IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant

v.

BRUNEL HOSTY,

Appellee.

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

L.T. NO.: 4D02-3457

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ON DIRECT APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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APPELLANT'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant, the State of Florida, is the prosecution in the trial court and was the petitioner in the Fourth District Court of Appeal. Appellant will be referred to herein as "appellant" or "the State." Appellee, Brunel Hosty, is the defendant in the trial court and was the respondent in the Fourth District Court of Appeal. Appellee will be referred to as "appellee."

The record in this case consisted of the exhibits attached to the State's petition for writ of certiorari. In this brief, the exhibits attached to the State's petition for writ of certiorari will be cited as "Pet. Ex."

STATEMENT OF THE CASE AND FACTS

Appellee is charged with committing sexual battery upon Tiffany Simpkins (the victim), a mentally defective person twelve years of age or older. (Pet. Ex. 1). Although the victim was twenty-three years of age at the time of the offense, the State argued she had the mentality of a ten-year-old. (Pet. Ex. 2, p. 7, 9). The State initially filed a notice of intent to utilize the victim's statements to her teachers and to law enforcement pursuant to section 90.803(23) of the Florida Statutes. Id. at 9-10. The trial court heard argument on the issue and struck the State's notice without prejudice, thus permitting the filing of a new notice under section 90.803(24). Id. at 19-20.

On April 29, 2002, the State filed the notice of intent to use the victim's hearsay statements pursuant to the disabled adult hearsay exception contained in section 90.803(24). (Pet. Ex. 3). On May 6, 2002, appellee filed a motion to strike the State's April 29, 2002 notice. (Pet. Ex. 4). Appellee argued that section 90.803(24) was unconstitutional in light of this Court's decision in Conner v. State, 748 So. 2d 950 (Fla. 1999). Id. On May 30, 2002, a hearing was held on the matter. (Pet. Ex. 5).

At the May 30, 2002 hearing, appellee argued that section

90.803(24) was unconstitutional when applied to disabled adults. Id. at 5-7. Appellee argued that someone with a broken or sprained ankle would qualify as a disabled adult under section 90.803(24). Id. at 8-9. Appellee argued the "disabled adult" hearsay exception was too broad. Id. at 9. In response to this argument, the State requested the opportunity to present relevant evidence to demonstrate there were sufficient indicia of reliability to admit the victim's hearsay statements into evidence. Id. at 12-13, 20. The trial court denied the State's request to present relevant evidence on the issue, over the State's protestations. Id. at 22-25. The trial court subsequently entered a written order declaring section 90.803(24) unconstitutional. (Pet. Ex. 6).

In response to the trial court's order declaring section 90.803(24) unconstitutional, and its denial of the State's request to present relevant evidence on the issue, the State filed a petition for writ of certiorari with the Fourth District Court of Appeal. In State v. Hosty, 835 So. 2d 1202, 1204 (Fla. 4th DCA 2003), the Fourth District denied the State's petition for writ of certiorari and "agree[d] with the trial judge that the section 90.803(24) provision for disabled adults suffers from the same constitutional shortcomings identified by the supreme court in *Conner* with respect to the elderly person

exception to the hearsay rule."

Even though the Fourth District agreed with the trial court that the section 90.803(24) disabled adult hearsay exception was unconstitutional, it certified a question of great public importance to this Court. Under Florida Rule of Appellate Procedure 9.030(a)(1)(A)(ii), this Court shall review decisions of district courts of appeal declaring invalid a state statute. This direct appeal followed because the decision in Hosty held the disabled adult hearsay exception in section 90.803(24) was unconstitutional.[1] Id.

[1] The State also filed a Notice to Invoke Discretionary Jurisdiction due to the Fourth District's certification of a question of great public importance.

SUMMARY ARGUMENT

Point I. This Court should reverse the Fourth District's opinion in this case because the trial court refused to provide the State an opportunity to establish a factual predicate. The trial court's refusal to (1) permit the State to present evidence on this matter, and (2) apply the provisions of section 90.803(24) to the facts in this case, violated the fundamental maxim of judicial restraint that courts should not decide constitutional issues unnecessarily. The trial court should have addressed the constitutionality of section 90.803(24) if, and only if, it conducted a proper analysis and found that the victim's statements satisfied the applicable indicia of reliability and other requirements under section 90.803(24).

