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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES REPORT 2016-02 **CASE NO.: SC16-**

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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) of the Florida Constitution.

	Instruction #	Title
Proposal 1	**2.8**	**Recorded Interview**
Proposal 2	**3.12**	**Verdict**
Proposal 3	**11.22**	**Giving Obscene Material to a Minor**
Proposal 4	**20.22**	**Unlawful Filing of False [Documents] [Records] Against [Real] [Personal] Property**
Proposal 5	**22.17**	**Unlawful Operation of Drawing by Chance**
Proposal 6	**22.18**	**Unlawful Operation of a Game Promotion**
Proposal 7	**27.1**	**Escape**

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

All proposals were published in the January 1, 2016 issue of The Florida Bar *News*. Two comments, both pertaining to Proposal 1 (Recorded Interview), are in Appendix B.

PROPOSAL #1: INSTRUCTION 2.8

The idea to create a standard limiting instruction to cover police assertions and opinions in a recorded interview with the defendant came from former committee member Brian Iten. The majority of the Committee agreed with Mr. Iten that it would be a good idea for trial judges to have the benefit of a standard limiting instruction. One member opposed the idea because she thought the creation of a standard limiting instruction would make it more likely that inadmissible evidence would be admitted.

The Committee first published a proposal for a new Instruction 2.8 in the Bar *News* on October 15, 2015. In response to comments, the Committee decided that initial proposal needed revisions.

A second proposal was published in the Bar *News* on January 1, 2016. It was based on a recommendation from Ms. Nancy Daniels for the Florida Public Defenders Association (FPDA). This revised proposal explained to jurors that they were about to watch or hear a recorded interview containing assertions or opinions from a police officer to the defendant. Jurors would then be instructed that these assertions or opinions were not to be considered by the jurors as being true, but were only pertinent to explain the reactions or responses of the defendant. The proposal included relevant case law and an italicized instruction to the trial judge.

The Committee received two comments in response to the January 1, 2016 publication. Attorney Scott Sakin believes the instruction is a misleading comment on the evidence and does not give the jury any direction. He also believes the proposal invites police misconduct and misrepresentation and jury speculation. Mr. Sakin also wonders how jurors could gauge reactions and responses on an audiotape. FPDA President Julianne Holt took a different approach. Ms. Holt appears to be in favor of a standard limiting instruction, but she believes the published proposal has two deficiencies. First, she suggested the italicized instruction to the judge clarify that police opinions are generally inadmissible and must be redacted unless the redaction makes the recording incomprehensible. Second, she suggested the italicized instruction clarify that the limiting instruction must be given (rather than may be given) upon the request of the defense.

The Committee agreed with the two suggestions from Ms. Holt and revised the italicized instruction to the trial judge so that it reads:

Police opinions and statements regarding guilt are generally inadmissible and must be redacted from recordings introduced into evidence unless redaction would render the defendant's relevant admissions incomprehensible. If a recorded interview cannot be appropriately redacted, the trial judge must, upon request, give the following limiting instruction immediately before the recorded interview is played for the jury.

The majority of the Committee did not agree with Mr. Sakin because (a) the proposal was supported by the case law and (b) the benefit of a standard limiting instruction outweighed the costs. The Committee did, however, make one change upon post-publication review: the published proposal used the phrase "assertions or opinions," and the Committee's final proposal is to instruct jurors regarding "opinions and statements." The vote to change "assertions or opinions" to "opinions and statements" was unanimous. The vote was 9-1 to send the proposal in Appendix A to the Court. As mentioned above, the sole dissenter was opposed to the creation of a standard limiting instruction.

PROPOSAL #2: INSTRUCTION 3.12

The idea to amend Instruction 3.12 (Verdict) came from a former member who realized the existing instruction does not cover instances where the jury can find the defendant guilty of more than one lesser-included offense. For example, in *Gian-Grasso v. State*, 899 So. 2d 392 (Fla. 4th DCA 2005), the Fourth District Court held that a defendant could be convicted of both Trespass and Battery as lesser-included offenses of the compound crime of Burglary with a Battery. To fix this problem, the Committee proposes to add: **Only one verdict may be returned as to [the crime] [each crime] charged <u>[, except as to Count</u>** <u>(insert number)</u>**<u>, where the defendant can be found guilty of more than one lesser included crime]</u>.** Additionally, the sample verdict form section within Instruction 3.12 was revised to include the possibility that jurors could find a defendant guilty of two lesser-included offenses.

