Filing # 21906036 Electronically Filed 12/23/2014 11:09:29 AM

RECEIVED, 12/23/2014 11:13:39, John A. Tomasino, Clerk, Supreme Court

**IN THE SUPREME COURT OF FLORIDA**

**IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2014-06**

**CASE NO.: SC14-1909**

_____/

**STANDARD JURY INSTRUCTION COMMITTEE'S RESPONSE TO COMMENTS GENERATED FROM THE FLORIDA SUPREME COURT'S PUBLICATION OF THE SELF-DEFENSE PROPOSALS**

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) files this Response to comments from the Florida Association of Criminal Defense Lawyers (FACDL) and Mr. Joseph Daiak. These two comments were made in response to the Court's publication of the Committee's self-defense proposals. Mr. Daiak's comments were not filed with the Clerk but were instead emailed to the Committee. The Committee has included both comments in Appendix A to this Response.

FACDL argues that because of the case law, the italicized notes for the *Aggressor* sections in Instructions 3.6(f) and 3.6(g) should state that the instruction that covers s. 776.041(1), Fla. Stat. can be given *only* when the defendant is *charged* with an independent forcible felony.

The Committee has debated FACDL's argument in the past because FACDL had previously made the same point in a comment. The Committee points out the following using the FACDL example: A defendant robs a store clerk, a customer tries to protect the clerk by hitting the defendant in the head with a bottle, and the defendant then turns and stabs the customer. If the defendant is charged with the stabbing of the customer, the defendant should not be able to prevail on a self-defense claim because the defendant was the initial aggressor because he committed the robbery. But according to FACDL and the case law cited in the FACDL comment, if the state does not *charge* the robbery, the jury should not be informed that an initial aggressor cannot claim self-defense, which appears to be inconsistent with s. 776.041(1), Fla. Stat.

The Committee did not agree with FACDL's argument that a defendant's due process rights dictate that the defendant be *charged* with an independent forcible felony. First, the Committee noted that the defendant is not under an obligation to inform the state that he or she intends to rely on self-defense at trial.

Thus the state goes to trial guessing that the defendant will claim self-defense. The Committee thought it odd for the state to have an obligation to explain to the defense why the state does not think a certain defense applies, when the state does not even know for sure that the defendant will be claiming that defense. More important, assuming a defendant has a due process right to notice of the state's theory of why self-defense does not apply, it would be even odder for the law to help the defense prepare for trial by requiring that the defendant be charged with another crime. So, even assuming FACDL is correct that a defendant has a due process right to notice of the state's theory of why self-defense does not apply, the state could satisfy that obligation by filing some pleading or by providing discovery that gives notice.

Additionally, if the evidence of the independent forcible felony was not inextricably intertwined with the act that the defendant is charged with or was too prejudicial or was not disclosed in the discovery process, then the evidence of the independent forcible felony[1] would be excluded and the instruction that covers s. 776.041(1), Fla. Stat. would not be read to jurors. Accordingly, the Committee did not think that FACDL's hypothetical (defense finds out at the end of the trial that self-defense does not apply because defendant was the initial aggressor) is realistic.

On the other hand, the Committee acknowledged and agreed with FACDL that there are cases that say the defendant must be charged with an independent forcible felony for this section of the standard instruction to be read. The Committee did not believe it was appropriate to propose an italicized note that was directly contrary to *Martinez v. State*, 981 So. 2d 449 (Fla. 2008). As a compromise position, the Committee thought it best to retain the citation to *Giles v. State* in the italicized note but to make the italicized note consistent with the actual language used in the *Giles* opinion. Therefore, the Committee continues to propose to change the existing italicized note from this:

*Give only if the defendant is charged with an independent forcible felony. See Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002).*

to this:

---

[1] The phrase "independent forcible felony" can be confusing because the forcible felony is not truly independent. It occurs moments prior to the crime that is charged and it must be related to the charged crime or the forcible felony would not render the defendant as the initial aggressor.

