



Criminal Justice Subcommittee

November 7, 2013

3:00 PM

Webster Hall (212 Knott)

Will W. Weatherford
Speaker

Matt Gaetz
Chair

Committee Meeting Notice
HOUSE OF REPRESENTATIVES

Criminal Justice Subcommittee

Start Date and Time: Thursday, November 07, 2013 03:00 pm
End Date and Time: Thursday, November 07, 2013 08:00 pm
Location: Webster Hall (212 Knott)
Duration: 5.00 hrs

Consideration of the following bill(s):

HB 4003 Use of Deadly Force in Defense of a Person by Williams, A., Stafford

Consideration of the following proposed committee substitute(s):

PCS for HB 89 -- Threatened Use of Force

NOTICE FINALIZED on 10/31/2013 16:10 by hudson.jessica

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4003 Use of Deadly Force in Defense of a Person
SPONSOR(S): Williams; Stafford and others
TIED BILLS: IDEN./SIM. **BILLS:** SB 116

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Cunningham	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Generally speaking, a person is justified in using force, other than deadly force, where the person reasonably believes such force is necessary to:

- Defend himself, herself, or another against another person's imminent use of unlawful force; or
- Prevent or terminate another person's trespass on, or other tortuous or criminal interference with certain property.

Deadly force is justified when the person reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself, herself, or another or to prevent the imminent commission of a forcible felony.

Prior to 2005, Florida's statutes were silent regarding a duty to retreat before using force. However, Florida common law recognized such a duty and required one to "retreat to the wall" when attacked in a place outside one's home. There is no duty to retreat before using force when in one's home (a principle often referred to as the "Castle Doctrine").

In 2005, legislation often referred to as Florida's "Stand Your Ground" law passed, which, in part, amended ch. 776, F.S., to create presumptions relating to the Castle Doctrine and to remove one's duty to retreat before using force in certain instances outside of one's home.

The bill repeals s. 776.013, F.S., in its entirety, which abolishes all of the presumptions relating to the Castle Doctrine. Repealing s. 776.013, F.S., also abolishes a provision which removes one's duty to retreat prior to using force outside of one's home so long as the person is not engaged in an unlawful activity and is in a place he or she has a right to be. However, the bill does not remove the "duty to retreat" provisions in ss. 776.012 and 776.031, F.S., that were added in 2005. As such, a person does not have a duty to retreat outside of his or her home:

- Prior to using non-deadly force if the person is in a place where he or she has a right to be and reasonably believes that such conduct is necessary to prevent or terminate another person's trespass on, or other tortuous or criminal interference with certain property.
- Prior to using deadly force if the person reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

The bill does not appear to have a fiscal impact on state or local government.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Justifiable Use of Force - Background

Prior to 2005, s. 776.012, F.S., specified that a person was justified in using force, other than deadly force, where the person reasonably believed such force was necessary to defend himself, herself, or another against another person's imminent use of unlawful force. Deadly force was justified when the person reasonably believed such force was necessary to prevent imminent death or great bodily harm to himself, herself, or another or to prevent the imminent commission of a forcible felony^{1,2}.

Section 776.031, F.S. (2004), governed the instances in which a person was justified in using force to protect property. This statute authorized a person to use force, other than deadly force, where the person reasonably believed such force was necessary to prevent or terminate another person's trespass on, or other tortuous or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect.³ Deadly force to protect property was justifiable only if used to prevent a forcible felony.⁴

The justifications described in ss. 776.012 and 776.031, F.S. (2004), were not available to a person who:

- Was attempting to commit, committing, or escaping after the commission of, a forcible felony; or
- Initially provoked the use of force against himself or herself, unless:
 - Such force was so great that the person reasonably believed that he or she was in imminent danger of death or great bodily harm and that he or she had exhausted every reasonable means to escape such danger other than the use of force which was likely to cause death or great bodily harm to the assailant; or
 - In good faith, the person withdrew from physical contact with the assailant and indicated clearly to the assailant that he or she desired to withdraw and terminate the use of force, but the assailant continued or resumed the use of force.⁵

