

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS CRIMINAL CASES
REPORT 2015-03

CASE NO.: SC15-

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.

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	<u>Instruction #</u>	<u>Topic</u>
Proposal 1	25.2	Sale, Purchase, Manufacture, Delivery, or Possession with Intent to Sell, Purchase, Manufacture, or Deliver a Controlled Substance
Proposal 2	25.3	Sale, Purchase, Delivery, or Possession In Excess of Ten Grams of a Controlled Substance
Proposal 3	25.4	Delivery of a Controlled Substance to or Use of Minor
Proposal 4	25.5	Bringing a Controlled Substance into State
Proposal 5	25.6	Sell, Manufacture, Deliver, or Possession with Intent to Sell, Manufacture, or Deliver a Controlled Substance in Specified Locations
Proposal 6	25.7	Possession of a Controlled Substance
Proposal 7	25.8	Obtaining a Controlled Substance By Fraud
Proposal 8	25.9	Trafficking in Cannabis
Proposal 9	25.10	Trafficking in Cocaine
Proposal 10	25.11	Trafficking in [Morphine] [Opium] [Hydromorphone] [Heroin] [(Specified Substance Alleged)]
Proposal 11	25.11(a)	Trafficking in Hydrocodone
Proposal 12	25.11(b)	Trafficking in Oxycodone
Proposal 13	25.12	Trafficking in Phencyclidine

Proposal 14	25.13	Trafficking in Methaqualone
Proposal 15	25.13(a)	Trafficking in [Amphetamine] [Methamphetamine]
Proposal 16	25.13(b)	Trafficking in Flunitrazepam
Proposal 17	25.13(c)	Trafficking in [GHB] [GBL] [1,4- Butanediol]
Proposal 18	25.13(d)	Trafficking in Phenethylamines (includes MDMA)
Proposal 19	25.13(e)	Trafficking in LSD
Proposal 20	25.14	Use or Possession with Intent to Use Drug Paraphernalia
Proposal 21	25.15	Delivery, Possession with Intent to Deliver, or Manufacture with Intent to Deliver Drug Paraphernalia
Proposal 22	25.16	Delivery of Drug Paraphernalia to a Minor
Proposal 23	25.17	Contraband in County Detention Facility
Proposal 24	25.18	Contraband in Juvenile [Detention Facility] [Commitment Program]
Proposal 25	25.20	Possession of Contraband [in] [upon The Grounds of] a State Correctional Facility
Proposal 26	25.21	[Introduction] [Removal] of Contraband [into] [from] a 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 proposals were published in *The Florida Bar News* on March 15, 2015. One comment was received from Assistant Public Defender Richard Summa. The comment is in Appendix B.

Relevant statutes are in Appendix C.

Some standard constructive possession instructions from other jurisdictions are in Appendix D.

A minority report is in Appendix E.

Initial Remarks

The Committee revisited the controlled substances instructions for three reasons: 1) The 2014 legislature amended some of the drug statutes; 2) the Committee believed the Court wanted “knowledge of presence” to be an element of the drug-related crimes; and 3) the Committee concluded the current explanation of constructive possession was deficient.

More specifically, the 2014 legislature: (a) changed the definition of “manufacture” in s. 893.02, Fla. Stat.; (b) changed the statutory numbering for both “manufacture” and “deliver” in s. 893.02, Fla. Stat.; (c) created a new definition of “possession” to include temporary possession for the purpose of verification or testing, irrespective of dominion or control in s. 893.02, Fla. Stat.; (d) created a lawful use of medical marijuana; and (e) revised some of the drug trafficking statutes.

Additionally, the Court wrote the following in *In re: Standard Jury Instructions in Criminal Cases — Report No. 2013–05*, 153 So. 3d 192, 194-195 (Fla. 2014): “In *Adkins*, in the process of finding the statute constitutional, a majority of the Court found that ‘knowledge of the presence’ continued to be an element of drug-related offenses.” However, not all of the instructions that were promulgated in that same opinion contained “knowledge of presence” as an element. The Committee voted unanimously that the Court intended to make “knowledge of presence” an element in the drug-related instructions.

