Filing # 97279037 E-Filed 10/15/2019 10:50:34 AM

RECEIVED, 10/15/2019 10:51:30 AM, Clerk, Supreme Court

# APPENDIX B

**Committee on Standard Jury Instructions in Criminal Cases**
**The Honorable F. Rand Wallis, Chair**
**Report 2019-10**

# COMMENT OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION ON PROPOSED AMENDMENTS TO 27 JURY INSTRUCTIONS FOR CRIMINAL CASES

August 29, 2019

The Florida Public Defender Association (FPDA) submits the following comments on the proposed amendments to Standard Instructions 3.12, 8.26, 14.4, 21.19(a), 21.19(c), 27.1, 28.6, 28.7, 28.8, 28.8(a), 28.9(a), and 28.11(b). FPDA has no comment for the other proposed amendments included in the same proposal document. Following the comments, there is an appendix suggesting an alternate amendment to Standard Instruction 14.4. Please see the comment for that instruction for more information.

Respectfully submitted,

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## Instruction 3.12 — Verdict

The proposed amendments to this rule appear to have the intent of streamlining the instructions in cases where there are no lesser-included offenses. This intent is laudable; however, the specific change proposed has what appears to be an unintended consequence for some cases.

By instructing the trial court to read the second paragraph only in cases where there are lesser-included offenses, rather than in all cases, the jury will not be read the line "If you find that no offense has been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty" unless there are lesser-included offenses at issue. But this line is important not only in those cases, but in all cases.

This line is the only place in Standard Instruction 3.12 where the jury is reminded of the "beyond a reasonable doubt" standard. Although this is present elsewhere, it is important to remind the jury of the standard at the time it is being instructed on the verdict form—the very thing that they must apply the standard to.

Perhaps the easiest way of keeping this sentence while still accomplishing the goal of the proposed amendment would be to bifurcate the second paragraph of the standard instruction into two paragraphs. The first, with the asterisk and instruction to read only in cases with lesser-included offenses, would be only the first sentence of the current second paragraph. The second sentence would become the third paragraph of the standard instruction, and would not have the asterisk or any brackets

around it. This paragraph would be read in all cases, and should be written as "If you find that [the] [no] offense has [not] been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty."

This alteration would still achieve the apparent goal of not discussing lesser-included offenses with the jury when they are irrelevant, but would maintain the important reasonable doubt line as part of this instruction. Whether the court reads "If you find that no offense has been proven beyond a reasonable doubt . . ." or "If you find that the offense has not been proven beyond a reasonable doubt . . ." would depend on whether a lesser-included offense has been included on the verdict form or not. But with this structure, one of those would be given in every case.

## Instruction 8.26 —Sexual Cyberharassment

One of the proposed amendments to this instruction is a change to the definition of "Personal Identification Information" to reflect a recent statutory change to that definition. However, the statutory change negates the need to continue to cite § 817.568(1)(f), Fla. Stat., in the heading to this portion of the instructions. The previous version of § 784.049(2)(b) defined "Personal Identification Information" with reference to § 817.568, but the new version contains its own definition without cross-reference. Therefore, in addition to the amendment proposed to the substance of the definition, this standard instruction should be further amended to remove the reference to § 817.568(1)(f), Fla. Stat.

## Instruction 14.4 — Retail Theft

This standard instruction needs updating in light of recently passed legislation. However, the proposed amendments change too much. The proposal adds an alternative way of committing the crime not contemplated by the statute, eliminates necessary findings, and adds confusion to an instruction that, even at its best, would be hard to parse. Respectfully, the Florida Public Defender Association strongly objects to the proposed amendment to this standard instruction.

This comment first explains the proposed changes that should be adopted, because an update is necessary and some of what is proposed is correct. The comment then explains in more detail how the proposed amendments do not capture the applicable law, and would in fact allow for convictions outside the statutory scheme. A final section of this comment is included as an appendix at the close of the document; it is a proposal for how the instruction could be amended to both incorporate the good and eliminate the bad.

### What the Proposed Amendments Get Right

The most basic change required by the 2019 amendment to § 812.015, Fla. Stat., is to update the minimum value of the stolen property from $300 to $750. The proposed amendment makes this update, and this change is correct.

