

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.) CASE NO. SC02-1812
)
 VICTOR GIORGETTI,)
)
 Respondent.)
)
 _____)

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In the brief, the parties will be referred to as Respondent and State/Petitioner, respectively.

The following symbols will be used:

"R" = Record on Appeal

"T" = Transcript on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent, Victor Giorgetti, accepts Petitioner's Statement of the Case and Facts as being accurate and nonargumentative.

SUMMARY OF THE ARGUMENT

The Fourth District correctly ruled that the trial court committed reversible error when it held that intent or knowledge was not an element that the State had to prove beyond a reasonable doubt and gave the State's requested jury instruction to that effect. It is contrary to both federal and state law to define section 943.0435 as a mere regulatory statute which does not trigger constitutional protection when this statute provides that its violation is a felony punishable by up to five years in prison and a \$5,000 fine. Such penalties do not comport with the traditional definition of a "regulatory" or "public welfare" statute.

Respondent was robbed of his only defense when the trial court granted the State's request for a special jury instruction which told the jury they could find Respondent guilty of failure to register as a sex offender with DMV within 48 hours of moving without his having any knowledge of the requirement or any intent to violate the law. A long history of both state and federal law indicates that some kind of *mens rea* or guilty mind has always been an essential element where the crime constitutes a felony and subjects the defendant to years in prison. The statute, itself, is silent as to a scienter element. An interpretation of this statute which required a *mens rea* element would comport with constitutional principals. However,

interpreting §943.0435(9) as one of strict liability, when its violation is a third degree felony, is unconstitutional. In this case, it utterly deprived Respondent of his only defense.

The Fourth also correctly ruled that the trial court erred again when it permitted the prosecutor to ask the arresting officer whether or not Respondent said anything in protest upon being informed he was being charged with failure to register as a sex offender. These questions constituted an impermissible comment on Respondent's right to silence at the time of arrest and were reversible error.

ARGUMENT

POINT I

WHETHER THE APPELLATE COURT CORRECTLY HELD THAT THE TRIAL COURT ERRED WHEN IT GAVE THE STATE'S SPECIAL JURY INSTRUCTION ABSOLVING THE STATE OF THE BURDEN TO PROVE GUILTY KNOWLEDGE FOR A CRIMINAL CONVICTION OF THE SEXUAL OFFENDER REGISTRATION STATUTES. [RESTATED]

Although the certified question asks this Court to decide whether Chicone applies to the sexual offender registration statutes, Respondent suggests that the issue might be better framed by the question of whether or not interpreting the sex offender registration statutes as not requiring the State to prove the defendant had notice of the registration requirement, or intended to violate the statute, offends due process. The Fourth District, upon reconsideration of the issue, found that interpreting §943.0435, Florida Statutes, as requiring no knowledge or intent was contrary to well-settled jurisprudence. Respondent urges this Court to find that §943.0435, although silent as to scienter, requires the State to prove that the defendant had notice of the registration requirement and/or intentionally failed to register. Accordingly, Respondent asks that this Court affirm the Fourth's decision below, which held that the trial court erred in giving the jury instruction which absolved the State of any duty to prove that Respondent had knowledge of, or intent to violate, the registration requirement.

Petitioner argues that the Giorgetti v. State, 821 So. 2d 417 (Fla. 4th DCA 2002), decision is in direct conflict with Quinn v. State, 751 So. 2d 627 (Fla. 4th DCA 1999), and Simmons v. State, 753 So. 2d 762 (Fla. 4th DCA 2000), but, as the Fourth pointed out in its opinion, Quinn only decided the constitutional question of whether or not §943.0435 was invalid because it did not contain an explicit scienter requirement. Giorgetti, 821 So.2d at 419. Simmons, wrote the Fourth, simply followed Quinn in that holding. Id. The Fourth found that neither Simmons nor Quinn addressed the “entirely separate” issue regarding whether or not the court should read a scienter element into the statute.