Prior to 2005, Florida's statutes were silent regarding a duty to retreat before using force. However, Florida common law recognized such a duty and required one to "retreat to the wall" when attacked in a place *outside one's home*.⁶ This principle was recognized by the Florida Supreme Court, which held that a person could not justifiably resort to using force *outside of his or her residence* without first using every reasonable means within his or her power to avoid the danger, including retreat.⁷ Florida has long recognized that there is no duty to retreat before using force when *in one's home* (a principle often referred to as the "Castle Doctrine").⁸

The "Stand Your Ground" Law

During the 2005 Legislative Session, Senate Bill 436 was filed. The bill, often referred to as Florida's "Stand Your Ground" law, amended ch. 776, F.S., to create presumptions relating to the Castle

¹ Section 776.08, F.S. (2004), defined the term "forcible felony" as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

² Section 776.012, F.S. (2004).

³ Section 776.031, F.S. (2004).

⁴ *Id.*

⁵ Section 776.041, F.S. (2004).

⁶ *Hedges v. State*, 172 So.2d 824, 827 (Fla. 1965); *Pell v. State*, 122 So. 110 (Fla. 1929).

⁷ *Weiland v. State*, 732 So.2d 1044 (Fla. 1999).

⁸ *Id.* at 1049.

Doctrine, to remove one's duty to retreat before using force in certain instances outside of one's home, and to provide immunity for those who lawfully use force in self-defense.

Castle Doctrine Presumptions

Senate Bill 436 created s. 776.013, F.S., which created the following presumptions related to the Castle Doctrine:

- A person has a reasonable fear of imminent peril or death or great bodily harm to themselves or another when using deadly force when:
 - The person against whom the deadly force was used was in the process of unlawfully entering or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
 - The person using the deadly force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.⁹
- A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

Duty to Retreat

The bill also created subsection (3) within s. 776.013, F.S., which removed one's duty to retreat before using force, including deadly force, *outside of one's home* so long as the person:

- Was not engaged in an unlawful activity;
- Was in a place where he or she had a right to be; and
- Reasonably believed that doing so was necessary to prevent death or great bodily harm or to prevent the commission of a forcible felony.

The bill made similar "duty to retreat" changes in other statutes. In s. 776.012, F.S., relating to the use of force in defense of persons, the bill specified that a person did not have a duty to retreat prior to using deadly force¹⁰ outside of one's home if:

- He or she reasonably believes that such force is necessary to prevent imminent¹¹ death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
- Under those circumstances permitted pursuant to s. 776.013, F.S.¹²

In s. 776.031, F.S., relating to the use of force in defense of property, the bill specified that a person did not have a duty to retreat prior to using force or deadly force in accordance with the statute so long as the person was in a place they had a right to be.¹³

⁹ Section 776.013(2), F.S., specifies that this presumption does not apply if the person:

- Against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;
- Sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used;
- Who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or
- Against whom the defensive force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

¹⁰ Note that the bill did not remove one's duty to retreat in instances where *non-deadly* force is used.

¹¹ Note that the standard for using deadly force in s. 776.012, F.S., requires *imminence*, while the standard in s. 776.013, F.S., does not.

¹² Note that unlike s. 776.013, F.S., s. 776.012, F.S., removes one's duty to retreat prior to using deadly force even if the person is engaged in an unlawful activity and/or in a place where he or she does not have a right to be.

¹³ Note that unlike s. 776.013, F.S., s. 776.031, F.S., removes one's duty to retreat prior to using force or deadly force even if the person is engaged in an unlawful activity.

Immunity

The bill also created s. 776.032, F.S., which grants immunity from criminal prosecution¹⁴ and civil action to a person who used force or deadly force, so long as the force was used in accordance with ss. 776.012, 776.013, and 776.031, F.S.¹⁵ The bill specified that a law enforcement agency could use standard procedures for investigating the use of force, but the agency could not arrest the person for using force unless it determined that there was probable cause that the force used was unlawful.¹⁶

The bill passed the Senate unanimously, passed the House with 94 favorable votes and 20 negative votes, and was signed by the Governor on April 26, 2005. It became effective October 1, 2005.¹⁷

Effect of the Bill

Castle Doctrine Presumptions

The bill repeals s. 776.013, F.S., in its entirety. As such, all of the above-described presumptions relating to the Castle Doctrine are abolished.

