APPENDIX B

The Committee on Standard Jury Instructions in Criminal Cases
The Honorable F. Rand Wallis, Chair
Report 2017-10

IN THE

SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, PUBLISHED January 1, 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 10.1*: Unlicensed Carrying a Concealed [Weapon] [Firearm]**

A. Definition Section

FACDL objects to the portion of the proposed instruction defining the terms "on or about [his] or [her] person" and "ordinary sight of another person." The current proposed version is incomplete and does not adequately implement the holdings in *Ensor v. State*, 403 So. 2d 349 (Fla. 1981), and *Dorelus v. State*, 747 So. 2d 368 (Fla. 1999).

The last sentence of the paragraph in question currently states the following: "However, a [firearm] [weapon] is not a concealed if, although not fully exposed,

its status as a [firearm] [weapon]."

As currently written, the sentence appears to be incomplete. FACDL suggest that, pursuant to *Ensor* and *Dorelus*, the sentence should be amended to state the following: "However, a [firearm] [weapon] is not concealed if, although not fully exposed, its status as a [firearm] [weapon] is immediately recognizable."

B. Lawful Self-Defense

FACDL also objects to the last paragraph of the instruction as incomplete, because it fails to address the applicable burden of proof. The last paragraph currently states as follows:

> It is a defense for a person who carries for purposes of lawful self-defense, in a concealed manner:
>
> 1. A self-defense chemical spray.
>
> 2. A nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.

This language effectuates Fla. Stat. § 790.01(3)(b). The proposed instruction for Fla. Stat. § 790.01(3)(a) includes specific language for a trial judge if the judge determines that either the State or the defendant has the burden of proof. FACDL suggests that similar language should be included in the proposed instruction for § 790.01(3)(b). As written, the jury is provided with no guidance as to the applicable burden on how to reach a determination on the defense laid out in § 790.01(3)(b).

***Instruction 10.5*: Improper Exhibition of a [Weapon] [Firearm]**

FACDL objects to the second-to-last sentence of the proposed instruction. That sentence states the following: "The term 'firearm' does not include an antique firearm unless the antique firearm is used in the commission of a crime."

It is FACDL's position that this sentence is circular and confusing because the elements of the offense require that the State prove that the defendant carried a "firearm" and exhibited the "firearm" in a rude, careless, angry, or threatening manner. It would not be a crime if the defendant carried an antique firearm and exhibited it in a rude, carless, angry, or threatening manner. However, as written, the proposed instruction suggests to the jury that, if an antique firearm is carried and exhibited it in a rude, careless, angry, or threatening manner, it would qualify as a "firearm," because it was "used in the commission of a crime." In the interest of clarity, FACDL suggests that this sentence should be removed from the standard instruction.

***Instruction 10.6(b)*: Driver or Owner of a Vehicle Knowingly Directing Another to Discharge a Firearm From the Vehicle**

FACDL raises the same objection to this instruction as it raised to Instruction 10.5.

***Instruction 10.6(c)*: Recreational Discharge of a Firearm Outdoors in a Residential Area**

FACDL raises the same objection to this instruction as it raised to

Instructions 10.5 and 10.6(b).

***Instruction 14.4*: Retail Theft**

FACDL objects to the proposed removal of the definition of the term "knowingly" which is found in the current instruction. The term "knowingly" is included and defined in multiple other sections of the standard jury instructions in criminal cases:

Chapter 10 – discharging firearm (different definition)
Chapter 12.6; 12.8 – offenses against computer users (different definition)
Chapter 20 – welfare fraud (same definition)
Chapter 20.20 – addressing mortgage fraud (different definition)
Chapter 25.15 – drug paraphernalia (same definition)

Specifically with regard to actions undertaken by consumers in retail establishments; § 812.015(1)(d), Fla. Stat. potentially criminalizes activities that shoppers carry-out on a regular basis. The term "knowingly" therefore serves to protect from a felony conviction the shopper who: innocently moves an item in her shopping cart from one container to another –or- who pushes her shopping cart into an adjacent parking lot to load her items into her vehicle.

If the committee is concerned with the definition of "knowingly" currently found in Instruction 14.4; FACDL suggests replacing that definition with the definition found in Instruction 20:20 ("'Knowingly' means that the defendant is aware of the act and is not acting through ignorance, mistake or accident.").

***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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