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APPENDIX B

The Committee on Standard Jury Instructions in Criminal Cases
The Honorable Jerri L. Collins, Chair

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTION
IN CRIMINAL CASES

COMMENT ON PROPOSED JURY INSTRUCTION 11.17(a),
AND
REQUEST FOR ORAL ARGUMENT

The Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases proposed a new jury instruction entitled: Soliciting a [child] [person believed by the defendant to be child] for unlawful sexual conduct using computer services or devices. The proposed instruction was published in the August 15, 2014, edition of the Florida Bar News. The undersigned understands that the primary purpose of the new proposal is to implement recent statutory amendments for enhancement factors. Nonetheless, this comment suggests an egregious error in element #3 of the standard jury instructions implementing section 847.0135(3)(a), Florida Statutes.

Element #3 of the proposed instruction 11.17(a), states:

> **3.** During that contact, (defendant) [seduced] [solicited] [lured] [enticed] [attempted to [seduce] [solicit] [lure] [entice]] (victim) **to engage in (any illegal act** as charged in the indictment or information under chapter 794, 800, 827, or other unlawful sexual contact with a child or with a person believed by the defendant to be a child).

Note the emphasized phrase **"to engage in any illegal act."** Element #3 should be compared to section 847.0135(3)(a), Florida Statutes (2012), which provides in pertinent part:

> (3) Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:
>
> (a) seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed to be a child, **to commit any illegal act** described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or . . .

The standard instruction deviates, obviously, from the statute by changing the phrase "to commit any illegal act" to "to engage in any illegal act." The reason for the change is not as obvious. In accordance with its plain language, section 847.0135(3)(a) is a true solicitation statute. The statute prohibits a person from soliciting another person to commit a crime. In this case, the other person is a child or a person believed to be a child.

One may ask whether the change in language was intended to cure an ambiguity in the statute, or whether the Legislature intended to enact a true solicitation statute. Compare a related statutory provision. Under the "traveling" statute, section 847.0135(4), Florida Statutes, the Legislature made it unlawful for

any person to travel "for the purpose of engaging in any illegal act " proscribed by chapters 794, 800 or 827, "or to otherwise engage in any other unlawful sexual conduct with a child or with another person believed to be child. . . ." Under the "traveling" offense, the Legislature proscribed "engaging in" any unlawful sexual act with a minor child. One must presume that the Legislature used different terms in related provisions to convey different standards of criminality. Clearly, the Legislature did not use the phrase "to engage in" in section 847.0135(3)(a) because it intended to convey a different standard of criminality.

Turn now to section 847.0135(4)(a), Florida Statutes. Paragraph 4(a) makes it unlawful for a person to "travel" after using a computer to:

> (a) Seduce, solicit, lure, or entice or attempt to seduce, solicit, lure, or entice a child or another person believed to be a child, **to engage in any illegal act** described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in unlawful sexual conduct with a child; or

Paragraph (4)(a) is the apparent "companion" to paragraph (3)(a), but uses somewhat different terminology. Paragraph (4)(a) prohibits the person from soliciting a child "to engage in any illegal act. . . . ." In comparison, paragraph (3)(a) prohibits the person from soliciting the child "to commit any illegal act. . . ." The fact that the Legislature used different terminology confirms a different

legislative intent. The Legislature intended to incorporate a different standard of criminality.

Both the current instructions, 11.17(a) and (c), and the proposed instructions, 11.17(a) and (c), treat paragraphs (3)(a) and (4)(a) in substantially similar manner by incorporating the phrase "to engage in any illegal act." The current and proposed instructions, 11.17(a), must be erroneous because they fail to accommodate, or incorporate, the distinctive terminology, "to commit any illegal act," unique to section 847.0135(3)(a), Florida Statutes.

The phrase "to engage in" any illegal act is broader than the plain terms used in section 847.0135(3)(a), i.e., "to commit" any illegal act. By its plain terms, section 8147.0135(3)(a), Florida Statutes, enacts a true solicitation statute. Under the standard jury instruction, the state may prosecute one who solicits a child to participate in an unlawful sex act committed by the solicitor. That may be a reasonable exercise of the legislative power, but that is not what the Legislature enacted. The plain language of the statute evinces a legislative intent to punish only those who solicit a child (or a person believed to be child) to commit a sexual offense proscribed in chapter 794, 800 or 827, or to punish those who solicit a child to "otherwise engage in any unlawful sexual conduct with a child" or a person believed to be a child. As it stands, the use of the phrase "to engage in"

permits a jury to convict a defendant under an invalid theory of prosecution. The standard instruction should be changed to conform to the language of the statute and thereby conform to the intent of the Legislature.

