

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 Committee on Criminal Justice

BILL: CS/SB 764

INTRODUCER: Judiciary Committee and Senator Detert

SUBJECT: Hearsay

DATE: March 28, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 764 creates an exception to the general hearsay rule. The hearsay rule is a rule of evidence which prohibits the admission of out-of-court statements that are offered to prove the truth of the matter asserted as evidence in judicial proceedings.

Under the hearsay exception, an out-of-court statement is admissible if it describes an act of domestic violence which was made to enable law enforcement assistance to meet an ongoing emergency. The statements are admissible regardless of whether the statement was made under oath or whether the person who made the statement is available as a witness in the judicial proceeding.

II. Present Situation:

The Hearsay Rule

The hearsay rule is a rule of evidence which prohibits the admission of out-of-court statements that are offered to prove the truth of the matter asserted as evidence in judicial proceedings.¹ The reasoning behind excluding hearsay statements in general is that they are considered unreliable as probative evidence. There are many reasons for this unreliability, including that the statement

¹ 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.

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.

However, current law provides 24 separate hearsay exceptions where, based on the circumstances surrounding the statement, the law finds sufficient reliability to warrant a hearsay exception. For example, out-of-court statements made by children under 16 are admissible in certain instances.²

Courts note of particular importance the questioning of hearsay in criminal cases based on the constitutional right of the accused to cross-examine all witnesses appearing against him or her.³

Although hearsay evidence is generally inadmissible as evidence in a court hearing or trial, courts permit the admission of hearsay if the statement falls under a firmly-rooted exception in law. Courts consider these exceptions to possess a circumstantial guarantee of trustworthiness.⁴

Florida's evidence code groups hearsay exceptions together as non-hearsay, hearsay exceptions where the availability of the declarant is immaterial, and hearsay exceptions where the declarant is unavailable.

Non-hearsay (s. 90.801, F.S.)

Current law contains an exception to hearsay based on it not being hearsay.

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination and the statement is:

- Inconsistent with the declarant's testimony and given under oath subject to perjury at a trial, hearing, or other proceedings or in a deposition;
- Consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or
- A statement of identification of a person made after perceiving the person.⁵

Before Florida adopted the Evidence Code, prior inconsistent statements were inadmissible as substantive evidence. The 1978 Legislature based the provision of s. 90.801(2)(a), F.S., in part on Federal Rule of Evidence 801(d)(1), which requires a statement to have been given under oath, subject to perjury, at a trial, hearing, or deposition.⁶

² s. 90.803(23), F.S.

³ The Confrontation Clause of the Sixth Amendment of the U.S. Constitution provides, in part "that in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Section 16, Art. I, of the State Constitution, provides, in part "In all criminal prosecutions the accused ... shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses" Indeed, "the right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

⁴ 29 AM. JUR. 2D EVIDENCE S. 689

⁵ Section 90.801(2), F.S.

⁶ FRE Rule 801, 28 U.S.C.A.; *Corbett v. Wilson*, 48 So.3d 131, 134 (5th DCA 2010); *State v. Green*, 667 So.2d 756, 758-759 (1995).

Hearsay Exceptions Where the Availability of the Declarant is Immaterial (s. 90.803, F.S.)

This list of hearsay exceptions applies, regardless of whether the declarant is a witness.

Regardless of whether the declarant is available as a witness, current law includes the following statements as hearsay exceptions:

- Spontaneous Statement: A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when the statement is made under circumstances that indicate lack of trustworthiness.
- Excited Utterance: A statement relating to a startling event or condition made under the stress of excitement caused by the event or condition.
- Then-existing Mental, Emotional, or Physical Condition: A statement of then-existing state of mind, emotion, or physical sensation, when the state is an issue in the case.
- Statements for Purposes of Medical Diagnosis or Treatment: A statement that describes medical history, symptoms, pain or sensations reasonably pertinent to diagnosis or treatment.
- Recorded Recollection: A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection, shown to have been made when the matter was fresh.
- Records of Regularly Conducted Business Activity: A memorandum, report, record, or data compilation made at or near the time by a person with knowledge.
- Absence of Entry in Records of Regularly Conducted Activity: Evidence that a matter is not included in the memoranda, reports, records, or data compilation if the matter was of the kind regularly made and preserved.
- Public Records and Reports: Records, reports, statements reduced to writing, or data compilations, of public officers or agencies.
- Records of Vital Statistics: Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law.
- Absence of Public Record or Entry: Evidence, in the form of a certification in accord with s. 90.902, F.S., or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.
- Records of Religious Organizations: Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.
- Marriage, Baptismal, and Similar Certificates: Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.
- Family Records: Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

