The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 782
INTRODUCER:	Judiciary Committee and Senator Bennett
SUBJECT:	Florida Evidence Code
DATE:	February 20, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	**Fav/CS**
2.			MS	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The Florida Evidence Code generally prohibits a judge or jury from considering hearsay, which is an out-of-court statement offered by someone other than the declarant while testifying at trial or a hearing used to prove the truth of the matter asserted. This bill creates a hearsay exception to allow a court to consider statements that would otherwise be inadmissible into evidence if a party wrongfully makes a witness unavailable. Specifically, this bill creates a hearsay exception for a statement offered by an unavailable witness against a party that has engaged or acquiesced in wrongdoing intended to make the witness unavailable.

This bill substantially amends section 90.804, Florida Statutes.

II. Present Situation:

The Florida Evidence Code

Article II, section 3 of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches

unless expressly provided herein."[1] The Florida Supreme Court has explained that the separation-of-powers doctrine recognizes two fundamental prohibitions imposed on each branch of government.[2] The Court explained that "'[t]he first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.'"[3] Under the state's constitutional framework, the Legislature has authority to enact substantive laws, while the Florida Supreme Court has authority to govern practice and procedure in all state courts.[4]

The Florida Evidence Code is statutory, as enacted and amended by the Legislature and codified in ch. 90, F.S. There is a balance between the jurisdiction of Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature continues to revise ch. 90, F.S., and the Supreme Court tends to adopt these changes as rules. The Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Court has on very infrequent occasions rejected legislative amendments to the Evidence Code as rules of court.[5]

Hearsay

"Hearsay"[6] is a statement,[7] other than one made by the declarant[8] while testifying at trial or a hearing,[9] offered in evidence to prove the truth of the matter asserted.[10] Current law provides that hearsay statements are not admissible at trial unless a statutory exception applies.[11] The reasoning behind excluding hearsay statements is that they are considered unreliable as probative evidence. There are many reasons for this unreliability, including: the statement is not made under oath; jurors cannot observe the demeanor of the declarant and judge the witness' credibility; and there is no opportunity to cross-examine the declarant and thereby test his or her credibility.[12]

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[1] *See also Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).
[2] *Whiley v. Scott*, 2011 WL 3568804 at 3 (Fla. 2011) (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991).
[3] *Id*.
[4] *See, e.g., Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).
[5] *See, e.g., In re Amendments to the Fla. Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court); *compare In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), *clarified by In re Florida Evidence Code* 376 So. 2d 1161 (Fla. 1979).
[6] Section 90.801, F.S.
[7] A "statement" is either an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion. Section 90.801(1)(a), F.S. For example, the act of pointing to a suspect in a lineup in order to identify her is a "statement." *See* Fed. R. Evid. 801 Advisory Committee Note.
[8] The "declarant" is the person who made the statement. Section 90.801(1)(b), F.S.
[9] Often referred to simply as an "out-of-court statement."
[10] Section 90.801(1)(c), F.S. For example, testimony that the witness heard the declarant state "I saw the light turn red" is *not* hearsay if introduced to prove the declarant was conscious at the time she made the statement. It *would* be hearsay if offered to prove the light was in fact red.
[11] Section 90.802, F.S.
[12] *See* Charles W. Ehrhardt, *Florida Evidence*, s. 801.1, 770 (2008 ed.).

Exceptions to the Hearsay Rule

Exceptions to the hearsay rule fall into two categories: those under s. 90.803, F.S., where the availability of the declarant is irrelevant, and those under s. 90.804, F.S., where the declarant must be unavailable to testify in court. Section 90.804, F.S., provides that a declarant is "unavailable" as a witness if the declarant:

- Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement (for example, a declarant is unavailable if the trial court sustains an assertion of the Fifth Amendment privilege against self-incrimination);[13]
- Persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order to do so;
- Has suffered a lack of memory of the subject matter of his or her statement so as to destroy the declarant's effectiveness as a witness during the trial;
- Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
- Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.[14]

The section also provides that a witness is not unavailable if the party who seeks to admit the statement caused the unavailability by wrongful conduct.[15]

The party seeking to introduce a hearsay statement under the exception in s. 90.804, F.S. exception bears the burden of establishing that the declarant is unavailable as a witness. The trial judge makes the determination of such unavailability at a pretrial hearing.[16]

Forfeiture by Wrongdoing

Forfeiture by wrongdoing is a common law hearsay exception in many jurisdictions, which innately requires that the declarant be unavailable.[17] Under the forfeiture by wrongdoing doctrine, a person who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation the witness.[18] The doctrine of forfeiture by wrongdoing is in part an equitable doctrine in which courts curtail attempts by a defendant who seeks to undermine the judicial process by procuring or coercing silence from witnesses and victims.[19]