Duty to Retreat

The repeal of s. 776.013, F.S., also abolishes subsection (3), which removes one's duty to retreat prior to using force or deadly force outside of one's home so long as the person is not engaged in an unlawful activity and is in a place he or she has a right to be. However, the bill does not remove the "duty to retreat" provisions in ss. 776.012 and 776.031, F.S., that were added in 2005. As such, a person does not have a duty to retreat outside of his or her home:

- Prior to using non-deadly force if the person is in a place where he or she has a right to be and reasonably believes that such conduct is necessary to prevent or terminate the other's trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect.
- Prior to using deadly force if the person reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

Immunity

The bill makes a non-substantive conforming change to s. 776.032, F.S., to remove a reference to s. 776.013, F.S.

Discharging a Firearm

The bill also makes a conforming change to add the definition of the term "dwelling" that is currently in s. 776.013, F.S., to s. 790.15, F.S. (making it a first degree misdemeanor for a person to recklessly or negligently discharge a firearm outdoors on any property used primarily as the site of a dwelling.)

B. SECTION DIRECTORY:

Section 1. Repeals s. 776.013, F.S., relating to home protection; use of deadly force; presumption of fear of death or great bodily harm.

Section 2. Amends s. 776.012, F.S., relating to use of force in defense of person.

Section 3. Amends s. 776.032, F.S., relating to immunity from criminal prosecution and civil action for justifiable use of force.

¹⁴ "Criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant. Section 776.032(1), F.S.

¹⁵ Immunity is not granted if the person against whom force was used was a law enforcement officer who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. Section 776.032(1), F.S.

¹⁶ Section 776.032(2), F.S.

¹⁷ Chapter 2005-27, L.O.F.

Section 4. Amends s. 790.15, F.S., relating to discharging firearm in public or on residential property.

Section 5. Makes the bill effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled

2 An act relating to the use of deadly force in defense
 3 of a person; repealing s. 776.013, F.S., relating to
 4 home protection and the use of deadly force, which
 5 created a presumption of fear of death or great bodily
 6 harm in certain circumstances and provided that a
 7 person has no duty to retreat and has the right to
 8 stand his or her ground and meet force with force in
 9 certain circumstances; amending ss. 776.012, 776.032,
 10 and 790.15, F.S.; conforming provisions; providing an
 11 effective date.

12
 13 Be It Enacted by the Legislature of the State of Florida:

14
 15 Section 1. Section 776.013, Florida Statutes, is repealed.

16 Section 2. Section 776.012, Florida Statutes, is amended
 17 to read:

18 776.012 Use of force in defense of person.—A person is
 19 justified in using force, except deadly force, against another
 20 when and to the extent that the person reasonably believes that
 21 such conduct is necessary to defend himself or herself or
 22 another against the other's imminent use of unlawful force.
 23 However, a person is justified in the use of deadly force and
 24 does not have a duty to retreat if:

25 ~~(1)~~ he or she reasonably believes that such force is
 26 necessary to prevent imminent death or great bodily harm to
 27 himself or herself or another or to prevent the imminent
 28 commission of a forcible felony; ~~or~~

29 ~~(2) Under those circumstances permitted pursuant to s.~~
 30 ~~776.013.~~

31 Section 3. Subsection (1) of section 776.032, Florida
 32 Statutes, is amended to read:

33 776.032 Immunity from criminal prosecution and civil
 34 action for justifiable use of force.—

35 (1) A person who uses force as permitted in s. 776.012,~~s.~~
 36 ~~776.013,~~ or s. 776.031 is justified in using such force and is
 37 immune from criminal prosecution and civil action for the use of
 38 such force, unless the person against whom force was used is a
 39 law enforcement officer, as defined in s. 943.10(14), who was
 40 acting in the performance of his or her official duties and the
 41 officer identified himself or herself in accordance with any
 42 applicable law or the person using force knew or reasonably
 43 should have known that the person was a law enforcement officer.
 44 As used in this subsection, the term "criminal prosecution"
 45 includes arresting, detaining in custody, and charging or
 46 prosecuting the defendant.