The other major change required by the 2019 amendment to the statute is to incorporate the 30-day period rule (which was, for some subdivisions, a 48-hour

rule, and which was omitted entirely for others). The proposed amendment incorporates these changes through two new "give if applicable" instructions and by amending the current "give if applicable" instruction. The proposed amendment is right to make these changes, but as discussed below the method of doing so is not the best way.

The final change required by the 2019 amendment to the statute is to incorporate the new subsection (8)(b) and subsection (9)(c) dealing with conspiracy to sell the stolen property. The proposed amendment does recognize that this needs to be incorporated, but the method of doing so is not the best way.

The amendments also add a comment regarding theft of a shopping cart as a separate crime. This appears correct.

Finally, the amendments make an alteration to the comment regarding the second-degree felony described in § 812.015(9). This amendment is correct in that the original language was overbroad, but would become largely unnecessary if the committee accepts the proposed instruction for § 812.015(9) offered in the appendix to these comments.

## What the Proposed Amendments Get Wrong

The previous/current version of the standard instruction lists four elements for the crime: (1) the act of theft, with four specific acts; (2) the intent to deprive; (3) various circumstances, acts, or agreements in how the theft was committed; and (4)

the minimum value of the property taken. This follows how the statute is written. Subsection (1)(d) defines "retail theft" as being any of four specific acts performed with the intent to deprive. The current instruction's first two elements are therefore just the definition of "retail theft." But as both the current and proposed-amended instructions recognize, "[t]here is no misdemeanor Retail Theft crime." The crimes at issue are created by subsections (8) and (9), and both are felonies.

Subsection (8)'s crime states that a person who "commits retail theft" commits a third-degree felony "*if* the property stolen is valued at $750 or more, *and* the person" engages in any of five specific acts (the previous statute only had four specific acts). (emphases added). The four acts listed as the third element in current instruction match the four acts that were present in subsection (8)'s old version. And the fourth element of the current instruction is the value requirement, which requires updating but is still an element. The current version of the instruction therefore recognizes that, to commit the crime listed in subsection (8), four elements must be met: the definition of retail theft (two elements), plus the minimum value, plus a specific act—beyond those required to define retail theft—from the list provided in subsection (8).

The proposed amended instruction, however, eliminates two of the elements by adding a second question for the jury, by moving some subelements to the "give if applicable" section, and by adding an option in the first element that is more

properly part of the current third element. This amendment has the effect of making the instruction much harder to give and follow, and allows for convictions when the crime has not actually occurred.

A correct version of the instruction would still have four elements, just as the statute has and the current instruction has. What each of these elements should be, and how the proposed-amended instruction deals with them, are discussed in turn.

The first two elements are the definition of "retail theft," which is found in subsection (1)(d). The first element should have four subparts, given as applicable: the taking of possession or carrying away of merchandise (or similar); altering or removing a label (or similar); transferring merchandise from one container to another; or removing a shopping cart. The second element should be the "intent to deprive" language. The proposed amendments have the "intent to deprive" language still as element two, and the minor alterations made to that only make it clearer. This element is fine. The proposed amendment, however, alters the first element by adding a fifth possibility: "(Defendant) knowingly acted in concert with one or more other individuals within one or more establishments to distract the [merchant or merchant's employee] [or] [law enforcement officer] in order to (insert language from element(s) 1a-1d as applicable)." This is part of the statute, in subsection (8), but it is not part of the definition of "retail theft" necessary to invoke subsection (8) in the first place. This language should not be part of the first element.

The third element is the (a)-(e) sub-subsections of subsection (8). These are, in abbreviated language, (a) the individual commission, or the coordination of others to commit, retail theft; (b) a conspiracy to commit retail theft with the intent to sell the property; (c) the individual or in-concert-with-others commission of theft from more than one location within 30 days; (d) the acting in concert with others to distract the merchant or the coordination of others to commit the offense; and (e) the commission of retail theft by switching boxes. Sub-subsections (a)-(c) also allow for the aggregation of the amount stolen in a 30-day period for purposes of satisfying the value element of $750, but sub-subsections (d) and (e) do not. As can be seen by the statutory structure, these sub-subsections are not merely definitions of a crime, and they are not part of any other element. These are all separate ways of meeting the fourth and final element necessary for the crime in subsection (8) to be proven. Where the proposed-amended instructions err is by including sub-subsection (d) as a part of the first element rather than the fourth, by moving sub-subsections (a)-(c) to "give if applicable" instructions rather than elements, and by completely removing any reference to sub-subsection (e).

