IN THE SUPREME COURT OF FLORIDA

IN RE: SC07-767
STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES—
REPORT 2007-4.
_____/

COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed jury instructions involving failure to register as a sexual offender or sexual predator. Many, if not most, of the defendants charged with these crimes are indigent clients of public defenders. The FPDA consists of the twenty elected public defenders, approximately a thousand assistant public defenders, and support staff. As appointed counsel for these indigent criminal defendants, FPDA members are deeply interested in the standard jury instructions in these cases.

The FPDA's greatest concern is with the adequacy of the scienter element in the proposed jury instructions. The FPDA also notes that the proposed jury instructions rewrite the statutory elements in the provision applicable to homeless persons. Additionally, the proposed jury instructions omit the element that the person was not incarcerated at the time of registration. Finally, the FPDA notes

some other, minor problems, including alterations that will need to be made to conform the jury instructions to the most-recent legislative amendments.

"Knowingly" is not adequate statement of the scienter element.

In *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004), this Court applied *Lambert v. California*, 355 U.S. 225 (1957), and held that "at a minimum '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 sexual offender registration statutes] can stand.'" *Giorgetti*, 868 So. 2d at 520 (quoting *Lambert*, 355 U.S. at 229) (emphasis supplied). After that opinion, law enforcement agencies became very proficient at having everyone registering simultaneously sign papers informing them of all their obligations under the sexual offender and sexual predator statutes. While sometimes mere knowledge solves the strict liability problem, that is not always true. Assume that the law enforcement agencies have provided the standard warning form[1] in the following situations:

- A person timely appears at the sheriff's office to reregister, but is told that reregistration can occur only at

[1] An internet version of that form is posted at: http://offender.fdle.state.fl.us/offender/Important.jsp.

certain days and times, and the next such date will be beyond the time for registration.[2]

- A person timely registers with the sheriff's office late on a Friday afternoon. The person then must register with the DMV within 48 hours, but no DMV offices will be open again until Monday morning (Tuesday if it is a holiday).[3]
- A person is driving to the sheriff's office to register on the last day of required month when s/he is involved in an automobile accident. As leaving the scene of the accident is illegal until a police officer arrives, and such calls receive low priority, the officer does not arrive until after the registration office is closed.
- A person who is required to register is incarcerated, hospitalized or otherwise physically unable to report in person incapacitated during the last days of the month in which the person was required to register.

Although logic and common sense would say these persons have done nothing wrong if they register as soon as practical, such sentiments are scarce-to-nonexistent in the current political and cultural climate. The result of that climate is "zero tolerance" arrest policies in law enforcement agencies and vigorous prosecution policies by State Attorney's offices. In this climate, a jury may be the

---

[2] *See* http://offender.fdle.state.fl.us/offender/Documents/REREGISTRATIONLOCATIONS1.pdf (Only four counties allow reregistration 24hours/7 days a week. Most other counties allow reregistration Monday-Friday during normal business hours. Charlotte, Columbia, DeSoto, Gulf, Hamilton, Hendry, Hernando, Lafayette, Manatee, Sarasota, St. Johns, Sumter, and Suwannee Counties, however, limit reregistration to two or three days a week. Franklin County limits reregistration to three hours in the morning of the second Wednesday of each month.)

[3] *See* http://www.hsmv.state.fl.us/offices/index.html (clicking on most of the counties reveals no DMV offices that are open on weekends. In major metropolitan areas, one or two offices are open "by appointment only" on Saturdays.).

only entity with the political courage and will to apply common sense. This fact makes providing the jury with clear, concise instructions all the more important.

The proposed jury instructions attempt to take into account this Court's decision in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004). Unfortunately, just using the word "knowingly" does not adequately address the scienter issue because that term is capable of different meanings. Sometimes "knowingly" requires mere knowledge, and sometimes it requires purposeful or "willful" violations.

The best example of the different meanings of "knowingly" is the recent jurisprudence involving Medicaid fraud. This Court held that federal law preempted the state statute after comparing how Florida and federal law defined that word:

> The Florida statute defines "knowingly" as "done by a person who is aware or *should be aware* of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." In contrast, the federal statute applies only to those acts that are performed "knowingly and willfully," which requires proof that "the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful."

State v. Harden, 938 So. 2d 480, 491 (Fla. 2006) (emphasis in original; footnote and citations omitted).