47 Section 4. Subsection (1) of section 790.15, Florida
 48 Statutes, is amended to read:

49 790.15 Discharging firearm in public or on residential
 50 property.—

51 (1) Except as provided in subsection (2) or subsection
 52 (3), any person who knowingly discharges a firearm in any public
 53 place or on the right-of-way of any paved public road, highway,
 54 or street, who knowingly discharges any firearm over the right-
 55 of-way of any paved public road, highway, or street or over any
 56 occupied premises, or who recklessly or negligently discharges a

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57 | firearm outdoors on any property used primarily as the site of a
 58 | dwelling ~~as defined in s. 776.013~~ or zoned exclusively for
 59 | residential use commits a misdemeanor of the first degree,
 60 | punishable as provided in s. 775.082 or s. 775.083. This section
 61 | does not apply to a person lawfully defending life or property
 62 | or performing official duties requiring the discharge of a
 63 | firearm or to a person discharging a firearm on public roads or
 64 | properties expressly approved for hunting by the Fish and
 65 | Wildlife Conservation Commission or Florida Forest Service. As
 66 | used in this subsection, the term "dwelling" means a building or
 67 | conveyance of any kind, including any attached porch, whether
 68 | the building or conveyance is temporary or permanent, mobile or
 69 | immobile, which has a roof over it, including a tent, and is
 70 | designed to be occupied by people lodging therein at night.

71 | Section 5. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 89 Threatened Use of Force
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Cunningham <i>gmc</i>	Cunningham <i>gmc</i>

SUMMARY ANALYSIS

A person charged with a criminal offense in which force was used (e.g., battery, murder, etc.) may argue at trial that he or she did so in "self-defense." Chapter 776, F.S., contains a variety of provisions setting forth the instances in which a person may use force justifiably. A close read of ch. 776, F.S., reflects that only a person's *actual* use of force is justifiable – not a person's *threatened* use of force. While some courts have recognized that a threatened use of force equates to an actual use of force, the statutes do not clearly indicate this.

In recent years, there have been cases in which persons have been convicted of aggravated assault for threatening to use force (e.g., displaying a firearm, firing a "warning shot," etc.) and have been sentenced to mandatory minimum terms of imprisonment pursuant to the 10-20-Life law. In some of these cases, the defendant unsuccessfully argued self-defense. Specifying that the justifications in ch. 776, F.S., apply to threatened uses of force will provide clarification.

The bill amends ch. 776, F.S., to specify that the justifications contained therein apply to threatened uses of force.

The bill also contains the following legislative findings and intent:

- The Legislature finds that persons have been criminally prosecuted and have been sentenced to mandatory minimum terms of imprisonment pursuant to s. 775.087, F.S., for threatening to use force in a manner and under circumstances that would have been justifiable under ch. 776, F.S., had force actually been used.
- The Legislature intends to:
 - Provide criminal and civil immunity to those who threaten to use force if the threat was made in a manner and under circumstances that would have been immune under ch. 776, F.S., had force actually been used;
 - Clarify that those who threaten to use force may claim self-defense if the threat was made in a manner and under circumstances that would have been justifiable under ch. 776, F.S., had force actually been used;
 - Ensure that those who threaten to use force in a manner and under circumstances that are justifiable under ch. 776, F.S., are not sentenced to a mandatory minimum term of imprisonment pursuant to s. 775.087, F.S.; and
 - Encourage those who have been sentenced to a mandatory minimum term of imprisonment pursuant to s. 775.087, F.S., for threatening to use force in a manner and under circumstances that are justifiable under ch. 776, F.S., to apply for executive clemency.

