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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2013-05

CASE NO.: SC13-

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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. The report also contains the Committee's response to the Court's referral letter dated April 22, 2013.

	Instruction #	Topic
Proposal 1	**25.2**	**Sale/Purchase/Mfg./Delivery or Possession with Intent to Sell, Purchase, Manufacture, Deliver**
Proposal 2	**25.3**	**Sale/Purchase/Delivery/Poss. > 10 Grams**
Proposal 3	**25.4**	**Delivery to or Use of Minor**
Proposal 4	**25.5**	**Bringing Into State**
Proposal 5	**25.6**	**Contraband in Specified Locations**
Proposal 6	**25.7**	**Possession of a Controlled Substance**
Proposal 7	**25.8**	**Obtaining Cont. Substance By Fraud**
Proposal 8	**25.9**	**Trafficking in Cannabis**
Proposal 9	**25.10**	**Trafficking in Cocaine**
Proposal 10	**25.11**	**Trafficking in Illegal Drugs**
Proposal 11	**25.12**	**Trafficking in Phencyclidine**
Proposal 12	**25.13**	**Trafficking in Methaqualone**
Proposal 13	**25.14**	**Use or Possession of Drug Paraphernalia**
Proposal 14	**25.15**	**Delivery or Possession w/Intent (Drug Paraphernalia)**
Proposal 15	**25.16**	**Delivery Drug Paraphernalia to Minor**
Proposal 16	**25.17**	**Contraband in County Detention Facility**
Proposal 17	**25.18**	**Contraband in Juvenile Facility**
Proposal 18	**25.20**	**Possession Contraband in State Correctional Facility**
Proposal 19	**25.21**	**Introduction/Removal Contraband State**

Correctional Facility

The proposals are in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined. The referral letter from the Court is in Appendix B.

These proposals have not been published. Instead, the Committee wanted to meet the Court's deadline set forth in the referral letter.

Committee's Response to Referral Letter

On April 22, 2013, the Court sent a referral letter to the Committee asking two questions:

1) Should instructions 25.2-25.8 be amended in light of either *State v. Adkins*, 96 So. 3d 412 (Fla. 2012) or *In re: Standard Jury Instructions in Criminal Cases – Instructions 25.9-25.13*, 38 Fla. L. Weekly S237 (Fla. April 18, 2013)?

2) Should the trafficking instructions be amended in light of *Smith v. United States*, 133 S. Ct. 714 (2013)?

Response to Question #1

The Committee reviewed all of the drug instructions in light of *Adkins* and the recently-issued trafficking jury instruction opinion and concluded that there was one issue that needed debate: Whether knowledge of presence should be an element in all of the drug-related instructions?

The Committee first looked at the drug-related statutes and noted that the word "knowingly" is only in the trafficking statutes; the word "knowingly" is not in any of the other drug-related statutes. The Committee then reviewed the existing non-trafficking jury instructions and noted that knowledge of presence is not an element, except for crimes involving Possession, Possession with Intent, and Bringing into the State. Finally, the Committee looked at the case law.

It is clear from the case law that knowledge of presence is an element of Possession and thus the Possession with Intent crimes. See *State v.Oxx,* 417 So. 2d 287 (Fla. 5th DCA 1982), *Chicone v. State*, 684 So. 2d 736 (Fla. 1984), and *Scott v. State*, 808 So. 2d 162 (Fla. 2002). Note: Although Fla. Stat. 893.101 states that

Chicone and *Scott* were decided contrary to legislative intent, that statute explicitly refers to the parts of *Chicone* and *Scott* dealing with knowledge of illicit nature and not knowledge of presence.

It is not obvious from the case law whether knowledge of presence is an element of the other drug-related crimes. The Committee did not find any pre-*Adkins* cases that held that knowledge of presence is an element of Sale, Manufacture, Delivery, Purchase, or Bringing into the State. In fact, some case law suggests otherwise. For example, *State v. Medlin*, 273 So. 2d 394, 396-397 (Fla. 1973) states: "The Florida cases set out the rule that where a Statute denounces the doing of an act as criminal without specifically requiring criminal intent, it is not necessary for the State to prove that the commission of such act was accompanied by criminal intent. It is only when criminal intent is required as an element of the offense that the question of 'guilty knowledge' may become pertinent in the State's case" and "Proof that defendant committed the prohibited act raised the presumption that the act was knowingly and intentionally done."

