1-1-2001

Narrowing the Gap Between Florida's Hearsay Exceptions for Child Declarants and Elderly Declarants: Sections 90.803(23) and 90.803(24), Florida Statutes

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I. INTRODUCTION

On September 16, 1999, the Florida Supreme Court reviewed the constitutionality of the hearsay exception for elderly persons or disabled adults, *Florida Statutes* section 90.803(24)(1995).[1] The case began in October of 1995 when the State of Florida charged the defendant, David R. Conner, with armed burglary of a dwelling, armed robbery, and armed kidnapping.[2] The victim, Earl Ford, was an 84-year old man who lived alone.[3] He suffered from poor eyesight, some hearing loss, and occasional memory lapses.[4] David Conner broke into Earl Ford's home, tied him to a chair with his suspenders, and ransacked the house.[5] Conner then robbed Ford at gunpoint for money and several other items.[6] The next day, Ford provided an initial statement to the police;[7] two weeks later, he gave them a sworn statement.[8] However, three months later, Ford died. Prior to trial, the State of Florida provided Conner with notice that it intended to introduce Ford's hearsay evidence at trial. The State relied on section 90.803(24), the hearsay exception that makes admissible out-of-court statements made by elderly persons or disabled adults.[9] Conner challenged the hearsay exception as facially violative of

1. Conner v. State of Florida, 748 So. 2d 950 (Fla. 1999).
2. *Id.* at 952.
3. *Id.*
4. *Id.*
5. Conner v. State of Florida, 709 So. 2d 170, 171 (Fla. 2d DCA 1998).
6. *Id.*
7. *Id.*
8. *Conner*, 748 So. 2d at 952.
9. FLA. STAT. § 90.803(24) (1995).

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing 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 elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
> 1. 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

both his right to confront witnesses and to due process under the Florida and U.S. constitutions.[10] The trial court ruled that the State would have to establish that the circumstances surrounding the statements guaranteed their reliability before the court would admit them at trial.[11] As a result, Conner pleaded nolo contendre and specifically preserved the right to appeal the issue of the constitutionality of the hearsay exception.[12] On appeal, the Second District Court of Appeal of Florida held that the elderly hearsay exception is not facially void under either the confrontation clause or the due process provisions of both the federal and state constitutions.[13] Nevertheless, the Florida Supreme Court granted certiorari.[14] Although the Court declined to reach the constitutionality of 90.803(24) as it applies to disabled adults, it concluded that the exception with regards to elderly persons violates the defendant's constitutional rights of confrontation.[15] The court came to this conclusion only after thoroughly comparing section 90.803(24) with section 90.803(23), the hearsay exception with regards to child declarants. Thus, on appeal, the Florida Supreme Court quashed the Second District's decision and held that the hearsay exception for elderly adults in criminal cases is unconstitutional because it cannot justify the abrogation of a defendant's most basic constitutional right: the right to confront witnesses.

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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; and

2. The elderly person or disabled adult either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Id.

10. U.S. CONST. amends. V, VI; FLA. CONST. art. I, §§ 9, 16.

11. *Conner*, 748 So. 2d at 953.

12. *Id.* at 953-54.

13. *Conner*, 709 So. 2d at 170.

14. *Conner*, 748 So. 2d at 952.

15. *Id.* at 954.

II. PERSPECTIVE

A. *Analysis of Section 90.803(24), the Hearsay Exception for Statements of Elderly Persons*

In 1995, the Florida Legislature enacted Florida Statutes section 90.803(24) which addressed hearsay statements of elderly persons and disabled adults. At the same time, the legislature also enacted section 825.101, which provided definitions of "elderly person" and "disabled adult."[16] In *Conner v. State of Florida,*[17] the Supreme Court of Florida declined to reach the constitutionality of section 90.803(24) as it applies to disabled adults because that issue was not presented in the case.[18] Instead, the parties and the court only concentrated on the exception as it pertains to elderly persons.

There are two components to the definition of an "elderly person," as defined by section 825.101.[19] First, an individual must be at least sixty years old and "suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning."[20] Second, "the ability of the person to provide adequately for his own care or protection is impaired."[21] Only once it is established that the declarant is an elderly person, as defined by the statute, is this hearsay exception, section 90.803(24), appropriately available for use. Ford certainly satisfies the first component of the definition, as evidenced by his advanced age, poor eyesight, hearing loss, and occasional memory lapses. Thus, it appears that Ford suffered from the infirmities of aging as manifested by these symptoms of old age. Ford's disabilities fall squarely within the physical and mental dysfunctioning provisions of the statute.

However, the statute indicates that a person is defined as an "elderly person" only if his dysfunctions inhibit his ability to provide adequately for his own care or protection.[22] The definition's very language implies that being "elderly" is contingent on one's inability to independently care for himself in an "adequate" manner.[23] Thus, the fact that Ford lived alone and cared for himself may suggest that his "dysfunctioning" did not impair his ability to provide for himself. If the defini-

16. Ch. 95-158, §§ 1, 2 at 1587-89, Laws of Fla.
17. Conner v. State of Florida, 748 So. 2d 950 (Fla. 1999).
18. *Id.* at 961 n.11.
19. FLA. STAT. § 825.101 (1999).
20. *Id.*
21. *Id.*
22. *Id.*
23. The statute fails to clearly define the term "adequately." Thus, on its face, this provision seems vague as it fails to carefully delineate examples in which a person's self care and protection are not adequate, nor does it give examples of borderline adequacy. *See id.*

tion is read literally, it is likely that a court would not consider Ford to be elderly. As a consequence, he would not be granted protection by the hearsay provision and would have been forced to testify in court.[24] The statute's requirement that an elderly person be unable to adequately care for himself is vague and leaves room for various interpretations. According to what or by whose definition of adequacy is one required to live? If Conner had decided to challenge whether Ford satisfied this vague part of the definition, he would have a valid argument. Nevertheless, Conner did not challenge the use of section 90.803(24) on these grounds.

More generally, however, Conner argued that elderly persons are per se incompetent to testify, and that admitting an elderly person's out-of-court statements violated his right to confront that witness.[25] He asserted that the same age-related infirmities which allow individuals to be considered "elderly persons" renders that very person unreliable and untrustworthy.[26] In its decision, the Second District Court of Appeals refuted this argument and stated that the limitations which impair an elderly person's ability to protect or care for himself have nothing to do with the victim's ability to provide a reliable statement.[27] In fact, that court declared, "to the extent that the infirmities of age—loss of sight, hearing, memory, or other abilities—adversely affect the elderly person's ability to discern what happened or to describe the events, those issues can be explored when the trial court receives evidence . . . of the statement['s] . . . reliability."[28] The court suggested that although the infirmities which render a person "elderly" may implicate a statement's reliability, a process exists which would remove any doubts as to a statement's trustworthiness.

Notwithstanding the lower courts' positions, the Supreme Court of Florida agreed with Conner's argument, and stated that "the circumstances that might necessitate the use of the statement—such as the mental infirmity or physical infirmity of the elderly person—would be the very circumstances that would render the statement less reliable."[29] This remark fails to recognize that the statute allows for the exclusion of

24. This argument is inconclusive, as Ford's death would have prevented him from testifying in court, regardless of whether or not he was considered an "elderly person" according to the statute.

25. *Conner*, 709 So. 2d at 171-72. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

26. *Conner*, 709 So. 2d. at 171.

27. *Id.* at 172.

