

IN THE SUPREME COURT OF FLORIDA

IN RE:  
STANDARD JURY INSTRUCTIONS  
IN CRIMINAL CASES -  
REPORT NO.: 2007-04

CASE NO.: SC07-767

COMMENTS OF THE FLORIDA ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS (FACDL)  
RE: STANDARD JURY INSTRUCTIONS IN  
CRIMINAL CASES - REPORT NO.: 2007-04

The Florida Association of Criminal Defense Lawyers (FACDL) by and through the undersigned attorney, offers the following comments to the Proposed Jury Instructions in Report No.: 2007-04 (Instructions as to Failure to Register as a Sexual Offender, Section 943.0435, Florida Statutes).

A. The proposed instruction is unconstitutional - it lacks a requirement of willful conduct.

FACDL submits that the proposed jury instructions, based upon the statutory language of Section 943.0435, Florida Statutes will be unconstitutional - the proposed instruction does not require that a Defendant willfully fail to register as a sexual offender pursuant to the requirements of Section 943.0435. Section 943.0435 requires a Defendant, designated as a sexual offender to perform certain acts within forty-eight

(48) hours of the establishment of a permanent or temporary residence after release from prison. The proposed instruction requires proof that the Defendant **knowingly** (the Defendant knew of the requirements of registration pursuant to Section 943.0435) failed to register. However, the proposed instruction does not require the proof of the **willful** failure to register i.e., the Defendant knew of the need to register but willfully failed to do so, in spite of the ability to comply with the registration requirement.

B. The decision in State v. Giorgetti, 868 So.2d 512 (Fla. 2004).

The proposed jury instruction and Section 943.0435 violate the general rule that criminal statutes which require affirmative acts by a Defendant also require willful conduct for the failure to act as required so as to finish only criminal conduct. Such statutes seek to punish willful conduct so as to avoid punishment of an individual who lacks the ability to perform as required.

This Court in State v. Giorgetti, 868 So.2d 512 (Fla. 2004) construed the statute that required registration of a sex offender to include a **knowing** requirement - the state had to prove that the Defendant knew he had to register. This Court so

construed the statute to eliminate due process problems with a criminal statute which did not require proof of mens rea.

The Giorgetti decision did not specifically address the question presented in these comments - whether the state must prove that the Defendant knew of the requirement to register and willfully or intentionally failed to register. The Court in Giorgetti held that the state must prove the knowing element and the failure to register. The Giorgetti decision does not directly require proof of willful or intentional conduct. Consequently, this Court should now require proof of willful conduct to make Section 943.0435 conform with 1) due process requirements as to proof of mens rea; 2) proof of violations of probation; 3) case law from state jurisdictions as to the crime of the failure to register as a sex offender.

C. Proof of violation of probation.

Punishment for a violation of probation or for failure to pay a fine or restitution require willful conduct - the willful failure to perform as required despite the ability to do so. See Stephens v. State, 630 So.2d 1090 (Fla. 1994); Bearden v. Georgia, 461 U.S. 660 (1983); See also Slovak v. State, 862 So.2d 875 (Fla. 3d DCA 2003); Rodriguez v. State, 768 So.2d 1234 (Fla. 5<sup>th</sup> DCA 2000); Garcia v. State, 701 So.2d 607 (Fla. 2d DCA

1997); Taylor v. State, 687 So.2d 33 (Fla. 3d DCA 1997) (no violation of probation if Defendant lacks ability to comply). Probation is a matter of grace and proof of any violation must be by the greater weight of the evidence. See Roundtree v. State, 955 So.2d 1184 (Fla. 3d DCA 2007). If the willful requirement applies to a violation of probation, it should also apply to a criminal statute like Section 943.0435 which has criminal sanctions and which the state must prove beyond a reasonable doubt.

D. Case law from other jurisdictions.

Case law from other jurisdictions demonstrate that proof of the failure to register as a sex offender must include proof of willfulness. California courts specifically require proof of knowing and willful conduct by a Defendant who fails to register as a sex offender. People v. Sorden, 113 P.3d 565 (Cal. 2005); People v. Barker, 34 Cal. 4<sup>th</sup> 345 (Cal. 2004). Massachusetts has construed its registration statute to require knowing and willful conduct. Commonwealth v. Ramirez, 865 N.E. 2d 1158 (Mass. Ct. App. 2007). Indiana requires proof of knowing and intentional conduct. State v. Casada, 825 N.E. 2d 936 (Ind. Ct. App. 2005). Alaska, Mississippi, and North Dakota also require proof of willful or intentional conduct in addition to knowledge

of the requirement of register. See Dailey v. State, 65 P.3d 891 (Alaska Ct. App. 2003); Garrison v. State, 950 So.2d 990 (Miss. 2006); State v. Knowels, 643 N.W. 2d 20 (N.D. 2002). Colorado and Virginia require proof of intentional conduct. People v. Garcia, 23 P.3d 590 (Colo. 2006); Kitze v. Commonwealth, 475 S.E. 2d 830 (Va. Ct. App. 1996).

This Court should follow the weight of authority in this country and construe Section 943.0435 to require proof of knowing and willful conduct. FACDL realizes that this Court could approve the proposed instructions and wait for a case-in-controversy to address any constitutional deficiencies in Section 943.0435. This Court has followed this procedure in the past as to proposed jury instruction. However, the constitutional deficiencies in 943.0435 are apparent from the face of the statute and this Court in State v. Giorgetti, *supra*, has previously held that a reviewing Court has the duty to construe a statute so as to remove any constitutional deficiencies. This Court should so construe 943.0435 pursuant to this proceeding.

If the jury instruction for Section 943.0435 does not have a willful requirement, then absurd or unfair results could occur. The undersigned counsel is aware of an example where a

Defendant was unable to register as required because he was in an automobile accident and was in the hospital for several weeks. Consequently, this Defendant was unable to register within 48 hours. However, under the proposed jury instructions, this Defendant would have been guilty if the state proved he knew he had to register and he failed to do so. The criminal law should punish persons for what they knowingly and willfully fail to do and not for what they physically cannot do. A review of the law of violations of probation will demonstrate the various circumstances which can make the failure to act a non-willful and criminal act. (See cases cited above on page 3)

FACDL realizes that the proposed instruction tracks the statutory language of 943.0435 - 943.0435 does not contain a willfulness requirement. This Court could approve of the instruction and await for a case-in-controversy to decide the constitutional issue as to proof of willful conduct. Nonetheless, Section 943.0435 is a criminal statute and this Court should construe and enforce it in a way which renders it constitutional. If this Court approves of the proposed instruction, then this Court will approve of and sanction convictions which do not require proof of the requisite mens rea (willfulness) and actus rea (the failure to act when one has the

ability to do so). Consequently, this Court should add the term **willfully** to the instruction - the state must prove that the Defendant **knowingly** and **willfully** failed to register.

Respectfully submitted,

/S/ James T. Miller  
James T. Miller

On behalf of

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