

**IN THE SUPREME COURT OF FLORIDA**

**IN RE:**

**STANDARD JURY INSTRUCTIONS  
CRIMINAL CASES-  
REPORT 2010-05**

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**CASE NUMBER: SC10-**

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

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

	<b><u>Instruction #</u></b>	<b><u>Topic</u></b>
<b>Proposal 1</b>	<b>2.13</b>	<b>Questions by Jurors</b>
<b>Proposal 2</b>	<b>24.6</b>	<b>Prohibition of Certain Acts in Connection with Obscene Materials - Promoting or Performing</b>
<b>Proposal 3</b>	<b>13.3</b>	<b>Trespass in a Structure or Conveyance</b>
<b>Proposal 4</b>	<b>13.4</b>	<b>Trespass on Property Other than a Structure or Conveyance</b>
<b>Proposal 5</b>	<b>16.4(a)</b>	<b>Contributing to Child Dependency</b>
<b>Proposal 6</b>	<b>28.41</b>	<b>Leaving the Scene of a Crash Involving Only Damage to an Attended Vehicle or Property</b>
<b>Proposal 7</b>	<b>25.9-25.13</b>	<b>Traffickings</b>
<b>Proposal 8</b>	<b>28.14-28.17</b>	<b>Boatings Under the Influence</b>
<b>Proposal 9</b>	<b>29.14</b>	<b>Taking Deer/Wild Turkey with Gun and Light</b>
<b>Proposal 10</b>	<b>3.8(a)</b>	<b>Evidence of Other Crimes, Wrongs, or Acts</b>
<b>Proposal 11</b>	<b>14.8</b>	<b>Organized Fraud</b>
<b>Proposal 12</b>	<b>6.6</b>	<b>Attempted Voluntary Manslaughter</b>

The proposals are provided in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined.

Proposals 1 and 2 were published in *The Florida Bar News* on February 1, 2010. Proposals 3-10 were published in *The Florida Bar News* on June 15, 2010.

Proposal 11 was first published in *The Florida Bar News* on June 15, 2010 and then a revised version was published on November 1, 2010.

Proposal 12 was published in *The Florida Bar News* on November 1, 2010.

Comments are attached in Appendix B.

Proposal 1 - Comments were received from the Florida Public Defender Association (hereinafter “FPDA”) and Judge Kevin Emas.

Proposal 2 - A comment was received from Assistant Public Defender Mr. R. Blaise Trettis.

Proposal 4 - A comment was received from the Florida Association of Criminal Defense Lawyers (hereinafter “FACDL”).

Proposal 7 - Comments were received from the FPDA, Attorney Brent Del Gaizo, Assistant State Attorney Ben Fox, Assistant State Attorney Chris Miller, and Assistant State Attorney Stewart Stone.

Proposal 10 - Comments were received from Attorney Joseph Bernstein and the FACDL.

Proposal 11- A comment was received from the FACDL.

No comments were received for proposals 3, 5, 6, 8, 9, and 12.

A minority report for Proposal 7 (Traffickings) is provided in Appendix C.

### **Explanation of Proposals**

#### **Proposal 1 - 2.13 Questions by Jurors**

A committee member thought instruction 2.13 needed to be updated to accurately reflect Rule 3.371, Fla. R. Crim. P. A proposal was first passed in 2009 but the committee then adopted a suggestion from Judge Kevin Emas, who had urged that the instruction be written in a way that the litigants could not identify the juror(s) who asked the question(s). The committee concluded that this procedure should be included as an alternative for trial judges. The committee also added a note to alert the trial judge that he or she had the discretion to allow or disallow questions. The body of the proposal was altered to comply with Rule 3.371, Fla. R. Crim. P. The committee received one comment from the Florida Public Defenders Association (FPDA). The FPDA stated they have received mixed reviews from their experiences with jury questions of witnesses; they had no

recommendation for this instruction. The proposal was unanimously approved by the committee on October 8, 2010.

### **Proposal 2 – 24.6 Prohibition of Certain Acts in Connection with Obscene Materials – Promoting or Performing**

The committee published instruction 24.6 (Prohibition of Certain Acts in Connection with Obscene Materials – Promoting or Performing) on February 1, 2010 in *The Florida Bar News*, and received one comment from committee member, R. Blaise Trettis. After discussing the comment, the committee decided by a vote of 7 to 4 to exclude the instruction in the report dealing with the prostitution and lewd/lascivious instructions ( SC10-636). The committee was concerned that the current instruction might be outdated in light of more recent U.S. Supreme Court case law. Three members of the committee agreed to serve as a subcommittee to research and recommend any proposed changes.

At the October 8, 2010 meeting, Mr. Trettis withdrew his objection to the proposal. He stated the proposal was legally accurate, he could not recommend any improvements, and the crime was rarely prosecuted anyway. The proposal was unanimously approved by the committee on October 8, 2010.