28. *Id.*

29. *Conner*, 748 So. 2d at 955. FLA. STAT. § 90.803(24) provides for a hearing outside the presence of the jury in which the court finds whether the time, content, and circumstances of the statement provide sufficient safeguards of reliability. § 90.803(24) (1995).

certain types of statements. A court would not admit the statements of a mentally incompetent person because the statute requires the court to find that the statement has safeguards of reliability.[30] This threshold requirement will allow a court to exclude those statements that lack guarantees of trustworthiness. Furthermore, in this assertion, the court indicates that an elderly person's physical infirmity may render the statement less reliable.[31] This allegation makes no sense whatsoever. Consider the following example: an elderly person is wheelchair-dependent or bedridden for life. Do these infirmities dictate one's competence to make a reliable and trustworthy statement? Although it is clear that, in some circumstances, the statements of a mentally infirm person would be less reliable than those of a mentally sound person, the same rationale does not apply in the case of a physically disabled elderly person. Nevertheless, the Florida Supreme Court concludes that a defendant's right to confront an elderly victim outweighs the importance of protecting the elderly person from testifying in court and again facing the alleged victimizer.

Pursuant to the hearsay exceptions in section 90.803, the availability of the declarant is immaterial.[32] Thus, regardless of whether the declarant is available to testify, the out-of-court statement will be admitted because it is determined that the statement is sufficiently reliable. However, in section 90.803(24) of the Florida statutes, the court must make a finding that the elderly person is deemed unavailable because "participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm."[33] In its decision, the Second District Court of Appeals included a policy reason in support of finding an elderly person unavailable: the hearsay exception is designed "to insure that elderly victims will not suffer injustice at the hands of the legal system."[34] Conner argues that protecting the elderly runs counter to his right to face witnesses against him.[35]

The Federal Rules of Evidence, as well as the Florida Evidence Code, provides that every person is competent to be a witness except as otherwise provided in the rules, so long as he has personal knowledge of the matter at hand.[36] In addition, the witness's testimony must be rationally based on his perception.[37] According to these rules, an elderly per-

30. § 90.803(24)(a)(1).
31. *Conner*, 748 So. 2d at 959.
32. § 90.803 (1999).
33. § 90.803(24)(a)(2)(b) (1995).
34. *Conner*, 709 So. 2d at 171.
35. *Id.*
36. FED. R. EVID. 601, 602; § 90.601 (1995).
37. FED. R. EVID. 701.

son would be competent to testify if it can be shown that he has personal knowledge of the relevant facts. However, Conner argues that the elderly are incompetent to testify because the very definition of "elderly person" requires that one suffer from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning.[38] Conner asserted that these same dysfunctions would likely impair the ability of the witness to rationally base his testimony on personal knowledge.[39]

Notwithstanding this argument, once a court establishes that a declarant is an elderly person and is unavailable to testify due to the substantial likelihood that it would result in severe emotional, mental, or physical harm, the threshold issues of competency and unavailability have been met. In order to admit the statement into evidence, the court must find that it indicates a level of trustworthiness.[40] To do so, the court must conduct a hearing outside the presence of the jury to determine whether the time, content, and circumstances of the statement provide sufficient safeguards of reliability.[41] Thus, in making this determination, the court utilizes a "totality of circumstances" approach to analyze the declarant's statement.[42] Furthermore, when the state seeks to admit hearsay evidence, it must show the reliability of the statement based on its "particularized guarantees of trustworthiness."[43]

According to the statute, the court may look at certain factors during the process of determining whether or not a statement is sufficiently reliable to admit as hearsay evidence. The factors are: the mental and physical age and maturity of the elderly person; 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; and any other factor deemed appropriate.[44] The court can thus consider any factor it finds relevant in making its determination, and the court makes a "case-specific" finding of reliability.[45] It appears that the court will not admit a statement by an elderly person if it finds that the person lacked the mental capacity for competence, or that the assertion is not reliable due to that person's specific circumstances. This "case-specific" inquiry appears to aid the defendant because, absent a finding of reliability, the

38. *Conner*, 709 So. 2d at 171-72; *see also* FLA. STAT. § 825.101(6) (1995).

39. Initial Brief of Petitioner on the Merits at 15, Conner v. State of Florida, 748 So. 2d 950 (Fla. 1999).

40. FLA. STAT. § 90.803(24) (1995).

41. FLA STAT. § 90.803(24)(a)(1) (1999).

42. Idaho v. Wright, 497 U.S. 805, 819 (1990).

43. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

44. FLA. STAT. § 90.803(24)(a)(1) (1999).

45. FLA. STAT. § 90.803(24)(c) (1999).

statement will be excluded. In fact, these guidelines are mere recommendations. A court may use as many or as few as it wishes, but a hearing must take place to make these determinations.

Although on its face it appears that this suggested list of factors would assist the court in its determination of the reliability and trustworthiness of an out-of-court statement, the very language of the statute may suggest otherwise. The court is required to conduct a hearing, but what takes place in the hearing is not regulated by the statute.[46] Again, the factors listed in the statute are mere suggestions and discretionary. As Conner argued in his appeal to the Supreme Court of Florida, the jury, not the judge, should determine the reliability of a statement through cross-examination, judging the demeanor of the witness, and deciding how much weight to give his statement.[47] The statute states that the trial court *may* consider the listed factors in making its determination as to whether the time, content, and circumstances of the statement provide sufficient safeguards of reliability.[48] This failure to command the court to consider these factors may result in arbitrary decision-making by courts. Without a required list of factors to consider, this area of the law runs the risk of being inconsistent. The result may abrogate a defendant's right to confront a witness by admitting the hearsay statement, yet favor another defendant by excluding the hearsay statement.

Conner suggested that "[a]mending the . . . hearsay statute to mandate consideration of an elderly person's or a disabled adult's physical and mental infirmities, together with other factors deemed appropriate would provide sufficient 'particularized guarantees of trustworthiness' or 'safeguards of reliability' as to be so trustworthy and reliable that adversarial testing would add little."[49] Therefore, he argues that the statute is unconstitutional on its face. Supporting this argument is the fact that the Supreme Court of Florida has set forth a permissive list of additional factors that would assist the courts in determining the reliability of child hearsay statements in addition to those already enumerated in section 90.803(23) (the hearsay exception for statements of child victims).[50] The exception for statements of elderly persons tracks the exception for statements of child victims.[51] Despite these similarities, the court was unable to formulate a comparable list of permissible considerations which would ensure the reliability of hearsay statements made by elderly

46. § 90.803(24)(a)(1).

47. Initial Brief of Petitioner at 24.

48. § 90.803(24)(a)(1) (emphasis added).

49. Initial Brief of Petitioner at 26.

50. *Conner*, 748 So. 2d at 958; State of Florida v. Townsend, 635 So. 2d 949, 957-58 (Fla. 1994).

51. *Conner*, 748 So. 2d at 958.

adults to the same extent that it does for statements made by children.[52] Conner's argument ultimately prevailed when the Supreme Court of Florida determined that the hearsay exception for elderly persons, section 90.803(24), was unconstitutional.

Once a court finds that an out-of-court statement has particularized guarantees of trustworthiness and the requisite safeguards of reliability, it is still not admitted into evidence until there is proof of corroborating evidence of the abuse or offense.[53] Such evidence of the offense must be independent of the evidence used in determining the statement's reliability.[54] The court may not bootstrap the corroborating evidence onto that which is admitted as hearsay.[55] In the dicta of the Second District Court of Appeals' decision, the court stated that to "assure that a defendant is not convicted solely on the basis of hearsay statements of an unavailable witness, the statute provides that, after determining that the hearsay statement is reliable and originates from a trustworthy source, the trial court must then find that other evidence corroborates the statement."[56] That court misstated the final word of the statute. The court's duty is not to find corroboration of the *statement*, but of the *abuse or offense*.[57] This distinction is extremely important because it requires that the state provide other sources of information in support of the allegations of abuse or offense, in addition to the reliable hearsay statement. Although the Second District did not specifically rule on the constitutionality of the statute, the exception was upheld largely due to the fact that the trial court closely followed the statute's guidelines. Among other reasons in support of this judgment, the court found "other corroborating evidence to support the victim's statement."[58] The court refers to the condition of Ford's house after the incident, and the recovery of the telephone which had been taken from his home as evidence supporting the hearsay statement.[59] However, these facts actually exist as corroborating evidence of the *offense.*

As previously stated, an elderly person need not testify in court if

52. *Id.* at 958-59.

