IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY INSTRUCTIONS CRIMINAL CASES REPORT 2017-03

CASE NO.: SC17-

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

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

	Instruction #	**Topic**
Proposal 1	**16.10**	**Possession of Material Including Sexual Conduct by a Child with Intent to Promote**
Proposal 2	**25.7**	**Possession of a Controlled Substance**

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. A proposal for Instruction 16.10 was published in the January 1, 2017 issue of the *Bar News* and a proposal for Instruction 25.7 was published in the *Bar News* on July 1, 2017. One comment, related to Proposal 2, was received from Richard Sanders (Appendix B).

Referral from Court

The Committee filed proposals for the drug instructions in Case No. SC16-1692, *In re Standard Jury Instructions in Criminal Cases – Report 2016-09.* In that case, Assistant Public Defender Richard Sanders filed a comment. The Committee informed the Court that there were benefits to the ideas in Sanders's comment but they were rejected because the proposed changes were too drastic.

In a referral dated February 7, 2017, the Court suggested the Committee create a subcommittee of prosecutors, defense lawyers, and judges to more thoroughly consider the issue of whether the concept of possession could be simplified for jurors. The initial deadline to report back to the Court was set for August 2017, but was later extended to the end of September 2017. (*See* Appendix C).

The Committee accepted the Court's suggestion, and created a subcommittee of 11 persons, consisting of DCA judges, circuit judges, prosecutors, and defense lawyers. The only subcommittee member who is also a member of the Committee is the undersigned, who acted as chair of both committees.

Everyone on the subcommittee agreed the existing explanation of possession in the standard instructions should be simplified. The consensus view was that there was no need to differentiate between actual possession and constructive possession; that the explanation of constructive possession was too confusing; that it was also confusing to use "ability to control" in one place in the standard instructions but "power and intention to control" in other places; that it was inaccurate to require the State to prove the drugs were in the defendant's presence in order to prove constructive possession of drugs in a place not controlled by the defendant; and that the inference section was unnecessary, except for the statutory inference in § 893.101(3), Fla. Stat.

Everyone on the subcommittee agreed that the elements of simple drug possession (Instruction 25.7) should be:

1. D possessed a substance.
2. The substance was (name of substance).

The subcommittee then differed about how to explain possession. A slight minority of subcommittee members thought the Court should rely on § 775.087(4), Fla. Stat. as a template to describe actual possession. In that subsection of the statute, the Legislature stated that for purposes of imposing a minimum mandatory firearm sentence, the term "possession' is defined as carrying a firearm on his or her person, or within immediate physical reach and readily accessible with the intent to use the firearm during the commission of a crime. The minority of subcommittee members further thought the concept of constructive possession could be explained with: "The power and the intent to exercise control over the substance." The minority of the subcommittee therefore suggested the following:

"Possessed" means the defendant was aware of the substance and:

a. carried the substance on his or her person; or

b. had the substance within his or her immediate physical reach, with ready access, and with the intent to exercise control over the substance; or

c. had the power and the intent to exercise control over the substance.

Give in all cases.

Intent is an operation of the mind and therefore is not always capable of direct or positive proof. It may be established by circumstantial evidence.

The majority of subcommittee members did not agree because having the substance within physical reach, with ready access, and with the intent to exercise control sounded too much like Attempted Possession. Instead, the majority of the subcommittee approved a proposal by subcommittee member Chris Altenbernd, who suggested:

To prove (defendant) **"possessed a substance," the State must prove beyond a reasonable doubt that [he] [she] a) knew of the existence of the substance and b) intentionally exercised control over that substance.**

Give if applicable.

Control can be exercised over a substance whether the substance is carried on a person, near a person, or in a completely separate location. Mere proximity to a substance does not establish that the person intentionally exercised control over the substance in the absence of additional evidence. Control can be established by proof that (defendant) **had direct personal power to control the substance or the present ability to direct its control by another.**

The advantage of Chris Altenbernd's proposal is that it simplifies the understanding of criminal possession down to its core concepts of a) knowledge of the existence of the substance (which is more precise than being "aware of the substance") and b) intentionally exercising control over that substance. Then, if a party wants the jury to have further explanation, jurors would be told that control can be exercised regardless of the physical proximity to the substance to the accused but that mere proximity does not establish the intentional exercise of control in the absence of additional evidence (e.g., the accused exclusively controlled the place where the substance was located, suspicious behavior, incriminating statements, etc.).

