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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES REPORT 2014-05 **CASE NO.: SC14-**

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

This report, 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	**1.6**	**Note-Taking by Jurors**
Proposal 2	**2.1(d)**	**Insanity – Psychotropic Medication**
Proposal 3	**2.5**	**Conviction of Certain Crimes as Impeachment**
Proposal 4	**2.8**	**Jury to be Guided by Official English Translation/Interpretation**
Proposal 5	**2.13**	**Questions by Jurors**
Proposal 6	**2.14**	**Pro se Defendant**
Proposal 7	**8.10**	**Assault on LEO, etc.**
Proposal 8	**8.11**	**Battery on LEO, etc.**
Proposal 9	**8.12**	**Aggravated Assault on LEO, etc.**
Proposal 10	**8.13**	**Aggravated Battery on LEO, etc.**
Proposal 11	**29.16(a)**	**Unlawful Protests**

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strike-through marks; words and punctuation to be added are underlined. Two comments were received post-publication; they are in Appendix B.

OVERVIEW PROPOSALS #1-6

Judge Joseph Bulone, the former chair of the Committee, pointed out that jury instructions starting with the number "1" are supposed to be "Instructions Before the Trial" (prior to voir dire) and jury instructions starting with the number "2" are categorized as "Instructions During Trial." However, the existing numbers do not always match up with the appropriate category. Consequently, for the first

six proposals in this report, the Committee reviewed the instructions to ensure that they were properly numbered.

PROPOSAL #1: NOTE-TAKING BY JURORS

Instruction 1.6 pertains to note-taking by jurors and is usually given by the judge after the jury is sworn. Thus, the Committee unanimously proposed to renumber Instruction 1.6 as Instruction 2.1(a) so that it falls into the category of "Instructions During Trial."

The proposal was published in *The Florida Bar News* on April 1, 2014. One comment was received from Assistant Public Defender Richard Summa (see Appendix B). Mr. Summa argued that a portion of the instruction should be deleted because it defeats the purpose of note-taking, infringes upon the jury's prerogative as the fact-finding body, and also serves as an impermissible comment on the weight of the evidence by the trial court.

Upon post-publication review, the Committee unanimously disagreed with Mr. Summa, especially since the Committee believed the hypothetical in his comment was unrealistic. The Committee did make one post-publication change, however, which was to add "court deputy" as an alternative to "bailiff." The Committee did not think re-publication was necessary. The vote to send the proposal to the Court was unanimous. (Note: The Committee recommends that existing Instruction 1.6 be deleted since it is the last of the instructions starting with the number "1".)

PROPOSAL #2: INSANITY- PSYCHOTROPIC MEDICATION

In existing Instruction 3.6(c), there is an italicized note for the judge to give an instruction about the defendant taking medication if requested by the defendant *at both* the beginning of the trial *and* in the final charge to the jury. The Committee thought that any instruction that might be given at the start of the trial should start with number "2." Therefore, the Committee voted unanimously to copy Instruction 3.6(c), but to label it as Instruction 2.1(d). Note: The Committee did not propose any change to Instruction 3.6(c), so there would be identical instructions about a defendant taking psychotropic medication, one for the beginning of the trial and one for the end of the trial.

The proposal was published in *The Florida Bar News* on April 1, 2014. No comments were received. Upon post-publication review, the Committee again voted unanimously to send the proposal to the Court.

PROPOSAL #3: CONVICTION OF CERTAIN CRIMES AS IMPEACHMENT

For Instruction 2.5, no change to the number of the instruction is required. The Committee did propose one change to the content: The word "crime" in the existing instruction is in parenthesis and is not bolded, which means the judge is supposed to insert the name of the crime in that part of the instruction. However, jurors should not be instructed on the name of the crime that the witness or defendant was convicted of. Therefore, the Committee voted unanimously to change "(crime)" to **"a crime"**.

The proposal was published in *The Florida Bar News* on April 1, 2014. No comments were received. Upon post-publication review, the Committee again voted unanimously to send the proposal to the Court.

PROPOSAL #4: JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Because existing Instruction 2.8 is an instruction that is given near the beginning of the trial, the Committee voted unanimously to renumber it as Instruction 2.1(b). No other changes were made to the body of the instruction.

