

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 89 Threatened Use of Force

**SPONSOR(S):** Judiciary Committee; Criminal Justice Subcommittee; Combee; Edwards and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 448

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 1 N, As CS	Cunningham	Cunningham
2) Judiciary Committee	15 Y, 2 N, As CS	Cunningham	Havlicak

### 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 in self-defense. 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 are not clear.

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

The bill also provides that a person is eligible to apply for and receive a certificate of eligibility for expunction from the Florida Department of Law Enforcement (FDLE), and does not have to comply with the criteria for obtaining such certificate, if the person has an information, indictment, or other charging document not filed or dismissed by the state attorney or court because it was found that the person acted in lawful self-defense pursuant to ch. 776, F.S.

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’s expunction provisions will have a workload impact on FDLE. See fiscal section.

The bill is effective upon becoming a law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **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 in self-defense.

##### *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
- 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.

##### *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.

### *Castle Doctrine Presumptions*

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").<sup>1</sup> Section 776.013, F.S., contains the following presumptions relating 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.
- 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.<sup>2</sup>

### *Immunity*

Section 776.032, F.S., grants immunity from criminal prosecution<sup>3</sup> 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.<sup>4</sup> A law enforcement agency may use standard procedures for investigating the use of 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.<sup>5</sup>

### *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,<sup>6</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>7</sup> In some of

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<sup>1</sup> *Weiland v. State*, 732 So.2d 1044, 1049 (Fla. 1999).

<sup>2</sup> Section 776.013(2), F.S.

<sup>3</sup> "Criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant. Section 776.032(1), F.S.

<sup>4</sup> 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.

<sup>5</sup> Section 776.032(2), F.S.

<sup>6</sup> *See, e.g., Hosnedl v. State*, 2013 WL 5925402 (Fla. 4th DCA 2013)(quoting *State v. Moore*, 729 A.2d 1021, 1029 (N.J. 1999)); *Stewart v. State*, 672 So.2d 865 (Fla. 2d DCA 1996)(the mere display of a gun without more constitutes non-deadly force); and *Miller v. State*, 613 So.2d 530 (Fla. 3d 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>7</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 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

these cases, the defendant unsuccessfully argued self-defense.<sup>8</sup> Specifying that the justifications in ch. 776, F.S., apply to threatened uses of force may 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. As a result, the criminal and civil immunity provisions apply to those who threaten to use force, so long as 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. Additionally, 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.

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 the 10-20-Life law,<sup>9</sup> and
  - Encourage those who have been sentenced to a mandatory minimum term of imprisonment pursuant to the 10-20-Life law for threatening to use force in a manner and under circumstances that are justifiable under ch. 776, F.S., to apply for executive clemency.

### **Expunging Criminal History Records**

Section 943.0585 F.S., sets forth procedures for expunging criminal history records. When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record, and can only make a notation indicating compliance with an expunction order.<sup>10</sup> FDLE must retain expunged records.<sup>11</sup> Records that have been expunged are confidential and exempt from public records.<sup>12</sup>

A person seeking an expunction must first obtain a certificate of eligibility from FDLE. In order to receive a certificate, a person must:

- Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor indicating that:

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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 February 17, 2014); <http://www.theledger.com/article/20090619/NEWS/906195060> (last visited on February 17, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> 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 to a minimum term of imprisonment if, during the commission of the offense, the person possessed or discharged a firearm or destructive device. Under the 10-20-Life law, a person convicted of aggravated assault must be sentenced to:

- 3 years if such person possessed a firearm or destructive device during the commission of the offense;
- 20 years if such person discharged a firearm or destructive device during the commission of the offense; and
- 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.

<sup>10</sup> Section 943.0585(4), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> Section 943.0585(4)(c), F.S.

