

APPENDIX B

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**COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL
CASES
THE HONROABLE F. RAND WALLIS, CHAIR
REPORT 2017-02**

Instructions 23.1-23.7: Prostitution offenses.

FACDL suggests that the “Comments” portion of the seven proposed, revised instructions related to Florida Statutes Chapter 796 make clear that certain prior criminal history is an element of the enhanced offense to be determined by the jury in a bifurcated trial.

FACDL proposes that the ‘Comments’ sections of these seven proposed, revised instructions read as follows:

The crime in § 796.07..., Florida Statutes, is enhanced based on the number of prior violations. As of October 2016, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be found by the jury in a bifurcated trial or whether a prior violation can be proven to the judge at sentencing.

FACDL is concerned that the comment, as written, could lead to a defendant’s prior criminal history being introduced during a jury trial. Absent some unique circumstance, this has long been held to be inappropriate. *See State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000) (felony driving under the influence), and *Smith v. State*, 771 So. 2d 1189 (Fla. 5th DCA 2000) (felony petit theft). These cases contemplate a bifurcated procedure in cases regarding proof of prior convictions as an element of a later crime. Bifurcation is warranted where the State must first prove a statutory offense, either DUI or petit theft, and a jury must make a finding of guilt before the separate proceeding to prove the existence of the

prior convictions. *See generally Milton v. State*, 19 So. 3d 1143, 1146 (Fla. 1st DCA 2009).

FACDL is concerned that, as currently written, the Comments section of these seven instructions seem to suggest that the defendant's prior criminal history could be introduced to the jury prior to the jury's determination of the existence of the statutory offense.

Respectfully submitted,

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