53. FLA. STAT. § 90.803(24)(a)(2)(b)(1999).

54. Initial Brief of Petitioner at 18. Such evidence includes the time, content, and circumstances of the declarant's statements.

55. Idaho v. Wright, 497 U.S. 805, 823 (1990). The use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. *Id.* at 823.

56. *Conner*, 709 So. 2d at 172.

57. FLA. STAT. § 90.803(24)(a)(2)(b) (1995) (emphasis added).

58. *Conner*, 709 So. 2d at 172.

59. *Id.*

participating in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm.[60] If such harm exists, the court would find the declarant unavailable.[61] In *Conner*, the declarant, Ford, was "unavailable" to testify due to his death. Florida statute section 90.804(1)(d) states that when the declarant "[i]s unable to be present or to testify at the hearing because of death he is unavailable as a witness."[62] Thus, Ford was excluded from testifying. Nevertheless, because no subsection of 90.804 applied to the statements in question, it was inapplicable. Although it may seem appropriate for Ford's hearsay statements to have been admitted pursuant to section 90.804, "declarant unavailable," the types of hearsay permitted under that statute do not include statements describing acts of abuse or violence on the elderly person.[63] In other words, there is no similar "death" provision under section 90.803 that exists under section 90.804 for determining unavailability of a declarant.

The court would be more inclined to protect an elderly living declarant if testifying in court would be a harmful experience to that individual.[64] On its face, this requirement is easily satisfied by a mere showing that the elderly person would be physically burdened by testifying in court, or that facing the defendant would cause emotional or mental harm. In reality, however, the language of the statute is careful not to be over inclusive, and it specifically states that a finding of unavailability would be possible only if there is a substantial likelihood of severe harm to the defendant.[65] Although Conner argues that the statute is facially void, this provision is clear. Moreover, the statute is not overbroad. Should the court fail to find a substantial likelihood of harm, the declarant would be "available" and consequently required to testify.[66]

In addition to these "particularized guarantees of trustworthiness," the statute includes a notice provision which, if followed, abrogates neither the defendant's right to confront witnesses nor to due process.[67]

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60. § 90.803(24)(a)(2)(b) (1999).

61. *Id.*

62. FLA. STAT § 90.804 (1995).

63. § 90.804(2) admits as hearsay evidence the following: (a) former testimony, (b) statement under belief of impending death, (c) statement against interest, (d) statement of personal or family history. Ford's statements do not fall within any of the above categories, and thus, § 90.803(24) is the correct statute to look to in order to admit his statements. § 90.804(2).

64. § 90.803(24)(a)(2)(b).

65. § 90.803(a)(2)(b).

66. *Id.*

67. § 90.803(24)(b). In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the

The statute provides for a ten-day warning to the defendant so that he may prepare a defense to counter the admission of additional evidence against him.[68] This seems reasonable, and, in fact, ten days is a substantial amount of time. Moreover, the notice given the defendant includes the court's findings as to the reliability and circumstances of the state.[69] Therefore, the defendant is provided with all relevant facts with which he may challenge the reliability of the statements at issue. In criminal trials,[70] the jury must base a conviction on a high burden of proof. If the defense can show any reasonable doubt as to the hearsay statement's reliability, the defendant may have a greater likelihood of success in excluding the out-of-court statement.[71] The notice provision provides fundamental fairness to the defendant because it vitiates any possible unfair advantage to the side submitting the hearsay evidence.

Therefore, the hearsay exception regarding statements made by elderly victims of abuse or violence does not appear unconstitutional. There are many requirements which must be met before an out-of-court statement is admitted under this exception. First, the statement's proponent must prove that the declarant is elderly.[72] Second, the statement must contain indica of trustworthiness and provide sufficient safeguards of reliability.[73] The statute even includes a non-exclusive list of factors that the court may consider in this determination.[74] Third, the court must find corroborative evidence of the abuse or violent offense.[75] Fourth, the court must find that the witness is unavailable to testify either due to the strictures of section 90.804 or because there is a substantial likelihood that testifying would be harmful to the declarant.[76] Lastly, the defendant in a criminal action must receive ten days' notice that the statement will be used as evidence against him.[77] Without first meeting these requirements, an out-of-court statement will not be admitted.

In spite of the many threshold requirements, the Florida Supreme Court still held this hearsay exception unconstitutional because it vio-

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circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement. *Id.*

68. *Id.*

69. *Id.*

70. The notice provision only applies in criminal actions. *Id.*

71. In fact, if one juror finds that the statement lacks reliability, he may weigh this against all other evidence, and may find that the prosecution's case lacks merit. According to the unanimity requirement this may result in a victory for the defense. FED. R. CRIM. P. 31(a).

72. FLA. STAT. § 90.803(24) (1999); § 825.101(5) (1995).

73. § 90.803(24)(a).

74. *Id.*

75. § 90.803(24)(a)(2)(b).

76. § 90.804.

77. FLA. STAT. § 90.803(24)(b) (1997).

lates the defendant's right of confrontation.[78] Since the Court was unable to formulate a permissive list of factors to assist in determining the reliability of a statement made by an elderly person, the court reasoned that the exception did not ensure the reliability of the statements admitted at trial.[79] As a result, statements such as these would benefit from adversarial testing in order to guarantee their trustworthiness and reliability.[80] In Ford's case, however, no adversarial testing is possible. His statements, and the statements of others similarly situated, are forever excluded as a result of this decision. The court's message is clear—although an injustice was committed against Ford, a vulnerable and elderly man who lived alone—his alleged victimizer will remain free because the court found that Conner's rights are more valuable than Mr. Ford's.

B. *Defendant's Attack of Section 90.803(24)*

In declaring section 90.803(24) unconstitutional, the Florida Supreme Court reasoned that the exception is not supported by the same competing policy interests which are present in the child abuse context.[81] The child hearsay exception was enacted in "response to the need to establish special protections for child victims in the judicial system."[82] Specifically, the state has an interest in protecting the child victim of abuse from the further trauma that would be caused by forcing him to testify in court.[83] Furthermore, the child's out-of-court statements may be more trustworthy than in-court testimony due to the "stress and trauma of rehashing bad memories, hostile attacks on the child's credibility, [and] facing the alleged perpetrator again."[84]

Despite these arguments, in *Idaho v. Wright*,[85] the U.S. Supreme Court held that the admission of a child's hearsay statements violated the Confrontation Clause rights of the child's mother.[86] This holding is similar to that in *Conner*. *Wright* involved the conviction of a mother on two counts of lewd conduct with her own children, aged five and a half and two and a half.[87] The lower court admitted hearsay statements made

78. *Conner*, 748 So. 2d at 960.
79. *Id.* at 954-55.
80. *Id.* at 960.
81. *Id.* at 959.
82. State v. Jones, 625 So. 2d 821, 825 (Fla. 1993).
83. Gladening v. State, 536 So. 2d 212, 217 (Fla. 1988).
84. Dep't of Health and Rehabilitative Servs v. M.B., 701 So. 2d 1155, 1158 n.4 (Fla. 1997).
85. 497 U.S. 805 (1990).
86. *Id.* at 813.
87. *Id.* at 808. Specifically, the mother and her companion (Robert Giles) had committed sexual acts upon the mother's two children. The youngest daughter was the child of Giles. The older daughter told her father's female companion that Giles had sexual intercourse with her while

by the younger daughter to her pediatrician about the abuse, holding that the child was incapable of communicating to the jury.[88] The Supreme Court of Idaho held, and the U.S. Supreme Court affirmed, that the child's statements lacked particularized guarantees of trustworthiness because the doctor had failed to conduct the discussion with the child using appropriate procedural safeguards.[89] The Court stated that incriminating statements are not admissible unless the statements bear adequate indicia of reliability.[90] The reliability requirement is met either when the statement falls within a firmly-rooted hearsay exception or has the essential "particularized guarantees of trustworthiness."[91]

