

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD JURY

INSTRUCTIONS CRIMINAL CASES  
REPORT 2016-09

CASE NO.: SC16-

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

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

|             | <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   |

|                    |                 |  |
|--------------------|-----------------|--|
| <b>Proposal 14</b> | <b>25.13</b>    | <b>Trafficking in Methaqualone</b>   |
| <b>Proposal 15</b> | <b>25.13(a)</b> | <b>Trafficking in [Amphetamine]<br/>[Methamphetamine]</b>  |
| <b>Proposal 16</b> | <b>25.13(b)</b> | <b>Trafficking in Flunitrazepam</b>  |
| <b>Proposal 17</b> | <b>25.13(c)</b> | <b>Trafficking in [GHB] [GBL] [1,4-<br/>Butanediol]</b>  |
| <b>Proposal 18</b> | <b>25.13(d)</b> | <b>Trafficking in Phenethylamines (includes<br/>MDMA)</b>  |
| <b>Proposal 19</b> | <b>25.13(e)</b> | <b>Trafficking in LSD</b>  |
| <b>Proposal 20</b> | <b>25.14</b>    | <b>Use or Possession with Intent to Use<br/>Drug Paraphernalia</b>   |
| <b>Proposal 21</b> | <b>25.15</b>    | <b>Delivery, Possession with Intent to<br/>Deliver, or Manufacture with Intent to<br/>Deliver Drug Paraphernalia</b> |
| <b>Proposal 22</b> | <b>25.16</b>    | <b>Delivery of Drug Paraphernalia to a<br/>Minor</b>   |
| <b>Proposal 23</b> | <b>25.17</b>    | <b>Contraband in County Detention<br/>Facility</b>   |
| <b>Proposal 24</b> | <b>25.18</b>    | <b>Contraband in Juvenile [Detention<br/>Facility] [Commitment Program]</b>  |
| <b>Proposal 25</b> | <b>25.20</b>    | <b>Possession of Contraband [in] [upon<br/>The Grounds of] a State Correctional<br/>Facility</b>                     |
| <b>Proposal 26</b> | <b>25.21</b>    | <b>[Introduction] [Removal] of<br/>Contraband [into] [from] a State<br/>Correctional Facility</b>                    |

The proposals are in Appendix A. Words to be deleted are shown with strike-through marks; words to be added are underlined. All the proposals were published in *The Florida Bar News* on August 1, 2016. One comment, which is in Appendix B, was received from Assistant Public Defender Richard Sanders.

### **Initial Remarks**

The Committee revisited the standard controlled substances, drug paraphernalia, and contraband in facility instructions because the Legislature amended the drug laws in Chapter 2016-105 and Chapter 2016-123, Laws of Florida. In Chapter 2016-105, the Legislature changed the definition of “mixture” in § 893.02(16), Florida Statutes, which required amendments to the possession and trafficking instructions. Also, the Legislature deleted the reference to the

synthetic cannabis drugs in § 893.13(6)(b), Florida Statutes, which required changes to the instructions where those synthetic cannabis drugs were mentioned. The Legislature also changed the definition of drug paraphernalia in § 893.145(6) and § 893.145(12), Florida Statutes, which required changes to instructions 25.14-25.16. Finally, in Chapter 2016-123, the Legislature now refers to medical marijuana as either “low-THC” or “medical cannabis,” which required amendments to some of the Comment sections.

The Committee is also proposing a slight change to the affirmative defense section covering § 893.101, Florida Statutes, which covers lack of knowledge of the illicit nature of the substance. In the existing instructions, the italicized note at the top of the affirmative defense section and the first paragraph reads as follows:

*Affirmative defense: Lack of knowledge of illicit nature. Give if there is evidence that the defendant 1) did not know of the presence of the substance or 2) knew of the presence of the substance, but did not know of its illicit nature. § 893.101(2) and (3), Fla. Stat.*

**Lack of knowledge of the illicit nature of a controlled substance is a defense to (crime charged). (Defendant) has raised this defense.**

The italicized note was based on *Scott v. State*, 808 So. 2d 606 (Fla. 2002) and *Garcia v. State*, 901 So. 2d 788 (Fla. 2005), in which the Court said that when a defendant disputes knowledge of the presence of the substance, the defendant necessarily disputes knowledge of the illicit nature of the substance. However, the crimes addressed in *Scott* and *Garcia* were committed before § 893.101, Florida Statutes became effective. That statute makes lack of knowledge of illicit nature an affirmative defense to a drug prosecution. More recently, the Third District Court’s opinion in *Williams v. State*, 184 So. 3d 623 (Fla. 3d DCA 2016), suggests there is a difference between disputing knowledge of presence of the substance and disputing knowledge of the illicit nature of the substance. The Committee does not know whether the Court will maintain its *Scott/Garcia* logic when directly faced with the issue in a case involving a crime after § 893.101, Florida Statutes, went into effect. But no matter what the Court decides, there is an easy fix for the note in the standard instructions. The Committee recommends amending the italicized note so that it reads:

