

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/SB 448

INTRODUCER: Judiciary Committee and Senator Evers

SUBJECT: Threatened Use of Force

DATE: March 10, 2014

REVISED: \_\_\_\_\_

|    | ANALYST       | STAFF DIRECTOR | REFERENCE | ACTION             |
|----|---------------|----------------|-----------|--------------------|
| 1. | <u>Cellon</u> | <u>Cannon</u>  | <u>CJ</u> | <b>Favorable</b>   |
| 2. | <u>Brown</u>  | <u>Cibula</u>  | <u>JU</u> | <b>Fav/CS</b>      |
| 3. | <u>Cellon</u> | <u>Phelps</u>  | <u>RC</u> | <b>Pre-meeting</b> |

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 448 amends Florida's self-defense laws in chapter 776, F.S. The self-defense laws regulate a person's right to use force in self-defense and provide that a person is immune from civil actions and criminal prosecutions for the lawful use of force. The self-defense laws in chapter 776, F.S., do not expressly regulate the use of threats of force in self-defense. This bill expressly authorizes a person to threaten the use of force in all situations in which the person may lawfully use actual force in self-defense. Additionally, the bill extends the immunity protections in existing law for the lawful use of force to a person who lawfully uses threats of force in self-defense.

In recent years, defendants have been convicted of aggravated assault for threatening to use force (e.g., displaying a firearm, firing a "warning shot," etc.) and sentenced to mandatory minimum terms of imprisonment pursuant to the 10-20-Life law. In some cases, the defendant unsuccessfully argued self-defense. This bill removes the criminal offense of aggravated assault from the list of offenses qualifying for sentencing under the 10-20-Life law.

The bill provides a process for a person charged with a criminal offense but found to have acted in lawful self-defense to apply to the court to expunge the record.

## II. Present Situation:

### Aggravated Assault

Assault, a second degree misdemeanor<sup>1</sup> is defined as an intentional, unlawful threat by word or act to do violence to another person, coupled with an apparent ability to do so, followed by an act which creates a well-founded fear in the other person that violence is imminent.<sup>2</sup>

Aggravated assault, a third degree felony,<sup>3</sup> is an assault:

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

### The 10-20-Life Law

Section 775.087, F.S., often referred to as the “10-20-Life” law, requires a judge to sentence a person convicted of specified offenses, including aggravated assault, to a minimum term of imprisonment if, while committing the offense, the person possessed or discharged a firearm or destructive device.<sup>5</sup> 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 the person possessed a firearm or destructive device during commission of the offense;
- A minimum term of imprisonment of 20 years if the person discharged a firearm or destructive device during commission of the offense; or
- A minimum term of imprisonment of at least 25 years and up to life in prison if, during commission of the offense, the person discharged a firearm or destructive device which resulted in death or great bodily harm.<sup>6</sup>

### Self-defense

#### *The “Castle” Concept*

Section 776.013, F.S., absolves a person of a duty to retreat before using deadly force if the person knows or reasonably believes that an unlawful and forcible entry of a dwelling, residence, or occupied vehicle was occurring or had occurred.<sup>7</sup> This provision appears to codify and expand

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<sup>1</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082(4)(b) and 775.083(1)(e), F.S.

<sup>2</sup> Section 784.011(1), F.S.

<sup>3</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082(3)(d) and 775.083(1)(c), F.S.

<sup>4</sup> Section 784.021, F.S.

<sup>5</sup> The terms “firearm” and “destructive device” are defined in accordance with s. 790.001, F.S.

<sup>6</sup> Section 775.087(2)(a)1., 2., and 3., F.S.

<sup>7</sup> A dwelling is defined as: “a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.” Section 776.013(5)(a), F.S. A residence is defined as “a dwelling in which a person resides, even temporarily, or visits as an invited guest.” Section 776.013(5)(b), F.S. A vehicle is defined as “a motorized or non-motorized conveyance intended to transport people or property.” Section 776.013(5)(c), F.S. In addition to extending the concept of a home to other places of shelter, s. 776.013(3), F.S., extends the right to “stand your ground” beyond a place of habitation

what constitutes a “castle” under the common law. Under the common law “Castle Doctrine,” a “castle” was limited to a person’s home.

Section 776.013(4), F.S., creates a presumption that a person intends to commit an unlawful act using force or violence when that person unlawfully and forcibly enters another person’s dwelling, residence, or occupied vehicle. Similarly, s. 776.013(1), F.S., creates a presumption that the person using deadly, defensive force has a reasonable fear of imminent peril of death or great bodily harm.

