that live testimony is preferred because it allows the jury to view the demeanor of the witness, i.e., the accused has "the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Barber*, 390 U.S. at 721 (citing *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895)).

This preference for live testimony is deeply woven into the fabric of our judicial system. In weighing witness credibility, jurors in criminal cases are instructed to "consider how the witnesses acted, as well as what they said." Fla. Std. Jury Instr. (Crim.) 2.04; *Standard Jury Instructions-Criminal Cases (99-2)*, 777 So.2d 366, 374-75 (Fla. 2000). An important principle of appellate review--the deference given to a trial court's factual findings--is premised on the trial court's superior position "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses." *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976). *See also Stephens v. State*, 748

So.2d 1028, 1034 (Fla. 1999). Indeed, admission to the Florida Bar has been denied on the basis of an applicant's demeanor while testifying. *See Florida Bd. of Bar Exam'rs re C.W.G.*, 617 So.2d 303, 304 (Fla. 1993) (adopting Board's finding that applicant lacked candor where the "Board observed that [the applicant's] credibility, during his testimony, was lessened by his demeanor, including the manner in which he answered questions and the time he took to answer them").

Florida, of course, is not alone in recognizing the superiority of live testimony. "The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949)(citation omitted). In *Broadcast Music*, *supra*, Judge Frank stated:

> The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like--all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned.... The witness' demeanor, not apparent in the record, may alone have "impeached" him.

Id. at 80(footnotes omitted). *See also NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951) (L. Hand, J.) ("[O]n the issue of veracity the bearing and delivery of a witness will

usually be the dominating factors, when the words alone leave any rational choice."); *Untermeyer v. Freund*, 37 F. 342, 343 (S.D.N.Y. 1889) ("A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487-90 (2d Cir. 1952) (Frank, J.) (recounting the history of "demeanor evidence" from Roman times).

As the Fourth District observed, the importance of live testimony is highlighted in this case: at the first trial, jurors could judge Mr. Eckman's demeanor, and some of those jurors voted to acquit; at the second trial, the jurors had no such opportunity, and they voted to convict. *Abreu*, 804 So.2d at 444. Thus, the Fourth District correctly held that "...live testimony may not be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability." *Abreu*, 804 So.2d at 444. As the United States Supreme Court stated in *Inadi*: "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." *Inadi*, 475 U.S. at 394.

Here, there was no "justification for relying on the weaker version" because there was no showing that Mr. Eckman was unavailable to testify at the second trial. The State points to

Mr. Eckman's illness during the first trial as evidence of unavailability. *Initial Brief* at pp. 6-7. But Mr. Eckman testified at the first trial; he was obviously "available" then, notwithstanding his illness; and there is nothing in this record to show that Mr. Eckman was not also available to testify at Mr. Abreu's second trial. *See* § 90.804(1)(d), Fla. Stat. ("unavailability" means the inability to testify because of "then existing physical or mental illness or infirmity"). In fact, since the record is silent as to Mr. Eckman's medical condition at the time of the second trial, it is quite possible that he fully recovered and was "more available" to testify at that time.

Instead of being unavailable to testify because of illness, it appears that Mr. Eckman was tired of the case and unwilling to cooperate with the State any longer (T 688; ST 120).[4] Indeed, if Mr. Eckman had been unavailable to testify at the time of the second trial, the prosecutor would have relied on § 90.804(2)(a), Fla. Stat., and established that Mr. Eckman was unavailable. But the prosecutor did not attempt to establish that Mr. Eckman was

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[4] THE COURT:

> Mr. Abreu, you know that Mr. Eckman – and Mr. Tylock [the prosecutor] has indicated he is not going to be able to get him back, that man was not coming back here for anybody. He was not cooperating again, and that was it. Mr. Tylock's made that known during the last trial and in the interim periods, I believe.
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> * * *

(T 688).

unavailable, and he did not ask the trial court to make such a finding. Instead, the prosecutor relied solely on § 90.803(22), a hearsay exception that dispenses with the unavailability requirement. This strongly suggests that Mr. Eckman *was* available to testify, and that the prosecutor was trying to accommodate a witness who did not want to be inconvenienced again. As stated in *Barber*, *supra*, 390 U.S. at 725: "The right of confrontation may not be dispensed with so lightly."

The burden of showing the unavailability of the witness is on the party who seeks to use the former testimony. *Jackson v. State*, 575 So.2d 181, 187 (Fla. 1991). "[T]he mere reluctance of a witness to attend a trial--understandable or not--does not mean that the State is *unable* to procure his attendance. The proponent of the former testimony must establish what steps it took to secure the appearance of the witness[.]" *McClain v. State*, 411 So.2d 316, 317 (Fla. 3d DCA 1982)(citations omitted; emphasis in original.).

Here, the prosecutor did not establish what steps he took to secure Mr. Eckman's appearance; moreover, he made no attempt to show that Mr. Eckman was unavailable, and the trial court made no determination in that regard. The State cannot rely on the former testimony exception to the hearsay rule when the unavailability of the witness was not established in the lower court. *Rivera v. State*, 510 So.2d 340, 341 (Fla. 3d DCA 1987); *Spicer v. Metropolitan Dade County*, 458 So.2d 792, 794-95 (Fla. 3d DCA 1984).

CONCLUSION

Section 90.803(22), Fla. Stat. (1998), is unconstitutional in criminal cases because it dispenses with the unavailability requirement for the former testimony exception to the hearsay rule. There is no justification for allowing a former testimony exception to the hearsay rule if the witness is available. The trial court's ruling allowing the prosecutor to introduce testimony from the State's key witness into evidence without establishing his unavailability to testify denied Mr. Abreu due process of law and the right to confront a witness against him. U.S. Const. Amend. VI, XIV; art. I, §§ 9, 16, Fla. Const. This Court should affirm the decision under review.

CERTIFICATE OF SERVICE

I certify that a copy of this Answer Brief has been sent to Joseph Tringali, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, by courier this 5th day of March, 2002.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2). The brief was written in Courier New 12-point font.

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