APPENDIX B

COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES
THE HONORABLE F, RAND WALLIS, CHAIR
REPORT 2016-09

COMMENT ON PROPOSED INSTRUCTION 25.7

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This comment addresses proposed instruction 25.7, for the basic offense of possession of a controlled substance (although many of the comments apply equally to instructions for other possession-based offenses). Attached is an article just submitted for publication in *The Florida Defender*, the quarterly periodical of FACDL. The article can be summarized as follows:

1. "Possession" is one of the vaguest of legal terms. Its definition often depends on the context in which it is being used.

2. The drug-possession instructions have been significantly amended several times since first adopted in 1981. The overall trend has been toward greater length and complexity. Yet, during all this time, Florida appellate courts, in cases with facts essentially indistinguishable from prior cases, continue to reverse convictions for possession-based offenses because the evidence failed to prove the possession element of the offense. There are dozens of such cases.

3. The author respectfully suggests that the drug-possession instruction should be simplified. In particular,

> a. Consistent terminology should be used throughout for the crucial terms in the instruction (*e.g.*, "was aware of presence of substance" vs. "knew substance was within presence"; "ability to control substance" vs. "power and intent to control substance" vs. "exercised control over substance"); and

b. All the inferences, and the concepts of actual-versus-constructive possession, should be eliminated entirely. Crucial terms used here -- "control over place where drugs are found"; "joint vs. exclusive"; "common area"; "in presence"; "in plain view" -- are not defined and the case law provides little guidance. Thus, it is not entirely clear what these terms mean or when jurors should be instructed on these matters. Further, all this language -- none of which is in the applicable statute but rather originated in cases deciding particular evidence sufficiency issues -- is cumbersome and confusing, especially for jurors who are encountering all these concepts for the first time.

TO HAVE AND TO HOLD: THE FLORIDA DRUG-POSSESSION OFFENSE

I. INTRODUCTION AND SUMMARY

This article analyzes the elements of the basic Florida offense of possession of a controlled substance ("drug-possession") and notes possible problems in the standard instruction for that offense. Many of the comments also apply to instructions for other possession-based offenses.

The drug-possession instructions have been significantly amended several times since first adopted in 1981. The overall trend has been toward greater length and complexity.[1] And all during this time, in cases with facts essentially identical to those in prior cases, Florida courts have reversed convictions for drug-possession because the State failed to prove the possession element. See section V below. This fact might lead some to ask whether the concept of possession is being properly explained to jurors. This article argues that the drug-possession instruction should be greatly simplified.

It is well recognized that, "both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession." *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914). It "has no single, clear definition[; rather it] takes its

[1] *Standard Jury Instructions in Criminal Cases*, 191 So. 3d 291 (Fla. 2016); *Standard Jury Instructions in Criminal Cases*, 153 So. 3d 192 (Fla. 2014); *Standard Jury Instructions in Criminal Cases*, 969 So. 2d 245 (Fla. 2007); *Standard Jury Instructions in Criminal Cases*, 697 So. 2d 84 (Fla. 1997); *Standard Jury Instructions in Criminal Cases*, 543 So. 2d 1205 (Fla. 1989).

meaning from its context." *In re Minnesota Dep't of Nat. Res. Special Permit No. 16868*, 867 N.W.2d 522, 528 (Minn.Ct.App. 2015). The present context is a criminal charge based on possession of contraband, where the State must prove D possessed an item that D denies possessing.

Drug-possession cases, particularly those with no admissions by D or eyewitness testimony putting the drugs in D's hand, often boil down to the inferences we can draw from a wide variety of circumstances. There are two competing concerns in these cases. First, the offense can be very hard to prove. The *actus reus* element can be entirely passive. The State need not, and often cannot, prove that D *did something* that we can pinpoint as the commission of the offense. The "commission" of the offense can be purely mental; the blind and the bedridden can possess things, even if they've never seen or touched them. All that is needed is the right mental attitude, *i.e.*, a knowledge of the item's existence coupled with an intent to control it in some way. Given these problems, the State often needs the help of flexible inferences and definitions to prove its case.

Conversely, there may be no crime for which the innocent can be so easily "framed," even if unintentionally (*e.g.*, X forgets his drugs in D's car, where an officer finds them the next day, when D is the sole occupant). Flexible inferences and definitions can bridge gaps in the State's case against the guilty; but they

can also build false bridges to convict the blameless. We must balance these concerns when formulating the instruction.