The Committee then studied the *Adkins* opinion. In *Adkins*, the two dissenters stated that they believed knowledge of the illicit nature is a required element for drug offenses. The Committee concluded that these dissenters would also require knowledge of presence to be an element of all drug-related crimes.

Justice Pariente's concurring opinion in *Adkins* explicitly states that Florida's statutes require knowledge of presence to be an element of drug-related offenses. Accordingly, there appears to be three votes on the Florida Supreme Court to require knowledge of presence as an element. The question is whether there is a fourth vote.

The Committee then studied the remaining *Adkins* opinion, which was authored by Justice Canady and was joined by Chief Justice Polston and Justice Labarga. The Committee could not definitively determine whether that opinion requires knowledge of presence to be an element of non-possession and non-trafficking drug-related crimes.

The issue in *Adkins* was whether the legislature could constitutionally make lack of knowledge of the illicit nature an affirmative defense. It was not necessary for the Court to determine whether knowledge of presence must be an element. The closest part of Justice Canady's opinion that might resolve the issue was the following sentence: "The statute does not eliminate the element of knowledge of presence of the substance, which we acknowledged in *Chicone,* 684 So. 2d at

739-40, and *Scott,* 808 So. 2d at 169."

A member of the Committee argued that one could infer that knowledge of presence was an element from Justice Canady's *Adkins* opinion and from other case law. But no one else agreed. The statute that Justice Canady referred to is Fla. Stat. 893.101, which is the affirmative defense statute covering lack of knowledge of the illicit nature. It is true that Fla. Stat. 893.101 does not eliminate the element of knowledge of presence. But the cases that are immediately cited in Justice Canady's opinion - *Chicone* and *Scott* – both involved the crime of Possession. As mentioned above, criminal possession requires knowledge of presence. But it is not clear that the Sale, Delivery, Purchase, Manufacture, and Bringing into the State statutes also require knowledge of presence. And the Committee was uncertain whether Justice Canady, Justice Labarga, Justice Lewis, or Chief Justice Polston intend to read a knowledge of presence element into the drug statutes when those statutes do not contain the word "knowingly."

The Committee discussed whether there were realistic scenarios for a person to sell, purchase, or manufacture a controlled substance without knowing of the presence of the substance. The Committee thought such scenarios required a stretch of imagination, but that it was more conceivable for a person to deliver a controlled substance or to bring a controlled substance into Florida without knowing of its presence.

With these realistic and unrealistic scenarios in mind, the Committee concluded that if the legislature did not put the word "knowingly" in the statutes and if the Court did not add a "knowingly" element into the drug-related statutes, then lack of knowledge of presence would be an affirmative defense. That conclusion was based on the idea that because the legislature made lack of knowledge of the illicit nature of the substance a defense, then the legislature would also want lack of knowledge of the presence of the substance to be a defense.

Finally, the Committee studied the federal 11th Circuit opinion in *Shelton v. Secretary, DOC,* 691 F. 3d 1348 (11th Cir. 2012). In *Shelton*, the federal appellate court suggested that the Florida Supreme Court required knowledge of presence to be an element of all drug-related crimes. But as stated above, the Committee did not think that four voters in *Adkins* said what the federal court said they said.

Additionally, the Committee noted that Mr. Shelton's jury was told that in order to convict, the State must prove two elements: 1) That Shelton delivered a

substance and 2) That the substance was cocaine. There was no *mens rea* in the instructions that were given to Mr. Shelton's jury and Mr. Shelton's conviction was upheld by the federal appellate court. The Committee noted that the *Shelton* case was in federal court via an appeal of a habeas corpus petition and that it is difficult for defendants to prevail on those petitions when there has been an adjudication on the merits in the state court. But the reversal of the federal district court judge's opinion and the affirmance of the *Shelton* conviction in the federal appellate court highlights the fact that neither the U.S. Supreme Court nor the Florida Supreme Court require *mens rea* in all criminal statutes, particularly if lack of *mens rea* is an affirmative defense.