The presumption that a person intends to commit an unlawful act does not apply if the person against whom force is used:

- Has the right to enter the place, including as an owner or lessee, and if he or she is not subject to a court-ordered injunction or “no contact” order.
- Has custody of and is in the process of legally removing a child or grandchild.
- Is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle for that purpose.
- Is a law enforcement officer acting pursuant to his or her official duties.

***Self-defense and Defense of Others (Outside the “Castle”)***

Section 776.012, F.S., relieves a person of a duty to retreat before using non-deadly force when the person reasonably believes that the force is needed for defense against a person’s imminent use of unlawful force. Deadly force is permitted when the person defends himself or herself or another person under a reasonable belief that deadly force is needed to prevent imminent great bodily harm or death or to prevent the perpetrator from committing a forcible felony.<sup>8</sup>

***Self-defense and Defense of Property***

Section 776.031, F.S., authorizes a person to use non-deadly force to protect personal property and real property other than a dwelling. Additionally, the provision absolves a person of a duty to retreat and justifies the use of deadly force if the person reasonably believes deadly force is necessary to prevent the commission of a forcible felony.<sup>9</sup>

***Limitations on Self-defense Claims by Aggressors***

A person who is in the process of committing or escaping after committing a forcible felony is precluded from claiming a justifiable use of force.<sup>10</sup>

The defense is also not available to a person who otherwise qualifies but initially provokes the use of force against himself or herself, unless:

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altogether provided that a person is attacked while he or she is in a place where he or she has a right to be and is not engaged in unlawful activity.

<sup>8</sup> Section 776.012, F.S.

<sup>9</sup> A forcible felony is defined to include the following offenses: “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.” Section 776.08, F.S.

<sup>10</sup> Section 776.041(1), F.S.

The force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and has exhausted every reasonable means other than the use of force which is likely to result in death or great bodily harm; or

- The person physically withdraws in good faith and clearly indicates the desire to withdraw, but the assailant continues or resumes the use of force.<sup>11</sup>

### ***Immunities and Defenses to Legal Actions***

A person who uses force as authorized under the Stand Your Ground law is immune from criminal prosecution and any civil action based on the use of force. Immunity from criminal prosecution includes immunity from being arrested, detained in custody, and charged or prosecuted.<sup>12</sup> A defendant to a civil action based on a use of force is entitled to reasonable attorney's fees, court costs, lost income and all expenses related to the defense of the action if the defendant is immune from criminal prosecution for the use of force.<sup>13</sup>

### **Case Law**

#### ***Actual Use of Force vs. Threatened Use of Force***

The above-listed provisions of ch. 776, F.S., expressly address a person's actual use of force, not a person's threatened use of force. Although some courts have recognized that a threatened use of force, the firing of a warning shot, is an actual use of force,<sup>14</sup> 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.<sup>15</sup> In some of these cases, the defendant unsuccessfully argued self-defense.<sup>16</sup>

### **Expunctions of Criminal Records**

To expunge a record generally means to remove or delete an offense from a person's criminal record. This authority is reserved with the court. Florida law authorizes courts to order that a record be expunged, in accordance with the court having jurisdiction over their own procedures, including maintaining and expunging judicial records.<sup>17</sup>

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<sup>11</sup> Section 776.041(2)(a) and (b), F.S.

<sup>12</sup> Section 776.032(1), F.S.

<sup>13</sup> Section 776.032(3), F.S.

<sup>14</sup> See, e.g., *Hosnedl v. State*, 2013 WL 5925402, 404-405 (Fla. 4th DCA 2013) in which a weapon was arguably accidentally discharged; *Stewart v. State*, 672 So.2d 865, 867-868 (Fla. 2nd DCA 1996)(the mere display of a gun without more constitutes non-deadly force); and *Miller v. State*, 613 So.2d 530, 531 (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).

<sup>15</sup> 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's aggressive behavior towards his daughter. The Defendant alleged that his daughter's boyfriend had physically attacked him earlier that day and, upon returning to the Defendant's house, shoved his daughter and punched a hole in the wall). The defendant 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 20, 2013); <http://www.theledger.com/article/20090619/NEWS/906195060> .

<sup>16</sup> *Id.*

<sup>17</sup> 16 FLA. PRAC. SENTENCING S. 12:29 (2013).

Section 943.0585, F.S., establishes authority for persons charged with or convicted of crimes in certain circumstances to request that the court expunge the criminal record. A person whose record is expunged may, in most circumstances, deny or fail to acknowledge arrests covered by an expunged record.