Third, the Committee thought the existing explanation of constructive possession was deficient. The current instruction states that constructive possession means the person is aware of the presence of the substance, the substance is in a place over which the person has control, and the person has the ability to control the substance. The Committee thought this explanation was deficient because 1) a person can be in constructive possession of drugs that are in a place the person does not control; and 2) the explanation does not give jurors adequate guidance regarding the common situation that occurs when drugs are found in a place occupied by two people. Furthermore, the Committee thought that although lawyers would probably understand the phrase “ability to control” as meaning the “power, right, authority to control,” the Committee feared that jurors would interpret “ability to control” as meaning “the physical capability to reach out and touch.”

The Committee thought of a hypothetical where two people, Felix and Oscar, share an apartment. Felix could be a health nut and therefore have nothing to do with drugs. In fact, Felix could refuse to touch any drugs. Oscar, on the other hand, could be a drug user. Assuming Oscar stored his drugs in the jointly-used

medicine cabinet, the Committee wondered whether Felix would be in possession of Oscar's drugs.

If the police searched the apartment and found Oscar's drugs, the Committee concluded that the case against Felix should survive a judgment of acquittal. But the Committee did not think Felix should be found guilty of Possession of a Controlled Substance, even though Felix knew the drugs were in his apartment and even though Felix used the medicine cabinet, assuming the jurors believed Felix or at least had a reasonable doubt about whether Felix was telling the truth. However, even if Felix were believed by the jurors, the Committee thought jurors would find Felix guilty given the existing instruction: "Constructive possession means the person is aware of the presence of the substance, the substance is in a place over which the person has control, and the person has the ability to control the substance."

The Committee was also concerned with the part of the existing instruction that states: "In order to establish defendant's constructive possession of a substance that was in a place he/she did not control, the State must prove defendant 1) knew that the substance was within his/her presence..." The Committee did not think the defendant's proximity to a controlled substance was necessary in order for the state to prove constructive possession of drugs in a place that the defendant did not control. As an example, a Miami drug trafficker caught on tape saying to an accomplice: "Take my cocaine from your house in Orlando and move it to your brother's house in Orlando" should not be acquitted because the drug trafficker was in Miami while his cocaine was in Orlando.

In order to remedy these deficiencies, the Committee voted 9-2 to provide a better explanation for jurors to understand constructive possession. The new explanation was derived, in part, from standard jury instructions in other states and federal jurisdictions. (See Appendix D.) The majority of the Committee did not think it was changing Florida law with the following proposal: "Constructive possession means the person is not in actual possession but is aware of the presence of the substance and has the power and intention to exercise control over the substance, either directly or through another person. Intention is an operation of the mind and therefore is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case." Then, the phrase "power and intention to control" is used in (a) the "mere proximity is not sufficient" paragraph and (b) in the "Inferences" section.

One dissenting member filed a minority report (see Appendix E), which was joined by a second member. Their votes are based on the idea that the Committee is altering Florida law by substituting "power and intention to exercise control over the substance" for "ability to control the substance." More specifically, the

dissenters think 1) the word “ability” is not vague and 2) the addition of “*intention to exercise control*” is a substantive change in Florida law.

The other Committee members agreed that the phrase “ability to control” is used in Florida appellate decisions. But the majority of the Committee still disagreed with the two dissenters, particularly because jury instructions are written for the average citizen whereas appellate opinions are not.

Accordingly, the majority of the Committee thought that jurors could easily conclude that “ability to control” means “able to reach out and touch.” Additionally, the Committee did not think that the law of constructive possession was different in Florida than in all the other jurisdictions that use the phrase “power and intention to exercise control” in their standard jury instructions (see Appendix D). Third and most important, the majority of the Committee started from the premise that Florida case law does not hold that control of a place that has drugs in it makes one guilty of possession of those drugs. The Committee relies on a case such as *State v. Reese*, 774 So. 2d 948 (Fla. 5th DCA 2001), which states that control over contraband may be inferred from the ability to exercise control over the premises where the contraband is found. In other words, exercising control of the premises makes for a strong *inference* that the person controls any drugs that are in that premises. But it is the substance itself that needs to be controlled, not just the place. Therefore, even though Florida appellate decisions use the phrase “ability to control the substance,” the majority of the Committee thought this phrase could lead jurors astray, particularly in cases involving joint occupancy, because it suggests that controlling the premises equates to possessing anything in that premises. The mere substitution of “*power to control the substance*” for “*ability to control the substance*” does not solve the problem. The Committee’s belief is that the phrase that is used in many other jurisdictions – “power and intention to exercise control over the substance” – does not alter Florida law but instead makes it clearer that it is the substance itself that must be controlled in order for a person to be in possession of a controlled substance. The majority of the Committee also believes there would be less juror confusion that “ability to control” means “able to reach out and touch.”