The trial court and the Fourth District Court of Appeal misinterpreted this Court's decision in Conner v. State, 748 So. 2d 950 (Fla. 1999), and improperly disregarded their duty to construe section 90.803(24) to be constitutional if possible. If the victim in this case testifies, the disabled adult hearsay exception in section 90.803(24) is clearly constitutional from a Confrontation Clause standpoint because appellee would have the ability to cross-examine the declarant. Finally, the lower courts erred in this case because they did not consider whether a portion of section 90.803(24) could be severed to preserve the

validity of the statute.

Point II. The Fourth District's reasoning in Hosty is flawed because it makes numerous sweeping conclusions that are not based upon any evidence or applicable authority. Specifically, the Fourth District's opinion comments on (1) the "broadness" of the class of disabled adult declarants under section 90.803(24), (2) the scope of testimony admissible under the disabled adult hearsay exception in section 90.803(24), (3) the ability of a court to formulate a list of permissible considerations that would ensure the reliability of the victim in this case, and (4) the applicability of the policies behind the child victim hearsay exception to the victim in this case, but does not provide any evidence or pertinent authority to support such comments. The Fourth District's decision in Hosty should be reversed because it is based upon speculation, supposition, and conjecture rather than evidence and controlling authority.

ARGUMENT

POINT I

THE LOWER COURTS DISREGARDED WELL-SETTLED PRINCIPLES OF FLORIDA LAW AND ERRONEOUSLY ANALYZED THE DISABLED ADULT HEARSAY EXCEPTION IN SECTION 90.803(24)

During the May 30, 2002 hearing on appellee's motion to strike, which requested the trial court to declare section 90.803(24) unconstitutional, the trial court thwarted the State's attempt to lay a proper factual basis in this case. (Pet. Ex. 5, p. 22-25). The State specifically argued that a factual basis was necessary in order to determine whether the victim's statements satisfied the applicable indicia of reliability. Id. at 5, 16-17, 22-25. The State pointed out that this Court's decision in Conner v. State, 748 So. 2d 950 (Fla. 1999), addressed the facts therein when conducting its analysis. Id. at 19-22. Furthermore, the decision in Conner relied on its facts when it compared section 90.803(24) with the child victim hearsay exception in section 90.803(23).[2] Id.

The State argued that a factual basis for its request to use the victim's statements pursuant to section 90.803(24) was necessary for the appellate courts to conduct a meaningful

[2] This Court held that the child victim hearsay exception was constitutional in State v. Townsend, 635 So. 2d 206 (Fla. 1994).

review of the trial court's ruling in this case. Id. at 23-24. The trial court, however, refused to provide the State an opportunity to establish a factual predicate in this case. Id. at 1-28. Furthermore, the trial court did not analyze whether the victim's statements satisfied the applicable indicia of reliability. Id. Finally, the trial court denied the State's request to apply the provisions of section 90.803(24) to the facts in this case and held the disabled adult hearsay exception in section 90.803(24) was unconstitutional. Id. at 20-27; (Pet. Ex. 6).

The trial court's refusal to permit the State to present evidence on this matter, and apply the provisions of section 90.803(24) to the facts in this case, violated the fundamental maxim of judicial restraint that "'courts should not decide constitutional issues unnecessarily.'" State v. Efthimiadis, 690 So. 2d 1320, 1322 (Fla. 4th DCA 1997)(citation omitted). It is clear that under Florida law, "a court has a duty to refrain from passing on the validity of a statute if the case can be properly decided on another ground." Victer v. State, 174 So. 2d 544, 545 (Fla. 1965)(footnote omitted); see also Buckhalt v. McGhee, 632 So. 2d 120, 121 (Fla. 1st DCA 1994)("Florida courts must avoid passing on the constitutionality of a statute if it is possible to resolve the case on other grounds."). If the

trial court applied the provisions of section 90.803(24) to the facts of this case and determined whether the victim's statements satisfied the applicable indicia of reliability,[3] it could have refrained from passing on the constitutional issue.