The Confrontation Clause of the Sixth Amendment states that the accused shall enjoy the right to confront the witnesses against him.[92] However, the Confrontation Clause does not prohibit the admission of all hearsay statements, as evidenced by the many exceptions to the hearsay rule in both federal and state law. Thus, the Supreme Court has limited its interpretation of the Confrontation Clause stating that "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'"[93] The hearsay exception allows some evidence to be admitted even though the evidence may be incriminating, and the defendant is not given the opportunity to face the declarant. The Supreme Court has rejected a literal interpretation of the Confrontation Clause that would completely prevent any hearsay testimony from being introduced in a criminal trial.[94]

Although the out-of-court statements in *Wright* were not admitted at trial, not all hearsay statements are excluded. A court must take a case-specific approach in determining whether or not to allow hearsay statements to be admitted. As stated in *Wright*, if a statement falls within a firmly rooted hearsay exception or has the essential "particularized guarantees of trustworthiness" the statement will be admitted.[95]

The purpose of the Confrontation Clause is to protect a defendant's

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her mother held her down and covered her mouth and that she had seen the same thing be done to her younger sister. *Id.* at 809.

88. *Id.* At the time of trial, the child was three years old. *Id.*

89. *Id.* at 812-13. He failed to videotape the interview, asked leading questions, and had a preconceived idea of what the child should be disclosing. *Id.*

90. *Id.* at 816.

91. *Id.* at 816-17.

92. U.S. CONST. amend. VI. *See also* FLA. CONST. art. I, § 16(a) (stating that the accused shall have the right to confront at trial adverse witnesses).

93. Bourjaily v. U.S., 483 U.S. 171, 182 (1980).

94. *Conner*, 748 So. 2d at 956.

95. Idaho v. Wright, 497 U.S. 805, 817 (1990).

due process rights by allowing the defendant to defend himself against the accusations confronting him.[96] The rights to confront and cross-examine witnesses and to call witnesses on one's behalf are essential to due process and implicit in one's constitutional rights.[97] Furthermore, the right of cross-examination assures the "accuracy of the truth-determining process."[98] For example, in *Chambers v. Mississippi*,[99] the Supreme Court held that the defendant was deprived a fair trial when he was denied the right to cross-examine his own witness.[100] Similarly, in *Coy v. Iowa*,[101] that Court held that the Confrontation Clause provides a criminal defendant the right to confront, face-to-face, adverse witnesses, and the placement of a screen between the defendant and child sexual assault victims violated that right.[102] Nevertheless, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[103]

The purpose of the Confrontation Clause is deeply rooted in U.S. legal history. In 1895, in *Mattox v. U.S.*,[104] the Supreme Court held that:

> The primary object of the constitutional provision in question was to prevent depositions or *ex party* affidavits,. . ., being used against the prisoner in lieu of 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

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96. U.S. CONST. amend. XIV.

97. Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (citing *In re* Oliver, 333 U.S. 257, 273 (1948)).

98. *Id.* at 295 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970)).

99. *Id.*

100. *Id.* Defendant was arrested for murder, and another person (McDonald) made, but later repudiated, a written confession. On three separate occasions, each time to a different friend, McDonald orally admitted to the killing. Defendant was nonetheless convicted of the murder. The state failed to call McDonald as a witness, and the defendant thus called him. Under Mississippi's common-law 'voucher' rule, a party may not impeach his own witness and the defendant was prevented from exploring the circumstances of McDonald's three prior oral confessions. The defendant was deprived of the right to contradict testimony that was clearly "adverse." *Id.* at 284.

101. 487 U.S. 1012 (1988).

102. *Id.* at 1020-22. The facts of this case are as follows: appellant was charged with sexually assaulting two thirteen-year old girls, and was convicted of two counts of lascivious acts with a child. The appellant was arrested in August 1985 for the assault of two girls who were camping out in the backyard of the house next door to him. He allegedly entered the tent after they were asleep wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him. *Id.* at 1014.

103. *Chambers*, 410 U.S. at 295 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)).

104. 156 U.S. 237 (1895).

belief.[105]

Despite this objective, the Court still noted instances in which public policy and the necessities of a case overcome these general rules of law.[106] An example is when the declarant is unavailable to testify due to death, such as in *Conner v. State of Florida*, where Ford's death prevented him from testifying. Therefore, the supreme court reasoned that

> [t]o say that a criminal, . . . should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.[107]

Consequently, the Confrontation Clause allows the admission of hearsay statements in narrow circumstances despite the defendant's inability to confront the declarant at trial.[108] Absent these narrow circumstances, however, confrontation still acts to ensure the reliability of the evidence against a criminal defendant by subjecting it to adversary testing before the jury.[109]

The Supreme Court has stressed the importance of the right of confrontation. In fact, in *California v. Green,*[110] the Supreme Court gave three reasons in support of the right of confrontation.[111] This threefold purpose is that confrontation:

> 1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; 2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; 3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[112]

Unlike the requirement that a witness must acknowledge by oath or affirmation the obligation to testify truthfully,[113] hearsay evidence is usually unsworn. The oath requirement is a legal obligation to tell the

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105. *Id.* at 242-43.

106. *Id.* at 243.

107. *Id.*

108. Maryland v. Craig, 497 U.S. 836 (1990). "[T]he right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured." *Id.* at 837.

109. *Id.* at 845.

110. 399 U.S. 149 (1970).

111. *Id.* at 158.

112. *Id.*

113. FED. R. EVID. 603.

truth.[114] The rule is designed to subject the witness to the penalties of perjury and to indicate the importance of truthful testimony.[115] The Federal Rules of Evidence state that the "oath or affirmation [be] administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully.[116] In addition, if a witness refused to make an oath or affirmation, the rule requires that the witness be deemed incompetent to testify.[117] Thus, hearsay statements are generally deemed inadmissible, and the "lack of an oath or affirmation heightens the judge's doubts about the reliability of the statement."[118]

Nevertheless, the numerous hearsay exceptions[119] readily admit out-of-court statements that have an inference of reliability due to the circumstances surrounding the making of the statement.[120] In cases such as these, the oath is no longer required based on the theory that hearsay evidence may be more reliable than any testimony that the declarant would give on the stand, and the circumstances of the statement suggest the declarant's sincerity.[121]

The predominant explanation in support of excluding hearsay statements is that admitting hearsay denies the defendant the opportunity to cross-examine the declarant.[122] In *Pointer v. Texas,*[123] the Supreme Court extended the right granted by the Confrontation Clause to defendants in state, as well as in federal, criminal proceedings. Section 16(a) of the Florida Constitution indicates that the accused shall have the right to confront adverse witnesses at trial via cross-examination.[124] Cross-examination, coined "the greatest legal engine ever invented for the discovery of truth,"[125] is the "principal means by which the believability of a witness and the truth of his testimony are tested."[126] Without cross-examination of a witness, no adversarial testing is imposed upon the hearsay statements that put their reliability into question.

