

Supreme Court of Florida

In the matter of use by the trial courts
of the Supreme Court Standard Jury Instructions
Committee in Criminal Cases

Case No. SC

Report No. 2007-10
Committee on Standard Jury Instructions in Criminal Cases

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

This report regarding proposed amendments to the Florida Standard Jury Instructions in Criminal Cases on the Supreme Court's website at http://www.floridasupremecourt.org/jury_instructions.shtml, is filed pursuant to Article V, section 2(a), Florida Constitution. The committee proposes the following amended criminal jury instructions.

Proposal 1

7.7 Manslaughter

Proposal 2

8.9 Culpable Negligence

Proposal 3

6.6 Attempted Voluntary Manslaughter

The proposed amended instructions can be found in legislative format at Appendix A. Words to be removed are shown by strike-through marks, and words to be added are shown by underlining. The proposed manslaughter instruction was published in *The Florida Bar News* on January 15, 2007. Comments were received from Mr. Adam Tebrugge, Assistant Public Defender, Twelfth Judicial Circuit; Mr. Jay Thomas, Staff Attorney, Second District Court of Appeal; The Honorable

Bob Dillinger, Public Defender, Sixth Judicial Circuit, on behalf of the Florida Public Defender Association; and Mr. Stephen Krossschell. These comments were received in February of 2007. Mr. Michael Sinacore, Assistant State Attorney, Thirteenth Judicial Circuit, filed his comments by e-mail on March 15, 2007. All of the comments received address the manslaughter instruction. The proposed culpable negligence instruction was published in *The Florida Bar News* on July 1, 2007. Mr. James T. Miller, on behalf of the Florida Association of Criminal Defense Lawyers (FACDL) filed his comments regarding this instruction on July 25, 2007. All three proposed instructions were published in *The Florida Bar News* on August 1, 2007. Mr. Dillinger filed comments regarding the manslaughter instruction on August 23, 2007. Mr. Sinacore filed comments on August 27, 2007 regarding the manslaughter instruction. The comments and committee discussion for each comment are contained in the separate proposals in this report.

Documents supplementing this report are attached at Appendix B. Comments to the proposed instructions are located at Appendix C. The interim project of the Florida House of Representatives is attached at Appendix D. The minority report of the committee is located at Appendix E.

Explanation of Proposals

Proposal 1 7.7 Manslaughter

The pertinent part of Florida's manslaughter statute, s. 782.07(1), Florida Statutes, reads as follows.

(1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of this chapter, is manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s.775.083, or s. 775.084.

The original manslaughter jury instruction was approved by the Supreme Court in 1970. The Court also approved a culpable negligence instruction that same year. The definition of "culpable negligence" in the two instructions was not identical. The manslaughter instruction defined "culpable negligence" as follows.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use

under like circumstances. Negligence may consist either of doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. Culpable negligence is a conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when done without the intent to injure any person but with utter disregard for the safety of others.

The culpable negligence instruction read:

Culpable negligence is a conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when done without the intent to injure any person but with utter disregard for the safety of others.

There have been subsequent amendments to one or both of these instructions in 1981, 1985, 1992, and 1994, which are relevant to this report.

In 1981, the definition of "culpable negligence" in the manslaughter instruction read as follows:

I will now define "culpable negligence" for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

In 1985, in The Florida Bar re: Standard Jury Instructions in Criminal Cases, 477 So.2d 985 (Fla. 1985), the Court approved a new manslaughter instruction. The committee stated in its report to the Court: "A new manslaughter instruction is submitted to take the place of the one which appears on page 68 (exhibit 2). The new instruction is intended to make clear the residual aspect of manslaughter and to substitute a new definition of culpable negligence more nearly

in line with current law.” The Court approved the instruction. The 1985 revision to the instruction was written as follows:

- 1. (Victim) is dead.**
- 2. The death was caused by the**
 - (a) act of (defendant).**
 - (b) procurement of (defendant).**
 - (c) culpable negligence of (defendant).**

The definition of "culpable negligence" was also amended to the following:

I will now define “culpable negligence” for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

In the 1985 opinion, the Court also approved a new culpable negligence instruction. In a report to the Court, the committee stated: "A new definition of culpable negligence has been adopted so as to more nearly reflect current law. Therefore, a new instruction on culpable negligence is submitted to take the place of the one which appears on page 91." The Court approved the changes. The instruction read as follows.

