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**IN THE SUPREME COURT OF FLORIDA**

CASE NO.: SC13-1254

IN RE: STANDARD JURY  
INSTRUCTIONS CRIMINAL CASES  
PETITION 2013-03

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**COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION**

The Florida Public Defender Association, Inc. (“FPDA”) respectfully offers the following comments on the proposed amendments to the standard jury instruction in criminal cases.

The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants in hundreds of trials every year, FPDA members are deeply interested in the standard jury instructions designed to ensure the fairness and accuracy of the criminal justice system.

The FPDA is grateful for the hard work by all of the members of the Committee on Standard Jury Instructions in Criminal Cases (“Committee”) that have resulted in the proposal before this Court. The FPDA disagrees with only two of the proposals: Proposal 5 implementing section 741.29(6), Florida Statutes, relating to violation of pretrial release orders, which was substantially altered after the Committee first published its proposed instruction, and Proposals 7 and 8

recommending an instruction telling the jury what is not an element of arson. The basis for the FPDA's disagreements are as follows:

### **Proposal 5**

The disagreement centers on the second element in the proposed jury instruction. Initially, the Committee proposed that it should read:

**Before [his] [her] trial, (defendant) was released from custody on the domestic violence charge with a condition of (insert condition of pretrial release in Fla. Stat. 903.047).**

The FPDA agrees that this instruction correctly states the law, and submitted no comments with the Committee regarding it. The Florida Prosecuting Attorneys Association ("FPAA"), however, submitted an alteration to that element:

**Before [his] [her] trial, (defendant's) release on the domestic violence charge was set with a condition of (insert condition of pretrial release in Fla. Stat. 903.047).**

In an extremely close 6-5 vote, the Committee voted to adopt the FPAA's version and submitted the proposal to this Court without republishing for additional comments.

This change matters considerably. When someone is arrested and taken to jail, their first telephone call is usually to their spouse or intimate partner. Often that person is the only one who can access the defendant's funds for bail, provide notification to employers, manage child care, and handle a myriad of other problems that occur as the result of even a brief incarceration. In domestic

violence situations, the defendants may also call to threaten or intimidate, but often, after sobering up in jail, they call to apologize. Such telephone contact, however, is prohibited if the spouse or intimate partner is the alleged victim of the crime.

Prosecutors and defense attorneys know that most defendants, especially those with limited education, do not understand that even if they are calling for benign or practical reasons, those telephone calls are still prohibited. Prosecutors also know that, because of the recording of telephone calls from jail, it is far easier to prosecute for a telephone call to the alleged victim than for the underlying domestic violence charge. Therefore, prosecutors have turned to section 741.29(6), Florida Statutes.

The problem for the prosecutors is that the statute's plain language does not apply to defendants who have not been released and therefore do not violate a "condition of release." The statute to be implemented reads in its entirety:

A person who willfully violates a condition of pretrial release provided in s. 903.047, when the original arrest was for an act of domestic violence as defined in s. 741.28, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and shall be held in custody until his or her first appearance.

§ 741.29(6), Fla. Stat. (2012) (emphasis supplied). The statute incorporated by reference provides:

- (1) As a condition of pretrial release, whether such release is by surety bail bond or recognizance bond or in some other form the defendant shall:
  - (a) Refrain from criminal activity of any kind.
  - (b) Refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure.
  - (c) Comply with all conditions of pretrial release.

§ 903.047(1), Fla. Stat. (2012) (emphasis supplied).

The plain language of the section 741.29(6), “condition of release” requires that the person be on pretrial release and violate a condition of it. The original instruction captured that language, requiring that the person be “released from custody . . . with a condition of.” The FPAA’s instruction, however, would amend the statute to read “violate a condition set for release.” The FPAA’s instruction, “release . . . was set with a condition,” is not an attempt to implement the statutory language, but amend it. Nothing in the statute refers to “setting” or “the court set” or any similar language.

