APPENDIX B

Committee on Standard Jury Instructions in Criminal Cases
Honorable F. Rand Wallis, Chair
Report 2017-05

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LAW OFFICE, P.A.

February 16, 2017

Standard Jury Instructions Committee in Criminal Cases,
c/o Bart Schneider, General Counsel's Office
Office of the State Courts Administrator
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To whom it may concern:

My comment on proposed jury instructions 28.4(a) and (b) is in regard to the citation of Gaulden v. State, 195 So.3d 1123 (Fla. 2016), (Gaulden III), as support for the newly proposed definition of "involved in a crash" which is published as follows: "A vehicle is 'involved in a crash' if it collides with another vehicle, person, or object, *or if it causes another vehicle to collide with another vehicle, person, or object.*" (emphasis added)

In fact, as to the italicized portion of the proposed amendment, Gaulden III says exactly the opposite. The following question was certified to the Supreme Court in Gaulden v. State (Gaulden II), 132 So.3d 916 (Fla. 1st DCA), rev. granted, 145 So.3rd 824 (Fla. 2014):

WHEN A PASSENGER SEPARATES FROM A MOVING VEHICLE AND COLLIDES WITH THE ROADWAY OR ADJACENT PAVEMENT, BUT **THE VEHICLE HAS NO PHYSICAL CONTACT** EITHER WITH THE PASSENGER, AFTER THE PASSENGER'S EXIT, OR **WITH ANY OTHER VEHICLE, PERSON OR OBJECT, IS THE VEHICLE "INVOLVED IN A CRASH" SO THAT THE DRIVER MAY BE HELD CRIMINALLY RESPONSIBLE FOR LEAVING THE SCENE?".** Gaulden II, 132 So. 2nd at 922. Emphasis added.

The Florida Supreme Court answered the question in the negative, holding "that the operative phrase 'any vehicle involved in a crash' means that a vehicle must collide with another vehicle, person, or object." Id. Justice Canady in his concurrence agreed that the statute must be strictly construed and that criminal liability under s. 316.027 was barred because "[t]he statutory phrase 'vehicle involved in a crash' is commonly understood to refer to circumstances in which *the* vehicle has been in a collision with something or someone". Emphasis added.

Although the opinion arguably states that only "a" vehicle, as opposed to "the" vehicle (driven by defendant) need have crashed, the concurrence clarifies that common understanding of being "involved" in a crash is that the defendant's vehicle was itself in the crash. And, "[w]hen a rule of conduct is laid down in words that evoke in the common mind" particular circumstances, the rule of strict construction precludes application of that rule of conduct to different circumstances". Id., Justice Canady concurrence, citing McBoyle v United States, 283 U.S. 25, 27 (1931)

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Therefore, while someone who causes a collision between other vehicles and/or objects may be later proven civilly liable for same, they should not be held to a criminal charge for arguably having been the cause of someone else's collision; in fact, there would be many occasions I suppose, that the driver who has caused a collision has carried on their merry way oblivious to any havoc wreaked after they have passed. Unless there is at least a requirement to prove knowledge of having been the cause of someone else's crash, and with such knowledge, the intent to leave the scene, I believe this portion of the instruction is inappropriate.

Sincerely,

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IN THE

SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, PUBLISHED January 15, 2017	Case No. SC17-

COMMENTS OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers ("FACDL") submits the following comments relating to the proposed revisions to the standard jury instructions in criminal cases.

***Instruction 3.12*: Verdict**

FACDL objects to the portion of the instruction that states the following:

> If you return a verdict of guilty to the charge of First Degree Murder, it is not necessary that all of you agree the State proved First Degree Premeditated Murder and it is not necessary that all of you agree the State proved First Degree Felony Murder. Instead, what is required is that all of you agree the State proved either First Degree Premeditated Murder or First Degree Felony Murder.

FACDL acknowledges that this instruction is consistent with the Florida Supreme Court's decision in *Mansfield v. State*, 911 So.2d 1160 (Fla. 2005). FACDL asserts, however, that this instruction is inconsistent with the Florida

Supreme Court's recent decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016). In *Hurst*, the Supreme Court held that the Florida Constitution requires a unanimous jury verdict. *Id.* at 53-59. Therefore, by permitting different jurors to reach a guilty verdict on two very different theories of First Degree Murder, the instruction in question permits a non-unanimous verdict in violation of the Florida Constitution.