The fourth element (in the statute this is listed third, but it is fourth in the current standard instructions) should be the minimum value required by subsection (8). After the recent statutory change, that value is $750. This was present as element four in the current instruction (at the old $300 value), but is missing from

the elements in the proposed-amended instructions. Instead, the proposed-amended instructions have the dollar value as a separate interrogatory for the jury to answer only after and if it finds the defendant guilty of retail theft. But because subsection (8) is what creates the crime (as opposed to the definition of the term, which is all the jury would have found from the two elements listed), the jury should not be finding a dollar value *after* finding the defendant guilty, because finding the dollar value is *required* for a finding of guilt in the first place. The extraction of the dollar value from the elements of the crime and its placement as a special interrogatory is legally incorrect and will cause confusion in the application of this statute.

Some examples of how the proposed-amended instructions could result in a miscarriage of justice would be the following scenarios.

First, a person, acting alone, carries away merchandise with the intent to deprive the merchant of possession. However, the merchandise in question is worth only $100. This person would have satisfied the first two elements of the current instruction, and would have satisfied both elements of the proposed-amended instruction. Under the current instruction, however, element four is not met and the person is not guilty. Under the proposed-amended instruction, the person is guilty of retail theft, but the jury would answer "no" to the two interrogatories. But what then? There is no misdemeanor crime of retail theft, so the person cannot be guilty of anything. But the jury found them guilty. What is the court to do? The obvious

answer is to enter a judgment of not guilty, but that seems contrary to the verdict reached. The problem here is caused by the value not being included in the elements.

Second, a person, acting in concert with others but who does not coordinate any activities and does not distract any person, takes $900 worth of merchandise ($500 themselves, $400 taken by others) from a single location in a single instance, by smuggling it under their shirt, with the intent to deprive the merchant of possession, and with the intent only to use the property themselves for no gain. Under the current instruction, the first, second, and fourth elements would be satisfied. The third, however, would not. Looking at the new language for subsection (8)'s sub-subsections (because the current instruction is outdated on these), the person has not "individually commit[ted] retail theft," and even if their own role could be viewed as individual they are not individually over the $750 minimum. The person has not "coordinated the activities" of individuals, meaning the "in concert" portion of sub-subsection (a) does not apply. There is no conspiracy to sell the property, so sub-subsection (b) does not apply. The theft was from one location, so sub-subsection (c) does not apply. There was no distraction and again no coordination by the defendant, so sub-subsection (d) does not apply. And the merchandise was smuggled under a shirt rather than repackaged, so sub-subsection (e) does not apply. Under the statute, this person is not guilty of the crime listed in § 812.015(8). But under the proposed-amended instructions, the person will meet

the only two elements and will be guilty. The jury may correctly find that the value was not over $750 based on the definitions provided (the § 812.015(8)(a) definition requires the person to have coordinated activities), but it seems odd to have the jury make the finding of insufficient value based on subsection (8)(a) rather than simply finding that subsection (8)(a) was not met at all. The jury is likely to make a mistake at this point and find the $750 was met, but even if it correctly says that it is not, then the same conundrum as the first scenario arises.

Third and finally, a person acts in concert with others to distract a merchant while those others take possession of $1,500 worth of merchandise with the intent to deprive the merchant of possession. Under the statute and current instructions, the way this should be charged and a conviction reached is using principal liability. The defendant would not individually have met the definition of "retail theft" in subsection (1)(d). They then should not be charged directly under subsection (8) at all. Instead, what should happen is that the State would charge the defendant as a principal to the crime under subsection (8) committed by the person who actually took possession of the merchandise. The State would prove that other person performed the action (element 1), with the intent (element 2), under circumstances bringing the crime under subsection 8 (element 3, using sub-element (d) dealing with distraction), and the property had the necessary value (element 4). The defendant would be liable not because they committed the crime *directly*, but because their

actions (the distraction and agreement) caused them to be a principal to the crime committed by the *other* person. Under the proposed-amended instruction, however, the person would just be guilty as an individual. They would meet the first element using sub-element (e), and would meet the second based on the agreement. The jury interrogatory would be a "yes" to the second question. But that way of reaching the same result is not what the statute contemplates.

These are only three specific examples of the problems that may, and likely will, arise from the proposed amendments. But there are countless other permutations of facts that would also result in confusion and injustice.

