IN THE SUPREME COURT OF FLORIDA

IN RE: CASE NO.: SC07-767
STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES-
REPORT 2007-4
_____/

COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES

RESPONSE TO THE COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION AND THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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

Comes now the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, by and through the Chair, the Honorable Terry D. Terrell, Circuit Court Judge, and files this response to the comments received by the Florida Public Defender Association and the Florida Association of Criminal Defense Lawyers.

The committee filed a report with the court on May 2, 2007, proposing a set of new standard jury instructions in criminal cases that addresses legislative enactments regarding sexual predators and sexual offenders.

The court published the proposed instructions in *The Florida Bar News* on June 1, 2007. Comments were received from the Florida Public Defender Association and the Florida Association of Criminal Defense Lawyers.

The committee met on July 11, 2007, via telephone conference and in Tampa on August 17, 2007, to address the comments received by the committee. This response is divided into two segments that separately address the concerns of each entity. The amended instructions for Sexual Offenders can be found at Appendix A. The amended instructions for Sexual Predators can be found at Appendix B. The comments of the Florida Public Defender Association and the Florida Association of Criminal Defense Lawyers can be found at Appendix C and Chapter 2007-209, Laws of Florida, is attached at Appendix D.

I. Comments from the Florida Public Defender Association (FPDA).

Issue: **"Knowingly" is not an adequate statement of the scienter element.**

The association feels that the use of the word "knowingly" in the proposed instructions does not adequately address the scienter issue because the word is capable of different meanings. The association feels that instructions should make it clear that "knowingly" requires a deliberate and conscious violation. FPDA suggested that the proposed instructions should be amended to replace the word "knowingly" with the phrase "knowingly and willfully" or "knowingly and intentionally." The committee discussed *State v. Giorgetti*, 868 So.2d 512 (Fla. 2004). It was noted by the committee that the word "willfully" does not appear in any of the statutory references found in the proposed instructions. Although the word "knowingly" is also absent from the statutory language, the committee noted that the Florida Supreme Court believed that the legislature must have meant that knowledge was a required element. As this Court stated in *Giorgetti:*

> Thus, like the United States Supreme Court, we held in *Chicone* that we will ordinarily presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent. An express provision dispensing with guilty knowledge will always control, of course, since in that instance the Legislature will have made its intent clear.

Since the court in *Giorgetti* did not choose to expand the use of the word "knowingly" to include "willfully," the committee, by a unanimous vote, declined to expand the elements in the instructions to require the state to meet this burden of proof. The committee concluded that the language in the proposed instructions was based on the law as written by the legislature, and that branch of government had chosen not to require that degree of proof in sexual predator and sexual offender registration prosecutions.

Issue: **Homelessness provision is rewritten by proposed instructions 11.14(d) and 11.15(g).**

The association takes exception to the wording of element 3b of proposed instruction 11.14(d) and element 3b of instruction 11.15(g). The association feels that the language "and failing to establish or maintain another permanent or

temporary residence" criminalized a person for being homeless. The association recommended that the Court omit this proposed instruction since it did not correctly match the statutory language. The committee disagreed and did not believe the language cited by the association created a situation where the instruction criminalized a homeless person. Section 943.0435(4)(b), Florida Statutes, states:

> 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.

This language is also found in section 775.21(6)(g)2, Florida Statutes, as it relates to sexual predators.

The proposed instructions that contain element 3 in each instruction adopt the statutory language and read as follows:

> (Defendant) **knowingly failed to report in person to an office of the sheriff of** (name of county) **County in which [he] [she] is located, within 48 hours of vacating [his] [her] permanent residence and failing to establish or maintain another permanent or temporary residence.**

These proposed instructions do not criminalize homelessness. The committee noted that if a person is living in a tent under the interstate, or in a homeless shelter, that fact is to be reported to the sheriff. The intent of the statute is to allow law enforcement to be aware of the physical location of a sexual predator or offender, regardless of where that physical location may be. The statute requires that a person must report to the sheriff within 48 hours and provide an address for the residence or other location that he or she may be located during the time no temporary or permanent residence is established or maintained. The

instruction does nothing more than restate that legal requirement. The committee voted unanimously to not reword the proposed instructions.

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

The association recommends that an additional element be added to the sexual predator and sexual offender instructions to require the state to prove that the defendant was not in the custody or control of the Department of Corrections, county jails, or federal correctional institutions. In its response, the association relies upon the statutory language located in Chapter 944 of the Florida Statutes.