Insofar as the language found in Quinn and Simmons, as well as the various cases Petitioner cites in his brief, which indicate that §943.0435 is merely a regulatory statute, Respondent’s position is that this blanket conclusion is incomplete. In Walker, the Fourth found that the sexual predator **designation**, pursuant to §775.21, Florida Statutes, was not a sentence nor a punishment, but simply a “status resulting from the conviction of certain crimes.” Walker v. State, 718 So. 2d 217, 218 (Fla. 4th DCA 1998). Similarly, Ortega v. State, 712 So. 2d 833 (Fla. 4th DCA 1998), also found that the **registration** provisions of the sexual predator statutes were regulatory and did not, in itself, constitute punishment. See

also, Andrews v. State, 792 So. 2d 1274 (Fla. 4th DCA 2001) (**registration requirements** of sexual offender statutes not punitive); State v. Carrasco, 701 So. 2d 656 (Fla. 4th DCA 1997) (**registration requirements** for sexual predators designed to protect public, are regulatory, and not punishment). While it may be correct to say that the **registration** requirements of the sexual offender and sexual predator statutes are merely regulatory and do not, in themselves, constitute punishment, it is an entirely different thing to rule that the **penalties** provided for in these statutes for failure to comply with the registration requirements do not constitute punishment. Section 943.0435 makes it a third degree felony to fail to register as a sexual offender. Unquestionably, being imprisoned for five years (or more depending on one's score under the Criminal Punishment Code) constitutes punishment. To say otherwise would be disingenuous. It would make a mockery of the entire history of Anglo-American criminal jurisprudence.

Up to a certain point, the legislature is free to define crimes and even dispense with the element of intent. Hall v. State, 823 So. 2d 757, 763 (Fla. 2002) ("The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions.") But the legislature's power is necessarily limited by certain constitutional constraints such as due process. State v. Oxx, 417 So. 2d 287,

288 (Fla. 5th DCA 1982). One restriction enumerated by the Fifth District is where the statute in question imposes an affirmative duty to act, then penalizes the failure to comply. Id. at 289-90. "In such an instance, if the failure to act otherwise amounts to essentially innocent conduct, the failure of the penal statute to require some specific intent or knowledge may violate due process." Id. at 290. See also, State v. Gruen, 586 So. 2d 1280, 1281-282 (Fla. 3d DCA 1991). Section 943.0435 is just such a statute. Moving one's residence certainly constitutes "essentially innocent conduct." Thus, punishing a person for its violation without requiring the State to prove some degree of guilty knowledge violates due process.

Section 943.0435(4) provides that within 48 hours of any change in a sexual offender's residence, the offender shall report in person to a driver's license office, identify himself as a sexual offender, and provide other personal information. Section 943.0435(9) states that a sexual offender who does not comply with the reporting and registration requirements of this statute commits a felony of the third degree punishable as provided in §775.082, 775.083, or 775.084. Under §775.082, a third degree felony is punishable by a maximum of five years in prison. Of course, under the current Criminal Punishment Code, a statutory maximum only has meaning if the offender's total score is lower than the statutory maximum. In the instant case,

Respondent actually received a sentence of 77.25 months, or 6.44 years, in prison for failure to inform the DMV within 48 hours that he had changed residences.

At common law, all crimes which subjected an offender to a loss of liberty or worse required some form of scienter. Morrisette v. United States, 342 U.S. 246, 260, 72 S.Ct. 240, 248 (1952); State v. Oxx, 417 So. 2d 287, 288-89 (Fla. 5th DCA 1982); Francis B. Sayre, Public Welfare Offenses, 33 Colum. L.Rev. 55, 71 (1933); R. Perkins, Criminal Law 793-798 (2d ed. 1969). This Court, in considering whether *mens rea* was required to convict felony possession of cocaine, wrote:

Our characterization of the public welfare offense in Morrisette hardly seems apt, however, for a crime that is a felony After all, "felony" is, as we noted in distinguishing certain common law crimes from public welfare offenses, "'as bad a word as you can give to man or thing.'" . . . Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*. . . We agree with this view and, consistent therewith, **conclude that the criminal statutes at issue before us today are more akin to offenses that presume a scienter requirement in the absence of express contrary intent. The penalties imposed for violating sections 893.13(6)(a) and 893.147(1) are incongruous with crimes that require no mens rea. For example, a defendant convicted of possession of a controlled substance can receive up to five years imprisonment and a fine of up to \$5,000.**

Chicone v. State, 684 So. 2d 736, 742-43 (Fla. 1996), superceded by statute, Norman v. State, 826 So. 2d 440 (Fla. 1st DCA 2002) (emphasis added, citations omitted) The Chicone Court stated that it was influenced by the fact that "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence", and agreed that:

The group of offenses punishable without proof of any criminal intent must be sharply limited. The sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing; and the law in the last analysis must reflect the general community sense of justice.

