IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES — REPORT 2016-04 / **CASE NO.: SC16-**

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

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

	Instruction #	Title
Proposal 1	**3.3(a)**	**Aggravation of a Felony by Carrying a Firearm**
Proposal 2	**3.3(b)**	**Aggravation of a Felony by Carrying a Weapon Other than a Firearm**
Proposal 3	**3.3(f)**	**Aggravation of a Crime by Selecting a Victim Based on Prejudice**
Proposal 4	**3.6(c)**	**Psychotropic Medication**
Proposal 5	**8.18**	**Violation of an Injunction for Protection Against Domestic Violence**
Proposal 6	**8.19**	**Violation of an Injunction for Protection Against [Repeat] [Sexual] [Dating] Violence**
Proposal 7	**8.24**	**Violation of an Injunction for Protection Against [Stalking] [Cyberstalking]**

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.

All of the proposals were published in the Florida Bar *News* on May 15, 2016. Comments were received from 1) the Florida Public Defenders Association ("FPDA"), 2) the Florida Association of Criminal Defense Lawyers ("FACDL"), and 3) Mr. Gerry Rose. The three comments are in Appendix B, although some of the comments pertain to proposals that are not a part of this report.

PROPOSALS #1 and #2: INSTRUCTION 3.3(a) & 3.3(b)

Instruction 3.3(a) and 3.3(b) cover the section 775.08(1), Florida Statutes, reclassification of certain felonies if a firearm or a weapon other than a firearm are carried, displayed, used, threatened to be used, or attempted to be used in the

commission of the crime. The idea to amend these two instructions came from a prosecutor who informed the committee that the existing standard instructions do not adequately cover Florida law.

According to *Menendez v. State*, 521 So. 2d 210 (Fla. 1st DCA 1988), to carry a firearm or weapon for purposes of section 775.08(1) means not only actual physical possession of the firearm or weapon, but also having the firearm or weapon readily available.

In order to capture this case law and to avoid the need for special instructions, the Committee added an italicized "*Give if applicable*" paragraph with a cite to *Menendez* in both instruction 3.3(a) and 3.3(b). The Committee also added an explanation that to "carry" a firearm (or weapon in instruction 3.3(b)) during the commission of a crime means either having it on one's person or having it readily available.

Two comments were received after publication. FACDL argued that the *Menendez*-based phrase of "having it readily available" was too broad and the Committee should instead use "within immediate grasp" as was used in *Smith v. State*, 438 So. 2d 10 (Fla. 2d DCA 1983). Upon post-publication review, the Committee partially agreed with FACDL. The Committee thought there could be a difference between "having it readily available" and "within immediate grasp." However, instead of choosing the Second District over the First District, the Committee put both choices in brackets and cited to both *Menendez* and *Smith*.

FPDA stated that *State v. Rodriguez*, 602 So. 2d 1270 (Fla. 1992), arguably overruled *Menendez*. No one on the Committee agreed. *Rodriguez* stands for the proposition that section 775.08(1) does not extend to a co-perpetrator who does not possess the weapon. *Menendez* and *Smith* address the circumstance where the defendant does not have actual possession of a firearm but still carries it for purposes of section 775.08(1) because it is readily available. FPDA also argues that *Menendez* is weak authority for the Committee's proposal and that if anything needs to be added, *Smith's* verbiage of "within immediate grasp" is more appropriate. The Committee did not think *Menendez* was weak authority, but the Committee did partially agree with the FPDA. Two members voted not to amend instruction 3.3(a) or 3.3(b), but the majority voted to add a "*Give if applicable*" paragraph based on both *Menendez* and *Smith*, which will allow trial judges to decide, in appropriate cases, whether to give the First District's clarification or the Second District's clarification. The Committee's final proposal, which passed by a vote of 8-2 is:

Give if applicable. Menendez v. State, 521 So. 2d 210 (Fla. 1st DCA 1988); Smith v. State, 438 So. 2d 10 (Fla. 2d DCA 1983).

To "carry" a firearm during the commission of a crime means either having the firearm on one's person [or] [having it readily available] [having it within immediate grasp].

PROPOSAL #3: INSTRUCTION 3.3(f)

Instruction 3.3(f) covers Florida's hate crime statutes. The reason the Committee revisited this instruction was because the 2016 legislature took the protected class of people who suffer from a mental or physical disability out of § 775.085(1)(a), Florida Statutes, and created a new hate crime statute for people with those disabilities in a newly created § 775.0863, Florida Statutes. Because the two hate crime statutes mimic each other, the Committee only needed to add a new statutory cite near the top of the instruction.

The Committee also took the opportunity to make a few minor changes to the existing instruction. For example, "**the victim**" was changed to "(victim)" so that the judge would not refer to the alleged victim as a victim. Also, "**the defendant**" was changed to "(defendant)." Finally, italicized statutory cites were added above the terms "mental or physical disability," "advanced age," and "homeless status," and the definition of "mental or physical disability" was made consistent with the new statute.

There are no other changes proposed other than to update the dates in the Comment section. The proposal was published. No comments were received. Upon post-publication review, the Committee vote was unanimous to file the proposal with the Court.