The bill does not appear to have a fiscal impact on state or local government.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Aggravated Assault

Assault, a second degree misdemeanor¹ is defined as an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.² Aggravated assault, a third degree felony,³ is an assault:

- With a deadly weapon without intent to kill; or
- With an intent to commit a felony.⁴

10-20-Life

Section 775.087, F.S., often referred to as the "10-20-Life" law, requires a judge to sentence a person convicted of a specified offense to a minimum term of imprisonment if, during the commission of the offense, the person possessed or discharged a firearm or destructive device.⁵ Under the 10-20-Life law, a person convicted of aggravated assault must be sentenced to:

- A minimum term of imprisonment of 3 years if such person possessed a firearm or destructive device during the commission of the offense;
- A minimum term of imprisonment of 20 years if such person discharged a firearm or destructive device during the commission of the offense; and
- A minimum term of imprisonment of not less than 25 years and not more than life in prison if, during the course of the commission of the offense, the person discharged a firearm or destructive device and, as the result of the discharge, death or great bodily harm was inflicted upon any person.⁶

Justifiable Use of Force

A person charged with a criminal offense in which force was used (e.g., battery, murder, etc.) may argue at trial that he or she did so in "self-defense." Chapter 776, F.S., contains a variety of provisions setting forth the instances in which a person may use force justifiably.

Use of Force in Defense of Persons

Section 776.012, F.S., provides that a person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

- He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
- Under those circumstances permitted pursuant to s. 776.013, F.S.

Section 776.013(3), F.S., also addresses use of force in defense of persons, by specifying that a person does not have a duty to retreat before using force, including deadly force, outside of one's home so long as the person:

- Was not engaged in an unlawful activity;
- Was in a place where he or she had a right to be; and

¹ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

² Section 784.011, F.S.

³ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

⁴ Section 784.021, F.S.

⁵ The terms "firearm" and "destructive device" are defined in accordance with s. 790.001, F.S.

⁶ Section 775.087(2)(a)1., 2., and 3., F.S.

- Reasonably believed that doing so was necessary to prevent death or great bodily harm or to prevent the commission of a forcible felony.

Use of Force in Defense of Property

Section 776.031, F.S., provides that a person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to prevent or terminate the other's trespass on, or other tortious or criminal interference with, either real property other than a dwelling or personal property, lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal duty to protect. A person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent the imminent commission of a forcible felony. A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

Castle Doctrine Presumptions

Section 776.013, F.S., contains the following presumptions relating to the use of force by a person in their home (a principle often referred to as the Castle Doctrine):⁷

- A person has a reasonable fear of imminent peril or death or great bodily harm to themselves or another when using deadly force when:
 - The person against whom the deadly force was used was in the process of unlawfully entering or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
 - The person using the deadly force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
- A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

The first presumption listed above does not apply if the person:

- Against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;
- Sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used;
- Who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or
- Against whom the defensive force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself or the person using force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.⁸

Immunity

Section 776.032, F.S., grants immunity from criminal prosecution⁹ and civil action to a person who used force or deadly force, so long as the force was used in accordance with ss. 776.012, 776.013, or 776.031, F.S.¹⁰ A law enforcement agency may use standard procedures for investigating the use of

⁷ *Weiland v. State*, 732 So.2d 1044, 1049 (Fla. 1999).

⁸ Section 776.013(2), F.S.

⁹ "Criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant. Section 776.032(1), F.S.

¹⁰ Immunity is not granted if the person against whom force was used was a law enforcement officer who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. Section 776.032(1), F.S.

force, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force used was unlawful.¹¹

Instances When Use of Force is Not Justifiable

Section 776.041, F.S., specifies that the above-described justifications are not available to a person who:

- Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or
- Initially provokes the use of force against himself or herself, unless:
 - Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or
 - In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Section 776.051, F.S., provides that a person is not justified in the use of force to resist an arrest by a law enforcement officer (LEO), or to resist an LEO who is engaged in the execution of a legal duty, if the LEO was acting in good faith and he or she is known, or reasonably appears, to be an LEO.

Actual Use of Force v. Threatened Use of Force

A close read of the above-listed provisions of ch. 776, F.S., reflects that only a person's actual use of force is justifiable – not a person's *threatened* use of force. While some courts have recognized that a threatened use of force equates to an actual use of force,¹² the statutes do not clearly indicate this.

