

Supreme Court of Florida

No. 73,033

IN RE: STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES.

[March 30, 1989]

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions (Criminal) has submitted two petitions which propose amendments to the Florida Standard Jury Instructions in Criminal Cases. The petitions are set forth below, and the exhibits referred to therein are appended to the end of this opinion:

PROPOSED AMENDMENTS TO FLORIDA STANDARD
JURY INSTRUCTIONS IN CRIMINAL
CASES (88-1)

To: CHIEF JUSTICE AND JUSTICES OF THE
SUPREME COURT OF FLORIDA

Your committee recommends the following revisions to the Florida Standard Jury Instructions in Criminal Cases. Most of the proposed revisions are the same as those published in the January 1, 1988, issue of the Florida Bar News. A few changes have been made based on responses to the proposals as published, and some additional proposals that the committee believes are

noncontroversial have been added. Following the order in which the instructions appear in The Florida Bar's jury instructions manual, the changes recommended and the reasons for the changes are provided below. To the extent possible, wording to be deleted is indicated by strike through marks and wording to be added is underlined.

1. Page 39 of the Bar's manual provides an instruction on entrapment. Chapter 87-243, Section 42, Laws of Florida, creates Section 777.201, Florida Statutes, which redefines the entrapment defense. Instructions incorporating the new law are provided in Exhibit 1. The new instruction is for offenses occurring on or after October 1, 1987. The committee decided to retain the current instruction for use when the offense occurred before October 1, 1987. An additional proposed change to both of the instructions is the addition of a definition of "predisposition." In particular, the court's attention to the final paragraph of the new instruction is requested.

2. Pages 45c and 45d of the manual provide the current instruction on justifiable use of force by law enforcement officers. Chapter 87-147, Laws of Florida, amends Section 776.05, Florida Statutes, to redefine justifiable use of force by an officer. A revised instruction to reflect the statutory change is provided in Exhibit 2.

3. Pages 77 through 82 of the manual provide instructions on penalty proceedings in capital cases. Chapter 87-368, Section 1, Laws of Florida, creates Section 921.141(5)(j), Florida Statutes, which provides an additional aggravating circumstance to be considered by the jury. The committee therefore proposes the addition of paragraph 10 to the list on pages 78 and 79 of the manual as follows:

10. The victim of the crime for which defendant is to be sentenced was a law enforcement officer engaged in the performance of the officer's official duties.

4. Page 97 of the manual provides for the offense of carrying concealed weapons. A change to paragraph 2 of that instruction is proposed as follows:

2. The (weapon alleged) was concealed from the ordinary sight of another person ~~others who might casually observe the defendant.~~

Support for the current wording comes from Ensor v. State, 403 So.2d 349, 354 (Fla. 1981), but the committee believes that the instruction should be amended to conform to the statutory definition of "concealed weapon" in Section 790.001(3)(a), Florida Statutes (1987).

5. Page 98 of the manual provides an instruction based on Section 790.05, Florida Statutes (1981). That law was repealed in 1987; therefore, the instruction should be removed. See Chapter 87-24, Laws of Florida.

6. Page 99 of the manual provides an instruction based on Section 790.07(1) and (2), Florida Statutes. A change in paragraph 1b is proposed as follows:

b. [carried a [weapon] [firearm], which was concealed from the ordinary sight of another person ~~others who might casually observe him.~~]

The reason for this change is the same as the one in paragraph 4 above.

7. Page 102 provides an instruction on Section 790.15, Florida Statutes. The committee recommends amending paragraphs a and b of the instruction as follows:

a. [(Defendant) knowingly discharged a firearm in a public place.]

b. [(Defendant) knowingly discharged a firearm on the right of way of a paved road, highway or street.]

The word "knowingly" is included in paragraph c of the current instruction and should be inserted in paragraphs a and b as shown.

8. Regarding page 103 of the manual, paragraph 3b should be amended as follows:

b. [a disruption of ~~governmental~~ commerce.]

Although the wording of the Section 790.161, Florida Statutes, may be ambiguous, the committee believes that "governmental" modifies only "operations" and not "commerce."

9. Pages 111 and 112 provide instructions for Sections 790.221 and 790.23, Florida Statutes, respectively. The committee proposes the addition of a definition of "possess" to those

instructions. The definition proposed is the same as the one used in the drug possession instructions. Exhibit 3 provides the full instructions with the definition of "possess" added. Paragraph 2 of the instruction on Section 790.23 also is amended to conform to the statute.