In sum, the Committee concluded that either knowledge of presence is an element or lack of knowledge of presence is an affirmative defense in the non-trafficking and non-possession drug crimes. The Committee did not think it appropriate for the Committee to decide this disputed issue of law. If the Court is willing to vote on the issue, the Committee asks that these proposals be sent back to the Committee with direction. In the meantime, the Committee's vote was 11-0: The proposals in Appendix A give the option to the trial judge to determine whether knowledge of presence is an element or whether lack of knowledge of presence is an affirmative defense.

<u>Response to Question #2</u>

The Committee reviewed *Smith v. United States* and concluded that this U.S. Supreme Court opinion did not change the legal landscape. The Committee has been operating for a long time with the understanding that it does not violate due process for a legislature or a court to allocate the burden of persuasion of an affirmative defense to the defendant. *Smith* does nothing to change the Committee's understanding of the law. If the Court is asking whether *Smith v. United States* <u>requires</u> the burden of persuasion to be placed on the defendant, the answer is no. If the Court is asking whether *Smith v. United States* allows the Court to allocate the burden of persuasion of the affirmative defense to the defendant, the answer is yes.

Prior Standard Jury Instruction Committees sent proposals to the Court which allocated the burden of persuasion of the Florida Statute 893.101 affirmative defense to the state under the beyond a reasonable doubt standard. The prior committees did so in the absence of statutory direction and in the absence of case law. In fact, it has been argued to the Committee that in cases of silent statutes and no case law, the common law "reception" statutes (Fla. Stat. 775.01 and Fla. Stat.

2.01) require the burden of an affirmative defense to be put on the defendant under the preponderance of evidence standard because that is what the common law required.

When the 2010 Standard Jury Instruction Committee made revisions to the trafficking instructions, a member proposed that the Committee not allocate the burden of persuasion of the affirmative defense to either party and that the issue be allowed to percolate in the lower courts before being decided by this Court. The motion to allow the trial judge to decide which party should bear the burden of persuasion did not pass because the vote to change the existing instruction was 6-6. The Committee sent a proposal to the Court that retained the burden of persuasion on the state, along with an explanation of the 6-6 vote, a minority report, and comments from prosecutors who objected to the Committee's proposal. See the report filed in SC10-2434.

The current members of the Standard Jury Instruction Committee discussed the fact that the Court had all of this information and were also aware of the *Smith v. United States* opinion. The Committee noted that the Court then voted 5-2 to leave the burden of persuasion on the state to disprove the affirmative defense in Florida State 893.101 under the beyond a reasonable doubt standard. In light of the Florida Supreme Court's recent 5-2 vote on this issue, the Committee voted 11-0 to not amend the Fla. Stat. 893.101 affirmative defense sections.

<u>Proposal 1 – Instruction 25.2</u>

The first proposed change was to the format of element #1. The Committee thought it was better to use its usual format by putting alternative elements in brackets on the same line instead of in a column.

Next, the italicized instruction immediately before element #3 explains that there is uncertainty about whether knowledge of presence is an element or whether lack of knowledge is an affirmative defense.

The Committee also added an element to cover instances where the jury has to find that the cannabis weighed more than 20 grams. The Committee also added a statutory definition of cannabis.

Many of the drug-related instructions include an explanation of the concept of possession. Because the Committee was reviewing all of the drug-related instructions, the Committee thought it was a good idea to make the explanation of the concept of possession clearer and more accurate. The following explanations

apply to many of the other proposals in this report.

Most important, *criminal* possession requires *both* knowledge of presence *and* control. The Committee wanted to make that clear throughout these instructions. Therefore, the Committee deleted portions of the instruction where possession is explained only as a concept involving control.

For the explanation of actual and constructive possession, the Committee added the requirement that the person be aware of the presence of the substance.

In the constructive possession section, the Committee deleted the part about concealment because one can be in constructive possession of a controlled substance without the substance being concealed.

The "mere proximity" paragraph has been moved so that the concepts of actual possession and constructive possession are explained one right after the other. The "mere proximity" paragraph has also been reworded so that the concept in the paragraph is explained more clearly.

Similarly, the explanation of constructive possession when a drug is in a place that the defendant did not control has been reworded for clarity.

In the "joint possession" paragraph, the concept of knowledge of presence has been added so that jurors do not equate possession with just control.

Next, the Committee thought that the instruction needed to be improved when jurors were instructed on inferences. The existing instruction reads: **If a person has exclusive possession of a controlled substance, knowledge of its presence may be inferred or assumed.** The problem with this sentence is that there is no instruction on the inference regarding the defendant's ability to control the substance.

