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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES PETITION 2013-03 **CASE NO.: SC13-**

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

This petition, proposing new and amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	Instruction #	Topic
Proposal 1	**7.3**	**Felony Murder – First Degree**
Proposal 2	**7.5**	**Felony Murder – Second Degree**
Proposal 3	**7.6**	**Felony Murder – Third Degree**
Proposal 4	**7.11**	**Death Penalty**
Proposal 5	**8.25**	**Violation of Dom. Viol. Pretrial Release**
Proposal 6	**11.18**	**Sexual Misconduct by a Psychiatrist**
Proposal 7	**12.1**	**Arson – First Degree**
Proposal 8	**12.2**	**Arson – Second Degree**
Proposal 9	**12.9**	**Arson Resulting In Injury**
Proposal 10	**14.10**	**Failure to Return Leased Property**
Proposal 11	**28.14-28.17**	**BUIs**
Proposal 12	**29.3**	**Sale of Alcohol to a Person Less than 21**

The proposals are in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined. All of the proposals were published in *The Florida Bar News*. All comments received by the committee are in Appendix B and will be discussed below.

Proposal 1 – First Degree Felony Murder - Instruction 7.3

A committee member pointed out that the existing standard instruction – if read literally - requires that the victim's life expire *while* the defendant was engaged in the commission of the felony. This is not an accurate instruction because the death can occur after the felony is completed, as long as the death was caused by the felony. Accordingly, the committee unanimously voted to recommend element #2 be reworded as follows:

a. **While engaged in the commission of a[n]** (felony alleged)**,** **[**(defendant)**] [**(defendant's) **accomplice] caused the death of** (victim)**.**

b. **While engaged in the attempt to commit a[n]** (felony alleged)**,** **[**(defendant)**] [**(defendant's) **accomplice] caused the death of** (victim)**.**

c. **While escaping from the immediate scene after [committing] [attempting to commit] a[n]** (felony alleged)**, [**(defendant)**] [** (defendant's) **accomplice] caused the death of** (victim)**.**

For purposes of clarity, the committee voted unanimously to change the italicized instruction before element #3 to read:

Give 3a if defendant was the person who actually killed the deceased.
and
Give 3b if defendant was not the person who actually killed the deceased.

Next, the committee voted unanimously to add an italicized section to address the situation where the defendant is charged with felony murder in one count and the underlying felony in a separate count. If such cases, if a jury finds the defendant guilty of felony murder but not guilty of the underlying felony, Florida courts do not treat the verdict as an exercise of the jury's pardon power. Instead, such a verdict is treated as truly inconsistent and the conviction on the felony murder count is vacated. In order to try to avoid this harsh result, the committee recommends that an italicized instruction be added that reads:

If the underlying felony is charged as a separate count, read instruction 3.12(d)(Legally Interlocking Counts). Failure to do so may result in an impermissible inconsistent verdict. See, e.g., Brown v. State, 959 So.2d 218 (Fla. 2007).

Next, the committee voted unanimously to add a section that covers Fla. Stat. 782.065, which mandates certain sentences if the victim of the crime was a law enforcement officer, correctional officer, or correctional probation officer. Statutory definitions (Fla. Stat. 943.10) for the various types of officers are provided.

Next, the committee voted unanimously to rework the table of lesser included offenses so that these lesser offenses are listed in descending order of severity.

Finally, the committee voted unanimously to add a note in the Comment section drawing attention to the fact that Fla. Stat. 782.065 does not require the state to prove that the defendant knew the status of the victim but that the appellate courts have yet to address this issue.

The committee's proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

Proposal 2 – Second Degree Felony Murder – Instruction 7.5

For Instruction 7.5, the committee unanimously thought the instruction would read better if existing element #3 became element #2 and existing element #2 became element #3.

Under the existing element #3, the instruction does not cover the circumstance where the defendant actually committed the felony. Instead, the existing instruction contemplates only that the defendant aided, abetted, counseled, hired, or otherwise procured the felony. Accordingly, for the new element #2, the committee voted unanimously to cover the circumstance where the defendant actually committed the felony.