REQUEST FOR ORAL ARGUMENT

If the Florida Supreme Court should entertain oral argument on the proposed instruction, 11.17(a), the undersigned requests five minutes of the Court's precious time to discuss this issue.

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SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTION
IN CRIMINAL CASES

COMMENT ON PROPOSED JURY INSTRUCTIONS 11.17(a) & (b)

The Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases proposed new jury instruction for the "solicitation" and "traveling" offenses, 11.17(a) and (b). The proposed instructions were published in the August 15, 2014, edition of the Florida Bar News. The undersigned understands that the primary purpose of the new proposals is to implement recent statutory amendments for enhancement factors. Nonetheless, this comment suggests an error in the language accompanying the statement of the elements of the "solicitation" and "traveling" offenses under section 847.1035(3)(a) and (b), Florida Statutes.

The proposed instructions also include the following language "if applicable" following the statement of the elements:

> The mere fact that an undercover operative or law enforcement officer was involved in the detection and investigation of this offense shall not constitute a defense from prosecution.

This language is drawn from section 847.0135(2), Florida Statutes.

The contested language should not appear as part of jury instructions on the elements of the offenses because it does not relate to an element of either offense.

If the instruction has any utility, it is conjunction with the defense of entrapment. In the context of entrapment, however, this instruction is superfluous because we already have an instruction on entrapment, instruction 3.6(j).

The greater problem arises when the defendant claims entrapment, as is common in the solicitation and traveling cases. If the challenged language appears in conjunction with the statement of the elements, it will cause confusion in the consideration of the entrapment defense. The entrapment instruction is more precise and more comprehensive. The entrapment instruction defines a line over which law enforcement may not cross to induce a person to commit a crime. The contested instruction includes no such line. The contested instruction may be construed by the jury to give law enforcement *carte blanche* to use any conceivable means to induce the defendant to commit the crime. To that extent, the challenged instruction may be inconsistent with the entrapment instruction. Even if not inconsistent with the entrapment instruction, the contested instruction may easily cause jury confusion in the application of the law of entrapment.

In short, the contested instruction has no saving grace. It is unnecessary and, at the very least, confusing. The instruction should be eliminated.

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IN THE

SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, PUBLISHED AUGUST 15, 2014	Case No SC14-

COMMENTS OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers ("FACDL") submits the following comments relating to the proposed revisions to the standard jury instructions in criminal cases.

1. ***Instruction 11.7*: Unlawful Activity with Certain Minors, Fla. Stat.794.05.**

FACDL objects to the proposed instruction to the extent it defines "Student" to mean "a person younger than 18 years of age who is enrolled in school." Element three of the offense described in Fla. Stat. § 794.05 is defined to require the jury to determine whether the alleged victim was 16 or 17 years of age. In order to avoid confusion among the jury about what age the alleged victim is required to be in order to find that the State has proven element three, the subsequent definition of "Student" should be defined as meaning "a person 16 or

17 years of age who is enrolled at a school." The definition of "Student" should track the preceding instruction on the element of the charged offense.

2. ***Instruction 11.0(a)*: Lewd or Lascivious Battery (Engaging in Sexual Activity), Fla. Stat. § 800.04(4)(a)1**

A. Age of Alleged Victim/Student

FACDL objects to the proposed instruction to the extent it defines "Student" to mean "a person younger than 18 years of age who is enrolled in school." Element one of the offense described in Fla. Stat. § 800.04(4)(a)1 is defined to require the jury to determine whether the alleged victim was twelve years of age or older, but under the age of sixteen.

In order to avoid confusion among the jury about what age the alleged victim is required to be in order to find that the State has proven element one, the subsequent definition of "Student" should be defined as meaning "a person twelve years of age or older, but under the age of sixteen who is enrolled at a school." The definition of "Student" should track the preceding instruction on the element of the charged offense.

