

**IN THE SUPREME COURT OF FLORIDA****IN RE: STANDARD JURY****INSTRUCTIONS CRIMINAL CASES  
REPORT 2013-04****CASE NO.: SC13-**


---

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

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

	<u>Instruction #</u>	<u>Topic</u>
<b>Proposal 1</b>	<b>28.4</b>	<b>Leaving Scene of a Crash Involving Injury/Death</b>
<b>Proposal 2</b>	<b>28.6</b>	<b>Fleeing to Elude</b>
<b>Proposal 3</b>	<b>28.7</b>	<b>Fleeing to Elude (Siren and Lights)</b>
<b>Proposal 4</b>	<b>28.8</b>	<b>Fleeing to Elude (Siren/Lights/High Speed/Reckless)</b>
<b>Proposal 5</b>	<b>28.8(a)</b>	<b>Fleeing to Elude (Siren/Lights/High Speed/Reckless/Causing SBI or Death)</b>
<b>Proposal 6</b>	<b>28.8(b)</b>	<b>Aggravated Fleeing</b>
<b>Proposal 7</b>	<b>28.8(c)</b>	<b>Aggravated Fleeing</b>
<b>Proposal 8</b>	<b>28.8(d)</b>	<b>Aggravated Fleeing</b>
<b>Proposal 9</b>	<b>28.8(e)</b>	<b>Aggravated Fleeing</b>
<b>Proposal 10</b>	<b>28.18</b>	<b>Failure to Obey</b>

The proposals are in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined. All of the proposals were published in *The Florida Bar News*. All comments received by the Committee are in Appendix B and will be discussed below.

**Proposal 1 – Leaving the Scene of a Crash Involving Injury or Death –  
Instruction 28.4**

In 2012, the Committee proposed changes to Instruction 28.4 as part of SC12-2031. While SC12-2031 was pending, the 4<sup>th</sup> DCA issued *Dorsett v. State*, 38 Fla. L. Weekly D233 (Fla. 4<sup>th</sup> DCA January 30, 2013). The *Dorsett* opinion required changes to the elements of this crime and the committee thought it best to

get a proposal in the pipeline as soon as possible. As a result, the Committee has requested (in a separate motion) the Court to withdraw the 28.4 proposal filed in SC12-2031.

The Court is currently addressing the State's appeal of *Dorsett* in SC13-310. If the Court ultimately affirms the 4<sup>th</sup> DCA's *Dorsett* opinion, the committee respectfully asks the Court to review the proposal in this petition. If the Court reverses the 4<sup>th</sup> DCA, the Committee asks the Court to disregard this proposal.

The proposed changes that are not related to *Dorsett* are as follows:

1) In the title, the Committee put brackets around "death" and "injury" and deleted the word "or."

2) Near the top of the instruction, the Committee cited to section 316.062 because that statute sets forth the requirements that a driver has to fulfill after being involved in a crash.

3) The Committee added "Involving [Death] [Injury]" to the name of the crime in the first paragraph.

4) The Committee added the words "or accident" after the word "crash" everywhere in the instruction. The Committee did so for two reasons, even though Fla. Stats. 316.027 and 316.062 use only the word "crash." First, cases such as *Mancuso v. State*, 652 So. 2d 370 (Fla. 1995) and *State v. Dumas*, 700 So. 2d 1223 (Fla. 1997) use the word "accident." Second, the Committee thought jurors might not realize that this statute applies when a vehicle hits a pedestrian because the jurors might not consider that circumstance to be a "crash."

5) In a response to a comment from Mr. Blaise Trettis (see Appendix B), the Committee added a reference to the crash/accident "occurring on public or private property" because that phrase is in Fla. Stat. 316.027.

6) The Committee added a definition of "vehicle" and a cite to the appropriate statute for that definition.

7) The Committee added the word "knowingly" to the definition of "willfully" along with an italicized cite to *Patterson v. State*, 512 So. 2d 1109 (Fla. 1<sup>st</sup> DCA 1987) as support for that definition.

8) The Committee added Attempt to the Category 2 box of lesser-included offenses.

9) The Committee updated the Comment section and added cites to *Mancuso v. State*, 652 So. 2d 370 (Fla. 1995) and *State v. Dumas*, 700 So. 2d 1223 (Fla. 1997) as support for the elements in the instruction.

These proposed amendments passed unanimously although there was one vote not to add attempt as a lesser included offense and one vote not to add “occurring on public or private property” in element #1.

