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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES REPORT 2014-02 **CASE NO.: SC14-**

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

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

	Instruction #	Topic
Proposal 1	**9.1**	**Kidnapping**
Proposal 2	**9.2**	**False Imprisonment**
Proposal 3	**16.1**	**Aggravated Child Abuse**
Proposal 4	**16.2**	**Nonsupport of Dependents**
Proposal 5	**16.3**	**Child Abuse**
Proposal 6		**Grand Jury Handbook**
Proposal 7		**Grand Jury Instructions**

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strike-through marks; words and punctuation to be added are underlined.

All of the proposals were published in *The Florida Bar News* on January 1, 2014. The three comments received by the committee are in Appendix B.

Explanation of Proposals

Proposal #1 – Kidnapping

A committee member suggested the standard Kidnapping instruction be updated.

In the elements section, the committee added the words "to do so" at the end of element #2 in order to better connect the ideas that: **(a)** the defendant had no lawful authority; **(b)** to do the act of confining, abducting, or imprisoning. Also, the committee put in "(victim)" for elements 3a and 3c so that the judge would read the alleged victim's name in those elements. Next, the committee agreed to replace the reference to *Carron v. State* with the more commonly used *Faison v.*

State citation. The committee added a definition of "secretly" from *Bishop v. State,* 46 So. 3d 75 (Fla. 5th DCA 2010). The committee also replaced **"[his] [her]**" with "**the child's**" in the section regarding confinement of a victim less than 13 years of age.

The committee then added language to cover the enhancement in s. 787.01(3)(a). Pursuant to that subdivision, the crime of Kidnapping is enhanced from a first degree felony punishable by life to a life felony if the victim was less than 13 years old and the defendant committed an enumerated offense in the course of committing the kidnapping. For the enhancement to apply, the victim of the defendant's sexual battery or 796.03 offense or 796.04 offense or exploitation offense must be the same person who was kidnapped. However, the statute appears to allow for enhancement if the defendant commits an Aggravated Child Abuse, a Lewd or Lascivious Battery, a Lewd or Lascivious Molestation, a Lewd or Lascivious Conduct, or a Lewd or a Lascivious Exhibition during the course of the kidnapping, regardless of who the victim is. In other words, the enhancement seems to apply if D kidnaps Child V, and during the course of the kidnapping, D also commits an Aggravated Child Abuse against Child X. The committee did not know if this outcome was intended by the legislature or whether the courts will adhere to the strict letter of the statute. Nonetheless, the committee thought it best for the proposal to track the statute.

Finally, the committee added a sentence in the Comment section that reflects the holding of *Davila v. State*, (parents who kidnap their own child are not necessarily exempt from a kidnapping charge).

Post-publication, the committee received one comment from Assistant State Attorney Ben Fox (see Appendix B), who suggested there be a "*Give if applicable"* that informs jurors that tying a person up can constitute "confinement." The committee discussed the comment and voted 5-4 not to adopt Mr. Fox's suggestion. The majority view was that jurors would view a "tying up" as a confinement and thus the additional language was possibly confusing and unnecessary. The four members in the minority thought it would be useful to include this language as part of the standard instruction. Other than the dispute about Mr. Fox's comment, the proposal passed unanimously.

Proposal #2 – False Imprisonment

The committee updated the False Imprisonment instruction in essentially the same ways proposed in the Kidnapping instruction. Specifically, the words "to do so" were added to the end of element #2. The *Bishop v. State* definition of "secretly" was added; the reference to **"[his] [her]**" was replaced with "**the child's**" in the section regarding confinement of a victim less than 13 years of age;

and the enhancement section for s. 787.01(3)(a) was added. In the Comment section, the Committee provided an explanation for why the *Faison* test does not apply to the crime of False Imprisonment.

For False Imprisonment, Prosecutor Ben Fox made the same suggestion that he made for the Kidnapping instruction (regarding tying up the victim) in his comment. (See Appendix B.) The Committee vote was the same for False Imprisonment as it was in Kidnapping: 5-4 against adding language about tying up constituting a confinement. Other than the dispute about Mr. Fox's comment, the False Imprisonment proposal passed unanimously.