The same result occurs after a legal analysis of the word “condition,” a term well-known to the law, especially contract law.<sup>1</sup> The conditions in the statutes at

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<sup>1</sup> Pretrial release “is a three-party contract between the state, the accused, and the surety, whereby the surety guarantees the appearance of the accused. A suretyship contract is subject to Florida’s general laws of contract.” *Fireline Bail Bonds v. Brock*, 101 So. 3d 11, 14 (Fla. 2d DCA 2013) (citations, internal quotations and bracket omitted).

issue here are concurrent conditions.<sup>2</sup> Basic hornbook law teaches that: “Where the performance of promises on the part of each party is conditioned upon the performance of promise by the other party, the conditions are said to be concurrent.” 11 Fla. Jur. 2d Contracts § 191. This definition matches the structure of the statute: the state releases the defendant, and the defendant abides by these conditions. “Concurrent conditions are merely mutual conditions precedent, and in the case of a concurrent condition, there is no liability until the condition is performed or occurs.” 11 Fla. Jur. 2d Contracts § 191.

“A condition precedent has been defined as one which calls for the performance of some act, or the happening of some event after a contract is entered into, upon the performance or happening of which its obligation to perform is made to depend.” *Alvarez v. Rendon*, 953 So. 2d 702, 708 (Fla. 5th DCA 2007). The Second Restatement of Contracts notes that: “Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.” Restatement (Second) of Contracts § 225 (1981).<sup>3</sup> Thus, if the

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<sup>2</sup> Conditions can be either conditions precedent, concurrent conditions, or conditions subsequent. 11 Fla. Jur. 2d. Contracts § 188. “A condition subsequent is one the follows liability upon the contract and operated to defeat or annul such liability.” 11 Fla. Jur. 2d Contracts § 192.

The conditions in the statutory scheme (refraining from criminal activity and not contacting the alleged victim) are not such that on their occurrence they annul liability, and therefore are not conditions subsequent.

<sup>3</sup> Conditions precedent “are not favored, and courts will not construe provisions to be such, unless required to do so by plain, unambiguous language or

condition never occurs—release from jail—then the obligations in section 903.047(1), Florida Statutes, never arise.

Perhaps the Legislature wisely recognized that telephone calls from someone safely locked in jail are much less threatening than calls from someone at liberty. Perhaps the Legislature recognized that jailed defendants often need to contact their families about child care, finances, and the mundane day-to-day necessities of life. Perhaps the bail bondsmen persuaded the Legislature that their business would suffer if the defendants could not call their families to raise the premiums for their bail. Whatever the reason, the language of the statute is a “condition of pretrial release” not a “condition set for pretrial release,” and this Court should honor that legislative decision.

The FPAA’s argument to the contrary is based on one case interpreting a different statute with different language. The Third DCA has held that a defendant who contacted an alleged victim while still in jail awaiting release provides the court with “probable cause to believe that the defendant committed a new crime while on pretrial release” and order the person held without bail under a different statute, section 903.0471, Florida Statutes. *Santiago v. Ryan*, 109 So. 3d 848, 850 (Fla. 3d DCA 2013).

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necessary implication.” *Covelli Family, L.P. v. ABG5, L.L.C.*, 977 So. 2d 749, 752 (Fla. 4th DCA 2008) (citations and internal quotations omitted). Of course, the plain language of the statutes specifies that here they are “a condition of pretrial release.” §§ 741.29(6), 903.047(1), Fla. Stat. (2012).

Two things are notable about that decision. First, the statute in question there did not refer to a “condition of pretrial release” but used different language: “while on pretrial release.” *Compare* § 903.0471, Fla. Stat. (2012) *with* §§ 741.29(6), 903.047, Fla. Stat. (2012). Hence, *Santiago* contained no discussion of either the plain language of sections 741.29(6) and 903.047 or the law governing conditions as discussed above.

Second, the statute in *Santiago* did not impose criminal liability. Instead, that statute governs the right to pretrial release. The *Santiago* court invoked *Martin v. State*, 243 So. 2d 189 (Fla. 4th DCA 1971), and its progeny addressing whether a probationer can violate probation before the probationary term begins. *Santiago*, 109 So. 3d at 850. *Martin* relied not on statutory authorization, but instead on the inherent power of the judiciary:

Although the statute empowers the court to revoke probation when a probationer has violated a condition of his probation in a material respect, the power to revoke probation is an inherent power of the trial court, which may be exercised at anytime upon the court determining that the probationer has violated the law. Under the exercise of such inherent power, the court can revoke an order of probation, the term of which has not yet commenced, should the court determine that the defendant probationer has been guilty of misconduct occurring subsequent to the entry of the order of probation.