In recent years, there have been cases in which persons have been convicted of aggravated assault for threatening to use force (e.g., displaying a firearm, firing a “warning shot,” etc.) and have been sentenced to mandatory minimum terms of imprisonment pursuant to the 10-20-Life law.¹³ In some of these cases, the defendant unsuccessfully argued self-defense.¹⁴ Specifying that the justifications in ch. 776, F.S., apply to threatened uses of force would clarify the issue.

Effect of the Bill

The bill amends each of the statutes in ch. 776, F.S., described above to include threatened uses of force.

The bill also contains the following legislative findings and intent:

- The Legislature finds that persons have been criminally prosecuted and have been sentenced to mandatory minimum terms of imprisonment pursuant to s. 775.087, F.S., for threatening to use force in a manner and under circumstances that would have been justifiable under ch. 776, F.S., had force actually been used.
- The Legislature intends to:
 - Provide criminal and civil immunity to those who threaten to use force if the threat was made in a manner and under circumstances that would have been immune under ch. 776, F.S., had force actually been used;

¹¹ Section 776.032(2), F.S.

¹² See, e.g., *Miller v. State*, 613 So.2d 530 (Fla. 3rd DCA 1993)(firing a firearm in the air, even as a so-called “warning shot,” constitutes as a matter of law the use of deadly force); and *Stewart v. State*, 672 So.2d 865 (Fla. 2nd DCA 1996)(the mere display of a gun without more constitutes non-deadly force).

¹³ For example, 53 year old Orville Wollard was charged with aggravated assault with a deadly weapon after firing a warning shot into a wall in response to his daughter's boyfriend aggressive behavior towards his daughter (the boyfriend had physically attacked Wollard earlier that day and, upon returning to Wollard's house, shoved Wollard's daughter and punched a hole in the wall). Wollard claimed self-defense but was convicted and sentenced to 20-years pursuant to the 10-20-Life law. <http://famm.org/orville-lee-wollard/> (last visited on November 1, 2013); <http://www.theledger.com/article/20090619/NEWS/906195060> (last visited on November 1, 2013).

¹⁴ *Id.*

- Clarify that those who threaten to use force may claim self-defense if the threat was made in a manner and under circumstances that would have been justifiable under ch. 776, F.S., had force actually been used;
- Ensure that those who threaten to use force in a manner and under circumstances that are justifiable under ch. 776, F.S., are not sentenced to a mandatory minimum term of imprisonment pursuant to s. 775.087, F.S.; and
- Encourage those who have been sentenced to a mandatory minimum term of imprisonment pursuant to s. 775.087, F.S., for threatening to use force in a manner and under circumstances that are justifiable under ch. 776, F.S., to apply for executive clemency.

B. SECTION DIRECTORY:

Section 1. Provides legislative findings and intent.

Section 2. Amends s. 776.012, F.S., relating to use of force in defense of person.

Section 3. Amends s. 776.013, F.S., relating to home protection; use of deadly force; presumption of fear of death or great bodily harm.

Section 4. Amends s. 776.031, F.S., relating to use of force in defense of others.

Section 5. Amends s. 776.032, F.S., relating to immunity from criminal prosecution and civil action for justifiable use of force.

Section 6. Amends s. 776.041, F.S., relating to use of force by aggressor.

Section 7. Amends s. 776.051, F.S., relating to use of force in resisting arrest or making an arrest or in the execution of a legal duty; prohibition.

Section 8. Provides that the bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

The bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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A bill to be entitled
An act relating to threatened use of force; providing legislative findings and intent; amending s. 776.012, F.S.; applying provisions relating to the use of force in defense of persons to threats of force; amending s. 776.013, F.S.; applying presumption that relate to the use of force to threats of force; applying provisions relating to the use of force to threats of force; amending s. 776.031, F.S.; applying provisions relating to the use of force in defense of property to threats of force; amending s. 776.032, F.S.; applying immunity provisions that relate to the use of force to threats of force; amending s. 776.041, F.S.; applying provisions relating to the use of force by an aggressor to threats of force; providing exceptions; amending s. 776.051, F.S.; providing that a person is not justified in the threatened use of force to resist an arrest by a law enforcement officer; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1.

