

7-1-2001

## The Florida Supreme Court vs. The United States Supreme Court: the Florida Decision in *Conner v. State* and the Federal Interpretation of Confrontation and Federal Rule of Evidence 807

Stacey Schulman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Evidence Commons](#)

---

### Recommended Citation

Stacey Schulman, *The Florida Supreme Court vs. The United States Supreme Court: the Florida Decision in Conner v. State and the Federal Interpretation of Confrontation and Federal Rule of Evidence 807*, 55 U. Miami L. Rev. 583 (2001)  
Available at: <https://repository.law.miami.edu/umlr/vol55/iss4/6>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# **The Florida Supreme Court vs. The United States Supreme Court: the Florida Decision in *Conner v. State* and the Federal Interpretation of Confrontation and Federal Rule of Evidence 807**

## **INTRODUCTION**

An eighty-four-year old man, who lives alone, has his home broken into one night. The armed intruder ties the elderly man to a chair with his own suspenders and proceeds to ransack the house. He takes the elderly man's money and items from the home, including the telephone, before leaving the residence. The elderly man, despite suffering from occasional memory loss as well as hearing and vision problems, is able to provide the police with a statement a few hours after the incident. He gives the authorities a sworn statement two weeks later. With the help of a confidential informant, the police are able to arrest a suspect. Sadly, the victim dies two months after the arrest. Buried with the victim is the only potential eyewitness testimony to the attack. So the question for the prosecution becomes—what to do now? Is this defendant who violently attacked an eighty-four year old man at his home now going to go free? Should this dangerous defendant be released, only to continue terrorizing and exploiting other elderly victims?

This is exactly what the Florida Supreme Court decided in *Conner v. State*.<sup>1</sup> The aforementioned scenario depicts the facts of *Conner*. The elderly man's name was Earl Ford and the defendant was David J. Conner.<sup>2</sup> In the case the state tried to offer Ford's statements under Florida's hearsay exception for the elderly, section 90.803(24), *Florida Statutes*. After the trial court decided it would consider allowing Mr. Ford's statements to be admitted under this exception, Conner fought the statute, claiming it was unconstitutional.<sup>3</sup> Both the trial court and the intermediate appellate court upheld the statute's constitutionality.<sup>4</sup> The Florida Supreme Court, however, reversed the lower court and allowed Conner to go free.<sup>5</sup>

---

1. 748 So. 2d 950 (Fla. 1999).

2. *Id.* at 952.

3. *Id.* at 953.

4. *Conner v. State*, 709 So. 2d 170, 172 (Fla. 2d DCA 1998).

5. *Conner*, 748 So. 2d at 960.

HISTORY OF *CONNER V. STATE*

David Conner was facing armed burglary, armed kidnapping, and armed robbery charges in Florida's Tenth Judicial Circuit based on his alleged 1995 attack on Earl Ford. The problem for the state was how to get Mr. Ford's statements before the jury, since he was no longer alive to testify. The statements would have fallen under the hearsay definition in section 90.801(1)(c), *Florida Statutes*, since they would be used to establish the truth of the matter asserted, namely, that Mr. Conner was the attacker.<sup>6</sup> Unfortunately, the state did not take measures to preserve Mr. Ford's testimony prior to trial, as required by Florida Rule of Criminal Procedure 3.190(j).<sup>7</sup> Therefore, in order for Mr. Ford's statements about his attack to be admitted, the statements would have to be admitted under a hearsay exception.

The prosecution in *Conner* sought to introduce the statements pursuant to Florida's hearsay exception for statements by the elderly.<sup>8</sup> The

---

6. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FLA. STAT. § 90.801(1)(c) (2000).

7. Under this statute, a witness's testimony can be preserved for later use if the witness becomes unavailable at the time of trial. It provides, in relevant part:

After an indictment or information on which a defendant is to be tried is filed, the defendant or the state may apply for an order to perpetuate testimony. The application shall be verified or supported by the affidavits of credible persons that a prospective witness reside beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice. The court shall order a commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents, or tangible objects, not privileged, be produced at the same time and place. If the application is made within 10 days before the trial date, the court may deny the application.

FLA. R. CRIM. P. 3.190(j)(1).

8. FLA. STAT. § 90.803(24) (1999):

HEARSAY EXCEPTION; STATEMENT OF ELDERLY PERSONS OR DISABLED ADULT.

(a) Unless the source of the 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 person, 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 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 factor deemed appropriate; and

2. The elderly person or disabled adult either:

Florida Legislature enacted this exception to allow statements by elderly victims of battery, assault, and certain sex crimes to be used as evidence.<sup>9</sup> The statute also requires that before such statements are allowed in, the defendant must receive notice and a hearing must be held to determine if the circumstances sufficiently protect the statement's reliability and trustworthiness.<sup>10</sup> Since Mr. Ford's statement to the police did not fall under any of Florida's other hearsay exceptions, section 90.803(24) would be the only way for his statements to be used as evidence.

Prior to the trial, the state filed notice, pursuant to section 90.803(24), of its intent to introduce Mr. Ford's statements.<sup>11</sup> In the hearings conducted to determine if the statements were admissible under the exception, the trial court found that Mr. Ford met the "elderly person" definition set out in section 825.101(5), *Florida Statutes*.<sup>12</sup> The judge found that Mr. Ford was a person over sixty years of age who was suffering from the infirmities of age to the extent that such conditions impaired his ability to care for himself.<sup>13</sup> The trial court reserved ruling on the admissibility of the statements themselves, noting that evidence would have to be presented as to the trustworthiness of the statements, as well as the declarant's condition, before such a decision could be made.<sup>14</sup>

---

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.

9. The statute also covers statements by disabled adults. *Id.* This article only addresses the statute as it pertains to the elderly.

10. FLA. STAT. § 90.803(24) (1999).

11. *Conner v. State*, 709 So. 2d 170, 171 (Fla. 2d DCA 1998).

12. "Elderly person means a person sixty years of age or older 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 the person's own care or protection is impaired." FLA. STAT. § 825.101(5) (2000).

13. Initial Br. for Pet. on the Merits at 5, *Conner v. State*, 748 So. 2d 950 (Fla. 1999) (No. 92,835).

14. *Id.* at 2.

Subsequent to this ruling, the defense made a motion to have the Florida elderly hearsay exception declared unconstitutional.<sup>15</sup> At a hearing on the motion, Mr. Conner argued that the exception violated his right to confrontation under both the United States and Florida Constitutions.<sup>16</sup> He also maintained that the statute was void for vagueness, therefore denying him due process under both the state and federal constitutions.<sup>17</sup> After hearing argument, the trial court disagreed and denied the defense motion.<sup>18</sup> After this decision, Mr. Conner plead nolo contendere to the charges.<sup>19</sup> He did, however, reserve the right to appeal the constitutionality of the elderly hearsay exception.<sup>20</sup> The parties agreed that this issue was only dispositive as to two of the counts against Mr. Conner—armed kidnapping and armed robbery.<sup>21</sup>

At Mr. Conner's appeal to the Second District Court of Appeal, the court affirmed the trial court's ruling that section 90.803(24) was constitutional.<sup>22</sup> The court found section 90.803(24) closely tracked the language of a hearsay exception for children, section 90.803(23), *Florida Statutes*,<sup>23</sup> which had recently been upheld by the Florida Supreme

---

15. *Id.*

16. *Id.* at 2-3.

17. *Id.* at 3.

18. *Id.*

19. *Conner v. State*, 748 So. 2d 950, 953 (Fla. 1999).

20. *Id.*

21. *Id.* at 954.

22. *Conner v. State*, 709 So. 2d 170, 172 (Fla. 2d DCA 1998).

23. FLA. STAT. § 90.803(23) (2000).

#### HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM:

(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 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 factor deemed appropriate; and

2. The child 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 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

Court in *State v. Townsend*.<sup>24</sup>

The appellate court in *Conner* reasoned that if the language of section 90.803(23), a hearsay exception for children in sexual and physical abuse cases, could stand the test of confrontation and vagueness in a manner satisfactory to the Florida Supreme Court, then so too could section 90.803(24), the elderly exception.<sup>25</sup> The Second District Court of Appeal also noted that the same policy concerns inform both exceptions.<sup>26</sup> The court never reached the question of whether Mr. Ford's statements themselves could be admitted, since the trial court never decided that issue. In sum, the court found no "grave deficiencies" that would call the elderly hearsay exception's constitutionality into question.<sup>27</sup> Mr. Conner then appealed to the Florida Supreme Court.<sup>28</sup>

The Florida Supreme Court reversed the lower courts.<sup>29</sup> In reaching its decision, the court found that the statute lacked factors with which to evaluate potentially admissible statements.<sup>30</sup> The court also found the breadth of the statute invalidated its use.<sup>31</sup> Additionally, it held that section 90.803(24) violated a defendant's right to confrontation.<sup>32</sup> Finally, the court reasoned that this exception was different from section 90.803(23) because, unlike the appeals court, it found that the policy interests present in the child hearsay context do not support a similar exception for the elderly.<sup>33</sup> In short, the court found that the exception allowing hearsay by the elderly was facially unconstitutional.<sup>34</sup>

In examining the Florida Supreme Court's decision in *Conner*, a number of problematic questions arise as to the strength and basis for its arguments. Part I of this Comment contrasts the Florida Supreme Court's interpretation of Confrontation with that of the United States Supreme Court. Part II looks at the Florida Supreme Court's call for

---

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.

