

STORAGE NAME: h2139a.jud

DATE: April 11, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 2139

RELATING TO: Evidence/Hearsay Exception

SPONSOR(S): Rep. Stafford & others

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 7 NAYS 1
 - (2) CRIME & PUNISHMENT
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

HB 2139 substantially amends s. 90.803(24), F.S., which provides a hearsay exception for statements made by an elderly person or mentally disabled person. The bill ostensibly narrows the application of the exception to statements describing any act of abuse or neglect, and act of exploitation, or any act of violence, including a sexual offense, committed on the declarant elderly person or mentally disabled person.

The bill is designed to restore this hearsay exception for criminal cases, in the wake of the Florida Supreme Court's decision in Conner v. State, 748 So.2d 950 (Fla. 1999), which found the current elderly hearsay exception unconstitutional with respect to the Confrontation Clause of the United States and Florida Constitutions.

The bill does not appear to have any fiscal impact on state or local government.

The bill shall be effective on July 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

B. PRESENT SITUATION:

Section 90.803(24), F.S., provides for an exception to the rule that hearsay evidence is not admissible in a civil or criminal proceeding. The exception allows for the admission of an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

- The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and
- The elderly person or disabled adult either: a. testifies; or b. is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense.

Section 825.101(5), F.S., defines an "elderly person" as "a person 60 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."

Section 825.101(4), F.S., defines a "disabled adult" as "a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living."

The Florida Supreme Court declared the hearsay exception for elderly persons or disabled adults unconstitutional in Conner v. State, 748 So.2d 950 (Fla. 1999). In Conner, the court addressed whether the adult hearsay exception violated a criminal defendant's right to confront witnesses as guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and by Article I, Section 16(a) of the Florida Constitution. Id. at 954.

The court noted that hearsay evidence may be admitted in a criminal trial, if, on the one hand, it bears "such indicia of reliability" that "adversarial testing would add little to its reliability." Conner, at 956 (quoting Idaho v. Wright, 497 U.S. 805, 821 (1990)). On the other hand,

hearsay evidence may be admitted if the evidence is offered under a “firmly rooted” exception, where “reliability can be inferred without more.” Conner, at 956 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Firmly rooted exceptions to the hearsay rule include excited utterances, dying declarations, and statements made to obtain medical diagnoses. Conner, at 956.

An exception to the hearsay rule that is not firmly rooted is “presumptively unreliable and inadmissible for Confrontation Clause purposes.” Conner, at 956 (quoting Wright, supra at 818). The court noted that the Confrontation Clause requires exclusion of hearsay statements “unless an affirmative reason, arising from the circumstances in which the statements were made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial.” Conner, at 956 (quoting Wright, supra at 821).

In analyzing the adult hearsay exception, the court noted that it was not firmly rooted, as it had been enacted in 1995. Conner, at 957. Moreover, as of publication of the court’s opinion, no other states had closely similar exceptions. Id. Since the Florida exception was not firmly rooted, the court held that it was presumptively unreliable. Id. Therefore, to offer such hearsay, the state would have to demonstrate that it was reliable because it had “particularized guarantees of trustworthiness.” Conner, at 957 (quoting Roberts, supra at 66). The court went on to note that the evidence would have to “be so trustworthy that adversarial testing would add little to its reliability.” Conner, at 957 (quoting Wright, supra at 821.)

Central to the court’s determination was its comparison of s. 90.803(24), F.S., with the child hearsay exception provided by s. 90.803(23), F.S., which has been upheld. State v. Townsend, 635 So.2d 949 (Fla. 1994). Section 90.803(23), F.S., provides in relevant part as follows:

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:

- The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
- The child either a. testifies; or b. is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense.

In Conner, the court noted four essential differences between the adult hearsay exception created by 90.803(24), F.S., and the child hearsay exception in 90.803(23), F.S. In the first place, the court found that the two exceptions apply to different victim declarants. While the child exception applies to children “with a physical, mental, emotional, or developmental age of 11 or less,” the elderly exception could apply to a much broader class of adult declarants. Conner, at 958. The court noted that “any adult over the age of sixty potentially qualifies as an ‘elderly person’ under [the] definition.” Id. The court also found that the scope of testimony was a “critical difference” between the two hearsay exceptions. Id. The child hearsay exception is limited to statements describing acts of child abuse and child neglect or abuse.

The adult exception allows testimony on “any act of abuse or neglect, any act of exploitation, the offense of batter or aggravated battery or assault or sexual battery or any other violent act.” Id.

The court also found that the factors listed in the adult hearsay exception to be used in assessing the reliability of hearsay statements tracked the language in the child hearsay exception, but that those factors did not guarantee the reliability of a statement when applied to an elderly adult. Id. The court went on to note in this regard that it could not develop a list of permissive factors 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” Conner, at 958 (quoting Wright, supra at 821). The court reasoned that the circumstances that might necessitate the use of a hearsay statement, such as the mental or physical infirmity of the elderly person “would be the very circumstances that would render the statement less reliable.” Conner, at 959. In such cases, adversarial testing would add to the reliability of the trial. Id.