Id. at 743.

In considering the question of whether or not involuntary intoxication should be a defense to DUI, the Fourth District extensively quoted Morissette where the United States Supreme Court described the types of minor crimes for which a defendant could be convicted without a showing of intent or knowledge and why this did not offend due process:

This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called 'public welfare offense.' These cases do not fit neatly into any of such accepted classifications of common-law offenses . . . Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to a person or property but merely create the danger or probability of it which the law seeks to minimize. . . In this respect, whatever the intent of

the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Carter v. State, 710 So. 2d 110, 112 (Fla. 4th DCA 1998) (emphasis added).

The Giorgetti court also extensively quoted Morissette, specifically highlighting the sentence about the penalties for strict liability statutes being relatively small. Giorgetti, 821 So. 2d at 420-21. The Carter court noted that scienter was not a mere technicality in the law, but a "safeguard which must be preserved in the interest of justice so that the constitutional rights of our citizens may be preserved." Id. Furthermore, "[w]here . . . the issue is whether a defendant without intent can be strictly liable for a crime, there is no confusion. Both federal and Florida law are clear that **criminalization of conduct without fault is constitutionally limited to minor infractions such as parking violations** or other regulatory offenses." Id. at 111 (emphasis supplied). Ultimately holding that involuntary intoxication was a defense against a DUI charge, the court noted that some other states

have not recognized the defense. In a footnote, the Fourth explained:

. . . States which have been unwilling to recognize involuntary intoxication as a defense in DUI cases have rationalized that DUI is an "infraction" rather than a crime. . . **The penalty for a first DUI violation in Florida, up to six months incarceration, is clearly more severe than what would qualify as an infraction under Morissette.**

The Fourth DCA recognized that there were serious constitutional due process implications in failing to give a jury instruction on involuntary intoxication, which could permit the defendant's conviction of DUI absent any proof of intent. Carter, 710 So. 2d. at 113. These same constitutional due process concerns are at issue in section 943.0435, as written and as applied in the instant case, because it allows for conviction of a person who fails to timely register as a sex offender whether or not the person knew of the requirement and whether or not the person intentionally violated the statute. Thus, this statute has been treated as a "strict liability" offense for which the State had absolutely no obligation to prove any sort of intent or scienter.

However, this changed when the Fourth held, in the instant case, that the trial court erred when it gave the special jury instruction "absolving the state of the burden to prove guilty knowledge or scienter or *mens rea* in this prosecution for a criminal violation of the sexual offender registration

statutes." Giorgetti, 821 So. 2d at 422. It wrote, "These statutes create **no mere informational reporting requirement, the violation of which is punished with a small fine.**" Id. After reviewing Morissette, the Fourth also considered United States v. U.S. Gypsum, 438 U.S. 422, 442, 98 S.Ct. 57 (1978), where the United States Supreme Court held that "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" in a statute whose violation was three years imprisonment. Giorgetti, 821 So. 2d at 421. It also considered the statement found in Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084 (1985), where the Supreme Court wrote, "the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption¹ of our criminal law." Giorgetti, 821 So. 2d at 421. The Fourth additionally found that both Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793 (1994), and United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S.Ct. 464 (1994), held that, in the absence of an expressed contrary intent, a "broadly applicable guilty knowledge requirement must be presumed." Giorgetti, 821 So. 2d. at 421.

¹ The "background assumption" referred to was the assumption which requires courts to infer *mens rea* to the Sherman Act. Giorgetti, 821 So. 2d at 421, quoting Gypsum, 438 U.S. at 438, 98 S.Ct. at 2864.

Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793 (1994), is similar to the instant one in that the Staples jury was also given an instruction which told them the Government need not prove Staples had special knowledge that the weapon could be fired automatically. The Staples Court distinguished Freed² and Balint³ when it reviewed a federal statute which imposed strict registration requirements on certain types of firearms. This statute defined a machine gun as any weapon which shoots, or could be readily restored to shoot, more than one shot with only one trigger pull. Id. at 602, 1795. It required that a machine gun be registered, and failure to register was punishable by up to 10 years in prison. Id. at 602-03, 1795. Staples was arrested after police discovered he was in possession of an AR-15, which is the civilian version of the M-16 rifle, and which had been modified to fire as a fully automatic weapon. Id. at 603, 1795-96. Staples testified that the AR-15 never fired automatically when he had fired it and that he did not even know that it could be fired automatically. Id. at 603, 1796. He requested a jury instruction that the Government had to prove the he knew the gun could fire fully automatically before he could be found guilty of violating the

² United States v. Freed, 401 U.S. 601, 91 S.Ct. 1112 (1971).

³ United States v. Balint, 258 U.S. 250, 42 S.Ct. 301 (1922).

statute, but the court refused the instruction. Instead, it gave the one the Government requested which told the jury that it did not need to prove that Staples knew he was dealing with a weapon which could be fired automatically, but that it would be enough to prove that he knew he was dealing with a dangerous device which would alert a person to the likelihood of regulation. Id. at 604, 1796. Staples was convicted and sentenced to five year's probation and a \$5,000 fine. Upon review, the Court considered whether *mens rea* was required under the statute. It found that the statute, itself, was silent concerning *mens rea*, but cautioned that **silence did not necessarily mean that Congress intended to dispense with it.** Id. at 605, 1797. The Court found that it must "construe the statute in light of the background rules of the common law in which the requirement of some *mens rea* for a crime is firmly embedded." Id. It noted that the traditional rule was that offenses which required no *mens rea* were generally disfavored. Id. at 606, 1797.

The Government argued that the Act was intended to regulate and restrict circulation of dangerous weapons and was, therefore, a "public welfare" or "regulatory" statute for which Congress was free to impose strict liability. Id. The

Government cited Balint and Dotterweich⁴ in support of this argument. The Supreme Court wrote that so called "public welfare" offenses have been created by Congress and recognized by the Court in "limited circumstances." Id. at 607, 1708. The typical cases recognizing such public welfare offenses involved statutes that regulated potentially harmful items, like grenades, addictive drugs, and obnoxious waste materials. Id. The Court wrote that **dispensing with a *mens rea* requirement in these cases was permissible so long as the defendant knew that he was dealing with a "dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation,** and we have assumed that in such cases Congress intended to place the burden on the defendant to ascertain at his peril whether [his conduct] comes within the inhibition of the statute." Id. (citations omitted) (emphasis added). The Government argued that guns were inherently dangerous and would put a gun owner on notice that they must determine whether their weapons were subject to regulation. Id. at 608, 1798. It claimed that all they needed to prove was that the defendant knew he possessed a firearm. The Government claimed that this case was like Freed, which involved the prosecution for possession of grenades, and the

⁴ United States v. Dotterweich, 320 U.S. 277, 281, 64 S.Ct. 134 (1943).

Court found that the statute did not require the Government to prove that the defendant knew that the grenades were unregistered. Id. at 608, 1799. But, the Staples Court found that possessing hand grenades was distinguishable from possessing a rifle because there was a "long tradition of widespread lawful gun ownership" which did not apply to possession of grenades. Id. at 610, 1800. It held that the potential harm of the restricted item was not sufficient to alert a person to probable regulation, as there were many dangerous items which were commonplace and could be owned in perfect innocence. Id. at 611, 1800. The Court questioned whether regulations on guns were sufficiently "intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct", as about half of American homes contain at least one firearm and buying a shotgun or rifle is a "simple transaction that would not alert a person to regulation any more than would buying a car." Id. at 614, 1801.