II. THE STRUCTURE OF THE STANDARD DRUG-POSSESSION INSTRUCTION

The standard instruction provides in pertinent part:

> To prove [drug-possession], the State must prove [three elements:]
>
> 1. [D] KNEW OF THE PRESENCE of a substance.
> 2. [D] **exercised control or ownership over that substance**.
> 3. The substance was (specific substance alleged).
>
> . . .
>
> There are two types of possession: actual possession and constructive possession.
>
> Actual possession means [D] is AWARE OF THE PRESENCE of the substance and:
>
> a. The substance is in the hand of or on [D's] person, or
> b. The substance is in a container in the hand of or on [D's] person, or
> c. The substance is so close as to be within ready reach and is **under the control of [D]**.
>
> Constructive possession means [D] is AWARE OF THE PRESENCE of the substance, the substance is in *a place over which [D] has control*, and [D] **has the ability to control the substance**.
>
> Mere proximity to a substance is not sufficient to establish the **power and intention to control** that substance when the substance is in *a place that [D] does not control*.
>
> In order to establish [D's] constructive possession of a substance that was *in a place [D] did not control*, the State must prove [D] (1) KNEW THAT THE SUBSTANCE WAS WITHIN [D'S] PRESENCE and (2) **exercised control or ownership** over the substance itself.
>
> Possession of a substance may be sole or joint, that is, two or more persons may be AWARE OF THE PRESENCE of a substance and may jointly **exercise control** over it....
>
> If you find that [D]:
>
> a. had direct physical custody of the substance, [or]
> b. was within ready reach of the substance and the substance was **under [D's] control**, [or]
> c. had *exclusive control of the place* where the substance was

located,

you may infer that [D] was AWARE OF THE PRESENCE of the substance and had the **power and intention to control** it.

If [D] did not have *exclusive control over the place* where a substance was located, you may not infer [D] had KNOWLEDGE OF THE PRESENCE of the substance or the **power and intention to control** it, in the absence of other incriminating evidence.

However, you may infer [D] KNEW OF THE PRESENCE of the substance and had the **power and intention to control** it if [D] had *joint control over the place* where the substance was located, and the substance was located in a common area in plain view and in the presence of [D].

Lack of knowledge of the illicit nature of a controlled substance is a defense to [drug-possession].

You [may] infer that [D] was aware of the illicit nature of the controlled substance if you find that [D] KNEW OF THE PRESENCE of the substance and **exercised control or ownership** over the substance.

Fla. Std. Jury Instruct. (Crim.) 25.7. The relevance of the various emphases is explained in section IV below.

The instruction defines possession using two binary concepts, actual/constructive and exclusive/joint. This creates four types of possession: actual-exclusive, actual-joint, constructive-exclusive, and constructive-joint. The actual-joint type can be briefly noted. We might imagine odd examples of the *in-hand* or *on-person* types of actual possession that could qualify as joint possession, *e.g.,* two people carrying a large bale of marijuana. But the author can find no cases with such facts. As to the *in-ready-reach and under-control* type of actual possession, we can easily imagine a case that could qualify as a joint-actual case, *e.g.,* co-owners seated at a table with the drugs on the table

between them. But courts seem to always treat such facts as a constructive-joint case. *E.g.*, *Session v. State*, 187 So. 3d 379 (Fla. 5th DCA 2016); *Harris v. State*, 954 So. 2d 1260 (Fla. 5th DCA 2007). Thus, the actual-joint type of possession need not be discussed further.

As to the other three types of possession, unless the drugs are found in-hand or on-person (which are clearly actual-exclusive cases), many cases cannot be neatly classified as one of the other three types. For example, suppose officers, executing a search warrant on a home, find D sitting on the living room couch with a small baggie of cocaine on a coffee table in front of him. Going through the home, the officers find X hiding in a closet and Y going out the back door. As to D, what type of possession is this?

Using the standard instruction, we could call this an actual-exclusive case: The cocaine was *in D's ready reach and under his control*, because it was in plain view right there in front of him. Or was the cocaine *under D's control*? He *could*, if he wished, pick it up, pocket it, *etc.* Is this what we mean by under-control?

Related to this question is the issue of the interplay between the *ready-reach/under-control* form of actual possession and the mere-proximity rule in the instruction. The instruction says that one's *mere proximity* to drugs does not, in itself, prove one's *power and intent to control* them, if they are *in a place one does not control.* The apparent negative inference is, if the drugs

are in a place one *does* control, then mere-proximity *is* sufficient to prove power-and-intent-to-control. Assuming this is true, did D have this control-over-place? Control over exactly what place? The home? The living room? The coffee table? The baggie? However we define *place*, what does it mean to say D *had control* over it?

Thus, to determine if this is an actual-exclusive case, we must know what is meant by 1) the drugs were *under D's control* and 2) D *had control over the place where the drugs were located*.

