

# Supreme Court of Florida

**ORIGINAL**

CORRECTED OPINION

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No. 79,320

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STANDARD JURY INSTRUCTIONS--  
CRIMINAL CASES NO. 92-1

[July 2, 1992]

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions (Criminal) has submitted recommended amendments to the Florida Standard Jury Instructions in Criminal Cases. The explanatory portion of the report is quoted below:

REPORT (NO. 92-1) OF THE COMMITTEE ON  
STANDARD JURY INSTRUCTIONS (CRIMINAL)

TO THE CHIEF JUSTICE AND JUSTICES OF  
THE SUPREME COURT OF FLORIDA:

Your Committee on Standard Jury Instructions (Criminal) recommends that The Florida Bar be authorized to publish amendments to FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES. The proposed additional instructions and revised instructions are attached.

After the title of each instruction, a parenthetical description of the proposal is given. The proposal is described as "(Amended)," "(Revised)," or "(New)." "Amended" means that the wording is not substantially revised; the added words are underlined and the deleted words have strike-overs. "Revised" means that the language has changed substantially and that no attempt is made to show the changes with underlines and strike-overs. "New" means that the instruction is based on a statute for which no current instruction exists. Short explanations also follow each proposal.

Some of the proposed instructions were published on April 15, 1989. Those proposals along with many new proposals were published in the February 15, 1991, Bar News.

No responses were received to the first publication. Two letters in response to the second publication were received. The committee has considered the responses and has amended its proposals to conform substantially to the suggestions made.

A few of the committee's suggested changes have not been published in the Bar News. To allow all interested parties a final opportunity to review the proposals, the committee is asking The Florida Bar to publish a notice that amendments have been filed, that a copy of this report can be obtained at cost for review, and that comments should be submitted by March 15, 1992, to the court.

A copy of this report also is being sent to the presidents or chairs of the Florida Prosecuting Attorneys Association, the Florida Public Defenders Association, the jury instructions subcommittee of the Criminal Law Section of The Florida Bar, and the Conference of Circuit Court Judges.

One of the committee's recommendations pertained to the instruction on excusable homicide. The so-called short-form instruction on this subject is found in the introduction to homicide on pages 61 and 62 of the manual, and the so-called long form is found on page 76 of the manual. The current instructions provide that the short form shall be read in all murder and manslaughter cases, and that the long form shall also be read whenever excusable homicide is an issue in the case. The committee concludes that the long form as last amended in State v. Smith, 573 So. 2d 306 (Fla. 1990), is incorrect because it requires under all three of the alternative circumstances that the killing be committed by accident and misfortune. The committee believes that a killing upon sudden combat without any dangerous weapon being used and not done in a cruel and unusual manner need not have occurred by accident and misfortune and has recommended an instruction to this effect. The committee suggests that its recommended instruction replace both the current short- and long-form instructions and that the new instruction not be given where there is no basis for it in the evidence. We respectfully disagree with the committee's recommendation on this subject.

Section 782.03, Florida Statutes (1991), reads as

follows:

**782.03 Excusable homicide.--**Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

We believe the most logical interpretation of this language is as follows:

Homicide is excusable when committed (1) by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or (2) by accident and misfortune

- (a) in the heat of passion upon any sudden and sufficient provocation, or
- (b) upon a sudden combat without any dangerous weapon being used and not done in a cruel and unusual manner.

Thus, a killing which results from sudden combat must have been committed by accident and misfortune. This view is supported by logic as well as the language of the statute. We do not believe the legislature would have intended to always excuse a homicide that occurred during sudden combat so long as a dangerous weapon was not used and it was not done in a cruel or unusual manner. If this were so, anyone who became involved in a fight and later

purposefully killed his opponent would be excused if he did not use a dangerous weapon and did not do the killing in a cruel and unusual manner. We interpret the sudden combat exception to protect a person who becomes involved in a fight which accidentally leads to the death of the other party.

Furthermore, we do not concur with the committee's suggestion that no portion of the excusable homicide instruction need be read when it has no basis in the evidence. We say this because Florida case law has consistently held that manslaughter is a residual offense which cannot be properly defined without an explanation that justifiable homicide and excusable homicide are excluded from the crime. Rojas v. State, 552 So. 2d 914 (Fla. 1989); Hedges v. State, 172 So. 2d 824 (Fla. 1965). Because a manslaughter instruction will have to be given in every homicide case, the instruction on excusable homicide will also have to be included. We do, however, concur with the committee's suggestion that only one instruction on excusable homicide need be given rather than both the current short and long forms.

Therefore, we hold that the following instruction on excusable homicide shall be given in every homicide case in place of the short form now found on pages 61 and 62 of the manual.

#### EXCUSABLE HOMICIDE

The killing of a human being is excusable and therefore lawful, under any one of the following three circumstances:

1. When the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or
2. When the killing occurs by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or
3. When the killing is committed by accident and misfortune resulting from a sudden combat, if a dangerous weapon is not used and the killing is not done in a cruel or unusual manner.

"Dangerous weapon" is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

Because this instruction will adequately cover the subject even when excusable homicide is an issue in the case, the long-form instruction now found on page 76 of the manual need not be given and shall be eliminated. The new pages 61 and 62 are included in the appendix to this opinion as pages A-10 and A-11 in lieu of the amendment to the long-form instruction on excusable homicide proposed by the committee.

All of the other recommendations of the committee, which are included in the appendix to this opinion, are approved for publication. We caution all interested persons, however, that the notes and comments reflect only the opinion of the committee and are not necessarily indicative of the views of this Court as

to their correctness or applicability. We wish to express our appreciation to the committee for its dedication in presenting to the Court its comprehensive recommendations.

It is so ordered.

BARKETT, C.J. and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Standard Jury Instructions--Criminal

Harry Lee Coe III, Chair, Committee on Standard Jury Instructions  
(Criminal), Tampa, Florida,

for Petitioner



**2.04(c) DEFENDANT TESTIFYING (Amended)**

~~Give if  
defendant  
requests~~

**The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.**

Explanation of amendments: This instruction is on page 18 of the manual. The note in the margin is being removed because the committee believes that this instruction should be given any time the defendant testifies.

Feminine pronouns have been added to this and the other proposed instructions to avoid gender bias.

## MISCELLANEOUS INSTRUCTIONS

### 3.01 PRINCIPALS (Amended)

F.S. 777.011      **If two or more persons help each other [commit] [attempt to commit] a crime and the defendant is one of them, the defendant is a principal and must be treated as if [he] [she] had done all of the things the other person or persons did if the defendant:**

1.    **Knew what was going to happen,**
2.    **Intended to participate actively or by sharing in an expected benefit and**
3.    **Actually did something by which [he] [she] intended to help [commit] [attempt to commit] the crime.**

**“Help” means to aid, plan or assist.**

See State v.  
Dene, 533  
So.2d 265  
(Fla. 1988)

**To be a principal, the defendant does not have to be present when the crime is [committed] [or] [attempted].**

Note to  
Judge

~~Omit last sentence when felony murder is charged.~~

Explanation of amendments: This instruction is from page 32a of the manual. The note to judge is obsolete in light of State v. Dene.

**3.01(a) PRINCIPALS — WHEN ACTIVE PARTICIPANT  
HIRED BY DEFENDANT (Amended)**

F.S. 777.011

**If the defendant paid or promised to pay another person or persons to [commit] [attempt to commit] a crime, the defendant is a principal and must be treated as if [he] [she] had done all of the things the person who received the money did if:**

- 1. The defendant knew what was going to happen,**
- 2. [He] [She] made or promised the payment in exchange for the commission or promise to commit the crime or to help commit the crime and**
- 3. The [crime] [attempt] was committed by (co-conspirator).**

Note to  
Judge

~~Omit last sentence when felony murder is charged.~~

See State v.  
Dene, 533  
So.2d 265  
(Fla. 1988)

**To be a principal, the defendant does not have to be present when the crime is [committed] [or] [attempted].**

Explanation of amendments: This instruction is from page 33 of the manual. The note to judge is obsolete in light of State v. Dene.

**3.04(e) JUSTIFIABLE USE OF NONDEADLY FORCE  
(Amended)**

Note to  
Judge

Since there are many defenses applicable to self-defense, give only those parts of the instructions that are required by the evidence.

Read in all  
cases

An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which (defendant) is charged if the [death of] [injury to] (victim) resulted from the justifiable use of force not likely to cause death or great bodily harm.

In defense of  
person F.S.  
776.012

(Defendant) would be justified in using force not likely to cause death or great bodily harm against (victim) if the following two facts are proved:

Give if  
applicable

1. (Defendant) must have reasonably believed that such conduct was necessary to defend ~~{[himself]}~~, [herself] ~~{[another]}~~; against (victim's) imminent use of unlawful force against the [defendant] ~~{[other person]}~~.
2. The use of unlawful force by (victim) must have appeared to (defendant) ready to take place.

In defense of  
property  
F.S. 776.031

(Defendant) would be justified in using force not likely to cause death or great bodily harm against (victim) if the following three facts are proved:

Give if  
applicable

1. (Victim) must have been trespassing or otherwise wrongfully interfering with land or personal property.
2. The land or personal property must have lawfully been in (defendant's) possession, or in the possession of a member of [his] [her] immediate family or household, or in the possession of some person whose property [he] [she] was under a legal duty to protect.

3. (Defendant) must have reasonably believed that [his] [her] use of force was necessary to prevent or terminate (victim's) wrongful behavior.

Aggressor  
F.S. 776.041

**The use of force not likely to cause death or great bodily harm is not justifiable if you find:**

Give if  
applicable

1. (Defendant) was attempting to commit, committing or escaping after the commission of a (applicable forcible felony).

Define  
applicable  
forcible  
felony

2. (Defendant) initially provoked the use of force against [himself] [herself], unless:

(a) The force asserted toward the defendant was so great that [he] [she] reasonably believed that [he] [she] was in imminent danger of death or great bodily harm and had exhausted every reasonable means to escape the danger, other than using force not likely to cause death or great bodily harm to (assailant).

(b) In good faith, the defendant withdrew from physical contact with (assailant) and indicated clearly to (assailant) that [he] [she] wanted to withdraw and stop the use of force not likely to cause death or great bodily harm, but (assailant) continued or resumed the use of force.

Force in  
resisting  
arrest

**A person is not justified in using force to resist an arrest by a law enforcement officer who is known, to be or reasonably appears to be a law enforcement officer.**

F.S.  
776.051(1)  
and F.S.  
776.012

Give if  
applicable

**However, if an officer uses excessive force to make an arrest, then a person is justified in the use of reasonable force**

See *Ivester v. State*, 398 So.2d 926 (Fla. 1st DCA 1981); *Jackson v. State*, 463 So.2d 372 (Fla. 5th DCA 1985).

to defend [himself] [herself] (for another)], but only to the extent [he] [she] reasonably believes such force is necessary.