The committee respectfully disagrees with the association that an additional element regarding incarceration is necessary in the proposed instructions. Proposed instruction 11.15(a) contains this element simply because the legislature included it in s.775.21(6)(e), Florida Statutes. None of the other proposed instructions contain the element of incarceration because the instructions are based on Chapter 775 and Chapter 943, Florida Statutes, rather than Chapter 944. The committee feels that the statutory language in Chapter 775 and Chapter 943 is controlling, and voted unanimously not to change the proposed instructions.

Issue: **Miscellaneous problems.**

The association notes that portions of the proposed instructions use non-gender-neutral language. The committee agreed. The proposals have been amended to provide for [he] [she] where applicable.

The association feels that the use of the language "has been convicted as a sexual offender" (same language used for sexual predator) is incorrect. Since there is no crime for being a sexual offender or a sexual predator, a better choice of words would be "has a prior conviction that automatically results in the person being designated as a sexual offender" (same language used for sexual predator). The committee considered changing the language in the proposals after a lengthy discussion, but opted by a unanimous vote to leave the proposed language in place.

The association takes exception to the language contained in proposed instruction 11.14(g), element 3c, and proposed instruction 11.15(h). The association feels that it is a crime only to fail to respond to correspondence received from the Florida Department of Law Enforcement. The committee proposal also lists the Department of Corrections and the sheriff. The committee

agrees and voted unanimously to delete the reference to these two agencies in 11.14(g) and 11.15(h). The committee also voted unanimously to amend 11.14(g) and 11.15(k) based on legislative changes to s. 943.0435(14), and s. 775.21(8)(a), Florida Statutes, that occurred during the 2007 legislative session (Chapter 2007-209, Laws of Florida).

These amendments require quarterly reporting. Chapter 2007-209 is attached at Appendix C. It is noted that in Report 2007-4 (SC07-767), proposed instruction 11.14(g) contains element 3 which includes subsections 3a and 3b. The last subsection of element 3 omitted the "c." The committee amended element 3, creating a new subsection 3c based on the legislative change to the statute. The unlabeled subsection "c" in element 3 in the report became 3d. There are now four subsections in element 3. The committee determined this was the logical order for the paragraphs.

The association believes that proposed instruction 11.14(c), relating to a failure to report to the Department of Highway Safety and Motor Vehicles after reporting to the sheriff, does not contain a statutory exception found in the statute. The committee voted unanimously not to include the statutory exception. It was felt that any exception could be raised as a defense, or the state attorney would not file an Information or seek an Indictment if the offender was entitled to the exception.

The association addresses the question of lesser included offenses for instructions 11.14(d) and 11.15(g). The association feels that since element 3(c) described a felony of the second degree, then element 3(a) is a lesser included offense since it is a felony of the third degree. The association also used the same logic in reviewing proposed instructions 11.14(e) and 11.15(j), noting that these provisions are aggravated forms of failing to report a permanent address and as such, the basic failure to do so is a lesser included offense.

Proposed instruction 11.14(e) does not address remaining in the state after giving notice of leaving the jurisdiction. The instruction that covers that scenario is 11.14(f). The consensus of the committee is that the 3d degree felony offenses are not necessarily lesser included offenses of the 2d degree felony offenses. In its simplest form, a lesser included offense is one which must necessarily be included before a higher offense can be committed. One cannot commit aggravated assault without first committing an assault. There is no such relation between the third degree felony offenses and the second degree felony offenses. Third degree felony offenses address a failure to register, i.e., the defendant never goes to the sheriff's

office. Second degree felony offenses require registration, i.e., the defendant goes to the sheriff's office. The second degree felony crime is committed only when the defendant, having first registered, changes his/her mind and doesn't move, leave the state, etc. Failing to register (the third degree felony offense) is not necessary to the second degree felony offense. In fact, they are mutually exclusive concepts.

Issue: **Amendments required by continuing legislative enactments.**

The association recommends that proposed instructions 11.14, 11.14(a), 11.14(b), 11.15(b), 11.15(c), 11.15(d) and 11.15(f) delete the reference to the Florida Department of Law Enforcement. The committee agreed with the association, except for instruction 11.14. That instruction does not refer to the Florida Department of Law Enforcement. The amendments are attached at Appendix A.

The association recommends that proposed instruction 11.15 be amended to reflect that an offender has three business days in which to register with the Department of Corrections. The committee agrees. Amended instruction 11.15 is attached at Appendix A.

The association recommended that proposed instructions 11.14 and 11.15(a) be amended to reflect the fact that an offender is required to register with the sheriff where the offender establishes a residence, and is required to register with the sheriff in the county where the offender was convicted. The committee agrees. Amended proposals 11.14 and 11.15(a) are attached at Appendix A.

The association notes that chapter 2007-209, Laws of Florida, changes the registration requirements for sexual predators and certain sexual offenders. They now must register four times a year. The committee agrees. Proposed instructions 11.14(g) and 11.15(k) are attached at Appendix A.

