IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-2263

IN RE: STANDARD JURY
INSTRUCTIONS CRIMINAL CASES
REPORT 2017-07
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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 regarding weapons.

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 has concerns with only two aspects of the proposal by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases ("committee"):

I.
THE CIRCULARITY OF THE ANTIQUE FIREARMS EXCEPTION.

All of these jury instructions contain an optional instruction on antique firearms: "The terms 'firearm' does not include an antique firearm unless the antique firearm is used in the commission of a crime." Of course, in any case where this instruction would be read, the state has always accused the defendant of using the antique firearm in a crime. A jury could reasonably construe these instructions to mean that, for instance, because improper exhibition of a firearm is a crime, the statutory exception for antique firearms does not apply because improperly exhibiting a firearm is a crime.

The circularity of such instructions is obvious. In the past, such circular definitions invite fundamental error. *See, e.g.*, *Lee v. State*, 958 So. 2d 521, 522 (Fla. 2d DCA 2007) ("circular burglary instruction constitutes fundamental error.") (citing cases); *Beven v. State*, 908 So. 2d 524, 525 (Fla. 2d DCA 2005) (circular self-defense instruction was fundamental error).

The committee seems to understand this problem, but nevertheless voted to stick with the statutory language to "allow the parties to litigate the issue in the trial courts." (Petition at 4-5). This is not a wise strategy when dealing with fundamental error. *See State v. Montgomery*, 39 So. 3d 252 (Fla. 2010). By the time the litigation concludes, there could be many convictions that would have to

be reversed.

The obvious legislative intent was to exclude antique firearms from the definition of firearms unless such an antique was used in another crime, not the weapons offense itself. That was how this Court understood the statute in *State v. Weeks*, 202 So. 3d 1 (Fla. 2016). In that case, a felon was out hunting in possession of a muzzle loading black-powder rifle with a modern scope. *Id*. at 3. The issue this Court decided was whether "replica" meant a replica in every aspect or simply the firing system. *Id*. at 8. That question arises only if the weapons charge (felon in possession) does not trigger the statutory exception for situations where "the antique firearm is used in the commission of a crime." § 790.001(6), Fla. Stat. (2017).

The FPDA would recommend replacing the phrase "a crime," which could be construed circularly, with "another crime" so that this language would read: "The term 'firearm' does not include an antique firearm unless the antique firearm is used in the commission of another crime." This instruction captures the legislative intent and avoids a circular jury instruction.

II.
THE MENS REA ELEMENT FOR DISCHARGING A FIREARM IN A RESIDENTIAL AREA.

The committee has attempted to craft jury instructions for discharging a firearm in a residential area. That statute, omitting some exceptions that are not pertinent to these comments, reads:

> (4) Any person who recreationally discharges a firearm outdoors, including target shooting, in an area that the person knows or reasonably should know is primarily residential in nature and that has a residential density of one or more dwelling units per acre, commits a misdemeanor of the first degree . . . .

§ 790.15(4), Fla. Stat. (2017).

The issue is whether the *mens rea* "knows or reasonably should know" applies to both the subsequent elements, "primarily residential in nature," and "residential density of one or more dwelling units per acre." The committee's proposal would have the *mens rea* apply only to the former but not the latter element:

> To prove the crime of Recreational Discharge of a Firearm Outdoors in a Residential Area, the State must prove the following four elements beyond a reasonable doubt:
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> 1. (Defendant) recreationally discharged a firearm.
> 2. The discharge took place outdoors.
> 3. The discharge took place in an area that had a residential density of one or more dwelling units per acre.

> 4. At the time of the discharge, (defendant) knew or reasonably should have known that the area was primarily residential in nature.