In some instances, the instructions applicable to F.S. 776.012, 776.031 or 776.041 may need to be given in connection with this instruction.

Read in all cases

In deciding whether the defendant was justified in the use of force not likely to cause death or great bodily harm, you must judge [him] [her] by the circumstances by which [he] [she] was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force not likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.

~~Necessity to avoid use of deadly force~~  
Read in all cases

~~The defendant cannot justify his use of force not likely to cause death or great bodily harm unless he used every reasonable means within his power and consistent with his own safety to avoid the danger before resorting to that force.~~

Reputation of  
victim

Give if  
applicable

**If you find that (victim) had a reputation of being a violent and dangerous person and that [his] [her] reputation was known to the defendant, you may consider this fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.**

Physical  
abilities  
Read in all  
cases

**In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the defendant and (victim).**

Read in all  
cases

**If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether or not the defendant was justified in the use of force not likely to cause death or great bodily harm, you should find the defendant not guilty.**

**However, if from the evidence you are convinced that the defendant was not justified in the use of force not likely to cause death or great bodily harm, then you should find [him] [her] guilty if all the elements of the charge have been proved.**

Explanation of amendments: This instruction is on pages 44–45b of the manual. The paragraph being deleted does not seem to be a correct statement of law. The note in the margin indicates that the paragraph is about the use of deadly force, but the paragraph actually talks about nondeadly force. In doing so, it apparently is inaccurate. The committee is in agreement that no duty to use “every reasonable means . . . to avoid the danger exists under Florida law.” See *Redondo v. State*, 380 So.2d 1107 (Fla. 3d DCA 1980) (footnote 1).

**3.05(c) AGGRAVATION OF A FELONY BY  
COMMITTING AN AGGRAVATED BATTERY  
(New)  
F.S. 775.087(1)**

Note to  
Judge

This instruction should not be given in conjunction with the instructions pertaining to any felony in which the use of a weapon is an essential element.

**If you find that (defendant) committed (felony as identified by F.S. 775.087(1)) and you also find that during the commission of the crime the defendant committed an aggravated battery, you should find the defendant guilty of (felony) with an aggravated battery.**

Definitions

**“Aggravated battery” is legally defined as (read applicable instructions).**

**If you find only that defendant committed (felony, as identified in F.S. 775.087(1)) but did not commit an aggravated battery, then you should find the defendant guilty only of (felony).**

Explanation of proposed instruction: This instruction is based on the instruction on page 46 of the manual and on amendments to F.S. 775.087(1) in 1989.



**3.05(d) AGGRAVATION OF A FELONY BY  
POSSESSION OF A FIREARM OR  
DESTRUCTIVE DEVICE (New)  
F.S. 775.087(2)**

**If you find that (defendant) committed (felony identified  
by F.S. 775.087(2)) and you also find that during the  
commission of the crime the defendant possessed**

**[a firearm]**

**[a destructive device]**

**[a semiautomatic firearm and its high-capacity  
detachable box magazine]**

**[a machine gun],**

**you should find the defendant guilty of (felony) with  
(applicable firearm(s)/device).**

**Definitions**

**Give applicable definitions as contained in F.S.  
790.001(4), F.S. 790.001(6), F.S. 775.087(2)(b), and F.S.  
790.001(9).**

**If you find only that defendant committed (felony, as  
identified in F.S. 775.087(2)) but did not possess a (applicable  
firearm(s)/device), then you should find the defendant guilty  
only of (felony).**

Explanation of proposed instruction: This is based on the instruction on page 46  
of the manual and on amendments to F.S. 775.087(2) in 1989.

## INTRODUCTION TO HOMICIDE

Note to  
Judge

Read in all murder and manslaughter cases.

**In this case** (defendant) **is accused of** (crime charged).

Give degrees  
as applicable

**Murder in the First Degree includes the lesser crimes of Murder in the Second Degree, Murder in the Third Degree and Manslaughter, all of which are unlawful.**

**A killing that is excusable or was committed by the use of justifiable deadly force is lawful.**

**If you find (victim) was killed by (defendant), you will then consider the circumstances surrounding the killing in deciding if the killing was (crime charged) or was [Murder in the Second Degree] [Murder in the Third Degree] [Manslaughter], or whether the killing was excusable or resulted from justifiable use of deadly force.**

## JUSTIFIABLE HOMICIDE

F.S. 782.02

**The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.**

## EXCUSABLE HOMICIDE

F.S. 782.03

**The killing of a human being is excusable, and therefore lawful, under any one of the following three circumstances:**

- 1. When the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or**
- 2. When the killing occurs by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or**

~~3. When the killing results from a sudden combat, without any dangerous weapon being used and not done in a cruel and unusual manner.~~

3. When the killing is committed by accident and misfortune resulting from a sudden combat, if a dangerous weapon is not used and the killing is not done in a cruel or unusual manner.

Definition

“Dangerous weapon” is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

I now instruct you on the circumstances that must be proved before (defendant) may be found guilty of (crime charged) or any lesser included crime.

Note to  
Judge

For complete instructions on Self-defense and ~~Excusable Homicide~~, if in issue, see pages [40, 44] and ~~76~~ respectively 40 and 44.

**FELONY MURDER — FIRST DEGREE  
F.S. 782.04(1)(a)**

**Before you can find the defendant guilty of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:**

- |  |   |
|--|---|
| Elements   | 1. (Victim) is dead.  |
| <u>Give 2a, 2b<br/>or 2c as<br/>applicable</u>       | 2. a. [The death occurred as a consequence of and while (defendant) was engaged in the commission of (crime alleged).]<br><br>b. [The death occurred as a consequence of and while (defendant) was attempting to commit (crime alleged).]<br><br>c. [The death occurred as a consequence of and while (defendant), or an accomplice, was escaping from the immediate scene of (crime alleged).] |
| Give 3a if<br>defendant<br>actual<br>perpetrator     | 3. a. [(Defendant) was the person who actually killed (victim).]  |
| Give 3b if<br>defendant not<br>actual<br>perpetrator | b. [(Victim) was killed by a person other than (defendant); <del>who was involved in the commission or attempt to commit (crime alleged)</del> but <u>both (defendant) and the person who killed (victim) was present and did knowingly aid, abet, counsel, hire or otherwise procure were principals in the commission of (crime alleged).</u> ]   |

**In order to convict of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.**

Notes to  
Judge

1. Define the crime alleged. If Burglary, also define crime that was the object of burglary.
2. If 2b above is given, also define "attempt" (see page 55).
3. If 3b is given, immediately give principal instruction (3.01 on page 32a).
4. Since the statute does not require its proof, it is not necessary to define "premeditation."

Explanation of amendments: This instruction is on page 64 of the manual. The changes are intended to conform the instruction to the holding of State v. Dene, 533 So.2d 265 (Fla. 1988).

**MURDER — THIRD DEGREE  
F.S. 782.04(4)**

**Before you can find the defendant guilty of Third Degree Murder, the State must prove the following three elements beyond a reasonable doubt:**

- |   |   |
|---|---|
| Elements                                    | 1. (Victim) is dead.  |
| Give 2a, 2b or 2c as applicable             | 2. a. [The death occurred as a consequence of and while (defendant) was engaged in the commission of (crime alleged).]<br>b. [The death occurred as a consequence of and while (defendant) was attempting to commit (crime alleged).]<br>c. [The death occurred as a consequence of and while (defendant), or an accomplice, was escaping from the immediate scene of (crime alleged).] |
| Give 3a if defendant actual perpetrator     | 3. a. [(Defendant) was the person who actually killed (victim).]  |
| Give 3b if defendant not actual perpetrator | b. <del>{(Defendant) was not the person who actually killed (victim), but was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of (crime alleged).}</del> [(Victim) was killed by a person other than (defendant); but both (defendant) and the person who killed (victim) were principals in the commission of (crime alleged).]                 |

**It is not necessary for the State to prove the killing was perpetrated with a design to effect death.**

- |                |                              |
|----------------|------------------------------|
| Notes to Judge | 1. Define the crime alleged. |
|----------------|------------------------------|

2. If 2b above is given, also define “attempt” (see page 55).
3. If 3b is given, immediately give principal instruction (3.01 on page 32a).

Explanation of amendments: This instruction is on page 67 of the manual. The changes are intended to conform the instruction to the holding of *State v. Dene*, 533 So.2d 265 (Fla. 1988).

**MANSLAUGHTER (Amended)**  
**F.S. 782.07**

**Before you can find the defendant guilty of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:**

- Elements
1. (Victim) is dead.
  2. The death was caused by the
    - (a) intentional act of (defendant).
    - (b) intentional procurement of (defendant).
    - (c) culpable negligence of (defendant).
- Give 2(a), (b) or (c) depending upon allegations and proof.

**However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms.**

Note to Judge

In the event of any reinstruction on manslaughter, the instructions on justifiable and excusable homicide as previously given on page 61 should be given at the same time. *Hedges v. State*, 172 So.2d 824 (Fla. 1965).

Definitions

Give only if 2(b) alleged and proved.

**To “procure” means to persuade, induce, prevail upon or cause a person to do something.**

Give only if 2(c) alleged and proved.

**I will now define “culpable negligence” for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or such an entire want of**



**care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.**

**The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.**

Explanation of amendments: The instruction begins on page 68 of the manual. The addition of "intentional" to (2)(a) and (2)(b) was approved by the committee after discussion of Taylor v. State, 444 So.2d 931 (Fla. 1983).

DUI MANSLAUGHTER (Amended)  
F.S. 316.193(3)(c)3

Before you can find the defendant guilty of DUI Manslaughter, the State must prove the following three elements beyond a reasonable doubt:

- |  |   |
|--|---|
| Elements   | 1. (Defendant) operated a vehicle.  |
| <u>See Magaw v. State, 537 So.2d 564 (Fla. 1989)</u> | 2. (Defendant), by reason of such operation, caused or <u>contributed to the cause of the death of</u> (victim).  |
| Give 3a and/or 3b as applicable                      | 3. At the time of such operation (defendant) <ol style="list-style-type: none"><li>a. [was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.]</li><li>b. [had a blood alcohol level of 0.10 percent or higher.]</li></ol> |
| Definitions  | “Vehicle” is any device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.   |
| Give as applicable                                   |   |
| F.S. 316.003(75)                                     | “Normal faculties” mean those faculties of a person, such as the ability to see, hear, walk, talk, make judgments, and, in general, to normally perform the many mental and physical acts of our daily lives.   |
| F.S. 877.111(1)                                      | ( ) is a chemical substance under Florida law.  |
| Ch. 893, F.S.  | ( ) is a controlled substance under Florida law.  |

~~“Alcoholic beverages” are considered to be beer, wine, whiskey, and all other alcoholic beverages of any kind and description which are made for human consumption.~~

Note to  
Judge

In appropriate cases, an instruction may be given on one or more of the presumptions of impairment established by F.S. 316.1934(2)(a), (2)(b), and (2)(c). See State v. Rolle, 560 So.2d 1154 (Fla. 1990).