24. 635 So. 2d 949, 960 (Fla. 1994).

25. See *Conner*, 709 So. 2d at 171-72.

26. *Id.* at 171 (Briefly describing the policy justifications for both exceptions).

27. *Id.* at 172.

28. Initial Br. for Pet. on the Merits at 4, *Conner v. State*, 748 So. 2d 170, 950 (Fla. 1999) (No. 92,835).

29. *Conner v. State*, 748 So. 2d 950 (Fla. 1999).

30. *Id.* at 958-59.

31. *Id.* at 958.

32. *Id.* at 960.

33. *Id.* at 959-60.

34. *Id.* at 960.

factors to evaluate elderly hearsay statements and its formulation of a list to evaluate child statements in *State v. Townsend*. Part III examines the breadth of the statute as compared with similar exceptions found in other jurisdictions. Finally, Part IV looks at some of the policy reasons that uphold the hearsay exception for children and their applicability in the elderly context.

As this Comment demonstrates, the Florida Supreme Court misinterpreted and misconstrued the United States Supreme Court's cases regarding confrontation and the admission of hearsay in the *Conner v. State* decision. Basically, if the Florida Supreme Court is correct in its reasoning about Florida's elderly hearsay exception, then there are both federal laws and state laws being used in courts today which are unconstitutional.

### I. VIOLATION OF CONFRONTATION

The Florida Supreme Court invalidated section 90.803(24) because it reasoned that the exception was "facially violative of the defendant's constitutional right to confrontation."<sup>35</sup>

#### A. Federal "*Confrontation*" v. Florida "*Confrontation*"

Confrontation is considered to be one of the criminal defendant's most fundamental rights. The Sixth Amendment of the United States Constitution guarantees that the "... accused will enjoy the right ... to be confronted with the witnesses against him ..."<sup>36</sup> The Sixth Amendment is guaranteed to the states by the Fourteenth Amendment.<sup>37</sup> Florida also has a Confrontation Clause within its own constitution. Article I, section 16 of the Florida Constitution criminal defendants the right "... to confront at trial adverse witnesses ..."<sup>38</sup>

While the wording of the state and federal clauses is somewhat different, their meaning has been considered the same. In its Florida Confrontation Clause jurisprudence, the Florida Supreme Court has always considered the state and federal clauses to be analogous, despite their slight differences in wording. "The right of a defendant to confront his or her accusers is a basic constitutional right protected by both the United States and Florida constitutions."<sup>39</sup> The court always seems to

---

35. *Id.*

36. U.S. CONST. amend. VI.

37. See also *Ohio v. Roberts*, 448 U.S. 56, 62 (1980) (citing *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965)).

38. FLA. CONST. art., I § 16.

39. See, e.g., *Baber v. State*, 775 So. 2d 258 (Fla. 2000); *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998); *Perez v. State*, 536 So. 2d 206 (Fla. 1989).

link the two together. There does not appear to be case law where the court has found that the two clauses mean something different. Not only has the Florida Supreme Court implicitly held that the two clauses guarantee the same right, the court has consistently used federal case law when interpreting the right to confrontation in analyzing Florida cases.<sup>40</sup> In both *Conner* and *Townsend*, the Florida Supreme Court references a number of United States Supreme Court decisions and uses the language from those decisions to explain the rationale and basis for its opinions.<sup>41</sup> Since the Florida courts have deferred to the highest court's interpretation of confrontation, the rational conclusion is that the two clauses have the same meaning. Therefore, if a statute being appealed for Confrontation Clause violations passes muster according to the United States Supreme Court, then it *should* correspondingly be constitutional according to the Florida Supreme Court and vice versa.

### B. *Meaning of Confrontation*

Because the Florida Supreme Court has recognized the parallel between the federal guarantee of confrontation and Florida's guarantee, the focus then shifts to how the United States Supreme Court interprets confrontation and what this means in terms of section 90.803(24).

In its most strict interpretation, confrontation has been thought to mean a defendant's right to face a witness and cross-examine him.<sup>42</sup> In *Mattox v. United States*, one of the earliest cases to interpret the Confrontation Clause of the United States Constitution, the United States Supreme Court viewed the confrontation guarantee as a means of preventing a defendant from being tried on the basis of depositions and affidavits.<sup>43</sup> It was thought that confrontation provided the opportunity for the defendant to not only cross-examine the declarant, but also for the witness to be put under oath and have his demeanor assessed by the jury.<sup>44</sup>

The United States Supreme Court, however, has not held that the right to confrontation categorically prohibits the use of hearsay statements that may violate the clause's literal terms.<sup>45</sup> The Court has viewed confrontation, like other provisions found within the Bill of

---

40. *Id.*

41. In both *Conner* and *Townsend*, the court cites *Idaho v. Wright*, 497 U.S. 805 (1990), and *Ohio v. Roberts*, 448 U.S. 56 (1980), both of which are leading cases on how the United States Supreme Court has interpreted the Confrontation Clause. *Conner v. State*, 748 So. 2d 950, 954 (Fla. 1999); *State v. Townsend*, 635 So. 2d 949, 956 (Fla. 1994).

42. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

43. 156 U.S. 237, 242 (1895).

44. *Id.*

45. *Wright*, 497 U.S. at 813.



Rights, as subject to exceptions.<sup>46</sup> The court explained, in *Mattox*, that, "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."<sup>47</sup> While literal confrontation is the preferred means for admitting testimony,<sup>48</sup> there may be competing interests that warrant dispensing with literal confrontation at trial.<sup>49</sup> Hearsay exceptions have long been considered examples of statements that are sometimes immune from exclusion by the right to confrontation. The Confrontation Clause acts as the check on which hearsay may be admissible.<sup>50</sup> According to the Supreme Court in *Ohio v. Roberts*, the Confrontation Clause restricts what is considered admissible hearsay.<sup>51</sup>

The language in *Roberts* seems to require two different showings by the party wishing to introduce hearsay: necessity and trustworthiness.<sup>52</sup> In *Roberts*, the focus was placed on whether the declarant was available at trial when deciding whether her hearsay would be admissible.<sup>53</sup> The original reason for requiring a showing of unavailability was to emphasize the preference for face-to-face confrontation.<sup>54</sup> The requirement that a declarant be unavailable to allow the presentation of hearsay evidence has since eroded.<sup>55</sup> In *White v. Illinois*,<sup>56</sup> a case in which a child had been sexually assaulted, the Supreme Court revisited the availability issue from *Roberts* and announced that the unavailability requirement was only a necessary part of the Confrontation Clause inquiry when the statements to be introduced were from an earlier court proceeding.<sup>57</sup> Since *White*, a showing of unavailability is only required when the out-of-court statement attempting to be introduced was made in the course of a prior judicial proceeding.<sup>58</sup> Therefore, the Supreme Court's primary focus in analyzing hearsay in terms of the Confrontation

---

46. *Mattox*, 156 U.S. at 243.

47. *Id.*

48. *California v. Green*, 399 U.S. 149, 157 (1970).

49. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

50. *Id.* at 65.

51. *Id.*

52. *Id.*

53. *Id.* at 66. "... [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." *Id.*

54. *Id.* at 65.

55. Federal Rule of Evidence 803 contains twenty-three exceptions where the showing of unavailability is not relevant, and this pertains to well-established exceptions like business records, dying declarations, and excited utterances. FED. R. EVID. 803.

56. 502 U.S. 346 (1992).

57. *Id.* at 354.

58. MICHAEL H. GRAHAM, HANDBOOK TO THE FEDERAL RULES OF EVIDENCE 1724-25 (5th ed. 2000).

Clause is on the trustworthiness of the statement. The availability of the declarant is almost always immaterial.