Despite the well-established concept in Florida law that "a court has a duty to refrain from passing on the validity of a statute if the case can be properly decided on another ground," the Fourth District held that "there was no need to establish a factual basis for the application of the statute in this case, since the challenge to the statute was that it was facially unconstitutional." Victer, 174 So. 2d at 545; Hosty, 835 So. 2d at 1205. The Fourth District's holding in Hosty overlooks the fundamental judicial maxim that courts must avoid passing on the constitutionality of a statute if it is possible to resolve the case on other grounds and suggests that this Court's decision in Victer is inapplicable whenever someone claims a statute is facially unconstitutional. The trial court in this case should have addressed the constitutionality of the statute if, and only if, it conducted a proper analysis and found that the victim's

[3] If the trial court conducted a proper analysis and found that the victim's statements did not satisfy the applicable indicia of reliability and other requirements under section 90.803(24), then the trial court did not have to entertain the constitutional issue in this case.

statements satisfied the applicable indicia of reliability and other requirements under section 90.803(24). Accordingly, this Court should reverse the Fourth District's decision, remand the case to the trial court, and direct the trial court to allow the State to present evidence on this matter and apply the provisions of section 90.803(24) of the Florida Statutes to the facts in this case.

The trial court and the Fourth District Court of Appeal mistakenly interpreted this Court's decision in Conner and disregarded their duty to "construe [section 90.803(24)] as to cause it to be constitutional if possible to do so." State v. Leone, 118 So. 2d 781, 785 (Fla. 1960). Judge Cope's dissenting opinion in State v. Brocca, No. 3D02-2652 (Fla. 3d DCA Apr. 16, 2003), points out that the first question to be addressed under the United States Supreme Court's decision in Idaho v. Wright, 497 U.S. 805, 814-815 (1990)(citation omitted), is whether the hearsay declarant will testify. If the hearsay declarant testifies, there is no Confrontation Clause issue. Wright, 497 U.S. at 814-815; Felder v. State, 767 So. 2d 1267 (Fla. 3d DCA 2000)(defendant's reliance on Conner was misplaced when the victims testified at trial and were subject to cross-examination). Furthermore, Judge Cope's dissent in Brocca astutely recognizes:

> The Conner opinion is being interpreted by the majority and by the Fourth District as having struck down the elderly person hearsay exception in its entirety. State v. Hosty, 28 Fla. L. Weekly D 160 (Fla. 4th DCA Jan. 2, 2003); majority opinion at 2 (following Hosty). That is not a correct reading of Conner, and conflicts with Felder v. State, 767 So. 2d at 1267.
>
> The facts of the Conner case involved an elderly victim who was **unavailable** to testify at trial. The elderly victim died before the trial took place. 748 So. 2d at 953. The entire discussion in Conner was whether there were sufficient indicia of reliability to allow the elderly victim's hearsay statements to be admitted into evidence--given that the victim himself was unavailable. **In that context**, the court held the elderly person hearsay exception unconstitutional.
>
> Under another part of the statute, however, elderly person hearsay is **also** admissible if the hearsay declarant testifies at trial. If the elderly victim testifies at trial then there is, of course, no Confrontation Clause objection. Idaho v. Wright, 497 U.S. at 814. This court has already so held. Felder v. State, 767 So. 2d at 1267.
>
> It is plain that in speaking as it did, the Conner court **only** intended to address the issue presented--an unavailable elderly declarant--and did not reach a question not before it: the appropriate analysis where the elderly victim actually testifies at trial.

Brocca, No. 3D02-2652, *4.

In this case, the trial court and the Fourth District both succumbed to the pitfalls articulated by Judge Cope's dissent in Brocca. Under section 90.803(24)(a)2.a. of the Florida Statutes, a disabled adult's hearsay statement may be admissible if the declarant testifies at trial. Since the record in this

case indicates that the victim is competent to testify, she may be called as a witness at trial. (Pet. Ex. 5, p. 14-15). If the victim in this case testifies, the disabled adult hearsay exception is clearly constitutional from a Confrontation Clause standpoint. Wright, 497 U.S. at 814; Felder, 767 So. 2d at 1267; Brocca, No. 3D02-2652 (Cope, J., dissenting). Thus, the lower courts in this case erroneously overlooked their duty to "construe [section 90.803(24)] as to cause it to be constitutional if possible to do so." Leone, 118 So. 2d at 785.

