**IN THE SUPREME COURT OF FLORIDA**

**IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES – INSTRUCTIONS 1.5, 7.8, 7.8(A), AND 11.1-11.6(A)** **CASE NO.: SC15–470**

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**STANDARD JURY INSTRUCTION COMMITTEE'S RESPONSE TO COMMENTS AND REQUESTS FOR ORAL ARGUMENTS**



The Supreme Court Committee on Standard Jury Instructions in Criminal Cases ("Committee") files this Response to comments from the Florida Public Defender Association ("FPDA") and the Florida Association of Criminal Defense Lawyers ("FACDL"), and requests for oral argument from Mr. Steve Been and the FPDA. These pleadings were filed in response to the Court's publication of the Committee's proposals in The Florida Bar *News* on May 15, 2015.

**Response to FPDA Comments**

The FPDA made two suggestions pertaining to the Committee's sexual battery proposals. The first suggestion was that the proposal for: **"An object" includes a finger** should be changed to: **"An object" includes a defendant's finger.** The FPDA believes that a defendant who compels a female victim to insert her finger into her own vagina or her own anus without her consent is not guilty of sexual battery. The FPDA's second suggestion is to alter the existing definition of "union," which states: **"Union" means contact.**

The Committee discussed these comments during a telephonic conference and then voted unanimously to disagree with the two suggestions.

For the FPDA's first idea, the Committee believes the language of the sexual battery statute suggests that a defendant who compels a female victim to insert her finger into her own vagina or anus without her consent *is* guilty of committing a sexual battery. In the sexual battery statute (s. 794.011(1)(h), Fla. Stat.), the term "sexual battery" is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object…" The Committee also believes that *Watkins v. State*, 48 So. 3d 883 (Fla. 1st DCA 2010) provides some support for the Committee's position. In *Watkins*, a sexual battery conviction was reversed because the evidence demonstrated that the defendant forced the victim to lick his anus, not penetrate his anus with the victim's tongue. The opinion therefore suggests that if the victim had been forced to penetrate the defendant's anus with

her tongue, that act would have constituted a sexual battery because it would have involved the anal penetration of another by any other object.

The FPDA states that this issue is currently in front of at least one district court of appeal. If there is a written opinion in that case before the Court renders an opinion in this case, the Committee will file a notice of supplemental authority. In the meantime, the Committee unanimously recommends that the Court publish for use: **"An object" includes a finger.**

The FPDA's second comment was that jurors should not be told that "union" means contact. The Committee voted unanimously to not change the current definition of "union."

The Committee relied on the DCA cases cited in the FPDA comment that support the definition of "union" in the standard sexual battery instructions. As the FPDA pointed out, this definition of "union" has been used for almost 30 years. Also, the Committee did not think this Court held in *Seagrave v. State*, 802 So. 2d 281 (Fla. 2001) that union is not synonymous with contact for purposes of the sexual battery statute. The issue in *Seagrave* was whether points could be scored for "sexual contact" given that the defendant fondled the victim's buttocks and placed the victim's hand on the defendant's clothed penis. The Court held that for the purpose of scoring victim injury points, "sexual contact" was not limited to sexual union. The Committee thought this holding, regarding a scoresheet issue, did not mean that the standard sexual battery instruction, which involves the definition of "union" in the sexual battery statute, is wrong. The Committee also noted that the FPDA did not make it clear what they think jurors should be told regarding the definition of "union," but the FPDA seemed to suggest that "union" equated to penetration. If so, the Committee did not agree with such an argument because the sexual battery contains a clear distinction between "penetration" and "union." Finally, the Committee recognized that in other statutes, the legislature has differentiated between "contact" and "union." But the Committee also thought the legislature was aware of all the long-standing DCA opinions that explicitly state that "union" means contact and that if the legislature disagreed with those opinions, it would have changed the sexual battery statute at some point during the past 30 years.

**Response to FACDL comment**

FACDL reasserted a comment it had sent to the Committee when the Committee published its proposal for Instruction 11.3. FACDL's argument is that the word "acquiescence" is vague and could result in a reduction of the state's burden of proof. FACDL suggested that jurors be told that "acquiescence" means passive submission to a person reasonably believed by (victim) to be in a position of control or authority.

No one on the Committee changed his or her position in response to this repeat suggestion from FACDL. The Committee unanimously concluded that the term "acquiescence" was not vague and that any definition in the standard instruction should have more support from a statute or appellate opinion.

**Response to request for oral argument**

Assistant Public Defender Steve Been and the FPDA requested an oral argument on the Committee's proposal for Instruction 1.5 – Questioning in Capital Trials (Death Penalty). In response, the Committee voted unanimously to recommend that the Court not hold an oral argument because the positions of the Committee and the commenters are set forth plainly in the written pleadings. The Committee maintains its position that only a brief overview should be given by the judge to jurors at the beginning of a death penalty trial right before the (judge and) lawyers begin questioning the jurors.

Respectfully submitted this 24th day of June, 2015.

s/ Judge Jerri L. Collins
The Honorable Jerri L. Collins
Chair, Supreme Court Committee on
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## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this Response been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and that a copy of the Response has been sent by e-mail to: The Honorable Julianne Holt at jholt@pd13.state.fl.us; Assistant Public Defender Peter Mills at mills_p@pd10.state.fl.us; Mr. Steven Been at Steve.Been@flpd2.com; Mr. Luke Newman at luke@lukenewmanlaw.com; and Mr. William Ponall at ponallb@criminaldefenselaw.com, this 24th day of June, 2015.

s/ Judge Jerri L. Collins
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