***Instruction 25.13(f)*: [Ownership] [Lease] [Rental] of a Place for [[Trafficking in] [Sale of] a Controlled Substance] [Manufacturing a Controlled Substance Intended for Sale of Distribution]**

FACDL objects to the portion of the Lesser Included Offense section which states the following:

> If a person owns, leases, or rents a place knowing that the place will be used for trafficking, sale or manufacture of drugs, then the person is guilty of Trafficking, Sale, or Manufacture of drugs as an aider or abettor. Therefore, Trafficking or Sale or Manufacture are Category One lesser included offenses . . .

In order to establish that an individual was an aider or abettor, the State must prove that the individual "(1) assisted the actual perpetrators by doing or saying something that caused, encouraged, assisted, or incited the perpetrators to actually commit the crime, and (2) intended to participate in the crime." *Jimenez v. State*, 715 So.2d 1038, 1041 (Fla. 3d DCA 1998). Mere knowledge of the crime is insufficient to support a conviction. *Id.*

Therefore, although renting or lease a place with knowledge that it will be used for trafficking, sale, or manufacturing of drugs satisfies element (1) because it assists the perpetrators commit the crime, it does not necessarily satisfy element (2) because it does not establish that the individual intended to participate in the crime. Accordingly, trafficking or sale or manufacture of drugs should not be listed as a Category One lesser included offense.

Regarding the Comments section found following proposed Instruction 25.13(h):

FACDL is concerned with the language in the first paragraph of the "Comments" found under this proposed, new jury instruction. This portion of the "Comments" section directs the trial court as to appropriate lesser-included offense(s). FACDL sees the determination of lesser-included offenses as a litigation matter to be decided by courts in cases which present justiciable issues. Publishing the proposed "Comments" section would result in the Supreme Court of Florida passing judgment on the lesser-included offenses of this specific offense. FACDL sees such an outcome as premature and inappropriate.

FACDL notes that the source of authority for the "Comments" section is a concurrence in a District Court case which was *per curiam* affirmed. A *per curiam* affirmance, even one with a written dissent, has no precedential value and should

not be relied on for anything other than res judicata. *See St. Fort ex rel. St. Fort v. Post, Buckley, Schuh & Jernigan*, 902 So. 2d 244, 248 (Fla. 4th DCA 2005). Concurring opinions are not considered precedent. *See Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008) *citing Dunn v. State*, 454 So.2d 641, 642 (Fla. 5th DCA 1984). "Only the written, majority opinion of an appellate court has precedential value." *Gould v. State*, 974 So. 2d 441, 445 (Fla. 2d DCA 2007)(*citing Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.*, 434 So. 2d 310, 311 (Fla.1983)).

Regarding the Comments section found in Instructions 28.6; 28.7; 28.8; 28.8(a); 28.8(b); 28.8(c); 28.8(d) and 28.8(e):

The "Comments" added to the above-listed instructions seem like an outline of an argument in opposition to the Second District's decision in *Lucas v. State*, 192 So. 3d 1269 (Fla. 2d DCA 2016) and not appropriate comments to a standard jury instruction.

The opinions of the Second District addressing the appropriate lesser included offenses of fleeing to elude do not appear to be contradicted by any authority from another District Court or the Florida Supreme Court. The Second District's holding from the noted line of opinions in the "Comments" section therefore represents the law in Florida until another District Court or the Florida

Supreme Court publishes a contrary opinion. *See generally Pardo v. State*, 596 So. 2d 665 (Fla. 1992). A "Comments" section that points out the Second District is alone in addressing disobedience to police as a lesser included offense seems like an invitation to challenge the holding in *Lucas* and not an appropriate addition to the standard jury instruction.

Regarding the definition of "involved in a crash" found in Instructions 28.8(b); 28.8(c); 28.8(d) and 28.8(e):

FACDL takes the position that the Florida Supreme Court defined "involved in a crash" in *Gaulden v. State*, 195 So. 3d 1123 (Fla. 2016) as follows:

> Accordingly, we hold that the operative phrase 'any vehicle involved in a crash' means that a vehicle must collide with another vehicle, person, or object.
> *Id.* at 1128.