To initiate the process of expunging a criminal history record, a person must first apply for and receive a certificate of eligibility from the Department of Law Enforcement. When the person applies for a certificate of eligibility, the department will, among other things, determine whether the request for an expunction relates to the following crimes which do not qualify for expunction:<sup>18</sup>

- Crimes committed against children, which are Luring or enticing a child (s. 787.025, F.S.); Procuring person under age of 18 for prostitution (s. 796.03, F.S.); Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age (s. 800.04, F.S.); Sexual performance of a child (s. 827.071, F.S.); Protection of Minors/prohibition of certain acts in connection with obscenity (s. 847.0133, F.S.); Computer pornography/traveling to meet minor (s. 847.0135, F.S.); Selling or buying of minors s. 847.0145, F.S.; and Qualifying offenses under the Florida Sexual Predators Act (s. 775.21, F.S.);
- Crimes involving Sexual battery (chapter 794, F.S.); Sexual misconduct (ss. 393.135, 394.4593, and 916.1075, F.S.); Lewd or lascivious offenses against the elderly or a disabled person (s. 825.1025, F.S.); and Voyeurism (s. 810.14, F.S.);
- Crimes involving Drug trafficking (s. 893.135, F.S.);
- Crimes involving the Florida Communications Fraud Act (s. 817.034);
- Offenses by Public officials (ch. 839, F.S.); and
- Crimes qualifying as dangerous crimes for purposes of pretrial detention determinations, which include aggravated assault, aggravated battery, homicide, and manslaughter (s. 907.041(4), F.S.)

Persons seeking the expunction of a criminal record must submit a petition to the court containing:

- A valid certificate of eligibility for expunction issued by the Department of Law Enforcement; and
- A sworn statement by the petitioner attesting that:
  - The petitioner has no prior adjudications of guilt by the court for a criminal offense or comparable ordinance violation, or been adjudicated delinquent by the court for a juvenile felony offense or certain misdemeanor offenses;
  - The petitioner has not received a prior sealing or expunction of a criminal history record.<sup>19</sup>

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<sup>18</sup> Section 943.0585, F.S.

<sup>19</sup> Section 943.0585(1), F.S.

### III. Effect of Proposed Changes:

CS/SB 448 amends Florida's self-defense law in ch. 776, F.S. The bill expressly authorizes a person to threaten the use of force in self-defense in all situations in which the actual use of force is lawful under existing law. However, the bill does not appear to authorize warning shots or overrule case law finding that a warning shot is the use of deadly force. Additionally, the bill extends the immunity protections in existing law for the lawful use of force in self-defense to persons who threaten the use of force in self-defense.

The bill removes the criminal offense of aggravated assault from the list of offenses qualifying for sentencing under the 10-20-Life law.

The bill provides a process for a person charged with a criminal offense but found to have acted in lawful self-defense to petition the court to expunge the criminal history record. A person may pursue an expunction if:

- The state attorney or statewide prosecutor dismisses an information, indictment, or other charging document, or a decision not to file, based on a finding of lawful self-defense and documents that finding in a written record; or
- The court dismisses an information, indictment, or other charging document based on a finding of lawful self-defense and documents that finding in an order or memorandum.

If the person is eligible to pursue an expunction, he or she must still obtain a certificate of eligibility from the Department of Law Enforcement. Then the person must submit the certificate along with a sworn statement attesting that the petitioner is eligible for an expunction.<sup>20</sup> However, the court may deny an expunction request even if a petitioner satisfies all the eligibility requirements.

Current law prohibits persons from receiving an expunction for criminal history records relating to aggravated assault, aggravated battery, homicide, or manslaughter. This bill allows a person charged with one of those crimes to request that the record be expunged if the person is found to have been acting in lawful self-defense, pursuant to ch. 776, F.S., for the threatened, or actual use of force.

The bill takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

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<sup>20</sup> If a petitioner provides false information on a sworn statement before the court on a motion to expunge a record based on a finding of lawful self-defense, the act is punishable as a third-degree felony.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator indicates that to the extent that people are being prosecuted for threatening to use force in legitimate self-defense, this bill may reduce judicial workload. However, impact is likely insignificant.<sup>21</sup>

The Department of Corrections may realize a reduction in beds allocated to inmates convicted of aggravated assault if there are fewer convictions due to successful claims of immunity or self-defense. Additionally, the need for prison beds may be reduced as a result of the elimination of the application of the 10-20-Life law to convictions for aggravated assault.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 776.012, 776.013, 776.031, 776.032, 776.041, and 776.051. The bill creates section 776.09 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on March 4, 2014:**

The committee substitute:

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<sup>21</sup> Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 448* (December 30, 2013).

- Removes the criminal offense of aggravated assault from the list of offenses qualifying for sentencing under the 10-20-Life law.
- Clarifies that self-defense may be claimed through the threatened use of force in each instance in which a person may currently claim self-defense for the actual use of force.
- Authorizes persons charged with a criminal offense to petition the court to expunge the record based on the finding that the person has acted in lawful self-defense.

B. Amendments:

None.