The structure of § 812.015 makes clear that a violation of subsection (8) has four elements: two that are from the definition of "retail theft" in subsection (1)(d), one that is a value element of a $750 minimum, and one that is found in subsection (8) itself with five possible methods of meeting it. The standard instruction for this crime should recognize that there are four elements, not only two.

The discussion so far has focused on the crime in subsection (8), but there is of course the additional crime listed in subsection (9). After its recent amendment, subsection (9) criminalizes three separate things: (1) a violation of subsection (8) following a previous violation of that subsection; (2) the coordination of others to commit retail theft with a total value over $3000; and (3) a conspiracy to resell goods after a retail theft with a total value over $3000. Subsection (9)(a), the subsequent

conviction, is discussed in the committee's comments to this instruction and needs no further discussion here. Subsections (9)(b) and (c), however, are more limited than, and appear to even involve different substantive elements (not just changed values) than, the crime described in subsection (8), FPDA suggests that the committee consider drafting an entirely new standard instruction for these two crimes. Standard Instruction 14.4, in either its current, proposed-amended, or proposed-here form, is simply too far afield to reasonably be amended to incorporate all that would be needed.

The final point meriting discussion is the inclusion of "give if applicable" instructions referring to the sub-subsections of subsection (8). FPDA does not oppose these instructions and has no substantive changes that it would suggest. However, they merit brief discussion simply to recognize that the purpose of these instructions is to help the jury reach its decision on the *value* element (the fourth element in the current instructions), not to affect its decision with regard to the subsection (8) *act/agreement* element (the third element in the current instructions).

Overall, FPDA strongly opposes the proposed amendments to Standard Instruction 14.4. However, recognizing that amendments are needed in light of recent statutory changes, we submit the proposal at the end of this document as an amendment that would update the instruction as necessary while maintaining the proper number and arrangement of the statutory elements.

**Instruction 21.19(a) — Causing Great Bodily Harm/Permanent Disability/Death to a Police/Fire/Search and Rescue Canine/Horse**

First Comment

The relevant statute, § 843.19(2), Fla. Stat., criminalizes four distinct acts: causing great bodily harm; causing permanent disability; causing death; or using a deadly weapon upon. However, Element 1 of the proposed instruction only provides options for the trial court to read three of those four (two in Element 1.a. and one in Element 1.b.). The missing act is death.

Element 1.a. should therefore be amended to include an option for the trial court to read "[death]" following the options available for it to read: "[great bodily harm] [permanent disability]."

Second Comment

Under the current proposed elements, there is a problem with how the "intentionally and knowingly" mens rea of the crime is applied.

The statute, in relevant part, reads: "Any person who intentionally and knowingly, without lawful cause or justification, causes great bodily harm, permanent disability, or death to, or uses a deadly weapon upon, a police dog, fire dog, SAR dog, or police horse commits a felony of the third degree." § 843.19(2), Fla. Stat.

The problem is that the "intentionally and knowingly" mens rea requirement is included only in Element 1.a. (relating to harm, disability, or death) and not in

Element 1.b. (relating to using a deadly weapon). The plain meaning of the statute as written is that "intentionally and knowingly" modifies all acts that follow, including "uses a deadly weapon upon." There are two possible ways of rewriting Element 1 to make the necessary fix. First, Element 1.b. could be changed to read "(Defendant) intentionally and knowingly used a deadly weapon upon a [canine] [horse]." Alternatively, the "(Defendant) intentionally and knowingly" language can be pulled out from 1.a. and made simply part of 1., with a. reading only "caused [great bodily harm] [permanent disability] [death] to a [canine] [horse]" (see First Comment regarding the addition of "[death]") and b. reading only "used a deadly weapon upon a [canine] [horse]."

Third Comment

The proposed elements omit an element that is part of the statute: "without lawful cause or justification."

§ 843.19 lists three crimes. The one at issue, (2), states that a person who performs certain actions intentionally and knowingly, "without lawful cause or justification," commits the offense. The other two crimes, (3) and (4), do not have this "without lawful cause or justification" language, and instead use the term "maliciously" in its place.