(1) The Legislature finds that persons have been criminally prosecuted and have been sentenced to mandatory minimum terms of imprisonment pursuant to s. 775.087 for threatening to use force

27 in a manner and under circumstances that would have been
 28 justifiable under ch. 776, had force actually been used.

29 (2) The Legislature intends to:

30 (a) Provide criminal and civil immunity to those who
 31 threaten to use force if the threat was made in a manner and
 32 under circumstances that would have been immune under ch. 776
 33 had force actually been used;

34 (b) Clarify that those who threaten to use force may claim
 35 self-defense if the threat was made in a manner and under
 36 circumstances that would have been justifiable under ch. 776 had
 37 force actually been used;

38 (c) Ensure that those who threaten to use force in a manner
 39 and under circumstances that are justifiable under ch. 776 are
 40 not sentenced to a mandatory minimum term of imprisonment
 41 pursuant to s. 775.087; and

42 (d) Encourage those who have been sentenced to a mandatory
 43 minimum term of imprisonment pursuant to s. 775.087, for
 44 threatening to use force in a manner and under circumstances
 45 that are justifiable under ch. 776, to apply for executive
 46 clemency.

47 Section 2. Section 776.012, Florida Statutes, is amended
 48 to read:

49 776.012 Use of force in defense of person.—A person is
 50 justified in using or threatening to use force, except deadly
 51 force, against another when and to the extent that the person
 52 reasonably believes that such conduct is necessary to defend

53 himself or herself or another against the other's imminent use
 54 of unlawful force. However, a person is justified in using or
 55 threatening to use ~~the use of~~ deadly force and does not have a
 56 duty to retreat if:

57 (1) He or she reasonably believes that using or
 58 threatening to use such force is necessary to prevent imminent
 59 death or great bodily harm to himself or herself or another or
 60 to prevent the imminent commission of a forcible felony; or

61 (2) Under those circumstances permitted pursuant to s.
 62 776.013.

63 Section 3. Subsections (1), (2), and (3) of section
 64 776.013, Florida Statutes, are amended to read:

65 776.013 Home protection; use of deadly force; presumption
 66 of fear of death or great bodily harm.—

67 (1) A person is presumed to have held a reasonable fear of
 68 imminent peril of death or great bodily harm to himself or
 69 herself or another when using or threatening to use defensive
 70 force that is intended or likely to cause death or great bodily
 71 harm to another if:

72 (a) The person against whom the defensive force was used
 73 or threatened was in the process of unlawfully and forcefully
 74 entering, or had unlawfully and forcibly entered, a dwelling,
 75 residence, or occupied vehicle, or if that person had removed or
 76 was attempting to remove another against that person's will from
 77 the dwelling, residence, or occupied vehicle; and

78 (b) The person who uses or threatens to use defensive

79 force knew or had reason to believe that an unlawful and
 80 forcible entry or unlawful and forcible act was occurring or had
 81 occurred.

82 (2) The presumption set forth in subsection (1) does not
 83 apply if:

84 (a) The person against whom the defensive force is used or
 85 threatened has the right to be in or is a lawful resident of the
 86 dwelling, residence, or vehicle, such as an owner, lessee, or
 87 titleholder, and there is not an injunction for protection from
 88 domestic violence or a written pretrial supervision order of no
 89 contact against that person; or

90 (b) The person or persons sought to be removed is a child
 91 or grandchild, or is otherwise in the lawful custody or under
 92 the lawful guardianship of, the person against whom the
 93 defensive force is used or threatened; or

94 (c) The person who uses or threatens to use defensive
 95 force is engaged in an unlawful activity or is using the
 96 dwelling, residence, or occupied vehicle to further an unlawful
 97 activity; or

98 (d) The person against whom the defensive force is used or
 99 threatened is a law enforcement officer, as defined in s.
 100 943.10(14), who enters or attempts to enter a dwelling,
 101 residence, or vehicle in the performance of his or her official
 102 duties and the officer identified himself or herself in
 103 accordance with any applicable law or the person using or
 104 threatening to use force knew or reasonably should have known

105 that the person entering or attempting to enter was a law
 106 enforcement officer.

