

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 Judiciary

BILL: CS/SB 764

INTRODUCER: Judiciary Committee and Senator Detert

SUBJECT: Hearsay

DATE: March 19, 2014

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Brown | Cibula | JU | Fav/CS |
| 2. | | | CJ | |
| 3. | | | RC | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

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

A declarant is a person who makes a statement.¹ Hearsay is an out-of-court statement that is offered into evidence to prove the truth of the matter asserted.²

Hearsay evidence is generally inadmissible as evidence in a court hearing or trial. 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 Still, courts

¹ Section 90.801(1)(b), F.S.

² Section 90.801(1)(c), 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

permit the admission of hearsay as testimony 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

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;

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).

- 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; and
- Public Records and Reports: Records, reports, statements reduced to writing, or data compilations, of public officers or agencies.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.

⁷ Section 90.803, 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.

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

III. Effect of Proposed Changes:

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

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:

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

⁹ Section 90.805, F.S.

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.

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
- 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

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.

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

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.¹⁷

VI. Technical Deficiencies:

None.

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.

¹⁷ Office of the State Courts Administrator, *2014 Judicial Impact Statement SB 764* (February 10, 2014) (on file with the Senate Judiciary Committee).

B. Amendments:

None.

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