Then, the next sentence reads: **If a person does not have exclusive possession of a controlled substance, knowledge of its presence may not be inferred or assumed.** The problem with this sentence is two-fold: 1) The sentence does not cover the idea that there is no inference for the defendant's ability to control the substance; and 2) the instruction does not cover the exception to the general rule in cases involving "joint possession, in plain view, in a common area, in the presence of the defendant."

Instead of the two bolded sentences above, the Committee thought it better to create a new "Inferences" section that thoroughly explains the law, with case law

support in italics. The new "Inferences" section is as follows:

Inferences.
Give if applicable. See McMillon v. State, 813 So. 2d 56 (Fla. 2002).
You are permitted to infer that a person who sells a controlled substance knows of its illicit nature.

Exclusive control. Henderson v. State, 88 So. 3d 1060 (Fla. 1st DCA 2012); Meme v. State, 72 So. 3d 254 (Fla. 4th DCA 2011).
If you find that (defendant)**:**

a. **had direct physical custody of the substance, [or]**
b. **was within ready reach of the substance and the substance was under [his] [her] control, [or]**
c. **had exclusive control of the place where the substance was located,**

you may infer that [he] [she] was aware of the presence of the substance and had the ability to control it.

If (defendant) **did not have exclusive control over the place where a substance was located, you may not infer [he] [[she] had knowledge of the presence of the substance or the ability to control it, in the absence of other incriminating evidence.**

Give if applicable. See Duncan v. State, 986 So. 2d 653 (Fla. 4th DCA 2008).
However, you may infer that (defendant) **knew of the presence of the substance and had the ability to control it if [he] [she] had joint control over the place where the substance was located, and the substance was located in a common area in plain view and in the presence of the defendant.**

Next, the Committee reworded the affirmative defense section to make the instruction read more clearly. Once again, the Committee added the requirement of knowledge of presence of the substance in the "permissive presumption" section.

Finally, the Committee amended the "reasonable doubt" section in order to make the instruction read more clearly.

In summary, the Committee's recommended changes are 1) changes that make the concept of possession easier to understand and 2) changes that make it clear that possession requires both control *and* knowledge of presence.

In the table of lesser-included offenses, Possession and Delivery are moved to Category One with the requirement that a greater form of Possession or Delivery has to be charged.

In the Comment section, the Committee provided a more detailed explanation for why knowledge of presence is an element for Possession with Intent but that it is unclear whether knowledge of presence is an element of the other crimes (sale, purchase, manufacture, delivery) or whether lack of knowledge is an affirmative defense. Also, the Committee provided a more detailed explanation of the lesser-included offenses for cases involving more than grams of cannabis or cases involving various amounts of synthetic cannabis.

The vote in favor of these changes was unanimous.

Proposal #2 – 25.3

The proposed changes to the instruction for Sale, Purchase, Delivery, or Possession in Excess of Ten Grams as similar to the changes proposed in Instruction 25.2. Specifically, the format for element #1 is changed, the italicized instruction for the uncertainty over the "knowledge of presence" issue is repeated, the Committee's new template to explain possession is inserted, the affirmative defense section is reworded for clarity, the Table of Lesser-Included offenses is updated, and the new Comment section mirrors the new Comment section in Instruction 25.2. The proposal was unanimously approved by the Committee.

Proposal #3 – 25.4

The proposed changes to the instruction covering the crime of Delivery of a Controlled Substance to or Use of a Minor (Fla. Stat. 893.13(4)) are similar to the proposed changes already discussed. Specifically, the uncertainty about whether knowledge of presence is an element is added as an italicized instruction both before element #4 and in the Comment section; the affirmative defense section is reworded for clarity; and the Table of Lesser Included offenses is updated. The proposal was unanimously approved by the Committee.

Proposal #4 – 25.5

This instruction covers the crime of Bringing a Controlled Substance into the State (Fla. Stat. 893.13(5)). For this crime, the committee did not find any case law that supported the requirement that knowledge of presence be an element. Thus, the Committee added an italicized note before element #3. The Committee also deleted the explanation of possession because the word "possession" is not part of

the statute for this crime. The affirmative defense is reworded just like in the other drug instructions, the Table of Lesser Included Offenses is updated, the Comment section includes the Committee's standard explanation for the uncertainty about knowledge of presence. The proposal was unanimously approved by the Committee.