We could also call this a constructive-exclusive case. Using the instruction, we could say that D *knew the cocaine was in D's presence*, and we *may infer D had the power and intent to control it* because he *had exclusive control over the place where it was located.* But again, what control over what place? And was any control-over-place that D had *exclusive*? X and Y were in the home but not in the living room, at least when the officers first saw them. What control over what place must either X or Y have to make this a constructive-joint case?

Assuming this is a constructive-joint case, can we, using the instruction, *infer D knew of the cocaine's presence and had the power and intent to control it* because D *had joint control over the place, and the cocaine was in a common area in plain view and in D's presence*? Again, what control, what place? Must any control D has be equal to that of X or Y? If X owns the home; and D is X's boyfriend, who keeps some clothes and personal items there and

often spends the night; and Y is D's friend, who sometimes comes with D to visit and on rare occasions sleeps over on the couch; who has joint control over what place?

Assuming D had the required joint-control-over-place, what about the common-area, in-presence, and plain-view elements of this inference? *Common-area* seems to refer to an area to which all occupants have equal access, although one might question whether finding drugs in a common area increases or decreases the probability that any particular occupant possessed those drugs; if all have equal access, wouldn't this make it *less* likely that D is the one that possessed them? Or is the assumption here that *all* occupants jointly possessed them? And is the living room a common-area when Y sleeps over on the couch?

As to the in-presence and in-plain-view elements, how close must D be to the cocaine for it to be in-D's-presence? Is this limited to items within D's arm's reach? Within D's eyesight? What if D is on the couch and the cocaine is on the kitchen floor and D must get off the couch and walk around the kitchen counter (a 20-foot journey) before he can see or touch the cocaine? If such facts prove the in-presence element, do they also prove the plain-view element, because D *could* see the cocaine if he walked into the kitchen? If the cocaine is back on the coffee table in a small brown paper bag that is open at the top, is the cocaine in-plain-view if D could see it by standing over the bag and looking down

but he couldn't see it when looking from the side, *i.e.*, from his actual vantage point when the police first see him? Must the State prove D actually saw the drugs (or at least was, at some time, in a position where he could see them)? Suppose, when the officers first enter, D is asleep on the couch (and the living room is pitch dark) and there is no proof that he was ever awake (and the lights were on) when the cocaine was on the table? Suppose D is blind, or has very poor eyesight and he wasn't wearing his glasses when the officers first saw him? What if we have no evidence about the acuity of D's eyesight; do we just assume it's 20-20?

And at what point in time do we measure all these things? The moment officers find the drugs (a test that, as our hypothetical shows, gives the fleet-footed and the quick-witted much advantage over the slow and the sleepy)? Or do we look to a past time frame during which it is reasonable to conclude that *someone* put the drugs there? Suppose, during pre-entry surveillance, officers see D, X, and Y (and perhaps unknown others) enter and leave the home many times; and, through the window, they can see people in the living room at times. But they can't see the coffee table, so they don't know when the cocaine first appeared there. On such facts, is this a constructive-exclusive case because 1) the relevant *place* is the living room (or the table) and 2) when the officers entered and saw the cocaine, D had *exclusive control over the place drugs were found*? Or is this a constructive-joint case

because, regardless of what is the relevant *place* and regardless of who was actually present when the drugs were found, others had access to, and thus had (perhaps) some control over, that place during the time frame in which we can infer that the cocaine first appeared on the coffee table?

And who bears what burden of proof on all this? If several people (including D) are present in the living room when the officers enter and find drugs on the table, do we just assume that all (including D) had some control over the table (or the room, or the whole house)? Or must the State prove who had control over what? Or is it the defense burden to prove D didn't have the needed joint-control-over-place that is assumed from D's physical presence in the room?

These are not frivolous concerns. The joint-versus-exclusive fact determines which definition of constructive possession we use, which in turn determines whether we need to be concerned with merely the concept of *exclusive-control-over-place* or with the interlocking complexities of *joint-control-over-place, common-area, in-presence,* and *in-plain-view.* In short, "less evidence is required for a conviction when possession is exclusive." *Lee v. State*, 835 So. 2d 1177, 1179 (Fla. 4th DCA 2002).

So; as to D; is this an actual-exclusive case, a constructive-exclusive case, or a constructive-joint case?

The author believes this is the wrong question. Rather than

try to squeeze this case into a preexisting, and somewhat artificial, analytical structure, we should simply ask: Does this evidence prove all the elements of drug-possession?