The Staples Court concluded that:

It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if . . . what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon."

Id. at 615, 1802. It noted that doing away with *mens rea* eased a prosecutor's path to conviction and would not impute that

purpose to Congress where it would mean **easing the path to convicting those whose conduct would not alert them to the probability of regulation.** Id. at 616, 1802.

Additionally, the Supreme Court also explained that the penalty provided by the statute, itself, was a major clue to whether or not Congress intended to dispense with *mens rea*, as public welfare offenses almost uniformly involved statutes which provided for only fines or short jail sentences. Id. Noting that our system of government generally required a "vicious will" to establish a crime, it was incongruous to impose severe punishments for offenses which required no *mens rea*. Thus, it questioned whether imprisonment was even compatible with the "reduced culpability required for such regulatory offenses." Id. at 617, 1803. Without making a hard, fast rule, the Supreme Court found that where "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." Id. at 618, 1804. The Court then reversed, holding that silence did not suggest that Congress had dispensed with *mens rea* for a conviction for violation of the statute. Id. at 619, 1804.

Here, like Staples, the potential penalty is severe for conduct which could easily be completely innocent. There is

nothing about merely living in Florida, or changing residences, which would necessarily put a person on alert that he or she is subject to certain lifetime regulations.

Lambert v. California, 355 U.S. 225, 78 S.Ct. 240 (1958) was a case almost squarely on point to the instant one. There, the city of Los Angeles had enacted a municipal code which made it a felony for "any convicted person to be or remain in Los Angeles for a period of more than five days without registering" with the Chief of Police. Id. at 226, 242. It defined "convicted person" as "any person who, subsequent to January 1, 1921, has been or hereafter is convicted of an offense punishable as a felony" either in California or any other state if the offense would have been a felony in California. Id. The code made the failure to register a continuing offense with each day's failure to register constituting a separate crime.

The defendant was arrested for an unrelated offense, then was charged with a violation of the registration law. Id. Lambert had been a resident of Los Angeles for over seven years at the time of her arrest, and she had been convicted of forgery, a felony, within this time period. Although she had been convicted of a felony, she was not registered under the Municipal Code.

At trial, Lambert claimed that the Code denied her due process of law, but the trial court overruled her objections.

Id. at 227, 242. Lambert was found guilty, placed on probation for three years and fined \$250. She appealed the constitutionality of the Code, where the appellate court found no merit to her claim. The Supreme Court took jurisdiction and held that the registration provisions of Los Angeles' Code violated the Due Process requirement of the Fourteenth Amendment. Id.

The Supreme Court started its analysis by noting that the Code provided for criminal penalties for a convicted felon if this person failed to timely register, but that no element of willfulness was included in the ordinance, nor read into it by the California courts. Id. The Court wrote that it must assume that Lambert had no actual knowledge of the registration requirement, as the trial court would not let her present evidence of this defense. It defined the issue as whether the ordinance violated due process when applied to a person who has no actual knowledge of his duty to register and where no showing is made of the probability of such knowledge. Id.

While acknowledging that the legislature has latitude to declare an offense and exclude the element of knowledge or scienter, the Court clarified that "we deal here with conduct that is **wholly passive - mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of**

his deed." Id. at 228, 243 (emphasis added). It noted that due process placed some limits on police power, and ingrained in the concept of due process was the requirement of notice. Id. It found that the Los Angeles law differed from other types of registration laws in that the "violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test." Id. at 229, 243. The Court went on:

We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.

Id. at 229, 243. The Court concluded, "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, **he may not be convicted consistently with due process.**" Id. at 229-30, 243-44.

Lambert presents virtually the same scenario as the instant case. Like the ordinance in Lambert, section 943.0435 also punishes **wholly passive** behavior. Unlike Balint or Freed, there was no conduct here, such as possessing firearms or hand grenades or selling controlled drugs, which would have alerted a person that they might be running afoul of the law. Here, like Lambert, a person can suffer severe sanctions for merely living in the state, or moving from one home to another. Although Respondent was allowed to present evidence that he did not understand the statute to require him to continue to register once he was off probation, with even his prior attorney

testifying that he did not think the registration law applied to Respondent, the jury was basically told to ignore that evidence because the State did not have to prove knowledge or intent. Conviction of failure to register under § 943.0435, without any element of knowledge or intent, violates due process just as the ordinance did in Lambert.