Proposal #5 – 25.6

This instruction covers the crime of Sale, Manufacture, Delivery, or Possession with Intent to Sell, Manufacture, or Deliver a Controlled Substance in Specified Locations. The formats for elements #1 and #2 were changed but the meaning of those elements was not altered by the changes, except for the addition of an assisted living facility as a possible specified location (statute for that location is 893.13(1)(h)). The other changes that are not related to a specified location mirror the amendments made in the other drug instructions. As for specified locations, the Committee added statutory cites for the definitions for each specified location in italics and a statutory definition of "assisted living facility." The Table of Lesser Included offenses was updated to reflect that the lesser offenses depend on what was charged. The vote in favor of these changes was unanimous.

Proposal #6 - 25.7

This instruction covers the crime of Possession of a Controlled Substance (Fla. Stat. 893.13(6)). For the elements, the Committee thought it would be clearer to separate the elements into: 1) knowledge of presence; 2) control or ownership; and 3) substance was x.

The Committee also updated the instruction for recent legislation which made possession of certain substances a felony if the weight was more than 3 grams.

Two new possible element #4s were added to cover Fla. Stats. 893.13(6)(b) and (6)(c) which pertain to jury findings that must be made as to weight. Then, a statutory definition of "cannabis" is provided.

The Committee's new template to explain the concept of possession was used here. The explanation for these changes are in Proposal #1 above. The Table of Lesser Included Offenses was updated to reflect possible misdemeanor possession crimes. The Committee added a section in the Comment section to reflect the good faith defense in Fla. Stat. 893.21. The Committee also added a

reference to the case law covering superficial possession. The vote in favor of these changes was unanimous.

Proposal #6 – 25.8

This instruction covers the crime of Obtaining a Controlled Substance by Fraud (Fla. Stat. 893.13(7)(a)9). For this proposal, the Committee changed the formats in elements #1 and #3 but these amendments did not change the meaning of the elements. The affirmative defense section was reworded for clarity and mirrors the affirmative defense sections in the other drug-related instructions. The vote in favor of these changes was unanimous.

Proposals #7-#12 – 25.9-25.13

These instructions cover the trafficking offenses (Fla. Stat. 893.135.) Note: The trafficking statutes contain the word “knowingly” so the elements in these instructions contain the word “knowingly.”

For element #1, the various ways to traffic in drugs were put on one line in brackets instead of in a column. The existing instruction covers the concept of possession, therefore the Committee copied its new format to explain possession. The explanations for the changes are in Proposal #1 above.

Because there are so many ways to traffic (sale, purchase, manufacture, deliver, bring into state, possession), there are a variety of lesser-included offenses that will depend on what was charged. Instead of creating a confusing table, the Committee thought it best to delete the table and instead put in an explanatory note. The vote in favor of these changes was unanimous.

Proposal #13- 25.14

This instruction covers the crime of Use or Possession with Intent to Use Drug Paraphernalia (Fla. Stat. 893.147(1)). For this instruction, the Committee reworked the elements to require: 1) knowledge of presence of the paraphernalia and 2) use or possession with intent to use the drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance or inject, ingest, inhale or introduce a controlled substance. The Committee believed those elements more closely track the statute.

The Committee then used its new format to explain the concept of possession, although the term “drug paraphernalia” was substituted for the word “substance.” The explanations for the changes to the concept of possession are in Proposal #1 above.

The Committee did not think it was necessary to include a section on the affirmative defense of knowledge of the illicit nature of a controlled substance because this instruction covers the possession or use of drug paraphernalia. Thus, the Committee recommends that this section be deleted. The vote in favor of these changes was unanimous.

Proposal #14 – 25.15

This instruction covers the crime of Delivery or Possession with Intent to Deliver, or Manufacture with Intent to Deliver Drug Paraphernalia (Fla. Stat. 893.147(2)). Despite a few changes, the meaning of the elements was not changed. The Committee’s new format for the explanation of possession was inserted. The Committee proposes to delete the definitions of “deliver” and “manufacture” because those definitions are designed for a controlled substance instruction, not a drug paraphernalia instruction. Similarly, the affirmative defense section that explains Fla. Stat. 893.101 is not pertinent for a drug paraphernalia instruction. The Table of Lesser Included offenses was updated for the crime of simple Possession of Drug Paraphernalia as a Category One offense. The vote in favor of these changes was unanimous.

