

## ANALYSIS OF FLORIDA'S NEW "PROTECTION OF PERSONS & PROPERTY" LAW

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In April 2005 the Florida Legislature passed Senate Bill 436, which was signed into law by the governor. This law went into effect on October 1, 2005, and has made some important changes in Florida law. Let's take a look, and analyze this new law, remembering that there are NO appellate cases yet interpreting it. Here's a synopsis of the legislation written by the Senate Committee on Criminal Justice:

"The bill permits a person to use force, including deadly force, without fear of criminal prosecution or civil action for damages, against a person who unlawfully and forcibly enters the person's dwelling, residence, or occupied vehicle. Additionally, the bill abrogates the common law duty to retreat when attacked before using deadly force that is reasonably necessary to prevent imminent death or great bodily harm.

"The bill creates a presumption that a defender in his or her home, in a place of temporary lodging, as a guest in the home or temporary lodging of another, or in a vehicle has a reasonable fear of imminent death or great bodily harm when the intruder is in the process of unlawfully and forcibly entering or enters. It also creates a presumption that the intruder intends to commit an unlawful act involving force or violence. These presumptions protect the defender from civil and criminal prosecution for unlawful use of force or deadly force in self-defense.

"These presumptions about the intent of the intruder, however, do not apply when the intruder:

- Has a right to be in the home, place of temporary lodging, or vehicle, unless there is a domestic violence injunction or written pretrial supervision order of no contact against that person;
- Is seeking to remove a person lawfully under his or her care from a home, place of temporary lodging, or vehicle; or
- Is a law enforcement officer, acting lawfully, and the defender knew or had reason to know that the intruder was a law enforcement officer.

"Additionally, a defender is not entitled to the benefit of the presumptions created by the bill if the defender was engaged in unlawful activity at the time . . . or was using his or her home, place of temporary lodging . . . or vehicle to further unlawful activity. The bill does not require any connection between the unlawful activity and the unlawful and forcible entry.

"This bill expands the castle doctrine by expanding the concept of what is a "castle" and by expanding the group of persons entitled to the castle's protection.

"Under the castle doctrine, a person has no duty to retreat from his or her "castle" (a person's home or workplace), before resorting to deadly force necessary for self-defense. The bill expands the concept of the castle to include attached porches, any type of vehicle, and places of temporary lodging, including tents.

"Under the castle doctrine, only persons lawfully residing in a dwelling have no duty to retreat before resorting to deadly force necessary for self-defense. Under the provisions of the bill, invited guests in another person's "castle" will have the same rights to self-defense as a resident . . . .

"Under Florida common law, a person has a duty to retreat, if outside his or her home or place of business, before resorting to deadly force reasonably believed necessary to prevent imminent death or great bodily harm. A person attacked within his or her home by a co-occupant or invitee must also retreat, if possible, within the home, but not from the home, before resorting to deadly force. Under the bill, a person will no longer have any duty to retreat, as long as the person is in a place where he or she is lawfully entitled to be.

"The bill provides that a person who acts in self-defense in accordance with the provisions of the bill is immune from criminal prosecution and civil actions. This provision is slightly different than the defense to civil actions under s. 776.085, F.S., in that the bill does not require proof that the intruder was attempting to engage in a forcible felony. Under the bill, the intruder's actual intent is irrelevant. The bill, in effect, creates a conclusive presumption of the intruder's malicious intent."

Anyway, now you know what the Legislature was trying to do. Whether the courts interpret the law exactly as the Criminal Justice Committee envisioned it is another question. However, one thing that should be perfectly clear to everyone is that the Legislature was not very happy with the "retreat rule", and wanted to make some drastic changes in it. For that, they should be applauded!

To do this the Legislature enacted some new laws, and amended some old ones. Here's my analysis.

### THE TWO NEW PRESUMPTIONS IN 776.013:

Completely new to the statutes is F.S. 776.013. This section is titled "Home Protection; Use of Deadly Force: Presumption of Fear of Death or Great Bodily Harm." It creates two new presumptions.

The **first presumption** is:

A person who uses deadly force under certain conditions has a "reasonable fear" of "imminent" death or great bodily harm to themselves or others when an intruder (1) has unlawfully and forcefully entered, or is attempting to enter, a dwelling, residence, or occupied vehicle, or (2) the intruder has removed or is attempting to remove another person against their will from such place or vehicle.