The third purpose of confrontation is to allow the jury to observe a witness and judge his demeanor in order to assess his credibility. As

114. RONALD L. CARLSON, et al., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 135 (4th ed. 1997).
115. *Id.*
116. FED. R. EVID. 603.
117. CARLSON, *supra* note 114, at 135.
118. *See id.* at 437 (citing 5 J. WIGMORE, EVIDENCE §§ 1362, 1373-77 (3d ed. 1940)).
119. FED. R. EVID. 803, 804.
120. CARLSON, *supra* note 114, at 489.
121. *Id.*
122. *See id.* at 437.
123. 380 U.S. 400 (1965).
124. FLA. CONST. art. I, § 16(a).
125. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 WIGMORE § 1367).
126. CARLSON, *supra* note 114, at 867.

previously cited in *Mattox*, the Court stated the importance "of compelling [the witness] 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."[127] A jury may find it helpful to observe the witness in order to ascertain whether or not that person is telling the truth. If a witness perspires on the stand, fidgets, or appears to be nervous, a jury may tend to question that person's truthfulness. The admission of out-of-court statements prevents the jury from making certain relevant assumptions about the witness's reliability because the declarant is not on the stand. Despite the importance of judging a witness's demeanor, hearsay statements that are admitted are permitted because they are just as reliable as any in-court testimony, if not more so.

It would seem that each time an individual is denied his right of confrontation, the fundamental right to face a witness and to be able to ensure the reliability of that person's statement is violated. However, the admission of hearsay statements does not always abrogate this right. Although the Supreme Court, in *Ohio v. Roberts*,[128] stated that denying one the right to confront witnesses "calls into question the ultimate 'integrity of the fact-finding process,'"[129] this right is not absolute and may give way to other competing interests as long as those interests are closely examined.[130] Close examination requires that the protected hearsay bear adequate "indicia of reliability" or at least a showing of "particularized guarantees of trustworthiness"[131] such that "adversarial testing would add little to its reliability."[132]

Unless an out-of-court statement falls under a "firmly rooted hearsay exception,"[133] it will be presumed unreliable and therefore inadmissible for Confrontation Clause purposes.[134] On the other hand, statements that are admitted under a firmly-rooted exception are deemed to be so trustworthy that adversarial testing would not add to their reliability.[135] Thus, as previously mentioned, the right to confront witnesses is not absolute.[136] In cases involving a firmly-rooted hearsay exception,

127. *Mattox*, 156 U.S. 237, 242-43 (1895).

128. 448 U.S. 56 (1980).

129. *Id.* at 64 (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

130. *See Chambers*, 410 U.S. at 295.

131. *See Roberts*, 448 U.S. at 66.

132. Idaho v. Wright, 497 U.S. 805, 821 (1990).

133. Examples of firmly rooted hearsay exceptions are: present sense impression, excited utterance, statements for purposes of medical diagnosis or treatment, records of regularly conducted activity, learned treatises, etc. FED. R. EVID. 803.

134. *Wright*, 497 U.S. at 818.

135. *Id.* at 820-21.

136. *See Roberts*, 448 U.S. at 63. The veracity of hearsay statements is sufficiently dependable

reliability can be inferred.

The Florida Supreme Court decided that the hearsay exception for statements made by elderly persons is not "firmly rooted."[137] The exception was enacted by the Florida Legislature in 1995.[138] Furthermore, no other state has a similar exception that allows out-of-court statements made by elderly victims of abuse or violence to be admitted.[139] The exception is not firmly rooted because the law is new. Therefore, the only way to admit hearsay statements falling under this provision is to require the court to closely examine the statement, pursuant to the Supreme Court's ruling in *Roberts*.[140] If the court finds the requisite "indicia of reliability" or at least a showing of "particularized guarantees of trustworthiness," the statement can be admitted. The language of section 90.803(24) requires the court to look at the totality of the circumstances surrounding the elderly person's statement to ensure that it has safeguards of reliability and guarantees of trustworthiness.[141] Therefore, although section 90.803(24) is not "firmly rooted," it is just as reliable as any other evidence that could be admitted under an established hearsay exception. Nevertheless, the Florida Supreme Court ruled it unconstitutional.

C. *Comparison with Child Victim Hearsay Exception, Section 90.803(23)*

The *Conner* court relied on past decisions regarding the hearsay exception that deals with statements made by child victims of abuse or neglect.[142] The exception for children directly precedes the exception for elderly persons in Florida's evidence code. The language of the two exceptions is strikingly similar. In *Conner,* the court stated that section 90.803(24) closely tracked the language of section 90.803(23).[143] In

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to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statement's reliability. Lilly v. Virginia, 119 S. Ct. 1887, 1894 (1999); Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

137. *Conner*, 748 So. 2d at 957.

138. *Id.*

139. *Id.*

140. 448 U.S. 56 (1980).

141. FLA. STAT. § 90.803(24) (1995).

142. FLA. STAT. § 90.803(23) (1995).

143. *Conner*, 748 So. 2d at 958; *see also* FLA. STAT. § 90.803(23) (1995). The statute reads:

> (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.—
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of

fact, the Court directly relied on the anteceding hearsay exception in deciding the constitutionality of section 90.803(24). However, the court held that because section 90.803(24) does not ensure the reliability of the hearsay statements admitted at trial and it is not supported by similar policy interests as is the child abuse exception, the elderly exception statute is facially violative of the defendant's constitutional right to confrontation.[144]

Although its decision was reversed by the Florida Supreme Court, the Second District Court of Appeals had upheld the constitutionality of section 90.803(24) by using the same analysis as applied in *Perez v. State of Florida*[145] and *State of Florida v. Townsend.*[146] Both of these cases were before the Florida Supreme Court, but questioned the constitutionality of section 90.803(23), the hearsay exception for statements made by child victims of abuse or neglect.

Perez was decided one year after section 90.803(23) was enacted and involved a father who was charged with sexually abusing his three and a half-year-old son.[147] The child's out-of-court statements—includ-

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11 or less describing 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 sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

(1) 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 child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

(2) The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Id.

144. *Conner*, 748 So. 2d at 959.

145. 536 So. 2d 206 (Fla. 1988).

146. 635 So. 2d 949 (Fla. 1994).

147. *Perez*, 536 So. 2d at 206.

ing those made to his baby sister while in the bathtub and others later made to a police officer—were admitted at trial.[148] These statements were admitted after the trial court conducted an evidentiary hearing and found that the child's hearsay statements were reliable and that the child was unavailable, pursuant to the requirements of the statute.[149]

Perez challenged this decision on the grounds that, among others, section 90.803(23) denies a defendant the opportunity to confront and cross-examine adverse witnesses.[150] Additionally, Perez argued that the factors set forth in the statute for the court's use in determining the reliability of the child's statements were too vague to guarantee an accused that the statements bear sufficient indicia of reliability.[151] The Florida Supreme Court rejected all of Perez's arguments and held that section 90.803(23) is constitutional.[152] Although the Court admitted that this exception was not "firmly rooted," the court found that it provided sufficient safeguards of reliability and guarantees of trustworthiness.[153] For that reason, the court concluded that section 90.803(23) comports with the requirements of the Confrontation Clauses of both the Florida and U.S. Constitutions.[154]

In 1994, in *Townsend*, the Florida Supreme Court again reviewed the admissibility of a child's hearsay statements in the sexual abuse context.[155] That case involved a father's conviction of sexual battery on his two-year-old daughter in 1988.[156] At trial, the state intended to introduce out-of-court statements made by the child as hearsay evidence.[157] Pursuant to the statute, the trial judge would first have to find that the child declarant was "unavailable."[158] However, contrary to *Perez*, the judge determined that the child was available, because she did not meet any of the definitions of unavailability provided in the statutes.[159] The state appealed this decision to the Court of Appeals, which remanded and ruled that the child was indeed unavailable.[160] After remand, the trial judge conducted a hearing pursuant to section 90.803(23), to determine whether the hearsay statements were reliable enough to admit at