Tellingly, in response to this issue, the legislature did not add a different *mens rea* element, but merely redefined "knowingly" to include the word "willfully:"

> "Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident. As used in this section, the term "knowingly" also includes the word "willfully" or "willful" which, as used in this section, means that an act was committed voluntarily and purposely, with the specific intent to do something that the law forbids, and that the act was committed with bad purpose, either to disobey or disregard the law.

See id. at 491. n.7.

Neither definition of the word is implausible or awkward. By itself, the word "knowing" can mean either "possessing knowledge, information or understanding" or "deliberate; conscious." American Heritage Dictionary (4th ed. 2004). This Court should not adopt such indeterminate jury instructions.

Instead, the jury instructions should make clear that "knowingly" requires a deliberate or conscious violation. Both *Giorgetti* and *Lambert* involved defendants whose claim was that they did not know about the registration requirements. Hence, those cases focus on requiring proof of mere knowledge. The strict liability problem discussed in those cases, however, does not vanish by the act of signing a paper informing the person of the registration duties. Just because a person knows of an obligation does not mean that no circumstances will arise temporarily

preventing the person from fulfilling those obligations. In that opinion, this Court noted the constitutional problem with strict liability:

> In [*State v.*] *Oxx*, [417 So. 2d 287 (Fla. 5th DCA 1982)], Judge Cowart recognized three possible restraints on the Legislature's power to eliminate scienter requirements from a statute: . . . and (3) states that impose an affirmative duty to act on an individual and then penalize the failure to act. With regard to this third category, Judge Cowart explained:
>
> > [A] third constitutional restriction may come into play where the statute imposes an affirmation duty to act and then penalizes the failure to comply. 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.

Giorgetti, 868 So. 2d at 516-17 (citation omitted).

The conduct here—"residing"—is as innocent as conduct can be. The statute punishes sleeping, eating, and spending time with family if the person has not registered to do so at that address. In addition to due process, the rights to privacy, due process, and the right against unreasonable searches protect such family matters. *See* Art. I, §§ 2, 12 & 23, Fla. Const.; *Davis v. State*, 834 So. 2d 322, 326 (Fla. 5th DCA 2003) ("Rather, privacy in the home is a constitutional right included within the catalog of indispensable freedoms guaranteed to each individual.") (internal quotations omitted).

As the introductory examples illustrate, the "mere knowledge" formulation of knowingly would still create strict liability if the person knew the information and was unable to register for any reason. Under due process, this type of strict liability is inappropriate in cases such as these carrying penalties for second or third degree felonies (even without the seemingly-inevitable alphabet-soup of enhancement statutes—H.O., H.V.O., etc.). *See Giorgetti*, 868 So. 2d at 518-19. A rule of strict liability would also have difficulty surviving rational-basis, let alone strict scrutiny review. *See generally*, *T.M. v. State*, 784 So. 2d 442, 443 n.1 (Fla. 2001). Punishing someone for failing to do something they could not do is irrational. Accordingly, any failure to register must be intentional and deliberate, not a matter of strict liability.

Therefore, the FPDA respectfully suggests that in the proposed jury instructions this Court should replace the word "knowingly" with the phrase "knowingly and willfully" or "knowingly and intentionally." Alternatively, this Court could provide a definition of "knowingly" to clarify that the standard is deliberate or conscious inaction, not mere knowledge. This alternative, however, is far more cumbersome and the FPDA cannot endorse it for that reason.

Homelessness provision is rewritten by proposed instructions 11.14(d) and 11.15(g)

As one would anticipate, homelessness is an almost-insurmountable problem for a statutory scheme that revolves around registering residential addresses. The statute starts out plausible enough, but then descends into something to make Kafka smirk:

> (b) A sexual offender who vacates a permanent residence and fails to establish or maintain another permanent or temporary residence shall, within 48 hours after vacating the permanent residence, report in person to the sheriff's office of the county in which he or she is located. The sexual offender shall specify the date upon which he or she intends to or did vacate such residence. The sexual offender must provide or update all of the registration information required under paragraph (2)(b). The sexual offender must provide an address for the residence or other location that he or she is or will be occupying during the time in which he or she fails to establish or maintain a permanent or temporary residence.

§ 943.0435(4)(b), Fla. Stat. (2006) (emphasis supplied). How homeless persons are to provide the address of where they will be living while they are homeless is mystery the legislature left unresolved. This impossible statute is repeated for sexual predators with "predator" substituted for "offender." *See* § 775.21(6)(g)1., Fla. Stat. (2006).

A serious issue with this statute is whether a person who has become homeless must report that fact under the first sentence of that paragraph even if

s/he cannot comply with the third sentence. Such an issue must await an actual case, which may never happen as even the State Attorneys seem to realize the problems with this statute.