A person who unlawfully and by force enters or attempts to enter a person’s dwelling, residence, or occupied vehicle is doing so with the intent to commit an unlawful act involving force or violence.

**NEW DEFINITIONS IN 776.013:**

The statute redefines a “dwelling” as a building or conveyance of any kind, temporary or permanent, mobile or immobile, including an attached porch, so long as (1) there is a roof over it, and (2) it is designed to be occupied by people lodging there at night. It includes a tent.

A “residence” is defined as a dwelling where a person resides either temporarily, permanently, or is visiting as an invited guest. This will include a motel room, hotel room, or even a friend’s home.

A “vehicle” means a conveyance of any kind, motorized or not, which is designed to transport people or property. Probably excluded are bicycles, mopeds, and smaller non-motored boats where sleeping space is not provided as manufactured, as these are generally not considered as a “conveyance”.

**HOW DOES THIS SECTION, 776.013, WORK?**

According to the Senate Staff Analysis the presumptions in this section are absolute (ie: a “conclusive” presumption)<sup>1</sup>, and cannot be controverted or rebutted in a court of law. What does this mean?

Well, before anyone can lawfully use deadly force they must have a reasonable fear of imminent death or great bodily harm, or reasonably believe it is necessary to stop or prevent the imminent commission of a forcible felony. If you have the right to use deadly force – excessive force should generally not be an issue, because deadly force is the “most” force you can use. On the other hand, if you’ve incapacitated your assailant, he surrenders, or runs, I think there are some real serious problems with your pulling the trigger again, and you may be looking at a manslaughter or aggravated battery charge if that happens, because under those conditions there is a good possibility that you and your family are out of any imminent danger, and/or the forcible felony has ended. If that occurs it is rare you would have a “reasonable” fear of “imminent” anything.

Anyway, since it appears that this section of the statute creates a conclusive presumption that the attacker who unlawfully uses force to gain or attempt to gain entry into your dwelling, residence, or occupied vehicle is out to injure you or another person, and likewise, since it appears the statute creates a conclusive presumption that your fear of imminent death or great bodily harm is also reasonable once the unlawful intrusion or its attempt (ie: “forcible felony”) begins – you would seem to be “immune” from prosecution according to another new portion of the law, F.S. 776.032(1):

“A person who uses force as permitted in s. 776.012; 776.013; or s. 776.031 is justified in using such force and is **immune** from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a law enforcement officer, as defined in s. 943.10(14) . . . . As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.”

Now, don’t take the “immunity” literally. You might still be arrested and prosecuted, although this new section is designed to lessen your chances of this. At worst, if your use of force was due to an intruder’s unlawful and forceful entry pursuant to F.S. 776.013 – it appears that the only issues in such a case will be: (1) whether the person against whom the force was used was engaged in an unlawful attempt or unlawful entry into one of these places (ie: residence, dwelling, or occupied vehicle); (2) if the person using the force knew or had reason to believe this unlawful event was happening; and if so, (3) whether any of the statutory exceptions (*infra*) applied.

Furthermore, it appears that those persons’ able to benefit from these presumptions are going to be guests, residents, lawful occupants, and those who have a present right to enter the dwelling, residence, or occupied vehicle. It’s also possible that it may extend to anyone else who is defending such a structure or vehicle under the same requisites as an occupant – but I think the safer view is to interpret the presumptions in this section to apply only to occupants, guests, and those with a right to be inside. Unfortunately, the drafting of the law leaves much to be desired, lacks clarity, and is going to foster lots of litigation. Too bad they didn’t just adopt the Senate Criminal Justice Committee summary – which is a lot easier to understand than the actual bill passed.

**EXCEPTIONS TO PRESUMPTIONS IN 776.013:**

Now, remember – when you are defending your dwelling, residence, or occupied vehicle there are definite exceptions to the presumptions and protections of the statute. In the following situations there are no presumptions or immunity:

- A. The presumption in F.S. 776.013(1), that you had a reasonable fear of imminent death or great bodily harm to yourself or another does not exist if used against a person who is a lawful resident, owner, lessee, titleholder, or person with a right to be in such home/residence/occupied vehicle, unless
  - i. There is an active injunction for protection from domestic violence against them, or
  - ii. There is a written Court order of pretrial supervision of “no contact” against them.