And the jury should be so instructed, without all the language about control-over-place and actual-versus-constructive. None of this language is in the drug-possession statute; rather, it comes from cases that address particular evidence-sufficiency issues. *E.g.*, *Brown v. State*, 428 So. 2d 250, 252 (Fla. 1983) ("joint occupancy, with or without ownership of the premises, where [drugs are] discovered [in a common area] in plain view in the presence of the owner or occupant is sufficient to [prove] constructive possession"); *Frank v. State*, 199 So. 2d 117, 120-21 (Fla. 1st DCA 1967) ("Where one has exclusive possession of a home [where drugs] are found, it may be inferred [that one possessed them]."). But "a statement of reasoning ... in a judicial opinion [is not necessarily] a proper jury instruction," *Banker's Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 533, n.3 (Fla. 1985), "even though it is a correct statement of law." *Gutierrez v. State*, 177 So. 3d 226, 230 (Fla. 2015). The validity -- and wisdom -- of an instruction is a "[c]onsideration ... entirely separate from" evidence-sufficiency issues and the "proper subject of argument by counsel." *Brown v. State*, 11 So. 3d 428, 436, 439 (Fla. 2d DCA 2009). Further, Florida cases contain other general statements regarding the legal sufficiency of certain commonly

occurring bundles of facts, *e.g.*, "[t]he mere fact that some [drugs were] in plain view does not permit the inference that [D] knew of the presence of all [hidden drugs] ultimately found after [a search]"[2] and "[a]n inference of knowledge and ... control may also arise where [drugs] located in jointly occupied premises [are] found in or about other personal property which is shown to be owned or controlled by [D]."[3] Why aren't these inferential rules part of the standard instruction?

Again, the author believes the drug-possession instruction should be greatly simplified. To fully explain this conclusion, we begin by analyzing the two elements of a drug-possession offense: 1) D possessed a substance; and 2) the substance was a drug.[4]

III. THE ELEMENTS OF THE DRUG-POSSESSION OFFENSE

A. POSSESSION OF A SUBSTANCE

This element has two components, D 1) *knew of the presence of the substance* ("presence-knowledge") and 2) *exercised control or ownership over the substance* ("exercise-control").

1. The presence-knowledge component seems simple. But it can exist even though D has never seen the drugs and doesn't know where

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[2] *Santiago v. State*, 991 So. 2d 439, 442 (Fla. 2d DCA 2008); *accord, Nicholson v. State*, 33 So. 3d 107, 110 (Fla. 1st DCA 2010); *Mitchell v. State*, 958 So. 2d 496, 500 (Fla. 4th DCA 2007).

[3] *Jackson v. State*, 995 So. 2d 535, 540 (Fla. 2d DCA 2008); *accord, Knight v. State*, 172 So. 3d 990, 993 (Fla. 1st DCA 2015).

[4] The instruction says the offense has *three* elements: "[D] knew of the presence of a substance; "[D] exercised control or ownership over that substance"; and "the substance was [a drug]." Fla. Std. Jury Instr. 25.7. As discussed below, the first two elements define *possession*. It will be argued below that these two elements should be combined into a single element of *possessed-a-substance*.

they are. If D gives X cash to buy drugs and X goes across town and buys them, D now possesses them (through X, D's agent), even if D doesn't yet know that X succeeded or know exactly where X and the drugs are. Similarly, if D gives drugs to X to take to Y and sell, D still possesses the drugs (until the sale) even though D may not know exactly where X and the drugs are at a given moment.

Conversely, D may not have presence-knowledge even though the drugs are literally in her hand, if they are in an opaque "ordinary [package] commonly used for lawful purposes and not ... primarily [for drugs]." *Nicholson*, 33 So. 3d at 110. To prove presence-knowledge of drugs contained in such an opaque package, it must be proven D knew the drugs were in the package; presence-knowledge of the package itself is insufficient, even if the package was expressly sent to D or D knows it contains something (perhaps even something illegal). *E.g., T.R.W. v. State*, 732 So. 2d 466, 468 (Fla. 2d DCA 1999) (holding D's knowledge that the box he carried contained marijuana doesn't in itself prove that he knew the box also contained cocaine); *Rutskin v. State*, 260 So. 2d 525, 526 (Fla. 1st DCA 1972) (holding D's acceptance of a package addressed to him at his home and shipped through regular channels doesn't prove in itself that D knew the package contained drugs).

This component may be more of an existence-knowledge component: D knows the drugs exist somewhere, although she may not know exactly where they are and may not have ever seen them.

2. The exercise-control component is the crucial, and harder to define (and prove), component of the possessed-a-substance element.[5] This "involve[s] more than the mere ability ... to reach out and touch the [drugs]." *Martoral v. State*, 946 So. 2d 1240, 1243 (Fla. 4th DCA 2007). Although courts often

> use the phrase "the ability to exercise ... control," none of them mean it in the most simplistic sense. If "ability" to exercise ... control was enough, then proving simply that [D] could reach out and grab the contraband would suffice[. But] that is not the law. [D's] "mere proximity" to the contraband, without more, is insufficient proof of [D's] ability to exercise ... control over it.