Explanation of amendments: This instruction begins on page 70 of the manual. The words "or contributed to the cause of" were added to paragraph 2 after discussing *Magaw v. State*, 537 So.2d 564 (Fla. 1989). The committee decided that the definition of alcoholic beverages was unnecessary and perhaps too limiting.

**FELONY DUI — PRIOR CONVICTIONS (New)**  
**F.S. 316.193(2)(b)**

**Before you can find the defendant guilty of DUI, the State must prove the following two elements beyond a reasonable doubt:**

- |                                   |  |
|-----------------------------------|--|
| Elements                          | <ol style="list-style-type: none"><li>1. (Defendant) drove or was in actual physical control of a vehicle.</li><li>2. While driving or in control of the vehicle, (defendant)</li></ol>  |
| Give 2a and/or 2b as applicable   | <ol style="list-style-type: none"><li>a. [was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.]</li><li>b. [had a blood alcohol level of 0.10 percent or higher.]</li></ol> |
| Definitions<br>Give as applicable | <p><b>“Vehicle” is any device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.</b></p>  |
| F.S.<br>316.003(75)               | <p><b>“Normal faculties” mean those faculties of a person, such as the ability to see, hear, walk, talk, make judgments, and, in general, to normally perform the many mental and physical acts of our daily lives.</b></p>  |
| F.S.<br>877.111(1)                | <p><b>( ) is a chemical substance under Florida law.</b></p>   |
| Ch. 893, F.S.                     | <p><b>( ) is a controlled substance under Florida law.</b></p>   |
| Note to Judge                     | <p>In appropriate cases, an instruction may be given on one or more of the presumptions of impairment established by F.S. 316.1934(2)(a), (2)(b), and (2)(c). State v. Rolle, 560 So.2d 1154 (Fla. 1990).</p>  |

Explanation of proposed instruction: This instruction is based on F.S. 316.193(2)(b), which was created in 1986. The instruction covers the elements of DUI only. It does not mention three prior convictions, the element that separates felony DUI from misdemeanor DUI. The issue of previous convictions must be determined after a guilty finding on the basic elements of DUI. *State v. Rodriguez*, 575 So.2d 1262 (Fla. 1991).

**FELONY DUI — SERIOUS BODILY INJURY (New)**  
**F.S. 316.193(3)(c)2**

**Before you can find the defendant guilty of DUI with serious bodily injury, the State must prove the following three elements beyond a reasonable doubt:**

- Elements
1. (Defendant) **drove or was in actual physical control of a vehicle.**
  2. **While driving or in control of the vehicle,** (defendant)
    - a. **[was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.]**
    - b. **[had a blood alcohol level of 0.10 percent or higher.]**
  3. **As a result (defendant) caused serious bodily injury to (victim).**
- Give 2a or 2b as applicable

Definitions

Give as applicable

**“Vehicle” is any device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.**

F.S.  
316.003(75)

**“Normal faculties” mean those faculties of a person, such as the ability to see, hear, walk, talk, make judgments, and, in general, to normally perform the many mental and physical acts of our daily lives.**

F.S.  
877.111(1)

**( ) is a chemical substance under Florida law.**

Ch. 893, F.S.

**( ) is a controlled substance under Florida law.**

F.S.  
316.1933

**“Serious bodily injury” means a physical condition that creates a substantial risk of death, serious personal**

**disfigurement, or protracted loss or impairment of the function of any bodily member or organ.**

Note to  
Judge

In appropriate cases, an instruction may be given on one or more of the presumptions of impairment established by F.S. 316.1934(2)(a), (2)(b), and (2)(c). *State v. Rolle*, 560 So.2d 1154 (Fla. 1990).

Explanation of proposed instruction: This instruction is based on F.S. 316.193(3)(c)2, which was created in 1986.

**PENALTY PROCEEDINGS — CAPITAL CASES (Amended)  
F.S. 921.141**

Note to  
Judge

Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. In addition, give the jury other appropriate general instructions.

1. a. **Ladies and gentlemen of the jury, the defendant has been found guilty of (crime charged). Consequently, you will not concern yourselves with the question of [his] [her] guilt.**

Note to  
Judge

Give 1b at beginning of penalty proceedings before the jury that found the defendant guilty.

- b. **Ladies and gentlemen of the jury, you have found the defendant guilty of (crime charged).**
2. **The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant.**

Note to  
Judge

When the victim is a law enforcement officer, correctional officer, state attorney, assistant state attorney, justice, or judge, "eligibility for release" should be inserted in place of "possibility of parole for 25 years." See F.S. 775.0823.

Note to  
Judge

Give in all cases before taking evidence in penalty proceedings.

**The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that [this evidence when considered with the evidence you have already heard] [this evidence] is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that**



would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Note to  
Judge

Give after the taking of evidence and argument.

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for [his] [her] crime of (crime charged). As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence [that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings] [that has been presented to you in these proceedings].

F.S.  
921.141(5)

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

Note to  
Judge

Give only those aggravating circumstances for which evidence has been presented.

1. The crime for which (defendant) is to be sentenced was committed while [he] [she] [was under sentence of imprisonment] [or] [was placed on community control];
2. The defendant has been previously convicted of another capital offense or of a felony involving the

**[use] [threat] of violence to some person;**

Note to  
Judge

Since the character of a crime if involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court should instruct the jury of the following, as applicable:

Give a or b  
as applicable

- a. **The crime of (previous crime) is a capital felony;**
  - b. **The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person;**
3. **The defendant, in committing the crime for which [he] [she] is to be sentenced, knowingly created a great risk of death to many persons;**
  4. **The crime for which the defendant is to be sentenced was committed while [he] [she] was**

**[engaged]  
[an accomplice]**

**in**

**[the commission of]  
[an attempt to commit]  
[flight after committing or attempting to  
commit]**

**the crime of**

**[robbery]  
[sexual battery]  
[arson]  
[burglary]  
[kidnapping]  
[aircraft piracy]  
[the unlawful throwing, placing or discharging  
of a destructive device or bomb];**

5. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
6. The crime for which the defendant is to be sentenced was committed for financial gain;
7. The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
8. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
9. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
10. The victim of the crime for which defendant is to be sentenced was a law enforcement officer engaged in the performance of the officer's official duties.
11. The victim of the crime for which the defendant is to be sentenced was an elected or appointed public official engaged in the performance of [his] [her] official duties and the crime was related, in whole or in part, to the victim's official capacity.

Applicable  
only if  
defendant  
committed a  
homicide

**If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.**

Note to  
Judge

When the victim is a law enforcement officer, correctional officer, state attorney, assistant state attorney, justice, or judge, "eligibility for release" should be inserted in place of "possibility of parole for 25 years." See F.S. 775.0823.

F.S.  
921.141(6)

**Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:**

Note to  
Judge

Give only those mitigating circumstances for which evidence has been presented.

- 1. (Defendant) has no significant history of prior criminal activity;**

Note to  
Judge

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

**Conviction of (previous crime) is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

- 2. The crime for which the defendant is to be sentenced was committed while [he] [she] was under the influence of extreme mental or emotional disturbance;**
- 3. The victim was a participant in the defendant's conduct or consented to the act;**
- 4. The defendant was an accomplice in the offense for which [he] [she] is to be sentenced but the offense**

was committed by another person and the defendant's participation was relatively minor;

5. The defendant acted under extreme duress or under the substantial domination of another person;
6. The capacity of the defendant to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired;
7. The age of the defendant at the time of the crime;
8. Any other aspect of the defendant's character or record, and any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

**The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.**

**If a majority of the jury determine that (defendant) should be sentenced to death, your advisory sentence will be:**

**A majority of the jury, by a vote of \_\_\_\_\_, advise and recommend to the court that it impose the death penalty upon (defendant).**

**On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be:**

**The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole for 25 years.**

Note to  
Judge

When the victim is a law enforcement officer, correctional officer, state attorney, assistant state attorney, justice, or judge, "eligibility for release" should be inserted in place of "possibility of parole for 25 years." See F.S. 775.0823.

**You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman person and returned to the court.**

Explanation of amendment: This instruction begins on page 77 of the manual. The Note to Judge is added to bring F.S. 775.0823 to the court's attention in appropriate cases.

**ASSAULT ~~OF~~ON LAW ENFORCEMENT OFFICER OR  
FIREFIGHTER (Amended)  
F.S. 784.07-A(2)(a)**

**Before you can find the defendant guilty of Assault on a  
[law enforcement officer] [firefighter], the State must prove  
the following six elements beyond a reasonable doubt:**

Elements

- 1. (Defendant) intentionally and unlawfully threatened,  
either by word or act, to do violence to (victim).**
- 2. At the time, (defendant) appeared to have the ability  
to carry out the threat.**
- 3. The act of (defendant) created in the mind of  
(victim) a well-founded fear that the violence was  
about to take place.**
- 4. (Victim) was at the time a [law enforcement officer]  
[firefighter].**
- 5. (Defendant) knew (victim) was a [law enforcement  
officer] [firefighter].**
- 6. At the time of the assault (victim) was engaged in  
the lawful performance of [his] [her] duties.**

**The court now instructs you that (name of official position  
of victim designated in charge) is a [law enforcement officer]  
[firefighter].**

Explanation of proposed changes: The instruction is on page 92 of the manual.  
The changes are editorial.

**BATTERY OF LAW ENFORCEMENT OFFICER OR  
FIREFIGHTER (Amended)  
F.S. 784.07-B(2)(b)**

**Before you can find the defendant guilty of Battery of a  
[law enforcement officer] [firefighter], the State must prove  
the following four elements beyond a reasonable doubt:**

Elements

1. (Defendant) **intentionally**  
  
[touched or struck (victim) against [his] [her] will.]  
  
[caused bodily harm to (victim).]
2. (Victim) was a [law enforcement officer]  
[firefighter].
3. (Defendant) **knew** (victim) was a [law enforcement  
officer] [firefighter].
4. (Victim) was engaged in the lawful performance of  
[his] [her] duties when the battery was committed,  
~~against him.~~

**The court now instructs you that (name of official position  
of victim designated in charge) is a [law enforcement officer]  
[firefighter].**

Explanation of proposed changes: The instruction is on page 93 of the manual.  
The changes are editorial.



