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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES — REPORT 2019-02 **CASE NO.: SC19-**

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

This report, proposing amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	Instruction #	Title
Proposal 1	**7.3**	**Felony Murder – First Degree**
Proposal 2	**7.5**	**Felony Murder – Second Degree**
Proposal 3	**7.6**	**Felony Murder – Third Degree**

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strikethrough marks; words and punctuation to be added are underlined. The proposal for First Degree Felony Murder was published in the *Bar News* on February 1, 2019. No comments were received. The proposal for the First Degree Felony Murder jury instruction was generated in response to a Court referral. (Appendix B.)[1]

COMMITTEE RESPONSE TO REFERRAL

In *Williams v. State*, 242 So. 3d 280 (Fla. 2018), the Court held that *Alleyne v. United States*, 570 U.S. 99 (2013) requires a jury finding as to whether a juvenile offender actually killed, intended to kill, or attempted to kill, pursuant to § 775.082, Fla. Stat.

The *Williams'* conviction was reversed because the verdict form in that first degree murder case did not indicate that the jury found premeditation, which meant there was no clear finding that Williams intended to kill. Nevertheless, the Court wrote: "Therefore, regardless of whether Williams actually killed Brookins, or was a principal, a finding of intent to kill would have been inherent in a guilty verdict as to first-degree premeditated murder." *Id.* at 289. Accordingly, the Committee initially concluded (in jury instruction case SC18-1666) that a *Williams* section

[1] The Committee's response was due on March 13, 2019, but the deadline was later extended to March 29, 2019.

should not be added to the First Degree Premeditated Murder instruction but that a *Williams* section should be added to the First Degree Felony Murder instruction as follows:

> *Give if the defendant was a juvenile at the time of the crime alleged. § 775.082(1)(b), Fla. Stat. Williams v. State, 242 So. 3d 280 (Fla. 2018). If the jury were to find the defendant guilty of First Degree Premeditated Murder, the question of whether the defendant intended to kill or attempted to kill would inhere in that verdict. Therefore, the finding below should be made only for cases involving First Degree Felony Murder where it is alleged in the charging document that the defendant actually killed, intended to kill, or attempted to kill the victim. A general verdict for First Degree Murder without a specific finding of premeditation would require the paragraph below to be given.*
>
> **If you find** (defendant) **guilty of First Degree Felony Murder, you must also determine whether the State proved, beyond a reasonable doubt, that [he] [she] [actually killed] [intended to kill] [or] [attempted to kill]** (victim)**.**

The Court did not fully accept the Committee's proposal. Instead, the Court added the italicized underlined words below:

> *Give if the defendant was a juvenile at the time of the crime alleged. § 775.082(1)(b), Fla. Stat. Williams v. State, 242 So. 3d 280 (Fla. 2018). If the jury were to find the defendant guilty of First Degree Premeditated Murder <u>in a case where no principals instruction is given,</u> the question of whether the defendant intended to kill or attempted to kill would inhere in that verdict. Therefore, the finding below should be made only for cases involving First Degree Felony Murder where it is alleged in the charging document that the defendant actually killed, intended to kill, or attempted to kill the victim. A general verdict for First Degree Murder without a specific finding of premeditation would require the paragraph below to be given.*
>
> **If you find** (defendant) **guilty of First Degree Felony Murder, you must also determine whether the State proved beyond a reasonable doubt, that [he] [she] [actually killed] [intended to kill] [or] [attempted to kill]** (victim)**.**

The Court then issued the referral in Appendix B asking the Committee to reconsider whether the standard First Degree Premeditated Murder instruction should contain a *Williams* section.

The Committee believed that based on: 1) the referral, and 2) the words added to the italicized heading in the First Degree Felony Murder instruction, the Court is considering the possibility that a person guilty as a principal[2] to First Degree Premeditated Murder may not have intended to kill. However, the Committee's conclusion remains that a person found guilty as a principal to First Degree Premeditated Murder must have intended to kill.

The Committee discussed the following hypothetical: Bonnie and Clyde agree to rob a bank. The plan calls for Bonnie to drive Clyde to the bank and to wait outside while Clyde enters the bank. They agree that Clyde will bring a gun inside the bank to intimidate the tellers. There is no discussion about Clyde using the gun for any purpose other than intimidation. The plan is that after Clyde robs the tellers, Clyde will leave the bank with the money, jump into the car, and Bonnie will drive the getaway car to a place of safety.

Unfortunately, the plan goes awry because a teller recognizes Clyde and calls Clyde by his name. Clyde ponders the idea of killing the teller for a minute and then decides that he must not leave a witness alive. Clyde shoots and kills the teller, grabs the money, runs out of the bank, jumps into the car, and Bonnie drives away.

Later that night and after they have reached a place of safety, Bonnie tells Clyde they need to get the car repaired because it backfired while she was waiting for him. Clyde explains that Bonnie is mistaken. The car didn't backfire. The noise that Bonnie heard was the sound of Clyde killing the teller. Bonnie is shocked by the news.

Based on this scenario, every member agreed that both Bonnie and Clyde are guilty of First Degree Felony Murder. Everyone also agreed that Clyde is guilty of First Degree Premeditated Murder. But everyone concluded that Bonnie was not guilty of First Degree Premediated Murder even though Bonnie was a principal to the bank robbery. The reason is that Bonnie did not intend that anyone be killed.