Session, 187 So. 3d at 380; *accord, Alex v. State,* 127 P.3d 847, 848-51 (Alaska Ct.App. 2006) ("[D] should not be convicted of [possession] merely because [D] *could* have exercised ... control over the object[. The State] must also prove either that [D] *did* exercise ... control [or] or at least *intended* to do so"; "There is an ambiguity in the word 'power.' [It] can refer to [D's] right or authority to exert control, [or] to anything [D] might be physically capable of doing if not impeded by countervailing force. [Defining possession] as the 'power' to exercise [control] suggests that [D] could be convicted ... merely because [D] knew of the contraband and had physical access to it, even though [D]

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[5] Presence-knowledge may be part of the exercise-control component. At the least, presence-knowledge "is normally a prerequisite to exercising control" because one "ordinarily would not be deemed to exercise 'control' over an object about which he is unaware." *Dawkins v. State*, 547 A.2d 1041, 1046 (Md. 1988); *accord, People v. Gory*, 170 P.2d 433, 436 (1946); *State v. Burns*, 457 S.W.2d 721, 724 (Mo. 1970); *State v. Harris*, 632 S.E.2d 534, 536 (N.C.App.Ct. 2006); *Commonwealth v. Thompson*, 428 A.2d 223, 224 (Pa.Super.Ct. 1981).

had no intention or right to exercise control over it.").

This mere-proximity rule is designed to prevent convictions of "innocent bystander[s] or social or business visitor[s]." *Ball v. State*, 758 So. 2d 1239, 1241 (Fla. 5th DCA 2000). Often cited in constructive-joint cases, *see cases cited in Session,* 187 So. 3d at 380, the rule is also used in cases where D is the only one present but D clearly didn't have exclusive-control-over-place (*e.g.,* D and the drugs are outside in a public space). *E.g., G.G. v. State*, 84 So. 3d 1162, 1163 (Fla. 2d DCA 2012).

While a mere ability-to-control does not, in itself, prove the exercise-control component, it is not entirely clear what else is needed. One Florida Supreme Court case noted four tests: "ability to maintain control"; "having in or taking into one's control or holding at one's disposal"; "having personal charge or exercising the right of ownership, management or control"; and "having control with the intent to have and to exercise such control." *Campbell v. State*, 577 So. 2d 932, 935 (Fla. 1991). District court cases use expressions like "could take actual possession [or] compel [another] to share the [drug] with him" (*Lester v. State*, 891 So. 2d 1219, 1220-21 (Fla. 2d DCA 2005)); "apparent authority to treat [the drugs] as [D's] own" (*Hons v. State*, 467 So. 2d 829, 830 (Fla. 2d DCA 1985)); "a proprietary interest" or an "immediate right to reduce the [drug] to his possession" (*State v. Snyder*, 635 So. 2d 1057, 1058 (Fla. 2d DCA

1994)); and "exercised control by directing where [the drugs] should be delivered and by helping to unload [them]." *State v. Brider*, 386 So. 2d 818, 818 (Fla. 2d DCA 1980).

Courts in other jurisdictions use tests of "exercise restraining or directing influence over [the drugs]";[6] "power and intent to control [the drugs'] disposition or use";[7] and "some appreciable ability to guide the [drugs'] destiny."[8] Some courts refer to D's "ultimate control over the [drugs, *i.e.*,] the right (not the legal right, but the recognized authority in [D's] criminal milieu) to possess [them]."[9] Of course, it is "anomalous to look at [a] 'right' to control illegal [drugs] in order to establish possession"; but this is what "distinguishes [the] raw physical ability to exercise control because of [mere] proximity [from] the type of rights that [prove] possession." *State v. Atkinson*, 620 N.W.2d 1, 4-5 (Iowa 2000); *accord*, *State v. Barger*, 247 P.3d 309, 315 (Ore. 2011) (distinguishing between "a bare and practical [or 'physical'] 'ability' to exercise a directing or