These three changes: 1) 2014 statutory amendments; 2) “knowledge of presence” as an element in the appropriate drug-related instructions; and 3) an improved explanation for constructive possession, are consistent throughout the proposals in this report.

Proposal 1 – Instruction 25.2

In the published proposal, the first change to the existing instruction was to add the words “A CONTROLLED SUBSTANCE to the title. The second change was to fix the number of elements at three, which would make “knowledge of presence” an element for all crimes covered by this instruction instead of just the crimes of possession with intent to sell, purchase, manufacture, or deliver. The third change was to treat the crime of Delivery of More Than 20 Grams of Cannabis as having three elements with a separate jury finding as to weight. The fourth change was to add an italicized note that references the Comment section for cases involving medical marijuana. The fifth change was to reference the new statutory number for the definition of “manufacture” (s. 893.02(15)(a), Fla. Stat.), and to provide jurors with the updated definition of “manufacture.” The sixth change was to update the italicized statutory number for the definition of “delivery” (s. 893.02(6), Fla. Stat.). The seventh change was a change from “There are two ways to exercise control...” to “There are two types of possession...” The eighth change was to use the new explanation for constructive possession that was discussed above. The ninth change was to add as a “*Give if applicable*” the new definition of “possession” in s. 893.02(19), Fla. Stat. The tenth change was to relocate the *McMillon v. State* inference about knowledge of illicit nature into the “Affirmative Defense – Lack of Knowledge of Illicit Nature” section. The eleventh change was to substitute “power and intention to control” for “ability to control” in the inferences section for the reasons stated above. The twelfth change was to expand the italicized note above the “Affirmative Defense – Lack of Knowledge of Illicit Nature” section to make it clear that this section should be given if there is evidence that the defendant did not know of the presence of the substance or did know of the presence but did not know of its illicit nature (which is supported by *Garcia v. State*, 901 So. 2d 788 (Fla. 2005)). The thirteenth change (after the relocation of the *McMillon* inference) was to update the Comment section to include synthetic drugs in s. 893.03(1)(c)166–173, which is in the 2014 legislation (see Appendix C). Other than some stylistic changes, the only other substantive change that was published was to add to the Comment section that explains how to handle cases where the defendant claims he or she was involved with medical marijuana.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015.

One comment was received from Assistant Public Defender Richard Summa. (See Appendix B.) Mr. Summa made three suggestions: 1) For the affirmative defense of lack of knowledge of the illicit nature in s. 893.101, Fla.

Stat., jurors should be told that the State is required to prove the defendant knew the nature of the substance; 2) Mr. Summa suggested that the language explaining the permissive presumption in s. 893.101, Fla. Stat., should be revised so that jurors would be instructed they do not have to infer that the defendant knew the exact nature of the substance just because he or she possessed the substance; 3) Mr. Summa suggested that jurors be told that the permissive presumption (in s. 893.101, Fla. Stat.) applies upon a finding that the defendant possessed the substance, rather than explaining possession as a) knowledge of presence and b) the exercise of control over the substance.

The Committee discussed Mr. Summa's comments at length. The Committee recognized that s. 893.101(2), Fla. Stat., states that "Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter." But the Committee concluded that ambiguity exists regarding what exactly "lack of knowledge of the illicit nature of a controlled substance" means. In other words, the Committee was unsure that when a defendant claims lack of knowledge of the illicit nature, whether the state is then required to prove the defendant knew the substance was cocaine, cannabis, etc. or whether it requires the state to prove the defendant knew the substance was a controlled substance. In the absence of clear direction from case law *after* s. 893.101, Fla. Stat., became law, the Committee unanimously decided to leave this part of the existing standard instruction as is.