**AGGRAVATED ASSAULT ON LAW ENFORCEMENT  
OFFICER OR FIREFIGHTER (New)**  
F.S. 784.07(2)(c)

**Before you can find the defendant guilty of aggravated assault of a [law enforcement officer] [firefighter], the state must prove the following seven elements beyond a reasonable doubt. The first three elements define assault.**

Elements

1. (Defendant) **intentionally and unlawfully threatened, either by word or act, to do violence to (victim).**
2. **At the time, (defendant) appeared to have the ability to carry out the threat.**
3. **The act of (defendant) created in the mind of (victim) a well-founded fear that the violence was about to take place.**

Give 4a or  
4b as  
applicable

4. a. **[The assault was made with a deadly weapon.]**
- b. **[The assault was made with a fully-formed, conscious intent to commit (crime charged) upon (victim).]**

Note to  
Judge

If 4b is alleged, define the crime charged.

5. **(Victim) was at the time a [law enforcement officer] [firefighter].**
6. **(Defendant) knew (victim) was a [law enforcement officer] [firefighter].**
7. **At the time of the assault (victim) was engaged in the lawful performance of [his] [her] duties.**

**The court now instructs you that (name of official position of victim designated in charge) is a [law enforcement officer] [firefighter].**

Definition;  
give if 4a  
alleged

**A weapon is a “deadly weapon” if it is used or threatened to be used in a way likely to produce death or great bodily harm.**

Give if 4a  
alleged

**It is not necessary for the state to prove that the defendant had an intent to kill.**

Explanation of proposed instruction: This instruction is new based on F.S. 784.07(2)(c), which was created in 1988. The wording is similar to the instruction for assault of law enforcement officer on page 92 of the manual.

**AGGRAVATED BATTERY ON LAW ENFORCEMENT  
OFFICER OR FIREFIGHTER (New)  
F.S. 784.07(2)(d)**

**Before you can find the defendant guilty of aggravated battery of a [law enforcement officer] [firefighter], the state must prove the following five elements beyond a reasonable doubt. The first element is a definition of battery.**

Elements

1. (Defendant)

**[intentionally touched or struck (victim) against  
[his] [her] will.]**

**[intentionally caused bodily harm to (victim).]**

2. (Defendant) in committing the battery

a. [intentionally or knowingly caused

**[great bodily harm to (victim)].]**

**[permanent disability to (victim)].]**

**[permanent disfigurement to (victim)].]**

b. [used a deadly weapon.]

3. (Victim) was a [law enforcement officer]  
[firefighter].

4. (Defendant) knew (victim) was a [law enforcement  
officer] [firefighter].

5. (Victim) was engaged in the lawful performance of  
[his] [her] duties when the battery was committed  
against [him] [her].

**The court now instructs you that (name of official position  
of victim designated in charge) is a [law enforcement officer]  
[firefighter].**

Definition;  
give if 2b  
alleged

**A weapon is a “deadly weapon” if it is used or threatened to be used in a way likely to produce death or great bodily harm.**

Explanation of proposed instruction: This instruction is new based on F.S. 784.07(2)(d), which was created in 1988. The wording is similar to the instruction for battery of a law enforcement officer on page 93 of the manual.

**PERSONS ENGAGED IN CRIMINAL OFFENSE HAVING WEAPON (Amended)  
F.S. 790.07(1) and (2)**

**Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:**

Elements;  
give 1a or 1b  
as applicable

1. (Defendant)
  - a. **[[displayed] [used] [threatened to use] [attempted to use]**  
  
**[a weapon].]  
[a firearm].]  
[an electric weapon or device].]**
  - b. **[carried] a [weapon] [firearm], which was concealed from the ordinary sight of another person.]**
2. **[He] [She] did so while committing or attempting to commit the felony of (felony alleged).**

Notes to  
Judge

1. Define the felony alleged. If Burglary, also define crime that was object of the burglary.
2. Define "attempt" (see page 55) and
3. Adapt the definition of the weapon or firearm alleged from F.S. 790.001 as required by the allegations.

*Explanation of amendments: This instruction appears on page 99 of the manual. The addition of "or firearm" clarifies the second Note to Judge.*

**THROWING, MAKING, PLACING, PROJECTING, OR  
DISCHARGING DESTRUCTIVE DEVICE (New)**  
F.S. 790.161(1)

**Before you can find the defendant guilty of (crime charged), the State must prove the following element beyond a reasonable doubt:**

Element

**1. (Defendant) willfully and unlawfully**

**[made]  
[possessed]  
[threw]  
[placed]  
[projected]  
[discharged]  
[attempted to [make] [possess] [throw] [place]  
[project] [discharge]]**

**a destructive device.**

Definition

**A “destructive device” is defined as (adapt from F.S. 790.001(4) as required by the allegations).**

*Explanation of proposed instructions: This instruction is based on the instruction on page 103 of the manual and on amendments to F.S. 790.161 in 1990.*

**THROWING, MAKING, PLACING, PROJECTING, OR  
DISCHARGING DESTRUCTIVE DEVICE (New)  
F.S. 790.161(2)**

**Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:**

Elements

**1. (Defendant) willfully and unlawfully**

**[made]**

**[possessed]**

**[threw]**

**[placed]**

**[projected]**

**[discharged]**

**[attempted to [make] [possess] [throw] [place]**

**[project] [discharge]]**

**a destructive device.**

Give those  
parts of  
paragraph 2  
as applicable

**2. (a) The act was committed with the intent to**

**[do bodily harm to another.]**

**[do property damage.]**

**(b) The act resulted in**

**[a disruption of governmental operations.]**

**[a disruption of commerce.]**

**[a disruption of the private affairs of  
(victim).]**

Definition

**A “destructive device” is defined as (adapt from F.S.  
790.001(4) as required by the allegations).**

Explanation of proposed instruction: This is based on the instruction on page 103 of the manual and on amendments to F.S. 790.161 in 1990.

**THROWING, MAKING, PLACING, PROJECTING, OR  
DISCHARGING DESTRUCTIVE DEVICE (New)  
F.S. 790.161(3)**

**Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:**

Elements

**1. (Defendant) willfully and unlawfully**

**[made]  
[possessed]  
[threw]  
[placed]  
[projected]  
[discharged]  
[attempted to [make] [possess] [throw] [place]  
[project] [discharge]]**

**a destructive device.**

**2. The act resulted in**

**[bodily harm to another.]  
[property damage.]**

Definition

**A “destructive device” is defined as (adapt from F.S. 790.001(4) as required by the allegations).**

Explanation of proposed instruction: This is based on the instruction on page 103 of the manual and on amendments to F.S. 790.161 in 1990.



**THROWING, MAKING, PLACING, PROJECTING, OR  
DISCHARGING DESTRUCTIVE DEVICE (New)  
F.S. 790.161(4)**

**Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:**

Elements

**1. (Defendant) willfully and unlawfully**

**[made]**

**[possessed]**

**[threw]**

**[placed]**

**[projected]**

**[discharged]**

**[attempted to [make] [possess] [throw] [place]**

**[project] [discharge]]**

**a destructive device.**

**2. The act resulted in the death of another.**

Definition

**A “destructive device” is defined as (adapt from F.S. 790.001(4) as required by the allegations).**

Explanation of proposed instruction: This is based on the instruction on page 103 of the manual and on amendments to F.S. 790.161 in 1990.

**DEALER SELLING ARMS TO MINORS (Amended)**  
**F.S. 790.18**

**Before you can find the defendant guilty of (crime charged), the State must prove the following three elements beyond a reasonable doubt:**

Elements

- 1. (Defendant) was engaged in the business of dealing in arms as a source of revenue.**
- 2. In the course of that business (defendant) sold to (minor alleged) the (weapon alleged).**
- 3. (Minor alleged) was at the time under the age of eighteen years.**

Definitions

**A “dealer in arms” is a person who buys and sells weapons or firearms.**

**A “(weapon or firearm alleged)” is legally defined as (adapt from F.S. 790.001 as required by the allegations).**

Explanation of amendments: This instruction is on page 108 of the manual. The addition of “or firearm” clarifies the last sentence of this instruction.

**FELONS POSSESSING WEAPONS (Amended)  
F.S. 790.23**

**Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:**

- Elements
1. (Defendant) **had been convicted of** (prior offense).
  2. **After the conviction** (defendant) **knowingly**
    - a. [owned] [had in [his] [her] care, custody, possession or control]  
  
[a firearm.]  
[an electric weapon or device.]
    - b. [carried a (weapon alleged), which was concealed from the ordinary sight of another person.]
- Give 2a or 2b as applicable

Defense

**If you find that the defendant's civil rights had been restored at the time of the offense, you shall find the defendant not guilty.**

Definitions

**"Convicted" means that a judgment has been entered in a criminal proceeding by a competent court pronouncing the accused guilty.**

**A ["firearm"] ["electric weapon or device"] ["concealed weapon"] is legally defined as (adapt from F.S. 790.001 as required by the allegations).**

Give if 2a alleged

**"Care" and "custody" mean immediate charge and control exercised by a person over the named object. The terms care, custody and control may be used interchangeably.**

**To "possess" means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.**

**Possession may be actual or constructive. If a thing is in the hand of or on the person, or in a bag or container in the hand of or on the person, or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person.**

**If a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in the constructive possession of that person.**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.**

Explanation of amendment: This instruction begins on page 111b of the manual. This change (addition of "knowingly" in paragraph (2)) is based on *White v. State*, 539 So.2d 577 (Fla. 5th DCA 1989).

**SEXUAL BATTERY — VICTIM TWELVE YEARS OF  
AGE OR OLDER — CIRCUMSTANCES SPECIFIED —  
(Amended)  
F.S. 794.011(4)**

**Before you can find the defendant guilty of sexual battery upon a person twelve years of age or older under specified circumstances, the State must prove the following four elements beyond a reasonable doubt:**

Elements

1. (Victim) was twelve years of age or older.
2.
  - a. [(Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
  - b. [(Defendant) committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]
3.
  - a. [(Victim) was physically helpless to resist.]
  - b. [(Defendant) coerced (victim) to submit by threatening to use force or violence likely to cause serious personal injury and (victim) reasonably believed the (defendant) had the present ability to execute the threat.]
  - c. [(Defendant) coerced (victim) to submit by threat of retaliation against (victim) or any other person and (victim) reasonably believed that (defendant) had the ability to execute the threat in the future.]
  - d. [(Defendant), without prior knowledge or consent of (victim), administered or had knowledge of someone else administering to (victim) a narcotic, anesthetic or other intoxicating substance that mentally or

**physically incapacitated (victim).]**

**e. [(Victim) was mentally defective and (defendant) had reason to believe this or had actual knowledge of that fact.]**

**f. [(Victim) was physically incapacitated.]**

**4. The act was committed without the consent of (victim).**

**Definitions**

**Give in all cases**

**“Consent” means intelligent, knowing, and voluntary consent and does not include coerced submission.**

**Give if applicable**

**Evidence of the victim’s mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.**

**“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.**

**“Mentally defective” means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.**

**“Union” is an alternative to penetration and means coming into contact.**

**Give if 3a alleged**

**“Physically helpless” means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to act.**

**Give if 3b alleged**

**“Serious personal injury” means great bodily harm or pain, permanent disability, or permanent disfigurement.**

Give if 3f  
alleged

**“Physically incapacitated” means that a person is bodily impaired or handicapped and substantially limited in his or her ability to resist or flee an act.**

Give if  
applicable

**However, any act done for bona fide medical purposes is not a sexual battery.**

Note to  
Judge

In the event of multiple perpetrators, give instruction on enhancement, F.S. 794.023.