243 So. 2d at 191 (citations omitted; emphasis supplied). All *Martin*’s progeny that *Santiago* cites likewise rely on this inherent power. *Williamson v. State*, 388

So. 2d 1345, 1347 (Fla. 3d DCA 1980) (“the power to revoke probation is an inherent power of the trial court”); *see also* *Stafford v. State*, 455 So. 2d 385, 386 (Fla. 1984) (quoting the “inherent power” language from *Martin*); *Hart v. State*, 364 So. 2d 544, 544-45 (Fla. 4th DCA 1978) (same).

*Santiago* is only one case, not relied on by any other decisions, and it conflicts with this Court’s decision in *State v. Paul*, 783 So. 2d 1042, 1050-51 (Fla. 2001), which limited the courts’ inherent power to impose pretrial detention to those situations specified by statute. *Id.* at 1050-51.

Even if *Santiago* were correct in the context of bond determinations, however, nothing in that case suggests the courts can use their inherent powers to create or define crimes. “Enacting laws—and especially criminal laws—is quintessentially a legislative function.” *Florida House of Representatives v. Crist*, 999 So. 2d 601, 615 (Fla. 2008).

[S]tatutes creating and defining crimes cannot be extended by construction or interpretation to punish an act, however wrongful, unless clearly within the intent and terms of the statute.” *Stelmack v. State*, 58 So. 3d 874, 877 (Fla. 2d DCA 2010) (simulated child pornography) (quoting *Clement v. State*, 895 So. 2d 446, 448 (Fla. 2d DCA 2005) (statute prohibition unethical behavior does not apply to candidates for public office) ((quoting *Hutchinson v. State*, 315 So.2d 546, 547 (Fla. 2d DCA 1975))). “Florida’s strong adherence to a strict separation of powers doctrine, art. II, § 3, Fla. Const., has led this Court to repeatedly warn against judicial legislation.



*Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991).

The rule of lenity requires that “the provision of this code [chapter 775] and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.” § 775.021(1), Fla. Stat. (2012) (emphasis supplied). The statute construed in *Santiago* did not create a criminal offense, and hence that opinion did not address this issue. The statute in question creates a criminal offense and must be construed in conformity to that rule of construction.

The Committee got this instruction right the first time. Violating “a condition of pretrial release” requires that a person be on pretrial release, not just have had a court set potential conditions should the defendant ever be able to post bond and be released. The FPDA respectfully requests that this Court adopt the Committee’s first proposal.

### **Proposals 7 and 8**

The Committee realized that “the existing standard instruction is in conflict with case law. The existing instruction informs jurors that the state must prove that the damage was done willfully and unlawfully.” The Committee then corrected the jury instruction to place the *mens rea* before the causing the fire element, not the

damage element. The FPDA agrees that this change is correct and thanks the Committee for noticing and correcting the error.

The Committee, however, then added another instruction to be read in every case that: “In order to convict the defendant of Arson, it is not necessary for the State to prove [he] [she] intended to damage the [dwelling] [structure].” This proposal is a negative jury instruction, telling the jury what is not an element of this crime.

In response to comments by the FPDA, the Committee seeks to defend its decision, saying only that there are “other instructions that contain ‘negative’ instructions (such as Aggravated Assault and Felony Murder).”

Every instruction should be judged individually. Felony murder is a particularly tricky concept for most citizens who have not gone to law school. Even for those who have gone to law school, the counter-intuitive nature of felony murder makes it a favorite subject for the writers of the multi-state bar examination. About the only way to try to explain felony murder is with a negative instruction that the defendant need not have intent to kill.

In its most common form, aggravated assault is with a deadly weapon. After telling the jury that a deadly weapon is one used “in a way likely to produce death or great bodily harm,” it makes sense to tell the jury that the defendant need not have intent to kill.

The arson instruction is neither counter-intuitive nor confusing and a negative jury instruction is unnecessary in this context. Once corrected, the arson instructions tell the jury that the elements are: (1) starting a fire with *mens rea*; and (2) that it caused damage. As rewritten, those two elements adequately tell the jury that intent goes only to the action, not the consequence.