There are equally strong arguments that the knowledge *mens rea* should apply to both elements. From a grammatical standpoint, in the statute both elements describe the phrase "in an area" where firearm discharges are prohibited. *See generally Polite v. State*, 973 So. 2d 1107, 1112 (Fla. 2007), *as clarified* (Jan. 24, 2008) ("the application of the rules of statutory construction lead us to conclude that 'knowingly and willfully' modifies the entire phrase 'resisting, obstructing or opposing an officer,' including both the verbs 'resist, obstruct, or oppose' and the object 'an officer.'").

If nothing else, the rule of lenity would require that *mens rea* apply to both elements because "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (2017).

More importantly, if the *mens rea* were not to apply to the third element, that element becomes a game of line drawing to define the "area," even beyond the way voting districts can be endlessly reconfigured. *Cf. League of Women Voters v. Detzner*, 179 So. 3d 258, 279-96 (Fla. 2015). The prosecution would create an "area" of any size or shape that includes the point where the firearm was discharged and then extend it around dense enough dwellings to reach an average of one dwelling per acre. Therefore, if the firearm was discharged in the backyard

of the only home for miles around, the prosecution simply draws the area as the one acre around that home. If a hunter fires a firearm a mile from that same house, the prosecution simply connects that point through a narrow corridor to that house, and the action is still a crime. If a hunter fires a firearm two miles away, the corridor's width shrinks by half and the action remains a crime.

The defense would do the opposite. For instance, a firearm fired anywhere in Miami-Dade County, even in the heart of Miami, would not be prohibited because the "area" could be defined as Miami-Dade County, which has almost 1,271,238 acres of land[1] but only 961,752 households.[2]

Note that it does not matter which way the numbers come out. If there were more dwellings than acres in [fill-in-the blank: municipality, county, the entire State of Florida] this would be a prosecution argument. If there were more acres than dwellings, it would be a defense argument.

In this morass, the jury could become lost because there is nothing in the statute that defines the size, shape or configuration of "an area." Having the *mens rea* element apply to this element, however, gives the jury a way to reject such line

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1 https://www.miamidade.gov/greenprint/planning/library/milestone_one/land_use.pdf (last visited Feb. 5, 2018).

2 http://flhousingdata.shimberg.ufl.edu/a/profiles?action=results&nid=4300 (last visited Feb. 5, 2018). Households are not exactly dwellings, but they are close enough for present purposes to illustrate the problem

drawing and avoids any potential vagueness challenges. Instead of looking at maps, the jury would look at the defendant's knowledge. Specifically, the jury would look for whether the defendant at the point where the firearm was discharged would reasonably know that she or he is in an area with one or more dwellings per acre, irrespective of how imaginatively *post hoc* lines might be drawn.

The FPDA believes that the *mens rea* elements applies to both elements of the statute. Thus, the FPDA would write the third element as: "At the time of the discharge, (defendant) knew or reasonably should have known that the area had a residential density of one or more dwelling units per acre." Done this way, element three becomes a concrete, quantitative measure (dwellings per acre) of the area, while element four becomes a more contextual, qualitative measure (residential nature) of the area.

If the committee disagrees, however, the standard jury instructions would still need to be redrafted to alert the trial judge that there is a question about the interpretation of this statute, similar to how the committee has handled the affirmative defenses in this (and other) proposals.

CONCLUSION

The FPDA's disagreement with two of the committee's specific proposals should not overshadow its deep gratitude for the hard work by all of the members of the Committee that have resulted in the proposals before this Court. The FPDA thanks the Court for this opportunity to provide these comments and hope that they will assist this Court in crafting standard jury instructions that accurately reflect the law in Florida.

Respectfully submitted,

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CERTIFICATES

I HEREBY CERTIFY that a copy of the above comments were served by email on the Committee Chair, The Honorable F. Rand Wallis, wallisr@flcourts.org, 300 South Beach Street, Daytona Beach 32114, and on the staff liaison, Bart Schneider, schneidb@flcourts.org, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, this ninth day of March 2018.

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

BY:/s/ John Eddy Morrison
JOHN EDDY MORRISON