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[6] *State v. Lewis*, 394 N.W.2d 212, 214, n.1 (Minn.Ct.App. 1986); *Anderson v. State*, 267 A.2d 302, 304 (Md.Ct.Spec.App. 1970).
[7] *State v. Harris*, 646 S.E.2d 526, 528 (N.C. 2007); *accord, Radke v. State*, 293 So. 2d 312, 313 (Ala.Ct.Crim.App. 1973); *Gory*, 170 P.2d at 436; *State v. Strutt*, 236 A.2d 357, 360 (Conn.Ct.App. 1967); *State v. Foulks*, 72 S.W.3d 322, 324 (Mo.Ct.App. 2002); *State v. Schmidt*, 540 A.2d 1256, 1266 (N.J. 1988); *Commonwealth v. Heidler*, 741 A.2d 213, 216 (Pa.Super.Ct. 1999).
[8] *United States v. Staten*, 581 F.2d 878, 883 (D.C. Cir. 1978); *accord, United States v. James*, 540 F.3d 702, 707 (7th Cir. 2008); *United States v. Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984); *C.B.D. v. State*, 90 So. 3d 227, 246 (Ala.Crim.App. 2011); *Greer v. United States*, 600 A.2d 1086, 1087 (D.C. 1991).
[9] *United States v. Manzella*, 791 F.2d 1263, 1266 (7th Cir. 1986); *accord, United States v. McBride*, 19 F.3d 20 (6th Cir. 1994) (table); *People v. Flick*, 790 N.W.2d 295, 303 (Mich. 2010); *Schmidt,* 540 A.2d at 1262; *State v. Kueny*, 724 N.W.2d 399, 401 (Wisc.Ct.App. 2006).

restraining influence" -- which is "insufficient by itself" to prove exercise-control -- and "a 'right' to control a thing, [*i.e.*,] something akin to a *legal* right to do so").

It is not "necessary to prove ownership in the sense of title"; and, while the exercise of control need not be "of great duration," it must be "conscious and substantial," not "merely involuntary or superficial." *State v. Eckroth*, 238 So. 2d 75, 76 (Fla. 1970). For instance, exercise-control is proven if D takes a puff from a cigarette or pipe being passed among several users. *Id.*; *State v. Thornton*, 327 So. 2d 227 (Fla. 1976). Conversely, Florida courts have held that drug-possession is not proven by such acts as "casual[ly] holding and looking at" drugs while passing them from seller to buyer (*Sanders v. State*, 563 So. 2d 781, 783 (Fla. 1st DCA 1990); *Hamilton v. State*, 732 So. 2d 493 (Fla. 2d DCA 1999)); a car passenger taking "momentary possession" of drugs when "the driver tossed the[m to him] to hide" as police execute a traffic stop (*Ford v. State*, 69 So. 3d 391, 393 (Fla. 2d DCA 2011)); and "tak[ing] temporary control" of drugs to "throw[them] away, destroy[them], or giv[e them] to police" (*Stanton v. State*, 746 So. 2d 1229, 1230 (Fla. 3d DCA 1999)); *see also Tingley v. Brown*, 380 So. 2d 1289, 1291 (Fla. 1980) ("The mere holding of a crawfish while measuring it to determine if it is of legal size is a superficial possession and is insufficient to [prove] illegal possession"); Fla. Std. Jury Instr. (Crim.) 3.6(m) (defining defense

of "temporary possession for legal disposal").

In sum, the exercise-control component has an element of power-and-intent-to-control, although that alone is insufficient. As to what else is needed, it is something akin to an owner, agent, or bailee relation to the drugs, although even that may not be enough, depending on one's motive for taking control.

B. THE SUBSTANCE IS A DRUG

Before 2002, this second element of the drug-possession offense had a mental element of "knowledge of illicit nature of substance" (*nature-knowledge*), a phrase Florida courts used to mean D knew the drug's identity.[10] Post-2002, nature-knowledge is a defense that, if raised, requires that that knowledge be proven beyond reasonable doubt. Fla. Stat. §893.101 (2015).

Here we encounter the first potential problem with the standard instruction: It uses the phrase "illicit nature of substance" in the nature-knowledge defense. But if, in section 893.101, the legislature meant to adopt the judicial meaning of this phrase, then the instruction is insufficient because it doesn't make it clear that what must be proven is that D knew the drug's identity, not merely that D knew that it was a drug of some kind.

There are other problems with the instruction.

IV. PROBLEMS IN THE STANDARD INSTRUCTION

[10] *Scott v. State*, 808 So. 2d 166, 169 (Fla. 2002); *Chicone v. State*, 684 So. 2d 736, 738, 745 (Fla. 1996); *State v. Dominguez*, 509 So. 2d 917, 917-19 (Fla. 1987); *Way v. State*, 475 So. 2d 239, 240-41 (Fla. 1985).

A. PROBLEMS WITH STRUCTURE AND DEFINITIONS

We begin with the parts of the instruction that were given the various emphases above. There are four problems here.