107 (3) A person who is not engaged in an unlawful activity
 108 and who is attacked in any other place where he or she has a
 109 right to be has no duty to retreat and has the right to stand
 110 his or her ground and use or threaten to use force ~~meet force~~
 111 ~~with force~~, including deadly force if he or she reasonably
 112 believes it is necessary to do so to prevent death or great
 113 bodily harm to himself or herself or another or to prevent the
 114 commission of a forcible felony.

115 Section 4. Section 776.031, Florida Statutes, is amended
 116 to read:

117 776.031 Use of force in defense of property ~~others~~.—A
 118 person is justified in using or threatening to use ~~the use of~~
 119 force, except deadly force, against another when and to the
 120 extent that the person reasonably believes that such conduct is
 121 necessary to prevent or terminate the other's trespass on, or
 122 other tortious or criminal interference with, either real
 123 property other than a dwelling or personal property, lawfully in
 124 his or her possession or in the possession of another who is a
 125 member of his or her immediate family or household or of a
 126 person whose property he or she has a legal duty to protect.
 127 However, a ~~the~~ person is justified in using or threatening to
 128 use ~~the use of~~ deadly force only if he or she reasonably
 129 believes that such conduct ~~force~~ is necessary to prevent the
 130 imminent commission of a forcible felony. A person does not have

131 a duty to retreat if the person is in a place where he or she
132 has a right to be.

133 Section 5. Subsections (1) and (2) of section 776.032,
134 Florida Statutes, are amended to read:

135 776.032 Immunity from criminal prosecution and civil
136 action for justifiable use of force.—

137 (1) A person who uses or threatens to use force as
138 permitted in s. 776.012, s. 776.013, or s. 776.031 is justified
139 in ~~using~~ such conduct ~~force~~ and is immune from criminal
140 prosecution and civil action for the use or threatened use of
141 such force, unless the person against whom force was used or
142 threatened is a law enforcement officer, as defined in s.
143 943.10(14), who was acting in the performance of his or her
144 official duties and the officer identified himself or herself in
145 accordance with any applicable law or the person using or
146 threatening to use force knew or reasonably should have known
147 that the person was a law enforcement officer. As used in this
148 subsection, the term "criminal prosecution" includes arresting,
149 detaining in custody, and charging or prosecuting the defendant.

150 (2) A law enforcement agency may use standard procedures
151 for investigating the use or threatened use of force as
152 described in subsection (1), but the agency may not arrest the
153 person for using or threatening to use force unless it
154 determines that there is probable cause that the force that was
155 used or threatened was unlawful.

156 Section 6. Subsection (2) of section 776.041, Florida

157 Statutes, is amended to read:

158 776.041 Use of force by aggressor.—The justification
159 described in the preceding sections of this chapter is not
160 available to a person who:

161 (2) Initially provokes the use or threatened use of force
162 against himself or herself, unless:

163 (a) Such force or threat of force is so great that the
164 person reasonably believes that he or she is in imminent danger
165 of death or great bodily harm and that he or she has exhausted
166 every reasonable means to escape such danger other than the use
167 or threatened use of force which is likely to cause death or
168 great bodily harm to the assailant; or

169 (b) In good faith, the person withdraws from physical
170 contact with the assailant and indicates clearly to the
171 assailant that he or she desires to withdraw and terminate the
172 use or threatened use of force, but the assailant continues or
173 resumes the use or threatened use of force.

174 Section 7. Subsection (1) of section 776.051, Florida
175 Statutes, is amended to read:

176 776.051 Use of force in resisting arrest or making an
177 arrest or in the execution of a legal duty; prohibition.—

178 (1) A person is not justified in the use or threatened use
179 of force to resist an arrest by a law enforcement officer, or to
180 resist a law enforcement officer who is engaged in the execution
181 of a legal duty, if the law enforcement officer was acting in
182 good faith and he or she is known, or reasonably appears, to be

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183 a law enforcement officer.

184 Section 8. This act shall take effect upon becoming a law.