Proposal #3 Aggravated Child Abuse

A prosecutor in Brevard County informed staff for the committee that there were two problems in the affirmative defense sections of the Aggravated Child Abuse and Child Abuse jury instructions.

The existing standard Aggravated Child Abuse instruction states it is not a crime for "…**[a person who is acting as the lawful guardian] of a child**" to impose reasonable physical discipline.

The existing standard Child Abuse instruction states that it is not a crime for "... **[a person who has legal custody] of a child**" to impose reasonable physical discipline.

The Brevard prosecutor pointed out: (1) there is no logical reason why those portions of the two instructions should be different; and (2) neither version adequately captures the law, which is that a person acting *in loco parentis* is entitled to claim the affirmative defense. Note: In *Raford v. State,* 828 So. 2d 1012 (Fla. 2002), the court discussed the idea that a parent - or one standing *in loco parentis* - may be convicted of child abuse if the discipline was excessive. The Committee agreed with the Brevard prosecutor that those portions of the two instructions should be consistent and that both should be amended to reflect the correct law. The Committee did not want to use "*in loco parentis*" because jurors would not know what that phrase meant. Instead, the Committee proposed "**[a person who is acting in place of a parent]**" to capture the idea of "*in loco parentis*."

Additionally, the Committee realized that there could be a dispute about whether the defendant was actually a parent or a person acting in place of a parent. Accordingly, the Committee added language in the affirmative defense sections to capture the idea that two separate findings are required: (1) that the defendant was either the parent of the child or a person acting in place of the parent; and (2) that reasonable physical discipline for misbehavior under the circumstances was used by that person.

Furthermore, a note referencing s. 39.01(49) was added to the italicized note at the beginning of the affirmative defense section. The idea to add this reference to s. 39.01(49) came from the existing standard Child Abuse instruction which states: *Note to Judge: See § 39.01(49) Florida Statutes, if the defendant's status as a parent is at issue.*

All of the Committee's votes were unanimous. No comments were received. Post-publication, the Committee voted unanimously to file the proposal with the Court.

Proposal #4 – Nonsupport of Dependents

A committee member proposed that there be a new standard instruction for the crime of "Failure to Provide Financial Support" in s. 827.06. The proposal was not controversial at first. The elements for the crime were easily tracked from the statute. A section on one of the enhancements (from a misdemeanor to a felony) in s. 827.06(3) was added. An inference about a person who willfully failed to make good faith efforts to acquire resources to pay support was tracked from s. 827.06(5)(a).

Then, the committee used the following language: **You may conclude that the defendant knew he was legally obligated to provide financial support for** (victim) **if you find that a court or tribunal entered an order that obligated the defendant to provide financial support to** (victim)**"** as a way to capture the idea in s. 827.06(5)(b) which states: " The element of knowledge may be proven by evidence that a court or tribunal as defined in s. 88.1011(22) has entered an order that obligates the defendant to provide the support."

The committee's customary definition of "willfully" was added with a cite to *Patterson v. State*. 512 So. 2d 1109 (Fla. 1st DCA 1987). The Committee added two boxes of lesser-included offenses – one for the felony of $5,000 or more and one for the felony of three priors. The Comment section informs everyone that if the state has charged a felony because of three priors, the fact of the priors should be determined in a bifurcated proceeding.

The Committee approved the proposal unanimously. Post-publication, one comment (see Appendix B) was received from Mr. Joseph Schimmel who noted that there was an incorrect statutory cite in the published proposal. The Committee agreed and fixed the citation. A second comment (see Appendix B) was received from Mr. Blaise Trettis, who argued that there should not be an instruction for this crime but that if one were created, it should not include anything regarding s. 827.06(5)(b). Mr. Trettis argued that just because a court had ordered someone to pay financial support does not prove that the person knew about the order to pay.

The Committee voted 5-4 in favor of proposing a standard instruction for this crime. The minority thought an instruction was unnecessary because the crime is not prosecuted enough on a regular basis. The majority of members thought that a standard jury instruction would be useful, however, even if there were rare instances where the crime is charged.