1. The Elements Of Presence-Knowledge And Exercise-Control Should Be Combined Into A Single Element Of Possessed-a-Substance: As the language underlined above shows, jurors are told drug-possession has three elements, the first two of which are D *knew of the presence of, and exercised control over, a substance*. Together, these two elements constitute what should be a single element of *possessed a substance*. This is recognized in the standard instructions for trafficking-by-possession offenses under section 893.135, which combine these two into a single element of *knowingly possessed a substance*. *E.g.*, Fla. Std. Jury Instr. (Crim.) 25.10. Here, *knowingly* refers to the nature-knowledge element (*Way*, 475 So. 2d at 241; *State v. Ryan*, 413 So. 2d 411 (Fla. 4th DCA 1982)); which the Florida Supreme Court read into section 893.13 offenses in 1996 (*Chicone*, 684 So. 2d at 738); and which was "exclude[d] as an element of 'any offense under [chapter 893]'" in 2002 when section 893.101(2) was enacted. *In re Standard Jury Instructions*, 153 So. 3d at 194. As things now stand, if *knowingly* no longer refers to nature-knowledge; and *possession* is defined as presence-knowledge plus exercise-control; then *knowingly possessed* is redundant (and *unknowingly possessed* is an oxymoron): If one *possesses* something, then one, by definition,

knows one possesses it (although one might not know -- have no nature-knowledge of -- exactly *what* it is that one possesses).

The same wording should be used for the basic elements for all chapter 893 possession offenses. This is a minor point but it could cause confusion if jurors are instructed on both simple possession and trafficking-by-possession. The differences in the wording could lead jurors to believe (erroneously) that *possession* is defined differently in these two offenses.

2. <u>We Should Use A Single Phrase For The Presence-Knowledge Component</u>: As the language capitalized above shows, the instruction defines the presence-knowledge component in three ways: *knew* (or *had knowledge*) *of presence* (four times); *aware of presence* (four times); and *knew drugs were within presence* (once). The difference between *knew-of* and *aware-of* is probably nugatory, although jurors might think some distinction is intended. And *knew-were-within-presenc*e can certainly convey a different meaning to jurors: It implies the drugs must be in D's actual physical presence or close to D's person. One can *know of the presence* of drugs in a location miles from one's own location. But many would say these drugs are not *within one's presence*. To avoid confusion, the same language should be used throughout the instruction.

Also, as noted above, the presence-knowledge component may be more of an existence-knowledge component. The State need not prove D knew the precise location of the drugs; rather, it need only

prove D knew the drugs existed somewhere (presumably in the hands of D's agent). This issue will rarely arise; in most cases, the issue will be whether D knew the drugs were in the location where they were found. But in rare cases, the issue will be whether D knew of the drugs' existence, even though it is clear D didn't know their precise location. The presence-knowledge language in the instruction should be modified to account for such cases.

3. <u>We Should Use A Single Phrase For The Exercise-Control Component</u>: As the language emphasized in bold above shows, the instruction uses four phrases for the exercise-control component. The problems this may cause are exposed by focusing on the series of explanations jurors are given for the concept of possession:

> a. The drug-possession offense has two elements, possession-of-substance and substance-was-drug
>
> b. The possession-of-substance element has two components, presence-knowledge and *exercised control or ownership over substance*
>
> c. There are two types of possession, actual and constructive
>
> d. There are three types of actual possession, all of which require both presence-knowledge and either
>
> 1. substance in hand or on person;
> 2. substance in container in hand or on person; or
> 3. substance within ready reach and *under D's control*
>
> e. There are two types of constructive possession, both of which require both presence-knowledge and either
>
> 1. *ability to control substance*, if substance is *in place over which D has control*
> 2. *exercised control or ownership over substance,* if substance is *in place D did not control*

Intermixed with these explanations, jurors are told: 1) Mere proximity to the substance is insufficient to prove a *power and intent to control the substance* if it is *in a place D did not control*; 2) possession can be joint, if two persons have presence-knowledge and jointly *exercise control over the substance*; and 3) *power and intent to control the substance* may be inferred, if the required predicate facts are proven.

Thus, 1) *under-control* is used for one form of actual possession; 2) *ability-to-control* is used for one form of constructive possession; 3) *exercise-control* is used for the second form of constructive possession, for joint possession, and for the basic definition of possession; and 4) *power-and-intent-to-control* is used for the mere-proximity rule and for the inferences. These phrases are not necessarily synonymous. Indeed, there may be a three-step hierarchy here: 1) *ability-to-control*, meaning a raw physical (but unexercised) ability; 2) *power-and-intent-to-control*, meaning a recognized-authority-type power and an unexercised intent; and 3) *under-control/exercise-control*, meaning the intent has been exercised and control has actually been obtained.

In addition to any confusion caused by this apparent hierarchy, the main problem here is that jurors could interpret ability-to-control to mean simply the raw physical *ability* to

reach out and grab the drugs. But, as noted above, this is insufficient to prove the exercise-control component.