The proposal was published in the Bar *News* on January 1, 2016. No comments were received. Upon post-publication review, the Committee made three additional changes. First, the existing sample verdict forms section includes a form for death penalty cases. This form should no longer be used because of the new law that requires a jury finding on aggravating circumstances. Accordingly, the Committee proposes to delete that part of the sample verdict form from Instruction 3.12. Instead, a verdict form for death penalty cases will be provided in a proposal for a death penalty instruction that is working its way to the Court. Second, the Committee did not like the layout of the instruction because the sample verdict form section is at the beginning of the existing instruction and the bolded instruction that must be given to jurors is buried at the end of the existing instruction. The Committee reversed the order so that the bolded language is located up front. Third, the Committee added a citation to *Gian-Grasso v. State*, 899 So. 2d 392 (Fla. 4th DCA 2005), in the Comment section so that people have a reference for the idea that a defendant can be found guilty of two lesser-included offenses when a compounded crime is charged. The vote to send the proposal in Appendix A to the Court was unanimous.

PROPOSAL #3: INSTRUCTION 11.22

The idea for there to be an instruction for the crime in section 847.0133, Florida Statutes, came from a member who thought there should be a standard instruction for giving obscene materials to a minor. The Committee did not find it difficult to track the statute because only one element is necessary to cover the crime. The definitions of "knowingly," "obscene material," and "obscene" were copied from the statutes.

A proposal was published in the January 1, 2016 issue of the Bar *News*. No comments were received, but the Committee did receive a phone call from former committee member Mr. Glen Gifford who pointed out that the standard instruction should not track the statutory definition of "obscene" because the statute states that the material "depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein…" Mr. Gifford noted that jurors would have no way of knowing what "as specifically defined herein" means. Upon post-publication review, the Committee agreed with Mr. Gifford and added a statutory definition of "sexual conduct." Because the definition of "sexual conduct" refers to terms such as "deviate sexual intercourse," "sadomasochistic abuse," "sexual battery," "sexual bestiality," and "simulated," the Committee inserted statutory definitions for those terms also.

The vote was unanimous to send the proposal in Appendix A to the Court.

PROPOSAL #4: INSTRUCTION 20.22

The idea to create a new standard instruction for the crime of Filing a False Document Against Property came from a member who noted that there has been an increase in the number of people who file false liens against judges and other public officials.

The Committee thought the crime in section 817.535(2), Florida Statutes, could be covered in three elements: (1) Defendant filed or directed a filer to file an instrument; (2) at the time, Defendant had the intent to defraud or harass another; and (3) the instrument contained a materially false, fictitious or fraudulent statement or representation that purported to affect an owner's interest in the property described in the instrument.

The elements of the crime are followed by three possible enhancements, which are set forth in sections 817.535(3), (4), and (5), Florida Statutes. The enhancement section is followed by statutory definitions for "file," "filer," "instrument," "official record," and "public officer or employee." These definitions are followed by the enhancement for a prior conviction. The Committee identified no lesser-included offenses other than the possibility of an Attempt.

The proposal was published in the Bar *News*. No comments were received. Upon post-publication review, the vote was unanimous to send the proposal in Appendix A to the Court.

PROPOSAL #5: INSTRUCTION 22.17

The idea to create a standard instruction for the crime of Unlawful Operation of a Drawing by Chance came from Assistant State Attorney Joe Cocchirella. Mr. Cocchirella drafted the instruction that is in Appendix A.