Thus, this second requirement stated in *Roberts*, the reliability determination, now forms the core of the federal confrontation doctrine. Under *Roberts*, a declarant's out-of-court statements, where that declarant is not testifying at trial under oath subject to cross-examination, must be shown to be so trustworthy that the statements can be regarded as accurate even without the adversarial testing of in-court cross-examination.<sup>59</sup> The statements must contain sufficient "indicia of reliability" such that there is no real difference between admitting the hearsay statements without the declarant and evaluating the declarant's statement during cross-examination.<sup>60</sup>

The underlying rationale for the indicia of reliability notion stems from the theory that the circumstances surrounding certain types of statements are equivalent or superior mechanisms by which to guarantee trustworthiness than is the process of cross-examination. The Court looked to the fact that there were already well-established common law exceptions to the rule against hearsay that were thought to guarantee the same protections that the Confrontation Clause is supposed to guard against.<sup>61</sup> Thus, these "indicia of reliability" can be inferred when "evidence falls within a firmly rooted hearsay exception."<sup>62</sup> Such firmly rooted exceptions are considered to be those like dying declarations<sup>63</sup> and excited utterances.<sup>64</sup> It is thought that the circumstances under which such statements are made guard against the risk of fabrication.<sup>65</sup>

Statements, however, that do not fall into those long-accepted exceptions are presumptively unreliable.<sup>66</sup> Accordingly, these statements must be excluded " . . . absent a showing of particularized guarantees of trustworthiness."<sup>67</sup> Since Florida's elderly hearsay exception is not a firmly rooted exception whose circumstances are thought to effec-

---

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Dying declarations are classic hearsay—they are rarely made in the presence of the defendant, they do not provide an opportunity for cross-examination, and the witness is not brought before the jury. However, "from time immemorial they have been treated as competent testimony." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

64. A statement that is made in an excited state is made without the chance to reflect on what the consequences of one's exclamation may be has indicia of reliability greater than a statement made in the relative calm of the courtroom. *White v. Illinois*, 502 U.S. 346, 347 (1992).

65. "[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath." *Mattox*, 156 U.S. at 244.

66. *Idaho v. Wright*, 497 U.S. 805, 818 (1990).

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

tively guarantee reliability, it falls into this latter category requiring a specific showing of particularized guarantees of trustworthiness.<sup>68</sup>

When dealing with statements falling outside a firmly rooted exception, these particularized guarantees of trustworthiness are easier to find in some cases than others. In *Ohio v. Roberts*, the daughter of the victim was called by the defense at a preliminary hearing regarding forgery and stolen credit card charges.<sup>69</sup> During her questioning by the defense, she did not admit giving Roberts, the defendant, the credit cards and check at issue without telling him that she did not have permission to use them.<sup>70</sup> At the subsequent trial, the daughter could not be produced despite numerous attempts by the state to procure her appearance.<sup>71</sup> As a substitute, the prosecution sought to introduce her testimony from the preliminary hearing.<sup>72</sup> While the trial court admitted her statements, both the appellate court and the Ohio Supreme Court took issue with the statements' admissibility and reversed the trial court's decision.<sup>73</sup> The United States Supreme Court, however, said that because the witness was unavailable and her prior testimony possessed sufficient "indicia of reliability," her statements could come in without violating the defendant's right to confrontation.<sup>74</sup> Because the witness was under oath and the defendant's attorney was able to cross-examine the witness, the testimony was deemed sufficiently reliable.<sup>75</sup>

Courts are often faced with this question of whether to admit former testimony when the witness is unavailable at the time of trial. This is an area of considerable debate because there is a hearsay exception under Rule 804(b)(1) of the Federal Rules of Evidence that allows former testimony to be admitted when the declarant is unavailable and the party against whom the testimony is now being offered had an opportunity and motive to develop that testimony by direct or cross-examination.<sup>76</sup> There are often situations, however, where the prosecution seeks

---

68. Without section 90.803(24), there would have been no way to admit statements by an elderly person, to a police officer, since it does not fall into any of the traditional hearsay exceptions. *Conner v. State*, 748 So. 2d 950, 956 (Fla. 1999).

69. *Roberts*, 448 U.S. at 58.

70. *Id.*

71. *Id.* at 59.

72. *Id.*

73. *Id.* at 60-61.

74. *Id.* at 77.

75. *Id.* at 73.

76. FED. R. EVID. 804(b)(1) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of the same or another proceeding if the party against whom the testimony is

to introduce testimony that does not satisfy the requirements of Rule 804(b)(1). For example, grand jury testimony, which is sometimes allowed in at trial, is never subject to cross-examination but has still been considered "sufficiently trustworthy."<sup>77</sup> When testimony such as this is outside the "firmly rooted" former testimony exception, the grand jury testimony must be introduced through some other exception. Courts usually turn to Federal Rule of Evidence 807, the residual hearsay exception.<sup>78</sup>

Rule 807 allows the use of statements at trial that have equivalent guarantees of trustworthiness, when compared to other established exceptions. While it may seem as though this Rule would make a lot of testimony admissible, it was specifically established with the intention that it be used "very rarely and only in exceptional circumstances."<sup>79</sup> This Rule was created to allow reliable statements to come in when they arise from unanticipated situations that demonstrate a degree of trustworthiness equal to that found in specifically stated hearsay exceptions.<sup>80</sup> The idea behind this exception was that rather than artificially expand and consequently erode the effectiveness of the other exceptions, this catch-all exception could be used as necessity dictates.<sup>81</sup> Additionally, Rule 807 is considered to facilitate ascertainment of the truth and the fair adjudication of controversies, which are the basic functions of the Federal Rules of Evidence.<sup>82</sup>

Rule 807 requires that the statement be material, that its probative value outweigh that of any other evidence that could be reasonably pro-

---

now offered, or, in a civil action of proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

77. *See, e.g.*, *United States v. Earles*, 113 F.3d 796 (8th Cir. 1997); *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996).

78. FED. R. EVID. 807 provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) 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 (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

79. GRAHAM, *supra* note 58, at 2071 (citing S. REP. NO. 93-1277 (1974) *reprinted in* 1974 U.S.C.A.N. 7051, 7058).

80. *Id.* at 2069-70 (citing FED. R. EVID. 807 advisory committee's note).

81. *Id.* at 2075.

82. *United States v. Sposito*, 106 F.3d 1042, 1048 (1st Cir. 1997).

cured, and that its admission is in accord with the general purposes of the rules and in the interests of justice.<sup>83</sup> Since Rule 807 does not fall into the automatic indicia of reliability category because it is not a firmly rooted exception, the federal courts require that statements offered under this exception be shown to have particularized guarantees of trustworthiness.

In *United States v. Papajohn*, a federal district court was faced with the question of whether to admit the grand jury testimony of a witness who implicated the defendant on three separate occasions before the grand jury.<sup>84</sup> The defendant allegedly burned down her convenience store in order to collect the insurance proceeds and was facing arson, mail fraud, aiding and abetting, and conspiracy charges.<sup>85</sup> The witness, the defendant's son, had made one statement before the grand jury indicating that the defendant had burned down the store to get the insurance money.<sup>86</sup> The Eighth Circuit had to decide, since the son was unavailable to testify at trial, if the grand jury testimony was so reliable that in-court testimony would add little to the veracity of the statement.

While the son in *Papajohn* was under oath, as all grand jury witnesses are, there is a general problem with admitting grand jury testimony, namely, that the witness is not subject to cross-examination.<sup>87</sup> Cross-examination is considered to help test the reliability of the statement and to help bolster a showing of particularized guarantees of trustworthiness.<sup>88</sup> Another problem with admitting statements like those in *Papajohn*, is that they may be attempts to minimize the declarant's culpability in the alleged crime.<sup>89</sup> There may have been a question as to whether the declarant, the defendant's son, was somehow involved. Even statements in which the declarant inculcates himself are not per se reliable, and the statement by the son in *Papajohn* was presumably less so.<sup>90</sup>

Yet, the court in *Papajohn* still allowed the use at trial of the declarant's grand jury testimony.<sup>91</sup> The court relied on the fact that the son was under oath, present before the grand jury, and responding to open-ended questions as indications that the statements were reliable.<sup>92</sup>

---

83. *United States v. Mathis*, 559 F.2d 294, 298 (5th Cir. 1977).

84. 212 F.3d 1112 (8th Cir. 2000).

85. *Id.* at 1115-16.

86. *Id.* at 1116.

87. *See, e.g.*, *Dutton v. Evans*, 400 U.S. 74 (1970); *Papajohn*, 212 F.3d 1112 (8th Cir. 2000); *United States v. Earles*, 113 F.3d 796 (8th Cir. 1997).

88. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

89. *Lilly v. Virginia*, 527 U.S. 116, 132 (1999).

90. *See id.* at 125.

91. *Papajohn*, 212 F.3d at 1120.