The lower courts also erred in this case because they did not consider whether a portion of section 90.803(24) could be severed to preserve the validity of the statute. "Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactment where it is possible to strike only the unconstitutional portions." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999). As stated above, there are no Confrontation Clause problems with the disabled adult hearsay exception if the declarant testifies at trial. Wright, 497 U.S. at 814; Felder, 767 So. 2d at 1267; Brocca, No. 3D02-2652 (Cope, J., dissenting). Assuming for the sake of argument that this Court's decision in Conner stands for the proposition that the disabled adult hearsay exception is unconstitutional when the

declarant is unavailable, the lower courts should have addressed whether the portion of the disabled adult hearsay exception dealing with declarants who testify at trial was severable under the test reiterated by this Court in Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987).[4] Since all prongs of the severability test reiterated in Smith would be satisfied in this case, and the Legislature's "clear purpose in enacting the statute" would remain after severing the portion of section 90.803(24) dealing with unavailable disabled adult declarants, the lower courts erred by failing to sever the offending portion of the statute from the valid portion of the statute concerning statements of disabled adults who testify at trial. See id.; Richardson v. Richardson, 766 So. 2d 1036, 1041 (Fla. 2000). Therefore, the Fourth District's decision in this case should be reversed because it failed to sever the allegedly defective portion of section 90.803(24) from the unquestionably valid portion of the statute (concerning statements of disabled adults

[4] "When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken." Smith, 507 So. 2d at 1089 (citation omitted).

who testify at trial).

Finally, the Fourth District's opinion in Hosty overlooks the fact that section 90.803(24) must be applied as it exists in this case to assess the particularized guarantees of trustworthiness sufficient to satisfy the Confrontation Clause. Williams v. United States, 704 F.2d 1222, 1226-1227 (11th Cir. 1983). No assessment can be made on other hypothetical considerations that are not applicable here because this case does not implicate overbreadth analysis since First Amendment issues are not implicated. United States v. Raines, 362 U.S. 17 (1960); see also Schmitt v. State, 590 So.2d 404, 411 (Fla. 1991). The trial court and the Fourth District erred because they did not apply section 90.803(24) as it exists in this case to assess the particularized guarantees of trustworthiness sufficient to satisfy the Confrontation Clause. Accordingly, the Fourth District's decision in Hosty should be reversed.

POINT II

THE DISABLED ADULT HEARSAY EXCEPTION IN SECTION 90.803(24) OF THE FLORIDA STATUTES IS CONSTITUTIONAL

In the trial court, the State filed a notice of intent to utilize the victim's statements to her teachers and to law enforcement pursuant to section 90.803(24). (Pet. Ex. 3). The State asserted that the victim is a twenty-four-year-old woman

who suffers from a mental deficiency that restricts her ability to perform normal, daily activities. Id. At the May 30, 2002 hearing, the trial court stated that the victim had the mentality of a ten-year-old. (Pet. Ex. 5, p. 15). The victim has an I.Q. of 53, which places her within the range of mild mental retardation. (Pet. Ex. 3).

Despite the State's protestations, the trial court precluded the State from presenting evidence on this matter and refused to review the applicable indicia of reliability as they relate to this case. Instead, the trial court issued an order finding: (1) the definition of "disabled person" found in section 90.803(24) was overly broad, (2) the scope of testimony permissible under section 90.803(24) is identical to the scope of testimony the Conner court found to be objectionable, and (3) the disabled adult hearsay exception does not ensure the reliability of hearsay statements admitted at trial sufficiently to overcome the presumptive unreliability of hearsay statements. (Pet. Ex. 6). Based upon these findings, the trial court declared the disabled adult hearsay exception in section 90.803(24) unconstitutional. Id. The State filed a petition for writ of certiorari with the Fourth District, which was denied in Hosty.

