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: SB 782

INTRODUCER: Senator Bennett

SUBJECT: Florida Evidence Code

DATE: February 15, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	**Pre-meeting**
2.			MS	
3.				
4.				
5.				
6.				

I. Summary:

The Florida Evidence Code generally prohibits a judge or jury from considering hearsay, which is an out-of-court statement made 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 several hearsay exceptions to allow a court to consider statements that would otherwise be inadmissible.

This bill provides that a spontaneous statement made during a call to an emergency operations center is admissible as evidence if such statement is made for the immediate dispatch of personnel for emergency purposes and not merely to report a crime or event that occurred a substantial period of time in the past. The bill also specifies that in a criminal case, an excited utterance made by a victim to an emergency responder is admissible if the statement was made while the declarant was under the stress or excitement of the event.

The bill also creates a hearsay exception regarding the statement of a victim of domestic violence in a criminal proceeding. The exception provides that a statement made by a victim of domestic violence describing an act of domestic violence which is not otherwise admissible can be entered into evidence if the court finds in a hearing outside the presence of the jury that the statement is sufficiently reliable based on specified factors.

Additionally, the 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.

Finally, the bill creates a residual exception. The residual exception allows a fact-finder to consider a statement that does not specifically qualify for admission into evidence under the

existing hearsay exceptions if the court determines that the statement has equivalent guarantees of trustworthiness and is offered as evidence of a material fact, is more probative on the point for which it is offered than other evidence, and the interests of justice will be served by the admission of the evidence.

This bill substantially amends sections 90.803 and 90.804, Florida Statutes.

This bill creates section 90.807, 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]

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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).

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]

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]

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[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.).
[13] *Perry v. State*, 675 So. 2d 976, 980 (Fla. 4th DCA 1996).
[14] Section 90.804, F.S.
[15] *Id*.

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]

Spontaneous Statements

Florida's Evidence Code allows the admission of hearsay evidence regardless of whether the declarant is available as a witness if the hearsay statement is a "spontaneous statement." A spontaneous statement is defined as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness."[17] Similar exceptions are universally recognized nationwide with some variations, but all commonly require a startling event sufficient to "render inoperative the reflective thought process of the observer" and the declarant having a reaction to the occurrence that is "not the result of reflective thought."[18]

Excited Utterance

The Florida Evidence Code also recognizes a hearsay exception for excited utterances whether or not the declarant is available. An excited utterance under the code relates to "a startling event or condition made while the declarant was under the stress of excitement cause by the event or condition."[19] Similar exceptions are universally recognized with some variations, but all share the underlying policy of requiring a startling event sufficient to "render inoperative the reflective thought process of the observer" and the declarant having a reaction to the occurrence that is "not the result of reflective thought."[20] The rationale for the exception is the idea that the excitement of the startling event suspends the likelihood of fabrication and unreliability,[21] which are the concerns that form the basis for generally excluding hearsay evidence. Additionally, the availability of the declarant is immaterial regarding this exception because testimony given on the stand "at time when the powers of reflection and fabrication are operative, is no more (and perhaps less) reliable then the out-of-court statement."[22]

Forfeiture by Wrongdoing

Forfeiture by wrongdoing is a common law hearsay exception in many jurisdictions, which innately requires that the declarant be unavailable.[23] 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.[24] The doctrine of forfeiture by wrongdoing is in part an

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[16] *See Jones v. State*, 678 So. 2d 309, 314 (Fla. 1996).
[17] Section 90.803(1), F.S.
[18] 2 McCormick on Evid. s. 272 (6th ed.)
[19] Section 90.803(2), F.S.
[20] 2 McCormick on Evid. s. 272 (6th ed.)
[21] *Id.*
[22] *Id.*
[23] *See Chavez v. State*, 25 So. 3d 49, 51 (Fla. 1st DCA 2009).
[24] 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).

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.[25]

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 testify at trial and proof is established that the unavailability of the witness was due to misconduct on the part of the defendant.[26]

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.[27] 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."[28] The court reasoned that s. 90.802, F.S., "prohibits courts from admitting hearsay 'except as provided by statute.'"[29] 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."[30] 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*.[31] 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."[32]

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 made 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 several hearsay exceptions to allow a court to consider statements that would otherwise be inadmissible.

This bill provides that a spontaneous statement made during a call to an emergency operations center is admissible as evidence if such statement is made for the immediate dispatch of personnel for emergency purposes and not merely to report a crime or event that occurred a substantial period of time in the past. The bill also specifies that in a criminal case, an excited utterance made by a victim to an emergency responder is admissible if the statement was made while the declarant was under the stress or excitement of the event.