II. Comments of the Florida Association of Criminal Defense Lawyers (FACDL)

Issue: **The proposed instruction is unconstitutional - it lacks a requirement of willful conduct.**

The comments of FACDL are similar to those of the Florida Public Defender Association. The instructions are unconstitutional since the required

element of willful conduct has not been included. The committee disagrees since neither the statute nor the holding in *Giorgetti* requires willfulness.

***Giorgetti* Decision**

FACDL has asked the court to expand the holding in *Giorgetti* to require proof of willful conduct on the part of the predator or offender for failing to initially register or to re-register in a quarter of a year. The committee feels there is no reason to expand the holding in *Giorgetti*, since willfulness is not a required element of proof.

Issue : Proof of violation of probation.

FACDL opines that since proof of a violation of probation requires the state to prove the violation was willful, willfulness should also apply to section 943.0435, Florida Statutes. The committee disagrees. Neither section 943.0435, nor the holding in *Giorgetti*, requires that the state prove willfulness in order to obtain a conviction for a violation of the statute. In addition, if a violation of probation warrant is predicated upon the offender committing a criminal act, the court may find a violation has occurred if the elements of the charged offense are proven. The vast majority of crimes listed in the Florida Criminal Code do not require the state to prove that the violation of law was willful.

Issue: Case law from other jurisdictions.

FACDL notes that several other state courts have construed their statutes to require proof that the defendant willfully failed to register as a sexual offender. FACDL suggests 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 further suggests that although the Court could wait for a case in controversy, it would be wiser for the Court to cure the constitutional infirmity of the statute (and the instructions) and add the term "willful" to the instructions to read "knowingly and willfully" failed to register.

A reading of the cases cited by FACDL leads the committee to a very different conclusion than that reached by the association.

FACDL cited cases

State v. Sorden. In this California case, the court held that the defendant's claim that his depression made it more difficult for him to remember to register as a sex offender did not negate the willfulness element of the offense, and was not a defense. Contrary to the assertion by FACDL that the California Supreme Court requires proof of knowing and willful conduct by a defendant, California's sex offender registration statute requires the state to prove willfulness. Pen.Code. § 290, subd. (g)(2) states:

> Except as provided in paragraph (5), (7), and (9), any person who is required to register under this section based on a felony conviction or juvenile adjudication who willfully violates any requirement of this section or who has a prior conviction or juvenile adjudication for the offense of failing to register under this section and who subsequently and willfully violates any requirement of this section is guilty of a felony. . . .

People v. Barker. The California statute does not use the word "knowingly," but the Supreme Court of California has interpreted section 290 of the penal code to require that the defendant actually know of the duty to act. In *Barker*, the court noted:

> Logically one cannot purposely fail to perform an act without knowing what act is required to be performed . . . the term 'willfully'. . . imports a requirement that the person knows what he is doing. Consistent with that requirement, and in appropriate cases, knowledge has been held to be a concomitant of 'willfulness.' Accordingly, a violation of section 290 requires actual knowledge of the duty to register. A jury may infer knowledge from notice, but notice alone does not necessarily satisfy the willfulness requirement.

It is noted that section 290 of the California Penal Code was enacted in 1947. The statute was regulatory and did not contain an intent element. In 1957, the United States Supreme Court considered a due process challenge to another registration ordinance from the City of Los Angeles that required registration of felons. This ordinance did not require willfulness in order for there to be a violation. In *Lambert v. California*, 355 U.S. 225, 227 (1957), the Supreme Court held 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.

Twenty years later, the California Legislature added a willfulness element to section 290. Although *Lambert* requires proof of knowledge, the opinion does not require proof of both knowledge and willfulness.

Commonwealth v. Ramirez. The Massachusetts sexual offender registration statute does not require the state to prove a willful violation. The statute requires the state to prove the offender knowingly failed to register; knowingly failed to verify registration information; knowingly failed to provide a notice of change of address; or knowingly provided false information. In *Ramirez*, the court did not hold that the state was required to prove a willful violation of the statute. The court held that the evidence was insufficient to support a finding that the defendant knew he was supposed to register as a sex offender. The word "willful" appears in the opinion where the court is citing California cases. It is interesting to note that the Massachusetts court found that there is more than one way for the state to offer proof of the defendant's state of mind.

> Even when knowledge, willfulness, or some other mens rea is not explicitly required by a sex offender registration statute, some jurisdictions have applied the *Lambert* rationale to require proof of actual knowledge or the probability thereof for a conviction under the sex offender registration statute.

Clearly the Massachusetts court believed that knowledge or willfulness or other mens rea was required in order for the statute to pass constitutional muster. There is no requirement that the state prove both knowledge and willfulness.