The proposal was published in *The Florida Bar News* on April 1, 2014. No comments were received. Upon post-publication review, the Committee again voted unanimously to send the proposal to the Court. (Note: The Committee recommends that existing Instruction 2.8 be "Reserved" because it is in the middle of the instructions starting with the number "2".)

PROPOSAL #5: QUESTIONS BY JURORS

Because existing instruction 2.13 would be given near the start of the trial, the Committee voted unanimously to renumber it as Instruction 2.1(c). No other changes were made to the body of the instruction.

The proposal was published in *The Florida Bar News* on April 1, 2014. No comments were received. Upon post-publication review, the Committee again voted unanimously to send the proposal to the Court. (Note: The Committee recommends that existing Instruction 2.13 be "Reserved" because it is not the last instruction starting with the number "2".)

PROPOSAL #6: PRO SE DEFENDANT

The existing instruction about the defendant representing himself is numbered as 2.14, which means it is in the category of "Instructions During the Trial." However, the Committee thought this instruction should be given prior to jury selection, which would mean it should be re-labelled starting with the number

"1." As a result, the Committee voted unanimously to number this instruction as "Instruction 1.2"

Also, the Committee did not think the instruction should tell jurors that "**You should not allow that decision to affect your verdict**" because at the point that this instruction is read, the jurors are just starting to get involved in the case. Instead, the Committee initially agreed to: "**You should not allow that decision to affect your consideration of this case.**"

The proposal was published in *The Florida Bar News* on April 1, 2014. One comment was received from Attorney Diana Johnson (see Appendix B), who argued that the existing language in the instruction could be construed as telling jurors that the defendant made an incorrect choice. Attorney Johnson also proposed alternative language (see Appendix B).

Upon post-publication review, the Committee agreed with Attorney Johnson that the instruction should be more neutral. The final vote was 9-1 to amend the instruction as follows: "(Defendant) **has the right to be represented by an attorney or to represent [himself] [herself] in this trial, as do all criminal defendants in this country. [He] [She] has exercised [his] [her] constitutional right to act as [his] [her] own attorney. This decision should not affect your consideration of this case.**" The Committee did not think re-publication was necessary. (Note: The Committee recommends that existing Instruction 2.14 be deleted since it is the last of the instructions starting with the number "2".)

PROPOSALS #7 AND #9– ASSAULT AND AGGRAVATED ASSAULT ON LEO, ETC.

Judge Jerri Collins, the current chair of the Committee, updated Instructions 8.10 and 8.12 to include all the occupations of victims listed in Florida Statute 784.07. (The statute bumps an assault/battery/aggravated assault/and aggravated battery up a degree if the victim falls into a protected class, as long as he/she was engaged in the lawful performance of his/her duty when the crime was committed.)

Accordingly, the Committee voted unanimously to add: 1) Law Enforcement Explorer; 2) A Non-sworn Law Enforcement Agency Employee Certified as an Agency Inspector; 3) a Blood Alcohol Analyst; 4) a Breath Test Operator; 5) a Railroad Special Officer; and 6) a Licensed Security Officer as possible types of victims in these instructions. Additionally, the Committee deleted Federal Law Enforcement Officers because that type of victim is no longer in Florida Statute 784.07.

The Committee also discussed how to deal with a case such as *Spurgeon v. State*, 114 So. 3d 1042 (Fla. 5th DCA 2013), wherein the Fifth District held that certain people did not fit within a statutory definition for the class of victim. The Committee did not think the standard jury instruction should include the statutory

definitions for every type of victim because the instruction would then become unwieldy. Moreover, a very high percentage of prosecutions under this statute involve a law enforcement officer as victim. As a result, the Committee expanded and relocated the italicized instruction about *not* telling jurors that the victim alleged is a law enforcement officer and instead instructing on the class of officers to which the victim belongs. The Committee also added an italicized instruction so that the judge would read the appropriate statutory definition when other types of victims (not law enforcement officers) are alleged to be the victim. Finally, for the Assault on LEO etc. and Aggravated Assault on LEO etc. instructions, the Committee added a section to cover the case law (*McClain v. State, Smithson v. State, and Gilbert v. State*) regarding the objective standard of fear for assault. The Committee's proposed language for this section was copied from the existing standard instructions for Assault and Robbery. Finally, the Committee added a citation to *Spurgeon* in the Comment section as a way to reinforce the necessity of a jury finding that the victim meets the statutory definition for the class of victim alleged.