I will now define “culpable negligence” for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard for the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The last paragraph in the manslaughter instruction was omitted from the culpable negligence instruction. A review of the committee minutes for October and December of 1984 show that the committee deliberately omitted the second paragraph found in the definition of "culpable negligence" in the manslaughter instruction, from the culpable negligence instruction, however, no reasoning for the omission was noted in the minutes. An assumption can be drawn, however, that the last paragraph was deleted because the misdemeanor culpable negligence statute is designed to protect people from any injury, while the manslaughter statute is designed to protect people from death.

The wording of this instruction has not changed from 1985 to the present.

In 1992 the manslaughter instruction was amended. See Standard Jury Instructions-Criminal Cases No. 92-1, 603 So. 2d 1175 (Fla. 1992). The word “intentional” was added to the instruction in element 2(a) and element 2(b). The instruction now read:

- 1. (Victim) is dead.**
- 2. The death was caused by the**
 - (a) intentional act of (defendant).**
 - (b) intentional procurement of (defendant).**
 - (c) culpable negligence of (defendant).**

The definition of "culpable negligence" was not changed in the instruction.

In 1994 the manslaughter instruction was amended again. See Standard Jury Instructions in Criminal Cases (93-1), 636 So. 2d 502 (Fla. 1994). The instruction, in its current form, reads:

1. (Victim) **is dead.**

2. [Defendant]

(a) **intentionally caused the death of** (victim).

(b) **intentionally procured the death of** (victim).

(c) **The death of** (victim) **was caused by the culpable negligence of** (defendant).

The "culpable negligence" definition was not changed in the instruction.

The committee minutes of January 12, 1994, shed some light on why the manslaughter instruction was amended. A committee member argued that the element of "intent to kill" was omitted from the 1992 instruction. The committee noted that the courts had been applying common law manslaughter and requiring intent even though the statute did not include intent. One committee member asked how a jury could be instructed on the difference between intent for manslaughter and the intent for premeditated murder. Nonetheless, the committee approved the amendment requiring proof beyond a reasonable doubt that the defendant intentionally caused or procured the death of the victim. A copy of the minutes of the January 12, 1994 meeting is attached at Appendix B.

A committee of the Florida House of Representatives published a report in January 2004, titled "Interim Project on Standard Jury Instructions in Criminal Cases." This report was received by the staff of the jury instructions committee in November of 2004, and reviewed by the committee at the May 13, 2005 meeting.

The Committee on Public Safety and Crime Prevention took exception to the standard jury instruction regarding manslaughter that was approved by the Supreme Court in 1994. The committee stated in its report: "The jury instruction adds a requirement that the defendant intentionally cause or intentionally procure the death of another. In a factual situation, for example, where someone is responsible for a premeditated murder for hire plan, this instruction could effectively and erroneously confuse the culpability of the person hiring the killer to be liable for nothing more than manslaughter rather than as a principle (sic) to first degree murder. The instruction could also be construed to require essentially the

intentional cause of a negligently-caused death.” The report of the House of Representatives committee is attached at Appendix D.

Judge Bradford Thomas, a member of the Criminal Jury Instructions Committee, submitted a memorandum to the Criminal Jury Instructions Committee on September 5, 2005, titled “Proposed Revision of Second-Degree Murder & Manslaughter Instructions” requesting revisions to instruction 7.4 – Second Degree Murder and instruction 7.7 – Manslaughter.” He recommended substantial amendments to both instructions. For the purposes of this report, only the proposed change to the manslaughter instruction is discussed.

In his memorandum, Judge Thomas referenced the report by the legislative committee. Judge Thomas opined that the current manslaughter instruction added the element of an intent to kill the victim. This element was not required by the legislature when the manslaughter statute was enacted. In addition, Judge Thomas noted that the definition of “culpable negligence” in instruction 7.7 needed to be simplified because it contained unnecessary and confusing language. He submitted that juries are often confused as to the difference between first degree murder (premeditation), second degree murder (evil intent) and manslaughter (intent to cause death). He suggested that the instruction be amended to track the statute more closely, which would create an accurate statement of law and provide juries with greater clarity for identifying the delineation among the three crimes. The memorandum of Judge Thomas is attached at Appendix B.