Previously, in *State v. Elder*, 975 So. 2d 481 (Fla. 2d DCA 2007), the Second District relied on a dictionary definition of the term "involved" and held that a driver who had caused a crash but whose vehicle had never contacted another vehicle bore the responsibility of carrying out the duties described in the statute. Other District Courts cited *Elder* and another opinion in holding, pre-*Gaulden*, that the statute did not require the driver's vehicle be one of the colliding objects.

Just last summer however, the Florida Supreme Court rejected these interpretations of the statutory "crash" language as overbroad and counter to the strict construction required in applying a criminal statute. *Gaulden*, 195 So. 3d at 1127.

Because the broad concept of "crash" announced in Elder has been rejected by the Florida Supreme Court; FACDL objects to the second part of the proposed "involved in a crash" definition in the cited instructions. FACDL takes the position that: a vehicle is involved in a crash if it collides with another vehicle, person, or object. Simply "causing" another vehicle to collide with another vehicle, person, or object has been held to constitute "involved in a crash" in *Elder*. However *Elder's* reasoning can no longer be relied upon following the Florida Supreme Court's opinion in *Gaulden*.

Instruction 25.15(a) and 28.11:

FACDL suggests that the "Comments" portion of the proposed, revised instructions related to Florida Statutes Chapters 322.34 and 893.147 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 the proposed,

revised instructions read as follows:

> The crime in § 322.34(2)..., Florida Statutes, is enhanced based on the number of prior violations. ... ... As of November 2016, it is unclear whether the existence of a prior violation will be treated as an element of the crime that must be proven to the jury in a bifurcated trial or as a sentencing factor that can be proven to the judge.
>
> -and-
>
> The crime in § 893.147(6), Fla. Stat., is enhanced from a first degree misdemeanor to a third degree felony upon a second or subsequent violation. As of October 2016, it is unclear whether a prior violation will be treated as an element of the crime which must be proven to the jury or a sentencing factor which may be proven to the judge.

FACDL is concerned that the comments, 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 prosecutions involving 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 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.

Instruction 29.5:

As a matter of policy, FACDL would encourage the Committee and the Supreme Court of Florida to forgo drafting a standard jury instruction for the offense of disorderly conduct / breach of peace. The Florida Legislature's statute addressing this offense is circular and overbroad. It is FACDL's position that the nebulous language contained in Section 877.03 should be abandoned and replaced by the legislature with language which identifies specific, objective acts the legislature seeks to prohibit. Absent clear direction from the legislature, FACDL takes the position that the judicial branch should not attempt to assist by inserting definitions where the legislature has failed to do so.

In practice; Section 877.03, Florida Statutes is often an arrest and booking statute of last resort. Prosecutors in Florida's County Courts should not be emboldened by the publication of a standard jury instruction for disorderly conduct / breach of peace. Arrestees booked under Section 877.03 should be prosecuted (if at all) in trials for batteries, affrays, assaults or other objective criminal acts.

Taking any action to encourage prosecutions under Section 877.03 does not seem like a matter of sound policy or a productive use of Florida's criminal justice resources.

With that being said, FACDL objects to the proposed Instruction 29.5 as circular, overbroad, outdated, and lacking of sufficient consideration for the constitutionally protected conduct often at issue in a breach of peace prosecution.

The instruction itself includes a definition of disorderly conduct or breach of the peace which includes engaging in conduct which constitutes a breach of peace or disorderly conduct. FACDL does not suggest that this circularity reflects on the drafter of the proposed instruction but instead reflects on the complete lack of particularization used by the Florida Legislature in passing and maintaining Section 877.03. Jurors would therefore potentially be instructed that disorderly conduct is disorderly conduct and breach of peace is breach of peace. Such an instruction is unhelpful, confusing and will probably lead to convictions and criminal sanctions for constitutionally protected conduct and/or conduct that could be prosecuted under an objective statute.

The proposed instruction contains a "Give if applicable" section which provides examples of criminal speech such as "shouting 'fire' in a crowded theater" when the speaker knows there is no fire. This reference was born in Justice Oliver Wendell Holmes' opinion which upheld the Espionage Act

conviction of an individual who was found distributing anti-draft pamphlets. The opinion is almost 100 years old. *Schenck v. U.S.*, 249 U.S. 47 (1919). The opinion in *Schenck* used the language as a device. In so doing, the opinion allowed for the incarceration of individuals engaged in anti-war advocacy. Anti-war advocacy is now (and was soon 1919) unquestionably protected by the First Amendment.