*Affirmative defense: Lack of knowledge of illicit nature. Give if applicable. § 893.101(2) and (3), Fla. Stat.*

Additionally, the Committee recommends deleting the sentence in the bolded portion of the affirmative defense section that states: “(Defendant) **has raised this defense.**” The reason for the recommendation is that the verbiage may give rise to an implication that the defendant has to introduce evidence to get the affirmative defense instruction. However, an affirmative defense may be raised during the state’s case-in-chief. Moreover, the sentence doesn’t provide much help for jurors because it will be obvious from the closing arguments that the defendant is relying on the defense. In sum, the Committee voted unanimously to amend the affirmative defense sections in the relevant instructions as follows:

*Affirmative defense: Lack of knowledge of illicit nature. Give if applicable. ~~there is evidence that the defendant 1) did not know of the presence of the substance or 2) knew of the presence of the substance, but did not know of its illicit nature.~~ § 893.101(2) and (3), Fla. Stat.*

**Lack of knowledge of the illicit nature of a controlled substance is a defense to (crime charged). (Defendant) ~~has raised this defense.~~**

Finally, the Committee discussed the comment from Mr. Sanders (see Appendix B). Mr. Sanders argues that the standard possession instruction is too vague and too confusing. He argues that jurors should be provided with consistent terms and should not be provided with certain inferences or distinctions between actual and constructive possession. He would simplify the standard possession instruction as follows:

**To prove the crime of Possession of a Controlled Substance, the State must prove the following two elements beyond reasonable doubt:**

- 1. (Defendant) possessed a substance.**
- 2. The substance was (name of controlled substance).**

**To prove (defendant) possessed a substance, the State must prove [he] [she] knew of the presence of the substance and had the power and intention to exercise some control over the substance.**

**To prove that (defendant) knew of the presence of the substance, it is not necessary for the State to prove that the substance was within [his] [her] immediate presence or that [he] [she] knew exactly where the substance was**

**located. It is sufficient that [he] [she] knew of the substance's existence and knew approximately where it was or knew that another person possessed it.**

**(Defendant's) power and intention to exercise some control over the substance is not proven by the mere fact that the substance was in close proximity to [him] [her] such that [he] [she] could reach out and grab the substance if [he] [she] chose to do so. On the other hand, a person can have the power to exercise control over a substance even though it is too far away for [him] [her] to touch. If the person has some power or authority to direct others to do something with the substance, then [he] [she] has the power to exercise control over the substance.**

**The fact that (defendant) has some power over the substance must be coupled with an intention on [his] [her] part to exercise some control over the substance, either by exercising that control [himself] [herself] or directing another to do something with the substance.**

**It need not be proven that (defendant) did, in fact, exercise any control over the substance. It is sufficient that [he] [she] could have exercised some control over the substance if [he] [she] chose to do so. But if it is not proven that (defendant) did exercise some control over the substance, then it must be proven that [he] [she] intended to exercise some control over the substance in the future, either personally or through another person.**

**In effect, the power and intention to exercise control is similar to that of an owner of the substance or that of an agent who is authorized by the owner to possess the substance or to direct another person regarding what happens to the substance.**

*Give if applicable. Affirmative defense. § 893.101(2) and (3), Fla. Stat.*

**Lack of knowledge of the illicit nature of a controlled substance is a defense to the crime of Possession of a Controlled Substance.**

**You are permitted to infer that (defendant) was aware of the illicit nature of the controlled substance if you find that [he] [she] possessed the substance.**

**If you are convinced beyond a reasonable doubt that (defendant) knew of the illicit nature of the controlled substance, and all of the elements of the**

**charge have been proved, you should find [him] [her] guilty of Possession of a Controlled Substance.**

**If you have a reasonable doubt on the question of whether (defendant) knew of the illicit nature of the controlled substance, you should find [him] [her] not guilty of Possession of a Controlled Substance.**

The Committee unanimously disagreed with the proposal from Mr. Sanders because his changes are too drastic a departure from what everyone is accustomed to. There are benefits to his proposal, however, and the Committee asks the Court to consider whether the benefits outweigh the costs.