Judge Thomas presented arguments to the committee at the February, May, and August 2006 meetings. He contended that the problem with the manslaughter instruction is that it expands the statute by adding an element not contained in the statute. The variable elements 2a and 2b require the state to prove that the defendant “intentionally caused the death” or “intentionally procured the death” of the victim. Unlike first degree murder, section 782.07(1), Florida Statutes, does not require that a person “intentionally kill” the victim to constitute the crime of manslaughter. In addition, Judge Thomas contended that the definition of “culpable negligence,” where it refers to “conduct showing reckless disregard of human life or the safety of persons exposed to its dangerous effects,” was poorly written because it did not clearly define the statutory difference between the definition of second degree murder (depraved mind regardless of human life) and manslaughter (reckless disregard of human life). He recognized that much of the definition has been based on long-standing case law; however, he concluded that both phrases were unnecessary and confusing.

Judge Thomas also argued that the instruction which states, “. . . such an indifference to the rights of others as is equivalent to an intentional violation of such rights” could be taken by a juror to require “intent” much like first degree murder.

The committee debated the conclusions drawn by Judge Thomas in his memorandum and his proposed changes to the instruction at several meetings over the course of a year. On August 25, 2006, by a vote of 7-5, the committee agreed to adopt the recommendations of Judge Thomas and amend the manslaughter instruction. The amendments are as follows.

Element 2 a and 2b:

2. a. (Defendant) **intentionally knowingly or consciously committed an act that caused the death of** (victim)
- b. (Defendant) **intentionally knowingly or consciously procured an act that resulted in the death of** (victim).

The entire committee struggled to understand why the committee in 1994 changed element 2a and element 2b to require an intentional act. Judge Terrell stated that the 1994 instruction was made out of new cloth. As previously noted, five members of the committee disagreed with the proposed changes to element 2a and element 2b of the instruction. Mr. Schneider opined that the case law did not support a change in the instruction. He was concerned that the proposed instruction would create a situation where simple negligence that led to a death would be manslaughter. Mr. Hess was concerned that this proposed instruction would create an avenue for new trials since the proposed instruction differed from existing case law. Judge Casanueva felt the best approach to any change in the instruction should occur through a cross appeal filed by the state attorney. He stated that by changing the wording in the current instruction, the committee was asking the Court to set aside existing case law. Ms. Zayas questioned why the committee was changing the instruction since there was no case in controversy that suggested an amended instruction was required. Mr. Cervone was not sure that the proper remedy was to change the existing instruction.

The committee next considered the proposed revision of the "culpable negligence" definition found in element 2c of the instruction. The committee agreed with the conclusions reached by Judge Thomas in his memorandum. Judge Thomas noted that the existing instruction confuses the statutory definition of

second degree murder and manslaughter. He stated that it is hard to understand the difference between an act reflecting a “depraved mind regardless of human life” and an act that demonstrates a “reckless disregard of human life.” In addition, the language in the current instruction that refers to “such an indifference to the rights of others as is equivalent to an intentional violation of such rights” could be interpreted by a jury to mean the state must prove that the defendant intentionally caused a negligently caused death.

Based on the argument of Judge Thomas, the committee decided to delete the reference to “reckless disregard of human life” and the phrase referencing “an indifference to the rights of others.”

A point was made by a committee member that the phrase “safety and welfare of the public” was too broad and should be specific to a human being. The committee agreed. The term “public” was replaced with “another person or persons.”

The committee determined that since the proposed phrase beginning with “reckless disregard of human life” was being deleted, the following phrase, “or such an entire want of care . . .” should also be deleted. The proposed definition of “culpable negligence read as follows.

I will now define “culpable negligence” for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing ~~reckless disregard of human life or the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows a wantonness or recklessness or~~ a grossly careless disregard for the safety and welfare of ~~the public~~ another person or persons, ~~or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.~~

The last recommended change to the instruction was the paragraph instructing the jury on manslaughter as a lesser included of first degree

premeditated murder. The committee, by a vote of 9-2, deleted the phrase “by an intentional act” from the instruction. This change reads as follows.

Give only if 2(a) alleged and proved, and manslaughter is being defined as a lesser included offense of first degree premeditated murder.

In order to convict of manslaughter ~~by intentional act~~, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death.

This change by the committee was inadvertently not shown on the published instruction in *The Florida Bar News* of January 15, 2007. However, it was shown when the proposed manslaughter instruction was republished in *The Florida Bar News* on August 1, 2007.