The modern test for government censorship was adopted in *Brandenburg v. Ohio*, 395 U.S. 444 (1969):

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
>
> *Id.* at 447.

The proposed instruction's "Give if applicable" section also informs a jury that it may find a defendant guilty if the defendant spoke "fighting words[]" which the instruction does not define. Fighting words were initially recognized by the US Supreme Court in 1942:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
>
> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72

(1942)(internal footnotes omitted).

Seven years after *Chaplinsky*, the United States Supreme Court began to limit this holding. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the defendant, a preacher, was convicted of disturbing the peace for delivering a speech to a large, restless crowd in which he denounced various political and ethnic groups. In invalidating his disorderly conduct conviction, the Court stated:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.
>
> *Id.* at 4.

The Supreme Court refused to find that *Terminiello's* speech fell within the fighting words exception. Over the next few decades, the Supreme Court continued to narrow the fighting words doctrine and to extend First Amendment protections to offensive or vulgar speech. In *Cohen v. California*, 403 U.S. 15 (1971) a defendant, was convicted of disturbing the peace for wearing a jacket with a "Fuck the Draft" message on it into a courthouse. In invalidating his conviction, the Court ruled that offensive language did not constitute fighting words. The majority held that fighting words were only "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge,

inherently likely to provoke violent reaction." *Id.* at 20.

The following year, in *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court cited *Cohen* and stated that speech that is "vulgar or offensive...is protected by the First and Fourteenth Amendments." It is important to confront the profane speech involved in *Gooding*. While assaulting a police officer, Gooding shouted, "*White son of a bitch, I'll kill you.*" "*You son of a bitch, I'll choke you to death.*" and "*You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces.*" The question has to be asked - if this speech doesn't constitute fighting what words would actually qualify?

Then, the very next term, the Court reaffirmed this stance in *Hess v. Indiana*, 414 U.S. 105 (1973) by finding that the pronouncement "*we'll take the fucking street later*" did not constitute fighting words.

If the "fighting words" exception retains any merit, it is limited to face-to-face insults likely to provoke a reasonable person to violent retaliation. The Supreme Court has rejected every opportunity to use the doctrine to support restrictions on speech. The "which by their very utterance inflict injury" language the Supreme Court used in passing finds no support whatsoever in modern law — the only remaining focus is on whether the speech will provoke immediate face-to-face violence. Even this rationalization has limited support in light of the language used (and the result) in *Gooding*.

Respectfully submitted,

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February 8, 2017

Supreme Court Committee
on Standard Jury Instructions in Criminal Cases
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Dear Committee Members:

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to the standard jury instruction published in The Florida Bar News on January 15, 2017. The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants in hundreds of trials every year, FPDA members are deeply interested in the standard jury instructions designed to ensure the fairness and accuracy of the criminal justice system.

The FPDA appreciates the hard work by the members of the Committee on Standard Jury Instructions in Criminal Cases ("Committee") that have resulted in these proposals. The FPDA agrees with the vast majority of the proposals and the FPDA's disagreement on five aspects should not overshadow its gratitude for the many long hours that went into this proposal.

Proposed Instruction 3.12

The FPDA believes that non-unanimous jury verdicts are no longer constitutionally permissible after *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The prior case law holding that

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separate verdicts were not required did not take into consideration to constitutional right to a jury trial. *See Brown v. State*, 473 So. 2d 1260, 1265 (Fla. 1985).

Hurst held that "just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury." *Id.* at 53-54. The court then elaborated:

> The principle that, under the common law, jury verdicts shall be unanimous was recognized by this Court very early in Florida's history in *Motion to Call Circuit Judge to Bench,* 8 Fla. 459, 482 (1859). In the 1885 Constitution, the right to trial by jury was given even more protection by the promise that "[t]he right of trial by jury shall be secured to all, and remain inviolate forever." Declaration of Rights, § 3, Fla. Const. (1885). And, in 1894, this Court again recognized that in a criminal prosecution, the jury must return a unanimous verdict. *Grant v. State,* 14 So. 757, 758 (Fla. 1894). In 1911, this Court confirmed the unanimity requirement in *Ayers v. State,* 57 So. 349, 350 (Fla. 1911), stating that "[o]f course, a verdict must be concurred in by the unanimous vote of the entire jury." Almost half a century later, in *Jones v. State,* 92 So.2d 261 (Fla. 1956), again acknowledging that "[i]n this state, the verdict of the jury must be unanimous," this Court held that any interference with the right to a unanimous jury verdict denies the defendant a fair trial as guaranteed by the Declaration of Rights of the Florida Constitution.[10] *Id.* at 261 (On Rehearing Granted). Thus, Florida has always required jury verdicts to be unanimous on the elements of criminal offenses.

Id. at 55 (citations edited to conform to Fla. R. App. P. 9.800; footnote omitted).

The FPDA believes that *Hurst* puts an end to all non-unanimous jury verdicts in Florida. This Committee, however, proposes telling jurors:

> If you return a verdict of guilty to the charge of First Degree Murder, it is not necessary that all of you agree the State proved First Degree Premeditated Murder and it is not necessary that all of you agree the State proved First Degree Felony Murder. Instead, what is requires it that all of you agree the State proved either First Degree Premeditated Murder or First Degree Felony Murder.

Even before *Hurst*, it was permissible for jurors to be given separate verdict forms for premediated and felony murder for a single death. *Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002); *Johnson v. State*, 969 So. 2d 938, 945 (Fla. 2007). After *Hurst*, it is very likely required.

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

202 So. 3d at 57. Felony murder and premeditated murder have different elements, which is why this Committee has promulgated different jury instructions for each. *Compare* Fla. Std. Jury Instr. (Crim.) 7.2 *with* Fla. Std. Jury Instr. (Crim.) 7.3. It is difficult to see how jurors must come to unanimous verdicts on aggravating and mitigating factors but nevertheless do not need to come to a unanimous verdict on the underlying murder.

With *Hurst*, the law in Florida has changed. While the Committee may have drafted before *Hurst*, the Committee's proposal risks injecting error into countless murder cases. *Hurst* makes the Committee's proposal unconstitutional or, at the very least, constitutionally questionable. Standard jury instructions should not be based on such questionable law. Florida already has to clean up non-unanimous jury verdicts in capital cases. *See Mosley v. State*, 41 Fla. L. Weekly S629, S637-40 (Fla. Dec. 22, 2016). The FPDA would urge this Committee not to create another such situation.

Proposed Instruction 25.15(a) and 28.11

The proposed amendment to the comment in standard instruction 25.15(a) removes the case law that a trial judge needs to know:

> The crime in § 893.147(6), Fla. Stat., is enhanced from a first degree misdemeanor to a third degree felony upon a second or subsequent violation. As of October 2016, it is unclear whether a prior violation will be treated as an element of the crime which must be proven to the jury or a sentencing factor which may be proven to the judge.~~It is error to inform the jury of a prior violation of Retail Sale of Drug Paraphernalia. Therefore, if the information or indictment contains an allegation of one or more prior violations, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty of a Retail Sale of Drug Paraphernalia, the historical fact of a previous violation shall be determined beyond a reasonable doubt in a bifurcated proceeding. See *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).~~

It is unclear why this Committee would take out the helpful citation to *Harbaugh*, as that case is the controlling case law on how to conduct separate, bifurcated proceedings. *Harbaugh* is still relied on by appellate courts. *See, e.g., Dolan v. State*, 187 So. 3d 262, 266 (Fla. 2d DCA 2016).

If this Committee feels that there is any real issue of whether the prior convictions are substantive elements in this statute, this Court should refer the bench and bar to the cases upon which *Harbaugh* relied: *State v. Harris*, 356 So. 2d 315, 316 (Fla. 1978) (under the statute making petit larceny a felony on the third conviction, "prior convictions are considered an element of the offense and must be specifically alleged and proved.") and *State v. Rodriguez*, 575 So. 2d 1262, 1264 (Fla. 1991) ("the combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI"). Based on those precedents, the FPDA does not believe there is any real issue here, and therefore opposes this modification to the comments.

This same problem also occurs in the proposed comments to instruction 28.11, except that *Harbaugh* was never previously mentioned in the comments to that instruction. It should have been, and the FPDA urges this Committee to correct that omission.

