**IN THE SUPREME COURT OF FLORIDA**

CASE NOS. SC03-511 & SC03-512 (CONSOLIDATED)

(Fourth District Court of Appeal Case No. 4D02-3457)

**STATE OF FLORIDA**

Appellant

vs.

**BRUNEL HOSTY**

Appellee

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**ON DIRECT APPEAL FROM**
**THE FOURTH DISTRICT COURT OF APPEAL**

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# APPELLEE'S SUPPLEMENTAL BRIEF


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## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

After this Court accepted jurisdiction, on April 28, 2003, the Appellant filed its Initial Brief, followed by the Appellee's Answer Brief on May 27, 2003. The statement of the case and facts were fully presented in the Appellant's initial brief. On November 6, 2003, this Court heard oral arguments. On June 7, 2005, this Court ordered the parties to submit supplemental briefs addressing the impact the decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), had on this case.

## SUMMARY OF ARGUMENT

Section 90.803(24), Florida Statutes, (2001) the disabled adult hearsay exception, no longer passes constitutional muster in light of the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The legislature drafted the disabled adult hearsay exception to conform with Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), a case abrogated by Crawford. Prior to Crawford, a court could admit a hearsay statement if it fell under a firmly rooted hearsay exception, or if the trial court first made a judicial finding of reliability before admitting the statement. Roberts held that the judicial finding of reliability was necessary to protect an accused's right of confrontation.

In Crawford, the Court found that the Confrontation Clause bars the admission of all hearsay statements from an unavailable witness where the statements are testimonial and the accused has had no prior opportunity for cross-examination. Crawford further condemned any notion that the admissibility of a hearsay statement depends on a trial court's determination that the statement was reliable. The disabled hearsay exception embodies the Roberts test; a test the Court found to be inherently and permanently unpredictable.

The disabled hearsay exception enumerates a nonexclusive list of factors a court may determine prior to admitting the hearsay statements. Crawford unequivocally

prohibits a trial court from engaging in any type of reliability analysis as a prerequisite to a statement's admission. Crawford, therefore, renders the disabled adult hearsay exception unconstitutional.

In Crawford, the Supreme Court noted that the confrontation clause may not be violated if the declarant testifies. However, even if the declarant testifies, the disabled adult hearsay exception still mandates the trial court to first determine whether the hearsay statement is reliable before admitting the statement. Crawford absolutely condemns the notion of a judicial finding of reliability; therefore, any application of the statute would be at contrary to the dictates of Crawford.

## ARGUMENT

IN LIGHT OF CRAWFORD V. WASHINGTON, SECTION 90.803(24), FLORIDA STATUTES (2001), VIOLATES THE CONFRONTATION CLAUSE OF THE UNITED STATES AND THE FLORIDA CONSTITUTIONS.

The United States and Florida Constitutions requires that before any inculpatory, out-of-court statement is introduced at a criminal trial, the statement's admission must not violate an accused's right to confrontation. U.S. Const. amend VI; Art. I, § 16, Fla. Const. Prior to the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), courts looked toward Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), in determining whether the admission of a hearsay statement would violate the Confrontation Clause. Under Roberts, an unavailable witness's testimony may be admitted if the statement bears "adequate 'indicia of reliability.'" Id. at 66, 100 S.Ct. at 2531. To meet that test, the statement must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." Id.

In Crawford, the Supreme Court first reaffirmed that the right to confront a witness is a "bedrock procedural guarantee" that "applies to both federal and state prosecutions." 541 U.S. at 41, 124 S.Ct. at 1358. The Court then presented a brief history of the confrontation clause. The Court ultimately concluded that the Roberts

test of admissibility departed from the historical principles of the Confrontation Clause. Thus, in Crawford the Court announced a significant departure from the Confrontation Clause analysis courts and legislatures have been utilizing for over two decades.

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), this Court held that section 90.803(23), Florida Statutes (1985), did not violate the confrontation clause because the child hearsay exception fulfilled the Roberts test. Specifically, the child hearsay exception mandates that the trial court "must first find, in a hearing, that 'the time, content, and circumstances of the statement provide sufficient safeguards of reliability.'" Id. at 209. This Court noted that "[t]he reliability of a hearsay declaration **is a question to be determined by the court."** Id. (Emphasis added.) The adult hearsay exception and the child hearsay exception contain the identical list of factors a judge must consider in making a judicial determination of reliability. It is from the Roberts test that the disabled adult hearsay exception was born; Crawford has now signaled the statute's demise.

In abrogating Roberts, the Crawford Court pronounced several principles regarding the right to confrontation: First, States may develop hearsay law regarding nontestimonial hearsay; it is testimonial hearsay that affronts the right to confrontation.

Second, the "Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. at 68, 124 S.Ct at 1374. Lastly, and most critical to the case at bar, is that "admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." 541 U.S. at 61, 124 S.Ct. at 1370.

Since the Court's decision in Crawford, lower courts have primarily grappled with whether the statement sought to be introduced was "testimonial," and whether there had been a "prior opportunity for cross-examination." See Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004)(holding that the taking of a discovery deposition does not meet the Crawford requirement of a prior opportunity for cross-examination, certifying conflict with a contrary holding in Blanton v. State 880 So. 2d 798 (Fla. 5th DCA 2004)); Towbridge v. State, 898 So. 2d 1205 (Fla. 3d DCA 2005), held that an excited utterance recorded on a 911 tape was nontestimonial under Crawford, as opposed to an excited utterance made in response to a law officer's question. Lopez, supra.