Note to  
Judge

The option of the word “[with]~~(victim)~~” in 2a is provided to reflect the manner in which the crime was committed. See *Coleman v. State*, 484 So.2d 624 (Fla. 1st DCA 1986), at pages 627, 628.

Explanation of amendments: The instruction begins on page 119 of the manual. The addition of “physically incapacitated” is based on 1989 amendments to F.S. 794.011.

**LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT UPON OR IN THE PRESENCE OF CHILD; SEXUAL BATTERY (Revised)**  
**F.S. 800.04**

**Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:**

- |                    |   |
|--------------------|---|
| Elements           | 1. (Victim) was under the age of sixteen years.   |
| Give as applicable | 2. a. (Defendant)   |
| Subsection (1)     | <b>[made an assault upon (victim) in a lewd, lascivious or indecent manner.]</b><br><br><b>[handled or fondled (victim) in a lewd, lascivious or indecent manner.]</b>  |
| Subsection (2)     | b. (Defendant) <b>committed upon (victim) or forced or enticed (victim) to commit</b><br><br><b>[actual or simulated sexual intercourse.]</b><br><br><b>[deviate sexual intercourse.]</b><br><br><b>[sexual bestiality.]</b><br><br><b>[masturbation.]</b><br><br><b>[sodomasochistic abuse.]</b><br><br><b>[actual lewd exhibition of the genitals.]</b><br><br><b>[any act or conduct which simulated that sexual battery was being or would be committed on (victim).]</b> |
| Subsection (3)     | c. (Defendant)  |



**[committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of [(victim)] [(defendant)].]**

**[committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]**

Subsection (4)                      **d. (Defendant) knowingly committed a lewd or lascivious act in the presence of (victim).**

Definitions

Give in all cases                      **Neither the victim's lack of chastity nor the victim's consent is a defense to the crime charged.**

Give when F.S. 800.04(1) charged                      **As used in regard to this offense the words "lewd," "lascivious" and "indecent" mean the same thing. They mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.**

Give when assault is charged under F.S. 800.04(1)                      **An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.**

Give when F.S. 800.04(4) is charged                      **As used in regard to this offense the words "lewd" and "lascivious" mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.**

Note to Judge                      **Give applicable definitions from F.S. 847.001 when F.S. 800.04(2) is charged.**

Note to Judge                      **There is no need to make reference to the words "without committing the crime of sexual battery" because this refers to forcible sexual relations. *Lanier v. State*, 443 So.2d 178 (Fla. 3d DCA 1983); Chapter 84-86, Laws of Florida.**

Explanation of proposed revision: The instruction begins on page 122 of the manual. The revision is based on F.S. 800.04 as amended in 1990.

**ARSON — FIRST DEGREE (Amended)**  
**F.S. 806.01(1)**

**Before you can find the defendant guilty of Arson, the State must prove the following [three] [four] elements beyond a reasonable doubt:**

- |  |   |
|--|---|
| Elements                                     | 1. (Defendant) [damaged] [caused to be damaged] (structure or contents alleged) by [fire] [explosion].  |
| <u>Give 2a or 2b</u>                         | 2. <b>a. The damage was done willfully and unlawfully.</b><br><br><b>b. <u>The damage was caused while defendant was engaged in the commission of (felony alleged).</u></b> |
| Give 3a if charged under F.S. 806.01(1)(a)   | 3. <b>The (structure alleged) was</b><br><br><b>a. [a dwelling.]</b>  |
| Give 3b if charged under F.S. 806.01(1)(b)   | <b>b. [an institution in which the damage occurred during normal hours of occupancy.]</b><br><br><b>[an institution where persons are normally present.]</b>                |
| Give 3c if charged under F.S. 806.01(1)(c)   | <b>c. [a structure.]</b>  |
| Give only if charged under F.S. 806.01(1)(c) | 4. <b>The defendant knew or had reasonable grounds to believe the (structure alleged) was occupied by a human being.</b>  |

Definition;  
give if  
applicable  
F.S.  
806.01(3)

**“Structure” means:**

1. Any building of any kind.
2. Any enclosed area with a roof over it.
3. Any real property and its appurtenances.
4. Any tent or other portable building.
5. Any vehicle.
6. Any vessel.
7. Any watercraft.
8. Any aircraft.

Give only if  
2b is alleged

Define the crime alleged. If burglary, also define crime  
that was the object of burglary.

Explanation of amendments: The instruction begins on page 127 of the manual.  
The new language is added based on 1990 amendments to F.S. 806.01(1).

**ARSON — SECOND DEGREE (Amended)**  
**F.S. 806.01(2)**

**Before you can find the defendant guilty of Arson — Second Degree, the State must prove the following three elements beyond a reasonable doubt:**

Elements

1. (Defendant) [caused to be damaged] [damaged] a (structure alleged), owned by the defendant or another, by [explosion] [fire].

Give 2a or 2b

2. a. The damage was done willfully and unlawfully.

b. The damage was caused while defendant was engaged in the commission of (felony alleged).

3. The (structure alleged) is a structure.

Definition  
F.S.  
806.01(3)

“Structure” means:

1. Any building of any kind.
2. Any enclosed area with a roof over it.
3. Any real property and its appurtenances.
4. Any tent or other portable building.
5. Any vehicle.
6. Any vessel.
7. Any watercraft.
8. Any aircraft.

Give only if 2b is alleged

Define the crime alleged. If burglary, also define crime that was the object of burglary.

Explanation of amendments: The instruction begins on page 128 of the manual. The new language is added based on 1990 amendments to F.S. 806.01(2).

**CRIMINAL MISCHIEF (Amended)**  
**F.S. 806.13**

**Before you can find the defendant guilty of criminal mischief, the state must prove the following three elements beyond a reasonable doubt:**

- Elements
- 1. (Defendant) injured or damaged (copy from charge).**
  - 2. The property injured or damaged belonged to (person alleged).**
  - 3. The injury or damage was done willfully and maliciously.**

Give if applicable

**Among the means by which property can be injured or damaged under the law is the placement of graffiti on it or other acts of vandalism to it.**

Definitions

**“Willfully” means intentionally, knowingly and purposely.**

**“Maliciously” means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.**

Degrees;  
~~give up to~~  
~~the extent of~~  
~~the charges~~  
applicable

**The punishment provided by law for the crime of criminal mischief is greater depending upon the value of the property damaged. Therefore, if you find the defendant guilty of criminal mischief, you must determine by your verdict whether:**

- a. [The damage to the property was \$1,000 or greater.]**

**[By reason of the damage there was an interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which cost \$1,000 or more in labor and supplies to restore.]**

- b. [The damage to the property was greater than \$200 but less than \$1,000.]**
- c. [The damage to the property was \$200 or less.]**

Explanation of amendment: The instruction appears on page 130 of the manual.  
The underlined sentence is based on a 1988 amendment to F.S. 806.13(1)(a).

**THEFT (Amended)**  
**F.S. 812.014**

**Before you can find the defendant guilty of Theft, the State must prove the following two elements beyond a reasonable doubt:**

Elements

1. (Defendant) knowingly and unlawfully [obtained] [used] [endeavored to obtain] [endeavored to use] the (property alleged) of (victim).
2. [He] [She] did so with intent to, either temporarily or permanently,  
  
[deprive (victim) of [his] [her] right to the property or any benefit from it.]  
  
[appropriate the property of (victim) to [his] [her] own use or to the use of any person not entitled to it.]

Degrees;  
give if  
property is of  
monetary  
value up to  
extent of  
charge

**If you find the defendant guilty of theft, you must determine by your verdict whether:**

- a. [The value of the property taken was \$100,000 or more.]
- b. [The value of the property taken was \$20,000 or more but less than \$100,000.]
- c. [The value of the property taken was \$300 or more but less than \$20,000.]
- d. [The value of the property taken was less than \$300.]
- e. [The property was [a will, codicil, or other testamentary instrument.] [a firearm.] [a motor vehicle.] [~~a horse.~~] [~~a cow.~~] [~~a pig.~~] [~~a kind of livestock.~~] [a commercially farmed animal.] [an aquaculture species raised at a permitted

Give if  
applicable



**aquaculture facility.] [a fire extinguisher.] [2000 or more pieces of fruit.] [taken from a posted construction site.]]**

Inferences;  
give if  
applicable  
F.S.  
812.022(1)

**Proof that a person presented false identification not current in respect to name, address, place of employment or other material aspect in connection with the leasing of personal property, or failed to return leased property within 72 hours of the termination of the leasing agreement, unless satisfactorily explained, gives rise to an inference that the property was obtained or is now used with unlawful intent to commit theft.**

Inferences;  
give if  
applicable  
F.S.  
812.022(2)

**Proof of possession of recently stolen property, unless satisfactorily explained, give rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.**

Definitions;  
give if  
applicable  
F.S.  
812.012(2)

**“Obtains or uses” means any manner of:**

- (a) Taking or exercising control over property.
- (b) Making any unauthorized use, disposition, or transfer of property.
- (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- (d)
  1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, deception; or
  2. Other conduct similar in nature.

**“Endeavor” means to attempt or try.**

F.S.  
812.012(3)

**“Property” means anything of value, and includes:**

**real property, including things growing on, affixed to and found in land;**

**tangible or intangible personal property, including rights, privileges, interests and claims; and**

**services.**

F.S.  
812.012(5)

**“Services” means anything of value resulting from a person’s physical or mental labor or skill, or from the use, possession or presence of property, and includes:**

**repairs or improvements to property;**

**professional services;**

**private, public or government communication, transportation, power, water or sanitation services;**

**lodging accommodations; and**

**admissions to places of exhibition or entertainment.**

Note to  
Judge

It is error to inform the jury of a prior conviction. Therefore, do not read the allegation of prior conviction or send the information or indictment into the jury room. The historical fact of a previous conviction shall be determined by the judge, and shall thereby fix the degree of the crime. *State of Florida v. Harris*, 356 So.2d 315 (Fla. 1978).