Note: After the Committee vote, the United States Supreme Court issued *McFadden v. U.S.*, 2015 WL 2473377 (U.S.). In *McFadden*, the court stated that a federal statute which makes it unlawful to knowingly manufacture, distribute, or possess with intent to distribute controlled substances requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules. As stated above, it is unclear whether this Court will rule the same way when faced with the correct interpretation of s. 893.101, Fla. Stat.

The Committee partially agreed with Mr. Summa on his second point. Specifically, the Committee did not think it necessary for jurors to be informed that they did not have to infer knowledge of illicit nature upon a finding of possession. The Committee thought that idea was covered by use of the word "permitted" and could also be addressed by the lawyers in their closing arguments. However, the Committee did vote 7-1 to change "You are permitted to presume...." to "You are permitted to infer..." The majority of the Committee thought the word "presume" was too strong and also the use of the word "infer" would make the instruction consistent with the *McMillon*-inference, which is in the following paragraph.

Finally, the Committee unanimously did not agree with Mr. Summa's suggestion to state that the jurors are permitted to infer knowledge of illicit nature if they find the defendant possessed the substance. While it is true that s. 893.101(3), Fla. Stat., uses the term "possession," the Committee thought it best for jurors to be reminded that possession requires both 1) knowledge of presence and 2) control or ownership over the substance, throughout the instruction.

Proposal #2 – 25.3

The proposed changes to the instruction for Sale, Purchase, Delivery, or Possession in Excess of Ten Grams of a Controlled Substance are similar to the changes proposed for Instruction 25.2. Specifically, the words "OF A CONTROLLED SUBSTANCE" were added to the title. The number of elements was fixed at three, which would make knowledge of presence an element for all crimes covered by this instruction (instead of just possession). The statutory cite for the definition of "deliver" was updated. The new format for the explanation of possession is used along with a new "*Give if applicable*" for the definition of "possession" in s. 893.02(19), Fla. Stat. The *McMillion* inference was re-located. The Inference section was revised so that "power and intention to control" replaced "ability to control." The italicized note for the Affirmative Defense section was copied from Instruction 25.2. Finally, the Comment section was updated.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa. As discussed above, the Committee revised "You are permitted to presume..." to "You are permitted to infer..." in the affirmative defense section.

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 number of elements was set at four. The statutory cite for the definition of "deliver" was updated. The italicized note immediately above the Affirmative Defense section was expanded. Finally, the Comment section was updated.

All changes passed the Committee unanimously and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa. As discussed above, the Committee revised "You are permitted to presume..." to "You are permitted to infer..." in the affirmative defense section.

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 number of elements was fixed at three. The italicized note immediately above the Affirmative Defense section was expanded. Finally, the Comment section gives guidance regarding how to handle cases where the defendant claims he or she was involved with medical marijuana.

All changes passed the Committee unanimously and were published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa. As discussed above, the Committee revised “You are permitted to presume...” to “You are permitted to infer...” in the affirmative defense section.

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 number of elements was fixed at four. The definitions for “manufacture” and “deliver” were updated. The new format for the explanation of possession was used. A “*Give if applicable*” section was created for the new definition of “possession” in s. 893.02(19), Fla. Stat. The *McMillion* inference was re-located. “Power and intention to control” replaced “ability to control” in the Inferences section. The italicized note immediately above the Affirmative Defense section was expanded. Finally, the Comment section gives guidance regarding how to handle cases where the defendant claims he or she was involved with medical marijuana.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa. As discussed above, the Committee revised “You are permitted to presume...” to “You are permitted to infer...” in the affirmative defense section.

Proposal #6 - 25.7

This instruction covers the crime of Possession of a Controlled Substance (Fla. Stat. 893.13(6)). The Committee updated this instruction for 2014 legislation which made possession of certain synthetic drugs a felony if the weight was more than 3 grams. Also, a new italicized note and a new paragraph in the Comment section gives guidance in cases where a defendant claims he was possessing medical marijuana. The Committee’s new format for the explanation of possession was used and the new definition of “possession” in s. 893.012(19), Fla. Stat. was

added. Just like in the other drug instructions, “power and intention to control” replaced “ability to control;” the italicized note for the affirmative defense section was expanded, and the Comment section was updated.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa. As discussed above, the Committee revised “You are permitted to presume...” to “You are permitted to infer...” in the affirmative defense section.