Both subcommittee proposals were presented to the full Committee and the vote was 7-2 in favor of the Altenbernd proposal. Of the two dissenting Committee members, one thought the existing standard instruction should not change and one liked the minority proposal that was based on the 10-20-life statute.

Except for that one Committee member, everyone (subcommittee and Committee members) thought it best to delete the existing explanations related to actual possession, constructive possession in a place controlled by the accused, mere proximity to a substance that is located in a place not controlled by the accused, and constructive possession in a place not controlled by the accused. However, everyone thought it was important for jurors to know that possession can be sole or joint. Therefore, that section of the instruction is proposed to read:

Joint possession. Give if applicable.

Possession of a substance may be sole or joint, that is, two or more persons may possess a substance.

Everyone thought it was a mistake to retain § 893.02, Fla. Stat., definition of possession as including temporary possession for the purpose of verification or testing, irrespective of dominion or control, because no one could think of a case where that definition applied and that definition arguably conflicts with the core concept of a person intentionally exercising control over a substance.

Also, except for one Committee member, no one thought the inferences that come from the case law were necessary in the instruction. Everyone (except one person), thought that the lawyers would be able to argue the facts of the case without the jury being instructed on what they could infer. The one inference that everyone thought should be retained, however, was the inference in § 893.101(3), Fla. Stat., regarding the affirmative defense of lack of knowledge of the illicit nature of the substance. The explanation of the statutory inference is proposed to read as follows:

You may but are not required to infer that (defendant) **was aware of the illicit nature of the controlled substance if you find that [he] [she] possessed the controlled substance.**

The Committee published its streamlined explanation of possession in a proposal for Possession of a Controlled Substance in July 2017. Only one comment was received from that publication and it was from Richard Sanders, the person who filed the initial comment in SC16-1692.

Mr. Sanders agreed with the subcommittee's and Committee's decisions to eliminate for jurors the distinction between actual and constructive possession. He also agreed with the decisions to delete the non-statutory inference section, and he provided an explanation for why those decisions were proper. His one area of

concern was in the last sentence in the new "*Give if applicable*" paragraph, which he thinks needs to mention that there must be an intent to control the substance. No one on the subcommittee shared this concern and no one on the Committee did either. The reason for the disagreement with Mr. Sanders is that in the paragraph directly above the "*Give if applicable*" paragraph, the jury would be instructed that the State had to prove beyond a reasonable doubt that the defendant intentionally exercised control over the substance. Also, in the sentence directly before the last sentence (relates to mere proximity), the proposal also mentions the intent to exercise control. The vote was unanimous to leave the Committee's proposal for Instruction 25.7 as published.

In sum, the Committee believes that its streamlined explanation of possession is legally correct, comprehensive, and will be far less confusing to jurors than the existing explanation. The Committee recognizes that Florida case law is replete with allowable inferences and distinctions between actual and constructive possession. However, Florida case law mostly addresses the sufficiency of the evidence to survive a judgment of acquittal motion. The Committee did not think instructions that repeat legal concepts related to sufficiency of evidence was the best way to explain the concept of criminal possession to jurors.

The Committee did not want to overwhelm itself, or the Court, with a large number of new possession-related proposals because the Court may not agree with the subcommittee and Committee ideas. Accordingly, the Committee presents in this report only two possession-related proposals, one for drugs and one for material that contains sexual conduct by a child. The Committee thought it best to include these two proposals so that the Court could see how the new explanation of possession would work in two different contexts. In the first context (Instruction #16.10), the Committee thought that the State must prove that the defendant knew of the illicit nature of the material. In the second context (Instruction #25.7), the State must prove the defendant knew of the illicit nature of the material only if the defendant raised lack of knowledge as an affirmative defense. Further explanation for the two proposals is provided below.

Proposal 1 – 16.10 - Possession of Material Including Sexual Conduct by a Child with Intent to Promote

There are two substantive changes proposed for Instruction 16.10. First, the Committee realized that the existing instruction is missing a box for lesser-included offenses. The Committee believes there is one necessary lesser-included offense for § 827.071(4), Fla. Stat., which is § 827.071(5)(a), Fla. Stat. The former

statute makes it unlawful for a person to possess with intent to promote a photograph, motion picture … which includes any sexual conduct by a child. The latter statute makes it unlawful for a person to knowingly possess….a photograph, motion picture….which he or she knows to include any sexual conduct by a child.