F.S.  
812.012(9)

**“Value” means:**

**The market value of the property at the time and place of the offense, or if that value cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.**

**In the case of a written instrument that does not have a readily ascertainable market value, such as a**

**check, draft or promissory note, the value is the amount due or collectible.**

**In the case of any other instrument that creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation, the value is the greatest amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.**

**The value of a trade secret that does not have a readily ascertainable market value is any reasonable value representing the damage to the owner suffered by reason of losing an advantage over those who do not know of or use the trade secret.**

**If the exact value of the property cannot be ascertained, you should attempt to determine a minimum value. If you cannot determine the minimum value, you must find the value is less than \$300.**

**Amounts of value of separate properties, involved in thefts committed pursuant to one scheme or course of conduct, whether the thefts are from the same person or several persons, may be totaled in determining the grade of the offense.**

*Explanation of amendments: The instruction begins on page 147 of the manual. The changes are based on 1990 amendments to F.S. 812.014(2)(c)5.*

**CONTRIBUTING TO CHILD DELINQUENCY OR  
DEPENDENCY OR TO CHILD IN NEED OF SERVICES**

(Amended)

F.S. 827.04(3)

**Before you can find the defendant guilty of contributing to a child's becoming a [delinquent child] [dependent child] [child in need of services] ~~Delinquency or Dependency~~, the State must prove the following element beyond a reasonable doubt:**

Element

[(Defendant) knowingly (read act alleged from charge),  
which

[caused]

[tended to cause or encourage]

[contributed to]

(victim) [to become] [becoming] a [delinquent]  
[dependent] child [in need of services].]

[(Defendant), by

[act]

[threat]

[command]

[persuasion]

[induced] [endeavored to induce] (victim) to

[perform any act]

[follow any course of conduct]

[live]

so as to cause or tend to cause (victim) to

[become a dependent child]

[remain a dependent child]

[become a delinquent child]

[remain a delinquent child]

[become a child in need of services]

[remain a child in need of services].]

Definitions;           **“Child” means any person under the age of eighteen**  
F.S.                       **years.**  
827.01(1)

Note to                       Prepare the definition of “delinquency,” ~~or~~ of “dependency,”  
Judge                       or “child in need of services” based on the statutory definitions  
in effect at the time of the alleged offense. See F.S. 39.01.

Explanation of amendments: The instruction begins on page 163 of the manual.  
The changes are based on 1990 amendments to F.S. 827.04.

**WORTHLESS CHECK — OBTAINING PROPERTY**

(Amended)

F.S. 832.05(4)

Note to  
Judge

This statute applies to a variety of orders to pay money and “commercial paper,” and a variety of types of drawees and transactions. The charge has been framed to cover the most common transaction encountered in criminal litigation. It can be readily modified to fit other transactions covered by the statute.

**Before you can find the defendant guilty of (crime charged), the State must prove the following seven elements beyond a reasonable doubt:**

Elements

1. (Defendant)

[drew]  
[made]  
[uttered]  
[issued]  
[delivered]

**the check admitted in evidence as State Exhibit  
\_\_\_\_\_.**

2. (Defendant) **did so to obtain**

[services.]  
[goods.]  
[wares.]  
[(other thing of value alleged).]

3. **The [services] [goods] [wares] [(other thing of value alleged)] had some monetary value.**

4. **When (defendant) did so, there was not sufficient money on deposit in the bank to pay the check.**

5. (Defendant) **knew when ~~he wrote the check that he did not have~~ was written there was not sufficient money on deposit with the bank.**

6. (Defendant) **knew ~~he had~~ there was no arrangement or understanding with the bank for the payment of the check when it was presented.**

7. **The check was in the amount of \$150.00 or more.**

Defenses;  
give if  
applicable

**Even if you find all these elements are proved, you should go on to consider the defense. You must find the defendant not guilty if you find either of the following two defenses to have been proved:**

1. (Name of payee) **knew that (defendant's) funds and credit at the bank at the time the check was given were insufficient to pay the check; or**

2. (Name of payee) **had good reason to believe that (defendant's) funds and credit at the time the check was given were insufficient to pay the check.**

Give if  
applicable

**When an employee of a business receives a check, the business must be regarded as knowing whatever the employee knows about the check.**

Give if  
applicable

**The fact that (defendant) had previously issued a worthless check to the payee did not, by itself, give (payee) reason to believe that (defendant) had insufficient funds to ensure payment of this check.**

Explanation of amendment: This instruction is on pages 171-172 of manual. The underlined sentence is based on a 1988 amendment to F.S. 832.05(4)(a). Wording originally drawn by the committee was criticized in a letter from Mark F. Lewis. The committee agreed with Mr. Lewis and redrafted the paragraph based on his recommendation.

**PERJURY (Amended) (NOT IN AN OFFICIAL PROCEEDING — F.S. 837.012) (IN AN OFFICIAL PROCEEDING — F.S. 837.02)**

**Before you can find the defendant guilty of [Perjury Not in an Official Proceeding] [Perjury in an Official Proceeding], the State must prove the following five elements beyond a reasonable doubt:**

Elements

1. (Defendant) **took an oath or otherwise affirmed that [he] [she] was obligated by conscience or by law to speak the truth in** (describe proceedings, official or unofficial, in which the alleged oath was taken).
2. **The oath or affirmation was made to** (person allegedly administering oath), **who was a** (official capacity).
3. (Defendant), **while under an oath, made the statement** (read from charge).
4. **The statement was false.**
5. (Defendant) **did not believe the statement was true when [he] [she] made it.**

Give if applicable  
F.S.  
837.012(2) &  
837.02(2)

**Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that [his] [her] statement was not material is not a defense to the charge.**

Note to  
Judge F.S.  
837.011

Questions of the authority to administer oaths, whether the form of the oath or attestation is required or authorized by law, the official or unofficial nature of the proceedings and the materiality of a statement are matters of law.

Give if applicable  
F.S.  
837.011(3)

**The law requires the judge to decide if the alleged statement is material, and I have decided that it is material. Therefore, you will not further concern yourself with this issue.**



Note to  
Judge

An instruction on recantation should be given when raised as a defense. See F.S. 837.07; *Carter v. State*, 384 So.2d 1255 (Fla. 1980).

Explanation of amendment: The instruction begins on page 175 of the manual. "F.S. 837.07" is added to the note.

**MAINTAINING A GAMBLING ESTABLISHMENT  
(Amended)  
F.S. 849.01-A (849.02)**

Note to  
Judge

F.S. 849.01 covers both the maintaining of a gambling establishment and the permitting of gambling. Accordingly, separate instructions have been prepared for these offenses with the designations "A" and "B." F.S. 849.02 proscribes the same conduct when one is acting as a servant, clerk, agent or employee. Therefore, the instructions for F.S. 849.01 may be given for charges under 849.02 by using appropriate language as indicated.

**Before you can find the defendant guilty of Maintaining a Gambling Establishment, the State must prove the following two elements beyond a reasonable doubt:**

Elements

1. (Defendant),
  - a. [in person or by a servant, clerk or agent,]
  - b. [acting as servant, clerk, agent or employee of another,]
- had a substantial degree of control over and kept or maintained (place or articles alleged).
2. The [place was] [articles were] habitually kept or maintained for the purpose of gambling.

Give 1b if  
applicable  
under F.S.  
849.02

**A single instance or rare and isolated instances of placing bets or gambling would be insufficient to constitute the crime. But if the property was used at frequent intervals as a place or means for betting, gaming or gambling, the crime has been committed even if the principal use of the property is for some other lawful purpose.**

**It is not necessary to prove that the defendant gambled, or received any profit from the gambling, or that [he] [she] wholly owned or controlled the property.**

**It is not necessary to a conviction of this offense that there be direct and positive evidence of gambling. It is sufficient if implements, devices or apparatus commonly used by gambling houses or by gamblers are found under circumstances that convince you that the premises were kept or maintained for the purpose of gambling.**

Give if  
applicable  
under F.S.  
849.02

**A servant, clerk, agent or employee of another who keeps or maintains property for the purpose of gambling is equally guilty with [his] [her] employer.**

Definition

**“Gambling” is a game of chance in which the participant risks money or property on the outcome with the expectation of gaining or losing as a result of the game.**

Note to  
Judge

If there is evidence of the exception referred to in F.S. 849.093 and .085, an appropriate instruction should be given.

*Explanation of amendments: This instruction is on page 199 of the manual. The addition of “and .085” is to ensure that F.S. 849.085 is not overlooked.*

**DRUG ABUSE — USE OR POSSESSION OF DRUG  
PARAPHERNALIA (Amended)  
F.S. 893.147(1)**

**Before you can find the defendant guilty of Use or Possession of Drug Paraphernalia, the State must prove the following two elements beyond a reasonable doubt:**

- Elements
1. (Defendant) used or had in [his] [her] possession with intent to use drug paraphernalia.
  2. (Defendant) had knowledge of the presence of the drug paraphernalia.

Definitions

Possession            To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive. If a thing is in the hand of or on the person, or in a bag or container in the hand of or on the person, or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person.

If a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in the constructive possession of that person.

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Drug  
Paraphernalia  
F.S. 893.145

**The term "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:**

Give specific  
definition as  
applicable

**(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.**

**(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.**

**(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.**

**(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.**

**(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.**

**(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.**

**(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.**

**(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.**

**(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.**

**(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.**

**(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.**

**(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:**

**(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.**

**(b) Water pipes.**

**(c) Carburetion tubes and devices.**

**(d) Smoking and carburetion masks.**

**(e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.**

**(f) Miniature cocaine spoons, and cocaine vials.**

**(g) Chamber pipes.**

**(h) Carburetor pipes.**

**(i) Electric pipes.**

- (j) Air-driven pipes.
- (k) Chillums.
- (l) Bongs.
- (m) Ice pipes or chillers.

Relevant  
factors F.S.  
893.146

**In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:**

- (1) Statements by an owner or by anyone in control of the object concerning its use.
- (2) The proximity of the object, in time and space, to a direct violation of this act.
- (3) The proximity of the object to controlled substances.
- (4) The existence of any residue of controlled substances on the object.
- (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.
- (6) Instructions, oral or written, provided with the object concerning its use.
- (7) Descriptive materials accompanying the object which explain or depict its use.
- (8) Any advertising concerning its use.

**(9) The manner in which the object is displayed for sale.**

**(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.**

**(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.**

**(12) The existence and scope of legitimate uses for the object in the community.**

**(13) Expert testimony concerning its use.**

Explanation of amendments: This instruction begins on page 245 of the manual. The title and paragraph (1) is revised to conform to the wording of F.S. 893.147(1).