Petitioner cites to State v. Hamilton, 388 So. 2d 561 (Fla. 1980), in support of its argument that statutes enacted for the public benefit must be construed in favor of the public, and not in favor of the defendant, as a penal statute would be. However, even though this Court acknowledged that the Pollution Control Act was intended to operation in the public interest, it still held that the statute in Hamilton was unconstitutional because it criminally penalized simple negligence. Id. at 563-64. Furthermore, as indicated *supra*, the penalty portion of §943.0435 does not comport with "public welfare" treatment.

Failing to register as a sex offender within 48 hours of moving is a third degree felony. This Court made it clear that Florida has the same "background rule of the common law favoring *mens rea*" as federal law. Chicone v. State, 684 So. 2d 736 (Fla. 1996). As the Fourth wrote in Carter v. State, 710 So. 2d 110, 111 (Fla. 4th DCA 1998): "Justice Anstead's opinion [in Chicone], speaking for a unanimous court, contains a thorough analysis of why, under both federal and Florida law, intent or

knowledge is a prerequisite whenever offenses carry substantial criminal sanctions, regardless of how criminal statutes are worded." After all, one of the reasons scienter is generally presumed to be an element of any felony is that "'felony' is as bad a word as you can give to man or thing." Morissette, *supra*.

Quite simply, a law which makes its violation a third degree felony without requiring some kind of scienter or guilty mind cannot be constitutional. Respondent recognizes that this Court has a "duty to avoid a holding of unconstitutionality if a fair construction of the legislation will so allow." State v. Ecker, 311 So. 2d 104, 109 (Fla. 1975); Cohen v. State, 125 So. 2d 560, 562 (Fla. 1960). The legislature was silent regarding a guilty mind element of section 943.0435(9). Thus, the statute, on its face, does not violate constitutional principles. Rather, it is the *interpretation* of this statute as not requiring any form of *mens rea* which would run afoul of the Constitution. Accordingly, Respondent urges this Court to affirm Giorgetti because the Fourth's opinion comports with the well-settled principles of American jurisprudence and constitutional due process.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED RESPONDENT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR ELICITED SEVERAL REMARKS FROM DEPUTY SIMMONS CONCERNING RESPONDENT'S FAILURE TO PROTEST WHEN HE WAS TOLD HE HAD VIOLATED SECTION 943.0435. [RESTATED]

The Fourth also held that the trial court erred when it admitted testimony by the arresting officer regarding the fact that Respondent did not respond or object when the officer advised him that he was being arrested for failing to register his new address. Giorgetti, 821 So. 2d at 422. The appellate court specifically found that the testimony was *not* an invited response to the defense's line of questioning regarding the fact that Respondent was helpful and cooperative at the time of his arrest. The court also disagreed with Petitioner's allegation that the objected-to testimony concerned events which occurred prior to Respondent's arrest. Id. Respondent asks this Court to affirm on this point, also, since the transcript reveals that the deputy clearly and unambiguously made prejudicial comments relating to Respondent's right to remain silent.

The United States Supreme Court has ruled that comments regarding a defendant's silence at the time of his arrest, even when used for impeachment purposes, violate the Due Process Clause of the Fourteenth Amendment. Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245 (1976). The Doyle Court wrote:

When a person under arrest is informed, as Miranda requires, that he may remain silent . . . it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony . . .

Id. at 619, 2245. Any comment on a defendant's silence at the time of arrest is subject to the "fairly susceptible" test. State v. Hoggins, 718 So. 2d 761, 769 (Fla. 1998). If the comment is "fairly susceptible" of being construed as a comment on the defendant's exercise of his right to remain silent, it is error. Id. Such comments have been designated "high risk errors" because of the substantial likelihood that the impermissible comments will vitiate the right to a fair trial by influencing the jury verdict. Sharp v. State, 605 So. 2d 146, 148 (Fla. 1st DCA 1992). While erroneous admission of comments about a defendant's silence at the time of arrest are not *per se* reversible error, they are subject to a "rigorous harmless error" test. Id. This test requires the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error did not contribute to the verdict. Id.