Proposal #7 – 25.8

This instruction covers the crime of Obtaining a Controlled Substance by Fraud (Fla. Stat. 893.13(7)(a)9). Only minor changes were needed for this proposal because the Committee did not think it needed to add “knowledge of presence” as an element in light of the fact that jurors have to find that the defendant acquired or attempted to acquire the drugs by misrepresentation, fraud, forgery, deception, or subterfuge. Accordingly, the only proposed changes are an expanded italicized note for the Affirmative defense section, a new paragraph regarding medical marijuana in the Comment section, and an updated Comment section.

All changes passed the Committee unanimously and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa. As discussed above, the Committee revised “You are permitted to presume...” to “You are permitted to infer...” in the affirmative defense section.

Note about Drug Traffickings

Proposals #8–#18 cover all of the drug trafficking crimes in Chapter 893. Because the trafficking statutes and trafficking jury instructions are so similar, the undersigned thought it best to discuss the common changes made in all of the trafficking proposals in this initial note and then specific changes for each individual trafficking proposal will be discussed below.

Since trafficking can be committed by manufacturing a large amount of drugs, the new statutory definition of “manufacture” has been inserted in all of the trafficking proposals. Similarly, the statutory cites for “deliver” have been updated for the 2014 legislation. Since trafficking can also be committed by possessing a large quantity of drugs, the Committee’s new format for the explanation of possession was inserted throughout all of these trafficking instructions. The new format includes an updated explanation of constructive possession, the use of “power and intention” instead of “ability,” and the new definition of “possession in

s. 893.02(19), Fla. Stat. Throughout all of these trafficking instructions, the *McMillon v. State* inference for knowledge of illicit nature was re-located into the affirmative defense section that covers lack of knowledge of the illicit nature. Also, the italicized note immediately above that affirmative defense section was expanded to inform judges that section should be read if there is evidence that the defendant did not know of the presence of the substance or did know of the presence, but claims he or she did not know of the illicit nature. Finally, due to Mr. Summa's comment, the Committee changed "You are permitted to presume..." to "You are permitted to infer..." in the affirmative defense section.

Proposal #8 – 25.9

For Trafficking in Cannabis, the only changes specific to this instruction were to add an italicized note referring medical marijuana immediately above the definition of "Cannabis" and the definition of cannabis in s. 893.02(3), Fla. Stat., was expanded to include "the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. Finally, there is guidance given in the Comment section about how to handle cases where a defendant claims he or she was involved with medical marijuana.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #9- 25.10

For the Trafficking in Cocaine, there were no changes specific to this trafficking instruction; all amendments involved the common changes discussed in the initial note above.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #10 – 25.11

In 2014, the legislature created separate statutory sections for Trafficking in Hydrocodone and Trafficking in Oxycodone. Accordingly, mention of those two drugs was deleted from Instruction 25.11. The only other changes specific to this instruction were technical, such as adding at the top of the instruction a cite to s. 893.135(1)(c)4, Fla. Stat., for trafficking in more than 30 kilograms, and correcting the spelling of heroin.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #11 – 25.11(a)

In 2014, the legislature created a separate statutory section for Trafficking in Hydrocodone in s. 893.135(1)(c)2, Fla. Stat. The new statute has a lower threshold of 14 grams but less than 28 grams of hydrocodone. A more severe minimum mandatory sentence takes place at a level of 28 grams but less than 50 grams; at a level of 50 grams but less than 200 grams; and at a level of 200 grams but less than 30 kilograms. The highest form has a minimum of 30 kilograms or more of hydrocodone.