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- An indictment, information, or other charging document was not filed or issued in the case; or if filed, was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction;
  - None of the charges related to the record the person wishes to expunge resulted in a trial, without regard to whether the outcome was other than an adjudication of guilt; and
  - The criminal history record does not relate to a violation of specified offenses.<sup>13</sup>
- Pay a \$75 processing fee.
  - Submit a certified copy of the disposition of the record they wish to have expunged.
  - Have never been adjudicated guilty or delinquent for committing a felony or misdemeanor specified in s. 943.051(3)(b), F.S.,<sup>14</sup> prior to the date of their application for the certificate.<sup>15</sup>
  - Have never been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity of the record they wish to have expunged.
  - Have never had a prior sealing or expunction of criminal history record unless an expunction is sought for a record previously sealed for 10 years and the record is otherwise eligible for expunction. A record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court.<sup>16</sup>
  - No longer be under any court supervision related to the record they wish to have expunged.<sup>17</sup>

In addition to the certificate, a petition to expunge a criminal history record must also include the petitioner's sworn statement that he or she:

- Has not previously been adjudicated guilty of an offense or comparable ordinance violation, or adjudicated delinquent for committing a felony or misdemeanor listed in s. 943.051(3)(b), F.S.;
- Has not been adjudicated guilty or delinquent for committing any of the acts he or she is currently trying to have sealed or expunged;
- Has not obtained a prior sealing or expunction; and
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before any court.<sup>18</sup>

Once a petition to expunge is submitted, the court must decide whether the expunction is appropriate.<sup>19</sup>

#### Effect of the Bill

The bill provides that a person is eligible to apply for and receive a certificate of eligibility for expunction from FDLE, and does not have to comply with any of the above-described criteria for obtaining such certificate, if the person has an information, indictment, or other charging document not filed or dismissed by the state attorney or court because it was found that the person acted in lawful self-defense pursuant to ch. 776, F.S. The person will still have to provide the sworn statement outlined above. As a result, such persons will be able to receive a certificate without a certified statement from the state attorney indicating what occurred in the case, without paying the \$75 fee, and without

<sup>13</sup> These offenses include: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients, or the reporting of such sexual misconduct; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child, lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

<sup>14</sup> These offenses include: assault, as defined in s. 784.011, F.S.; battery, as defined in s. 784.03, F.S.; carrying a concealed weapon, as defined in s. 790.01(1), F.S.; unlawful use of destructive devices or bombs, as defined in s. 790.1615(1), F.S.; negligent treatment of children, as defined in s. 827.05, F.S.; assault or battery on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a) and (b), F.S.; open carrying of a weapon, as defined in s. 790.053 F.S.; exposure of sexual organs, as defined in s. 800.03, F.S.; unlawful possession of a firearm, as defined in s. 790.22(5), F.S.; petit theft, as defined in s. 812.014(3), F.S.; cruelty to animals, as defined in s. 828.12(1), F.S.; arson, as defined in s. 806.031(1), F.S.; and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property as defined in s. 790.115, F.S.

<sup>15</sup> Section 943.0585(2)(d), F.S.

<sup>16</sup> Section 943.0585(2)(h), F.S.

<sup>17</sup> Section 943.0585(2), F.S.

<sup>18</sup> Section 943.0585(1)(b), F.S. Knowingly providing false information on the sworn statement is a third degree felony.

<sup>19</sup> Section 943.0585, F.S.

submitting a certified copy of the disposition of the record they wish to have expunged to FDLE. The court retains discretion to grant or deny the person's petition to expunge.

**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. Creates s. 776.09, F.S., relating to eligibility for expunction of records.

Section 9. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 10. 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's expunction provisions will likely result in a workload impact to FDLE to the extent they require FDLE to investigate each expunction application to determine whether an information, indictment, or other charging document not was filed or was dismissed by the state attorney or court because it was found that the person acted in lawful self-defense pursuant to ch. 776, F.S. There will also be a negative fiscal impact in that the bill does not require the applicant to submit the \$75 application fee currently required by statute.

**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:**

Section 943.0585(2), F.S., requires FDLE to establish procedures pertaining to the application for and issuance of certificates of eligibility for expunction by rule adopted pursuant to ch. 120, F.S. The bill does not appear to create a need for additional rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Currently, persons applying for a certificate must submit to FDLE a sworn statement from the appropriate prosecutor indicating the disposition of the offense. However, the bill exempts from this requirement, applicants whose information, indictment, or other charging document was not filed or was dismissed by the state attorney or court because it was found that the person acted in lawful self-defense. It is unclear how FDLE will make this determination.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 20, 2014, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment provides that a person is eligible to apply for and receive a certificate of eligibility for expunction from FDLE, and does not have to comply with certain criteria for obtaining such certificate, if the person has an information, indictment, or other charging document not filed or dismissed by the state attorney or court because it was found that the person acted in lawful self-defense.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.