The proposals were published in *The Florida Bar News* on April 15, 2014. No comments were received. Upon post-publication review, the Committee voted unanimously to send both proposals to the Court.

PROPOSALS #8 AND #10– BATTERY AND AGGRAVTED BATTERY ON LEO, ETC.

The changes that were made to Assault on LEO, etc. and Aggravated Assault on LEO, etc. were also made to the Battery on LEO, etc. and Aggravated Battery on LEO, etc. instructions, except there is no objective standard of fear needed in these two instructions. Also, in the Table of Lesser-Included Offenses, the Committee voted unanimously to add an asterisk to highlight that Felony Battery is only a necessary lesser-included offense if it is alleged that the defendant intentionally or knowingly caused great bodily harm to the victim. Finally, the Committee voted unanimously to delete Improper Exhibition and Discharging Firearms in Public as Category 2 lesser included offenses because it is highly unlikely that the State would include language to support those crimes in its charging document. (Any crime can conceivably be a Category 2 lesser-included offense as long as the state adds appropriate language to the charging document.)

The proposals were published in *The Florida Bar News* on April 15, 2014. No comments were received. Upon post-publication review, the Committee voted unanimously to send both proposals to the Court.

PROPOSAL #11 – UNLAWFUL PROTESTS

A former committee member (Judge Spencer Levine) proposed this instruction because there is already a standard instruction for Disturbing a Military Funeral (Instruction 29.16). This statute is a bit tricky because it is debatable how far the "knowingly" travels. (The statute reads: A person may not knowingly engage in protest activities or knowingly cause protest activities to occur within 500 feet of the property line of a residence, cemetery, funeral home, house of worship, or other location during or within 1 hour before or 1 hour after the conducting of a funeral or burial at that place.") The Committee decided that the "knowingly" applied to both the location of the protest and the timing of the protest and thus proposed:

To prove the crime of Unlawful Protests, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) [**knowingly engaged in protest activities] [or] [knowingly caused protest activities to occur] within 500 feet of the property line of a [residence] [cemetery] [funeral home] [house of worship] [or] [other location].**

Give 2a if the defendant personally did the protest activities.

2. a. (Defendant) **knew that [his] [her] protest activities occurred [during] [or] [within one hour before or one hour after] the conducting of a funeral or burial at that location.**

Give 2b if the defendant caused the protest activities to occur.

b. Defendant) **knew that the protest activities would occur [during] [or] [within one hour before or one hour after] the conducting of a funeral or burial at that location and the protest activities did take place [during] [or] [within one hour before or one hour after] the conducting of a funeral or burial at that location.**

The statute also contains a section that exempts protest activities that occur adjacent to that portion of a funeral procession which extends beyond 500 feet of the property line of the location of a funeral or burial. However, it is not clear whether this circumstance is an element of the crime or an affirmative defense. Thus, the Committee added an italicized instruction that informs the judge of the issue and also informs the judge that if that portion of the statute is an affirmative defense, the judge must determine who has the burden of persuasion and the standard of proof for that burden.

Statutory definitions are provided for "funeral or burial," "protest activities," and "funeral procession" (if necessary.) Attempt was put in the Category 2 box and the Committee identified no necessarily lesser-included offenses.

The proposal passed unanimously and was published in *The Florida Bar News* on April 15, 2014. No comments were received. Upon post-publication review, the Committee voted unanimously to send the proposal to the Court.

CONCLUSION

The Standard Jury Instructions in Criminal Cases Committee respectfully requests the Court authorize for use the proposals for the jury instructions as outlined in this report.

Respectfully submitted this 8th day of July, 2014.

s/ Jerri L. Collins
The Honorable Jerri L. Collins
Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of this report and appendices were sent by e-mail to Attorney Richard Summa at richard.summa@flpd2.com and to Attorney Diana Johnson at diana@johnsonandlufrano.com, this 8th day of July, 2014.

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).

s/Jerri L. Collins
HONORABLE JERRI L. COLLINS
Chair, Committee on Standard Jury
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