92. *Id.*

Furthermore, the court pointed out that the witness was not in police custody nor was he charged with the crime.<sup>93</sup> The court felt because he was just voluntarily answering the government's questions, the conclusion could be drawn that the statements were inherently reliable.<sup>94</sup> *Papajohn* is not unique. There are many courts that have allowed the presentation of statements made before grand juries by witnesses who later become unavailable to testify at trial.<sup>95</sup>

Federal courts have been faced with more difficult applications of "particularized guarantees of trustworthiness." One such intricacy in the application of this notion comes in the form of statements in child abuse cases where there is no oath, no grand jury, and no cross-examination of any kind. The federal system does not have a specific exception for statements by children in this context, as Florida does in section 90.803(23). Therefore, such statements, if admitted, must come in under Rule 807.<sup>96</sup>

In *United States v. Cree*, the government sought to use the residual exception to introduce statements of a four-year-old assault victim.<sup>97</sup> The defendant was convicted after the trial court had admitted the child's statements. The defendant appealed contending a violation of her confrontation rights because the statements lacked the required showing of trustworthiness.<sup>98</sup> The Eighth Circuit disagreed and found that the statements were sufficiently credible.<sup>99</sup> The court looked at the child's age and his reaction to being shown the items used in the abuse, as well as the corroborating evidence as factors for finding the statements to be sufficiently reliable.<sup>100</sup> The court noted that while the catch-all exception should be limited to exceptional circumstances, "it is hard to imagine many cases more compelling than this case."<sup>101</sup>

The court in *Cree*, as in *Papajohn*, had to rely upon factors other than previous cross-examination to make a finding of trustworthiness. The courts, however, were able to examine the record and make the determination that the statements could be admitted without violating a defendant's right to confrontation.<sup>102</sup> Thus the federal courts have con-

---

93. *Id.* at 1119-20.

94. *Id.*

95. *See, e.g.,* *Dutton v. Evans*, 400 U.S. 74 (1970); *United States v. Earles*, 113 F.3d 796 (8th Cir. 1997).

96. *See* FED. R. EVID. 807.

97. 778 F.2d 474 (8th Cir. 1985).

98. *Id.* at 478.

99. *Id.* at 476.

100. The Eighth Circuit also felt the interests of justice were served by admitting the challenged statements. *Id.* at 477-78.

101. *Id.* at 478.

102. *Id.*

sistently held that when a statement fulfills the "indicia of reliability" requirement—either through a firmly rooted exception or a showing of particularized guarantees of trustworthiness—the right of confrontation is still protected.

C. *Confrontation and Section 90.803(24)*

The Florida Supreme Court in *Conner* discusses the meaning of confrontation, in similar terms as described above, and cites many of the same United States Supreme Court cases, but concludes that section 90.803(24) violates a defendant's right to confrontation. Looking at the United States Supreme Court's interpretation of confrontation and the requirements of section 90.803(24), it is difficult to see how the Florida Supreme Court arrived at its conclusion.

Most importantly, section 90.803(24) requires an "indicia of reliability" showing. Since the statute does not fall under a firmly rooted exception,<sup>103</sup> statements coming in under the exception must possess "particularized guarantees of trustworthiness" to be in accord with confrontation. Section 90.803(24) has a number of safeguards built in to satisfy this trustworthiness requirement.

First, the source of the information, the method, or the circumstances cannot show a lack trustworthiness.<sup>104</sup> Once this threshold trustworthiness is shown, the court must conduct a hearing outside the presence of the jury to assess whether the time, content, and circumstances of the statement provide assurances of reliability.<sup>105</sup> The statute further outlines factors for the court to consider and requires specific findings to be put on the record as the basis for the court's ruling.<sup>106</sup> Finally, the statute puts the burden on the prosecution in criminal actions, as part of the notice requirement, to provide a basis for the statement's admissibility.<sup>107</sup> This includes a showing that the circumstances surrounding the statement indicate its reliability.<sup>108</sup>

Section 90.803(24) even goes back to the original language of *Roberts* and emphasizes the preference for face-to-face confrontation by requiring a showing of necessity.<sup>109</sup> The elderly hearsay exception, in section 90.803(24)(a)(2), requires that the declarant either testify or be shown to be unavailable.<sup>110</sup> Clearly, section 90.803(24) requires that

---

103. *Conner v. State*, 748 So. 2d 950, 956 (Fla. 1999) (1999).

104. FLA. STAT. § 90.803(24)(a) (1999).

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

106. FLA. STAT. § 90.803(24)(a)(1) & § 90.803(24)(c) (1999).

107. FLA. STAT. § 90.803(24)(b) (1999).

108. *Id.*

109. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

110. FLA. STAT. § 90.803(24)(a)(2) (1999). The statute states:

statements admitted under its guise be both necessary and possess particularized guarantees of trustworthiness in strict conformance with the United States Supreme Court's confrontation doctrine.

Despite the employment of such procedural safeguards, the Florida Supreme Court contends that the statute is not in conformity with the guarantees of confrontation. This seems like quite a stretch. The statute seems calculated to adhere to the requirements set forth by the United States Supreme Court to guarantee trustworthiness, yet the Florida Supreme Court still rejects section 90.803(24) as violating a defendant's right to confrontation. In so holding, it seems the Florida Supreme Court either misconstrues the United States Supreme Court's hearsay exception jurisprudence, or interprets confrontation differently than the United States Supreme Court intended.

## II. THE *TOWNSEND* DECISION AND THE FLORIDA SUPREME COURT'S NEED FOR ADDITIONAL FACTORS TO EVALUATE

About five years before the Florida Supreme Court decided *Conner*, it considered *State v. Townsend*.<sup>111</sup> At issue in *Townsend* was the constitutionality of section 90.803(23), the analogue to the elderly hearsay exception in the child abuse context.<sup>112</sup>

Jack Timothy Townsend was on trial for sexual battery of his two-year-old daughter.<sup>113</sup> Mr. Townsend's daughter could not testify at trial because her age rendered her incompetent.<sup>114</sup> Therefore, the state introduced the little girl's statements to a number of people made in the year following the alleged abuse pursuant to section 90.803(23).<sup>115</sup> The girl's mother, a doctor, and a psychiatrist all testified to the two-year-old's statements about the abuse.<sup>116</sup> Mr. Townsend was convicted and appealed the decision contending that a number of the statements admitted at trial were violative of his right to confrontation.<sup>117</sup>

---

[I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. 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 of 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).

111. 635 So. 2d 949 (Fla. 1994).

112. Section 90.803(24) "closely tracks" section 90.803(23). *Conner v. State*, 709 So. 2d 170, 171 (Fla. 2d DCA 1998).

113. *Townsend*, 635 So. 2d at 952.

114. *Id.*

115. *Supra* note 23 and the accompanying text.

116. *Townsend*, 635 So. 2d at 952-53.

117. *Id.* at 956. The court reaffirmed its decision in *Perez v. State*, 536 So. 2d 206 (Fla. 1988),



The Florida Supreme Court disagreed. While the court remanded the case for further proceedings, it did uphold section 90.803(23) as constitutional.<sup>118</sup> The Florida Supreme Court analyzed the numerous safeguards built into the statute and found these to be sufficient protections of the defendant's rights when properly applied.<sup>119</sup> The court highlighted the statute's requirement that the trial court conduct a hearing to examine the circumstances surrounding the statement to determine its reliability.<sup>120</sup>

In its discussion of the hearing, the Florida Supreme Court paid particular attention to the factors the statute outlines for making the reliability determination. It quoted section 90.803(23)(a)(1): "[T]he 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."<sup>121</sup>

The court went on in *Townsend* to give a list of factors that a trial court should also consider in determining the reliability of statements in the child abuse context. It says these other factors should include:

... [T]he 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.<sup>122</sup>

The court in *Townsend* seemed very concerned with the guidance given to trial courts in order to assess the reliability of statements.

---

in which it held that section 90.803(23) comported with confrontation as outlined by the United States Supreme Court.

118. *Id.* at 952.

119. *Id.* at 958. The court found the trial court in *Townsend* had made insufficient determinations as to the reliability of the hearsay statements admitted at trial and required further findings to comply with the requirements of section 90.803(23). This case was an example of how a court failed to properly implement the safeguards, but, the court believed when properly applied, such protections could guarantee the reliability of the statements.

120. *Id.* at 957.

121. *Id.*

122. *Id.*

### A. *The Absence of Factors in Conner*

The Florida Supreme Court's discussion of the statute's hearing requirement, its list of factors as discussed in *Townsend*, and the sufficiency of those factors is interesting in light of the fact that section 90.803(24) has all the same requirements. Section 90.803(24)(a)(1) provides that:

[T]he court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any factor deemed appropriate.<sup>123</sup>

Like section 90.803(23), section 90.803(24) mandates that the court conduct a hearing to examine the circumstances of the statement sought to be admitted. At the hearing in *Conner*, the court ruled that the statute applied to Mr. Ford, but reserved ruling on the reliability of his statements. It is puzzling that the hearing to analyze a list of factors, which is deemed satisfactory by the Florida Supreme Court in child abuse context, can be deemed to be insufficient when the declarant's age simply increases. Despite the similarity in statutory language, the *Conner* court opined, "[u]nlike the child hearsay context, these factors do not guarantee the reliability of a statement when applied to an elderly adult."<sup>124</sup>

The task facing the Florida Supreme Court in *Conner* was the formulation of a list of factors indicating the reliability of statements by the elderly as it had done in *Townsend* for the exception for children's statements. The court failed to formulate such a list explaining, "[u]nlike the child hearsay context, we are unable to formulate a list of permissible considerations that would ensure the reliability of a hearsay statement made by an elderly adult to the extent that 'adversarial testing would add little to its reliability.'"<sup>125</sup>

In *Conner*, the court felt that because it could not provide the trial courts with additional factors to use to assess reliability, the statute could not be properly applied. It felt that the statutory factors included in section 90.803(24) were not enough. Without a supplemental list of considerations, the Florida Supreme Court felt it had to deem section 90.803(24) unconstitutional.<sup>126</sup>

In *Townsend*, the court strives to ensure that trial courts evaluate the whole picture when assessing hearsay statements.<sup>127</sup> It concludes its

---

123. FLA. STAT. § 90.803(24) (1995).

124. *Conner v. State*, 748 So. 2d 950, 958 (Fla. 1999).