In the proposed instructions for those other two crimes (21.19(b) and 21.19(c)), the committee has appropriately included a definition for "maliciously"

("with ill will, hatred, spite, or an evil intent") taken from *R.N. v. State*, 257 So. 3d 507 (Fla. 4th DCA 2018). *R.N.* determined that this was the definition of "maliciously" in this context after considering both legal malice ("wrongfully, intentionally, without legal justification or excuse") and actual malice ("ill will, hatred, spite, an evil intent"). *Id.* at 510. The reason the court determined actual malice was appropriate was in part by comparing subsection (4) to subsection (2). Because subsection (2) uses "the legal definition of malice," subsection (4) must mean actual malice because, if it meant legal malice, it should have used the same language as subsection (2). *Id.* at 510-11. Of course, the definition of a term not present in subsection (2) is not immediately relevant to the elements of subsection (2), but the court's holding in *R.N.* depends on the fact that the "without lawful cause or justification" in subsection (2) language describes legal malice.

With respect to other crimes that involve legal malice, the standard instructions include a requirement for the jury to find legal malice as an element of the crime. For example, Standard Instruction 8.7(b) requires the jury to find "(Defendant) knowingly, willfully, maliciously, and repeatedly [followed] [harassed] [or] [cyberstalked] (victim)." It then goes on to define "maliciously" as legal malice: 'wrongfully, intentionally, and without legal justification or excuse." The same is true of Standard Instruction 8.7(d) (the committee has proposed to add the "maliciously" definition). Other Standard Instructions do not define

"maliciously," or instruct the trial court to determine whether the definition given should be legal or actual malice, but they still require that the jury make a finding of malice as an element. *See* Standard Instructions 8.6, 8.7(a), 8.26. And the two other crimes related to this instruction (proposed instructions 21.19(b) and 21.19(c)) both define "maliciously" as described above and require the jury to find malice as an element.

Although different statutes require different forms of malice, and although not all Standard Instructions include a definition for malice, there appears to be a uniform recognition that malice (whichever form) is an element of the crimes in which the term appears. The same is true of "without legal cause or justification." That is simply the definition of legal malice, and it is as much an element of the crime as "maliciously" would be had the legislature used that term instead.

Therefore, the proposed elements for Standard Instruction 21.19(a) should be altered to include "without lawful cause or justification." This could either occur by incorporating it into Element 1 (*see* comment above dealing with "intentionally and knowingly" as for how this might be done such that it applies to all four possible acts), or by adding an Element 4 stating something similar to "The [causing of [great bodily harm] [permanent disability] [death] to] [use of a deadly weapon upon] a [canine] [horse] was done without lawful cause or justification."

Summary of Comments on Instruction 21.19(a)

Death should be included as a possible thing caused under Element 1.a.

"Intentionally and knowingly" should apply not only to the three things caused in Element 1.a., but also to the use of a deadly weapon in Element 1.b.

The jury should be required to find the action (either causing under Element 1.a. or using a deadly weapon under Element 1.b.) was performed "without lawful cause or justification."

**Instruction 21.19(c) — Maliciously Harassing a Police/Fire/Search and Rescue Canine/Horse While in Performance of Its Duties**

The proposed instruction for this crime states that "No lesser included offenses have been identified for this offense." Respectfully, it appears that "Attempt" (§ 777.04(1), Fla. Stat.; Instr. No. 5.1) should be listed as a Category Two Lesser.

The proposed instructions for 21.19(a) and 21.19(b), both of which are closely related crimes, list "Attempt" as Category Two Lessers. There does not appear to be any reason why it should not also be listed for 21.19(c).

The elements of 21.19(c) do make it such that "Attempt" may not be a Category Two Lesser for one particular form of the offense, but it would still be a Category Two Lesser for the other forms. The first element of the crime is satisfied when a person *either* "maliciously harasses, teases, interferes with, or attempts to interfere with" the relevant animal. § 843.19(4), Fla. Stat. It therefore appears to be impossible to have an attempt version of this crime with respect to "interferes with" or "attempts to interfere with," because attempt is already incorporated. But on the other hand, it seems possible to have "attempted malicious harassment," or "attempted teasing" of the animal in performance of its duties.

Therefore, depending on the specific facts of the case and how it is charged, "Attempt" would be a lesser included crime. It should be listed as a Category Two Lesser Included Offense.

## Instruction 27.1 — [Attempted] Escape

One of the proposed amendments to this instruction adds a comment that cites *Marquez v. State*, 450 So. 2d 345 (Fla. 2d DCA 1984). However, the comment incorrectly cites *Marquez* as "450 So. 2d **354**" rather than **345**. This inadvertent typographical error should be corrected before final publication.

**Instructions 28.6, 28.7, 28.8, and 28.8(a) — Various Forms of Fleeing to Elude a Law Enforcement Officer**

The proposed amendments to these instructions would remove the definition of the word "Operator." However, it is unclear what reason there is to remove this definition.