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[2] The language regarding principals is a bit confusing. The "principal" is the person who actually committed the crime. The person who aided and abetted the principal should be called an accessory or an aider or abettor. However, the statute that covers aiders/abettors/accessories (§ 777.0111, Fla. Stat.) is labeled "Principals" and states that the person aiding the crime "is a principal in the first degree…." Thus, everyone refers to the aider and abettor as a "principal."

The Committee's conclusion is supported by case law. For example, as mentioned above, the *Williams* opinion stated: "Therefore, regardless of whether Williams actually killed Brookins, or was a principal, a finding of intent to kill would have been inherent in a guilty verdict as to first-degree premeditated murder." *Id.* at 289. In other words, one cannot be guilty as a principal to First Degree Premeditated Murder without intending a human being to die.

This principle of law is long-standing in Florida. In *Savage v. State,* 18 Fla. 909 (1882), the Supreme Court of Florida held that it was error to charge the jury in a premeditated murder case that if the accomplice was present and aiding and abetting, then he was guilty of the same offense as the principal who committed premeditated murder. Rather, the Court stated that the jury should have been told if an accessory was present, aiding and abetting Savage, and knowing or believing that Savage intended to kill Paterson, and he then aided and abetted Savage in his act, only then was he equally guilty as Savage.

Similarly, in *Leavine v. State,* 147 So. 897 (1933), the Court, citing *Savage,* stated that premeditation is an essential element of murder in the first degree where the homicide is not committed in the perpetration of or an attempt to perpetrate rape, arson, robbery, etc. In order to hold one guilty of premeditated murder in the first degree who is personally present aiding and abetting a third person to commit the crime, the person present rendering such aid must be shown himself to have had a premeditated design to effect the death of the person killed or knew or believed that the third person who actually fired the fatal shot intended to kill the deceased.

Based on *Williams*, *Savage*, and *Leavine*, the Committee concluded that Florida law mandates that an accomplice is <u>not</u> guilty of First Degree Premeditated Murder unless the accomplice had a premeditated intent to kill or acted while knowing or believing that the codefendant had a premeditated intent to kill. Thus, it is inherent in a verdict for First Degree Premeditated Murder (and Attempted First Degree Premeditated Murder) that the juvenile intended to kill, regardless of whether he or she actually killed or aided or abetted the actual killer. The Committee continues to recommend that the standard First Degree Premeditated Murder (and Attempted First Degree Premeditated Murder) instruction(s) do not need a *Williams* section.

<u>PROPOSAL #1: INSTRUCTION 7.3</u>

If the Court agrees, then the Committee recommends the deletion of the words that the Court added in the First Degree Felony Murder instruction in SC18-1666: "*in a case where no principals instruction is given".* The reason this verbiage should be deleted is because the phrase suggests that it does not inhere in a verdict for First Degree Premeditated Murder that the juvenile intended to kill where the juvenile defendant was acting as an aider/abettor.

The Committee proposal was published and no comments were received. Upon final review, the Committee made two additional minor changes.

There are four italicized notes in the middle of the standard instruction. The Committee recommends deleting the reference to 2b in note #2 and deleting the reference to 3b in note #3 because it is not just element 2b that applies to the attempt instruction and it is not just element 3b that applies to the principal instruction. Specifically, if element 2c applies, then the judge should also instruct on attempts and principals. Thus, the instruction would be more accurate if it read: "*If applicable, immediately give ....*". The proposal is as follows:

1. *Define the felony alleged.*

2. *If ~~2b above is given~~applicable, immediately give the attempt instruction (5.1).*

3. *If ~~3b above is given~~applicable, immediately give the principal instruction (3.5(a)).*

4. *If the underlying felony is charged as a separate count, read, at an appropriate time, instruction 3.12(d)(Legally Interlocking Counts). Failure to do so may result in an impermissible inconsistent verdict. See, e.g., Brown v. State, 959 So. 2d 218 (Fla. 2007).*

No one thought these minor changes to the italicized notes required republication. The vote was unanimous to file the proposal in Appendix A with the Court.

PROPOSALS #2 and #3: INSTRUCTIONS 7.5 AND 7.6

In the standard instructions for Second Degree Felony Murder and Third Degree Felony Murder, there are italicized notes to the judge immediately before the boxes of lesser-included offenses. The Committee's proposals for those two

instructions are designed to ensure that those italicized notes are consistent with the italicized notes in the First Degree Felony Murder instruction.

For example, for Second Degree Felony Murder, the proposal includes substituting the word "felony" for the word "crime" in note #1; deleting the reference to defining the crime that was the object of the burglary in note #1 because the standard burglary instruction contains that direction to the judge; and replacing the reference to element 3b in note #2 so that note #2 simply says: *If applicable, immediately give the attempt instruction (5.1).*

For Third Degree Felony Murder, the proposal includes substituting the word "felony" for "crime" in note #1; replacing the reference to element 2b in note #2 so that note #2 says: *If applicable, immediately give the attempt instruction (5.1)*; and replacing the reference to element 3b in note #3 so that note #3 says: *If applicable, immediately give the principal instruction (3.5(a)).*

The proposals for the Second Degree Felony Murder and Third Degree Felony Murder instructions were not published because these changes were made only upon final review of the instruction for First Degree Felony Murder and every member thought it best to submit all three felony murder proposals to the Court at the same time. Additionally, these changes were not controversial, the Committee votes were unanimous, and the proposed changes are of very minor significance.

CONCLUSION

The Standard Jury Instructions in Criminal Cases Committee respectfully requests the Court authorize for use the three proposals in Appendix A.

Respectfully submitted this 18th day of March, 2019.

s/ Judge F. Rand Wallis_____
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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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