10. Page 147 provides an instruction on theft. Section 812.014, Florida Statutes, was amended by Chapter 87-376, Laws of Florida. A revised instruction to incorporate the changes in the law is provided in Exhibit 4.

11. The instructions on pages 150 and 151 cover dealing in stolen property. The effect of Section 812.028(3), Florida Statutes, is not provided for in the current instructions. The amendments shown in Exhibit 5 are intended to incorporate that statute.

12. The robbery instruction on page 155 of the manual needs to conform to Section 812.13, Florida Statutes, as amended by Chapter 87-315, Laws of Florida. Exhibit 6 provides the proposed instruction.

13. Pages 163 and 164 provide the instruction for contributing to delinquency and to dependency. The wording of the instruction on page 163 does not need to be revised. Most of the wording on page 164, however, is based on former delinquency and dependency definitions that have been revised several times. The committee intends to propose a revised instruction in the future but, for now, recommends the deletion of the instruction on page 164. Instead, a note should replace the instruction on that page as follows:

Note to Judge Prepare the definition of "delinquency" or of "dependency" based on the statutory definitions in effect at the time of the alleged offense. See F.S. 39.01.

14. Page 216 provides an instruction on bookmaking. Section 849.25, Florida Statutes, was amended by Chapter 87-243, Section 48, Laws of Florida. A revised instruction incorporating the 1987 amendments is proposed. See Exhibit 7.

15. Pages 219 through 250 provide instructions for drug abuse and drug trafficking offenses under Chapter 893, Florida Statutes. Chapter 87-243, Laws of Florida, amends several statutes

covered by those instructions.
Revisions to the affected instructions
are proposed. See Exhibit 8.

16. Currently there are no
instructions for prosecutions under
Chapter 895, Florida Statutes. Proposed
instructions are provided in Exhibit 9.

17. Pages 261 and 262 provide a
comment on the schedule of lesser
included offenses. Based on changes in
the law since 1981, the committee has
revised the comment. See Exhibit 10 for
the revised comment

18. The "SCHEDULE OF LESSER
INCLUDED OFFENSES" is provided on pages
263 through 284 of the manual. The
committee has not reviewed each offense
listed in the schedule in light of
recent opinions that may affect the
table. Nevertheless, some needed
changes have been identified by the
committee as shown in Exhibit 11.

Respectfully submitted,

/s/ Harry Lee Coe III
Harry Lee Coe, Chair

PROPOSED AMENDMENTS TO FLORIDA STANDARD
JURY INSTRUCTIONS IN CRIMINAL
CASES (88-2)

TO: CHIEF JUSTICE AND JUSTICES OF THE
SUPREME COURT OF FLORIDA

Your committee met on November 18,
1988, to review 1988 legislation that
affects the standard jury instructions.
Several changes in the instructions are
needed, and the committee believes they
can be made without following the normal
procedure of publishing proposed
instructions in The Florida Bar News.
The committee requests that those
changes (provided below) be considered
along with the proposals in the
committee's previous report (88-1).

1. The aggravating circumstances
for the jury to consider in a capital
offense are provided on pages 78 and 79
of the manual. An instruction on a new
circumstance is proposed in the previous
report (88-1). Chapter 88-381, §10,
Laws of Florida, created Section
921.141(5)(k), a new aggravating
circumstance. The committee, therefore,
proposes adding another new paragraph as
follows:

11. The victim of the crime for
which the defendant is to be

sentenced was an elected or appointed official engaged in the performance of his official duties and the crime was related, in whole or in part, to the victim's official capacity.

2. Section 784.045, Florida Statutes, was amended by Chapter 88-344, §3, Laws of Florida, to create a new aggravated battery offense. The committee, therefore, proposes that paragraph 2 of its instruction on page 90 of the manual be amended as follows:

2. (Defendant) in committing the battery
 - a. [intentionally or knowingly caused [great bodily harm to (victim)]]

[permanent disability to (victim)]]

[permanent disfigurement to (victim)]]
 - b. [used a deadly weapon.]
 - c. [knew or should have known that (victim) was pregnant.]

3. The court in State v. Potts 526 So.2d 63 (Fla. 1988) found section 790.07(2) "unconstitutional to the extent it purports to penalize a person who is under indictment." Paragraph 2 of the jury instruction on page 99 of the manual, therefore, should be amended by striking "[under indictment or information]" and by removing the brackets from "[committing or attempting to commit the felony of (felony alleged)]."