B. *Apprendi* Comment

FACDL objects to the language of the Comment regarding the enhancement of the offense to a felony of the first degree if the defendant is 18 years of age or older and has prior conviction for an enumerated crime pursuant to Fla. Stat. §

800.04(4)(c). The Comment currently reads that "If this enhancement is charged, **it is likely that** *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires the jury to make at least one additional finding regarding the defendant's age." (emphasis added).

FACDL asserts that the Comment should be amended to remove the language "it is likely that." In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, any fact that increases the penalty for the crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt.

It is inescapable that the defendant's maximum sentence is subject to being increased from 15 years to 30 years under Fla. Stat. § 800.04(c) by a finding that the defendant was 18 years of age or older at the time of the charged offense. Thus, pursuant to *Apprendi*, the State must prove that fact to a jury beyond a reasonable doubt.

3. *Instruction 11.0(b)*: Lewd or Lascivious Battery (Encouraging, Forcing or Enticing), Fla. Stat. § 800.04(4)(a)2

A. Age of Alleged Victim/Student

FACDL objects to the proposed instruction to the extent it defines "Student" to mean "a person younger than 18 years of age who is enrolled in school."

Element one of the offense described in Fla. Stat. § 800.04(4)(a)2 is defined to require the jury to determine whether the alleged victim was under the age of sixteen.

In order to avoid confusion among the jury about what age the alleged victim is required to be in order to find that the State has proven element one, the subsequent definition of "Student" should be defined as meaning "a person under the age of sixteen who is enrolled at a school." The definition of "Student" should track the preceding instruction on the element of the charged offense.

B. *Apprendi* Comment

FACDL objects to the language of the Comment regarding the enhancement of the offense to a felony of the first degree if the defendant is 18 years of age or older and has prior conviction for an enumerated crime pursuant to Fla. Stat. § 800.04(4)(c). The Comment currently reads that "If this enhancement is charged, **it is likely that** *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires the jury to make at least one additional finding regarding the defendant's age." (emphasis added).

FACDL asserts that the Comment should be amended to remove the language "it is likely that." In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, any fact that increases the penalty

for the crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt.

It is inescapable that the defendant's maximum sentence is subject to being increased from 15 years to 30 years under Fla. Stat. § 800.04(c) by a finding that the defendant was 18 years of age or older at the time of the charged offense. Thus, pursuant to *Apprendi*, the State must prove that fact to a jury beyond a reasonable doubt.

4. *Instruction 11.0(c)*: Lewd or Lascivious Molestation, Fla. Stat. § 800.04(5)

A. Age of Alleged Victim/Student

FACDL objects to the proposed instruction to the extent it defines "Student" to mean "a person younger than 18 years of age who is enrolled in school." Element one of the offense described in Fla. Stat. § 800.04(5) is defined to require the jury to determine whether the alleged victim was either 12 years of age or older but less than 16 years of age, or less than 12 years of age.

In order to avoid confusion among the jury about what age the alleged victim is required to be in order to find that the State has proven element one, the subsequent definition of "Student" should be defined as meaning "a person 12 years of age or older but less than 16 years of age who is enrolled at a school," or "a person less than 12 years of age." The definition of "Student" should track the

preceding instruction on the element of the charged offense.

B. *Apprendi* Comment

FACDL objects to the language of the Comment regarding the enhancement of the offense to a felony of the first degree if the defendant is 18 years of age or older and has prior conviction for an enumerated crime pursuant to Fla. Stat. § 800.04(5)(e). The Comment currently reads that "If this enhancement is charged, **it is likely that** *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requires the jury to make at least one additional finding regarding the defendant's age." (emphasis added).

FACDL asserts that the Comment should be amended to remove the language "it is likely that." In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, any fact that increases the penalty for the crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt.

It is inescapable that the defendant's maximum sentence is subject to being increased from 15 years to 30 years under Fla. Stat. § 800.04(c) by a finding that the defendant was 18 years of age or older at the time of the charged offense. Thus, pursuant to *Apprendi*, the State must prove that fact to a jury beyond a reasonable doubt.

5. ***Instruction 11.0(d)*: Lewd or Lascivious Conduct, Fla. Stat. § 800.04(6)**

FACDL objects to the proposed instruction to the extent it defines "Student" to mean "a person younger than 18 years of age who is enrolled in school." Element one of the offense described in Fla. Stat. § 800.04(6) is defined to require the jury to determine whether the alleged victim was under the age of sixteen.