The most significant amendment, however, was to element #2 which now reads:

(Defendant) **knew or should have known that [he] [she] was involved in a crash.**

In *Dorsett*, the 4<sup>th</sup> DCA held that actual knowledge of the crash/accident is required to sustain a conviction. To reflect this holding, the Committee proposes that element #2 read:

(Defendant) **knew that [he] [she] was involved in a crash or accident.**

The Committee also added a cite to *Dorsett* in the Comment section.

The Committee’s proposal assumes this Court will affirm the 4<sup>th</sup> DCA. As mentioned above, if the Court disagrees with the 4<sup>th</sup> DCA in SC13-310, the Court should disregard this proposal.

The proposal was published in *The Florida Bar News* on April 1, 2013. Two comments were received, one from Mr. Blaise Trettis and one from the Florida Public Defender’s Association (FPDA). Both comments are in Appendix B. Note: The FPDA’s comment regarding Arson is not relevant to this petition.

Mr. Trettis argued that the instruction should include the statutory language of “occurring on public or private property.” Upon post-publication review, the Committee voted 10-1 to include this language in element #1 simply to mimic the statutory language.

The Committee also received a comment from the FPDA who opposed language in element #3 about a defendant knowing “*from the nature of the crash*” of an injury or death. According to the FPDA, the judge would be not be neutral if he or she suggested to the jury that it look to only one factor – the nature of the crash – in determining whether a defendant knew or should have known of the injury or death.

Upon post-publication review, the Committee partly agreed and partly disagreed with the FPDA. The language in element #3 about “from the nature of the accident” comes directly from *Mancuso v. State*, 652 So. 2d 370 (Fla. 1995). Because of *Mancuso*, the Committee felt comfortable retaining that language. However, the Committee did think there could conceivably be other circumstances that would put a driver on notice that someone was injured (such as a bystander waving frantically) as a result of a crash/accident. As a result, the Committee unanimously agreed to propose that element #3 be amended as follows:

*Give 3a if death is charged or 3b if injury is charged.*

1.
  - a. (Defendant) **knew, or should have known from all of the circumstances, including the nature of the crash or accident, of the injury to or death of the person.**
  - b. (Defendant) **knew, or should have known from all of the circumstances, including the nature of the crash or accident, of the injury to the person.**

### **Proposal 2 – Fleeing to Elude – Instruction 28.6**

The Committee is not proposing any major changes to this instruction. Statutory cites for the definitions of “street or highway” and “vehicle” were added along with a cite to *Patterson* as support for the definition of “willfully.”

There was one issue that caused some debate, however. Specifically, one section of the reckless driving statute (Fla. Stat. 316.192(1)(b)) states that “Fleeing a law enforcement officer in a motor vehicle is reckless driving per se.” There is no case law on this section of the reckless driving statute and no one on the Committee had seen or participated in an argument about this provision. Nonetheless, the Committee did not think it appropriate to ignore the statute.

The Fleeing statute refers to a vehicle and not a motor vehicle. Under the definitions of those terms in Fla. Stats. 316.003(21) and (75), every motor vehicle would be a vehicle, but not every vehicle would be a motor vehicle. Accordingly, the Committee thought that if the charging document tracked the language of the Fleeing statute, then Fla. Stat. 316.192(1)(b) would be a necessary lesser-included offense. The Committee thus added “Reckless Driving (if there was evidence that the fleeing was in a motor vehicle)” in the Category One lesser-included box of the Fleeing instruction.

The proposal passed unanimously and was published in *The Florida Bar News*. No comments were received.

**Proposal 3 – Fleeing to Elude (Siren and Lights Activated) – Instruction 28.7**

The same changes that were made to Instruction 28.6 were made to Instruction 28.7. The proposal passed unanimously and was published in *The Florida Bar News*. No comments were received.

**Proposal 4 – Fleeing to Elude (Siren/Lights/High Speed/Reckless Driving) – Instruction 28.8**

The same changes that were made to Instructions 28.6 and 28.7 were made to Instruction 28.8, with one difference. For this crime, a defendant may violate the statute by either fleeing with a wanton disregard for the safety of persons or by driving at high speed. If the wanton disregard prong is charged, then Reckless Driving under Fla. Stat. 316.192(1)(a) is a necessary lesser-include offense. Thus, the Committee proposes that the Category One box in this instruction states that Reckless Driving is a necessary lesser if a) wanton disregard is charged or b) if there was evidence that the fleeing was in a motor vehicle.

The proposal passed unanimously and was published in *The Florida Bar News*. No comments were received.