Proposed Instruction 28.6, 28.7, and 28.8

The proposed comments take issue with the Second District Court of Appeal's decisions in *Lucas v. State*, 192 So. 3d 1269, 1271 (Fla. 2d DCA 2016), and *Koch v. State*, 39 So. 3d 464, 465-66 (Fla. 2d DCA 2010). The comment would read:

> The Second District Court of Appeal requires the lesser included offense of Disobedience to Police be given when Fleeing to Elude LEO is charged **even though Disobedience to Police has an element that Fleeing to Elude LEO does not. Specifically, Disobedience to Police requires the police order or direction to be lawful and Fleeing to Elude does not.**

The phrase in bold type is argumentative and should not be included in standard jury instructions. Additionally, the comment seems to make this comment personal to the Second District Court of Appeal. Other comments simply refer to "case law." Worse yet, that phrase makes the prosecution's argument, but not the defense's argument. Jury instructions should be neutral.

The proposed comment has no place in the standard jury instructions.

Proposed Instruction 29.5

The FPDA admires the Committee's initiative to tackle the creation of a standard jury instruction for section 877.03, Florida Statutes, criminalizing disorderly conduct or breach of the peace. The FPDA, however, believes that the circularity and First Amendment problems inherent in this statute doom all such efforts.

The proposed instruction is circular because, according to its terms, one can be guilty of disorderly conduct or breach of the peace if one: "engaged in conduct that constitutes a [breach of the peace] [or] [disorderly conduct]." Such a circular definition, even if that is how the statute reads, is not helpful to a juror.

The alternative statutory definitions—corrupted the public morals, outraged the sense of public decency—tread on the First Amendment right to free speech. For constitutional reasons, the Supreme Court limited the application of Section 877.03 "so that it shall hereafter only apply either to words which 'by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace.'" *State v. Saunders*, 339 So. 2d 641, 644 (Fla. 1976) (internal quotation omitted). In saving the village, however, the Supreme Court had to destroy it, replacing the statutory elements with these two new elements that are not found in the statute. Therefore, this statute has become subject to so many constitutional safeguards that the state's burden is not so much to prove the elements of the crime, but to prove that no exception applies.

The Committee's proposal attempts to deal with this situation by instructing the jury on First Amendment law. First, that instruction is problematic because it requires the state to meet its burden on proof only as to the (now antiquated) statutory elements, not the operative elements supplied by *Saunders* and its progeny.

Second, as a standard jury instruction, that proposal attempts to pack an enormous amount of case law into a short paragraph. In any given case, much of that will be irrelevant to the issue, causing juror confusion. Of necessity, much is simply omitted. For instance, the instruction does not address profanity. *K.Y.E. v. State*, 557 So. 2d 956, 957 (Fla. 1st DCA 1990) (child singing "Fuck the police"). Or screaming and yelling. *S.S. v. State*, 154 So. 3d 1217 (Fla. 4th DCA 2015). Some of the proposed instruction is antiquated: with modern fire safety

standards, shouting fire in a crowded theatre is more an annoyance than the trigger to a life-threatening stampede that Justice Holmes had in mind when he penned the phrase. *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); *see* https://en.wikipedia.org/wiki/Italian_Hall_disaster (six years before Justice Holmes wrote, in Calumet, Michigan, a false cry of "fire" at a meeting hall resulted in the deaths of 73 people, including 59 children).

While a trial court judge may be able to fashion an appropriate instruction for any specific case, a standard instruction is unlikely to be helpful. In almost any case, it would have to be modified to reflect what the state must prove in that particular context. The problems with current proposal are not drafting errors but a symptom of the constitutional problems within this statute. The FPDA opposes the current proposal and candidly suggests that any attempt to create a standard jury instruction for this statute would not fare any better.

Proposed Instructions 25.13(f), 25.13(g), 25.13(h), 25.15(b), 28.11

The FPDA is also concerned with the phrase "at the time" used as a drafting convention in these proposals: This phrase appears in the second element of proposed instructions 25.13(f), 25.13(g), 25.13(h), and 25.15(b). Someone trained in law would know that the Committee intended this phrase to require the actus reus (in these charges, usually possession) to occur at the same time as the mens rea (in these charges, usually knowledge). For a person untrained in law, however, "at the time" is vague because it does not refer to any specific time. A reasonable juror could fairly ask: "At what time?"