Additionally, under the existing element #2, the instruction requires that the victim die during the commission of the felony. Similar to the change made in the First Degree Felony Murder instruction, the committee voted unanimously for the instruction to read:

a. (Victim's) **death was caused during and was a consequence of the commission of the** (felony alleged).

b. (Victim's) **death was caused during and was a consequence of the attempted commission of the** (felony alleged).

c. (Victim's) **death was caused during and was a consequence of the escape from the immediate scene of the [**(felony alleged)**] [attempt to commit the** (felony alleged)**].**

The new italicized instruction regarding inconsistent verdicts was added as

were new sections covering the mandatory sentencing statute of Fla. Stat. 782.065.

The committee debated at length whether Manslaughter should be a Category 1 or Category 2 lesser-included offense. Although there is no explanation in the opinion, *Avila v. State*, 745 So. 2d 983 (Fla. 4th DCA 1999), states that Manslaughter is not a Category One lesser included offense of Second Degree Felony Murder. However, *Avila* may not be good law because of *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010).

Prior to publication, the committee put Manslaughter in the Category 2 column because of *Avila*. The committee's proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

Upon post-publication review, the committee voted 6-5 to put Manslaughter in the Category 1 box. The minority position was that the committee was bound by *Avila*. The majority thought, however, that if a defendant robs a store owner, and the store owner pulls out a gun and shoots at the defendant, but misses and kills a bystander, then the defendant has *necessarily* committed an act that caused the death of a victim that was neither justified nor excusable. The majority of the committee also thought it was safer to put Manslaughter in Category One because the failure to instruct on Manslaughter would be fundamental error (pursuant to *Montgomery*), if a Court determines that Manslaughter is a necessary lesser. To help explain the Committee's position, a note was added to the Comment section that reads:

Avila v. State, 745 So. 2d 983 (Fla. 4th DCA 1999) indicates that manslaughter is not a Category One lesser included offense of second degree felony murder, but see *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010).

Proposal 3 – Third Degree Felony Murder – Instruction 7.6

The committee's recommended changes to Instruction 7.6 mirror the recommended changes to Instruction 7.3. That is, a) the elements are reworded to ensure that the jury is not instructed that the victim's death has to take place during the commission of the felony; b) the italicized instructions before element #3 are reworded for clarity; c) an italicized instruction for interlocking counts was added; d) a new section for Fla. Stat. 782.065 was added; e) in the Table of Lesser Included Offenses, Manslaughter was added to Category One and Felony Battery was added to Category 2; and f) a note was added in the Comment section regarding "knowledge of status of victim" for Fla. Stat. 782.065. All of these changes were unanimously approved by the committee.

The committee's proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

<u>Proposal 4 – Death Penalty – Instruction 7.11</u>

In February 2012, as part of SC12-449, the committee sent a proposal to the Court with some recommended changes to Instruction 7.11. The committee later realized that its proposal was not updated to cover the aggravator in Fla. Stat. 921.141(5)(p). The Court granted the committee's motion to withdraw its proposal from SC12-449. The committee has now revised its Instruction 7.11 proposal as follows:

In the first italicized note, the committee voted 7-3 to delete the words "by the supreme court." The committee concluded that it did not matter whether the Florida Supreme Court or the U.S. Supreme Court did the remanding and that the reference to any supreme court was unnecessary.

Additionally, in *Armstrong v. State*, 73 So. 3d 155 (Fla. 2011), Justice Pariente suggested that the standard instruction address situations where a defendant has been serving a lengthy prison sentence and the jury in resentencing had a question as to the effect of the sentence on his or her eligibility for parole. The committee unanimously agreed with Justice Pariente's suggestion and therefore added a cite to *Green v. State*, 907 So. 2d 489, 496 (Fla. 2005) along with an explanation that if the jury inquires whether the defendant will receive credit for time served against a sentence of life without the possibility of parole for 25 years, the court should instruct that the defendant will receive credit for all time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently.

Also, the committee a) substituted the word "provide" for the word "render" throughout the instruction and b) deleted the word "final" in the phrase "final decision." The vote for both of these changes was 7-1. The majority of members thought the word "provide" was more easily understood and that it was incorrect to tell jurors that the final decision belonged to the trial judge when the trial judge's decision is not the final decision.