Unlike these cases, the case at bar deals with a statute that is facially abhorrent to the rule announced in Crawford because the statute requires what Crawford strictly forbids: a judicial determination as to the reliability of the hearsay statements. Prior to Crawford, the admission of a hearsay statement turned on whether the statement

was admissible via a firmly rooted exception, or whether the statement exhibited particularized guarantees of trustworthiness. Specifically, section 90.803(24)(1), Florida Statutes, allows admission of a hearsay statement only if:

> The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate. . .

In Crawford, the Court points out one of Roberts' striking pitfalls: the "Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one." 541 U.S. at 62, 124 S.Ct. at 1370. In condemning the practice of judges making findings of reliability, the Court explained that the concept of reliability is entirely subjective, and that "there are countless factors bearing on whether a statement is reliable." 541 U.S. at 63, 124 S.Ct. at 1371. The Court cites numerous cases to illustrate how a judicial determination is utterly unpredictable and "depends heavily on which factors the judge considers and how much weight he accords each of them." The Court also stated: "To add insult to injury, some of the courts that admit untested testimonial statements find reliability

in the very factors that **make** the statements testimonial." 541 U.S. at 65, 124 S.Ct. at 1372. (Emphasis in original.) The Court thereby shifts the focus from a subjective finding of judicial reliability to a more objective bar of any testimonial hearsay of an unavailable witness with no prior opportunity for cross-examination.

The disabled adult hearsay exception cannot be reconciled with Crawford. Crawford demands that testimonial hearsay without a prior opportunity for cross-examination must never be admitted at a criminal trial. In violation of Crawford, the disabled adult hearsay exception requires a trial court to consider a nonexclusive list of factors and then make a determination as to a statement's reliability. As noted above, a judge could conclude that because a statement was given to a law enforcement officer it is **more** reliable, even though that factor makes the statement "testimonial." Applying the factors enumerated in the disabled hearsay exception does nothing to safeguard against the admission of statements that violate the Confrontation Clause. As stated by the Court: "The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63, 124 S.Ct. at 1371.

To further illustrate Crawford's impact on the disabled adult hearsay exception, in its brief and at oral argument, the Appellant argued that the trial court should have

allowed the prosecutor to proffer the hearsay statements and then make a finding as to their reliability before passing on the constitutionality of the statute. While that may have been a logical argument prior to Crawford, this argument is now patently untenable. Crawford forbids the admission of a hearsay statement because a trial court found the statement to be reliable. Remanding this case, as the state suggested, would be requesting this Honorable Court to order the trial court to do something Crawford unequivocally forbids.

In its initial brief, the Appellant also mentioned the issue of severability. The severability analysis determines whether "the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail." Ray v. Mortham, 742 So. 2d 1276,1280 (Fla. 1999)(quoting Schmitt v. State, 590 So. 2d 404 at 414 (Fla. 1991)). The legislature drafted the disabled adult hearsay statute when Roberts was the law. The statute's requirement that the trial court make reliability findings was necessary because the exception was not a firmly rooted hearsay exception. Because Crawford has changed the definition of admissible hearsay, what was necessary at the statute's inception is now forbidden. Excising the invalid portion of the statute that mandates a judicial determination of reliability completely eviscerates the statute. The statute was written to satisfy the Robert's test, a test that is no longer viable. Severability, therefore, is not an option.

Lastly, at oral argument, this Court questioned whether the Confrontation Clause would be violated if the declarant testified at trial. The Appellee conceded that when a declarant testifies, the right of confrontation may not be implicated. However, after Crawford, whether the declarant testifies or is unavailable is a moot point in determining the continued viability of the disabled adult hearsay exception. Crawford condemns the practice of a judicial finding of reliability as a predicate to the admission of a hearsay statement. Whether the declarant testifies or is unavailable, the disabled adult hearsay exception requires a court to make the proscribed reliability finding before admitting the hearsay statements. As such, even if the declarant testifies, the statute would still be unreconcilable with the holding in Crawford.

In conclusion, the legislature drafted the disabled adult hearsay exception when Roberts was the law. The majority in Crawford recognized that the decision would cause "interim uncertainty." 541 U.S. at 68 n10, 124 S.Ct. at 1374 n10. The Court concluded, however, that any uncertainty would be better than the status quo. Id. The Court held that the Roberts test is **inherently**, and therefore **permanently**, unpredictable. Id. (Emphasis in original.) Because the disabled adult hearsay exception embodies what Crawford now condemns, the statute does not function as a filter to exclude hearsay that may violates an accused's basic right to confrontation.

## CONCLUSION

WHEREFORE, the Appellee respectfully requests this Honorable Court to affirm the decision of the district court and to hold that section 90.803(24) is unconstitutional as it relates to disabled adults.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the response was delivered by overnight mail to Assistant Attorney General Richard Valuntas, Department of Legal Affairs, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida, 33401, this 24th day of June, 2005.

_____
Donald Cannarozzi #776830

## CERTIFICATE OF FONT STYLE AND SIZE

I hereby certify that this supplemental brief was prepared using Times New Roman 14 point font.

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Donald J. Cannarozzi #776830