The second substantive change pertained to the streamlined explanation of possession. When the proposal was first published, the Committee added a definition of "possess" as meaning "to be aware of the nature of the material and to exercise control or ownership over it."

This proposed definition of "possess" came about after a long discussion about the differing types of *mens rea* in § 827.071, Fla. Stat. The Committee noted that § 827.071(3), Fla. Stat. has a *mens rea* of "knowing the character and content thereof" of a sexual performance by a child. However, § 827.071(4), Fla. Stat. uses only the term "possess with the intent to promote" a photo or motion picture which included sexual conduct by a child. To make matters worse, § 827.071(5)(a), Fla. Stat., requires the State to prove that the defendant "knowingly possessed" the photo and also knowing that the photo included sexual conduct by a child. The differing phraseology in the various subsections of the same statute raises the issue of whether the Legislature intended § 827.071(4), Fla. Stat. to require the State to prove that the defendant knew the photograph or motion picture included sexual conduct by a child. After much discussion, the Committee decided the courts would not allow someone to be punished for a second-degree felony for merely possessing a motion picture and intending to promote that motion picture, without also knowing the motion picture included sexual conduct by a child. Accordingly, the Committee voted unanimously to include in the definition of "possess" as "being aware of the nature of the material."

The only other changes were non-substantive as the Committee merely put italicized headings above the various statutorily defined terms.

The proposal passed unanimously and no comments were received from publication. But upon final review, the Committee would like the Court to see how the new explanation of possession would work in this context. To explain possession in Instruction #16.10, the Committee proposes:

To prove (defendant) **possessed a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation] that included sexual conduct by a child, the State must prove beyond a reasonable doubt that [he] [she] a) knew of the nature of the material in the [photograph] [motion**

picture] [exhibition] [show] [representation] [presentation] and b) intentionally exercised control over that [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

Give if applicable.

Control can be exercised over an item whether the item is carried on a person, near a person, or in a completely separate location. Mere proximity to an item does not establish that the person intentionally exercised control over the item in the absence of additional evidence. Control can be established by proof that (defendant) **had direct personal power to control the item or the present ability to direct its control by another.**

Joint possession. Give if applicable.

Possession may be sole or joint, that is, two or more persons may possess a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation].

As the Court can see, the Committee used its new template for explaining possession, but instead of "knew of existence of the substance," the relevant burden for the State would be to prove beyond a reasonable doubt that a) the defendant knew of the nature of the material in the photo, movie, etc., and b) intentionally exercised control over that photo, movie, etc.

The vote to submit this revised proposal to the Court was unanimous.

Proposal 2 – 25.7 – Possession of a Controlled Substance

As mentioned above, the Committee's proposal would have two elements for simple possession of a controlled substance.[1]

1. D possessed a substance.
2. The substance was (name of substance).

The Committee proposes to delete the existing § 893.13(6)(c), Fla. Stat., section in the standard instruction because that crime is already covered in Instruction #25.3 (Possession of More than 10 Grams of Certain Substances).

[1] If the charge were Possession of More than 20 Grams of Cannabis, there would be a third element related to the weight of the marijuana.

Then, the new explanation of possession is inserted and all the unnecessary explanations are deleted. In addition, the definition of "mixture" would be deleted because the word "mixture" would not be in the instruction. All other changes were discussed above, except for the proposed deletion of the second box of lesser-included offenses. That box would be deleted from Instruction 25.7 because it belongs in Instruction 25.3.

As mentioned already, one comment was received from Mr. Sanders. No one thought the proposal needed to be altered in light of Sanders's comment. The final vote was 9-1 to submit the proposal to the Court. The sole dissenter did not think the existing explanation of possession in the standard instructions should be streamlined.

In conclusion, the Committee requests the Court authorize for use the two proposals as outlined in Appendix A. If the new explanation of possession is accepted by the Court, the Committee will submit additional possession-related proposals as soon as possible.

Respectfully submitted this 14th day of September, 2017.

s/ Judge F. Rand Wallis_____
The Honorable F. Rand Wallis
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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

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 that a copy of the report and the appendices has been sent to Attorney Richard Sanders, at rsanders@pd10.org; this 14th day of September, 2017.

s/ Judge F. Rand Wallis
The Honorable F. Rand Wallis

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