There is a strong presumption in favor of the

constitutionality of statutes, and all doubt will be resolved in favor of the constitutionality of a statute. State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Courts are "obligated to interpret statutes in such a manner as to uphold their constitutionality if it is reasonably possible to do so." Dickerson v. State, 783 So. 2d 1144, 1146 (Fla. 4th DCA 2001). The trial court's order, and the Fourth District's opinion in Hosty, must be reviewed with all doubts resolved in favor of holding section 90.803(24) constitutional. Kinner, 395 So. 2d at 1363. Since the trial court (1) precluded the presentation of evidence below and (2) made no findings of fact, the proper standard of review in this case is de novo.[5] Parker v. State, No. SC01-1013, *2 (Fla. Mar. 27, 2003).

The Fourth District's opinion below "agree[d] with the trial judge that the section 90.803(24) provision for disabled adults suffers from the same constitutional shortcomings identified by the supreme court in *Conner* with respect to the elderly person exception to the hearsay rule." Hosty, 835 So. 2d at 1204. The State submits that the Fourth District's reasoning in Hosty is

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[5] As set forth in Point I above, the trial court, and the Fourth District, improperly declared section 90.803(24) unconstitutional without attempting to discern whether the victim's statements were admissible under the statute. See Victer; Efthimiadis.

flawed. According to the Fourth District, the disabled adult hearsay exception creates a class "broader than the class of declarants under section 90.803(23) that court approved in *Townsend* - children 'with a physical, mental, emotional, or developmental age of 11 or less.'" Id. However, there is no evidence in the record indicating that the class of disabled adult declarants under section 90.803(24) is any broader than the class of child victim declarants under section 90.803(23).

According to data from the 2000 United States Census, there are approximately 43,800,00 children in this country (approximately two million in Florida) who are eleven years of age or less.[6] See U.S. Census Bureau, Census 2000 Profile of General Demographic Characteristics, Geographic Area: United States, Tables DP-1 - DP-4; U.S. Census Bureau, Census 2000 Profile of General Demographic Characteristics, Geographic Area:

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[6] The U.S. Census statistics did not contain a category of 11 years of age or younger. Therefore, the total number used in this Motion was derived from adding the categories of "under 5 years" with "5 to 9 years." The number in the category "10 to 14 years" was then divided by the number of years in the set (5) to come up with an average for each specific age (10 year olds. 11 year olds, etc.). The number of 10 year olds and 11 year olds was then added to the number used above. A similar methodology was used for the number of persons over 18 years of age with a disability. The State would point out that its use of these numbers is for illustrative purposes only.

Florida, Tables DP-1 - DP-4.[7] Approximately 15,000 children are born in Florida each month, and "Florida's population of children is growing at a rapid clip, outstripping the rate of increase in adults."[8] The plain language of section 90.803(23) makes the statute theoretically applicable to any of those 43,800,000 children (approximately two million of which reside in Florida) eleven years of age or less. In addition, section 90.803(23) also applies to the unknown multitude of children over the "physical" age of eleven whose "mental, emotional, or developmental age" is "11 or less."

In contrast, data from the 2000 United States Census reflects that there are approximately 45,500,000 persons[9] over the age of eighteen in this country (approximately three million

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[7] For the convenience of the Court, the State has attached an appendix to this Initial Brief which includes copies of the applicable portions of the U.S. Census information referred to herein.

[8] See Alicia Caldwell, State Getting Younger, Census Says, St. Petersburg Times, March 31, 2001, *at* http://www.sptimes.com/News/033101/Census/State_getting_younger.shtml.; Voices for Florida's Children, Trends for Kids: Key Trends Affecting the Quality of Life for Children, Youth & Families, http://www.floridakids.com/trends.htm.

[9] Age questions are included in every 2000 U.S. Census form while disability questions are included in one of every six. The 2000 U.S. Census statistics regarding the number of disabled persons are based on sampling data, whereas the statistics regarding the number of persons in the various age categories are not.

of which are in Florida) with a disability (more than 17,900,000 of which carry on the "major life activity" of being gainfully employed).[10] See U.S. Census Bureau, Census 2000 Profile of General Demographic Characteristics, Geographic Area: United States, Tables DP-1 - DP-4; U.S. Census Bureau, Census 2000 Profile of General Demographic Characteristics, Geographic Area: Florida, Tables DP-1 - DP-4. It is unknown, however, whether all of the persons falling into the U.S. Census category of "with a disability" would satisfy the definition of "disabled adult" set forth in section 825.101(4). For example, a person blind in one eye may be considered disabled under the U.S. Census category. The same individual, however, would not satisfy the definition of "disabled adult" set forth in section 825.101(4) unless she was restricted in her ability to perform the normal activities of daily living.