- Records of Documents Affecting an Interest in Property: The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.
- Statements in Documents Affecting an Interest in Property: A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
- Statements in Ancient Documents: Statements in a document in existence 20 years or more, the authenticity of which is established.
- Market Reports, Commercial Publications: Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.
- Admissions: A statement that is offered against a party and that meets one of the 5 statutory criteria.
- Reputation Concerning Personal or Family History: Evidence of reputation concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.
- Reputation Concerning Boundaries or General History: Evidence of reputation in a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community; or about events of general history which are important to the community, state, or nation where located.
- Reputation as to Character: Evidence of reputation of a person's character among associates or in the community.
- Former Testimony: Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403, F.S.
- Statement of Child Victim: 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 16 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 certain statutory criteria are met.
- Statement of Elderly Person or Disabled Adult: Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, F.S., 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 certain statutory criteria are met.⁷

Hearsay Exceptions Where the Declarant is Unavailable (s. 90.804, F.S.)

Hearsay exceptions that apply when the declarant is unavailable⁸ for a hearing or trial include:

- **Statement of Former Testimony:** Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding if the other party had an opportunity to develop the testimony through direct, cross, or redirect examination;
- **Statement under Belief of Impending Death:** A statement made by a declarant while reasonably believing death was imminent, regarding the cause of what the declarant believed to be impending death;
- **Statement against Interest:** A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or render invalid a claim by the declarant against another, that a declarant wouldn't have made the statement unless he or she believed it to be true.
- **Statement of Personal or Family History:** A statement about the declarant's birth, adoption, marriage, divorce, parentage, ancestry, or other similar fact, even though the declarant had no means of acquiring personal knowledge of the matter stated.
- **Statement by Deceased or Ill Declarant Similar to One Previously Admitted:** A statement by a deceased or ill declarant about the same subject matter as another statement made by the declarant that has previously been offered by an adverse party and admitted in evidence, in an action brought against the personal representative, heir at law, assignee, legatee, devisee, or survivor of a deceased person; and
- **Statement Offered Against a Party that Wrongfully Caused the Declarant's Unavailability:** A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

Hearsay within Hearsay

Hearsay within hearsay, also known as double hearsay, is not automatically inadmissible. Instead, these statements are admissible provided that they each and separately conform to a hearsay exception.⁹

⁷ Section 90.803(1)-(24), F.S.

⁸ A witness is unavailable if he or she is exempted by a court ruling based on privilege; persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order; has suffered a lack of memory of the subject matter of the statement so as to destroy the declarant's effectiveness as a witness during the trial; may not attend or testify at the hearing due to death or then-existing physical or mental infirmity; or is absent from the hearing, and the proponent of the statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. Section 90.804(1), F.S.

⁹ Section 90.805, F.S.

Domestic Violence

Domestic violence usually takes place in private, where only the abuser and the abused are present. Because constitutional prohibitions preclude the prosecutor from compelling the accused to testify against himself or herself, the testimony of the victim becomes an essential element of the prosecution's case. The victim, however, is often unavailable because he or she has been killed, is unwilling to testify, or is otherwise unavailable. In these situations, a victim's hearsay statements can become the only opportunity for the prosecutor to bring in the victim's "voice" at trial.

III. Effect of Proposed Changes:

This bill creates an exception to the general hearsay rule. The hearsay rule is a rule of evidence which prohibits the admission of out-of-court statements that are offered to prove the truth of the matter asserted as evidence in judicial proceedings.

Under the bill's hearsay exception, an out-of-court statement is admissible if it describes an act of domestic violence which was made to enable law enforcement assistance to meet an ongoing emergency. These statements are admissible regardless of whether the statement was made under oath or whether the person who made the statement is available as a witness in the judicial proceeding.

The effect of the bill would likely be to make the investigation and prosecution of domestic violence cases possible under circumstances such as where the victim is unwilling or unable to follow through with the case.

The bill takes effect upon becoming a law.

