IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Appellant

v.

JOSE ABREU,

Appellee.

Case No. SC01-2596

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

INITIAL BRIEF OF APPELLANT ON THE MERITS

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Case No. SC01-2765
State of Florida v. Jose Abreu

CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable Victor Tobin
   Circuit Court Judge, Seventeenth Judicial Circuit of Florida
   (trial judge)

2. Joseph A. Tringali, Esq., Assistant Attorney General
   Office of the Attorney General, State of Florida
   Robert Butterworth, Attorney General
   (appellate counsel for the Appellant)

3. James Tylock, Esq., Assistant State Attorney(s),
   Office of the State attorney, Seventeenth Judicial Circuit
   Michael J. Satz, State Attorney
   (trial counsel for State, Appellant)

4. Jose Abreu
   (Defendant, Appellee)

5. Jeffrey Eckman and Gene Harris
   (Complainants, Victims)

6. Paul E. Petillo, Esq., Assistant Public Defender
   Office of the Public Defender, Fifteenth Judicial Circuit
   Carey Haughwout, Public Defender
   (appellate counsel for Appellee)

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PRELIMINARY STATEMENT

Appellant was the appellee in the Fourth District Court of Appeal and the prosecution in the Criminal Division of the Circuit Court of Seventeenth Judicial Circuit of Florida.

Appellee was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida.

In this brief, the parties will be referred to as they appear before this Court, except that Appellant may also be referred to as the "prosecution" or the "State."

The following symbols will be used:

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

The relevant facts are stated in the Fourth District Court of Appeal's opinion in *Abreu v. State,* 2001 WL 1266280, a copy of which is attached hereto for the convenience of this Court.

Appellee Jose Abreu was charged by amended information in the Seventeenth Judicial Circuit of Florida with burglary of a dwelling which occurred on or about February 19, 1998 (R 3-4). Appellee proceeded to trial *pro se.* The state's critical eyewitness at this first trial was Jeffrey Eckman, a lawyer who had moved to Philadelphia since the date of the offense, and returned to Fort Lauderdale for the trial (T 7, 59, SR 233-292). The trial first trial ended in a jury deadlock on May 16, 1999, and the trial court declared a mistrial (SR 686, 694; R 490-491).

Appellee was again before the trial court on June 24, 1999 (T 209). At that time the prosecutor asked the trial court for permission to read Jeffrey Eckman's trial testimony into the record at the second trial in lieu of his live testimony, pursuant to the newly-passed hearsay exception for former testimony found in section 90.803(22), Florida Statutes (1998). Mr. Eckman was apparently seriously ill at the first trial (T 688) and the State indicated that it could not get him to return to Florida (T 423). There was also an indication that Mr. Eckman was tried of the case and unwilling to cooperate (T688). The trial court granted the State's request to allow Eckman's

former testimony over the objection of the Appellee (T 257).

At trial, over Appellee's repeated objections grounded, in part, on the Confrontation Clause to the United States Constitution, Jeffrey Eckman's prior trial testimony was read to the jury (T 341-343, 385, 392, 394, 405, 421-423, 693). The prosecutor read the questions and another Assistant State Attorney read Eckman's answers from the witness stand (T 384-385).

The second trial ended in a conviction and Appellee appealed. The Fourth District Court of Appeal, (Stone, J.), reviewed the history of the statute in a written opinion and said that "live testimony cannot be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability." The Court went on to hold:

> As we deem section 90.803(22) unconstitutional in criminal cases, and as there was no showing that the state's witness was unavailable, the use of the prior testimony violated Abreu's right to confront and cross-examine the adverse witness.

The Court reversed Appellee's conviction and remanded for a new trial, and the State timely appealed, and this brief follows.

SUMMARY OF THE ARGUMENT

The admission of testimony from Appellee's former trial was clearly admissible under section 90.804 Fla. Stat. (1998), and, therefore, the trial court was "right" in admitting the victim's testimony. The trial court should have been affirmed under the principle of "right for any reason" expressed by this Court in *Caso v. State*.

Section 90.803(22), Florida Statutes (2000) expresses a substantive right in that the evidence which is admitted thereunder is substantive rather than procedural. As a matter of substantive law it should not have been declared unconstitutional by the appellate court.

