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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL:	SB 448
INTRODUCER:	Senator Evers
SUBJECT:	Threatened Use of Force
DATE:	January 3, 2014
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 448 amends provisions related to self-defense in ch. 776, F.S., 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 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.

Chapter 776, F.S., contains a variety of provisions setting forth the instances in which a person may use force in self-defense. Currently, ch. 776, F.S., reflects that only a person's *actual* use of force is justifiable – not a person's *threatened* use of force. While some courts have recognized that a threatened use of force equates to an actual use of force, the statutes do not clearly indicate this.

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

The bill is effective upon becoming a law.

II. Present Situation:

Aggravated Assault

Assault, a second degree misdemeanor[1] is defined as an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.[2]

Aggravated assault, a third degree felony,[3] is an assault:

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

10-20-Life

Section 775.087, F.S., often referred to as the "10-20-Life" law, requires a judge to sentence a person convicted of 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.[5] Under the 10-20-Life law, a person convicted of aggravated assault must be sentenced to:

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

[1] A second degree misdemeanor is punishable by up to 60 days in county jail and a $500 fine. Sections 775.082 and 775.083, F.S.
[2] Section 784.011, F.S.
[3] A third degree felony is punishable by up to five years imprisonment and a $5,000 fine. Sections 775.082 and 775.083, F.S.
[4] Section 784.021, F.S.
[5] The terms "firearm" and "destructive device" are defined in accordance with s. 790.001, F.S.

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

Justifiable Use of Force

A person charged with a criminal offense in which force was used (e.g., battery, murder, etc.) may seek immunity from prosecution or 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.

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

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").[7] Section 776.013, F.S., contains the following presumptions relating to the Castle Doctrine.[8]

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.
- 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;

[7] *Weiand v. State*, 732 So.2d 1044, 1049 (Fla. 1999).
[8] *Id*.

- 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.[9]

Immunity

Section 776.032, F.S., allows for immunity from criminal prosecution[10] 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.[11] 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.[12]

Actual Use of Force vs. Threatened Use of Force

The above-listed provisions of ch. 776, F.S., reflect that only a person's actual use of force is justifiable but 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,[13] 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.[14] In some of these cases, the defendant unsuccessfully argued self-defense.[15] Specifying that the justifications in ch. 776, F.S., apply to threatened uses of force would clarify the issue.

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[9] Section 776.013(2), F.S.

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

[11] 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.

[12] Section 776.032(2), F.S.

[13] *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. 2nd DCA 1996)(the mere display of a gun without more constitutes non-deadly force); and *Miller v. State*, 613 So.2d 530 (Fla. 3rd DCA 1993)(firing a firearm in the air, even as a so-called "warning shot," constitutes as a matter of law the use of deadly force).

[14] 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 boyfriend had physically attacked Wollard earlier that day and, upon returning to Wollard's house, shoved Wollard's daughter and punched a hole in the wall). Wollard claimed self-defense but was convicted and sentenced to 20-years pursuant to the 10-20-Life law. http://famm.org/orville-lee-wollard/ (last visited on November 20, 2013); http://www.theledger.com/article/20090619/NEWS/906195060 (last visited on November 20, 2013).

[15] *Id*.

III. Effect of Proposed Changes:

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:

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  - 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

It is a possibility that the courts, the state attorneys, and defense counsel will experience an increase in litigation at the pre-trial stage of criminal cases because the bill provides a defendant claiming self-defense, who has not actually harmed another person, to seek immunity.

The Department of Corrections could 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.

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.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.