Worse yet would be the use of that phrase twice in proposed instruction 28.11. The jury could believe the "at the time" in the third element requiring knowledge that the license was suspended refers to the second element of when the license was suspended, rather than the first element which is the actus reus of driving. Under that formulation, a person would be guilty if their license was suspended on the first of a month, drove on the second of that month, and received notification on the third of that month. That person would know of the suspension "at the time" the suspension was in effect, even if they did not know it at the time of the driving.

A better formulation is found in the current version of 28.11: "At the time of that [possession] [use] [driving],. . . ." Such a formulation leaves no questions about the necessary temporal relationship. The FPDA opposes removing that formulation from 28.11 and respectfully suggests that it be also used in the other jury instructions listed above.

Respectfully submitted,

FLORIDA PUBLIC DEFENDER
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May 31, 2017

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Supreme Court Committee on Standard
Jury Instructions in Criminal Cases
C/O Bart Schneider, Esquire
General Counsel's Office,
Office of State Court Administrator
500 South Duval Street
Tallahassee, Florida 32399-1900

Re: Proposed amendments to Instructions 28.6, 28.7, and 28.8

Dear Committee Members:

Mr. Schneider has written requesting a clarification of the Florida Public Defender Association's (FPDA) comment on the proposed amendments to Instructions 28.6, 28.7, and 28.8. The proposal would ask the Supreme Court to throw into doubt *Lucas v. State*, 192 So. 3d 1269, 1271 (Fla. 2d DCA 2016), and *Koch v. State*, 39 So. 3d 464, 465-66 (Fla. 2d DCA 2010). Those cases held that disobedience to police, § 316,072(3), Fla. Stat. (2016), is a category-two lesser-included offense of fleeing and eluding, § 316.1935(1), Fla. Stat. The proposed comment with its "even though" language suggests that trial courts disregard those precedents as being incorrect as a matter of law:

> The Second District Court of Appeal requires the lesser included offense of Disobedience to Police be given when Fleeing to Elude LEO is charged **even though Disobedience to Police has an element that Fleeing to Elude LEO does not. Specifically, Disobedience to Police requires the police order or direction to be lawful and Fleeing to Elude does not.**

In addition to pointing out the impropriety of standard jury instructions overruling precedent, the FPDA's comments also said that the bolded phrase "makes the prosecution's argument, but not the defense argument." Mr. Schneider has asked what the defense argument would be.

Fleeing and eluding may not necessarily require that the stop be lawful. *See State*

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v. Kirer, 120 So. 3d 60, 63 (Fla. 4th DCA 2013).[1] Nevertheless, that element may be charged by the state, and the evidence may prove that element. In which case disobedience to a police officer becomes a lesser-included offense. "The second category, which now incorporates all attempts and the remaining lesser degrees of offenses, encompasses offenses which *may* or *may not* be included in the offense charged, depending on the accusatory pleadings and evidence." *State v. Wimberly*, 498 So. 2d 929, 930 (Fla. 1986). *Lucas* and *Koch* are therefore correct—disobedience to a police officer is a category-two lesser-included offense. The FPDA maintains that the standard jury instructions should not disparage them with the proposed language.

The FPDA appreciates the invitation to clarify its comments and stands willing to provide any further clarification as needed

Respectfully submitted,
FLORIDA PUBLIC DEFENDER
ASSOCIATION, INC.

Bob Dillinger

Bob Dillinger, President

[1] Note: there is a strong argument that *Kirer* is wrong. The statute requires that the person "has been ordered to stop such vehicle by a duly authorized law enforcement officer." § 316.1935(1), Fla. Stat. (2016). That phrase, "duly authorized law enforcement officer," is not defined in either the statute or Chapter 316. That phrase could mean any sworn law enforcement officer, no matter how illegal their actions, as *Kirer* held. A better interpretation, however, is that a law enforcement office is "duly authorized" if acting under the Florida Stop and Frisk Law, section 901.151, Fla. Stat. (2016). That statute, and the associated case law, is the only law authorizing police officers to stop citizens. Even if the statute is ambiguous, the rule of lenity should result in that interpretation. § 775.021, Fla. Stat. (2016).

RHD/JEM