125. *Id.* at 958-59 (quoting *Idaho v. Wright*, 497 U.S. 805, 818 (1990)).

126. *Id.*

127. *State v. Townsend*, 635 So. 2d 949, 958 (Fla. 1994).

list of factors with the instruction that courts should use "a totality of the circumstances evaluation in determining reliability."<sup>128</sup> In *Conner*, however, the court was unable to come up with this inventory of factors to assess the totality of circumstances and used this as part of its basis for concluding that the statute is unconstitutional.

The court gets this "totality of the circumstances" language from the United States Supreme Court's language in *Idaho v. Wright*, which it cites to this end.<sup>129</sup> "In sum, as noted by the United States Supreme Court in *Wright*, a court is to use a totality of circumstances evaluation in determining reliability."<sup>130</sup> It seems as though the Florida Supreme Court may be citing *Wright* for a proposition different from its holding.

### B. *Wright's Perspective on Formulating a List of Factors*

*Wright* is one of the Supreme Court's leading cases dealing with making determinations on the reliability of hearsay statements for admissibility at trial. At issue in *Wright* were statements made to a pediatrician by a three-year-old victim of sexual abuse.<sup>131</sup> The state sought to introduce the little girl's statements because she was unavailable to testify at trial.<sup>132</sup> The trial court allowed the use of the child's statements pursuant to Idaho's residual hearsay exception, which allows the presentation of statements that do not fall within other hearsay exceptions but which have "equivalent circumstantial guarantees of trustworthiness."<sup>133</sup>

The United States Supreme Court's review of *Wright* focused on how to determine when a statement is sufficiently reliable to allow its admission.<sup>134</sup> The Court declined to list specific factors to be consid-

---

128. *Id.*

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

130. *Townsend*, 635 So. 2d at 958.

131. *Wright*, 497 U.S. at 809.

132. These facts are similar to those in *Townsend*. See *Townsend*, 635 So. 2d at 951.

133. IDAHO R. EVID. 803(24) (1990). Idaho's residential hearsay exception is modeled closely after Federal Rules of Evidence 807. The exception provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) 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 (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

134. *Wright*, 497 U.S. at 816.

ered, explaining, “[w]e do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial.”<sup>135</sup> The Court stated that the proper focus of a reliability inquiry should be on the circumstances surrounding the initial utterance of the statement in question and on any facts that appear to make the declarant worthy of belief.<sup>136</sup> In refusing to set forth a specific test, the Court chose instead to rely on the original rationale underlying all hearsay exceptions.

Hearsay is allowed when “the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.”<sup>137</sup> Therefore, as long as a court implements a test that shows a statement is so trustworthy that cross-examination is unnecessary, there are sufficient safeguards under the Court’s rationale. The only real guidance the Court provides is to suggest that particularized guarantees of trustworthiness “must be shown from the totality of the circumstances but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.”<sup>138</sup>

The United States Supreme Court, however, does not contend that there are no factors that a court can consider to determine the reliability of statements in looking at the totality of the circumstances. It simply does not think that there are hard and fast features that every court should be forced to consider. “[C]ourts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test . . .”<sup>139</sup>

In light of the flexible approach taken by the Court in *Wright*, it is difficult to reconcile the Florida Supreme Court’s rigid requirement of a list of reliability factors in *Conner*. This contradiction becomes particularly problematic in light of the fact that the need for factors was part of the Florida Supreme Court’s basis for overturning section 90.803(24). Here again, the Florida Supreme Court is at odds with long established principles of the United States Supreme Court.

### C. *Factors in a Physical Abuse Context*

It is also difficult to understand the Florida Supreme Court’s list of factors for section 90.803(23) in light of the fact that the statute applies to both child sexual and physical abuse cases. The court basically

---

135. *Id.* at 818.

136. *Id.* at 819.

137. *Id.* at 820.

138. *Id.* at 819.

139. *Id.* at 822.

imposes additional considerations that trial courts must undertake when ruling on the admissibility of statements in child abuse cases. While their suggested factors, like the child's use of terminology unexpected of a child of a similar age, may prove valuable in a sexual abuse context, it is hard to see how their list will prove effective in terms of physical abuse. The factors outlined would not prove helpful to show "indicia of reliability" in physical abuse cases. For example, in addition to the factors enumerated in section 90.803(23),<sup>140</sup> the court in *Townsend* added several factors that a court should consider in the child sexual and physical abuse context, namely:

[w]hether 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.<sup>141</sup>

The court's language belies the presumption that when a child describes certain kinds of sexual acts, there is inherent trustworthiness in his or her statements. For example, when a three-year-old child begins describing ejaculation, the statement is inherently trustworthy.

Yet, the same cannot be said for statements describing physical abuse. There is no real terminology that will reveal the trustworthiness of a statement made by a child who has been hit or otherwise physically battered. For example, if a ten-year-old boy uses child-like language in describing alleged abuse at the hands of his father just after the alleged incident, there are not sufficient assurance that the boy has not made up the story as a reaction to having been grounded or that the boy is not being coached by a parent seeking custody.

Although *Townsend* was not a physical abuse case, the Florida Supreme Court seemed to ignore the problem physical abuse cases pose in its decision. The additional factors the Florida Supreme Court enumerated in *Townsend*, listed above, do not assure reliability outside the child sexual abuse context. While it is unlikely that any kind of hard and fast list could guarantee trustworthiness in physical abuse cases, it is unreasonable for the Florida Supreme Court to treat section 90.803(23) factors as a benchmark of reliability when those factors are only in fact

---

140. FLA. STAT. § 90.803(23) (2000).

141. *Townsend*, 748 So. 2d at 957-58.

reliable for a portion of child abuse cases. That the section 90.803(24) exception for the elderly does not easily lend itself to the formulation of a convenient list of factors should not automatically render the exception unconstitutional.

The challenge as to how to “guarantee” reliability in terms of statements by the elderly goes to the heart of the court’s argument against section 90.803(24) in *Conner*. The court is correct in that it is difficult to formulate a list of factors that would ensure that an elderly person is being truthful in his accusations of abuse or neglect. Suggestions have even been made to rewrite the elderly exception to include such a list to satisfy the Florida Supreme Court.<sup>142</sup> Yet like the child physical abuse

---

142. Meredith E. James, Note, *Narrowing the Gap Between Florida’s Hearsay Exceptions for Child Declarants and Elderly Declarants: Sections 90.803(23) and 90.803(24), Florida Statutes*, 55 U. MIAMI L. REV. 309, 338-39 (2000). This article includes a proposed revision of 90.803(24) to read with changes indicated in italics to read:

(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

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).

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.

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

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.

cases, even these other considerations do not guarantee reliability.

Even these efforts, however, ignore the United States Supreme Court's emphasis on the particularized guarantees of trustworthiness, choosing instead to focus on the factors leading to a finding of trustworthiness.<sup>143</sup> The United States Supreme Court stresses the need for an ad hoc determination. A proclamation of a list of factors could hinder, rather than promote the ad hoc analysis required by the United States Supreme Court.

Clearly, formulating a list of factors is difficult in terms of the elderly, as well as physically abused children, but the United States Supreme Court has decided that a court should apply whatever factors it deems appropriate. Apparently, the Florida Supreme Court disagrees.<sup>144</sup> Once again, the Florida Supreme Court seems to disregard the mandate of the highest court in setting out Florida's laws.

### III. SCOPE OF SECTION 90.803(24)

Another reason cited by the Florida Supreme Court in striking down section 90.803(24) was overbreadth.<sup>145</sup> The statute allows presentation of statements by elderly persons describing acts 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."<sup>146</sup>

The court in *Conner* first remarks that "the reach of the statute is far broader than the child hearsay exception."<sup>147</sup> While section 90.803(23) is limited to children under age eleven who are victims of physical and sexual abuse,<sup>148</sup> section 90.803(24) applies to elderly adults who satisfy the requirements of section 825.101(5), *Florida Statutes*, and who are victims of "any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or aggravated assault or sexual battery, or any other violent act . . . ."<sup>149</sup> The court seemed concerned that the elderly hearsay exception applied to a array of crimes as well as to a broadly defined class of citizens.<sup>150</sup>

---

143. See *Idaho v. Wright*, 497 U.S. 805 (1990).

144. See *infra* Section II.

145. *Conner v. State*, 748 So. 2d 950, 959-60 (Fla. 1999).