#### **Proposal 1 – Instruction 25.2**

There are only two changes proposed for this instruction. First, the Committee revised the affirmative defense section as discussed above. Second, as discussed in the initial remarks, the Committee revised the Comment section to delete the references to synthetic cannabis and added the phrase “medical cannabis.” All changes passed the Committee unanimously. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

#### **Proposals #2 & #3 – Instructions 25.3 & 25.4**

The only proposed change for these instruction was to the affirmative defense sections (discussed above), which passed the Committee unanimously. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

#### **Proposals #4 & #5 – Instructions 25.5 & 25.6**

There are only two changes proposed for these instructions. First, the Committee revised the affirmative defense section as discussed above. Second, as discussed in the initial remarks, the Committee added the phrase “medical cannabis” in the Comment section. All changes passed the Committee unanimously. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

#### **Proposal #6 – Instruction 25.7**

There are four substantive changes proposed for this instruction. First, the Committee deleted the reference to certain synthetic cannabis due to legislative

changes to § 893.03(1)(c), Florida Statutes. Second, the new definition of “mixture” in § 893.02(16), Florida Statutes, was added. Third, the affirmative defense section was amended as discussed above. Fourth, the Committee added the phrase “medical cannabis” in the Comment section. All changes passed the Committee unanimously. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

#### **Proposal #7 – Instruction 25.8**

There are only two changes proposed for this instruction. First, the Committee revised the affirmative defense section as discussed above. Second, as discussed in the initial remarks, the Committee added the phrase “medical cannabis” in the Comment section. All changes passed the Committee unanimously. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

#### **Proposals #8 - #19 — Trafficking in Controlled Substances**

Proposals #8–#19 cover all of the drug trafficking crimes in Chapter 893. The proposed changes for these instructions were discussed above. In every trafficking instruction, the affirmative defense section was revised as previously mentioned. Where appropriate, the Committee added the new statutory definition of “mixture.” In the Trafficking in Cannabis instruction, the Committee added the term “medical cannabis” to the Comment section. All changes passed the Committee unanimously. No comments were received from publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

#### **Proposal #20 – Instruction 25.14**

This instruction covers the crime of Use or Possession with Intent to Use Drug Paraphernalia. For this instruction, element #2 informs jury that the paraphernalia was used or intended to be used to inject, ingest, inhale, etc. a controlled substance into the human body. Also, the new definition of drug paraphernalia states that the paraphernalia was used or intended to be used to inject, ingest, inhale, etc. a substance listed in § 877.111, Florida Statutes, into the human body. The Committee therefore thought the judge needed to instruct the jury that substance x is a controlled substance or that substance x is a substance listed in § 877.111, Florida Statutes. Additionally, the Committee amended the definition of drug paraphernalia in the instruction to be consistent with the latest

version of § 893.145, Florida Statutes. All votes were unanimous. No comments were received after publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

**Proposals #21 & #22 – Instructions 25.15 & 25.16**

For these proposals, the Committee's changes are consistent with the proposals for instruction 25.14. Specifically, because the elements inform the jury that the state must prove the defendant knew or should have known that the paraphernalia would be used to inject, ingest, inhale, etc. a controlled substance into the human body and because the latest definition of drug paraphernalia states that the paraphernalia was used or intended to be used to inject, ingest, inhale, etc. a substance listed in § 877.111, Florida Statutes, into the human body, the Committee thought the jury needed to be instructed that substance x is a controlled substance or that substance x is a substance listed in § 877.111, Florida Statutes. Additionally, the Committee amended the definition of drug paraphernalia in the instruction to be consistent with the latest version of § 893.145, Florida Statutes. All votes were unanimous. No comments were received after publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

**Proposals #23-#26 – Instructions 25.17, 25.18, 25.20 & 25.21**

These four instructions cover crimes associated with contraband in different types of incarcerative facilities. The only change needed for all of these instructions pertained to the changes to the affirmative defense section for lack of knowledge of the illicit nature of the substance (discussed above). All of these changes passed the Committee unanimously. No comments were received after publication. Upon post-publication review, the Committee voted unanimously to file the proposal with the Court.

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

Respectfully submitted this 15th day of  
September, 2016.

s/ Judge F. Rand Wallis\_\_\_\_\_  
The Honorable F. Rand Wallis  
Chair, Supreme Court Committee on



Standard Jury Instructions in Criminal Cases  
Fifth District Court of Appeal  
300 South Beach Street  
Daytona Beach, Florida 32114  
Florida Bar Number: 980821  
WallisR@flcourts.org

**CERTIFICATE OF FONT SIZE AND SERVICE**

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 was sent by email to Attorney Richard Sanders at rsanders@pd10.org, this 15th day of September, 2016.

s/ Judge F. Rand Wallis  
The Honorable F. Rand Wallis  
Chair, Supreme Court Committee on  
Standard Jury Instructions in Criminal Cases  
Fifth District Court of Appeal  
300 South Beach Street  
Daytona Beach, Florida 32114  
Florida Bar Number: 980821  
WallisR@flcourts.org