The current statutory reference for the definition, § 316.003(48), Fla. Stat., is now incorrect, but the definition has not been completely removed from the statutes, it has simply relocated to § 316.003(50). The instructions should be amended to reflect this change, but that does not require eliminating the definition entirely.

Other than the changed statutory reference, there appears to be no discernable reason why this definition should be removed from the standard instructions. In fact, there is a strong reason why it should stay included—the first element of all four instructions is that "(Defendant) was operating a vehicle upon a street or highway in Florida." In order to make the factual determination regarding whether the State has proved that element of the crime, juries should be informed of what it means to "operate" a vehicle.

There is of course a technical distinction between the verb "operating" in the elements of the crime and the noun "operator" in the definition. But if this distinction is the cause for removing the definition entirely, it would be preferable to simply define "operating" by rewording the definition to, for example, "'Operating' means being in actual physical control of a motor vehicle upon the

highway [or exercising control over or steering a vehicle being towed by a motor vehicle]." This alleviates the verb/noun distinction problem while still providing the jury with a definition for a key term in the elements of the crime.

## Instruction 28.9(a) —No Valid Commercial Driver License

Please see the final paragraph of the comment for Instruction 28.11(b), immediately following this comment, for a recommendation of an additional amendment to make to this instruction.

**Instruction 28.11(b) — Driving Commercial Vehicle While License Canceled/Suspended/Revoked/Disqualified**

The lesser-included offenses the committee has identified for this new instruction place "No Valid Commercial Driver's License" and "No Valid Driver's License" in Category One. It appears they should in fact be in Category Two.

The difference between Category One and Category Two lesser included offenses was summarized in *Taylor v. State*, 608 So. 2d 804 (Fla. 1992). A Category One offense necessarily occurs when the greater offense is committed, meaning that "[i]f the lesser offense has at least one statutory element not contained in the greater, it cannot be a category-one necessarily lesser included offense." *Id.* at 805. A Category Two offense, however, may include statutory elements not present in the greater, and should be given "if its elements are alleged in the accusatory pleading and proven at trial." *Id.*

Here, the elements of the new instruction are (1) that the defendant drove a commercial motor vehicle upon a highway, *and* (2) *any of the following*: their license/driving privilege was (a) cancelled, (b) suspended, (c) revoked, (d) disqualified, *or* (e) was under suspension or revocation equivalent status. The elements of instruction 28.9(a) (the first lesser-included offense listed) are (after the modifications made by these amendments), (1) that the defendant drove a commercial motor vehicle upon a street or highway, and (2) the defendant did not have a valid commercial driver's license. A "valid commercial driver's license" is

a Class A, B, or C license "that has not expired, been suspended, revoked or canceled, or is not in 'suspension or revocation equivalent status.'" The elements of instruction 28.9 (the second lesser-included offense listed) are (again after these proposed amendments' changes), (1) the defendant drove a motor vehicle upon a highway, and (2) the defendant did not have a valid driver's license. A "valid driver's license" in this context is a license "that has not expired, been suspended, revoked or canceled, or is not in 'suspension or revocation equivalent status.'"

The crux of the problem with listing 28.9 and 28.9(a) as Category One lesser included offenses for proposed instruction 28.11(b) is that the greater offense can be violated in a way different from the two lesser. Specifically, a person whose commercial driver's license has been disqualified will violate 28.11(b) if they drive a commercial motor vehicle, but will not violate 28.9(a) because their disqualified license is not one that has "expired, been suspended, revoked or cancelled, or is not in 'suspension or revocation equivalent status.'" The same is true for 28.9—a person may have a disqualified commercial license but still have a "valid driver's license" as that term is defined for purposes of 28.9.

The fact that there is a difference between disqualification and the other listed possible statuses is made clear by the different ways those statuses are handled throughout Chapter 322, Florida Statutes. For example, in § 322.01, "disqualification" is defined separately and differently from the other terms used.