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

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

148. See *supra* note 23.

149. FLA. STAT. § 90.803(24)(a) (1999).

150. The statute applies to "elderly persons" as defined in FLA. STAT. § 825.101(5) (2000). See *supra* note 12 for the exact language of the definition.

### A. *Florida's Exception and the Federal Exception*

Once again, the Florida Supreme Court's decision seems to be at odds with United States Supreme Court's decisions. While the United States Supreme Court has never addressed the issue of whether a statute admitting statements by the elderly is too broad,<sup>151</sup> it has consistently reviewed Federal Rule of Evidence 807 and its predecessors, Federal Rules of Evidence 803(24) and 804(b)(5).<sup>152</sup>

Rule 807, the "residual exception," allows the use of statements not falling under one of the other outlined exceptions but having equivalent guarantees of trustworthiness.<sup>153</sup> It requires a showing of: (1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) the interest of justice; and (5) notice.<sup>154</sup>

Nowhere in the statute is there a limitation as to the crimes to which it is applicable.<sup>155</sup> Rule 807 operates in the following manner:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) 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 (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.<sup>156</sup>

Since it has no restrictions, Rule 807 has been used to admit statements in a wide range of cases. In *United States v. Santos*, Rule 807 was used to admit statements about campaign activities to prove fraud and extortion after the statements were found to be material, probative, and reliable.<sup>157</sup> In *United States v. Ellis*, a social worker, who had examined

---

151. The United States Supreme Court denied certiorari on *Conner* on June 26, 2000. *Florida v. Conner*, 748 So. 2d 950 (Fla. 1999), *cert. denied*, 530 U.S. 1262 (1999).

152. FED. R. EVID. 803(24) and 804(b)(5) were combined to form Rule 807.

153. FED. R. EVID. 807.

154. *United States v. Hall*, 165 F.3d 1095, 1110 (7th Cir. 1999) (citing *Moffett v. McCauley*, 724 F.2d 581, 583 (7th Cir. 1984)).

155. However, Congress did state that it intended for the exception to be used "rarely, and only in exceptional circumstances." GRAHAM, *supra* note 58 at 2075 (citing S. REP. NO. 93-1277 (2000) reprinted in 1974 U.S.C.C.A.N. 7051, 7058).

156. FED. R. EVID. 807.

157. 65 F. Supp. 2d 802 (N.D. Ill. 1999).



a child for signs of abuse, was allowed to testify under the residual exception about the remarks and gestures of a two-year-old child made while playing with anatomically-correct dolls to prove the occurrence of sexual abuse.<sup>158</sup> In *United States v. Cree*, the residual exception was also used to admit statements made to a social worker and a government worker by a four-year-old boy about how his injuries occurred.<sup>159</sup> This statute has no limit in scope as far as the crimes for which it can be used, yet it is still constitutional according to the United States Supreme Court.

Not only does Rule 807 not limit the charges it can be used to prove, it also has no restriction as to the declarants to which it applies. It has been used in cases like *United States v. Barbati* in which the court allowed references to a barmaid's pointing out counterfeiters at the scene of the crime, even though the woman could not remember the faces of the perpetrators at the time of trial.<sup>160</sup> Rule 807 has been used to try and introduce the statements made to a neighbor by a man who had just been burned by his exploding hot water heater in *Parsons v. Honeywell, Inc.*<sup>161</sup> Even statements by nine-year-old victims of sexual assault made to an FBI agent were allowed in under the residual exception in *United States v. Groom*.<sup>162</sup> The age or condition of the declarant has no bearing on the operation of Rule 807.

Given the United States Supreme Court's approval of a hearsay exception that is not limited to any category of charge or declarant, the Florida Supreme Court's reasoning behind its rejection of section 90.803(24) seems attenuated at best. Florida Statute section 90.803(24) is considerably more limited than Rule 807, yet the Florida Supreme Court has rejected section 90.803(24) as too broad. After *Conner*, it would seem that the Florida Supreme Court, given the chance, would also reject Rule 807 as too broad and therefore unconstitutional. In light of the United States Supreme Court never having taken issue with Rule 807's breadth, Florida's position appears strained.

Furthermore, section 90.803(24) seems to have most of the same procedural safeguards built directly in to the language of the statute that the federal courts have recognized within their Rule 807 case law. Both

---

158. 935 F.2d 385 (1st Cir. 1991) (statements were admitted under former Rule 803(24) which has subsequently become Rule 807).

159. 778 F.2d 474 (8th Cir. 1985) (statements came in under former Rule 803(24) which has been recodified as Rule 807).

160. 284 F. Supp. 409 (E.D.N.Y. 1968) (admitting statements pursuant to former Rule 803(24) which has been recodified as Rule 807).

161. 929 F.2d 901, 908 (2d Cir. 1991) (the court found the statement was not as probative as other potential evidence and thus would not allow the statements in under the residual exception).

162. 978 F.2d 425 (8th Cir. 1992) (allowing statements in under former Rule 803(24) which is now Rule 807).

compel a showing of reliability and notice.<sup>163</sup> In addition to these protections of the defendant's rights, the Florida statute also requires specific findings as to the victim's age and as to the type of crime involved. It would seem that these additional restrictions provide an even greater measure of security to the defendant's rights by excluding even more hearsay. Yet, the Florida Supreme Court focuses on the fact that the elderly hearsay exception applies in a broader context than does the child hearsay exception in ruling section 90.803(24) unconstitutional.<sup>164</sup> If the Florida Supreme Court is right, the United States Supreme Court must be wrong in holding Rule 807 constitutional, for the two positions cannot be reconciled.

### B. *Florida's Exception and Other States' Exceptions*

It is also interesting to note that the federal courts are not alone in their use of an unlimited residual hearsay exception. While the Florida legislature has declined to enact such an exception, a number of jurisdictions have enacted exceptions similar to Federal Rule of Evidence 807.<sup>165</sup>

Georgia has enacted what has been termed the necessity exception, which requires much of the same showing that Rule 807 does.<sup>166</sup> Georgia's exception, section 24-3-1 states, "Hearsay evidence defined; when admitted. (a) Hearsay is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons. (b) Hearsay evidence is admitted only in specified cases from necessity."<sup>167</sup> Under Georgia's exception, statements have been admitted to prove various facts in a case ranging from a defendant's gang association<sup>168</sup> to threats made to a victim.<sup>169</sup>

In *Ward v. State*, such threats to a victim were deemed admissi-

---

163. While section 90.803(24) does not expressly require showing of materiality, probative value, or interests of justice, such requirements indirectly apply through section 90.403, *Florida Statutes* (2000). Section 90.403 requires that relevant evidence be inadmissible if its probative value is outweighed by prejudice. FLA. STAT. § 90.403 (2000).

164. *Conner v. State*, 748 So. 2d 950, 958 (Fla. 1999).

165. COLO. R. EVID. 807; GA. CODE ANN. § 24-3-1(b) (1999); IDAHO R. EVID. 803(24), 804(b)(5); IOWA R. EVID. 803(24), 804(b)(5); MISS. R. EVID. 803(24), 804(b)(5); NEB. REV. STAT. § 27-803(23) (2000); N.M. STAT. ANN. §§ 11-803(x), 11-804(b)(5) (2000); N.C. GEN. STAT. § 8C-1, Rule 804(b)(5) (2000); R.I. R. EVID. 803(24), 804(b)(5); WIS. STAT. ANN. § 908.045(6) (2000).

166. GA. CODE ANN. § 24-3-1(b) (2000).

167. While Georgia's exception seems somewhat vague, it has been interpreted to mean that when the hearsay declarant is unavailable and the circumstances under which the statement was made show its trustworthiness, that the statement can be admitted. *See Shavers v. State*, 406 S.E.2d 803 (Ga. Ct. App. 1991).

168. *Clark v. State*, 515 S.E.2d 155 (Ga. 1999).

169. *Ward v. State*, 520 S.E.2d 205 (Ga. 1999).

ble.<sup>170</sup> The defendant was convicted of assault and felony murder after having run over the victim, his live-in girlfriend.<sup>171</sup> The trial court had admitted statements made by the deceased prior to her death to friends that she was afraid for her life. The defendant appealed their admissibility. The Georgia Supreme Court employed a two-prong test, similar to the inquiry used by United States Supreme Court, to the statements at issue.<sup>172</sup> Having found that the statements were necessary, since the victim was deceased, and that the circumstances surrounding the statements tended to verify their reliability, the court upheld the statements' admissibility and the defendant's conviction.<sup>173</sup>

Nowhere in its discussion of the exception or the statements admissibility did the court in *Ward* even mention the scope of the statute. In fact, the Georgia statute is much more vague and broad than Florida's section 90.803(24), yet the Georgia Supreme Court has upheld section 24-3-1. The Georgia Supreme Court, unlike the Florida Supreme Court, seems to be in accord with the United States Supreme Court.