After the committee had approved amendments to instruction 7.7, a three judge panel of the Second District Court of Appeal rendered an opinion regarding the element of intent to commit the offense of voluntary manslaughter in the case of Hall v. State, 31 Fla. L. Weekly D 2963. This opinion was withdrawn and after a hearing en banc, a substitute opinion was issued by the court on March 13, 2007. The opinion is located at 951 So. 2d 91 (Fla. 2nd DCA, 2007). Hall is a significant case. The court addressed what it considered the status of the law as it pertains to the applicability of the crime of manslaughter by an intentional act that results in an unintentional death. The defendant in Hall contended that under Taylor v. State, 444 So.2d 931 (Fla. 1983), a conviction for manslaughter cannot be sustained when the evidence does not support an intent to kill. The court did not agree with this interpretation of the Taylor opinion. The Second District Court of Appeal did not read Taylor to hold that the crime of manslaughter by act is limited to intentional killings. Adding such an element to the crime of manslaughter by act would serve to elevate the crime above second degree murder, which does not require a specific intent to cause death. The appellate court went on to state that requiring the specific intent to kill in manslaughter cases by act would make the crime of manslaughter virtually indistinguishable from premeditated murder. The court cited the current jury instruction on manslaughter (7.7) and noted that the instruction requires a finding that the defendant “intentionally caused the death” of the victim. The court did not read this instruction to require the intent to kill. It read the instruction to require an intentional act that “caused the death of” the victim. Although the court’s reading of the instruction differs from the rationale of the committee in 1994 that intent is required, the opinion in Hall is squarely on all fours with the conclusions drawn by Judge Thomas in his

recommendation to amend the second element of the present manslaughter instruction. The court in Hall stated: "We hold that a conviction for manslaughter by act does not require an intent to kill but only an intentional act that causes the death of the victim."

The comments received from Mr. Tebrugge, Mr. Thomas, Mr. Dillinger, Mr. Krosschell, and Mr. Sinacore regarding the manslaughter instruction were reviewed by the committee at the May 10th and 11th, 2007 meeting. The comments are discussed below, together with the committee's response.

Mr. Tebrugge did not object to the language of the proposed instruction, but believed the instruction did not address two areas. He suggested the committee consider an instruction on non-accidental killings that occur during the heat of passion. Second, Mr. Tebrugge suggested the committee consider a jury instruction to cover section 782.11, Florida Statutes (Unnecessary Killing to Prevent Unlawful Act). The committee decided not to take any action to begin drafting these requested instructions.

Mr. Thomas agreed with the committee that the changes to element 2a and 2b of the proposed manslaughter instruction eliminate the possibility that a juror would believe the State had to prove the defendant intentionally killed the victim. Mr. Thomas noted that the online jury instructions appearing on the Supreme Court website did not contain the enhanced penalty provisions as of February 6, 2007. The website has been updated since that date to reflect other approved changes in the manslaughter instruction. Mr. Thomas also suggested that the aggravated manslaughter categories needed to be removed from the current instruction, and a stand alone instruction should be created. He submitted a proposed instruction to the committee. The committee chose to take no action on this recommendation.

Mr. Bob Dillinger did not object to the amendments to elements 2a and 2b. He did object to the rewording of the "culpable negligence" definition. Mr. Dillinger noted that the wording has been in place since 1985 and the proposed amendments by the committee would reduce the burden of proof on the prosecution and make a conviction easier to obtain. The committee did not agree with the comments of Mr. Dillinger. The committee felt that the existing culpable negligence definition was too confusing and that the amendments were legally accurate and more easily understood.

Mr. Kosschell disagreed with the proposed changes in element 2a and element 2b. Mr. Kosschell believed that specific intent to kill, rather than general

intent, is an element of manslaughter by act or procurement. He strongly disagreed with the holding in Hall and asked the committee to not adopt the logic of the Hall opinion. Mr. Kosschell believed that the intent to kill has been an element of voluntary manslaughter for over a century in Florida. He cited Olds v. State, 33 So. 296 (Fla. 1902). Mr. Kosschell noted that the appellate court in Hall admitted that if the logic of Hall was incorrect, it would conflict with the holding of the Supreme Court in Taylor. Mr. Kosschell did not comment on the proposed change to the definition of "culpable negligence."

Judge Thomas stated that the decision in Hall was the correct interpretation of Taylor. He submitted that the comments received were erroneous in their analysis. It was his feeling that the amended instruction was correct as published and should be sent to the Court. He stated that he had tried to come up with examples where the proposed instruction would create an unjust result, but he could not identify a set of circumstances that would reach that conclusion. Judge Thomas felt that the committee in 1994 reached an erroneous conclusion with regard to intent.