Finally, the court determined that the reach of the adult hearsay exception was far broader than the reach of the child hearsay exception, and that the child hearsay exception was supported by policies that were not found in the elderly exception. Id. The court noted that the child exception was grounded in part on the “response to the need to establish special protections for child victims in the judicial system.” Conner, at 959 (quoting State v. Jones, 625 So.2d 821, 825 (Fla. 1993)). The court also noted that it had recognized the importance of the state’s interest and public consideration of sparing child victims of sexual crimes the further trauma of in-court testimony. Conner, at 959. (citations omitted). In part because the adult hearsay exception applied to statements describing a wide range of crimes not necessarily unique to adults over the age of sixty, the court found the elderly exception unreliable and therefore violative of the Confrontation Clause.

The court noted in a footnote that it was not reaching a determination of the constitutionality of the elderly exception as it applied to disabled adults or to civil cases. Conner, n.11 at 960

C. EFFECT OF PROPOSED CHANGES:

The bill amends s. 90.803(25), F.S., to define an elderly person as “a person 60 years of age or older who suffers from the infirmities of aging as manifested by advanced age, organic brain damage, or other mental or emotional dysfunctioning to the extent that the person’s ability to provide adequately for his or her own care or protection is impaired.”

The bill defines a mentally disabled person as “a person who suffers from a condition of mental or emotional incapacitation due to a developmental disability, organic brain damage, or mental illness which restricts the person’s ability to perform the normal activities of daily living. “

The bill provides that, when made in the context that provides substantial guarantees of its trustworthiness, an out-of-court statement made by an elderly person or mentally disabled person describing any act of abuse or neglect, and act of exploitation, or any act of violence, including a sexual offense, committed on the declarant elderly person or mentally disabled person is admissible in evidence in any civil or criminal proceeding if:

- The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide such sufficient safeguards of reliability that adversarial testing of the statement in court would add little to its reliability; and

- The elderly person or mentally disabled person either testifies or is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense.

In making its determination, the court must consider:

- The mental age and capacity of the declarant elderly person or mentally disabled person adult;
- The nature and duration of the abuse or offense;
- The relationship of the declarant victim to the offender;
- The reliability of the assertion under the totality of the circumstances; and
- The reliability of the declarant.

In addition the court may consider any other factor deemed appropriate, including, but not limited to:

- The statement's spontaneity;
- Whether the statement was made at the first available opportunity following the alleged incident;
- Whether the statement was elicited in response to questions;
- The mental state of the elderly or mentally disabled person when the incident was reported;
- Whether the elderly or mentally disabled person used terminology unexpected of a person with his or her disability;
- The motive or lack thereof to fabricate the statement;
- The vagueness of the accusations;
- The possibility of any improper influence on the elderly person or mentally disabled person; and contradictory statements.

The bill also makes conforming changes to s. 90.803(25), F.S.

D. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of any funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The bill narrows the scope of the elderly or disabled adult hearsay exception in response to the Conner case, but it still may broadly apply to classes of crimes and may apply to a wide variety of adults in a manner that might raise the same concerns expressed by the Florida Supreme Court in Conner. By allowing such statements to be offered regarding any "act of violence," the bill may stray beyond the narrow abuse or neglect limitations applied in the child hearsay exception. Moreover, by retaining the definition of an "elderly person" in essentially the same form as in s. 825.101(5), F.S., the bill may raise the concern that it may apply to "almost any adult."

Moreover, by retaining the definition of an "elderly adult" to include the mental or emotional dysfunction element, the bill may be internally flawed. Since the court has to reach the conclusion that the declarant is an "elderly person" under the bill before the next step in the analysis can be made, it may conclude, in light of Conner, that the mere fact that the declarant is suffering from mental or emotional dysfunction is enough to prohibit the admission of the hearsay, because questioning the mental infirmity of the declarant would be a circumstance

STORAGE NAME: h2139a.jud

DATE: April 11, 2000

PAGE 7

that would render the statement less reliable. As the court noted, in such cases, adversarial testing would add to the statement's reliability. Conner, supra at 959. (emphasis added).

The bill may also apply to children and minors, in that it specifically excludes the term "adult" from the title and refers in part to "mentally disabled persons." This definition could readily apply to children and minors. If this construction is possible, the bill would apply to every category of person who meets the definition of a "mentally disabled person," and would include adults and children. This wide scope of application would likely stray beyond the bounds set by the Florida Supreme Court in Conner.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

Michael W. Carlson, J.D.

P.K. Jameson, J.D.