Accordingly, the Committee created a new instruction numbered 25.11(a). The proposal mimics all of the other trafficking instructions, including all the updates discussed above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #12 – 25.11(b)

In 2014, the legislature created a separate statutory section for Trafficking in Oxycodone in s. 893.135(1)(c)3, Fla. Stat. The new statute has a minimum threshold of 7 grams but less than 14 grams of oxycodone. A more severe minimum mandatory sentence takes place at a level of 14 grams but less than 25 grams; at a level of 25 grams but less than 100 grams; and at a level of 100 grams but less than 30 kilograms. The highest form has a minimum of 30 kilograms or more of oxycodone.

Accordingly, the Committee created a new instruction numbered 25.11(b). The proposal mimics all of the other trafficking instructions, including all the updates discussed above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #13 – 25.12

For Trafficking in Phencyclidine, there were no changes specific to this trafficking instruction; all amendments involved the common changes discussed in the initial note above.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #14 – 25.13

For Trafficking in Methaqualone, there were no changes needed specific to this trafficking instruction; all amendments involved the common changes discussed in the initial note above.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #15 – 25.13(a)

The Committee created a new trafficking instruction to cover Trafficking in Amphetamines or Methamphetamine or a mixture of certain chemicals used in the manufacture of Amphetamines or Methamphetamine. (See s. 893.135(1)(f), Fla. Stat.) That statute has a minimum threshold of 14 grams but less than 28 grams. A more severe minimum mandatory sentence takes place at a level of 28 grams but less than 200 grams. The highest form has a minimum of 200 grams or more.

Accordingly, the Committee created a new instruction numbered 25.13(a) to cover this crime. The proposal mimics all of the other trafficking instructions, including all the updates in the initial note above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #16 – 25.13(b)

The Committee created a new trafficking instruction to cover Trafficking in Flunitrazepam. (See s. 893.135(1)(g), Fla. Stat.) That statute has a minimum threshold of 4 grams but less than 14 grams. A more severe minimum mandatory sentence takes place at a level of 14 grams but less than 28 grams. The next highest

minimum sentence has a minimum of 28 grams but less than 30 kilograms. The highest form is for 30 kilograms or more.

Accordingly, the Committee created a new instruction numbered 25.13(b) to cover this crime. The proposal mimics all of the other trafficking instructions, including all the updates in the initial note above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #17 – 25.13(c)

The Committee created a new trafficking instruction to cover Trafficking in GHB, GBL, or 1,4—Butanediol or a mixture containing those substances. (See s. 893.135(1)(h), 893.135(1)(i), and 893.135(1)(j), Fla. Stat.) Those statutes have a minimum threshold of 1 kilogram but less than 5 kilograms. A more severe minimum mandatory sentence takes place at a level of 5 kilograms but less than 10 kilograms. The highest form has a minimum of 10 kilograms.

Accordingly, the Committee created a new instruction numbered 25.13(c) to cover these crimes. The proposal mimics all of the other trafficking instructions, including all the updates in the initial note above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #18 – 25.13(d)

The Committee created a new trafficking instruction to cover a host of chemicals covered under the name Trafficking in Phenethylamines (See s. 893.135(1)(k), Fla. Stat.) That statute has a minimum threshold of 10 grams but less than 200 grams. A more severe minimum mandatory sentence takes place at a level of 200 grams but less than 400 grams. The highest minimum sentence for simple trafficking (no death) has a minimum of 400 grams.

Accordingly, the Committee created a new instruction numbered 25.13(d) to cover these crimes. The proposal mimics all of the other trafficking instructions, including all the updates in the initial note above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #19 – 25.13(e)

The Committee created a new trafficking instruction to cover Trafficking in LSD. (See s. 893.135(1)(l), Fla. Stat.) That statute has a minimum threshold of 1 gram but less than 5 grams. A more severe minimum mandatory sentence takes place at a level of 5 grams but less than 7 grams. The highest minimum sentence for simple trafficking (no death) has a minimum of 7 grams.

