

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL

AUG 08 2000

CLERK, SUPREME COURT
BY _____

AMENDMENTS TO
THE FLORIDA RULES OF EVIDENCE

CASE NO.: SC00-607

**COMMENTS OF FLORIDA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS (FACDL)**

*8-24-00
w/not
attend
o.o.*

The Florida Association of Criminal Defense Lawyers (FACDL), by and through the undersigned counsel, offers the following comments, pursuant to the order of July 13, 2000 requesting comments concerning Section 90.803(22), Florida Statutes.

1. Statement of interest - FACDL is a statewide organization of over 1,200 criminal defense lawyers, including private attorneys and public defenders. FACDL has discussed this Court's order requesting comments at a board meeting. The Board of Directors of FACDL voted to oppose the adoption of Section 90.803(22), Florida Statutes as a Rule of Evidence for the reasons set forth below.
2. Section 90.803(22) is unconstitutional as applied to criminal cases - This Court has previously held that deposition testimony is not admissible in a criminal case as substantive evidence. State v. James, 402 So.2d 1169 (Fla. 1982); State v. Green, 667 So.2d 756 (Fla. 1995); See Ehrhardt, Florida

Evidence, pg. 786 (2000 edition, West Publishing). Section 90.803(22) does not involve the question of the admissibility of prior inconsistent statements as substantive evidence. See State v. Green, *supra*. Section 90.803(22) permits deposition testimony in lieu of a witness testifying at trial. Consequently, 90.803(22) violates the confrontation rights of criminal defendants. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed 2d 597 (1980); Conner v. State, 748 So.2d 950 (Fla. 1999) Section 90.803(22) does not require that the declarant be subject to cross-examination or that the Defendant be present (to confront the witness) during prior deposition testimony. See State v. Basilere, 353 So.2d 820 (Fla. 1977) Section 90.803(22) does not require the witness to be unavailable: this provision exacerbates the constitutional violation due to a lack of confrontation.

FACDL adopts by reference the other arguments advanced by the Florida Bar Code and Rules of Evidence Committee on Section 90.803(22). These arguments are additional reasons for this Court to not adopt Section 90.803(22) as a Rule of Evidence.

3. Section 90.803(22) is procedural in nature - This Court specifically asked interested parties to comment on whether Section 90.803(22) is procedural or substantive. This

question is a difficult one to answer because some evidentiary rules, by definition, involve both issues of substance and procedure: what type of evidence is admissible and how such evidence is admissible. This Court has previously wrestled with this problem. See In re Evidence Code, 372 So.2d 1369 (Fla. 1979); In re Evidence Code, 638 So.2d 920 (Fla. 1993); In re Evidence Code, 675 So.2d 584 (Fla. 1996) FACDL suggests that Section 90.803(22), unlike the prior Evidence Codes reviewed by this Court, is mostly, if not completely, procedural. Consequently, FACDL will now offer its comments as to why Section 90.803(22) is procedural such that only this Court may enact such a provision.

Section 90.803(22) does not substantively create a class of evidence: a class of evidence which is admissible under a certain set of substantive predicate circumstances, like a particular new class of hearsay evidence. Section 90.803(22) provides for the procedure to make any class of evidence (if otherwise admissible under the rest of the Evidence Code) admissible if certain procedural predicates are present: testimony given in a different or the same proceeding or in a deposition, if the party against whom the testimony is 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

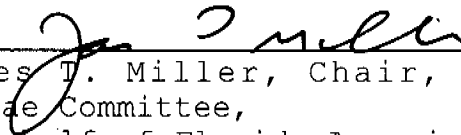
direct, cross or redirect examination. Section 90.803(22) does not specifically define what type of evidence is admissible but how any type of evidence may be admissible if the procedural predicates are present. Consequently, FACDL suggests Section 90.803(22) is primarily procedural.

Although Section 90.803(22) is primarily procedural, one could argue aspects of it are also substantive - the procedural predicates define the substantive types of evidence which are admissible. FACDL suggests this position is a conundrum and an example of the riddle - which came first, "the chicken or the egg?" For the purposes of Section 90.803(22) it does not matter which came first - the chicken or the egg - the egg and chicken must both exist for there to be chickens and eggs. Similarly, substance cannot exist without procedure in the context of an Evidence Code. Any new evidentiary provision which does not merely create a new class of evidence without any new procedural predicate will always be a mixture of procedure and substance. Therefore, this Court should find that Section 90.803(22) is primarily procedural and must be adopted as a Rule by this Court.

FACDL understands this Court's attempt to respect the constitutional prerogatives of the Legislature as to matters of substance. However, when the Legislature creates a new evidentiary provision which contains new procedural predicates (as in Section 90.803(22) - E.g. witness does not have to be unavailable), then

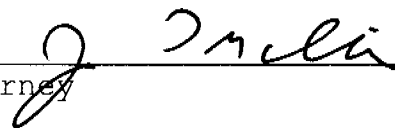
the Legislature has intruded upon this Court's exclusive power over procedural matters. (Section 90.804(2)(a), Florida Statutes is unconstitutional for the same reason) This Court should: 1) find that 90.803(22) is primarily procedural and must be adopted by the Court; 2) this Court should reject 90.803(22) as a rule for the reasons stated above.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above comments will be furnished by FACDL by August 15, 2000 to the names on the service list attached to this Court's order of July 13, 2000 requesting comments, this 8th day of August 2000.


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AUG 08 2000

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August 7, 2000

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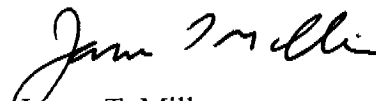
RE: AMENDMENTS TO THE FLORIDA RULES OF EVIDENCE
CASE NO.: SC00-607

Dear Mr. Hall:

Enclosed please find the original and seven (7) copies of Comments of Florida Association of Criminal Defense Lawyers (FACDL) regarding Amendments to The Florida Rules of Evidence for filing.

If you have any questions, you may telephone me at 904/791-8824.

Respectfully,


James T. Miller

JTM/fjs
Encl.

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