148. *Id.* at 211.
149. *Id.* at 207-08; FLA. STAT. § 90.803(23) (1995).
150. *Perez*, 536 So. 2d at 208.
151. *Id.* at 209.
152. *Id.* at 211.
153. *Id.* at 209.
154. *Id.*
155. *Townsend*, 635 So. 2d at 951.
156. *Id.* at 952.
157. *Id.*
158. FLA. STAT. § 90.803(23)(a)(2)(b) (1999).
159. *Townsend*, 635 So. 2d at 952.
160. *Id.*

trial.[161] The court's findings ultimately resulted in the admission of most of the child's hearsay statements.[162]

At trial, several witnesses testified as to the statements made by the child regarding the alleged abuse by the child's father.[163] These witnesses included a doctor and a psychologist, who provided sufficient evidence to allow the jury to convict the defendant.[164] On appeal, the district court found that the child's statements had been erroneously admitted at trial, and that the defendant's rights under the Confrontation Clause may have been violated.[165] In its decision, the district court queried: does a finding of incompetency to testify because one is unable to recognize the duty and obligation to tell the truth satisfy the legislative "testify or be unavailable" requirement of section 90.803(23)(a)(2)?[166] On appeal, the Florida Supreme Court answered this question in the affirmative.[167]

In reaching this outcome, the court discussed section 90.803(23), which was enacted by the Florida Legislature as an attempt by both the legislature and the courts to provide a means for admitting a child's hearsay statements.[168] Section 90.803(23) is similar to the hearsay exception for elderly declarants, section 90.803(24), because out-of-court statements made by children may only be admitted after the court has made a determination that the statement is reliable. The court reasoned that such a determination is necessary to avoid violating a defendant's constitutional rights of confrontation and due process.[169]

In order to admit a hearsay statement pursuant to this statute, the statement must indicate trustworthiness, and the circumstances surrounding the statement must provide sufficient safeguards of reliability.[170] Thus, the legislature ensured that the admission of a child's statements would not be permitted absent clear indications of reliability.[171] The dispositive issue in *Townsend* was whether a child's inability to recognize the importance of the oath requirement, and the duty to tell the truth, would render him or her incompetent to testify.[172] An individ-

161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 952-53.
165. *Id.* at 953.
166. *Id.* at 952-93.
167. *Id.* at 960.
168. *Id.* at 953-54.
169. *Id.* at 954.
170. *Id.*
171. *Id.*
172. *See* State v. Townsend, 635 So. 2d 949 (Fla. 1994).

ual declared incompetent to testify is also deemed unavailable.[173] In resolving this issue, the court found that a child's incapacity to understand the oath requirement does not render him incompetent, but instead renders him unavailable.[174] Consequently, a court must still look at the reliability of the child when making its determination of a statement's trustworthiness.[175] This is only one factor that should be considered when making this determination.[176]

The importance of ensuring the reliability and trustworthiness of an out-of-court statement in the child victim context is the same as that in the context of an elderly declarant. Both statutes require that the court make a finding that the "time, content, and circumstances of the statement provide sufficient safeguards of reliability."[177] In each statute, the legislature has provided a list of factors the court may consider when making this finding. Although the lists are by no means exhaustive, both suggest certain issues to consider such as the age and maturity of the declarant, the nature and duration of the offense, the relationship of the declarant to the offender, and the reliability of the assertion and the declarant.[178] In *Townsend*, the court listed several other factors a court may consider when looking at the totality of the circumstances surrounding a statement made by a child.[179] In *Conner,* the court held that those factors are tailored only to the child abuse context, and could not be extended to section 90.804(24), because no similar list could be formulated in the elderly person context.[180] Despite the many similarities between the two hearsay exceptions, the one regarding child declarants was upheld, whereas the exception for elderly persons was not. This discrepancy is solely due to the court's inability to create a similar list of additional factors in the elderly person context as it had in the child abuse context.

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173. *Id.* at 956.

174. *Id.*

175. *Id.*

176. *See* FLA. STAT. § 90.803(23)(a)(1) (1995) for other factors.

177. *Id.* § 90.803(24)(a)(1).

178. *Id.*

179. *Townsend*, 635 So. 2d at 957-58. These may include:

> 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 availability 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.

Id.

180. *Conner*, 748 So. 2d at 958.

In addition to the aforementioned distinction between the two statutes, the court clearly set forth a thorough list of reasons why the hearsay exception regarding elderly persons is distinct from that regarding child declarants. In the concluding portion of the *Conner* opinion the court began to draw these distinctions.[181] The court pointed out that the elderly hearsay exception is much broader than the child hearsay exception because the exception applies to different types of victims.[182] The hearsay exception for child declarants only applies to children age eleven or younger, whereas the hearsay exception for elderly persons includes any adult over the age of sixty who falls under the definition of "elderly."[183] This class of persons is potentially much broader.

Another difference the court noted between the two exceptions is that the child hearsay exception has greater limitations on the scope of admissible testimony.[184] Section 90.803(23) only allows statements describing acts of child abuse, neglect, or sexual abuse, but section 90.803(24) allows evidence of *any* act of abuse or neglect, exploitation, battery or aggravated battery, assault or aggravated assault, sexual battery, or any other violent act committed against an elderly person.[185] Thus, the hearsay exception for elderly adults applies not only to a broader class of declarants, but also to a broader class of offenses. In this context, evidence of an offense not nearly as violent as sexual abuse may be admitted against a defendant, such as a mugging or pursesnatching. Thus, the permitted evidence does not necessarily have to pertain to elder abuse, since the exception refers to a broad range of crimes not necessarily unique to persons over the age of sixty.[186]

Finally, the *Conner* court held that the policies which support upholding the hearsay exception for child declarants do not exist in the context of the elderly person exception.[187] While the child hearsay exception was enacted in "response to the need to establish special protections for child victims in the judicial system," the court found no equivalent justification for the elderly person exception.[188] In addition, the court adopted the reasoning of the Supreme Court of Arizona in *State v. Robinson* when it held that a child's spontaneous comments are usually more reliable than in-court testimony given months after the event and after many interviews and interrogations that may have dis-

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 959.
188. *Id.*

torted the child's memory.[189] Therefore, the court seems to imply that an out-of-court statement by an elderly person made at or near the time of the offense is less reliable than one made several months later, in court. The implication is that the elderly person may fabricate some details of the event immediately after it occurred. This argument does not seem rationally based on the legislature's initial intent when it enacted the statute—to protect elderly persons from being re-victimized by their assailants.

The court concludes by offering an apology for the impact its holding may have, by stating that "[w]hile we as a court, condemn in the strongest terms acts of exploitation or violence committed against persons who are elderly, any state interest in prosecuting crimes against the elderly cannot constitutionally justify the abrogation of a defendant's most basic constitutional right."[190] It is apparent that the court recognizes that it essentially conducted a balancing test between the importance of prosecuting crimes against the elderly and the importance of an accused's rights of confrontation. Here, the rights of the accused prevailed. Nevertheless, in analyzing section 90.803(24) along the same lines as the child abuse hearsay exception, the court could have easily resulted in a different outcome. If it had only viewed the elderly in the same sympathetic manner as it did children, the same justifications would have been able to support the constitutionality of the elderly person exception.

III. ANALYSIS

Conner v. State of Florida leaves many unanswered questions. By quashing the district court's opinion, the Florida Supreme Court overturned Conner's conviction. As a result, a crime was committed against Ford and the assailant was not punished for it. If Conner did not commit the crime, he should not have been convicted for it just for the sake of vindicating Ford. Nevertheless, the hearsay statements ought to have been admitted as one piece of evidence to assist the jury in finding out who perpetrated the crime.