In order to avoid confusion among the jury about what age the alleged victim is required to be in order to find that the State has proven element one, the subsequent definition of "Student" should be defined as meaning "a person under the age of sixteen who is enrolled at a school." The definition of "Student" should track the preceding instruction on the element of the charged offense.

6. ***Instruction 11.0(e)*: Lewd or Lascivious Exhibition, Fla. Stat. § 800.04(7)(a)**

FACDL objects to the proposed instruction to the extent it defines "Student" to mean "a person younger than 18 years of age who is enrolled in school." Element one of the offense described in Fla. Stat. § 800.04(7)(a) is defined to require the jury to determine whether the alleged victim was under the age of sixteen.

In order to avoid confusion among the jury about what age the alleged victim is required to be in order to find that the State has proven element one, the subsequent definition of "Student" should be defined as meaning "a person under

the age of sixteen who is enrolled at a school." The definition of "Student" should track the preceding instruction on the element of the charged offense.

7. ***Instruction 11.11*: Lewd or Lascivious Offenses Committed upon or in the presence of an Elderly Person or Disabled Person, Fla. Stat. § 825.0125**

FACDL objects to the proposed instruction to the extent it includes a definition of "Disabled adult." The relevant statutory language in Fla. Stat § 825.0125 is "disabled person" and does not appear to limit the potential victims of the offense to adults. A revised definition of "disabled person" should be included in the proposed instruction.

To the extent the statute is interpreted to only apply to "disabled adults," and elderly persons over the age of 60, the proposed instruction should not include language regarding a potential enhancement pursuant to Fla. Stat. § 775.0862. Pursuant to § 775.0862, the enhancement is limited to victims who are "students" that are under the age of 18.

8. ***Instruction 11.17(c)*: Traveling to Meet a Minor, Fla. Stat. § 847.0135(4)(a)**

FACDL objects to the indication in the proposed instruction that "it is unclear whether the crime of Solicitation in § 847.0135(3)(a), Fla. Stat, as a necessary lesser included offense . . ." The Fourth DCA has specifically held that all the elements of Solicitation of a Minor via Computer, as defined in Fla. Stat. §

847.0135(3)(a), are included within the offense of Traveling to Meet a Minor, as defined in Fla. Stat. § 847.0135(4)(a). *See Hartley v. State*, 129 So.3d 486, 491 (Fla. 4th DCA 2014); *See also Mizner v. State*, 39 Fla. L. Weekly D1586 (Fla. 2d DCA, July 20, 2014) (same conclusion with regards to §§ 847.0135(3)(b) and (4)(b)); *Shelley v. State*, 134 So.3d 1138, 1140-41 (Fla. 2d DCA 2014) (same); *Pinder v. State*, 128 So.3d 141, 143 (Fla. 5th DCA 2013) (same).

Therefore, Solicitation is a lesser included offense of Traveling. The proposed instruction should be modified to include Solicitation as a Category One lesser included offense.

9. ***Instruction 11.17(d)*: Traveling to Meet a Minor Facilitated by Parent, Legal Guardian, or Custodian, Fla. Stat. § 847.0135(4)(b)**

FACDL objects to the indication in the proposed instruction that "it is unclear whether the crime of Solicitation in § 847.0135(3)(b), Fla. Stat, as a necessary lesser included offense . . . " The Second and Fifth DCA's have specifically held that all the elements of Solicitation of a Minor via Computer, as defined in Fla. Stat. § 847.0135(3)(b), are included within the offense of Traveling to Meet a Minor, as defined in Fla. Stat. § 847.0135(4)(b). *See Mizner*, *supra*; *Shelley, supra*; *Pinder, supra*; *See also Hartley, supra* (addressing §§ 847.0135(3)(a) and (4)(a).

Therefore, Solicitation is a lesser included offense of Traveling. The

proposed instruction should be modified to and the instruction should be modified to include Solicitation as a Category One lesser included offense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished by email delivery this 15th day of September, 2014, to:

Standard Jury Instructions Committee in Criminal Cases
c/o Bart Schneider, Office of the General Counsel
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Respectfully Submitted,

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