### **Proposal 3 – 13.3 - Trespass in a Structure or Conveyance**

The committee made revisions to 13.3 - Trespass in a Structure or Conveyance - after a committee member pointed out the existing instruction does not allow jurors to find that the property entered was a structure or conveyance. (The existing instruction says that the State must prove the defendant entered in the (*structure or conveyance alleged*)). Because there is a “trespass on property other than a structure or conveyance” statute, the committee thought jurors should be required to find the property entered was a structure or conveyance. Additionally, the committee decided the instruction would be more understandable if Trespass and Trespass After Warning were separated. Definitions of “person authorized” and “firearm” were added and the word “knowingly” was added to the definition of “willfully” for consistency with other standard instructions. The committee deleted the reference to an increased punishment and added in the burden of proof (beyond a reasonable doubt) for the aggravators of “armed with a firearm or other dangerous weapon” and “human being present at the time of the trespass.” No comments were received after the proposal was published in *The Florida Bar News* on June 15, 2010. The committee voted unanimously to approve the instruction at its October 8, 2010 meeting.

## **Proposal 4 – 13.4 Trespass on Property other than a Structure or Conveyance**

The committee was also concerned that instruction 13.4 does not allow a jury to find that the property trespassed upon was something other than a structure or conveyance. (The existing instruction reads: “Defendant willfully entered/remained in (*property alleged*).”) Therefore, the instruction was amended to ensure jurors found that the property trespassed upon was not a structure or conveyance. Instruction 13.4 was also amended to allow for an instruction based on Florida Statute 810.09(1)(a)2 – a trespass upon the unenclosed curtilage of a dwelling. In element #4, the committee tracked the language of the statute by using the words “authorization, license, or invitation” instead of the word “permission.” Definitions were added for: “structure,” “conveyance,” “person authorized,” “unenclosed curtilage of a dwelling,” “firearm,” and “dwelling.” The word “knowingly” was added to the definition of “willfully” for consistency with other standard instructions. The committee deleted the reference to an increased punishment and added in the burden of proof (beyond a reasonable doubt) for the aggravator of “armed with a firearm or other dangerous weapon.” The paragraph regarding a simple trespass with no aggravating circumstance was deleted because the committee felt it was unnecessary.

The proposal was published in *The Florida Bar News* on June 15, 2010. One comment was received from the Florida Association of Criminal Defense Lawyers (FACDL). They contended a) the word “permission” should be used instead of the statutory “authorization, license, or invitation;” b) the definitions of “structure” and “conveyance” were unnecessary in most circumstances; and c) the language about a harsher punishment and simple trespass without an aggravating circumstance should both remain. The committee discussed the FACDL’s comments at length but declined to adopt any of their suggestions. The proposal was adopted unanimously at the October 8, 2010 meeting.

## **Proposal 5 – 16.4(a) – Contributing to Child Dependency; Person 21 or Older Impregnating Child Under 16**

A committee member proposed 16.4(a) because there was no existing instruction to cover Florida Statute 827.04(3). The proposal passed unanimously in 2008 but was delayed as the committee debated the Child Abuse instruction. The proposal was published in *The Florida Bar News* on June 15, 2010. No comments were received; the proposal passed unanimously at the October 8, 2010 meeting.

**Proposal 6      28.41 – Leaving the Scene of a Crash Involving Only  
Damage to an Attended Vehicle or Property**

A committee member proposed 28.41 because there was no existing instruction to cover this common misdemeanor. The proposal was published in *The Florida Bar News* on June 15, 2010. No comments were received and the proposal passed unanimously at the October 8, 2010 meeting.

**Proposal 7      25.9 - 25.13 Traffickings**

Because of the recent decisions of *Barrientos v. State*, 1 So. 3d 1209 (Fla. 2d DCA 2009) and *Nash v. State*, 951 So. 2d 1003, 1005 (Fla. 4<sup>th</sup> DCA 2007), a committee member proposed changing the trafficking instructions. Those cases rely on Florida Statute 893.101, which states knowledge of the illicit nature of a controlled substance is not an element of any offense under chapter 893. In light of *Barrientos*, the committee deleted element #4 (Defendant knew the substance was “x”) in the cocaine, cannabis, morphine/opium/oxycodone/hydrocodone/heroin, phencyclidine, and methaqualone trafficking instructions.

The committee made other minor changes and added a note to the judge that a special instruction is needed when drugs are found in jointly-occupied premises, in a common area, in plain view, and in the presence of the owner or occupant. The existing instruction informs jurors that knowledge of the presence of the drug may not be inferred if a person does not have exclusive possession. This instruction is legally incorrect in the circumstance outlined above. *Brown v. State*, 428 So. 2d 250 (Fla. 1983). Additionally, the committee concluded that jurors should be instructed on an inference that one who sells a controlled substance knows of its illicit nature. *McMillon v. State*, 813 So. 2d 56 (Fla. 2002). The committee concluded that such an instruction would only be given if the defendant raised the affirmative defense regarding lack of knowledge of the illicit nature.