Section 90.803(22), Florida Statutes (2000), conforms to the principles laid down by the United States Constitution as interpreted by the United States Supreme Court in that a defendant has ample opportunity to confront and cross-examine witnesses against him. The defendant in the case at bar had that opportunity and exercised it. His constitutional rights were not violated.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT SECTION 90.803(22), FLORIDA STATUTES (2000) IS UNCONSTIUTIONAL.

Appellant, the State of Florida, respectfully submits the Florida Fourth District Court of Appeal erred when it held

It is axiomatic that appellate courts should, if reasonably possible and consistent with constitutional rights, interpret statutes in such a manner as to uphold their constitutionality. See *State v. Mitro,* 700 So.2d 643 (Fla. 1997); *State v. Wershow,* 343 So.2d 605, 607 (Fla.1977). Once the legislature passes a law, it is incumbent upon this Court to interpret the meaning of that law consistent with constitutional principles whenever possible. See, generally, *Mitro,* id. It is this Court's duty to save Florida statutes from the "constitutional dustbin" whenever possible. See *Doe v. Mortham,* 708 So.2d 929, 934 (Fla.1998); *Richardson v. Richarson,* 766 So.2d 1036 (Fla. 2000).

In its opinion *In re Amendments to Florida Evidence Code,* 782 So.2d 339, 340-42, (Fla. 2000), this Court admittedly expressed "grave concerns" about the constitutionality of section 90.803(22), Florida Statutes (2000).

First, Appellant respectfully suggests the Fourth District Court of Appeal picked up on that concern and ruled on the constitutionality of the statute without

regard to the facts of the case which was before it.

It has long been the law of this State that a trial court will not be reversed if it reach the proper conclusion regardless of the reason. *Caso v. State,* 524 So.2d 422 (Fla. 1988). The result reached in the trial court must be affirmed if it is right, even if it is right for wrong reason. See *Chase v. Cowart,* 102 So.2d 147, 150 (Fla.1958).

In the case at bar, there was evidence in the record – pointed out by Appellant in the Fourth District Court of Appeal – that the trial judge had made a factual finding that the victim was "seriously ill" during the first trial (T 688). Section 90.804 Fla. Stat. (1988) recognizes an exception to the hearsay rule if the declarant is unavailable, and defines "unavailable" as being "unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity." The burden of demonstrating the unavailability of a witness for trial rests on the party seeking to use that witness' previous testimony; responsibility for evaluating adequacy of the showing of nonavailability rests with the trial judge, and his determination on such issue will not be disturbed unless an abuse of discretion clearly appears. *Outlaw v. State,* 269 So.2d 403 (Fla. 4th DCA), *certiorari denied* 273 So.2d 80 (Fla. 1972). Thus, where a witness was not in condition to undergo an examination, and where it was also shown that any evidence elicited from her would have been substantially the same as the prior proceeding, it was not error to allow her

prior testimony to be read into the record. *Alexander v. Bess,* 167 So.2d 533 (Fla. 1936). And in *Blackwell v. State,* 79 Fla. 709, 86 So. 224 (1920), where it appeared "to the satisfaction of the court" that witnesses were ill and probably could not testify for more that two weeks, when the accused had confronted them and had full opportunity to examine them at a former trial, this Court found no error in allowing into evidence their former testimony.

Appellant respectfully submits that in the case at bar the trial judge was satisfied the victim was suffering from a serious disease at the first trial and made a finding that he was very ill. Accordingly, the trial court could have admitted his testimony under section 90.804 Fla. Stat. (1998), and, therefore, the court was "right" in admitting the victim's testimony. It should have been affirmed under the principle of "right for any reason" expressed by this Court in *Caso,* id.

Secondly, Appellant respectfully submits that although this Court refused to adopt section 90.803 (22) Fla. Stat. (1998) as a rule, that refusal does not, in and of itself, end the matter. In declining to adopt the measure the Court specifically said that it did so "to the extent (the statute) may be procedural." It declined to address "the substantive/procedural issue until such time as the issue comes before the Court in a true 'case or controversy,' because to do otherwise would effectively pass on the constitutionality of the legislation itself." See: *In re: Amendments to the Florida*

Evidence Code, id. Appellant submits that in addition to the fact that this case is not the kind on which this Court should base a constitutional decision, the statute in question deals with a substantive, and not a procedural issue..

Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law. See *Allen v. Butterworth,* 756 So.2d 52 (Fla. 2000). If the Court finds that the statute is "substantive and that it operates in an area of legitimate legislative concern," then we are precluded from finding it unconstitutional. See *VanBibber v. Hartford Accident & Insurance Indemnity Co.,* 439 So.2d 880 (1983). This Court has said, "The distinction between substantive and procedural law is neither simple nor certain," and, in an attempt to distinguish the concepts has referred to its previous decisions in cases such as *Haven Federal Savings & Loan Ass'n v. Kirian,* 579 So.2d 730, 732 (1991) where it said:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia,* 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright,* 403 So.2d 391 (Fla.1981). On the other

> hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In re Florida Rules of Criminal Procedure,* 272 So.2d 65, 66 (Fla.1972) (Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis,* 147 Fla. 22, 2 So.2d 116 (1941).

579 So.2d at 732 (1991) See also *Benyard v. Wainwright,* 322 So.2d 473, 475 (Fla.1975) (stating that "[s]ubstantive law prescribes the duties and rights under our system of government," while "[p]rocedural law concerns the means and method to apply and enforce those duties and rights").

In *Chambers v. Mississippi,* 410 U.S. 284 (1973), the United States Supreme Court permitted the use of hearsay as substantive evidence. It has long been the law of Florida that admissions by a party opponent have been admissible as substantive evidence. Ehrhardt, Florida Evidence, § 803.18; *Carter v. Rukab,* 437 So.2d 761 (Fla. 1st DCA 1983). In considering the application of section 90.803(23, Florida Statutes

this Court held that "admission and subsequent consideration of . . . statements as substantive evidence by the trier of fact" does not require that the a child's testimony at trial be consistent with his or her out-of-court statements.

Appellant submits that in much the same way, the use of former testimony as substantive evidence defines a substantive rather than a procedural right. While the manner in which it the testimony is presented may be procedural, the Legislature has defined the testimony itself is substantive. Thus, the statute is a matter of substantive law, and it should be upheld by this Court.

Third and finally, Appellant submits the Fourth District Court of Appeal's reliance on the holdings of the United States Supreme Court *Barber v. Page,* 390 U.S. 719 (1968) and *Ohio v. Roberts,* 448 U.S. 56 (1980) was misplaced. In both *Barber* and *Roberts* the Court dealt with previous testimony which had been taken at preliminary hearings: hearings at which the burden of proof was minimal and the right to extensive cross-examination was therefore limited. As the Court itself noted in *Barber,* the assumption that the defendant validly waived his right to cross-examination was "open to considerable question under the circumstances." *Barber,* 88 S.Ct. 1320-21. Clearly, confrontation is a significant right in the American criminal justice system. However the language used by the Court for over a century makes it clear that confrontation is not valued in and of itself: rather, its value lies in

the manner in which it affects the right to a thorough truth-testing through cross-examination. As the Court said in *Roberts:*

> The [Confrontation] Clause envisions "a personal examination and cross-examination of the witness, in which the accused has an 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."

Ohio v. Roberts, id., citing Mattox v. United States, 156 U.S., at 242-243, 15 S.Ct., at 339 (1895).

This Court has long held to the same reasoning, linking the use of former testimony to the right of cross-examination. In *Putnal v. State,* 56 Fla. 86, 47 So. 864 (1908), the Court held that where it was shown that accused had been convicted of substantially the same crime in a municipal court, at which former trial an absent witness testified, and that accused had an opportunity to cross-examine him, and the absent witness was only in town for two or three days, and had left the country, and his whereabouts could not be ascertained, a prima facie case for proving the former

testimony of such absent witness was established.

In the case at bar, the provisions of section 90.803(22), Florida Statutes (2000) were applied to Respondent in a manner consistent with the decisions of this Court and the United States Supreme Court. Appellee had not only the right to cross-examination, but he exercised that right in the prior proceeding: a proceeding with the same rules and which required the same quantum of evidence. He also exercised the right of cross-examination in a pre-trial suppression motion during which he heard the testimony of the victim and extensively questioned him (T 58-105). In short, the provisions of section 90.803(22) as applied to Appellee were completely constitutional. The decision of the Fourth District Court of Appeal should be reversed, and Appelleet's conviction in the trial court should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Petitioner/Appellant prays for an order of this Court to reversing the Fourth District Court of Appeal's decision, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Initial Brief of Petitioner/Appellant on the Merits" has been furnished by courier to PAUL E. PETILLO, Esq., Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 on January 10, 2003.

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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

_____
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APPELLANT'S APPENDIX

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