Colorado courts have also used its residual hearsay exception to admit trustworthy testimony that would otherwise be inadmissible because of the traditional rules against hearsay. Like Federal Rule of Evidence 807 and Georgia's section 24-3-1, Colorado's catch all exception, Colorado Rule of Evidence 807 provides:

A statement not specifically covered by any Rule 803 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the court determines (A) the statement is offered as evidence of a material fact; (B) 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 (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.<sup>174</sup>

Colorado's exception was used to admit statements by a child victim of sexual assault and aggravated incest in *People v. Diefenderfer*.<sup>175</sup> The three-year-old victim made statements to a number of individuals,

---

170. *Id.* at 208.

171. *Id.* at 207.

172. *Id.* at 208.

173. *Id.* at 209, 211.

174. COLO. R. EVID. 807.

175. 784 P.2d 741 (Colo. 1990).

including an investigator for the district attorney, about the sexual abuse she suffered at the hands of her stepfather.<sup>176</sup> Because of the potential trauma that testifying could pose for the little girl, the court deemed her unavailable and the state subsequently sought to introduce her hearsay statements to the investigator.<sup>177</sup> The trial court admitted the statements and the defendant was convicted.<sup>178</sup> He appealed, contending that his right to confrontation had been violated by the admission of the statements.<sup>179</sup>

While the Colorado Supreme Court found the statements should have been admitted under Colorado's specific exception for children in sex abuse cases,<sup>180</sup> the court nonetheless found that the statements satisfied the reliability requirements of Colorado Rule of Evidence 804(b)(5).<sup>181</sup> Here again, a court is upholding and implementing a residual exception, which has no specific requirements as to a category of declarants that it applies to. Like the United States Supreme Court and the Georgia Supreme Court, the Colorado Supreme Court took no issue with the scope of the residual hearsay exception.

There are many other cases in states across the country in which state courts have ruled on the admissibility of evidence under a residual hearsay exception.<sup>182</sup> While these courts sometimes question the trial court's finding of reliability, the breadth of these statutes has never been called into question. In that arena, the Florida Supreme Court stands alone.

### C. *Florida's Exception and the California Exception*

Florida is not the only state to have enacted a hearsay exception to protect statements made by the elderly. California Evidence Code section 1380 provides:

Elder and dependent adults; statements by victims of abuse (a) In a criminal proceeding charging a violation, or attempted violation, of Section 368 of the Penal Code, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant

---

176. *Id.* at 744.

177. *Id.* at 745.

178. *Id.*

179. *Id.*

180. This exception, COLO. REV. STAT. § 13-25-129, 6A (2001), is very similar to Florida's section 90.803(23). It creates a special exception for statements made by children in sex abuse cases.

181. *See Diefenderfer*, 784 P.2d at 751-52.

182. *See, e.g., State v. Castaneda*, 621 N.W.2d 435 (Iowa 2000); *State v. Garner*, 614 N.W.2d 319 (Neb. 2000); *State v. Lopez*, 993 P.2d 727 (N.M. 1999); *Tartaglia v. Hodges*, 10 P.3d 176 (N.M. Ct. App. 2000); *State v. Rivers*, 617 N.W.2d 906 (Wis. Ct. App. 2000).

is unavailable as a witness, as defined in subdivisions (a) and (b) of Section 240, and all of the following are true:

(1) The party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement, the statement was made under circumstances which indicate its trustworthiness, and the statement was not the result of promise, inducement, threat, or coercion. In making its determination, the court may only consider the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on the behalf of, the party who is offering the statement. (3) The entire statement has been memorialized in a videotape recording made by a law enforcement official prior to the death or disabling of the declarant. (4) The statement was made by the victim of the alleged violation. (5) The statement is supported by corroborative evidence. (6) The victim of the alleged violation is an individual who meets both of the following requirements: (A) Was 65 years of age or older or was a dependent adult when the alleged violation or attempted violation occurred. (B) At the time of any criminal proceeding, including, but not limited to, a preliminary hearing or trial, regarding the alleged violation or attempted violation, is either deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired. (b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve as a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial. (c) If the statement is offered during the trial, the court's determination as to the availability of the victim as a witness shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, and investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court

in which the action is pending.<sup>183</sup>

California's statute is substantially similar to Florida's section 90.803(24). Both exceptions apply to those falling under the state's definition of "elderly" in terms of both age and the manifestation of the effects of their advanced age.<sup>184</sup> Both statutes require notice to the party against whom the statement is offered and a hearing to determine the admissibility of the statements. The statutes' most important similarity is that they both stress that the statement, to be admitted, must be "trustworthy." While California goes a bit further in its requirements by mandating that statements be videotaped and is more stringent in outlining the hearing process, the core of the two statutes is the same. Both exceptions seem to be in accord with the United States Supreme Court's emphasis on the reliability of a statement.

Even more striking than the similarities between the statutes is the fact that while Florida's section 90.803(24) has been declared unconstitutional, California's section 1380 has not. Under the Florida Supreme Court's reasoning in *Conner*, section 1380 would clearly be unconstitutional in that it would be held to violate confrontation, be too broad, and would also lack the policy support in the same manner that Florida's exception does. Yet, California has not adjudged section 1380 to be unconstitutional.<sup>185</sup> It seems that California has recognized the legitimacy of section 1380 and the need for its protection of the elderly, unlike the Florida Supreme Court. Once again, the Florida Supreme Court in its *Conner* decision seems to depart from the rest of the nation's jurisprudence.

#### IV. POLICY SUPPORT FOR ELDERLY HEARSAY EXCEPTION

It also seems that the Florida Supreme Court has found error in section 90.803(24) because it lacks policy support. The United States Supreme Court has noted that literal confrontation should not be dispensed with lightly.<sup>186</sup> The Supreme Court also recognizes that literal confrontation must sometimes yield to other legitimate trial interests.<sup>187</sup>

The United States Supreme Court has held that because confrontation is such a serious right, it should only be dispensed with when neces-

---

183. CAL. EVID. CODE § 1380 (West 2000).

184. The Florida statute applies to those above the age of sixty. The California statute applies to those over sixty-five.

185. As of the publication of this Comment there is not case law challenging section 1380.

186. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("The right to cross-examine is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation . . .").

187. *Id.* at 295.

sary to further an important public policy.<sup>188</sup> There must be a showing that the admission will serve an interest greater than some "generalized, 'legislatively imposed presumption of trauma.'"<sup>189</sup> Thus, statements should only come in under a hearsay exception when there is a concern based on more than just the legislature's assumption that such a need exists. Since the required showing of necessity is *implicit* in most statutes, a finding as to whether there are supporting policy interests seems almost redundant.

Apparently, the Florida Supreme Court felt that the interests espoused by the legislature in enacting the elderly hearsay exception were not sufficient to support its constitutionality.<sup>190</sup> It found that while there was adequate policy support for the child exception, those policies were not present in the elderly adult context.<sup>191</sup> To the contrary, the elderly are a highly vulnerable class with as much need for a hearsay exception as children.

Under the law as it stands today, if an elderly person is abused, attacked, or falls victim to another form of exploitation, but subsequently becomes unavailable to testify before his sworn testimony with cross-examination can be procured, that attacker will likely get away with his crime if he is tried in a Florida state court. There is no way to admit statements made by such victims now that section 90.803(24) has been declared unconstitutional.

This is a particular problem in terms of the elderly because they frequently do become "unavailable" under the law. In many cases, the victim or witness dies. While the state should attempt to preserve such testimony under Florida Rule of Criminal Procedure 3.190(j),<sup>192</sup> this is not always practical with witnesses of fragile physical or mental health.<sup>193</sup> Witnesses who are advanced in age may become physically ill and unable to withstand the stresses of testifying. This is analogous to the child abuse setting where courts frequently hold that young witnesses can be declared unavailable for confrontation purposes to prevent them from suffering emotional or mental distress as a result of testifying.<sup>194</sup> In the same way that facing their attacker can be traumatic and distressing for young children, so too can such confrontation cause

---

188. *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

189. *Id.*

190. *Conner v. State*, 748 So. 2d 950, 959 (Fla. 1999).

191. *Id.*

192. FLA. R. CRIM. P. 3.190(j) makes provisions for the perpetuation of testimony. See *supra* note 7 for text of the rule.

193. With a backlog of cases, litigation may drag on unexpectedly and older witnesses are clearly at a higher risk of dying or becoming otherwise unavailable.

194. *Perez v. State*, 536 So. 2d 206 (Fla. 1989); *State v. Smith*, 730 A.2d 311 (N.J. 1999).

trauma and distress to elderly adults. In terms of the elderly, the risk of this stress making a witness unavailable is even greater because of the marked decrease in vitality that is possible over the course of lengthy litigation proceedings.