Here, this negative jury instruction is little more than a jury argument that should be left to the prosecutor. The dissenters on the Committee were right—the only purpose of this jury instruction is to create a straw man. If this instruction is included, many prosecutors will make some version of the following argument: “Ladies and Gentlemen of the jury, the judge is going to instruct you that the state does not need to prove that the Defendant intended to damage the Victim’s house. All we must prove is that there was damage. And we proved to you that the Victim’s house was damaged by . . . .” This instruction gives a prosecutor a rhetorical device to avoid the only real issue in most arson cases: was the fire set accidentally or intentionally.

Fair is fair. If this Court decides to give the state its negative jury instruction, then it should also give one to the defense: “if the fire was not set intentionally but negligently, then the jury must acquit.” Such an instruction is as well, if not better, supported by case law than the FPAA’s instruction. *See J.H. v.*

*State*, 107 So. 3d 1249, 1249 (Fla. 1st DCA 2013); *T.E. v. State*, 701 So. 2d 1237, 1238 (Fla. 3d DCA 1997).<sup>4</sup>

This type of tit-for-tat negative instructions can go indefinitely. The imagination is the only limit on what the state is not required to prove:

- The state is not required to prove malice. *Lofton v. State*, 416 So. 2d 522, 523 (Fla. 4th DCA 1982).
- The state is not required to prove the damage to the structure was extensive. *See Knighten v. State*, 568 So. 2d 1001, 1002 (Fla. 2d DCA 1990).
- The state is not required to prove that a vehicle has a roof over it to qualify as a structure. *State v. Jones*, 501 So. 2d 753, 755 (Fla. 5th DCA 1987)
- The state is not required to prove the contents of the dwelling were attached to the dwelling. *See State v. Harrington*, 782 So. 505, 507 (Fla. 5th DCA 2001).
- The state is not required to prove that the dwelling belonged to anyone other than the defendant. *Berry v. State*, 566 So. 2d 22, 24 (Fla. 1st DCA 1990).
- The state is not required to prove that the structure burned is something that anyone would ever be inside. *J.C. v. State*, 695 So. 2d 765, 766 (Fla. 1st DCA 1997) (recycling bin).

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<sup>4</sup> While it would be fair, the FPDA cannot in good conscience propose that this Court actually adopt such a defense-oriented instruction. Courts should not break their neutrality by giving either prosecution- or defense-oriented negative instructions.

Perhaps recognizing that such negative instructions are endless, Florida courts have been reluctant to give negative instructions. *See Peters v. State*, 33 So. 3d 812, 814 (Fla. 4th DCA 2010) (if jury is properly instructed on the elements of a principal, jury should not be instructed that mere presence at the scene is not sufficient for conviction); *McGuire v. State*, 639 So. 2d 1043, 1046-47 (Fla. 5th DCA 1994) (same); *Alvarez v. State*, 890 So. 2d 389, 395-97 (Fla. 1st DCA 2004) (if jury is properly instructed on evaluating witnesses, the jury need not be given an instruction that jail-house snitches are particularly unreliable); *Thomas v. State*, 494 So. 2d 240, 246-47 (Fla. 4th DCA 1986) (if instructed on the state's burden to prove case beyond reasonable doubt, the jury need not be negatively instructed that if the jurors were not convinced beyond a reasonable doubt, they must acquit).

Negative instructions are sometimes necessary if there is no other way to adequately explain the elements of a crime, or if the instructions are confusing or the crime is counter-intuitive. Arson is not such a crime. Intentionally causing a fire that causes damage is not a difficult concept. Any layperson asked "what is arson" would probably come up with something very close to the correct definition.

For arson, the proposed negative instruction is unnecessary and little more than the state's closing argument. The FPDA respectfully requests that this Court omit the instruction that "it is not necessary for the State to prove [he] [she]

intended to damage the [dwelling] [structure].” Prosecutors are capable of making that argument without judicial assistance.

Respectfully submitted,

FLORIDA PUBLIC DEFENDER  
ASSOCIATION, INC.

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#### CERTIFICATES

I HEREBY CERTIFY that a copy of the above comments were served by email on The Honorable Joseph Anthony Bulone, c/o Bart Schneider, schneidb@flcourts.org, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, this 26th day of September 2013.

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

/S/ Julianne M. Holt  
JULIANNE M. HOLT