Also, it appears to be relatively easy for a person's license to be disqualified compared to the other changes: § 322.59 disqualifies a license based on a failure to comply with medical certification requirements, § 322.212(7) disqualifies a license based on fraud during the application and testing, and § 322.64(1) permits a law enforcement officer to summarily disqualify a license, apparently at the scene of certain traffic stops. Even if a commercial license is disqualified, however, the driver is eligible for a Class E license during the period of the disqualification of the commercial license. § 322.251(4)-(5); *see also* § 322.64(10). Finally, § 322.61 provides a litany of situations in which a commercial driver's license may be disqualified, some of which require suspension, revocation, or cancellation of driving privileges altogether and others of which do not. Even this section, however, contains a provision allowing for a non-commercial license to be issued to a person whose commercial license is disqualified. § 322.61(7).

This statutory structure indicates that it is possible for a person to have a disqualified commercial driver's license, without having their commercial or non-commercial license cancelled, suspended, revoked, or under suspension or revocation equivalent status. If that person drives on the highways, they will violate § 322.34(7) (proposed instruction 28.11(b)), but will not violate either § 322.03 or § 322.53 (instructions 28.9 and 28.9(a)). Instructions 28.9 and 28.9(a) are therefore not Category One lesser included offenses of Instruction 28.11(b); they are instead

Category Two lesser included offenses because their elements may, but are not necessarily required to be, alleged when there is a charge brought under the greater offense at issue.

As a second matter, although the committee has not proposed a change to the lesser included offense table for instruction 28.9(a), the research into the table for 28.11(b) has revealed that "No Valid Driver's License" should in fact be a Category Two lesser included offense for 28.9(a) rather than a Category One lesser included offense. A person with a non-commercial driver's license who drives a commercial vehicle would violate § 322.53 (instruction 28.9(a)), but would not violate § 322.03 (instruction 28.9). The committee should therefore consider not only fixing the lesser included offense table for proposed instruction 28.11(b), but also amending the table for instruction 28.9(a) to move "No Valid Driver's License" from Category One to Category Two.

# APPENDIX TO THE FLORIDA PUBLIC DEFENDER ASSOCIATION'S COMMENTS ON THE PROPOSED AMENDMENT TO STANDARD JURY INSTRUCTION 14.4

For the proposed instruction included here, we have used the standard strikeout/underline format to indicate changes from the current version of Standard Instruction 14.4. To aid the committee, we have also changed the text color for all changes to blue (for amendments originally proposed by the committee) and red (for our own suggestions).

One change made here that was not fully discussed in the body of the comments is the splitting of Element 3.a. into two, resulting in six total sub-elements for Element 3 after the addition of the other new sub-element created by the statutory change. The reason for this change is because the previous version of the statute referred to a person who "Individually, or in concert with one or more other persons, coordinates the activities of one or more individuals in committing the offense . . . ." The new version of the statute makes clear that the "Individually" does not apply only to those who *coordinate* individually, but also those who commit retail theft individually without any coordination or concert: "Individually commits retail theft, or in concert with one or more other persons, coordinates the activities of one or more individuals in committing the offense." This necessitates two alternative sub-elements.

**FPDA PROPOSAL:**

**14.4 RETAIL THEFT**
§ 812.015(8), Fla. Stat.

**To prove the crime of Retail Theft, the State must prove the following four elements beyond a reasonable doubt:**

1. (Defendant) **knowingly:**

*Give ~~a, b, c, and/or d~~one or more as applicable.*

a. **took possession of or carried away [merchandise] [property] [money] [negotiable documents].**

b. **altered or removed a [label] [universal product code] [price tag] from merchandise.**

c. **transferred merchandise from one container to another.**

d. **removed a shopping cart ~~from a merchant's premises~~.**

2. (Defendant) **did so with the intent to deprive a merchant of possession, use, benefit, or full retail value of the [merchandise] [property] [money] [negotiable document(s)] [shopping cart].**

*Give ~~a, b, c, and/or d~~one or more as applicable.*

3. (Defendant),

a. **acted individually~~, or in concert with one or more other persons, coordinated the activities of one or more individuals in committing the offense~~.**

b. **acted in concert with and coordinated the activities of one or more individuals in committing the offense.**

c. **conspired with another person to carry out the offense with the intent to sell the stolen property for monetary or other gain, and subsequently took or caused such property to be placed in the control of another person in exchange for consideration.**

~~b~~d. **[individually] [in concert with one or more persons] committed theft from more than one location within a ~~48-hour~~30-day period.**

~~e~~e. **acted in concert with one or more individuals within one or more establishments to distract the merchant, merchant's employee, or law enforcement officer in order to carry out the offense, or acted in other ways to coordinate efforts to carry out the offense.**