CHARGED OFFENSES	CATEGORY 1	CATEGORY 2
First degree (premeditated) murder — 782.04(1)	Second degree (depraved mind) murder — 782.04(2) Manslaughter — 782.07	Second degree (felony) murder — 782.04(3) Third degree (felony) murder — 782.04(4) Attempt Vehicular homicide — 782.071 Culpable negligence — 784.05(2) Aggravated battery — 784.045 Aggravated assault — 784.021 Battery — 784.03 Assault — 784.011 *
First degree (felony) murder — 782.04(1)	Second degree (depraved mind)** murder — 782.04(2) Manslaughter — 782.07	Attempt Second degree — (depraved mind) murder — 782.04(2) Second degree (felony) murder — 782.04(3)

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\*But see *Martin v. State*, 342 So.2d 501 (Fla. 1977); *Drotar v. State*, 433 So.2d 1005 (Fla. 3d DCA 1983), holding that nonhomicide lessers should not be given when the only issue is whether the death was a lawful or unlawful homicide, but should be given if there is an issue of causation, *i.e.*, whether death was caused by defendant's act or some other unconnected cause. When a nonhomicide offense is a necessarily lesser included offense of the homicide offense, an instruction on the lesser may be necessary. See certified question in *Barritt v. State*, 517 So.2d 65 (Fla. 1st DCA 1987) [*rev'd* 531 So.2d 338].

\*\*See *Scurry v. State*, 521 So.2d 1077 (Fla. 1988).

**CHARGED OFFENSES**

**CATEGORY 1**

**CATEGORY 2**

**Second degree (depraved mind)  
murder — 782.04(2)**

**Manslaughter — 782.07**

**Second degree (felony) murder —  
782.04(3)**

**None**

**Third degree (felony) murder — 782.04(4)  
Manslaughter — 782.07  
Aggravated battery — 784.045  
Aggravated assault — 784.021  
Battery — 784.03  
Assault — 784.011  
\***

**Third degree (felony) murder — 782.04(4)  
Attempt  
Vehicular homicide — 782.071  
Culpable negligence — 784.05(2)  
Aggravated battery — 784.045  
Aggravated assault — 784.021  
Battery — 784.03  
Assault — 784.011  
\***

**Third degree (felony) murder — 782.04(4)  
Attempt**

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Third degree (felony) murder — 782.04(4)	None	Attempt Aggravated assault — 784.021 Battery — 784.03 Assault — 784.011
Manslaughter — 782.07	None	Attempt*** Aggravated assault — 784.021 Battery — 784.03 Assault — 784.011 Vehicular homicide — 782.071 Culpable negligence — 784.05(2)** Culpable negligence — 784.05(1)**
Assault — 784.011	None	Attempt
Aggravated assault — 784.021(1)(a)	Assault — 784.011	Attempt Improper exhibition of dangerous weapons or firearms — 790.10 Discharging firearms in public — 790.15
Aggravated assault — 784.021(1)(b)	Assault — 784.011	Attempt

\*But see *Martin v. State*, 342 So.2d 501 (Fla. 1977).

\*\*But see *Smith v. State*, 330 So.2d 526 (Fla. 4th DCA 1976), and *Murray v. State*, 328 So.2d 501 (Fla. 4th DCA 1976).

\*\*\*See *Taylor v. State*, 444 So.2d 931 (Fla. 1984).

<b>CHARGED OFFENSES</b>	<b>CATEGORY 1</b>	<b>CATEGORY 2</b>
<b>Battery — 784.03</b>	None	<b>Attempt</b>
<b>Aggravated battery — 784.045(1)(a)</b>	<b>Battery — 784.03</b>	<b>Attempt</b>
<b>Aggravated battery — 784.045(1)(b)</b>	<b>Battery — 784.03</b>	<b>Attempt</b> <b>Improper exhibition of dangerous weapons or firearms — 790.10</b> <b>Discharging firearms in public — 790.15</b>
<b>Culpable negligence — 784.05(2)</b>	<b>Culpable negligence — 784.05(1)</b>	None
<b>Assault of law enforcement officer — 784.07(2)</b>	None	<b>Attempt</b> <b>Assault — 784.011*</b>
<b>Battery of law enforcement officer — 784.07(2)</b>	None	<b>Attempt</b> <b>Battery — 784.03*</b>
<b>Kidnapping — 787.01</b>	<b>False imprisonment — 787.02</b>	<b>Attempt</b> <b>Aggravated assault — 784.021(1)(b)</b> <b>Battery — 784.03(1)(a)</b> <b>Assault — 784.011</b>

*\*Rosenberg v. State, 468 So.2d 971 (Fla. 1985)*

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<b>False imprisonment — 787.02</b>	<b>None</b>	<b>Attempt Assault — 784.011 Battery — 784.03(1)(a)</b>
<b>Carrying concealed weapons — 790.01(1)</b>	<b>None</b>	<b>Attempt</b>
<b>Carrying concealed firearms — 790.01(2)</b>	<b>None</b>	<b>Attempt</b>
<b>Carrying pistol or repeating rifle without first obtaining license — 790.06</b>	<b>None</b>	<b>Attempt</b>
<b>Persons engaged in criminal offense, having weapons — 790.07(1)</b>	<b>None</b>	<b>Attempt (may be applicable when concealed weapon is charged) Carrying concealed weapons — 790.01(1) Improper exhibition of dangerous weapons — 790.10</b>
<b>Persons engaged in criminal offense, having weapons — 790.07(2)</b>	<b>None</b>	<b>Attempt (may be applicable when concealed firearm is charged) Carrying concealed firearm — 790.01(2) Improper exhibition of dangerous firearms — 790.10</b>

<b>CHARGED OFFENSES</b>	<b>CATEGORY 1</b>	<b>CATEGORY 2</b>
<b>Discharging firearms in public — 790.15</b>	None	Attempt
<b>Furnishing weapons to minors under 18 years of age, etc. — 790.17</b>	None	Attempt
<b>Selling arms to minors by dealers — 790.18</b>	None	Attempt
<b>Felons; possession of firearms unlawful; exception; penalty — 790.23</b>	None	Attempt (may be applicable when concealed weapon is charged) Carrying concealed firearm — 790.01(2) Carrying concealed weapon — 790.01(1)
<b>Sexual battery — 794.011(2)</b>	Battery — 784.03	Attempt Assault — 784.011 Aggravated assault — 784.021(1)(a) Aggravated battery — 784.045(1)(a)
<b>Sexual battery — 794.011(3)</b>	Battery — 784.03	Attempt Aggravated battery — 784.045(1)(a) Aggravated assault — 784.021(1)(a) Assault — 784.011 Sexual battery — 794.011(4) Sexual battery — 794.011(5)

Sexual battery — 794.011(4)	Battery — 784.03	Attempt Aggravated assault — 784.021(1)(a) Assault — 784.011 Sexual battery — 794.011(5)
Sexual battery — 794.011(5)	Battery — 784.03	Attempt Assault — 784.011
Unnatural and lascivious act — 800.02	None	Attempt
Exposure of sexual organs — 800.03	None	Unnatural and lascivious act — 800.02
Lewd, lascivious, or indecent assault or act upon or in presence of child — 800.04	None	Attempt Assault — 784.011 Battery — 784.03 Unnatural and lascivious act — 800.02
Arson — 806.01(1)	<del>None Arson — 806.01(2)</del> Criminal mischief — 806.13(1)(b)1	<del>Arson — 806.01(2)*</del> Attempt Criminal mischief — 806.13(1)(b)2 Criminal mischief — 806.13(1)(b)3 Criminal mischief — 806.13(2)
Criminal mischief — 806.13(1)(b)1	None	Attempt

\*See Higgins v. State, 565 So.2d 698 (Fla. 1990).

<b>CHARGED OFFENSES</b>	<b>CATEGORY 1</b>	<b>CATEGORY 2</b>
<b>Criminal mischief — 806.13(1)(b)2</b>	<b>Criminal mischief — 806.13(1)(b)1</b>	<b>Attempt</b>
<b>Criminal mischief — 806.13(1)(b)3</b>	<b>Criminal mischief — 806.13(1)(b)1</b> <b>Criminal mischief — 806.13(1)(b)2</b>	<b>Attempt</b>
<b>Burglary with assault or battery or while armed — 810.02(2)</b>	<b>Burglary — 810.02(3)</b>	<b>Attempt</b> <b>Burglary of dwelling or with human being inside — 810.02(3)</b> <b>Trespass — 810.08(2)(a)</b> <b>Trespass — 810.08(2)(c)</b>
<b>Burglary of dwelling or with human being inside — 810.02(3)</b>	<b>Burglary — 810.02(3)</b>	<b>Attempt</b> <b>Trespass — 810.08(2)(a)</b> <b>Trespass — 810.08(2)(b)</b>
<b>Burglary — 810.02(3)</b>	<b>None</b>	<b>Attempt</b> <b>Trespass — 810.08(2)(a)</b>
<b>Possession of burglary tools — 810.06</b>	<b>None</b>	<b>None</b>
<b>Trespass in structure or conveyance — 810.08</b>	<b>None</b>	<b>Attempt (except refuse to depart)</b>
<b>Trespass on property other than structure or conveyance — 810.09</b>	<b>None</b>	<b>Attempt</b>



**Grand theft — first degree  
812.014(2)(a)**                      **None**

**Grand theft — second degree  
812.014(2)(b)**                      **None**

**Grand theft — third degree  
812.014(2)(c)**                      **None**

**Petit theft — 812.014(2)(d)**                      **None**

**Possession of altered property —  
812.016**                                      **None**

**Dealing in stolen property —  
trafficking — 812.019(1)**                      **None**

**Grand theft — second degree  
812.014(2)(b)**  
**Grand theft — third degree 812.014(2)(c)**  
**Petit theft — 812.014(2)(c)**  
*Cf. Gilford v. State, 313 So.2d 729 (Fla.  
1975)*  
**Trade secrets — 812.081**

**If value is alleged**  
**Grand theft — third degree 812.014(2)(c)**  
**Petit theft — 812.014(2)(d)**  
**Trade secrets — 812.081**

**If value is alleged**  
**Petit theft — 812.014(2)(d)**  
**Trade secrets — 812.081**

**No attempt — endeavor is included within  
definition of theft**

**Attempt**

**None**

CHARGED OFFENSES	CATEGORY 1	CATEGORY 2
Dealing in stolen property — managing and trafficking — 812.019(2)	812.019(1)	Attempt
Robbery with a firearm or deadly weapon — 812.13(2)(a)	Robbery with a weapon — 812.13(2)(b) Robbery — 812.13(2)(c) Petit theft — 812.014(2)(d)	Attempt Grand theft 1st degree — 812.013(2)(a) Grand theft 2d degree — 812.014(2)(b) Grand theft 3d degree — 812.014(2)(c) Battery — 784.03 Aggravated battery — 784.045 Assault — 784.011 Aggravated assault — 784.021 Extortion — 836.05 See <i>Davis v. State</i> , 277 So.2d 300 (Fla. 2d DCA 1973)
Robbery with a weapon — 812.13(2)(b)	Robbery — 812.13(2)(c) Petit theft — 812.014(2)(d)	Attempt Grand theft 1st degree — 812.014(2)(a) Grand theft 2d degree — 812.014(2)(b) Grand theft 3d degree — 812.014(2)(c) Battery — 784.03 Aggravated battery — 784.045 Assault — 784.011*

\*But see *Richardson v. State*, 523 So.2d 746 (Fla. 5th DCA 1988); *Sandy v. State*, 542 So.2d 436 (Fla. 2d DCA 1989).