Proposal #15 – 25.16

This instruction covers the crime of Delivery of Drug Paraphernalia to a Minor (Fla. Stat. 893.147(3)(a)). For this instruction, the Committee substituted “a controlled substance” for “(specific substance alleged)” because a specific substance may not be alleged. The Committee proposes to delete the definition of “deliver” because that definition pertains to a controlled substance instruction, not a drug paraphernalia instruction. Similarly, the affirmative defense section that explains Fla. Stat. 893.101 is not pertinent for a drug paraphernalia instruction. The vote in favor of these changes was unanimous.

Proposal #16 - Instruction 25.17

This instruction covers the crime in Fla. Stat. 951.22 (Contraband in a County Detention Facility). The first major proposed change is to add an element that requires the state to prove that the defendant knew of the presence of the contraband item. The Committee made this recommendation even though Fla. Stat. 951.22 does not contain the word “knowingly” because of *Williams v. State*, 413 So. 2d 1263 (Fla. 1st DCA 1982).

The *Williams* defendant was charged with Introduction of Contraband into a Prison. The statute for that crime (Fla. Stat. 944.47) did not have the word “knowingly” either. Nonetheless, the First District held that the defendant’s jury should have been instructed that the state must prove the defendant had knowledge of the presence of the contraband item in order to be found guilty of Introduction of Contraband into a Prison. The Committee unanimously voted that the two statutes - Fla. Stat. 951.22 and Fla. Stat. 944.47 - were sufficiently analogous to add the element of knowledge of presence into this instruction.

The second major change was to delete the existing element that the defendant did not introduce/possess the contraband as a result of permission from the sheriff or the person in charge of the facility and that the permission was obtained through regular channels. The Committee unanimously voted to convert that element into an affirmative defense based on *Wright v. State*, 442 So. 2d 1058 (Fla. 1st DCA 1983).

In *Wright*, the First District interpreted the “permission exception” in Fla. Stat. 944.47 as an affirmative defense rather than an element. Once again, the Committee thought that the two statutes were sufficiently analogous to treat the “permission exception’ in Fla. Stat. 951.22 as an affirmative defense rather than as an element. By doing so, the Committee made the second element of the crime pertain to the acts of introducing, possessing, giving, receiving, taking, or attempting to take or send the contraband item.

The Committee then tracked the statute and listed all of the possible contraband items as the third element of the crime.

Statutory definitions are provided for “county detention facility,” county residential probation center,” and “municipal detention facility.” The Committee retained the existing definition of “introduce.” The Committee added a section that explains that it is unlawful to give or receive a contraband item to or from an inmate even if the inmate is outside of the facility. That new language is supported from the plain language of the statute. The Committee then added definitions of the

contraband items along with support (either case law or a statute) for those definitions in italics.

One of the ways to violate the statute is to possess the contraband item upon the grounds of the facility. Accordingly, the Committee inserted its new format to explain the concept of possession. (See explanation above in Instruction 25.2.) The Committee also tracked its new format for the explanation of the affirmative defense in Fla. Stat. 893.101 (lack of knowledge of illicit nature).

For the affirmative defense of permission from the person in charge via regular channels, the First District has determined that once a defendant satisfies his burden of production, the burden of persuasion is on the state to disprove the defense beyond a reasonable doubt for Fla. Stat. 944.47. See *Wright v. State*, 442 So. 2d 1058 (Fla. 1st DCA 1983). As mentioned above, the Committee thought Fla. Stat. 944.47 was analogous to Fla. Stat. 951.22 and so the Committee allocated the burden of persuasion to the state for the affirmative defense in this statute.

All changes to this instruction passed the Committee unanimously.

Proposal #17 - Instruction 25.18

This proposal covers the crime of Contraband in a Juvenile Detention Facility of Commitment Program under Fla. Stat. 985.711.

