**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCS for HB 429 Hearsay
**SPONSOR(S):** Civil Justice Subcommittee
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 764

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| Orig. Comm.: Civil Justice Subcommittee | | Westcott | Bond |

## SUMMARY ANALYSIS


The Florida Evidence Code governs the admissibility of evidence a court may consider during the course of a hearing or trial. Hearsay, a statement made out of court offered to prove the truth of the matter asserted, is generally inadmissible in court. There are, however, numerous exceptions to the hearsay rule whereby hearsay may be admissible.

The bill creates a hearsay exception for a statement that describes a domestic violence incident and is made to enable law enforcement to respond to an on-going emergency.

The bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming law.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

"The purpose of the rules of evidence is to elicit and establish the truth."[1] One general rule of evidence is known as "hearsay." Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”[2] Hearsay evidence is inadmissible unless an exception applies and the evidence is otherwise admissible. “Hearsay”[3] is a statement,[4] other than one made by the declarant[5] while testifying at trial or a hearing,[6] offered in evidence to prove the truth of the matter asserted.[7]

For example, a victim of domestic violence calls the police. When a police officer arrives, the victim tells the officer that “Avery hit me.” If the officer then testifies for the state at trial that he heard the victim say “Avery hit me,” the officer’s testimony would be hearsay because “Avery hit me” is:

- A statement;
- Made outside of the court proceeding; and
- Offered to prove the truth of what it asserts (i.e., that Avery hit the victim).[8]

Current law provides that hearsay statements are not admissible at trial unless a statutory exception applies.[9] 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.[10]

The bill creates a hearsay exception that applies to statement that describes a domestic violence incident and is made to enable law enforcement to respond to an on-going emergency.

B. SECTION DIRECTORY:

Section 1 amends s. 90.803, F.S., relating to hearsay exceptions.

Section 2 provides that the bill becomes effective upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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[1] 23 Fla. Jur 2d Evidence and Witnesses s. 7, citing *Amos v. Gunn*, 94 So. 615 (Fla. 1922).
[2] Section 90.801, F.S.
[3] Section 90.801, F.S.
[4] 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.
[5] The “declarant” is the person who made the statement. Section 90.801(1)(b), F.S.
[6] Often referred to simply as an “out-of-court statement.”
[7] 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.
[8] *Rodriguez v. State*, 9 So.3d 745, 745-46 (Fla. 2d DCA 2009).
[9] Section 90.802, F.S.
[10] *Lyles v. State*, 412 So.2d 458, 459 (Fla. 2d DCA 1982); *see also* Charles W. Ehrhardt, *Florida Evidence*, s. 801.1, 770 (2008 ed.).

This bill does not appear to have any impact on state revenues.

2. Expenditures:

This bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have any impact on local government revenues.

2. Expenditures:

This bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have any direct impact on the private sector.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."[11] The Florida Constitution also contains a Confrontation Clause[12], which the Florida Supreme Court has held should be interpreted in the same manner as its federal counterpart.[13]

The United States' Supreme Court has held that the Confrontation Clause can only be invoked to exclude statements that are considered "testimonial" in nature.[14] The court clarified when a statement would be testimonial when it said:

> [S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[15]

The court in that case focused on the fact that the statements made to a 911 operator were made regarding what was presently happening, and not describing a prior incident.[16] The Court reasoned that the statements in that case were made to allow law enforcement to respond to an on-going

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[11] U.S. CONST. AMEND. 6.
[12] FLA. CONST. art. I, s. 16.
[13] *Perez v. State*, 536 So.2d 206, 209 (Fla. 1988).
[14] *Crawford v. Washington*, 541 U.S. 36 (2005).
[15] *Davis v. Washington*, 547 U.S. 813, 822 (2006).
[16] *Id.*

emergency, which rendered the statement to be non-testimonial in nature. The court also noted the difficulty of prosecuting domestic violence cases:

> This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.[17]

However, if a prior statement is admitted under this bill, it perhaps cannot be the sole basis for a conviction. The Florida Supreme Court has ruled that a prior inconsistent statement cannot be the sole substantive evidence for a conviction.[18] The rationale likely applies to any inconsistent statement that may be admitted under this bill. Under this rationale, the evidence of the prior statement could be used as some evidence, but could not be the sole source of evidence used to convict an individual.

B. RULE-MAKING 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.[19] 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.[20] On the other hand, legislation concerning matters of practice and procedure, are within the Court's "exclusive authority to regulate."[21] However, "the court has refused to invalidate procedural provisions that are 'intimately related to' or 'intertwined with' substantive statutory provisions."[22] Evidence law is considered by the court to be procedural, although the court usually accedes to changes in the statutory evidence laws.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

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[17] *Id.* at 832-33.
[18] *State v. Moore,* 485 So.2d 1279 (Fla. 1986).
[19] Art. V, s. 2(a), Fla. Const.
[20] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991).
[21] *Id.*
[22] *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)).