Under Federal Rule of Evidence 804(b)(6), the doctrine of forfeiture by wrongdoing is codified as a hearsay exception to make admissible "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Additionally, several states have adopted a comparable hearsay exception that allows out-of-court statements to be admitted where the witness is unavailable to

[13] *Perry v. State*, 675 So. 2d 976, 980 (Fla. 4th DCA 1996).
[14] Section 90.804, F.S.
[15] *Id*.
[16] *See Jones v. State*, 678 So. 2d 309, 314 (Fla. 1996).
[17] *See Chavez v. State*, 25 So. 3d 49, 51 (Fla. 1st DCA 2009).
[18] 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).
[19] 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).

testify at trial and proof is established that the unavailability of the witness was due to misconduct on the part of the defendant.[20]

In *Chavez v. State*, the Florida First District Court of Appeal held that the trial court was in error as a matter of law to admit hearsay evidence of a criminal defendant's threats to harm his wife based on the legal doctrine of forfeiture by wrongdoing.[21] The First District Court of Appeal rejected the state's argument that the doctrine of forfeiture by wrongdoing is applicable in Florida as a common law hearsay exception under s. 90.102, F.S., "which provides that the Florida Evidence Code replaces or supersedes only conflicting statutory or common law."[22] The court reasoned that s. 90.802, F.S., "prohibits courts from admitting hearsay 'except as provided by statute.'"[23] The court additionally found that under the facts in *Chavez*, "the murder was not committed with the specific intent to prevent the victim from providing testimony."[24] Based on the express statutory exclusion of the hearsay testimony under s. 90.802, F.S., the court declined to create a broad rule allowing the admission of the testimony in *Chavez*.[25] The court noted that "[a]lthought the forfeiture by wrongdoing doctrine is grounded in well-established principles of equity and sound public policy, we are without authority to rely on it because of the statutory exclusion of hearsay evidence in the Florida Evidence Code."[26]

III. Effect of Proposed Changes:

The Florida Evidence Code generally prohibits a judge or jury from considering hearsay, which is an out-of-court statement offered by someone other than the declarant while testifying at trial or a hearing used to prove the truth of the matter asserted. This bill creates a hearsay exception to allow a court to consider statements that would otherwise be inadmissible when a party wrongfully makes a witness unavailable.

Specifically, the bill provides for a hearsay exception for a statement by an unavailable witness offered against a party that has engaged or acquiesced in wrongdoing intended to make the witness unavailable. This exception to the hearsay rule is effectively identical to the Federal Rule of Evidence 804(b)(6).

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[20] *See* 23 C.J.S. *Criminal Law* s. 1174.
[21] *Chavez*, 25 So. 3d at 51.
[22] *Id*. at 52.
[23] *Id*. at 51.
[24] *Id.* at 52.
[25] *Id.* at 49.
[26] *Id.* at 49-50.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides, in part, that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."[27] In *Crawford v. Washington*,[28] the U.S. Supreme Court held that the Confrontation Clause applies to testimonial statements.[29] The Court has emphasized that there is no bright-line test to determine whether a statement is testimonial; the determination involves a "highly context-dependent inquiry."[30]

An out-of-court statement by a witness which is testimonial is inadmissible at trial under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[31] An out-of-court statement that violates the Confrontation Clause is inadmissible at trial even if it falls within a state's statutory hearsay exception.[32] In contrast, if a statement is non-testimonial, it does not implicate the Confrontation Clause, and therefore admission of such statements is determined by state hearsay exceptions.[33]

However, in *Crawford*, the Court recognized the constitutional validity of the "forfeiture by wrongdoing" exception to excluding testimonial statements. Such wrongdoing "extinguishes [defendant's] confrontation claims on essentially equitable grounds."[34]

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[27] U.S. CONST. amend. VI.
[28] *Crawford v. Washington*, 541 U.S. 36 (2004).
[29] The definition of a "testimonial statement" includes statements made during police interrogations. *Crawford*, 541 U.S. at 68.
[30] *Michigan v. Bryant*, 131 S. Ct. 1143, 1148 (2011) (The Court explained that in general, statements made to law enforcement where the circumstances indicate that the "primary purpose" of the statement is to aid the police in addressing an ongoing emergency are not testimonial. On the other hand, statements made to a law enforcement officer where the circumstances indicate that the primary purpose of the statement is to establish the facts of a past event that may be relevant in prosecuting a defendant at trial are testimonial.).
[31] *Crawford*, 541 U.S. at 53-54.
[32] *Id.* at 51 (2004) (finding that the Confrontation Clause applies to out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence); *see also State v. Lopez*, 974 So. 2d 340, 345 (Fla. 2008); *22 Fla. Prac., Criminal Procedure* s. 12:6 (2011 ed.).
[33] *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.").
[34] *Crawford*, 541 U.S. at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158 (1879) ("The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.")).

