IN THE SUPREME COURT OF FLORIDA

IN RE:
STANDARD JURY INSTRUCTIONS CASE NUMBER: SC11-
CRIMINAL CASES-
REPORT 2011-02
_____/

To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing an amended instruction to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	Instruction #	**Topic**
Proposal 1	**16.3**	**Child Abuse**

The proposal is provided in Appendix A. The word to be deleted is shown with a strike-through mark; words to be added are underlined.

A Child Abuse proposal was first published in the *Florida Bar News* on June 15, 2010. Comments were received from the Florida Public Defenders Association (FPDA), the Florida Association of Criminal Defense Lawyers (FACDL), and Assistant State Attorney Michael Sinacore. In response, the committee published a revised proposal in the *Florida Bar News* on November 1, 2010. One comment was received from committee member, Mr. R. Blaise Trettis. In response to that comment, the committee again revised the proposal and published the current version in the *Florida Bar News* on January 15, 2011. No comments were received. All of the comments are contained in Appendix B; a minority report is contained in Appendix C.

Explanation of Proposal

Proposal 1- Child Abuse

The committee started looking at the Child Abuse instruction when an Assistant Public Defender in Leon County pointed out the standard jury instruction lacked any reference to the affirmative defense of reasonable parental corporal discipline.

A debate ensued about (a) the best way to address this affirmative defense in light of cases such as *Raford v. State*, 828 So. 2d 1012 (Fla. 2002); *Czapla v. State*,

957 So. 2d 656 (Fla. 1st DCA 2007); *Julius v. State,* 953 So. 2d 33 (Fla. 2d DCA 2007); *King v. State,* 903 So. 2d 954 (Fla. 2d DCA 2005); *State v. McDonald,* 785 So. 2d 640 (Fla. 2d DCA 2001); *S.J.C. v. State,* 906 So. 2d 1115 (Fla. 2d DCA 2005); and *Burke v. State,* 49 So. 3d 943 (Fla. 2d DCA 2010) and (b) whether definitions from Chapter 39 should be included in the standard jury instruction. After many discussions, the committee voted 8-4 that the best approach was to instruct jurors that it is not a crime for a parent to impose reasonable physical discipline on a child for misbehavior under the circumstances, even though physical injury might result from the discipline. A minority of members wanted language from *King* and *McDonald* that a parent who inflicted significant bruises or welts could not be convicted of child abuse because more serious beatings were required. The committee rejected that language because of the distinctions drawn by the courts in cases such as *Julius* and *Czapla*.

The "reasonable parental discipline" defense comes from case law (*Raford*) and not a statute. The committee did not find an appellate opinion that allocated the burden of persuasion for the affirmative defense. Additionally, the committee did not find a case where a court determined what the burden of persuasion should be.

The majority of members did not think it was appropriate to decide who had the burden of persuasion of the affirmative defense or what the burden should be. Accordingly, the committee determined that the issue would be best handled by allowing it to percolate in the lower courts. As a result, the committee decided to inform all parties about the dispute and reference *U.S. v. Dixon*, 548 U.S. 1 (2006) which contains a discussion of the merits of various positions on the appropriate allocation of the burden of persuasion for an affirmative defense.

As for Chapter 39 definitions, the committee decided to only include the Chapter 39 definition for "mental injury" based on *Dufresne v. State*, 826 So. 2d 272 (Fla. 2002). The committee thought it best to not use other Chapter 39 definitions because of both *Czapla v. State,* 957 So. 2d 676 (Fla. 1st DCA 2007), in which the court found that the defendant did not use reasonable corporal discipline under the circumstances and thus the level of injuries sustained were not relevant and *S.J.C. v. State*, 906 So. 2d 1115 (Fla. 2d DCA 2005), in which the Second District warned against the proposition that Chapter 39 should always be read *in para materia* with Chapter 827. The vote to include only the Chapter 39 definition of "mental injury" was 10-1.

The committee also decided to add the words "knowingly or willfully" to the beginning of the instruction in order to track the language of the statute. (Fla. Stat. 827.03.) Finally, the Committee thought it wise to add Contributing to the Dependency of a Minor (Fla. Stat. 827.04) in the Category 2 box of lesser-included offenses as a way to remind all parties of that crime.

After an initial publication in *The Florida Bar News* on June 15, 2010, comments were received from the FPDA, the FACDL, and Assistant State Attorney Michael Sinacore. Mr. Sinacore did not think the words "knowingly or willfully" should be at the beginning of the instruction; he thought the instruction would focus jurors on the reason for the discipline instead of the act of the defendant; and he opposed "Contributing to dependency" as a Category 2 lesser included offense. The FPDA believed that the instruction should inform jurors what form or level of discipline is reasonable (anything not reasonably expected to be injury more severe than significant bruises or welts). The FPDA also thought the committee should allocate the burden of persuasion of the affirmative defense to the state under the beyond a reasonable doubt standard. The FACDL agreed with adding the Category 2 lesser included offense of "Contributing to dependency" and the words "Knowingly or willfully." They also argued that the committee should allocate the burden of persuasion of the affirmative to the state under the beyond a reasonable doubt standard.

In response to these comments, the committee added cites to *Raford v. State* and *Kama v. State*, but still did not agree to allocate and determine the burden of persuasion for the affirmative defense. The committee also did not agree that the instruction should mention anything about "significant bruises or welts." The motion to adopt the FPDA proposal was defeated 8-3. The motion to adopt the FACDL recommendation was defeated 8-4.

A revised proposal was published in *The Florida Bar News* on November 1, 2010. The committee received one comment from member Mr. R. Blaise Trettis. He believed the instruction should explicitly state that physical discipline is not reasonable when it results in the harms listed in Fla. Stat. 39.01(32)(a)4. The motion from Mr. Trettis to use the language in his proposal was defeated 7-5.

While discussing comments, the committee also considered *Burke v. State*, 35 Fla. L. Weekly D2610 (Fla. 2d DCA Dec. 1, 2010) in which the Second District wrote that "physical injury requires something more than mild or passing discomfort." As a result of *Burke* and the comments of Mr. Trettis, the committee changed its proposal to read: "It is not a crime for a parent of a child to impose reasonable physical discipline on a child for misbehavior under the circumstances, even though physical injury resulted from the discipline." The revised proposal was published in *The Florida Bar News* on January 15, 2011. No comments were received and the proposal passed the committee by a vote of 10-2.

Respectfully submitted this _____day of March, 2011.

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CERTIFICATE OF FONT SIZE

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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THE HONORABLE SAMANTHA WARD
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