*Aggressor. § 776.041(1), Fla. Stat. Give if applicable.*
*Give only if there is evidence that the defendant was committing an independent forcible felony. This instruction is normally given in situations where the accused is charged with at least two criminal acts: The act for which the accused is claiming self-defense and a separate forcible felony. See Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002).*

Mr. Joseph Daiak made six arguments in his comment. The Committee's responses are as follows:

#1 – Mr. Daiak suggests that the sub-sections in both instructions be labeled, either numerically or alphabetically. The Committee thinks it already did so by adding italicized headings above each sub-section.

#2 – Mr. Daiak suggests that the 2014 legislative amendments (adding "threatened to use deadly force" in the self-defense statutes) has rendered cases such as *Miller v. State,* 613 So. 2d 530 (Fla. 3d DCA 1993) and *Hosnedl v. State,* 126 So. 3d 400 (Fla. 4th DCA 2013) invalid. The Committee disagreed. The purpose of the italicized notes at the beginning of the self-defense instructions is to encourage trial judges to give both justifiable use of deadly force and justifiable use of non-deadly force instructions unless it is clear that only one applies. Shooting a gun in the air may or may not be justifiable, but will still be viewed as using deadly force as a matter of law.

#3 – Mr. Daiak suggests that Court delete the s. 782.02, Fla. Stat. section from the standard instruction. The Committee did not agree. Although the presence of two justifiable use of deadly force statutes raises problems, the Committee did not think the remedy was to ignore the statutes.

#4 – Mr. Daiak suggests that the italicized note pertaining to *Novak v. State* be retained although the word "unlawful" should be changed to "criminal." Mr. Daiak believes that without the note, there may be confusion as to whether the charged crime was the unlawful/criminal activity. The Committee disagreed. First, the Committee highlights that the italicized notes in the standard instructions are not read to the jurors. Thus, adding an italicized note will not help the jurors. Second, the Committee notes that its proposal includes the phrase "otherwise engaged in criminal activity" in the s. 776.012(2), Fla. Stat. and s. 776.031(2), Fla. Stat. section. The Committee thinks its proposed language makes it clear that the "criminal activity" is separate from the charged crime.

#5 – Mr. Daiak suggests there needs to be a more direct link between the "presumption of fear" and the "justifiable use of deadly/non-deadly force" by adding in the following: "(Defendant) **is presumed to have held a reasonable fear, sufficient to justify the use of deadly/non-deadly force, of imminent peril of death or great bodily harm to [himself] [herself] [another]…"** The Committee disagreed because the Committee concluded that everyone would understand that the two concepts are linked.

#6 – Mr. Daiak suggests the following sentence is confusing and should be deleted from both instructions: "**If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether the defendant was justified in the use of deadly force, you should find the defendant not guilty.**" Mr. Daiak also suggests the burden of persuasion be explained as follows: "**In your consideration of the issue of self-defense, if from the evidence you are convinced beyond a reasonable doubt that the defendant was not justified in the use of deadly force, you should find [him] [her] guilty if all of the elements have been proved. Otherwise you must find [him] [her] not guilt.**" The Committee disagreed and thought that its explanation of the burden of persuasion for the affirmative defense of self-defense was sufficient.

All Committee votes for this Response were unanimous. The Committee continues to recommend the self-defense proposals filed in Appendix A in its original pleading. The Committee also continues to believe that the Court should consider expediting this case because self-defense is a common defense and the new self-defense laws became effective in June 2014.

Respectfully submitted this 23rd day of December, 2014.

s/ Judge Jerri L. Collins
The Honorable Jerri L. Collins
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
Seminole County Courthouse
301 N. Park Avenue
Sanford, Florida 32772
Florida Bar Number: 886981
407-665-4132
Jerri.collins@flcourts18.org

**CERTIFICATE OF SERVICE AND COMPLIANCE**

I hereby certify that this Response 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) and that a copy has been sent by e-mail to: Mr. Luke Newman at luke@lukenewmanlaw.com; Mr. William Ponall at ponallb@criminaldefenselaw.com; and a copy has been sent by U.S. Mail to Mr. Joseph Daiak, 20101 Central Boulevard, Land O' Lakes, Florida 34637, this 23rd day of December, 2014.

s/ Bart Schneider
Bart Schneider
Staff Liaison to Committee on Standard Jury Instructions in Criminal Cases
Florida Bar Number 0936065
(850) 413-7321
schneidb@flcourts.org