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 United States Supreme Court in *Crawford v. Washington* ruled as inadmissible out-of-court statements that are testimonial unless the declarant is unavailable and the

defendant has had a prior opportunity to cross-examine the declarant.¹⁰ Otherwise, admitting the statement is a violation of the confrontation clause of the Sixth Amendment of the U.S. Constitution.¹¹

The Court described as testimonial “An accused who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”¹²

The United States Supreme Court in *Davis v. Washington* refined the holding of the *Crawford* Court to clarify that victim statements made during a 911 call are not testimonial, and are made for the purpose of enabling police assistance to meet an ongoing emergency.¹³ Therefore, these statements are admissible provided that they constitute a hearsay exception in law.¹⁴

The bill creates a new hearsay exception for statements made about domestic violence to enable law enforcement assistance in responding to an ongoing emergency. As the statements are in and of themselves a hearsay exception, the statements would not have to meet a separate, firmly-rooted hearsay exception to be admissible as evidence.

Traditionally, hearsay exceptions allow the admission of statements that bear pervasive assurances of trustworthiness. The admission of out-of-court statements that do not bear indications of trustworthiness could be challenged on the basis that the admission of the statement denies a defendant the constitutional due process right to a fair trial.

By way of analogy, two hearsay exceptions in Florida law allow as admissible statements of child victims and elderly persons or disabled adults, regardless of whether the declarant is available to testify.¹⁵ Still, each exception requires additional safeguards prior to admissibility. For both of these limited exceptions, the law requires other guarantees of trustworthiness in the form of:

- A hearing conducted outside the presence of the jury to establish that the time, content, and circumstances in which the statement is made provide sufficient safeguards of reliability; and

¹⁰ *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In *Crawford*, an assault and attempted murder case, the Court admitted a statement tape-recorded by the police from a person who allegedly witnessed a stabbing. The witness did not testify at trial, nor was there opportunity for the defendant to cross-examine the witness. *Id.* at 38.

¹¹ *Id.* at 68.

¹² *Id.* at 51.

¹³ *Davis v. Washington*, 547 U.S. 813, 829 (2006).

¹⁴ *Vanevery v. State*, 980 so.2d 1105, 1107 (Fla. 4TH DCA 2008), subsequently cited *Davis* for the proposition that a 911 transcript of a victim of domestic violence is not testimonial and is admissible if it meets an exception to the hearsay rule.

¹⁵ Section 90.803(23), F.S., provides a hearsay exception where the availability of the declarant is immaterial for child victims under the actual or mental age of 16, and the statement describes any act of child abuse or neglect, sexual abuse, or unlawful sexual acts performed in the presence of the child in civil or criminal proceedings. Section 90.803(24), F.S., allows as admissible statements by an elderly person or disabled adult describing acts of abuse or neglect, exploitation, battery or aggravated battery, assault or aggravated assault, sexual battery, or any other violent act.

- The child or elderly or disabled adult either testifies or is unavailable as a witness, and if the declarant is unavailable, the proponent of the statement offers other evidence corroborating the abuse or offense.¹⁶

Separation of Powers

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.¹⁷ The case law interpreting Art. 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 Art. V, s. 2.¹⁸ On the other hand, legislation concerning matters of practice and procedure, are within the Court’s “exclusive authority to regulate.”¹⁹ However, “the court has refused to invalidate procedural provisions that are ‘intimately related to’ or ‘intertwined with’ substantive statutory provisions.”²⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) indicates that the fiscal impact on expenditures cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial workload. The Office of the State Courts Administrator (OSCA) specifically noted an impact as follows:

Likely having a proportionately greater impact in relation to criminal matters, one might anticipate prosecutors will bring more cases to trial. This may be especially true of domestic violence and gang-related matters in which it is common for victim statements to change before trial.²¹

VI. Technical Deficiencies:

None.

¹⁶ Sections 90.803(23)(a) and 90.803(24)(a), F.S.

¹⁷ Art. V, s. 2(a), Fla. Const.

¹⁸ *Haven Fed. Sav. & Loan Ass’n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991).

¹⁹ *Id.*

²⁰ *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, 53-54 (Fla. 2000)).

²¹ Office of the State Courts Administrator, *2014 Judicial Impact Statement SB 764* (February 10, 2014) (on file with the Senate Judiciary Committee).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 90.801 of the Florida Statutes.

IX. 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 March 18, 2014:

The underlying bill created a hearsay exception that would have made admissible as evidence any inconsistent statement made by a person who testifies at trial. The committee substitute replaces the broad hearsay exception in the bill with an exception that is limited to certain statements describing acts of domestic violence.

- B. **Amendments:**

None.