A committee member questioned whether a killing in the heat of passion would be manslaughter. Judge Thomas answered that it would. Judge Thomas also thought that motor vehicle accidents that resulted in death would be covered by an instruction to the jury on excusable homicide.

The committee noted that Hall did not address culpable negligence. The State charged the defendant with manslaughter by act, procurement, or culpable negligence and the jury returned a general verdict form finding the defendant guilty of manslaughter. The court in Hall did not consider the defendant's arguments regarding culpable negligence since they were rendered moot by the jury when the general verdict form was used. One member of the committee disagreed with the proposed definition of "culpable negligence" and moved to reinstate the definition found in the current instruction. The motion failed.

Mr. Schneider, who was in the minority, continued to debate the changes made to element 2a. He was convinced that the wording of the element was wrong. He felt the opinion in Hall was incorrect. He opined that the amended element 2a meant that simple negligence causing death was manslaughter because it was not covered by excusable homicide. He felt that element 2a should be an intentional act intending to cause death but lacking premeditation. A motion was made to amend the proposed element 2a and return the wording to reflect the current instruction. In response, a committee member cited the case of Sireci v.

State, 399 So.2d 964 (Fla. 1981). In Sireci, the defendant contended that the killing was a spur-of-the-moment act occurring in a car lot after a fight had begun. He argued that he intended to enter the car lot without any intent to rob or harm the victim and therefore there existed no premeditation. The court concluded:

Premeditation is a fully-informed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in the pursuance of which an act of killing ensues.

The committee member who cited the Sireci case asked if one intentionally commits an act, why would that not be premeditation? The minority stated that the crime of manslaughter exists to cover situations where there is a killing in the heat of passion. There is no premeditation and no depraved mind. The motion to amend element 2a failed by a vote of 12 to 2.

Mr. Sinacore's comments were directed to the definitions of neglect of a child, elderly person, or disabled adult. He believed the proposed instruction did not provide a complete definition. He proposed the following language:

A caregiver's failure to make reasonable effort to protect [a child] [an elderly person] [a disabled adult] from abuse, neglect, or exploitation by another person.

It was pointed out that aggravated manslaughter of a child, disabled adult or elderly person arises only when there is a violation of s. 782.07, Florida Statutes. This statute does not define abuse or exploitation. The committee unanimously agreed to adopt the recommendation to expand the definition of neglect to mate with the definitions found in s. 825.102(3)(a)2 and s. 827.03(3)(a)2, Florida Statutes. The committee voted unanimously to amend the instruction to read as follows.

2. A caregiver's failure to make a reasonable effort to protect [a child] [elderly person] [disabled adult] from abuse, neglect or exploitation by another person.

This amendment to the instruction was shown in the August 1, 2007 publication. No comments were received regarding the amendment.

The committee made one additional change at the May 2007 meeting. By a vote of 9 to 3, the following sentence in the manslaughter instruction was amended to match the culpable negligence instruction that was also amended at the May 2007 meeting. The version of the instruction in January of 2007 read:

Culpable negligence is a course of conduct showing a grossly careless disregard for the safety and welfare of another person or persons.

The committee changed this portion of the instruction in May 2007 to read:

Culpable negligence is a course of conduct showing a gross careless disregard for the safety and welfare of another person or persons.

The end result was that the definition of "culpable negligence" in the manslaughter instruction was now identical to the term used in the culpable negligence instruction.

The committee met on November 16, 2007 to discuss the comments of Mr. Dillinger and Mr. Sincore. The comments of Mr. Dillinger were very succinct. He stated that there was no reason to change the definition of "culpable negligence" in the manslaughter instruction. He noted that paragraph two of the definition has been in place since 1985. He surmised that the only reason the committee was changing the definition was to make it easier to obtain a conviction. He also noted that his research did not reveal any case law that complained about the content of the instruction and the definition of "culpable negligence." The committee disagreed with the conclusions reached by Mr. Dillinger and felt the proposed change to the manslaughter instruction was appropriate because the existing definition of culpable negligence was confusing to ordinary people.