Interestingly, although committee and staff reports say the presumption in F.S. 776.013(4) also disappears under these circumstances, the actual subsection that became law is not drafted that way. So, it may be that an appellate court may one day say that the second presumption survives, even to this protected class, whenever a person “unlawfully and forcefully” enters or attempts to enter. Test case time, again.

- B. The same loss of presumption analysis applies to the use of deadly force against a parent or grandparent trying to remove their child or grandchild, or any other person who has lawful custody or guardianship of the child. 2
- C. The same loss of presumption analysis applies when the person **using** deadly force is engaged in an unlawful activity, or is using the residence, dwelling, or vehicle to further unlawful activity.
- D. There are no presumptions or immunity in favor of the use of deadly force when the person using deadly force knows or should know the person it is used against is a law enforcement officer; or in situations where the officer enters or attempts to enter after identifying himself while in the performance of his or her legal duties.

#### **DUTY TO RETREAT UNDER THE NEW LAW:**

Well, as already mentioned, the new Protection of Persons and Property Law has made major changes in the retreat rule. Prior to the new statute the case law made it clear that unless you were inside your home or business, you had to **retreat** before using deadly force if you could do so without increasing the danger to yourself. In your home or business there was no obligation to retreat except against a co-occupant, or person with a legally equal right to be there. It's pretty clear from the Committee Reports and Staff Analysis that the Legislature wanted to totally undo the retreat rule to residents, occupants, and guests in a dwelling, residence, or occupied vehicle – and that the duty to retreat from a co-occupant was also out. Unfortunately, the drafting of F.S. 776.013 on this issue really stinks! There is virtually **nothing** in F.S. 776.013 that discusses what happens to the retreat rule as applied to dwellings, residences, and occupied vehicles! Only subsection (3) discusses the retreat rule, and that subsection says a person not engaged in an unlawful activity who is attacked in "any other place" where they have "a right to be" has no duty to retreat, and may use deadly force if he/she reasonably believes such is necessary to prevent imminent death or great bodily harm, or to prevent or stop (the imminent commission of) a forcible felony.

"A person who is **not engaged** in an unlawful activity and who is attacked in **any other place** where he or she has a right to be has no duty to retreat, and has the right to stand his or her ground, and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another, or to prevent the commission of a forcible felony." [ F.S. 776.013(3) ]

So, what happened to the retreat rule? Well, the only way to find out is read the other amendments and new sections in this Act together, as a whole. If you do that, and start with the amendment to F.S. 776.012 [Use of Force in Defense of Person], that section states a person has no duty to retreat if they "reasonably believe the force is necessary to prevent imminent death or great bodily injury to themselves or another, or prevent the imminent commission of a forcible felony. If taken literally, you can use deadly force anywhere and anytime, co-occupants be damned, so long as there's a reasonable belief of imminent death or great bodily harm, or if you reasonably believe it's necessary to stop the imminent commission of a forcible felony. On the other hand, there could be limitations to this section, especially if we're reading all these new sections together.

The most probable limitation, assuming it will be limited, is by reading in the amendments to F.S. 776.031, which abrogates the retreat rule in defense of property – so long as you are "**in a place where you have a right to be**"? Sounds very possible when you consider that "in a place where you have a right to be" is also a requirement of F.S. 776.013(3).

QUESTION: If that's true, where are those places you "have a right to be"?

ANSWER: Darned if I know! Another drafting oversight by the Legislature. However, I'll give you my best guess in the following section:

#### **PLACES WHERE YOU SHOULD HAVE "A RIGHT TO BE":**

So, where are these places you "have a right to be". My best guess is arrived at by figuring out all the places you "**don't**" have a right to be in. These should include anywhere you would technically need permission to be where you don't have it (like a neighbor's yard); anywhere you've been told to keep off by the owner or a person with authority (ie: trespass); any place where you would be violating the law by being there; any place of nuisance such as a crack house or house of prostitution. What's left is where you have a "right to be". Again, no case law on this, so far, and only my best guess.