PROPOSAL #4: INSTRUCTION 3.6(c)

The idea to amend the Psychotropic Medication instruction came from a prosecutor who stated this instruction has the word "Insanity" in the title but has nothing to do with insanity. Accordingly, the Committee deleted the word "Insanity" from the title. In the published proposal, the only other change was to update the italicized note to the judge and to provide a reference to Florida Rule of Criminal Procedure 3.215(c) so that people can see the legal support for this standard instruction.

The proposal was published. One comment was received from the FPDA who suggested adding: "You should not allow the defendant's condition or any apparent side effect from the medication to affect your verdict." The FPDA also suggested that the Committee consider adding a comment that would allow the judge, upon defense request, to identify for the jury possible side effects from the medication.

The Committee did not like the idea of the judge informing the jury about possible side effects because the judge is not a medical expert and the Committee did not want to encourage the idea of trial judges getting bogged down with a debate among lawyers or medical experts about possible side effects. The Committee also did not like the FPDA's suggested language about the defendant's condition not affecting the verdict because the defendant's condition might be relevant to the crime charged or a defense to the crime charged. However, by a vote of 5-4, the Committee added a third paragraph that states: "**You should not allow the defendant's present condition in court or any apparent side effect from the medication that you may have observed in court to affect your deliberation.**" The majority thought this language would make it clear that the jury should ignore the defendant's condition in court, which might be different than his condition at the time of the crime alleged. The four dissenters did not think the existing standard instruction caused any problems and therefore should not be amended with this new idea.

PROPOSALS #5-#7: INSTRUCTIONS 8.18, 8.19 & 8.24

These three instructions cover the crimes of violation of different types of injunctions. The Committee revisited these instructions because the 2016 legislature passed new statutes in Chapter 2016-187 which makes a third time violation of an injunction a felony if the prior violations pertained to the same victim. To capture these new statutes, the Committee added new sections in each instruction which would be applicable only after the jury found the defendant guilty of the underlying misdemeanor. The Committee also added explanatory notes in the Comment sections to ensure that the historical fact of a prior conviction is determined separately from guilt on the underlying charge.

A few other changes were made in addition to the new enhancement language. For example, the titles of the crimes were made consistent with each other. The words "for the benefit of (victim)" were added to the first element in all three instructions so it was clear who the victim would be in every case, which may be important in future cases where the enhancement to a felony for prior violations is charged.

An italicized note was added in Instruction 8.18 so that judges would know where to find the definition of "domestic violence." Similarly, italicized notes were added in Instructions 8.19 and 8.24 so that judges would know where to find pertinent definitions or elements (such as "violence," "repeat violence," and "stalking").

Finally, in Instruction 8.24, not only was "for the benefit of (victim)" added to element #1, but "the petitioner" in element #2 was replaced with "(victim)" to tie the person named in element #2 with the person in element #1.

The proposals were published. Two comments were received, one from the FPDA and one from Mr. Gerry Rose. Mr. Rose suggested that in the new enhancement sections, the Committee change the word "whether" to "that."

The FPDA made two suggestions for Instructions 8.18 and 8.19. The first suggestion was to replace, in the elements section, "for the benefit of (victim)" with "for the benefit of (petitioner)" out of a concern that some judges will use the word "victim" instead of an actual name. The FPDA's second suggestion was to replace the word "victim" with the word "person" in the new enhancement sections.

The Committee agreed with Mr. Rose's idea and the FPDA's second suggestion, and thus the enhancement sections are proposed to read: **Now that you have found the defendant guilty of Violation of Injunction, you must further determine whether the State has proven beyond a reasonable doubt that the defendant was previously convicted two times or more of Violation of an Injunction against the same person."**

The Committee did not agree with the FPDA about changing the elements sections of Instruction 8.18 and 8.19. First, the Committee thinks it is clear that by not bolding the word "victim" and by putting the word "victim" in parenthesis, the trial judge should not be using the word "victim" to describe the alleged victim. Second, the Committee thought that injunctions can cover more people (such as a family member) than just the person who petitioned the court for the injunction. Thus, using "for the benefit of petitioner" might not be comprehensive enough in certain fact patterns.

For Instruction 8.24 (which covers Violation of an Injunction for Protection Against Stalking or Cyberstalking), the FPDA argued that it was inappropriate for the instruction to use "(victim)" instead of "(petitioner)" because the acts constituting the crime defined by section 784.0487(4) all concern actions taken against "the petitioner." The Committee disagreed. According to section 784.0487(4)(a), Florida Statutes, a person can violate an injunction by being within 500 feet of a place frequented regularly by any named family member of the petitioner. Therefore, just as in Instructions 8.18 and 8.19, using "for the benefit of petitioner" in the elements section instead of "for the benefit of (victim)" might not be comprehensive enough.

CONCLUSION

The Standard Jury Instructions in Criminal Cases Committee respectfully requests the Court authorize for use the proposals in Appendix A.

Respectfully submitted this 6th day of July, 2016.

s/ Judge F. Rand Wallis
The Honorable F. Rand Wallis
Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

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) and that a copy of the report and the appendices were emailed through the portal to Ms. Julianne Holt at jholt@pd13.state.fl.us; Mr. Luke Newman at luke@lukenewmanlaw.com; and to Mr. Gerry Rose at rose.gerry@gmail.com; this 6th day of July, 2016.

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