A review of this statute shows that it comes close to the format used by the legislature in Fla. Stat. 944.47 (Contraband in Prison). Thus the Committee voted to use the same logic and the same format that it had used for the instructions for Fla. Stats. 944.47 and 951.22. Specifically, knowledge of presence was added as an element because of *Williams v. State*, 413 So. 2d 1263 (Fla. 1st DCA 1982). Element #2 thus became the act of possessing, introducing, taking or sending or attempting to take or send, transmitting or attempting to transmit, and causing or attempting to cause an item to be transmitted or received. The third element lays out all the possible contraband items. The Committee then provided statutory definitions for "juvenile detention facility" and "juvenile commitment program." The definition of "introduce" was retained from the existing instruction. The various definitions are provided along with support for those definitions from either statutes or case law. The Committee's new format for the concept of possession is inserted as is the Committee's updated format to explain the affirmative defense for Fla. Stat. 893.101 (lack of knowledge of illicit nature).

Once again, the Committee thought that this statute was sufficiently

analogous to Fla. Stat. 944.47 in order to make the “permission exception” in this statute an affirmative defense and to allocate the burden of persuasion of the defense to the state under the beyond a reasonable doubt standard because of *Wright v. State*, 442 So. 2d 1058 (Fla. 1st DCA 1983).

All changes were passed unanimous.

Proposal #18 - Instruction 25.20

This instruction covers the crime of Possession of Contraband in a Prison under Fla. Stat. 944.47(1)(c). For this instruction, the Committee thought it would be cleaner to make the first element that the defendant possessed certain contraband and then to explain later that possession requires both knowledge of presence and control. All of the various contraband items are listed in element #1.

The Committee then provided definitions for the contraband items by using the same format and with the same statutory or case law support that had been used in Instructions 25.17 and 25.18. The Committee also copied its new formats to explain the concept of possession and the affirmative defense in Fla. Stat. 893.101 (lack of knowledge of illicit nature). The Committee also followed the format it had used in Instructions 25.17 and 25.18 to explain the affirmative defense of “permission from person in charge via regular channels.” The Committee created a table of lesser-included offenses which makes Possession of a Controlled Substance a necessary lesser-included offense if the contraband item was a controlled substance. Finally, some firearms/weapons charges were added in the Category 2 boxes.

All changes were approved by the Committee unanimously.

Proposal #19 - Instruction 25.21

The Committee thought it would be easier to have one instruction for Introduction or Removal of Contraband in a Prison and one instruction for Possession of Contraband in a Prison. Accordingly, Instruction 25.20 covers Fla. Stat. 944.47(1)(c) and Instruction #25.21 covers Fla. Stat. 944.47(1)(a).

The first element of this new instruction covers the act of introducing or taking or attempting to take or send the contraband item. The second element covers the requirement of knowledge of presence which is required under *Williams v. State*, 413 So. 2d 1263 (Fla. 1st DCA 1982). The third element lists all the various contraband items. Finally, there is a fourth element which is required if the contraband item is either a communication, currency or coin, or food or clothing.

The Committee then followed its usual format by defining various terms and by using statutory or case law support for each definition, which is in italics.

For this instruction, the explanation of possession is not necessary because if Possession is charged, the trial judge would read Instruction 25.20. However, the explanation of the affirmative defense in Fla. Stat. 893.101 is necessary and the Committee followed its usual format to explain that concept. Similarly, the Committee used the format it had used in Instructions, 25.17, 25.18, and 25.20, to allocate the burden of persuasion for the affirmative defense of "permission through regular channels" on the state beyond a reasonable doubt because of *Wright v. State*, 442 So. 2d 1058 (Fla. 1st DCA 1983). Once again, the Committee created a table of lesser-included offenses which has Possession of a Controlled Substance as a necessary-lesser if a controlled substance is alleged to be the contraband item and which also has various weapon/firearm-related crimes as Category 2 offenses.The proposal passed the Committee unanimously.

WHEREFORE, the Committee requests this Court to promulgate these proposals as standard instructions. There are two considerations that the Committee highlights**: First, none of these proposals have been published. Second, the Committee was not willing to make the legal decision as to whether knowledge of presence is an element - or whether lack of knowledge of presence is an affirmative defense** - for drug crimes involving sale, purchase, delivery, manufacture, and bringing into the state.

Respectfully submitted this 16th day of July, 2013.

s/ Judge Joseph A, Bulone
The Honorable Joseph A. Bulone
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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).

s/ Judge Joseph A. Bulone
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