Despite the complete lack of evidence regarding the "broad class" issue, the Fourth District's opinion below erroneously jumped to the conclusion that the class of declarants under section 90.803(24) is broader than the class of declarants under section 90.803(23). The State contends that the Fourth District's holding regarding this matter is erroneous because it

[10] Approximately 1,100,000 of those with a disability in Florida are employed.

is not supported by any evidence or other authority. Furthermore, data from the U.S. Census suggests that the number of potential declarants under section 90.803(24) may be remarkably similar to, if not less than, the number of potential declarants under section 90.803(23). Therefore, the Fourth District's conclusion that the disabled adult hearsay exception creates a class broader than the class of declarants under section 90.803(23) that this Court approved in Townsend is improper because it is not based upon any evidence or other authority.

The Fourth District's opinion also states that the disabled adult hearsay exception under section 90.803(24) "'would be broadly applicable to a wide variety of crimes and is not restricted to the [disabled] abuse context.'" Hosty, 835 So. 2d at 1204. This statement fails to acknowledge that the scope of testimony admissible is nearly identical under both the child victim hearsay exception and the disabled adult hearsay exception. Contrary to the Fourth District's conclusion, the State contends the disabled adult hearsay exception is applicable to the same variety of crimes as the child victim hearsay exception.

The child victim hearsay exception, which was held to be constitutional in State v. Townsend, 635 So. 2d 949 (Fla. 1994)

and Perez v. State, 536 So. 2d 206 (Fla. 1988), is available to describe "any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sex act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child." § 90.803(23)(a), Fla. Stat. The disabled adult hearsay exception is available to describe "any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant ... disabled adult." § 90.803(24)(a), Fla. Stat. Under the child victim hearsay exception, the broad category of "any act of child abuse or neglect" includes "(a) [i]ntentional infliction of physical or mental injury upon a child; (b) [a]n intentional act that could reasonably be expected to result in physical or mental injury to a child; or (c) [a]ctive encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child." § 827.03(1), Fla. Stat. This definition of child abuse clearly encompasses "the offense of battery or aggravated battery or assault or aggravated assault or sexual battery" as well as "any other violent act on the declarant" because such offenses qualify as "acts of child

abuse." The Fourth District's opinion in Hosty overlooks the fact that a close review of section 90.803(23) and section 90.803(24) reveals that the disabled adult hearsay exception has a scope nearly identical to that of the child victim hearsay exception.

The following example demonstrates the similarity between the scope of the disabled adult hearsay exception and the scope of the child hearsay exception. A criminal uses a crowbar during a physical attack on a ten year-old child. The criminal's actions constitute the crime of aggravated battery. § 784.045, Fla. Stat. The victim's hearsay statements regarding the attack may be admissible under section 90.803(23) as an "act of child abuse or neglect" because the definition of child abuse encompasses any "intentional infliction of physical or mental injury upon a child." § 827.03(1)(a), Fla. Stat. Similarly, if the same suspect uses a crowbar during an attack on an eighteen year-old disabled person (which would constitute the crime of aggravated battery), the victim's hearsay statements regarding the attack may be admissible under section 90.803(24). This example demonstrates, albeit simply, that the scope of the disabled abuse hearsay exception is nearly identical to the scope of the child victim hearsay exception that passed constitutional muster in Perez and Townsend.

The State would also point out that the Fourth District's analysis regarding the scope of the disabled adult hearsay exception in section 90.803(24) is contrary to well-established federal law. Federal Rule of Evidence 807, and its predecessors, provide for a "residual hearsay exception" which permits the use of statements not falling under one of the other outlined hearsay exceptions if the statements have equivalent guarantees of trustworthiness. Fed. R. Evid. 807. Admission of a statement under the federal residual hearsay exception requires the court to determine that: (1) the statement is offered as evidence of a material fact; (2) 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 (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[11] Id.

The scope of the residual hearsay exception in Rule 807 is unlimited because the Rule does not place a constraint as to the crimes for which it is applicable. Id. Despite this unlimited scope, the federal courts have not taken issue with the reach of Rule 807 when addressing Confrontation Clause arguments. See

[11] The federal residual hearsay exception has a notice provision that requires sufficient notice be provided to the adverse party.