State v. Casada. FACDL has advised the court that Indiana courts require the state to prove knowing and intentional conduct, and cites *Casada* as the authority for this proposition. In reality, the Indiana statute requires the offender to "knowingly or intentionally" fail to register. The *Casada* case does not require the state to prove that the offender both knowingly and intentionally failed to register. Although a head note (not part of the court opinion) erroneously uses the words knowingly and intentionally, the court never makes that finding in the opinion. In *Casada*, the state failed to allege in the Information that the defendant knowingly or intentionally failed to register. Defense counsel did not object to the omission and the appellate court determined the error of omission was waived. Sufficient

evidence was introduced at trial to support a finding that the defendant knowingly or intentionally failed to register. From this cited case, it is clear that proof of knowledge is all that is required to sustain a conviction for a violation of the Indiana statute.

Dailey v. State. The Alaska registration statute states:

> A person commits the crime of failure to register as a sex offender or child kidnapper in the second degree if the person knowingly fails (1) to register (2) file the written notice of change of address (3) file the annual or quarterly written verification, or (4) supply all of the information required to be submitted under (1) - (3) of this subsection, as required in AS12.63.010.

In *Dailey*, the offender prepared quarterly verifications, but refused to sign and attest that the information was accurate. The court stated that since the state had to prove the defendant knowingly failed to file the quarterly written verification, the following burden had to be met.

> In other words, to convict [defendant] of failure to file sworn written quarterly verifications, the State had to prove both that [defendant] was aware of the circumstances giving rise to his duty to file sworn quarterly verifications and that he knowingly refrained from performing that duty.

The court did not hold in *Dailey* that the State had to prove willful or intentional conduct in addition to knowledge of the requirement to register.

Garrison v. State. The Mississippi statute appears to be silent with regard to the requirement that the offender have knowledge of the requirement to register. Miss. Code Ann. Section 45-33-27 and 45-33-33. In *Garrison*, the defendant at trial argued that the state should be required to prove that his failure to register was willful, and that he received actual notice of his duty to register. The trial court refused to give instructions on both issues. The Mississippi appellate court addressed the holding in *Lambert.* Based on the *Lambert* decision, the court held that the jury must find beyond a reasonable doubt that the state proved that the defendant had actual knowledge of the duty to register, or that the state proved the probability of such knowledge. The holding of the court does not require the state to offer proof of the defendant's willful or intentional conduct in addition to proving knowledge.

State v. Knowels. In *Knowels*, the Supreme Court of North Dakota does not address the question of knowledge or intentional conduct. The statute that was interpreted by the court provided:

> An individual required to register under this section who violates this section is guilty of a class A misdemeanor. A court may not relieve an individual, other than a juvenile, who willfully violates this section from serving a term of at least ninety days in jail and completing probation for one year. An individual who violates this section who previously has pled guilty or been found guilty of violating this section is guilty of a class C felony.

The trial court interpreted this statute as a strict liability offense, but found the violation was not willful. The Supreme Court of North Dakota held that unless the North Dakota Legislature specifically stated that an offense was governed by strict liability, the courts must find that a violation of the law was willful. Since the trial court found that the failure to register was not willful, the defendant did not commit a criminal offense. It should be noted that the North Dakota Legislature in 2001 removed the words "willfully violates" from the current statute thus creating a strict liability statute. The state is not required to show any willfulness or intent on the part of the defendant to sustain the defendant's guilt.

People v. Garcia. FACDL cites this case at 23 P.3d 590 (Colo. 2006.) This case citation is for a California case that is discussed by the California Supreme Court in *Sorden*. The committee is unable to locate a 2006 Colorado opinion on point.

Kitze v. Commonwealth. This Virginia case was centered on whether registration for sexual offenders violated the constitutional prohibition against ex post facto laws. The court referenced the Virginia Criminal Procedure Code. The 1994 law stated:

> The knowing and intentional failure to register as provided in this section or knowingly providing materially false information to the Registry shall be punishable as a Class 1 misdemeanor.

This law has since been repealed.

FACDL suggests that a failure of this Court to require a willful intent will create an absurd and unfair result. The example given is one where an individual was unable to register because he was in an automobile accident and was hospitalized for several weeks. There is no indication in the comments that this person was ever prosecuted for a failure to register. Logic dictates that if an offender is unable to register because it is impossible to do so, the state will recognize that he or she did not have the requisite intent to violate the law. It is fair to assume that if the State did choose to file an Information for failure to register, the trial court would dismiss the Information.

A review of all the cases cited by FACDL makes it clear that the proposed instructions containing the element of knowledge satisfy any constitutional concerns of due process.

Respectfully submitted this _____day of August 2007.

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CERTIFICATE OF FONT SIZE

I hereby certify that this brief 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).

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing instrument has been furnished to:

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