The proposals were published in *The Florida Bar News* on June 15, 2010. The committee debated – both pre and post-publication - whether it was appropriate for the jury instruction committee to determine that the burden of persuasion on the affirmative defense should be allocated to the State because there was no case law supporting such an instruction. Comments were received from three prosecutors (Mr. Ben Fox, Mr. Stewart Stone, and Mr. Chris Miller) who argued either: Florida Statute 893.101(2) requires the burden of persuasion to be on

the defendant to prove his or her lack of knowledge of the illicit nature or that the standard instruction should be written in a way that allowed the issue to be litigated in the trial courts. A motion to propose an instruction that allowed trial judges to determine who had the burden of persuasion on the affirmative defense was defeated when the committee deadlocked on a 6-6 vote at the October 8, 2010 meeting. (See Appendix C for a minority report on this issue.)

Comments were also received from the Florida Public Defender Association (FPDA) and Attorney Brent Del Gaizo who opposed the deletion of element #4. The FPDA argued there was a conflict between Florida Statute 893.101 and the trafficking statutes (Florida Statute 893.135, which uses the word “knowingly”) and *State v. Dominguez*, 509 So. 2d 917 (Fla. 1987)(holding that knowledge of the illicit nature of the controlled substance is an essential element of trafficking). The FPDA also opposed the inference of knowledge for a defendant who sells a controlled substance and the special instruction in cases of joint occupancy/drugs in plain view in owner/occupant’s presence.

On October 8, 2010, the committee decided by a vote of 9-2 to delete element #4 in the trafficking instructions because of the language of Florida Statute 893.101 and *Barrientos* and *Nash*. The committee similarly decided to include the inference of knowledge for one who sells a controlled substance and the note to the judge that a special instruction is required in some circumstances.

### **Proposal 8 – 28.14-28.17 Boatings Under the Influence**

In Chapter 2009-86, section 7, Laws of Florida, the legislature lowered the blood/breath alcohol level from .20 to .15 for the enhanced penalty if the offender was accompanied in a vessel by a person under the age of 18. See Florida Statute 327.35. The committee amended the standard instructions to reflect this lower alcohol level for BUI, BUI Causing Property Damage or Injury, Felony BUI, and BUI Causing Serious Bodily Injury. No other changes were made to the standard BUI instructions. The proposals were published in *The Florida Bar News* on June 15, 2010; no comments were received; the proposal passed unanimously at the October 8, 2010 meeting.

### **Proposal 9 – 29.14 Taking Deer/Wild Turkey With a Gun and Light**

A committee member proposed 29.14 because of an incorrect statutory reference in the existing instruction. The corrected instruction passed at the March 2010 meeting, it was published in *The Florida Bar News* on June 15, 2010; no

comments were received; and the committee unanimously approved the proposal at the October 8, 2010 meeting.

### **Proposal 10 – 3.8(a) Evidence of Other Crimes, Wrongs, Acts**

A committee member proposed to add the mandatory language set forth in Florida Statute 90.404(2)(c)2 in Instruction 3.8(a). The proposal passed the committee unanimously at the March 2010 meeting and the proposal was published in the June 15, 2010 edition of the *Florida Bar News*. Comments were received from the Florida Association of Criminal Defense Lawyers (FACDL) and Atty. Joseph Bernstein. The FACDL did not believe that any change was warranted. In the alternative, the FACDL proposed other language. Attorney Bernstein also recommended alternative language. At the October 8, 2010 meeting, the committee discussed these comments and voted unanimously that standard instruction 3.8(a) track the language in Florida Statute 90.404 (2)(c)2.

### **Proposal 11 – Organized Fraud**

A committee member proposed a new instruction which tracks the language in Florida Statute 817.034. The format for the Theft instruction was used as a template and the definition of “willful” was copied from other instructions. A proposal was first published in the June 15, 2010 edition of *The Florida Bar News*. One comment was received from the FACDL who “strongly” suggested that dictionary definitions for “systematic,” “defraud,” and “fraudulent” needed to be provided for jurors. The committee disagreed and thought it best to wait for legislation or case law to develop the definitions. The FACDL also proposed that the instruction inform jurors that if a minimum value could not be determined, the jurors should find the value to be less than \$20,000. (There is no misdemeanor scheme to defraud and anything under \$20,000 is the lowest offense.) The committee agreed, amended the proposal, and republished in the November 1, 2010 edition of *The Florida Bar News*. No comments were received and the committee passed the proposal unanimously at the December 10, 2010 meeting.

### **Proposal 12 – Attempted Voluntary Manslaughter**

A committee member proposed changes to Instruction 6.6 in light of *Montgomery v. State*, 39 So.3d 252 (Fla. 2010) and opinions from various District Courts of Appeal reversing convictions for Attempted Voluntary Manslaughter in which jurors were given the existing standard instruction. The word “intentionally” was added to ensure that the defendant’s act was not accidental. Language about

“intent to cause death” was deleted. An explanation that jurors should exclude simple negligence was added so that there could be no finding of attempted negligence. Additionally, the last paragraph was clarified to ensure there is no requirement of an intent to cause death. The proposal was published in the November 1, 2010 edition of *The Florida Bar* news. No comments were received. The committee passed the proposal unanimously at the December 10, 2010 meeting.

Respectfully submitted this 16<sup>th</sup> day of  
December, 2010.

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### **CERTIFICATE OF FONT SIZE**

I hereby certify that this report has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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THE HONORABLE LISA T. MUNYON  
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