~~d~~f. **purchased merchandise in a package or box that [he] [she] knew contained merchandise other than, or in addition to, the merchandise purported to be contained in the package or box.**

**4. The value of the [merchandise] [property] [money] [negotiable documents] was ~~$300~~$750 or more.**

*Give if applicable.*
*§ 812.015(8)(a) ~~and (8)(b)~~, Fla. Stat.*
*If reading Element 3.a or 3.b:*

**If you find that the defendant [individually] [~~acted~~acting in concert with ~~one or more other persons~~ and ~~coordinated~~coordinating the activities of one or more individuals] ~~in committing a Retail Theft] [committed theft from more than one location within a 48-hour period]~~committed one or more acts of Retail Theft within a 30-day period, the amount of each individual theft is aggregated to determine the value of the property stolen.**

*§ 812.015(8)(b), Fla. Stat.*
*If reading Element 3.c:*

**If you find that the defendant conspired with another person to commit Retail Theft with the intent to sell the stolen property for monetary or other gain, and subsequently took or caused such property to be placed in the control of another person in exchange for consideration, the value of each item taken or placed within a 30-day period is aggregated to determine the value of the property stolen.**

*§ 812.015(8)(c), Fla. Stat.*
*If reading Element 3.d:*

**If you find that the defendant [individually] [in concert with one or more other persons] committed theft from more than one location within a 30-day period, the amount of each individual theft is aggregated to determine the value of the property stolen.**

*Theft of an Instrument.*

**In the case of a written instrument that does not have a readily ascertainable market value, such as a check, draft, or promissory note, the value is the amount due or collectible.**

**In the case of any other instrument that creates, releases, discharges or otherwise affects any valuable legal right, privilege, or obligation, the value is the greatest amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.**

*Definitions.*
*§ 812.015(1)(a), Fla. Stat.*

**"Merchandise" means any personal property, capable of manual delivery, displayed, held or offered for retail sale by a merchant.**

*§ 812.015(1)(b), Fla. Stat.*

**"Merchant" means an owner or operator, or the agent, consignee, employee, lessee, or officer of an owner or operator, of any premises or apparatus used for retail purchase or sale of any merchandise.**

*§ 812.015(1)(c), Fla. Stat.*

**"Value of merchandise" means the sale price of the merchandise at the time it was stolen or otherwise removed, depriving the owner of her or his lawful right to ownership and sale of said item.**

*Optional Definitions. Shaw v. State, 510 So. 2d 349 (Fla. 2d DCA 1987).*

**"Knowingly" means with actual knowledge and understanding of the facts or the truth.**

**"Knowingly" means an act done voluntarily and intentionally and not because of mistake or accident or other innocent reason.**

**Lesser Included Offenses**

| RETAIL THEFT —— 812.015(8) | | | |
|---|---|---|---|
| **CATEGORY ONE** | **CATEGORY TWO** | **FLA. STAT.** | **INS. NO.** |
| Grand theft* | | 812.014(2)(c) | 14.1 |
| Petit theft — first degree* | | 812.014(2)(e) | 14.1 |
| Theft of shopping cart, if element 1d is charged** | | 506.513 | |
| Petit theft — second degree* | | 812.014(3)(a) | 14.1 |

**Comments**

*Under the Retail Theft statute, the "value" of the property is the price stated on the price tag affixed to the item at the time it was stolen. *F.T. v. State*, 146 So. 3d 1270 (Fla. 3d DCA 2014). This determination of "value" may be different than "value" as defined in the theft statute.

**Theft of a shopping cart (valued at less than $750) is a first-degree misdemeanor under §§ 506.513m 506.518, Fla. Stats.

There is no misdemeanor Retail Theft crime. There is, however, a second-degree felony crime of Retail Theft ~~for a person who commits Retail Theft and the property stolen had a value in excess of $3,000 or~~ for a person who commits Retail Theft and has a prior conviction for Retail Theft. *See* § 812.015(9)(a), Fla. Stat. As of ~~August 2017~~May 2019, there was no case law that determined whether the jury must find the existence of the prior conviction in a bifurcated proceeding or whether that finding may be made by the sentencing judge. There was also no case law that decided whether a "conviction" includes a withhold of adjudication.

This instruction is not suitable for charges under § 812.015(9)(b) or (c), although some portions of it may be useful when crafting instructions for those charges.

This instruction was adopted in 1981 and amended in 2017 [231 So. 3d 384] and 2020.