This problem emerged in the case of *State v. Hays*, but the prosecutors were able to save the testimony before it was too late.<sup>195</sup> Mr. Hays was accused of armed carjacking, robbery with a deadly weapon, and aggravated battery on a person sixty-five-years or older. He allegedly attacked eighty-year-old Dorothy Freedman as she went to work at Office Depot at 5:45 a.m. on July 4, 2000 in West Palm Beach. While Mr. Hays was scheduled to go to trial within three months of the attack, Ms. Freeman had been suffering from throbbing headaches, sudden falls, and bouts of depression. The state feared she might pass away or become otherwise unavailable during the three months until trial. While Ms. Freeman made a 911 call and a statement to the police, these statements were not admissible under Florida law after *Conner*, so the state had to take other steps to save the testimony. Had they been unable to do so, however, Mr. Hays could have walked away a free man.

This case illustrates why there is a need for an exception that would protect any prior statements which are deemed to be reliable. Ms. Freeman's statements may never have been admitted if her headaches had gotten worse or one of her falls turned out to be something more serious than dizziness. The possibility that illness will prevent an older person from testifying is a real one. More likely in the case of the elderly is the possibility that the declarant will develop a mental infirmity, which would interfere with her capacity to testify. Dementia and Alzheimer's disease are ailments which are prevalent in older adults and which would render them incompetent witnesses. Alzheimer's disease afflicts over four million people nationwide and usually affects those over the age of sixty-five.<sup>196</sup> Witnesses suffering from these diseases may have been reliable, competent witnesses at one point, but may be totally incompetent by trial.<sup>197</sup> These diseases are even more problematic because once they have emerged, that declarant's testimony will have lost its ability to be declared reliable. Here again, we see the particular importance of having a safety net for prior statements made by the elderly. The elderly can become like children in many circumstances and it seems incongruent to allow a hearsay exception for one group while excluding the other.

---

195. John Pacenti, *80-Year-Old Recounts Savage Beating, Victim Couldn't Bear to Hear 911 Tape Played*, PALM BCH. POST, Aug. 31, 2000, at 1A.

196. Alzheimer's Disease Education & Referral Center, *Alzheimer's Disease Fact Sheet* (August 1995), available at <http://www.alzheimers.org/pubs/adfact.html>.

197. *See id.*



Mr. Conner tried to make the stretch between an elderly person's failings and the statute's requirements. Mr. Conner tried to argue in his brief to the Florida Supreme Court that the statute's requirement of fitting the definition of "elderly" necessarily precludes a proper finding of reliability.<sup>198</sup> This argument fundamentally misunderstands the elderly adult definition.

The elderly adult definition calls for a finding that the older person cannot care for himself, not that he is incompetent.<sup>199</sup> As the state pointed out in its brief to the Florida Supreme Court:

An individual's inability to physically care for all his or her own needs does not necessarily impact on his or her mental competence to any degree whatsoever—it can hardly be seriously contended that the fact of being legally blind or hearing impaired, even to the point of total blindness or deafness, adversely affects one's memory or renders him a liar! Obviously, a blind person will not be able to describe the perpetrator's appearance, and a deaf person will not be able to identify the perpetrator's voice, but an individual with some sensory disability will well be able to supply information gleaned by use of his or remaining senses. And it is certainly true that some elderly persons, by virtue of their disability, such as the poor memory with which some are afflicted and of which Petitioner complains, may be unreliable, untrustworthy witnesses, but, in such cases, the defendant's remedy is to challenge the reliability and trustworthiness of their statements, which the statute contemplates.<sup>200</sup>

While it is not true that an elderly witness is by definition unreliable, it is highly likely that an elderly declarant may become incompetent to testify. This likelihood highlights the strong need for section 90.803(24).

Even the Florida Supreme Court acknowledged the strong state interest in protecting the elderly. "[W]e as a court condemn in the strongest terms acts of exploitation or violence committed against persons who are elderly . . . ."<sup>201</sup> It is fundamentally unfair and inconsistent that the state would take extra measures to protect its youngest class of citizens but decline to take such steps to guard its oldest class.

### CONCLUSION

While the Florida Supreme Court's concern for protecting the

---

198. Initial Br. for Pet. on the Merits at 26, *Conner v. State*, 709 So. 2d 170 (Fla. 2d DCA 1998) (No. 92,835).

199. Resp't Br. on the Merits at 7, *Conner v. State*, 709 So. 2d 170 (Fla. 2d DCA 1998) (No. 92,835).

200. *Id.* at 7-8.

201. *Conner v. State*, 748 So. 2d 950, 960 (Fla. 1999).

accused is an important one, it does not justify the automatic disregard of society's interest in bringing those who prey upon the elderly to justice. The exclusion of hearsay is designed to protect the defendant and the exceptions that have been adopted are designed to protect society's interests. The elderly hearsay exception is the means for protecting our elder citizens while still respecting the rights of the accused.

The Florida Supreme Court found section 90.803(24) was in need of judicial supplementation, violated the defendant's right to Confrontation, was too broad, and was not supported by sufficient policy concerns to justify its existence. These concerns are at odds with a predominance of case law both within Florida and without the nation. Basically, if the Florida Supreme Court is correct, a significant number of United States Supreme Court cases as well as many decisions by state supreme courts are wrong and laws in jurisdictions across the United States are unconstitutional.

The United States Supreme Court has consistently held that only a showing of some indicia of reliability is required for hearsay statements to be in accord with a defendant's right to confrontation. In terms of section 90.803(24), these indicia of reliability require a showing of particularized guarantees of trustworthiness. Through its provisions, section 90.803(24) clearly adheres to this requirement of the United States Supreme Court. Given that the elderly hearsay exception would pass constitutional muster as defined by the United States Supreme Court, it is difficult to resolve how the exception can be declared unconstitutional by the Florida Supreme Court.

The court's invalidation of section 90.803(24) because of an inability to formulate a list of factors with which to determine reliability is also at odds with the United States Supreme Court. There is no need for judicial guidelines as to how to measure statements sought to be admitted under section 90.803(24) when all that is necessary is judicial discretion. In fact, it is this discretion and flexibility that the United States Supreme Court has lauded in its assessment of the admissibility of hearsay statements in *Idaho v. Wright* and subsequent decisions. While it is commendable that the Florida Supreme Court sought to give the trial courts guidance with its decision in *Townsend*, the court went too far when it ruled that guiding factors were not just desirable, but required. While the *Townsend* list may enhance a court's ability to determine reliability in child sexual abuse cases, it does not assist in measuring reliability in physical abuse cases. Furthermore, the United States Supreme Court has stressed the need for ad hoc determinations as to particularized guarantees of trustworthiness and not the factors used in such determinations. Yet, it was the Florida Supreme Court's inability to

formulate such a list in the elderly abuse setting that led to section 90.803(24)'s invalidation. This lack of supplemental factors forms a questionable basis for invalidating section 90.803(24), especially when the United States Supreme Court discourages this type of rigid list.

The Florida Supreme Court's next rationale, the scope of section 90.803(24), is most perplexing when one attempts to reconcile the Florida Supreme Court's analysis with the acceptance of far more broad laws in courts throughout the nation. Florida's former elderly hearsay exception was an even more narrow exception than the federal government's residual hearsay exception as well as other states' residual exceptions. Our highest court has not considered these residual exceptions to be too broad. Yet, the Florida Supreme Court takes issue with the more limited breadth of section 90.803(24). Based on the court's reasoning, Rule 807, as well as the residual hearsay exceptions on the books in states across the nation, would be unconstitutional. The odds are against Florida being an astute minority of one.

Finally, the idea that there are insufficient policy reasons to support an elderly hearsay exception seems to ignore the fact that our elderly need protection and they are at a great risk of becoming unavailable. Besides the fact that the United States Supreme Court has held that it is the reliability inquiry that should govern admissibility, the tangential question of supporting policy reasons seems to be answered in terms of section 90.803(24). All classes of citizens deserve the protection that exceptions like the elderly hearsay exception can provide. To say otherwise would also be at odds with the approval of residual hearsay exceptions across the nation, which seek to protect the rights of people generally without regard to a specific age or policy interest.

Regardless of the strength of the statements at issue in *Conner*, an issue the court never reached, section 90.803(24) should not have been declared unconstitutional. Clearly, there are weaknesses in the Florida Supreme Court's ruling in *Conner*. The court seems to misstate the United States Supreme Court's holdings and does not even attempt to use the facts of the federal cases it cites as support for its reasoning. We can only hope that either the Florida Legislature will make another attempt to maintain this important legislation, or that a higher court will overturn this decision. Until that time, we are left with a scheme that puts criminals' interests before those of the older members of our society and those of society's interests as a whole.

It is true that not all hearsay should be allowed into the courtroom setting. It is also true that a defendant's right to confront the witnesses against him is an integral part of protecting his right to a fair trial. Courts must proceed with caution, however, before striking down hear-

say protections which form the last line of defense for a uniquely vulnerable segment of the population. The Florida Supreme Court failed to exercise this caution when it struck down section 90.803(24) in *Conner*, and it is the state's elderly who will pay the price.

STACEY SCHULMAN