The court based its reasoning on the grounds that admitting Ford's out-of-court statements regarding the crime would eviscerate Conner's constitutional rights of confrontation.[191] Has the court forgotten its analysis of the purpose of confrontation and the exceptions which admit hearsay evidence? The answer seems to be that the court has. The lower court's decision and the Florida Supreme Court's reasoning in

189. *Id.* (quoting State of Arizona v. Robinson, 735 P.2d 801, 804 (Ariz. 1987).
190. *Id.* at 960.
191. *Id.*

upholding section 90.803(23) reveal inconsistencies in the *Conner* opinion. Clearly imbedded in section 90.803(24) are the provisions which would allow admitting the evidence resulting in the defendant being unable to confront it. Nevertheless, the court finds justifications in holding that these same provisions which helped support the hearsay exception for child declarants do not apply to the hearsay exception for elderly persons.

Had the statute not been overturned, it is still uncertain as to whether or not Ford's out-of-court statements would have been admitted. Under a narrow interpretation of the statute and the definition of "elderly person," a strict court may still have excluded this evidence. Although Ford was certainly an elderly person who suffered from some of the infirmities of aging, he still lived alone and cared for himself. Under the definition of "elderly," the signs of aging must reach the extent that the ability of the person to provide adequately for his own care or protection is impaired. Although this definition has not been challenged on grounds of vagueness, it does not clearly define what "adequate" means. Thus, a narrow court may find that since 84-year-old Ford cared and provided for himself, he is not an elderly person under the statute and the hearsay exception would not apply to him. As a result, someone in Ford's position would probably have been forced to testify and face his assailant. Nevertheless, it seems evident that a better outcome could have been reached in this case. An alternative outcome would better serve justice by accommodating the declarant's unavailability, submitting the hearsay evidence, and at the same time being careful not to violate a defendant's right to confrontation. The next section proposes such an alternative.

IV. A RECONSTRUCTION OF SECTION 90.803(24)

Conner's arguments have some merit. There are gaps in the language of section 90.803(24) suggesting that the statute may not have been tailored narrowly enough. Although the language of section 90.803(24) closely tracks the language of section 90.803(23), the legislature may not have fully taken into consideration the fact that the two sections apply to different groups of people. This distinction was essential to the statute's survival and the legislature's failure to recognize this resulted in the statute being overturned. The unfortunate consequence of this is that the state of Florida no longer has a hearsay exception for the admission of out-of-court statements made by abused or neglected elderly persons.

The *Conner* court does not explain the implication of its decision on future cases. Yet the implication is clear. No longer will an elderly

person be excused from testifying in court, regardless of whether he will suffer physical, mental, or emotional harm. But what of an elderly person who suffers abuse or neglect, and then dies before the case goes to trial? That person does not have a choice whether or not to testify, and does not consider whether facing his assailant in court would be too severe of an experience for him to bear. That person cannot confront his assailant, cannot point his finger at the defendant and tell the jury that their duty is to convict that person. Because his testimony is inadmissible, he will never know justice. His survivors will never have the satisfaction of knowing that the assailant has been rightfully condemned. With no other evidence or witnesses to the crime, the defendant will be exonerated. Thus, the outcome of *Conner* contradicts a long-established legal objective. As stated in *Mattox* in 1895, "[t]o say that a criminal, . . . should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent."[192] The Florida Supreme Court should have been wary of this result, and attempted to reconstruct the statute so as to avoid this outcome.

The first area which must be addressed in order to revise section 90.803(24), is the definition of an elderly person, section 825.101 of the Laws of Florida. An elderly person is defined as an individual at least sixty years old "who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for his own care or protection is impaired."[193] This definition has been criticized as being overbroad when used in the hearsay context. The elderly hearsay exception potentially applies to any person over the age of sixty. By raising the age minimum in the definition to at least that of the retirement age, the elderly exception will be applicable to a smaller group of people. Otherwise, many people who are not ordinarily considered elderly could invoke this provision in order to stay out of court.

The definition of "elderly person" can also been criticized because parts of it are irrelevant. Why is it important that a person is considered elderly only if his "dysfunctioning" impairs the ability to provide adequately for his own care or protection? Many people, including those over the age of sixty live alone. Some care for themselves adequately and some do not. But, there are varying degrees of adequacy, and one is not required to live up to the standards that another person lives by. Nevertheless, one's care or protection has little relevance to being con-

192. *Mattox*, 156 U.S. 237, 243 (1895).

193. Ch. 95-158, §§ 1, 2 at 1587-89, Laws of Fla.

sidered elderly or to a person's ability to testify in court. Although section 825.101 is the standard definition of "elderly person" used in the state of Florida, when it applies to an evidentiary rule such as section 90.803(24) it should be subjected to greater scrutiny.

Therefore, section 90.803(24) should include a separate clause defining "elderly person" specifically for the context of hearsay statements. Instead of cross-referencing to the definition of "elderly person" in section 825.101, this independent definition should exclude unnecessary verbiage while including other, necessary provisions. Moreover, having a separate definition of "elderly person" for use in the hearsay context will eliminate the necessity of rewriting the general definition, and will avoid the impact this revision might have on other areas of the law that depend on that definition.

A suggested definition for "elderly person," as applicable in the case of an elder victim wishing to utilize a hearsay protection, is as follows: "A person at least over the age of 65 who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional *impairment*, to the extent that the ability to provide for his own care or protection *may* be impaired, but not to the extent that one's ability to perceive events and to process and relay information is adversely affected." If this definition had existed in a hypothetical version of Ford's case in which he was alive, there would be no challenge to Ford's invocation of this exception.

Section 90.803(24) was criticized not only for involving a broader class of declarants than section 90.803(23), but also because it involves a broader class of offenses. In order to argue that section 90.803(24) should be upheld for the same reasons as section 90.803(23), the statutes must be as similar as possible. Yet, although the child hearsay exception allows evidence describing any act of child abuse, neglect, or child sexual abuse, the elderly hearsay exception allows evidence of a much wider range of offenses. These include abuse, neglect, exploitation, battery, assault, sexual battery, or "any other violent act on the declarant elderly person."[194] The offenses within the child context predominately apply to sexual abuse or neglect, whereas the offenses applicable to the elder context apply to essentially *any* violent act.

However, it is difficult to omit some of the offenses listed in section 90.803(24) because that would contradict the very purpose of the statute. It would be difficult to determine which offenses are more important than others, which to keep and which to omit. In the child

194. FLA. STAT. § 90.803(24)(a) (1995).

context, an assault or battery is considered abuse. The state would not charge an adult with battery against a child, but instead would charge that person with child abuse. Yet, a battery against an elderly person is not considered abuse, because adults are not given the same protections from harm as children are. Consequently, the only way to rephrase the statute so that it does not seem to apply to an overly broad range of offenses would be to eliminate the phrase which includes "any other violent act." This tightens the language of the statute to include only those acts of elder abuse or neglect, assault, or battery. These are more narrowly tailored to the elder abuse context.

After stating the threshold requirements that the declarant must be an elderly victim of one of the stated offenses, the statute goes on to describe the process of ascertaining whether the out-of-court statement made by the elderly victim is sufficiently reliable.[195] As previously stated, the statute lists many factors the court *may* consider during a hearing conducted out of the presence of the jury.[196] A similar list is provided in the child declarant hearsay exception.[197] In fact, an additional list of factors was created by the Florida Supreme Court in *State v. Townsend.*[198] However, no additional list was extended to the elder declarant context. Therefore, Conner argues that the language of the statute is not strict enough, because it states "the court *may*"[199] and not "the court *must.*" Consequently, it neither mandates the court to consider the listed factors, nor to consider any additional factors.

