IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2012-01

CASE NO.: SC12-

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

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

	Instruction #	Topic
Proposal 1	14.1	Theft
Proposal 2	13.1	Burglary
Proposal 3	7.11	Penalty Proceedings – Capital Cases
Proposal 4	11.10(c)	Lewd or Lascivious Molestation

The proposals are provided in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined. The current Theft and Burglary statutes are contained in Appendix B.

All the proposals were published in *The Florida Bar News* on January 15, 2012.

EXPLANATION OF PROPOSALS

Proposal 1 – 14.1 – Theft

During the 2011 session, the legislature added a provision to the theft statute that created a third degree felony for the theft of any amount of a controlled substance. See Fla. Stat. 812.014(2)(c)13 in Appendix B. As a result, the committee unanimously agreed to update the standard instruction for this amendment. No other changes were made other than a reordering and an updating of the paragraphs in the Comment section. No comments were received after publication.

Proposal 2 – 13.1 – Burglary

During the 2011 session, the legislature added a provision to the burglary statute that created a second degree felony for burglaries of a structure or

conveyance if the offense intended to be committed was theft of a controlled substance. See Fla. Stat. 810.02(3)(f) in Appendix B. As a result, the committee unanimously agreed to update the standard instruction for the amendment.

The committee also voted 8-1 to put "[(the crime alleged)]" before "[an offense]" throughout the instruction. Case law suggests that it is better practice for the state to specify the offense intended in its charging document. The committee thought putting "the crime alleged" before "an offense" might encourage prosecutors to do so.

By a 8-1 vote, the committee changed the part about the offense intended to "[an offense <u>other than burglary or trespass</u>]." This change is designed to make it clear to jurors and judges that the crime intended cannot be burglary or trespass.

By a vote of 8-1, the committee reinserted the words "or should have known" in the paragraph about entering an area of the premises open to the public. That phrase had been deleted erroneously in the last revision to the burglary instruction. The "should have known" language is supported by *Johnson v. State*, 786 So. 2d 1162, 1164 (Fla. 2001).

By a vote of 6-3, the committee added a sentence explaining that the enclosure around a structure or dwelling need not be continuous in order for there to be a curtilage. This instruction is supported by *Jacobs v. State*, 41 So. 3d 1004 (Fla. 1st DCA 2010).

Finally, the committee unanimously agreed to conform the definition of "authorized emergency vehicle" to the definition used in the Theft instruction and to shorten the Comment section about offenses occurring between February 2000 and July 2001 because the committee thought enough time had passed to make those comments unnecessary.

No comments were received after publication.

<u>Proposal 3 – 7.11 – Penalty Proceedings – Capital Cases</u>

In the first italicized note, the committee voted 7-3 to delete the words "by the supreme court." The committee concluded that it didn't matter whether the Florida Supreme Court or the U.S. Supreme Court did the remanding and that the reference to any supreme court was unnecessary.

Additionally, in *Armstrong v. State*, 73 So. 3d 155 (Fla. 2011), Justice Pariente suggested that the standard instruction address situations where a

defendant has been serving a lengthy prison sentence and the jury in resentencing had a question as to the effect of the sentence on his or her eligibility for parole.

The committee unanimously agreed with Justice Pariente's suggestion and therefore added a cite to *Green v. State*, 907 So. 2d 489, 496 (Fla. 2005) along with an explanation that if the jury inquires whether the defendant will receive credit for time served against a sentence of life without the possibility of parole for 25 years, the court should instruct that the defendant will receive credit for all time served but that there is no guarantee the defendant will be granted parole either upon serving 25 years or subsequently.

No comments were received after publication.

Proposal 4 – 11.10(c) – Lewd or Lascivious Molestation

A committee member discovered the existing standard instruction for Fla. Stat. 800.04(5) does not adequately reflect the elements of the crime. Specifically, the statute states:

A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.

However, the existing instruction for element 2b, which covers the act of the defendant forcing or enticing the victim to touch the defendant, does not specify that the touching has to be done in a lewd or lascivious manner.

Accordingly, the committee voted unanimously to add the words "in a lewd or lascivious manner" to element 2b and to reword element 2a to make it consistent with the format in element 2b.

The committee unanimously added a comma after the word "Defendant" in element 2 and revised the definition section of "lewd" and "lascivious" to make the instruction read better.

No comments were received after publication.

Respectfully submitted this _____day of February, 2012.

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Chair, Supreme Court Committee on
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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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