United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994)(drug smuggling case); United States v. Wilson, 249 F.3d 266 (5th Cir. 2001)(money laundering, mail fraud, etc.); United States v. Bradley, 145 F.3d 889 (7th Cir. 1998)(convicted felon in possession of firearm and ammunition). The residual hearsay exception contained in Rule 807 represents the majority rule in the United States. Brocca, No. 3D02-2652, *5 (Cope, J., dissenting)(twenty-eight states and the entire federal system have adopted a residual hearsay exception). The federal courts have not taken issue with the scope of the residual hearsay exception in Rule 807, which is much broader than the scope of the disabled adult hearsay exception in section 90.803(24), when addressing Confrontation Clause arguments. See Deeb; Wilson; Bradley. Thus, the Fourth District's conclusion about the scope of the disabled adult hearsay exception seems erroneous and unwarranted in light of federal authority dealing with a much broader hearsay exception.

The Fourth District held that "the factors set forth in section 90.803(24)(a)1. for the court to consider when assessing the reliability of the hearsay statement 'do not guarantee the reliability of a statement when applied' to a disabled adult." Hosty, 835 So. 2d at 1204 (citation omitted). According to the Fourth District, "part of the problem comes from the breadth of

the definition of 'disabled adult.'" Id. The definition of "disabled adult" used in section 90.803(24) is actually set forth in section 825.101(4) of the Florida Statutes as follows:

> "Disabled adult" means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

This definition of disabled adult is the same one utilized in defining the crimes of abuse, aggravated abuse, and neglect of a disabled person. See § 825.102, Fla. Stat. Despite the Fourth District's comment about the "breadth" of the definition of disabled adult, this definition has not been declared overly broad in the context of defining the aforementioned crimes.

Although the Fourth District apparently has reservations regarding the definition of disabled adult in the context of the hearsay exception in section 90.803(24), this Court apparently did not have such misgivings about the same definition of disabled adult when used to define the elements of a crime. See Sieniarecki v. State, 756 So. 2d 68 (Fla. 2000). In Sieniarecki, the defendant argued that section 825.102(3) was vague because "it is not clear, within the meaning of the statute, that her mother had 'one or more physical or mental

limitations that restrict the person's ability to perform the normal activities of daily living.'" Id. at 75. This Court rejected the defendant's vagueness argument and had no problem applying the definition of disabled adult to the facts in the Sieniarecki case. Based upon this Court's decision in Sieniarecki, the Fourth District's reservations regarding the "breadth" of the definition of "disabled adult" in section 90.803(24) are unfounded.

The exhaustive analysis in Judge Cope's dissenting opinion in Brocca, No. 3D02-2652, reveals how, contrary to the Fourth District's assertion in Hosty, "a court can 'formulate a list of permissible considerations that would ensure the reliability of a hearsay statement made by [a disabled adult] to the extent that 'adversarial testing would add little to its reliability.''" Hosty, 835 So. 2d at 1205. Judge Cope points out that section 90.803(24) satisfies the requirements of the Confrontation Clause analysis set forth in Idaho v. Wright, 497 U.S. 805 (1990), because the trial court must determine that the "'time, content, and circumstances of the statement provide sufficient safeguards of reliability.'" Brocca, No. 3D02-2652, *4 (Cope, J., dissenting). Section 90.803(24) also contains a list of nonexclusive factors to be considered in assessing

reliability.[12]

In Conner, this Court acknowledged:

> In Townsend, in an effort to ensure the reliability of any statement that would be admissible, we set forth additional factors that may be considered by the court including
>
> > the statement's spontaneity; whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to questions from adults; the mental state of the child when the abuse was reported; whether the statement consisted of a child-like description of the act; whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement; the ability of the child to distinguish between reality and fantasy; the vagueness of the accusations; the possibility of any improper influence on the child by participants involved in a domestic dispute; and contradictions in the accusation.