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[25] 21A AM. JUR. 2D *Criminal Law* s. 1094 (2011).
[26] *See* 23 C.J.S. *Criminal Law* s. 1174.
[27] *Chavez*, 25 So. 3d at 51.
[28] *Id*. at 52.
[29] *Id*. at 51.
[30] *Id*. at 52.
[31] *Id*. at 49.
[32] *Id*. at 49-50.

The bill also creates a hearsay exception regarding the statement of a victim of domestic violence in a criminal proceeding. The exception provides that a statement made by a victim of domestic violence describing an act of domestic violence that is not otherwise admissible can be entered into evidence if the court finds in a hearing outside the presence of the jury that the statement is sufficiently reliable based on specified factors. In order for the statement to be admitted as evidence, the victim of domestic violence must testify or be unavailable to testify. If the victim is unavailable to testify, other evidence must corroborate the offense. Unavailability under the bill includes a finding by the court that the victim's participation in the criminal proceeding would be likely to result in severe emotional, mental, or physical harm. Criminal defendants must be notified within 10 days of the trial if a hearsay statement will be offered under the new exception.

Additionally, 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 taken from the Federal Rules of Evidence. In a criminal case, the court may assume forfeiture by wrongdoing upon proof by a preponderance of the evidence that the accused assaulted an unavailable witness, or threatened to inflict physical harm upon the unavailable witness or his or her immediate family. The presumption may be rebutted by proof by a preponderance of the evidence that the accused did not engage in or acquiesce to the wrongdoing intended to cause the witness not to testify.

Finally, the bill creates a residual exception. The residual exception allows a fact-finder to consider a statement that does not specifically qualify for admission into evidence under the existing hearsay exceptions if the court determines that the statement has equivalent guarantees of trustworthiness and is offered as evidence of a material fact, is more probative on the point for which it is offered than other evidence, and the interests of justice will be served by the admission of the evidence.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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."[33] In *Crawford v. Washington*,[34] the U.S. Supreme Court held that the Confrontation Clause applies to testimonial statements.[35] 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."[36]

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.[37] 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.[38] 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.[39]

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."[40]

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.[41] The Court categorized statements made for the objective primary

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[33] U.S. CONST. amend. VI.
[34] *Crawford v. Washington,* 541 U.S. 36 (2004).
[35] The definition of a "testimonial statement" includes statements made during police interrogations. *Crawford*, 541 U.S. at 68.
[36] *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.).
[37] *Crawford*, 541 U.S. at 53-54.
[38] *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.).
[39] *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.").
[40] *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.")).
[41] *Davis v. Washington*, 547 U.S. 813 (2006).

purpose of enabling assistance in an ongoing emergency as non-testimonial.[42] 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."[43]

As some scholars have noted, domestic violence cases can present particularly difficult determinations for courts to make in terms of which statements implicate the Confrontation Clause. Given the unique interpersonal relationships involved in these cases, the declarant may often be absent from proceedings, thus presenting barriers to the court's fact-finding functions.[44] One scholar has stated that evidentiary issues in domestic violence cases are further complicated by the fact that many victims refuse to cooperate because they are either afraid of their partners or because they believe that the relationship will improve.[45]

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.[46] 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.[47] On the other hand, legislation concerning matters of practice and procedure are within the Court's "exclusive authority to regulate."[48] However, "the court has refused to invalidate procedural provisions that are 'intimately related to' or 'intertwined with' substantive statutory provisions."[49] 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.[50] 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.[51] The court noted that one of the reasons the exception was different than other hearsay exceptions adopted by the Court was that it

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[42] *Id.* at 822.
[43] *Id.*
[44] Ellen Liang Yee, *Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 734 (2008).
[45] David M. Gersten, *Evidentiary Trends in Domestic Violence*, 72 FLA. B.J. 65 (July/Aug. 1998).
[46] Art. V, s. 2(a), Fla. Const.
[47] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991).
[48] *Id.*
[49] *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)).
[50] *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).
[51] *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.[52] 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. Almost every time one party will attempt to introduce evidence under these new provisions, the other party will object, which will necessitate a hearing outside the presence of the jury. The increase in judicial workload is unquantifiable because there is no way to estimate the number of additional hearings that will be required. But it seems likely there will be a substantial increase in the number of hearings, particularly in county court, because of the new provision relating to a domestic violence hearsay exception.[53]

VI. Technical Deficiencies:

At line 64, the bill refers to a statement "made by the victim." Then at line 67 the bill refers to a statement made by "the victim or witness." These two parts of the same exception are inconsistent. The Legislature may wish to clarify whether the exception is intended to apply only to statements made by the victim or to statements made by a witness or a victim. Although in some cases the witness and victim may be the same person, the word "witness" could also refer to a third party.

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.)

None.

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

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.