

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS CRIMINAL CASES
REPORT 2017-02

CASE NO.: SC17-

To the Chief Justice and Justices of the Supreme Court of Florida:

This report, proposing amended instructions to the Florida Standard Jury Instructions in Criminal Cases, is filed pursuant to Article V, section 2(a), Florida Constitution.

	<u>Instruction #</u>	<u>Topic</u>
Proposal 1	23.1	Maintaining a Place of Prostitution, Assignment, or Lewdness
Proposal 2	23.2	Soliciting for the Purpose of Prostitution or a Lewd or Indecent Act
Proposal 3	23.3	Receiving for the Purpose of Prostitution, Lewdness, or Assignment
Proposal 4	23.4	Transporting for the Purpose of Prostitution, Lewdness, or Assignment
Proposal 5	23.5	Offering to Commit, Committing, or Engaging in Prostitution, Lewdness, or Assignment
Proposal 6	23.6	Soliciting for Prostitution, Lewdness, or Assignment
Proposal 7	23.7	Entering for the Purpose of Prostitution, Lewdness, or Assignment

The proposals are in Appendix A. Words and punctuation to be deleted are shown with strike-through marks; words and punctuation to be added are underlined. All proposals were published in the January 1, 2017 issue of the *Bar News*. One comment was received from the Florida Association of Criminal Defense Attorneys (“FACDL”). The pertinent part of the FACDL comment is in Appendix B.

Initial Note

Most of the changes are common to most of the proposals and will therefore be explained in this initial note. First, § 796.036, Fla. Stat., was repealed by the

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legislature. As a result, the Committee deleted the references to § 796.036, Fla. Stat., in all of these instructions.

Second, each instruction has a definitions section where words such as “prostitution,” “lewdness,” and “assignation” are defined. Wherever possible, the Committee added italicized headings so that everyone will know where to find the statutory source for those definitions.

For almost all of the prostitution-related crimes, a first violation is a second-degree misdemeanor; a second violation is a first-degree misdemeanor; and a third violation is a third-degree felony. *See* § 796.07(4), Fla. Stat. However, it has not been determined whether the courts will treat prior violations as an element of the crime to be determined by the jury or as a recidivist factor to be determined by the sentencing judge. Accordingly, each of the proposals has a reference in the Comment section that explains the uncertainty.

The FACDL comment pertains to all of the prostitution proposals. FACDL suggests adding “in a bifurcated proceeding” in the Comment sections to make it clear that the jury should not hear about a defendant’s prior record during the first phase of the trial. The Committee unanimously agreed with FACDL on this point.¹

Finally, four of the instructions (#23.1, #23.3, #23.4, and #23.7) include the definition of “structure” as: **A “structure” is any building of any kind, either temporary or permanent, which has a roof over it and includes any closely adjoining land enclosed by a fence or wall.** In February of this year, the Court decided in *Dubose v. State*, 210 So. 3d 641 (Fla. 2017), that a curtilage may have an ungated opening for entering and exiting. Accordingly, upon post-publication review, the Committee added an italicized cite to *Dubose* along with a new sentence in the definition of structure section that states: **The enclosure need not be continuous as it may have an ungated opening for entering and exiting.** This new sentence has brackets around it because it may not be applicable in all cases.

¹ FACDL also suggested that the Committee make it clear that priors are an element. The Committee could not do so because the Court has already rejected the idea that the issue of “element or recidivist factor” could be decided in a jury instruction case. *See In re Standard Jury Instructions in Criminal Cases – Report No. 2015-08*, 194 So. 3d 1007 (Fla. 2016).

All of the votes for these changes were unanimous. Any proposed change that is unique to an instruction will be discussed below.

Proposal 1 – 23.1

The crime of Maintaining a Place of Prostitution (§ 796.07(2)(a), Fla. Stat.) has a reclassification in § 796.07(7), Fla. Stat., that bumps up the degree of the crime if the place, structure, building, or conveyance that is owned, established, maintained, or operated in violation of the statute is a massage establishment that is or should be licensed. Accordingly, in Instruction 23.1, the Committee proposes to add a new section that allows for the jury to make a determination about whether the State proved that the reclassification applies. In order to do so, the Committee used statutory definitions from Chapter 480 to define “massage establishment,” “massage therapist,” and “massage.” Separately, the Committee added the words “vehicle or” within the definition of “conveyance” so that the instruction tracks the statutory definition of conveyance in § 810.011(3), Fla. Stat.

The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 2 – 23.2

All of the changes proposed for this instruction were addressed in the initial note. The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 3 – 23.3

Other than updating the definition of “conveyance,” all of the changes proposed for this instruction were covered in the initial note. The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 4 – 23.4

All of the changes proposed for this instruction were addressed in the initial note. The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 5 – 23.5

In Chapter 2016-24, Laws of Florida, the Legislature amended § 796.07(2)(e), Fla. Stat., in a way that criminalizes Offering to Commit, Committing, or Engaging in Prostitution *only for those persons 18 years of age or older*. Accordingly, the Committee added a second element that requires the State to prove that the defendant was 18 years of age or older at the time of his/her act (in element #1). All of the other changes proposed for this instruction were covered in the initial note. The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 6 – 23.6

The only change for this instruction that was not covered in the initial note is a proposal to redefine “solicit.” The Committee did not want to define the word “solicit” by using the word “solicited.” Instead, the Committee relied on § 777.04(2), Fla. Stat., and existing Instruction 11.5 to define “solicit” as “to command, encourage, hire, or request another person to engage in specific conduct.” The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

Proposal 7 – 23.7

Other than updating the definition of “conveyance,” all of the changes proposed for this instruction were covered in the initial note. The proposal was published, and no comments were received other than FACDL's comment discussed above. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

In conclusion, the Committee requests the Court authorize for use the seven prostitution proposals as outlined in Appendix A.

Respectfully submitted this 3rd day of
August, 2017.

s/ Judge F. Rand Wallis
The Honorable F. Rand Wallis
Chair, Supreme Court Committee on
Standard Jury Instructions in Criminal Cases
Fifth District Court of Appeal

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that this report has 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 report and the appendices have been sent through the portal to Attorney Luke Newman at lukenewmanlaw.com, and to Attorney William Ponall at ponallb@criminaldefenselaw.com; this 3rd day of August, 2017.

s/ Judge F. Rand Wallis
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