The committee next discussed the comments of Mr. Sinacore. Mr. Sinacore suggested that the table of lesser included offenses in the manslaughter instruction should contain the lesser included offenses of child neglect and elder neglect. These lesser included offenses would apply when the offense of aggravated manslaughter was charged and proven. The committee noted that these lesser included offenses would not apply to the offense of manslaughter. There was concern that a trial judge might inadvertently give these lesser included offenses in a manslaughter case. It was felt the better procedure would be for the State or defense to ask for the lesser included offense or offenses depending on the facts of

each case. The committee did agree with Mr. Sinacore that the definition of "culpable negligence" should be consistent in the manslaughter, culpable negligence, and child neglect jury instructions. The committee approved the changes to instruction 16.6 (Neglect of a Child). This amended instruction will be submitted to the Court at a later date.

On December 10, 2007, Mr. Bart Schneider submitted a six page minority report objecting to the proposed instruction. This report more clearly articulates his objections to the proposal that were argued at the August 25, 2006 meeting. In the report, he offers alternative language to both elements 2a and 2b, as well as a different definition of "culpable negligence." The report is attached at Appendix E.

Proposal 2 8.9 Culpable Negligence

After the proposed manslaughter instruction was published for comment on January 15, 2007, the committee recognized that instruction 8.9 needed to be amended so the definition of "culpable negligence" found in the manslaughter instruction matched instruction 8.9. The committee met on May 10th and 11th, 2007 to work on changes needed to the definition.

Based on the changes to the current manslaughter instruction, the committee, by a vote of 12 to 1, approved an amendment to instruction 8.9, Culpable Negligence. It reads as follows:

I will now define “culpable negligence” for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life or the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows a wantonness or recklessness or a grossly careless disregard for the safety and welfare of the public another person or persons. ~~or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.~~

~~The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.~~

The approved instruction matched the term "culpable negligence" found in the manslaughter instruction with one exception. The term "grossly careless disregard for the safety and welfare of another person or persons" was changed in the culpable negligence instruction to read: "gross careless disregard for the safety and welfare of another person or persons." The committee felt the term "gross" should be used as an adjective rather the word "grossly" being used as an adverb in the sentence. The instruction reads as follows.

Culpable negligence is a course of conduct showing a gross careless disregard for the safety and welfare of another person or persons.

It is noted that the last paragraph of the proposed culpable negligence instruction was shown as stricken through in the publication of the instruction on July 1, 2007 and August 1, 2007. It is reproduced below.

~~The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.~~

This paragraph is part of the manslaughter instruction, but is not part of the culpable negligence instruction that was approved by the Court in 1985. This paragraph was inadvertently included when the proposal was published for comment. No comments were received regarding this paragraph. The committee apologizes for the inclusion.

The Florida Association of Defense Lawyers, through Mr. Miller, filed comments with the committee on July 25, 2007, and objected to the proposed jury instruction on culpable negligence. These comments were discussed by the committee at the November 16, 2007 meeting. The association believed that the proposed definition of "culpable negligence" changed the statutory definition and

the case law which has construed that term since 1926. In addition, FACDL did not believe the committee had the authority to rewrite jury instructions unless a change was necessary due to legislative enactments or court decisions. The committee disagreed. Judge Thomas stated that the committee has the authority to amend any jury instruction that is erroneous and confusing. In addition, there is no requirement that the State prove that the defendant was aware of the risk created by his conduct as long as the defendant should have been aware of the risk.

Proposal 3 6.6 Attempted Voluntary Manslaughter

After the May 2007 meeting, Judge Terrell contacted staff and suggested that jury instruction 6.6, Attempted Voluntary Manslaughter, might need to be amended in light of the changes to instruction 7.7. The committee convened via conference call on July 11, 2007. During the conference call, the committee, by a vote of 15 to 1, amended instruction 6.6 by capturing the same language found in element 2 of the proposed manslaughter instruction in order to maintain consistency between the two instructions. The change to the existing instruction reads as follows.

(Defendant) **knowingly or consciously committed an act [or procured the commission of an act] which ~~was intended to~~ would have caused the death of (victim) and would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he] [she] failed to do so.**

No comments have been received regarding this instruction.

Respectfully submitted this ____ day of December, 2007.

The Honorable Terry David Terrell
First Judicial Circuit
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
M. C. Blanchard Judicial Center
190 W. Government Street

Pensacola, Florida 32502-5773
Florida Bar Number 231630

CERTIFICATE OF FONT SIZE

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

THE HONORABLE TERRY D. TERRELL
Chair, Committee on Standard Jury
Instructions in Criminal Cases
Florida Bar Number 231630