		<p>Aggravated assault — 784.021  Extortion — 836.05  See <i>Davis v. State</i>, 277 So.2d 300 (Fla. 2d DCA 1973)</p>
Robbery — 812.13(2)(c)	Petit theft — 812.014(2)(d)	<p>Attempt  Grand theft 1st degree — 812.014(2)(a)  Grand theft 2d degree — 812.014(2)(b)  Grand theft 3d degree — 812.014(2)(c)  Battery — 784.03  Assault — 784.011  Aggravated assault — 784.021  Extortion — 836.05  See <i>Davis v. State</i>, 277 So.2d 300 (Fla. 2d DCA 1973)</p>
Child abuse — 827.04(1)	Child abuse — 827.04(2)	<p>Attempt, if willfully  Negligent treatment of child — 827.05</p>
Child abuse — 827.04(2)	None	<p>Attempt, if willfully  Negligent treatment of child — 827.05</p>
Forgery — 831.01	None	<p>Attempt</p>
Uttering forged instrument — 831.02	None	<p>No attempt — <i>King v. State</i>, 317 So.2d 852 (Fla. 1st DCA 1975)</p>

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<b>CHARGED OFFENSES</b>	<b>CATEGORY 1</b>	<b>CATEGORY 2</b>
Stopping payment; purchase of farm or grove products — 832.04	None	Attempt, except when uttering is charged — 832.04 under \$50
Stopping payment with intent to defraud — 832.041	None	Attempt, except when uttering is charged; 832.04 if farm or grove product; 832.041 under \$50 Worthless check — 832.05(2) (second degree misdemeanor)
Worthless checks — 832.05(2)	None	Attempt, except when uttering is charged
Obtaining property by worthless checks — 832.05(4)	Worthless check — 832.05(2) (second degree misdemeanor)	Attempt, except when uttering is charged
Perjury not in official proceeding — 837.012	None	None
Perjury if official proceeding — 837.02	None	None
Perjury by contradictory statements — 837.021	None	None
False reports to law enforcement authorities — 837.05	None	None
False official statements — 837.06	None	None

<b>Bribery — 838.015</b>	None	<b>Attempt if only give or accept is charged</b>
<b>Unlawful compensation for official behavior — 838.016</b>	None	<b>Attempt if only give or accept is charged</b>
<b>Corruption by threat against public servant — 838.021</b>	None	<b>Attempt if only harm is charged</b>
<b>Bribery in athletic contests — 838.12(1)</b>	None	<b>Attempt only if give is charged</b>
<b>Bribery in athletic contests — 838.12(2)</b>	None	<b>Attempt only if accept is charged</b>
<b>Keeping gambling house — 849.01</b>	None	<b>Lottery — 849.09(1)(f)</b> <b>Lottery — 849.09(1)(k)</b> <b>Lottery — 849.11</b>
<b>Agents, servants, etc., of keeper of gambling house — 849.02</b>	None	<b>Lottery — 849.09(1)(f)</b> <b>Lottery — 849.09(1)(k)</b>
<b>Renting house for gambling purposes — 849.02</b>	None	None
<b>Permitting minors and persons under guardianship to gamble — 849.04</b>	None	<b>Permitting gambling and billiard or pool table by holder of license — 849.07</b> <b>Playing at games of chance by lot — 849.11</b>

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<b>CHARGED OFFENSES</b>	<b>CATEGORY 1</b>	<b>CATEGORY 2</b>
<b>Gambling — 849.08</b>	<b>None</b>	<b>None</b>
<b>Lottery — 849.09(1)(a)</b>	<b>None</b>	<b>Attempt</b> <b>Lottery — 849.09(1)(f)</b> <b>Lottery — 849.09(1)(g)</b> <b>Lottery — 849.09(1)(h)</b> <b>Lottery — 849.09(1)(i)</b> <b>Lottery — 849.09(1)(j)</b> <b>Lottery — 849.09(1)(k)</b> <b>Playing at game of chance by lot —</b> <b>849.11</b> <b>Gambling devices, etc. — 849.231</b>
<b>Lottery — 849.09(1)(b)</b>	<b>None</b>	<b>Attempt</b> <b>Lottery — 849.09(1)(f)</b> <b>Lottery — 849.09(1)(g)</b> <b>Lottery — 849.09(1)(h)</b> <b>Lottery — 849.09(1)(i)</b> <b>Lottery — 849.09(1)(j)</b> <b>Lottery — 849.09(1)(k)</b> <b>Gambling devices, etc. — 849.231</b>
<b>Lottery — 849.09(1)(c)</b>	<b>None</b>	<b>Attempt</b> <b>Lottery — 849.09(1)(f)</b> <b>Lottery — 849.09(1)(g)</b>

		<b>Lottery — 849.09(1)(h)</b> <b>Lottery — 849.09(1)(i)</b> <b>Lottery — 849.09(1)(j)</b> <b>Lottery — 849.09(1)(k)</b> <b>Gambling devices, etc. — 849.231</b>
	<b>Lottery — 849.09(1)(d)</b>	<b>None</b>
		<b>Attempt</b> <b>Lottery — 849.09(1)(f)</b> <b>Lottery — 849.09(1)(g)</b> <b>Lottery — 849.09(1)(h)</b> <b>Lottery — 849.09(1)(i)</b> <b>Lottery — 849.09(1)(j)</b> <b>Lottery — 849.09(1)(k)</b> <b>Playing at game of chance by lot — 849.11</b> <b>Gambling devices, etc. — 849.231</b>
	<b>Lottery — 849.09(1)(g)</b>	<b>None</b>
	<b>Lottery — 849.09(1)(h)</b>	<b>None</b>
	<b>Lottery — 849.09(1)(k)</b>	<b>None</b>
	<b>Bookmaking on grounds of permit-holder — 550.361 (adapted from former 849.24)</b>	<b>None</b>
	<b>Bookmaking — 849.25(1) and (2)</b>	<b>None</b>
		<b>Attempt</b>

CHARGED OFFENSES	CATEGORY 1	CATEGORY 2
<del>Bookmaking — 849.25(3)</del>	<del>Bookmaking — 849.25(2)</del>	<del>Attempt Bookmaking on grounds of permit holder — 550.361</del>
Driving under the influence — 316.193(1)	None	Attempt
DUI with damage to property or person — 316.193(3)(c)1	DUI — 316.193(1)	None
DUI with serious bodily injury — 316.193(3)(c)2	DUI — 316.193(1)	DUI — 316.193(3)(c)1
DUI manslaughter — 316.193(3)(c)3	DUI — 316.193(1)	Vehicular homicide — 782.071 DUI — 316.193(3)(c)2 DUI — 316.193(3)(c)1
Sale, manufacture, delivery or possession with intent to sell, manufacture or deliver controlled substance — 893.13(1)(a)	None	Attempt, except when delivery is charged; 893.13(1)(g) if possession or delivery of cannabis charged 893.13(1)(f) if possession is charged*

\*Provided that charged offense is a second degree felony under section 893.13(1)(a)1.



Sale, delivery or possession of more than 10 grams of controlled substance — 893.13(1)(b)	None	Attempt, except when delivery is charged 893.13(1)(a) 893.13(1)(f) if possession is charged
Delivery of controlled substance to person under 18 years old — 893.13(1)(c)	None	893.13(1)(a) 893.13(1)(g) if cannabis charged
Bringing controlled substance into state — 893.13(1)(d)	None	Attempt 893.13(1)(f) 893.13(1)(g) if cannabis charged
Possession of controlled substance — 893.13(1)(f)	None	Attempt; 893.13(1)(g) if cannabis charged
Offense of possession or delivery of not more than 20 grams of cannabis — 893.13(1)(g)	None	Attempt, except when delivery is charged
Obtaining controlled substances by fraud — 893.13(3)(a)1	None	
<u>Sale, purchase, etc., near public school — 893.13(1)(e)</u>	<u>None</u>	<u>Sale, purchase, manufacture, etc., 893.13(1)-(4)</u>
Possession of drug paraphernalia — 893.147(1)	None	Attempt

<b>CHARGED OFFENSES</b>	<b>CATEGORY 1</b>	<b>CATEGORY 2</b>
<b>Delivery, possession with intent to deliver, or manufacture with intent to deliver drug paraphernalia — 893.147(2)</b>	None	<b>Attempt, except when delivery is charged</b>
<b>Delivery of drug paraphernalia to a minor — 893.147(3)</b>	None	None
<b>Trafficking in cannabis — 893.135(1)(a)</b>	None	<b>Attempt, except when delivery is charged</b> <b>893.13(1)(a) if sale, manufacture or delivery is charged</b> <b>Bringing cannabis into state — 893.13(1)(d)</b> <b>Possession of cannabis — 893.13(1)(f)</b> <b>Possession or delivery of cannabis — 893.13(1)(g)</b>
<b>Trafficking in cocaine — 893.135(1)(b)</b>	None	<b>Attempt, except when delivery is charged</b> <b>893.13(1)(a) if sale, manufacture or delivery is charged</b> <b>Bringing cocaine into state — 893.13(1)(d)</b> <b>Possession of cocaine — 893.13(1)(f)</b>

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Trafficking in illegal drugs — 893.135(1)(c)	None	Attempt, except when delivery is charged 893.13(1)(a) if sale, manufacture or delivery is charged Bringing same illegal drug as charged into state — 893.13(1)(d) Possession of same illegal drug — 893.13(1)(f)
Trafficking in phencyclidine — 893.135(1)(d)	None	Attempt, except when delivery is charged 893.13(1)(a) if sale, manufacture or delivery is charged Bringing phencyclidine into state — 893.13(1)(d) Possession of phencyclidine — 893.13(1)(f)
Trafficking in methaqualone — 893.135(1)(d)	None	Attempt, except when delivery is charged 893.13(1)(a) if sale, manufacture or delivery is charged Bringing methaqualone into state — 893.13(1)(d) Possession of methaqualone — 893.13(1)(f)

**CHARGED OFFENSES**

**CATEGORY 1**

**CATEGORY 2**

**Contraband — 951.22**

None

**The nature of the contraband may give rise to misdemeanor, lesser included offenses. See *Cooper v. State*, 512 So.2d 1071 (Fla. 1st DCA 1987); *Moore v. State*, 512 So.2d 1149 (Fla. 1st DCA 1987).**

Explanation of amendments: The committee has not reviewed the Schedule in detail. The changes, therefore, do not necessarily fully update it. Only matters specifically brought to the committee's attention are addressed above.