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BREVARD & SEMINOLE COUNTIES

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November 8, 2007

Judge Terry D. Terrell
Chair, Standard Jury Instructions in Criminal Cases
c/o Les Garringer, General Counsel's Office
Office of State Courts Administrator
500 South Duval Street
Tallahassee, FL 32399-1900

COMMENT ON 11.16 DANGEROUS SEXUAL FELONY OFFENDER

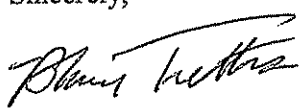
Undersigned counsel submits that the committee should not approve and send to the Supreme Court either proposal 11.16 or alternative proposal 11.16 for a couple of reasons. First, it doesn't make any sense for sentences 2d and 2e to be in the instruction considering that the proceeding is bifurcated. In other words, if 2d or 2e is alleged in the state's information, the jury can only learn of this allegation after the jury has found the defendant guilty of the sex crime. A separate instruction when 2d or 2e is alleged would need to be written for a bifurcated proceeding after the jury has found the defendant guilty. The separate instruction would need to be written in the past tense. For example, such an instruction for use in a bifurcated proceeding when 2d or 2e is alleged might read: "Having found (defendant) guilty of (felony, as identified by section 794.0115 (2), Fla. Stat.) you must now determine whether the State has proven beyond a reasonable doubt:". Counsel submits that the inclusion of 2d and 2e in the proposals is erroneous.

Secondly, counsel submits that the proposals should not be approved by the committee because the dangerous sexual offender statute results in the state charging separate crimes that have elements in addition to those of the enumerated sex crimes. These separate crimes result in mandatory sentences that exceed the statutory maximum sentence of the crimes identified by section 794.0115(2). For example, if a defendant were to in one criminal event use two children in a sexual performance in violation of § 827.071(2), the crime is increased by § 794.0115 from a second degree felony to a crime that has a 25 year mandatory prison sentence to life in prison. Since the fact of the victimization of more than one child pursuant to § 794.0115(2)(c) is what results in the enhanced sentence beyond the 15 year statutory maximum for a second degree felony, these facts must be alleged in the information, must be proven beyond a reasonable doubt, and by definition are elements of the crime of using more than one child in a sexual performance. See *Appredi v. New Jersey*, 530 U.S. 433, 483 n.10 (2000) ("...facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."). Counsel submits that the victimization of more than one child in the example above results in a separate crime in

which "more than one victim" is an element of the offense. The proposal does not treat the multiple victimization as an element of a crime and is therefore, counsel submits, erroneous.

Counsel's position is that there should not be a jury instruction on dangerous sexual felony offender because the effect of the dangerous sexual felony offender statute, § 794.0115, is to create an additional element of a crime – not a "determination" to be made by the jury after the jury finds the defendant guilty of what would be a lesser included offense of the crime charged.

Sincerely,



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