The committee voted unanimously to make this instruction consistent with the committee's proposal for Weighing the Evidence (Instruction 3.9, which is pending in SC12-2593). The committee also voted unanimously to make this instruction consistent with the Rules for Deliberation instruction (Instruction 3.10).

Finally, the committee unanimously approved the addition of the aggravating circumstance in Fla. Stat. 921.141(5)(p). The committee notes that this statute – if interpreted by plain language alone - does not require the defendant to know that the victim was a person who was the spouse, child, sibling, or parent of the person who obtained the injunction. The committee speculated that the Court might add a knowledge requirement to the statute, but the committee did not think it appropriate to create law on its own.

The committee's proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

Proposal 5 – Violation of a Condition of Pretrial Release from a Domestic Violence Charge - Instruction 8.25

A committee member proposed this instruction because there is no existing instruction for the crime in Fla. Stat. 741.29(6). The committee initially published the following proposal:

1. (Defendant) **was arrested for an act of domestic violence.**

2. **Before [his] [her] trial,** (defendant) **was released from custody on the domestic violence charge with a condition of** (insert condition of pretrial release in Fla. Stat. 903.047).

3. (Defendant) **knew that a condition of [his] [her] pretrial release was** (insert condition).

4. (Defendant) **willfully violated that condition of pretrial release by** (insert the manner in which the defendant is alleged to have violated pretrial release).

Also, statutory definitions for "domestic violence" and "family or household members" were provided along with the committee's usual practice of defining "willfully" as "knowingly, intentionally, and purposely." The committee then added a table of lesser included offenses with Attempt as a Category 2 lesser.

After publication, the committee received a comment from the Florida Prosecuting Attorneys Association (see Appendix B). The comment pointed out that according to *Santiago v. Ryan*, 109 So. 3d 848 (Fla. 3d DCA 2013), one can

violate a condition of pretrial release before being released from jail. The Florida Prosecuting Attorneys Association also pointed out that Fla. Stat. 741.29(6) does not require that the defendant be released from custody.

Upon post-publication review, the committee debated whether to make the change suggested by the FPAA. Those in opposition argued that *Santiago v. Ryan* pertained to a pretrial release statute (Fla. Stat. 903.0471) and not the statute that governed this jury instruction (Fla. Stat. 741.29(6)). Additionally, those in opposition argued that *State v. Rispoli*, 14 Fla. L. Weekly Supp. 662a (Fla. Brevard Cty. Ct. 2006)(see Appendix B) represented the opinion of only one county court judge. However, the majority of the committee thought that *Santiago v. Ryan* was sufficiently analogous and that the county judge's opinion was correct, particularly because Fla. Stat. 741.29(6) does not explicitly require that the defendant be released from jail in order to commit this crime. The vote to change element #2 was 6-5. The committee proposes element #2 read as follows:

Before [his] [her] trial, (defendant's) **release on the domestic violence charge was set with a condition of** (insert condition of pretrial release in Fla. Stat. 903.047).

No other changes were made from the published proposal.

Proposal 6 – Sexual Misconduct by a Psychiatrist – Instruction 11.18

A committee member proposed this instruction because there is no existing instruction for the crime in Fla. Stat. 491.0112. The committee did not have a problem tracking either the statute, the enhancement section in Fla. Stat. 491.0112(2), or the statutory definitions for "psychotherapist," "therapeutic deception," "sexual misconduct," and "client." The committee added a table of lesser-included offenses with Attempt as a Category 2 lesser. The committee's proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

Proposal 7 – First Degree Arson – Instruction 12.1

In SC12-1601 (which is pending at the time this petition is being filed), the committee recommended moving Second Degree Arson from Category 1 to Category 2 as a result of *Higgins v. State,* 565 So. 2d 698 (Fla. 1990). The committee made no other changes to the Arson instruction (12.1) when it filed its proposal in SC12-1601.