The relevant statutes covered by this new instruction (proposed to be numbered as 22.17) are sections 849.0935(4) and (7), Florida Statutes. There are three elements for this crime: (1) Defendant was an organization or a bona fide member or officer of an organization; (2) Defendant promoted, conducted, operated, a drawing by chance; and (3) Defendant (insert appropriate provisions within section 849.0935(4)(a)–(i), Florida Statutes, or section 849.0935(7), Florida Statutes). Before the definitions, there is an explanation of the law in section 849.00935(4)(b), Florida Statutes that states it is lawful for an organization to suggest a minimum donation utilized in connection with a fundraising event or drawing. Statutory definitions for "organization," "drawing by chance," "drawing," "raffle," "game promotion" and "operator" are provided. The Committee identified no lesser-included offenses other than the possibility of Attempt, Solicitation, or Conspiracy. Finally, the Committee added some parts of the statute in the Comment section to inform everyone about certain aspects of the law.

The vote was unanimous to publish the proposal. No comments were received. Upon post-publication review, the vote was unanimous to file the proposal with the Court.

PROPOSAL #6: INSTRUCTION 22.18

The idea to create a standard instruction for the crime of Unlawful Operation of a Game Promotion also came from Assistant State Attorney Joe Cocchirella. Mr. Cocchirella drafted the instruction that is in Appendix A.

The relevant statute covered by this new instruction (proposed to be numbered as #22.18) is section 849.094(2), Florida Statutes. There are two elements: (1) D was an operator of a game promotion; and (2) D (insert appropriate provisions within section 849.094(2)(a)–(e), Florida Statutes). Statutory definitions for "operator;" "game promotion" and "prize" are provided. The Committee identified no lesser-included offenses other than the possibility of Attempt, Solicitation, or Conspiracy. Finally, the Committee added a reference to section 894.094(10), Florida Statutes, to inform everyone about that part of the statute.

The vote was unanimous to publish the proposal. No comments were received. Upon post-publication review, the vote was unanimous to file the proposal with the Court.

PROPOSAL #7: INSTRUCTION 27.1

The idea to amend the Escape instruction came from a member who noted that the existing standard instruction does not cover the circumstance when a defendant escapes from a work release program. In order to capture the law set forth in a case such as *Poillot v. State*, 173 So. 3d 1070 (Fla. 5th DCA 2015), the Committee added the possibility of there being an element 2d:

Give 2a, 2b, ~~or~~ 2c, or 2d as applicable.

2. **While a prisoner,** (defendant) **was**

a. **confined at** (name of institution)**.**

b. **being transported to or from a place of confinement.**

c. **working on a public road.**

d. participating in a work release program and

1. willfully failed to return to [his] [her] place of confinement within the time prescribed

or

2. willfully failed to remain within the extended limits of [his] [her] confinement.

Also, because the statutes covering this type of work release escape from a prison or jail are in section 945.091(4), Florida Statutes, and in section 951.24(4), Florida Statutes, the Committee added cites to those statutes at the top of the instruction. The Committee also added some language to the italicized note above element 1 to make it clearer that element 1a pertained to pre-conviction escapes and element 1b pertained to post-conviction escapes.

The vote was unanimous to publish the proposal. No comments were received. Upon post-publication review, the Committee added the word “Attempted” in brackets before the word “Escape” in the title of the crime and also put “attempted to escape by (read overt act from charge)” within element 3 in brackets because of *Keel v. State*, 438 So. 2d 850 (Fla. 1st DCA 1983), which states that the offense of Attempted Escape is a criminal violation distinct from Escape. The Committee vote was unanimous to file the proposal in Appendix A with the Court.

CONCLUSION

The Standard Jury Instructions in Criminal Cases Committee respectfully requests the Court authorize for use the proposals in Appendix A.

Respectfully submitted this 3rd day of May, 2016.

s/ Judge F. Rand Wallis_________
The Honorable F. Rand Wallis
Chair, Supreme Court Committee on
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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I hereby certify that a true and correct copy of this report and the appendices were sent by e-mail to Attorney Scott Sakin at sakinlaw@hotmail.com; and to the Honorable Julianne Holt, President of the Florida Public Defenders Association, at holtj@pd13.state.fl.us; this 3rd day of May, 2016.

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 F. Rand Wallis
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