In Hoggins, two clerks at a convenience store were held up at gunpoint and robbed of the cash register drawer and a cigar box full of lottery tickets. Hoggins, 718 So. 2d at 762. The gunman fired two shots at the clerks as he left. Later that

evening, police observed a man riding a bicycle carrying a cash register drawer and a cigar box. Id. When the officers started to pursue the man, he fled, wrecking the bicycle and running into an apartment complex. Id. The officers followed a trail of lottery tickets and food stamps to the door of one of the apartments. The mother of defendant's child answered the door and gave the police permission to search the apartment. Id. Hoggins was found in an upstairs bedroom, where he was handcuffed and brought downstairs. Id. at 763. One of the convenience store clerks was brought to the apartment to see if he could identify the defendant. The victim threatened to kill Hoggins and was so enraged that police had to restrain him. Id. At that point, they placed Hoggins under arrest. The officers did not read Hoggins his Miranda rights until they removed him from the apartment. Id.

Hoggins' defense was that he had been visiting his child at the apartment that night. Id. While he was sitting on the front steps, he saw someone run through the complex and hide something in the playground. Id. When Hoggins investigated, he found the drawer and cigar box, which he took back to the apartment. Id.

Hoggins testified at trial, and the prosecution asked him about whether or not he had previously offered his version of events to the police. Id. at 763. The prosecutor asked, "You

never told them, the police, this story that you just told the jury, did you?" and "You never told anyone at that time [after the burglary victim identified you] the story you just told us here today?" Id. It was established that the police did not read Hoggins his rights while he was still in the apartment. Thereafter, the prosecution asked, "Okay. That's [the reading of Miranda warnings] not the issue here. The issue here is that you have just been involved in something very serious, and you didn't say anything?" Id. There were several other questions about how and why Hoggins did not offer his defense at the time of his arrest.

This Court held that the state's use of post-arrest silence was improper **even when the record is silent as to exactly when the defendant received his Miranda warnings.** Id. at 768-69. In reversing Hoggins' conviction upon finding that the trial court had committed reversible error, this Court wrote, "**The time of arrest is not an occasion when circumstances naturally call upon a defendant to speak out.** On the contrary, there are many reasons that a defendant may choose to remain silent." Id. at 771 (emphasis added).

In the instant case, the prosecutor's comments about Respondent's silence at the time of his arrest were at least as direct and egregious as the prosecutor's remarks in Hoggins.

Deputy Simmons was asked numerous questions about Respondent's response to being told that he had failed to register:

STATE: What was the defendant's response when you told him that the teletype showed you that he had not registered with D.M.V. as a sex offender, if there was any response?

SIMMONS: I don't recall that there was one.

STATE: He didn't scream and holler, "No, I don't have to do anything?"

SIMMONS: I don't recall that, no.

STATE: There is nothing that's in your reports to show that he objected in any way to what you told him?

SIMMONS: That's correct.

STATE: In between, had you already told the defendant about what you found on teletype before or after Sergeant Silio?

SIMMONS: I don't recall that.

STATE: But either way he didn't scream and holler and say, "No, no, no, you're mistaken?"

SIMMONS: No, he did not.

STATE: *So during this time when you told him he doesn't have to answer any of your questions or say anything to you, he hadn't done anything to object in what you're telling him?*

SIMMONS: He did not.

(T. 447-49) (emphasis supplied) By the State's own words, it is obvious that the prosecutor was referring to the time of Respondent's arrest, after or concurrent to the time Respondent was read his Miranda warnings.

