

**IN THE SUPREME COURT OF FLORIDA**

**IN RE:  
STANDARD JURY INSTRUCTION  
IN CRIMINAL CASES -  
REPORT NO. 2008-2**

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SC 08-484

**COMMENT REGARDING PROPOSED JURY INSTRUCTION FOR  
FLORIDA STATUTE SECTION 800.04(5)**

Florida Statute Section 800.04(5), Lewd or Lascivious Molestation, prohibits touching the "genital area," and "the clothing covering" the genital area, breasts, genitals, and buttocks of a minor. These two terms, "genital area" and "the clothing covering" are not defined in the statute or the proposed jury instruction. The absence of definitions will improperly require jurors, without appropriate guidance, to determine during deliberations exactly what these legal terms mean.

"Genital area" by the term itself, and by the fact it is listed separately from "genitals" in the statute, indicates that it is distinct and different from the genitals. In cases where the evidence does not establish, or the State does not charge, that the genitals, buttocks, breasts or clothing covering them were touched, the jury is tasked with determining -- without guidance from the proposed instructions -- what constitutes a "genital area." What "area" qualifies as this? Where does the "genital area" end and a non-genital

area begin? If "genital area" is to mean the same identifiable location in every trial, to every accused person, and to every determination of whether the location touched qualifies as "genital area," it would make sense to instruct each jury on the same definition. That does not exist at the moment.

The term "genital area" can be defined. *Compare Stall v. State*, 570 So. 2d 257 (Fla. 1990) ("The constitution requires criminal laws to unambiguously define the elements of a crime. A basic legal problem with the criminalization of obscenity is that it cannot be defined." Justice Barkett, dissenting, at 263). Although people are physically different, the anatomy of where genitals are located remains the same. Thus, somewhere from that known location is a further "area" that qualifies as the "genital area." While there are cases that may fall into the "I know it when I see it" category for this offense, the true danger in not having this term defined is for those cases that do not.

"Area" has no fixed meaning and the common definition of the word does not assist in determining where "genital area" begins and ends. *Merriam-Webster Online Dictionary*, 2008, defines "area," in pertinent part, as "a particular extent of space or surface or one serving a special function: as a: a part of the surface of the body b: a geographic region." <http://www.merriam-webster.com/dictionary/area>. *The American Heritage*

*Dictionary of the English Language, 4th Edition, 2000*, defines "area" as "1. A roughly bounded part of the space on a surface; a region." An inch from the genitals, certainly one can fairly argue is within the meaning of "genital area." But how many inches away is the line between genital area and non-genital area? What about the hip, the upper leg, the navel, the waistline, the torso meeting the leg? The further the alleged touching is away from the genitals, the more subjective a jury must be to make sense of this undefined term.

The "area" alleged to have been touched makes a difference. Section 800.04(5) prohibits contact with specific body locations. If a person has the requisite intent, but has not touched one of these locations, then there has not been a violation of Section 800.04(5), although there may be a violation of Section 800.04(6). Section 800.04(6) does not limit the location of the touching necessary to convict. The difference in punishment between the two sections can be significant. Section 800.04(5) imposes a punishment up to a life felony. Section 800.04(6) imposes a punishment up to a second degree felony.

While innocent citizens wrongfully accused of Lewd Molestation will undoubtedly dispute the intent element of this offense, an undefined "genital area" term can unfairly taint the proceedings. If the jury is without

instructions which clearly show the alleged touching did *not* qualify as a "genital area," the State will always be in a position to argue that the "genital area" was molested and therefore, "who touches a child's 'genital area' unless they have a lewd or lascivious intent?" Intent is often inferred from the facts. If the inference of intent is influenced by the jury's subjective interpretation of what "genital area" means, despite no definition of the term guiding the court and the parties, then the accepted concept of the jury applying the facts to the law instead devolves into the jury creating their own law to then apply the facts.

Similar problems exist with the term "the clothing covering." Again, there is no definition of what this phrase means. Does it mean the clothing *directly* covering skin, i.e. underwear? Does it mean the clothing covering clothing covering the area, i.e. jeans covering underwear? Does "clothing covering them" refer to a specific part of the clothing or the clothing as a whole? If a person touches the back of someone's shirt, yet the front of the shirt of course covers the breasts, has the "clothing covering the breasts" been touched in violation of the statute?

If the term applies to the clothing as a whole and any clothing being worn, then virtually any touching of a shirt or pants will always establish the prohibited areas. That would seem to be a drastic application of the law, yet

without an instruction to guide the jury, who is to say that jury will not interpret the term this way behind closed doors? The statute and the proposed jury instruction do not permit either party to advise the jury what "clothing covering them" means. The plain meaning of the words can be interpreted in more than one way.

The instruction problem is further compounded when one is being prosecuted for "clothing covering genital area." In that situation, the jury has two terms, neither of which is defined, that they must initially create a legal meaning for before they can even start to apply the facts.

An innocent person accused of Lewd Molestation already faces inherent obstacles in such a charge, regardless of how unsupported or wrong the charge may be. The thought of an individual committing a crime against a minor, especially a sexual crime, naturally draws strong emotions. The effort to rid society of suspected sexual abusers is more publicly prevalent than ever. Despite this, we ask ordinary citizens every day to set aside their emotions and disdain at such a thought, and make objective decisions about the facts applied to the law provided. If the jury instructions do not firmly define the very elements the jury is asked to decide, the subjective feelings of the jurors are likely to guide their interpretation of what the law *should* say. Citizens accused of this crime understand that

jurors decide the facts, but they should not have to wonder what interpretation the jury will assign to the law.

Florida Criminal Procedure Rule 9.985 permits trial judges to give additional instructions to the jury, outside the standard jury instructions, if the instruction is "necessary to instruct the jury accurately and sufficiently on the circumstances of the case." This Honorable Court has recognized "that no approval of the forms by the Court could relieve the trial judge of his responsibility under the law properly and correctly to charge the jury in each case as it comes before him." State v. Bryan, 287 So. 2d 73, 75 (Fla. 1973). However, if the trial judge gives a non-standard jury instruction that is determined to have misled the jury, reversible error occurs. Carpenter v. State, 785 So. 2d 782 (Fla. 2001). There is no guidance for the trial judge as to what a proper charge to the jury is when the inevitable disputes arise as to what these terms mean.

These terms are elements of the crime. They are not some unique factual concepts that invoke other areas of law to assist the jury. Having a uniform definition will ensure that the law is equally and clearly understood in every case. It can only help the parties, the trial judge, and most importantly, the jury.

While the issue raised in this comment can also find a path to this Honorable Court through a constitutional challenge of the law as applied, if the Court recognizes the need for guidance in these undefined elements and is in a position to remedy these concerns during the approval of jury instructions, it would seem appropriate to do so now.

Respectfully submitted,

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### **CERTIFICATES**

I HEREBY CERTIFY that a copy of the above comments were mailed overnight to the Honorable Judge Terry D. Terrell, Committee Chair, c/o Les Garringer, Office of the General Counsel, 500 S. Duval Street, Tallahassee, FL 32399-1925, this 14<sup>th</sup> day of May, 2008.

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

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