4. Section 790.161, Florida Statutes, was amended by Chapter 88-381, §44, Laws of Florida. The instruction on page 103 of the manual, therefore, should be amended as shown in Exhibit 12, which incorporates another change suggested in the (88-1) report.

5. Section 790.162, Florida Statutes, was amended by Chapter 88-381, §45, Laws of Florida. The instruction on page 104 of the manual, therefore, should be amended as shown in Exhibit 13.

6. Chapter 88-381, §46, Laws of Florida, amends Section 806.111(1)(b), Florida Statutes, which defines "fire bomb." The definition in the instruction on page 129 of the manual

should be amended to conform to the statute as follows:

"A 'fire bomb' is a container containing flammable liquid or combustible liquid, or any incendiary chemical mixture or compound, having a wick or similar device capable of being ignited or other means capable of causing ignition; but no device commercially manufactured primarily for the purpose of illumination, heating or cooking, shall be deemed to be such a fire bomb."

7. In Thomas v. State, 531 So.2d 708 (Fla. 1988), the court overruled previous decisions that distinguished between common and uncommon devices as burglary tools. The instruction on page 138 of the manual should be revised to conform to that decision. Paragraph 2b of the instruction should be removed, and the instructions in the margin related to paragraph 2 should be deleted. The "a" in front of the remaining paragraph 2 also should be deleted.

8. Chapter 88-151, §4, Laws of Florida, amends Section 827.04, Florida Statutes, concerning child abuse. The instruction on page 161 of the manual needs to be amended to conform to the statute. Paragraph 1 of the instruction, therefore, should be amended to read:

1. (Defendant) [willfully]
[by culpable negligence]
[knowingly]:

[[deprived (victim) of]
[allowed (victim) to be
deprived of] necessary
food, clothing, shelter
or medical treatment.]

[inflicted or permitted
the infliction of
[physical] [mental]
injury to (victim).]

9. Chapter 88-381, §51, Laws of Florida, amends Section 843.02, Florida Statutes, concerning the offense of resisting an officer without violence. To conform the instruction to the statute, paragraph 1 on page 196 of the manual should be revised to read:

1. (Defendant) [resisted]
[obstructed] [opposed]
(victim).

10. Chapter 88-122, §78, Laws of Florida, amended Section 951.23, Florida Statutes, adding "a county residential

probation center" to the definition of "county detention facility." The instruction on page 257 of the manual should be amended to conform to the statute as shown in Exhibit 14.

11. The committee in its previous report (88-1) recommended the addition of a note regarding all drug trafficking offenses listed in the Schedule of Lesser Included Offenses. The note cites "Dauphin v. State, 511 So.2d 1037 (Fla. 4th DCA 1987), cert. pending (case No. 70,995, Fla. S.Ct.)." The correct case name actually is "Daophon v. State" but of more importance the decision of the district court was reversed on October 20, 1988. The note, therefore, should not be approved.

The committee is drafting other amendments to existing instructions and some new instructions based on 1988 legislation, all of which need to be published in the Bar News. Those instructions will be submitted no sooner than March 1989.

Respectfully submitted,

/s/ Harry Lee Coe
Harry Lee Coe, Chair

We approve for publication these recommended amendments.*
We caution all interested persons, however, that the notes and comments reflect only the opinion of the committee and are not necessarily indicative of the views of this Court as to their correctness or applicability.

It is so ordered.

EHRlich, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

* The committee expressed concern over the constitutionality of chapter 87-243, section 42, Laws of Florida, creating section 777.201(2), which places the burden of proof of entrapment on the defendant. Therefore, the committee offered alternative final paragraphs of the instruction, one of which retained the existing instruction which requires the state to prove beyond a reasonable doubt that the defendant was not entrapped, and the other which requires the defendant to prove entrapment by a preponderance of the evidence. For the purpose of adopting standard jury instructions, the constitutionality of a statute must be assumed unless it has been declared unconstitutional. The Court deems it inappropriate to pass on the constitutionality of a statute except in adversary proceedings. Therefore, for offenses occurring on or after October 1, 1987, the Court has accepted the statutory alternative which places the burden of proof of entrapment on the defendant.

Original Proceeding - Standard Jury Instructions in Criminal Cases

Harry Lee Coe, III, Chairman, Committee on Standard Jury Instructions
(Criminal), Tampa, Florida,

for Petitioner