Since that time, a committee member realized that the existing standard

instruction is in conflict with case law. The existing instruction informs jurors that the state must prove that the damage was done willfully and unlawfully. However, it is not necessary for the state to prove that the defendant intended to cause damage. See for example, *Knighten v. State*, 568 So. 2d 1001 (Fla. 2d DCA 1990) and *N.K.D. v. State,* 799 So. 2d 428 (Fla. 1st DCA 2001). According to the case law, the state must prove 1) the defendant willfully and unlawfully (or while engaged in the commission of a felony) caused a fire or explosion and 2) damage to the dwelling or structure resulted. Accordingly, the committee voted unanimously to revamp the elements of the crime to be consistent with the case law.

In addition, by a vote of 6-2, the committee thought it would be a good idea to make it clear to the jurors that the state does not have to prove the defendant intended to cause damage and thus added a section to reflect *Knighten* and *N.K.D.* The two dissenters did not agree and argued that the committee was setting up a "straw man argument."

The definitions of "willfully" and unlawfully" were taken from case law that is cited in italics. The committee debated whether to use the Chapter 801 definition of "dwelling" because there was a question of whether a fire that is started willfully and unlawfully within the enclosed space of ground around a dwelling would still be arson of a dwelling. After debate, the committee voted 5-3 to use the Chapter 810 definition of "dwelling." The committee also added a note in the Comment section to reflect *Mitchell v. State*, 734 So. 2d 1067 (Fla. 1st DCA 1999), which deals with a vacant dwelling where the homeowner has no intention of returning. The word "structure" is defined in the arson statute and is copied in the committee's proposal.

The committee unanimously agreed to maintain its recommendation to the Court that Second Degree Arson be a Category 2 offense.

The proposal was published in *The Florida Bar News* on April 1, 2013. One comment was received from the Florida Public Defender's Association (FPDA) (see Appendix B). (Note: The FPDA's comments pertaining to Leaving the Scene of an Accident, Fleeing, and Failure to Obey are not relevant to this petition. They are relevant to a petition that will be filed soon.) The FPDA did not agree with the section about the state not needing to prove that the defendant intended to cause damage. The FPDA argued that the *Knighten* and *N.K.D.* cases deal with the sufficiency of the evidence not the propriety of giving such an instruction, that "negative" instructions are unnecessary, and that by giving such an instruction, the

trial judge is not being neutral and would be making a jury argument. The committee discussed the FPDA comment and voted 8-3 to retain its proposal because there are other instructions that contain "negative" instructions (such as Aggravated Assault and Felony Murder). The majority also thought this section would help jurors understand the elements of the crime.

Proposal 8 – Second Degree Arson – Instruction 12.2

For Second Degree Arson, the committee unanimously voted to correct the same mistake that exists in Instruction 12.1 (state does not have to prove that D intended to cause damage). For this instruction, the committee followed the format it had adopted for the First Degree Arson instruction. The vote, prior to publication, for the "not necessary for the state to prove" paragraph was also 6-2.

The proposal was published in *The Florida Bar News* on April 1, 2013 and the comment from the FPDA in Appendix B is pertinent for this instruction as well. As mentioned above, the committee discussed the FPDA comment post-publication and voted 8-3 to retain the paragraph about the state not needing to prove that the defendant intended to damage the structure.

Proposal 9 – Arson Resulting in Injury – Instruction 12.9

Because the committee reworked the arson instructions, a member thought it was a good idea to create a new standard instruction for the crime in Fla. Stat. 806.031. According to that statute, a crime separate from arson is committed if the arson led to either bodily harm (misdemeanor) or great bodily harm (felony). The committee thought the easiest way to instruct would be to give the elements that are in either Instruction 12.1 or 12.2 and then to add an element #3 for the result of bodily harm. If the defendant is charged with causing great bodily harm, an enhancement section informs the jury they must find that level of injury beyond a reasonable doubt. The elements section of the proposal passed unanimously.

The committee also added a section explaining that it is not necessary for the state to prove that the defendant intended to cause any level of bodily harm. This part of the instruction passed by a 6-2 vote.

The proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

Proposal 10 – Failure to Return Leased Property – Instruction 14.10

A committee member made this proposal because there is no standard

instruction for the crime in Fla. Stat. 812.155(3). The committee found it easy to track the statute, to add an enhancement section if the value was $300 or more, to define "value" from the statutory definition, and to create a table of lesser-included offense with Attempt in Category 2. The proposal was not controversial and passed unanimously. The proposal was published on April 1, 2013 in *The Florida Bar News* and no comments were received.

Proposal 11 – BUIs – Instructions 28.14-28.17

In the existing standard BUI instructions, the word "vessel" means a boat that is subject to a license tax for operation and includes every description of watercraft, barge, and airboat, other than a seaplane, on the water used or capable of being used as a means of transportation on water. This definition comes from Fla. Stat. 327.02(39), which defines "vessel," in part, as being synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution. Article VII, section (1)(b) states: "Motor vehicles, boats, airplanes, trailers, trailer coaches and mobile homes, as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes."

The question of how to define "vessel" was recently addressed by the 2nd DCA in *State v. Davis,* 110 So. 3d 27 (Fla. 2d DCA 2013). In *Davis*, the court held that the state was not required to prove that the boat the defendant was operating was subject to a license tax. The 2nd DCA's mandate issued in March 2013 and there does not appear to be any further appellate action on that case. As a result, the committee voted unanimously to delete the words "that is subject to a license tax for operation" in the definition of "vessel."

The committee's proposal was published on April 1, 2013 in *The Florida Bar News*. One comment was received from Mr. Darrell Sedgwick, who opposed the deletion of the language about the license tax (see Appendix B). Upon post-publication review, the committee voted unanimously that it was bound by the decision of the Second District Court of Appeal.

Proposal 12 – Sale of Alcohol to a Person Less than 21 Years Old – Instruction 29.3

A committee member drafted this proposal because there is no existing

instruction for the crime in Fla. Stat. 562.11(1)(a)1. Most of the proposal was uncontroversial because the committee thought it was easy to track both the statute and the statutory definitions for "alcoholic beverage," "sold," and "licensed premises." However, the committee could not agree whether the statute applied only to permittees of licensed premises. Five committee members were persuaded by the fact that the plain language of the statute did not limit the crime to permittees and that another statute – Fla. Stat. 562.11(1)(b) – seemed to be designed for permittees. Three members of the committee disagreed and felt that the intent behind the entire statute was to regulate the behavior of permittees. Because of the 5-3 vote, the following elements were published in the *Florida Bar News* on April 1, 2013.

Give 1a or 1b as applicable.

1. **a.** (Defendant) **[sold][gave] [served] [permitted to be served] an alcoholic beverage to** (name of person)**.**

   b. (Defendant) **permitted** (name of person) **to consume an alcoholic beverage on licensed premises.**

2. **At the time,** (victim) **was less than 21 years of age.**

The committee then received one comment from Mr. Blaise Trettis (see Appendix B). Mr. Trettis agreed with the minority position that the statute was designed to regulate only licensed vendors of alcoholic beverages upon the licensed premises of such vendors. After study of cases such as *United Services Automobile Association v. Butler*, 359 So. 2d 498 (Fla. 4th DCA 1978) and *Bryant v. Pistulka,* 366 So. 2d 479 (Fla. 1st DCA 1979), the committee voted unanimously to revise its proposal to reflect that the selling/giving/serving/permitting to be served or consumed had to take place *on the licensed premises*.

The new proposed elements are as follows:

Give 1a or 1b as applicable.

1. **a.** (Defendant) **[sold] [gave] [served] [permitted service of] an alcoholic beverage to** (name of person) **on licensed premises.**

b. (Defendant) **permitted** (name of person) **to consume an alcoholic beverage on licensed premises.**

2. **At the time,** (name of person) **was less than 21 years of age.**

The committee unanimously agreed to add the following two sentences in the Comment section:

Florida courts have interpreted this statute as applying only to business establishments. *United Services Automobile Association v. Butler*, 359 So. 2d 498 (Fla. 4th DCA 1978). It is yet to be determined whether the statute applies only to licensees of the business establishment.

Respectfully submitted this 19th day of June, 2013.

s/ Judge Joseph A, Bulone
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CERTIFICATE OF FONT SIZE

I hereby certify that this petition 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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