In a subsequent case, *Davis v. Washington*, the Court expanded on the distinction between testimonial and non-testimonial statements for purposes of the Confrontation Clause. The Court held that a domestic violence victim's statements in response to a 911 operator's questions were not testimonial in nature, and thus not subject to the Confrontation Clause. However, statements later given to police were testimonial and not admissible because admission in the absence of the accuser would have violated the Confrontation Clause.[35] The Court categorized statements made for the objective primary purpose of enabling assistance in an ongoing emergency as non-testimonial.[36] Statements are testimonial, on the other hand, when there is no such ongoing emergency and the primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution."[37]

Rulemaking Authority

Article V, s. 2(a) of the Florida Constitution provides that the Florida Supreme Court is responsible for adopting rules of practice and procedure in all state courts.[38] The case law interpreting Article V, s. 2 focuses on the distinction between "substantive" and "procedural" legislation. Legislation concerning matters of substantive law are "within the legislature's domain" and do not violate Article V, s. 2.[39] On the other hand, legislation concerning matters of practice and procedure are within the Court's "exclusive authority to regulate."[40] However, "the court has refused to invalidate procedural provisions that are 'intimately related to' or 'intertwined with' substantive statutory provisions."[41] Evidence law is considered by the court to be procedural, although the court usually accedes to changes in the statutory evidence laws.

The Florida Supreme Court held in one case involving the hearsay exception in s. 394.9155(5), F.S., regarding mental health reports in proceedings to commit sexually violent predators, does not violate Article V, s. 2(a) of the Florida Constitution.[42] In contrast, the First District Court of Appeal held that s. 90.803(22), F.S., the "former testimony" hearsay exception, violated Article V, s. 2 because it infringed on the Court's authority to adopt procedural rules.[43] The court noted that one of the reasons the exception was different than other hearsay exceptions adopted by the Court was that it

[35] *Davis v. Washington*, 547 U.S. 813 (2006).
[36] *Id.* at 822.
[37] *Id.*
[38] Art. V, s. 2(a), Fla. Const.
[39] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991).
[40] *Id*.
[41] *In re Commitment of Cartwright*, 870 So. 2d 152, 158 (Fla. 2d DCA 2004) (citing *Caple v. Tuttle's Design-Build, Inc*., 753 So. 2d 49, 54 (Fla. 2000)).
[42] *Cartwright*, 870 So. 2d at 161 (citing *Booker v. State*, 397 So. 2d 910, 918 (Fla. 1981) (rejecting the challenge under article V, section 2(a), to the provision in section 921.141, Florida Statutes (1977), permitting the admission of hearsay evidence).
[43] *Grabau v. Dep't of Health, Bd. of Psychology*, 816 So. 2d 701, 709 (Fla. 1st DCA 2002) (holding s. 90.803(22), F.S., to be unconstitutional on various grounds, including "as an infringement on the authority conferred on the Florida Supreme Court by art. V, s. 2(a) of the Florida Constitution").

was not modeled after the Federal Rules of Evidence.[44] The bill adopts a portion of the Federal Rules of Evidence hearsay exception.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Courts Administrator:

> By making more evidence admissible, there will be an increase in judicial workload .... The increase in judicial workload is unquantifiable because there is no way to estimate the number of additional hearings that will be required.[45]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on February 16, 2012
The committee substitute:

- Deletes language specifying that the spontaneous statement exception to the hearsay rule includes a call to an emergency operations center for the immediate dispatch of personnel for emergency purposes;
- Deletes language specifying that the excited utterance exception to the hearsay rule includes a statement made by a victim to an emergency responder while under the stress of the event in a criminal case;
- Deletes a section providing for a hearsay exception for statements by a victim of domestic violence in a criminal proceeding;

[44] *Id*. at 708 (citing *In re Amendments to the Florida Evidence Code*, 782 So. 2d 339, 340-42 (Fla. 2000)).
[45] Office of the State Courts Administrator, *2012 Judicial Impact Statement, SB 782* (Nov. 8, 2011(on file with the Senate Committee on Judiciary).

- Changes "forfeiture by wrongdoing" to "statement offered against a party that wrongfully caused the declarant's unavailability";
- Deletes language providing for a presumption of forfeiture by wrongdoing if the accused assaulted or threatened an unavailable witness or his or her family;
- Deletes a section providing for a residual exception to the hearsay rule giving the court discretion to admit evidence that is not included in a hearsay exception but has the same guarantees of trustworthiness; and
- Changes the effective date from July 1, 2012 to "upon becoming a law."

B. Amendments:

None.