Other testimony also establishes the chain of events. Simmons testified that once he found out that Respondent was a sex offender and there was a discrepancy between Respondent's ID card and the address he claimed to be living, Simmons contacted his supervisor, Sergeant Silio, who instructed Simmons to place Respondent under arrest. (T. 436) The prosecutor then asked

Simmons, "After speaking with Sergeant Silio, what did you do with regards to the defendant?" Simmons answered, "Placed him under arrest." (T. 436) Later, Simmons testified that, "[a]fter I found out what teletype told me then that's when I contact Sergeant Silio, yes." The prosecutor asked, "In between, had you already told the defendant about what you found on the teletype before or after Sergeant Silio?" Simmons answered, "I don't recall that." (T. 447)

In a recent case, the Fourth District held that a prosecutor's remarks about a defendant's silence were reversible error when the defendant had been taken into custody for interrogation, but not yet formally arrested, Harris v. State, 726 So. 2d 804 (Fla. 4th DCA 1999). Harris and the victim had previously been involved in a relationship which had produced one child. Id. At the time of the incident, Harris and his girlfriend were estranged, and their daughter was living with her mother. Id. at 805. Harris and the co-defendant, Cutts, went to the ex-girlfriend's where Cutts shot her twelve times. Id. Her body was found with her live daughter a few feet away. Cutts pled guilty and received a favorable sentence in exchange for his testimony against Harris. Id. At trial, the State introduced evidence regarding the fact that Harris did not ask about his daughter when he was first approached by police, nor did he tell the officers that Cutts gave him the gun to hide or

that it was Cutts, alone, who did the shooting. Id. The prosecutor also commented about this evidence in closing argument. Harris was convicted of second degree murder, but the appellate court reversed, concluding that the trial court erred in permitting the prosecutor to present testimony relating to Harris' constitutional right to silence. Id. at 804. The Harris court wrote, "under Hoggins, any reference, either through testimony or in argument, to a defendant's exercise of silence after the arrest is impermissible." Id.

The State argued that the controversial comments that related to Harris' silence took place **before he had been arrested**, and, therefore, the comments did not violate his right to silence. The record indicated, however, that some of the testimony and comments referred to Harris' silence when he was first taken into custody for interrogation the day before he was formally charged, and some others concerned his failure to speak after he was formally charged. Id. The Fourth held that the prosecutor's comments and other evidence concerning Harris' failure to speak violated his right to silence because Harris was taken into custody by the police and brought to the station for interrogation. Concluding that "these comments on silence during a custodial interrogation before Miranda warnings were given constitute harmful error," the Fourth reversed. Id.

In the instant case, Respondent was outside speaking with Simmons after the officer had come to the house asking about a third person. Simmons asked Respondent for some identification, which he then ran a check on. Finding that Respondent was a sex offender and that his I.D. did not match the address where Respondent told Simmons he was actually living, Simmons called his supervisor (Silio) for instruction. Simmons did not recall confronting Respondent with the discrepancy prior to calling his supervisor. Simmons testified that he **immediately** placed Respondent under arrest after speaking with Silio. While the record was unclear regarding exactly when Simmons read Respondent his Miranda rights, the prosecutor referred to them being given on the spot when he asked Simmons, "**[s]o during this time when you told him he doesn't have to answer any of your questions or say anything to you, he hadn't done anything to object in what you're telling him?"**"

The comments by Simmons went way beyond the "fairly susceptible" test; they were direct, clear testimony about what Respondent *did not* say in his own defense at the time of his arrest. This is so prejudicial, such a violation of Respondent's constitutional right to remain silent, that it really amounts to fundamental error. And these comments were in no way invited simply because the defense made the point that Respondent had been cooperative with the officer.

Thus, the prosecutor's questions about Respondent's lack of protest plainly referred to his silence at the time he was in the process of being arrested and having his Miranda rights being read to him. Consequently, these questions constituted impermissible comments on Respondent's silence and violated due process. The Fourth correctly ruled that the trial court committed reversible error when it allowed the prosecutor to ask those questions of Deputy Simmons. Accordingly, Respondent asks this Court to affirm the decision below.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Honorable Court to affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief has been furnished to DOUGLAS J. GLAID, Assistant Attorney General, 110 S.E. 6th Street, Ninth Floor, Ft. Lauderdale, Florida 33301, by First-Class U.S. Mail, this _____ day of December, 2002.

Attorney for Victor Giorgetti

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Courier-New 12-point font.

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