My second guess is a lot more restrictive, and would seem to defeat the broad purpose of the new law. Strictly speaking you have a "right" to be on your own property, property lawfully in your possession, property you have a legal duty to protect, and all public property such as roads, parks, etc., where the law does not restrict your presence. For example, if a park closes at night, and you are still there – you no longer have a "right to be" there.

Thus, if you want to take no chances until the courts sort this mess out, here's where you should be able to stand your ground without retreating, so long as you have a reasonable belief of (a) imminent death or great bodily harm to yourself or another, or (b) the imminent commission of a forcible felony:

- a. Your dwelling or residence (ie: where you live), even if it is only temporary. (eg: motel, hotel, rental, home). This includes everyone who resides there with you, and all invited guests.
- b. Other places you lease, rent, or pay money to belong to (eg: farm, club, golf course, pool).
- c. Public places that are open to the public (roads, streets, side walks, parks, etc.).
- d. Any vehicle you legally occupy and all invited passengers.

Unanswered is what happens to the “guest” status when a person with superior authority orders them to leave the premises, or they commit a forcible felony in the dwelling, residence or occupied vehicle against a person with superior authority. Based upon prior case law my opinion is that their protected status will disappear.

Anyway, by reading all these amendments and new sections in the new law together it appears that the retreat rule is dead in almost every circumstance where it’s reasonable to use deadly force to prevent death, great bodily harm, or a forcible felony, with the probable qualifier – you likely have to “have a right to be” in that place, as well. Of course, that’s only my opinion at this point, but it’s buttressed by F.S. 776.032(1), which clearly states that the “immunity” from arrest and prosecution applies across the board to each of the revised sections (ie: 776.012; 776.013; 776.031). So, if it applies to “each” instance – it should cover the totality of what they allow, combined! Again, due to poor drafting by the Legislature – the final word will have to come from the courts.

Still, when relying on these new provisions of the law, you probably can’t be engaged in any unlawful act yourself, at least not as the initial aggressor. That is what the prior interpretations of self-defense law said, and should still apply.

Also, unless you are acting under the protections of F.S. 776.013 (ie: dwelling, residence or occupied vehicle against unlawful and forceful intruder); F.S. 776.013(3) and F.S. 776.012 say you must still retreat unless you **reasonably believe** your use of deadly force is **necessary** to prevent the imminent commission of a forcible felony, or prevent imminent death or great bodily harm. This is pretty much a rehash of the law as it existed before except the elimination of that portion of the previous “retreat rule” which required you to retreat if you could do so without increasing the danger to yourself.<sup>2</sup> However, under these last two sections, since there are no presumptions, if you fail to retreat, and the State Attorney takes the position that your belief in the need to use deadly force was not “reasonable”, you will likely be prosecuted.

#### **HOW MAY THIS AFFECT THE BURDEN OF PROOF:**

However, the “million dollar question”, yet unanswered, is since F.S. 776.032 states you are “immune” if you acted pursuant to any of these new or amended statutes (ie: 776.012; 776.013; 776.031), what happens if you are somehow arrested and prosecuted? Will it be the State’s burden at trial to disprove you acted reasonably from the beginning of the trial, will it be your initial burden just to raise it, or will it be your burden to prove otherwise? Very critical question!

Based upon the current case law on immunity, and from a purely legal standpoint, my opinion is that the burden would have to be on the State from the inception so long as you put the court on notice that you were raising this issue. This is a major question for the courts to decide! Only time will tell if I’m right or wrong on this one.

#### **RETREAT RULE – BUSINESS PREMISES:**

There is nothing in any of the new or amended sections of the law that specifically discusses your right not to retreat on business premises. On the other hand, if you’re on the property of your employer you should have the right to defend it as if it were yours, and thus qualify for being “in a place where you have a right to be”. Same thing if you were a security guard. F.S. 776.031. Of course, this means you reasonably believe that such force is necessary to prevent the imminent commission of a forcible felony; or per F.S. 776.012, you reasonably believe that such force is necessary to prevent imminent death or great bodily harm to yourself or another person. In other words, it looks like you should have immunity under the new act, and not need to retreat.

Whatever! A well deserved good bye to the retreat rule that in my opinion really caused many convictions of innocent persons, and good citizens merely trying to protect themselves. My heartfelt thanks to the Legislature, and all the sponsors of this new law!

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