The proposed jury instructions, however, attempt to make sense out of this statute by rewriting it. Element 3b of proposed instructions 11.14(d) and 11.15(g) condense these statutes to: "knowingly failed to report in person to an office of the sheriff of (name of county) County within 48 hours of vacating [his] [her] permanent residence and failing to establish or maintain another permanent or temporary residence." (emphasis supplied)

This instruction mischaracterizes the statute. The statute criminalizes not reporting an address when a person is homeless. The proposed instruction criminalizes being homeless.[4] For obvious reasons, jury instructions cannot enact, amend or override substantive criminal law. *See, e.g., Yohn v. State*, 476 So. 2d 123 (Fla. 1985).

Because of the serious constitutional problems with the statute, the FPDA recommends that this Court not correct the proposed jury instruction to match the statute, but omit the proposed instruction altogether. Given the problematic mandate of this statute, this Court should not adopt a similarly problematic jury

[4] Note that if enacted by the legislature, the crime as envisioned by the proposed jury instructions would also have serious constitutional problems. Being homeless is not, and cannot be, a crime. *See Pottinger v. City of Miami*, 810 F. Supp. 1551, 1561-65, 1578-83 (S.D. Fla. 1992).

instruction. Should this statute ever be enforced before the legislature addresses the problem, and should it survive the obvious constitutional challenges, the trial court will have to construct a jury instruction based on whatever rational construction that court can give the statute. This Court should let that judicial process occur without interference.

The proposed instructions omit an element that the person is not incarcerated.

The following scenario explains how this situation occurs: A person is required to register by the end of a specific month. That person then is arrested on a minor charge and jailed through the end of that month. When the person is later released, he reports the sheriff's office to register within 48 hours as required by law. At that time, the person is rearrested for not registering during the appropriate month. Unfortunately, this scenario is not a hypothetical.

The legislature attempted to solve this problem by placing the duty to register persons in jail on the custodian. Although a person in the custody of the Department of Corrections must register with that department, *see* § 944.607(5) (Fla. Stat. 2006), "[i]f the sexual offender is in the custody of a local jail, the custodian of the local jail shall register the offender within 3 business days after intake of the offender for any reason and upon release, and shall forward the information to the Department of Law Enforcement." Ch. 2007-209, § 7 (to be codified as § 944.607(7)) (emphasis supplied); *see also* § 944.607(8), Fla. Stat.

(2006) (similar provision for those in federal custody, but with a permissive, "may" substituted for the mandatory, "shall" language). Parallel provisions exist for sexual predators. *See* Ch. 2007-209, § 1 (to be codified as § 775.21(6)(b)-(d)).

The proposed jury instructions, however, barely address these statutory provisions for sexual predators and do not address them at all for sexual offenders. The proposed instruction 11.15(a) (Proposal 1(A)), contains an element that the person "was not in the custody or control of or under the supervision of the Department of Corrections and was not in the custody of a private correctional facility." This element, as drafted, is incomplete because it omits jails and federal facilities. Nevertheless, at least it appears in some form.

That element disappears from all the other sexual predator instructions, however, and inexplicably never makes any appearance in the sexual offender instructions, even though the statutes are virtually identical. Instead, the majority of the proposed instructions incorrectly assume that a sexual offender always has the duty to register, even if s/he is incarcerated.

The FPDA recommends incorporating into every instruction an element similar to element 3 in proposed instruction 11.15(a), except with language including jails and federal correctional institutions.[5]

[5] Changing the scienter language to "knowingly and willfully" will largely solve this situation as a practical matter. Nevertheless, the jury instructions should still reflect that a person does not have a duty to register if s/he is incarcerated.

Miscellaneous Problems

The following are miscellaneous drafting issues that this Court should consider before promulgating these jury instructions:

- The proposed instructions all provide for a stipulation that "he has been convicted as a sexual offender" or "a sexual predator." Aside from the non-gender neutral language, the description here is awkward. Florida has no crime called "sexual offending" or "sexual predation." Instead, these labels automatically apply to persons convicted of certain crimes. Therefore, no one can stipulate to being "convicted" as a sexual offender or predator. Better language would state that the person "has a prior conviction that automatically results in the person being designated as a [sexual offender] [sexual predator]."
- Proposed instruction 11.14(g), element 3c, and proposed instruction 11.15(h) suggests that it is a crime to fail to respond to address verification correspondence from the sheriff, the Department of Corrections, or the Department of Law Enforcement. Sections 775.21(10)(a) and 943.0435(14)(a)4., Florida Statutes, requires a response to such correspondence only if it is from the Department of Law Enforcement.
- Proposed instruction 11.14(c), relating to failure to report to the DMV after reporting to the sheriff, does not contain an exception found in the statute:

"unless a driver's license or identification card was previously secured of updated under s. 944.607." § 943.0435(3), Fla. Stat. (2006). Section 944.607 governs sexual offenders under the supervision of the Department of Corrections. Effectively, this exception means that persons on probation or community control who already reported to DMV while under probation or community control do not have to do so again on release from supervision, even though they must report to the sheriff at that time. *See* Ch. 2007-209, § 2 (to be codified as § 944.0435(2)(a)1.b.).

- Proposed instructions 11.14(d) and 11.15(g) cover failure to report a change in address. Element 3.a. covers the basic failure to report. Element 3.c. covers an abuse use of the reporting process where a person reports leavings a permanent residence, but never leaves. This situation is a second-degree felony, unlike the other violations that are third-degree felonies. *See* §§ 775.21(6)(g) & 943.0435(4)(c), Fla. Stat. (2006). The proposed instructions identify no lesser-included offenses. The jury instructions should reflect, however, that the basic failure to register in element 3.a. is a lesser-included offense of the more-aggravated failure to register in element 3.c.
- Similarly, proposed instructions 11.14(e) and 11.15(j) cover remaining in a permanent residence in Florida after reporting leaving the state. This is crime is also a second-degree felony. *See* §§ 775.21(6)(j) & 943.0435(8), Fla. Stat.

(2006). Again, these crimes are aggravated forms of failing to report a permanent residence, and as such, the basic failure to do so is a lesser-included offense.

Amendments required by continuing legislative amendments

Passing amendments to the sexual predator and sexual offender statutes has become an annual legislative ritual. Chapter 2007-209 became effective July 1, 2007, and contains several provisions that will require amendments to the proposed jury instructions:

- Amendments to sections 775.21(6) and 943.0435(2)(b)1.&2. make it clear that a person reports to the Department of Law Enforcement "through the sheriff's office." Ch. 2007-209, §§ 1 & 2. Thus, the alternative "[the Florida Department of Law Enforcement]" language can be eliminated as unnecessary clutter in proposed instructions 11.14, 11.14(a), 11.14(b), 11.15(b), 11.15(c), 11.15(d), and 11.15(f).
- Amendments to section 775.21(6)(b) establish that a person supervised by the Department of Corrections but not in custody has three business days to register with the Department of Corrections. *See* Ch. 2007-209, § 1. Proposed instruction 11.15 will need to be amended to reflect that change.
- An amendments to section 775.21(6)(e) now require that sexual predators register with both the sheriff where they establish a residence and the sheriff

where they were convicted. An amendment to section 943.0435(2)(a) now allows sexual offenders to register with either such sheriff's office. Proposed instructions 11.14 and 11.15(a) will need to be amended to reflect these changes.

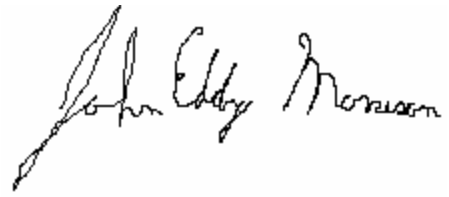
- Sexual predators and some sexual offenders now must reregister four times a year (every three months). *See* Ch. 2007-209, §§ 1 & 2 (to be codified as § 775.21(8)(a) and § 943.0435(14(b)). Proposed instructions 11.14(g) and 11.15(k) will need to be amended accordingly.

CONCLUSION

The FPDA respectfully requests that this Court amend the proposed jury instructions as suggested above before promulgating them.

Respectfully submitted.

Florida Public Defender Association, Inc.



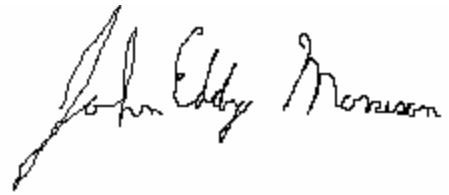
By:_____

John Eddy Morrison
Assistant Public Defender
1320 N.W. 14th Street
Miami, Florida 33125
Fla. Bar No. 072222

CERTIFICATES

I HEREBY CERTIFY that a copy of the above comments were mailed to the Honorable Terry D. Terrell, Committee Chair, c/o Les Garringer, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, this second day of July 2007.

I HEREBY CERTIFY that the above comments are printed in 14-point Times New Roman.



By:_____
John Eddy Morrison