Accordingly, the Committee created a new instruction numbered 25.13(e) to cover this crimes. The proposal mimics all of the other trafficking instructions, including all the updates in the initial note above, but has the appropriate weights in the enhanced penalty section.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #20 – 25.14

This instruction covers the crime of Use or Possession with Intent to Use Drug Paraphernalia. For this proposal, the Committee inserted its new format for the explanation of possession (including the revised explanation of constructive possession and the replacement of “ability to control” with “power and intention to control.” The only other changes are in the s. 893.146, Fla. Stat., section where the Committee replaced the words “this act” with “the drug laws” because jurors would not understand what “this act” refers to. Also, for number 11 within that section, the Committee deleted the words “Direct or circumstantial” because the Committee thought they were unnecessary.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015. No comments were received (the comment from Mr. Summa is not relevant to this instruction).

Proposal #21 – 25.15

This instruction covers the crime of Delivery, Possession with Intent to Deliver, or Manufacture with the Intent to Deliver Drug Paraphernalia. For this proposal, the Committee inserted its new format for the explanation of possession (including the revised explanation of constructive possession and the replacement

of “ability to control” with “power and intention to control.” The only other changes are in the s. 893.146, Fla. Stat., section where the Committee replaced the words “this act” with “the drug laws” because jurors would not understand what “this act” refers to. Also, for number 11 within that section, the Committee deleted the words “Direct or circumstantial” because the Committee thought those words were unnecessary.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received (the comment from Mr. Summa was not relevant to this instruction).

Proposal #22 – 25.16

This instruction covers the crime of Delivery of Drug Paraphernalia to a Minor (s. 893.147(3)(a), Fla. Stat.). For this instruction, the only changes required were to the s. 893.146, Fla. Stat., section where the Committee replaced the words “this act” with “the drug laws” because jurors would not understand what “this act” refers to. Also, for number 11 within that section, the Committee deleted the words “Direct or circumstantial” because the Committee thought those words were unnecessary.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received (the comment from Mr. Summa was not relevant to this instruction).

Proposal #23 – 25.17

This instruction covers the crime in s. 951.22, Fla. Stat. (Contraband in a County Detention Facility). The first change required for this instruction was to insert the Committee’s new format for the explanation of possession (includes the new constructive possession language and “power and intention” instead of “ability”). The second change was to expand the italicized note in the affirmative defense section to cover the possibilities of a defense that the defendant did not know of the presence of the substance or knew of the substance but not its illicit nature.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the *Florida Bar News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #24 – 25.18

This proposal covers the crime of Contraband in a Juvenile Detention Facility of Commitment Program under s. 985.711, Fla. Stat. The first change required for this instruction was to insert the Committee’s new format for the explanation of possession (includes the new constructive possession language and “power and intention” instead of “ability”). The second change was to expand the italicized note in the affirmative defense section to cover the possibilities of a defense that the defendant did not know of the presence of the substance or knew of the substance but not its illicit nature.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #25 - Instruction 25.20

This instruction covers the crime of Possession of Contraband in a Prison under s. 944.47(1)(c), Fla. Stat. For this instruction, the first change was to insert the Committee’s new format for the explanation of possession (includes the new constructive possession language and “power and intention” instead of “ability”). The second change was to expand the italicized note in the affirmative defense section to cover the possibilities of a defense that the defendant did not know of the presence of the substance or knew of the substance but not its illicit nature.

All changes passed the Committee unanimously (other than a 9-2 vote for the revised explanation of constructive possession) and were published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

Proposal #26 - Instruction 25.21

Instruction 25.21 covers s. 944.47(1)(a), Fla. Stat., Introduction or Removal or Contraband into or from a State Correctional Facility. The only change was to expand the italicized note in the affirmative defense section to cover the possibilities of a defense that the defendant did not know of the presence of the substance or knew of the substance but not its illicit nature.

The proposal passed the Committee unanimously and was published in the Florida Bar *News* on March 15, 2015. No comments were received other than the comment from Mr. Summa, which was discussed above.

WHEREFORE, the Committee requests this Court to promulgate the proposals in Appendix A.

Respectfully submitted this 23rd day of
June, 2015.

s/ Jerri L. Collins

The Honorable Jerri L. Collins
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CERTIFICATE OF SERVICE AND 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) and a copy of the report and the appendices has been e-mailed to Attorney Richard Summa at richard.summa@fldpd2.com and to Mr. Richard Combs at combsr@leoncountyfl.gov, this 23rd day of June, 2015.

s/ Jerri L. Collins

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