**Proposal 5 – Fleeing to Elude (Siren/Lights/High Speed/Reckless Driving Causing Serious Bodily Injury or Death) – Instruction 28.8(a)**

The Committee proposes to change the number of this instruction from 28.81 to 28.8(a) because there is a question as to what comes after 28.8 (28.81 or 28.9). Other than that, the same changes that were made to Instruction 28.8 were made to Instruction 28.8(a). The proposal passed unanimously and was published in *The Florida Bar News*. No comments were received.

**Proposal 6 – Aggravated Fleeing – Instruction 28.8(b)**

The Committee proposes to change the number of this instruction from 28.82 to 28.8(b). This crime is a bit complicated because it incorporates a Leaving the Scene crime with a Fleeing crime. The Leaving the Scene crime for this instruction is the same Leaving the Scene Involving Injury or Death in Proposal 1 in this report. Essentially, this crime involves someone who leaves the scene of a crash involving injury or death and then flees from the police. Accordingly, the Committee made the same changes to this instruction that it made to the Leaving

the Scene instruction in Instruction 28.4.

Specifically, the words “or accident” were added after the word “crash” throughout the instruction because the case law refers to “accident.” The words “on public or private property” were added to element #1 after the Committee reviewed the comment from Mr. Trettis. The words “should have known” were deleted from element #2 because of the 4<sup>th</sup> DCA’s *Dorsett* case. The committee added the words “from all of the circumstances including the nature of the crash or accident” in element #3, in response to the comment from the FPDA. The statutory cites for “identifying information” and “vehicle” were added, as was the cite to *Patterson* to support the definition of “willfully.” For this instruction, the Committee also added the definition of “vehicle,” which was omitted from prior proposals. The table of lesser-included offenses was updated, although here the Committee decided to use the word “Crash” instead of “Accident” because that is the name of the crime in the statute. In the Comment section, the Committee added cites to *Mancuso*, *Dumas*, and *Dorsett*.

The proposal passed unanimously and was published in *The Florida Bar News*. The comments from Mr. Trettis and the FPDA for the Leaving the Scene proposal (28.4) are pertinent here and, as mentioned above, the Committee voted to make the changes in this instruction consistent with the changes proposed in Instruction 28.4.

Reminder: The Court is addressing *Dorsett* in SC13-310. This proposal should be disregarded if the Court reverses the 4<sup>th</sup> DCA.

### **Proposal 7 – Aggravated Fleeing – Instruction 28.8(c)**

The Committee proposes to change the number of this instruction from 28.83 to 28.8(c). This crime is also a bit confusing because it not only combines a Leaving the Scene with a Fleeing, but the Leaving the Scene in this crime is different than the Leaving the Scene in Proposals 1 and 6. Specifically, the Leaving the Scene in this crime is for the misdemeanor offense in Fla. Stat. 316.061 (Leaving the Scene of a Crash Resulting Only in Damage to Property), not the felony offense of Leaving the Scene of a Crash Involving Injury or Death in Fla. Stat. 316.027.

As the Court may recall, when the Committee proposed an instruction for the misdemeanor Leaving the Scene Involving Property Damage, the Court rejected the Committee’s proposal because the Committee had not tracked the statute. That led the Committee to revise its proposal for Instruction 28.4(a). The

revised proposal is currently pending in SC12-1601. If the Court rejects the Committee's misdemeanor Leaving the Scene proposal in SC12-1601, the Committee will move to withdraw this proposal from this case. In the meantime, the Committee used as a template the elements of the Leaving the Scene Involving Property Damage that was proposed in Instruction 28.4(a). All of the other changes to this instruction are consistent with the changes made to the Fleeing instructions.

The proposal passed unanimously and was published in *The Florida Bar News*. No comments were received.

### **Proposal 8 – Aggravated Fleeing – Instruction 28.8(d)**

The Committee proposes to change the number of this instruction from 28.84 to 28.8(d). The crime for this instruction covers a person who commits the felony version of Leaving the Scene (involves injury or death) and then flees causing injury or property damage. Accordingly, all of the changes for the felony Leaving the Scene were made to this instruction (e.g., the words “or accident” were added throughout, the words “on public or private property” were added to element #1, the words “should have known” were deleted from element #2 because of *Dorsett*, the words “from all of the circumstances including the nature of the crash or accident” were added to element #3). Similarly, the changes made to the other fleeing instructions were made in this proposal as well (e.g., cite to *Patterson*, statutory cite for “identifying information,” statutory cite and definition for “vehicle,” updated box of lesser included offenses, and cites to *Mancuso*, *Dumas*, and *Dorsett* in the Comment section.

The proposal passed unanimously and was published in *The Florida Bar News*. The comments from Mr. Trettis and the FPDA for the Leaving the Scene proposal (28.4) are pertinent here and, as mentioned above, the Committee voted to make the changes in this instruction consistent with the changes proposed in Instruction 28.4.