The Committee then discussed whether the proposal should incorporate the idea covered in s. 827.06(5)(b). The vote was 7-2 to leave the proposal as published. The majority argued either 1) the statute was constitutional or 2) the Committee should not decide for the courts whether the statute was constitutional. The two dissenters were opposed because they believed that s. 827.06(5)(b) would be deemed unconstitutional.

Other than the dispute regarding the comment from Mr. Trettis, the proposal passed unanimously.

Proposal #5 – Child Abuse

For the Child Abuse instruction, the Committee proposes many of the same changes that were made in the Aggravated Child Abuse instruction. (1) The italicized note that refers to s. 39.01(49) was moved to the beginning of the affirmative defense section. (2) The idea that the defense applies to a person acting in place of a parent was added in the affirmative defense section. (3) The idea that there must be a finding that the person claiming the defense was either a parent or a person acting in place of a parent was added to the affirmative defense section. (4) The Committee deleted the reference to s. 39.01(35), which provides the definition of "legal custody," because the phrase "legal custody" would no longer be in the instruction. All of the Committee's votes were unanimous. No comments were received. Post-publication, the Committee again voted unanimously to file the proposal with the Court.

Proposal #6 – Grand Jury Handbook

The 2013 legislature repealed all statutes that had created terms of court for the Supreme Court and the circuit courts. Instead, the legislature created s. 43.43 which enables the Supreme Court to establish terms of court for all the lower courts, to allow the lower courts to establish their own terms of court, or to dispense with terms of court. Since it appears that the concept of terms of court is not being used in Florida, the Committee thought it best to amend the grand jury handbook and grand jury instructions to delete references to terms of court.

In the Handbook, the Committee proposes to delete the first few sentences of the "**TERM OF THE GRAND JURY**" section and to replace them with language

from s. 905.01 and s. 905.095 regarding the convening of a grand jury for a term of 6 months and a possible extension of that term. Then, in the section labeled "**GRAND JURY AND PETIT JURY DISTINGUISHED**," the Committee proposes to delete any reference to "the innocence" of the accused (because no jury decides that an accused is innocent). Finally, in the section labeled "**HISTORY OF THE GRAND JURY**," the Committee voted to call the document "Magna Carta" instead of "Magna Charta." There are no other changes proposed for the Grand Jury Handbook. All votes were unanimous. The proposal was published. No comments were received and the Committee again voted unanimously to file the proposal with the Court.

Proposal #7 – Grand Jury Instructions

For the Grand Jury Instructions, the Committee proposes the following changes:

Section 1.1 – Delete the reference to "term of court."

Section 2.2 – Replace the word "province" with "responsibility" for better juror understanding. Also, delete any reference to the innocence of the accused.

Section 2.3 – Delete the reference to the innocence of the accused and delete some unnecessary words ("Upon the trial based upon the indictment…")

Section 2.4 – Stylistic change to make the instruction more readable.

Section 4.5 – Delete the reference to "term of court."

Section 11.1 – Stylistic change (replace "commence your labor" with "to begin your work") to make the instruction more readable.

All votes were unanimous. The proposal was published. No comments were received and the Committee again voted unanimously to file the proposal with the Court.

Conclusion

The Standard Jury Instructions in Criminal Cases Committee respectfully requests that the Court amend and create standard jury instructions as outlined in this report.

Respectfully submitted this 11th day of February, 2014.

s/ Judge Joseph A. Bulone
The Honorable Joseph A. Bulone
Chair, Supreme Court Committee on

Standard Jury Instructions in Criminal Cases
Sixth Judicial Circuit
315 Court Street, Room 417
Clearwater, Florida 33756
Florida Bar Number #371130

CERTIFICATE OF COMPLIANCE AND SERVICE

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) and that a copy of this report and the appendices have been furnished via e-mail to Mr. Benjamin Fox at foxb@sao7.org; to Mr. Joseph Schimmel at jschimmel@MiamiTaxLaw.com; and to Mr. R. Blaise Trettis at btrettis@pd18.net.

s/ Judge Joseph A. Bulone
HONORABLE JOSEPH A. BULONE
Chair, Committee on Standard Jury
Instructions in Criminal Cases
Florida Bar Number #371130