Conner, 748 So. 2d at 957-958. These criteria are applicable to statements made by the victim in this case,[13] a twenty-four-year-old woman with the mentality of a ten-year-old and an I.Q. of 53. Brocca, No. 3D02-2652 (Cope, J., dissenting). The concerns

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[12] Section 90.803(24)(a)1. states "[i]n making its determination, the court may consider the mental an 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...."

[13] The victim has a mental disability that restricts her ability to perform normal, daily activities.

expressed by this Court in Conner regarding the elderly person hearsay exception (i.e., the factors identified in subsection 90.803(24) were not tailored for determining the reliability of hearsay statements by elderly persons) are inapplicable here because the victim, as a practical matter, is a child. Id. "Certainly the body of law which has developed with respect to the hearsay statements of child victims applies intact (or with little modification) to the situation of a mentally disabled adult." Id. at *4. Since the additional factors set forth by this Court in Townsend would be applicable to the victim in this case (a mentally disabled adult), the Fourth District erroneously concluded that a court would be unable to formulate a list of permissible considerations that would ensure the reliability of a disabled adult's hearsay statement.[14] Hosty, 835 So. 2d at 1204-1205.

The Fourth District's opinion in this case asserts that "'the policies that supported upholding the narrowly drawn child abuse hearsay exception are not present in the [broadly defined, disabled] adult context.'"[15] Id. at 1205 (citation omitted).

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[14] The State would also point out that the residual hearsay exception in Federal Rule 807, which is the majority rule in this country, does not have any restriction regarding the declarants to which it applies. Fed. R. Evid. 807.

[15] As stated above, the disabled adult hearsay exception is drawn as narrowly as the child victim hearsay exception is.

This assertion is mistaken because: (1) there is not any evidence in the record to support the assertion, and (2) the same policies that supported upholding the child abuse hearsay exception are present in the disabled adult context.

Persons with disabilities are four to ten times more likely to be victims of crimes than are people without disabilities. Pertersilia, Joan, Invisible Victims: Violence Against Persons with Developmental Disabilities, Human Rights: Vol. 27, No. 1, p. 9-13. Seventy percent of women with developmental disabilities, like the victim in this case, are sexually assaulted in their lifetime (which represents a rate 50% higher than the rest of the population). Id. Women with developmental disabilities have a high probability of being repeatedly victimized (study revealed that 50% of women with intellectual disabilities who had been sexually assaulted were assaulted ten or more times). Id. Although children usually receive special accommodations in court to assist with testimony, such accommodations do not generally apply to persons adults with disabilities. Id. However, "[m]any argue that special procedures now in place for handling the reporting and prosecution of child abuse should apply to [disabled adult] cases as well." Id.

This Court has repeatedly recognized that the Legislature

enacted the child victim hearsay exception in "response to the need to establish special protections for child victims in the judicial system." State v. Jones, 625 So. 2d 821, 825 (Fla. 1993); Conner, 748 So. 2d at 959 (quoting Jones). The staff analysis of CS/SB 82 states that Chapter 95-158 extends "a protection that is currently afforded child abuse victims," i.e., a special hearsay exception, to elderly persons and disabled adults. Staff of Fla.S.Comm. on Ways and Means, CS/SB 82 Staff Analysis 1-3 (March 10, 1995). According to Professor Petersilia's article, disabled adult victims are in dire need of protections similar to the ones afforded child abuse victims. In light of the special needs of disabled adult victims, and the staff analysis of CS/SB 82, it seems the Legislature enacted the disabled adult hearsay exception to afford disabled adult victims much-needed special protections in the judicial system. Thus, the Fourth District's conclusion that "the policies that supported the upholding of the child abuse hearsay exception are not present in the [broadly defined, disabled] adult context" is erroneous. Hosty, 835 So. 2d at 1205 (citation omitted).

The Fourth District's decision in this case is rife with factual statements and legal conclusions that are not supported by any evidence or pertinent authority. Accordingly, this Court should reverse the Fourth District Court of Appeal's decision as

it is based upon speculation, supposition, and conjecture rather than evidence and controlling authority.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of appeal and hold that the disabled adult hearsay exception in Section 90.803(24) of the Florida Statutes is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: Donald J. Cannarozzi, Assistant Public Defender, Broward County Courthouse, Suite 3872, 3rd Floor, North Wing, Fort Lauderdale, FL 33301 on April 25, 2003.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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