Reminder: The Court is addressing *Dorsett* in SC13-310. This proposal should be disregarded if the Court reverses the 4<sup>th</sup> DCA.

### **Proposal 9 – Aggravated Fleeing – Instruction 28.8(e)**

The Committee proposes to change the number of this instruction from 28.85 to 28.8(e). This crime covers the misdemeanor Leaving the Scene combined with a fleeing that causes injury or property damage. For an explanation of the changes, please see Proposal 7 above. Note: If the Court rejects the Committee's

proposal for 28.4(a) that is currently pending in SC12-1601, the Committee will move to withdraw this proposal.

The proposal passed unanimously and was published in *The Florida Bar News*. No comments were received.

### **Proposal 10 – Failure to Obey – Instruction 28.18**

In *Koch v. State*, 39 So. 3d 464 (Fla. 2d DCA 2010) and *Baker v. State*, 102 So. 2d 756 (Fla. 4<sup>th</sup> DCA 2012), the 2<sup>nd</sup> and 4<sup>th</sup> DCAs found it was error for the trial judge to fail to instruct on the crime of Failure to Obey in Fla. Stat. 316.072(3) as a lesser-included offense of Fleeing. Because there is no existing standard instruction for that crime, a committee member drafted a proposal.

The Committee found it mostly easy to track the statute. The statute makes it unlawful for any person to willfully fail or refuse to comply with any lawful order or direction of certain officials. The Committee unanimously agreed that the word “willfully” meant that the defendant had to know the person giving the order was that kind of official, but that “willfully” did not refer to the defendant knowing that the order was a lawful order.

The Committee initially came up with five elements. In summary, they are:

- 1) D was operating a vehicle;
- 2) (Official) gave a lawful order to D;
- 3) (Official) was acting in his capacity as an official;
- 4) D knew he had been given an order;
- 5) D willfully failed to obey.

The Committee then used the statutory definitions for “vehicle,” “bicycle,” “traffic crash investigation officer,” and “traffic infraction enforcement officer” along with the Committee’s customary definition for “willfully.” The Committee did not think there were any Category One lesser-included offenses and the crime of Attempt was put in Category 2.

The proposal passed unanimously and was published in *The Florida Bar News*. The Committee received a comment from the FPDA (see Appendix B).

The FPDA made two points: 1) The statute requires the order from the



government official to be a lawful order but the Committee’s proposal did not inform jurors when an order was lawful; and 2) there should be a nexus between the lawful order and the flow of traffic because that is what the statute was designed to address. The FPDA believed that the Committee should not send a proposal to the Court because there was insufficient case law surrounding these two issues.

Upon post-publication review, the Committee partly agreed and partly disagreed with the FPDA. The Committee did not think it wise to withdraw the proposal because trial judges need some guidance when they have to instruct on this crime as a lesser-included offense of Fleeing.

In order to help with the “lawfulness of the order” issue, the Committee voted unanimously to add a note that informs the judge that a special instruction may be necessary in cases where a defendant claims the order was not lawful.

The Committee also discussed the FPDA’s belief that there must be a nexus between the official’s order and the flow of traffic. Although this nexus is not in the plain language of Fla. Stat. 316.072(3), the Committee unanimously thought the FPDA argument was correct, particularly in light of Fla. Stat. 316.072(1) which states: “The provisions of this chapter shall apply to the operation of vehicles and bicycles and the movement of pedestrians upon all state-maintained highways, county-maintained highways, and municipal streets and alleys and wherever vehicles have the right to travel.”

To establish the nexus, the Committee proposes that element #2 read as follows:

(Name of official) gave a lawful [order] [or] [direction] to (defendant) regarding the operation of a vehicle or bicycle or the movement of a pedestrian.

Respectfully submitted this 25<sup>th</sup> day of

June, 2013.

s/ Judge Joseph A. Bulone

The Honorable Joseph A. Bulone  
Sixth Judicial Circuit  
Chair, Supreme Court Committee on  
Standard Jury Instructions in Criminal Cases  
315 Court Street, Room 417  
Clearwater, Florida 33756  
Florida Bar #371130  
[jbulone@jud6.org](mailto:jbulone@jud6.org)

**CERTIFICATE OF FONT SIZE**

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ Judge Joseph A. Bulone

HONORABLE JOSEPH A. BULONE  
Chair, Committee on Standard Jury  
Instructions in Criminal Cases  
Florida Bar #371130  
[jbulone@jud6.org](mailto:jbulone@jud6.org)