The determination as to whether the out-of-court statement is reliable is conducted out of the jury's presence.[200] Although this hearing is required by statute, the substance of the hearing is not regulated. By including some guidance as to how a judge is to decide whether an out-of-court statement is sufficiently reliable and trustworthy to use in court, the statute could avoid any criticism that it allows a judge to abuse his discretion. Therefore, in revising section 90.803(24), Conner's suggestion should be adopted. He recommended amending the statute to *mandate* the court to consider the factors listed in the statute, because it would "provide sufficient 'particularized guarantees of trustworthiness' or 'safeguards of reliability' as to be so trustworthy and reliable that adversarial testing would add little."[201] Although the Florida Supreme Court did not create an additional list of factors to be used in the elder

195. *Id.*
196. *Id.*
197. FLA. STAT. § 90.803(23) (1995).
198. 635 So. 2d 949 (Fla. 1994).
199. FLA. STAT. § 90.803(24)(a)(1) (1995) (emphasis added).
200. FLA. STAT. § 90.803(24) (1995).
201. *See* Initial Brief of Petitioner at 26.

hearsay exception, it would not be necessary if the court was required to consider the factors already in place.

The statute already incorporates a check on its use. That is, once a statement has been determined reliable and trustworthy, it is only used in court if there is other corroborating evidence of the offense.[202] Therefore, if Conner's case went to trial and the state was granted permission to use Ford's out-of-court statements, there would have to be other evidence of the crime as well. In this case, other evidence existed, such as the condition of Ford's house after the incident and a telephone which was recovered after the event.[203] However, the Second District Court of Appeals only considered this evidence to be corroborative of the *statement.*[204] The statute specifically states that there must be corroborative evidence of the abuse or offense.[205] A court should be careful to determine that the supporting evidence is independent of the hearsay statement. This is critical to ensure that section 90.803(24) in no way abrogates a defendant's confrontation rights.

The statute requires that the elderly person be found unavailable to testify in order to be protected by section 90.803(24).[206] In order to be considered unavailable, the declarant elderly person must prove to the court that harm would result if he participated in the trial.[207] Absent this finding, the declarant would not be exempted from taking the stand. The statute states, "unavailability shall include a finding by the court that the elderly person's . . . participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm."[208] Thus, although it appears that a broad range of excuses is allowed to prove unavailability, the exception requires that the likelihood of harm be substantial and the harm itself severe. Although it may seem that the declarant would be easily excused because he may assert many reasons as to why he is unavailable, he must first meet a high standard of proof.

The child hearsay exception has a similar, yet more limited provision requiring the declarant be found unavailable, and that the court should find that "the child's participation . . . would result in a substantial likelihood of severe emotional or mental harm."[209] Although section 90.803(24) closely tracks the language of section 90.803(23), instead of

202. FLA. STAT. § 90.803(24) (1995).
203. *Conner*, 709 So. 2d at 172.
204. *Id.*
205. FLA. STAT. § 90.803(24) (1995).
206. *Id.*
207. *Id.*
208. *Id.*
209. FLA. STAT. § 90.803(23) (1995).

having to prove either emotional or mental harm, an elderly person may also use the excuse of physical harm to avoid testifying in court.[210] While it is understandable why the legislature may have added this third factor, it results in the statute being overbroad. Although an elderly person may have physical handicaps that a child does not, this impairment has nothing to do with an ability to testify in court. The fact that an elderly person uses a wheelchair or walker should not excuse him from testifying in court.

The only time that a showing of physical harm should excuse an elderly person from testifying in court is when the physical handicap already exists, making it physically impossible for that person to get to court. For example, if the elderly person is bedridden or immobile, he should be exempted from testifying. The court should, however, use a case specific approach when granting these exemptions. By requiring an existing physical harm, the statute would not protect a larger group of people than intended. In this way, the language of the can statute can be narrowed.

One possible revision or the relevant portion of the statute would be: "unavailability shall include a finding by the court that the elderly person's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, or that the elderly person has a physical handicap which prevents him from being transported to court to testify." This restructures the statute so that it more closely resembles the child hearsay exception, while recognizing that it deals with a different class of declarants altogether. With proof of a substantial likelihood of severe emotional or mental harm, the court will not require the elderly person to testify. Moreover, proof of a person's physical limitations will also allow that person to avoid testifying in court. Without these sound excuses, the declarant should not be deemed unavailable.

Lastly, an important way to align the two statutes so that section 90.803(24) is reenacted on policy grounds, as section 90.803(23) was held constitutional, is to look at each section's policy interests. The child hearsay exception was enacted in response to the need to establish special protections for child victims in the judicial system. Similarly, the elderly hearsay exception was designed to insure that elderly victims will not suffer injustice at the hands of the legal system. In essence, these policies are the same.

A child victim of abuse or neglect may have severe emotional or mental harm as a result of the abuse for the rest of his life, but there is

210. FLA. STAT. § 90.803(24) (1995).

also the possibility of a similar result in an elderly person. Some have argued that a child has his entire life still ahead of him, whereas the elderly person does not. However, although a child may suffer great harm from testifying in court and facing the alleged perpetrator again, so too might an elderly person. Just as the state has an interest in protecting child victims of abuse from the further trauma that would be caused by forcing them to testify in court,[211] the state has a similar interest in protecting elderly victims of abuse. The state should not turn its back on the elders of the community with the assumption that an elderly person can deal with the trauma of facing his perpetrator better than a child. There ought to be greater protection for those who are considered more vulnerable as a result of their age or stage in life whether very young or very old. Restructuring and reenacting the elderly person hearsay exception would again provide this protection.

Thus, the reconstruction of section 90.803(24) should be as follows:

> (24) HEARSAY EXCEPTION: STATEMENT OF ELDERLY PERSON.—
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person, as defined in subsection (d), describing 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 on the declarant elderly person, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. 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 *must* consider the mental and physical age and maturity of the elderly person, 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, and other factors deemed appropriate; and
>
> 2. The elderly person either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided there is corroborative evidence *of the abuse or offense.* Unavailability shall include a finding by the court that the elderly person's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, or that the elderly person has a physical handicap which prevents them from being transported to court to testify, in addition to findings pursuant to s. 90.804(1).

211. Gladening v. State, 536 So. 2d 212, 217 (Fla. 1988).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.
(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.
(d) As pertains to this statute, an elderly person is one over the age of 65 who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional *impairment,* to the extent that the ability to provide for his own care or protection *may* be impaired, but not to the extent that one's ability to perceive events and to process and relay information is adversely affected.

V. CONCLUSION

When the legislature enacted section 90.803(24), it intended to protect a class of people more susceptible to harm than others. Unfortunately, the *Conner* case resulted in the statute being overturned and, as a consequence, there is no longer a necessary exception for elderly victims of abuse.[212] In overruling the statute, the Florida Supreme Court realized that the impact on future cases is great.[213] However, the opinion does not make clear whether the court even considered restructuring the statute so that it could be deemed constitutional. Surely, the court did not want to free a guilty man, but it also could not justify depriving an individual of his constitutional right to confront witnesses against him.

If no statute existed which allowed the admission of out-of-court statements, then the court's decision would be justified. Legal history demonstrates that a defendant's right of confrontation is not absolute, and bows to accommodate other legitimate interests in the criminal trial process.[214] Furthermore, the child hearsay exception has been upheld. Therefore, the court's argument that the elderly person hearsay exception cannot be upheld because it abrogates the defendant's right to confrontation does not hold much weight. If the court was concerned that it not deprive individuals of their constitutional rights, then it should have attempted to restructure the statute bearing this in mind.

The suggestions given in this note serve to accommodate these

212. *Conner*, 748 So. 2d 950 (Fla. 1999).
213. *Id.*
214. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

goals. By narrowing the gap between the reasons why section 90.803(23) was upheld and section 90.803(24) was overturned, the elderly person hearsay exception should be able to survive the court's scrutiny. Section 90.803(24) should be rewritten in language even more similar to section 90.803(23). That, in addition to the similar policy interests for each statute, should leave no room for distinctions to be made between the two exceptions. As a consequence, there could be no legal justification for upholding one statute, and not the other.

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* The author would like to thank her family for their love and support, with a special thank you to Grant for his enduring love and encouragement.