This potential confusion is exacerbated by the second way the instruction uses the concept of *control,* control-over-place. As the phrases italicized in the instruction above show, the control-over-place concept is related to the exercise-control component and it appears in three contexts: the definitions of constructive possession, the mere-proximity rule, and the inferences.

Jurors are given two definitions of constructive possession. They are first told that 1) two of the elements of drug-possession are presence-knowledge and *exercised-control-over-substance*; 2) one type of possession is constructive possession; and 3) constructive possession has three components: (a) presence-knowledge; (b) *substance-is-in-place-over-which-D-has-control;* and (c) D *has-ability-to-control-substance*. Thus, to prove possession, the *exercise* of control over the drugs must be proven; and that can be proven if D *has* control over the place and also has the *ability* to control the drugs. Jurors may understand this to mean that D must actually *have* control over the place but need only have the raw physical *ability* to control the drugs found there.

Jurors are then given a second definition of constructive possession, to be used if the drugs are *in a place D did not control.* In this situation, the State must prove D had presence-knowledge and *exercised control or ownership over the substance.*

In sum, if D has control-over-place, then only ability-to-control-substance is needed; but if D does not have control-over-place, then (actual) exercise-control-over-substance is needed.

Between these two definitions of constructive possession, jurors are told that mere-proximity-to-substance *is not sufficient to establish power and intent to control substance* if it is in a place D *did not control*. Again, the negative inference here is that mere-proximity *is* sufficient to prove *power and intent to control* if the substance is in a place D *did control*. Jurors might interpret all this to mean that:

> 1) If the drugs are in a place D controls, then (a) D's mere *ability*-to-control-drugs is sufficient to prove constructive possession, and (b) D's mere proximity to drugs is sufficient to prove D's *power and intent to control the drugs*; but
>
> 2) If the drugs are in a place D *did not control*, then (a) to prove constructive possession it must be proven that D *did* exercise-control-over-drugs, and (b) D's mere proximity to the drugs is not sufficient to prove D's *power and intent to control the drugs*.

As discussed below, the author believes this complex structure should be replaced with something much simpler. For now, it is enough to note that, to avoid possible confusion, consistent terminology should be used for the exercise-control component. The author believes power-and-intent-to-control is appropriate.

4. <u>The Failure to Define Control-Over-Place</u>: Again, control-over-place-where-drugs-are-found is a crucial concept in the instruction. This concept raises several questions: What is the

relevant *place*? What is meant by *control over* that place? When is that control *exclusive* or *joint*? What is meant by *common area, in plain view,* and *in presence*? The instruction provides no guidance.

Nor do the cases. As to the issues of control-over-place and exclusive-versus-joint, there may be conflicts in the cases regarding: 1) Whether D's exclusive-control-of-place-where-drugs-are-found is *always* sufficient to prove drug-possession;[11] 2) whether the issue of exclusive-versus-joint control-over-place turns on, not who was actually present when the drugs are found, but on whether others had *access* to that place, from which it may be inferred that someone else put the drugs there (even though D was the only one actually present when the drugs are found);[12] and 3) whether the relevant place-where-drugs-are-found must be the entire conveyance or structure, or can be a more focused location, such as the front or back seat, or trunk, of a jointly occupied car,[13] or a part of a jointly occupied structure. Some cases speak of D's "control over the premises" as if that means "this was [D's] residence," thus indicating it must be proven that D

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[11] *Cf. State v. Odom*, 862 So. 2d 56 (Fla. 2d DCA 2003), *Lee v. State*, 835 So. 2d 1177 (Fla. 4th DCA 2003), *and Gaines v. State,* 706 So. 2d 47 (Fla. 5th DCA 1998) *with Evans v. State*, 110 So. 3d 487 (Fla. 4th DCA 2013), *Bennett v. State*, 46 So. 3d 1181 (Fla. 2d DCA 2010), *and Links v. State*, 927 So. 2d 241 (Fla. 2d DCA 2006).

[12] *Cf. Santiago v. State,* 991 So. 2d 439 (Fla. 2d DCA 2008), *Links*, 927 So. 2d at 243, *and Doby v. State*, 352 So. 2d 1236 (Fla. 1st DCA 1977) *with Odom,* 862 So. 2d at 59 *and Parker v. State*, 641 So. 2d 483 (Fla. 5th DCA 1994).

[13] *Cf. Smith v. State,* 175 So. 3d 900 (Fla. 1st DCA 2015), *R.D.D. v. State*, 15 So. 3d 857 (Fla. 1st DCA 2009), and *State v. Williams*, 742 So. 2d 509 (Fla. 1st DCA 1999) *with R.C.R. v. State,* 174 So. 3d 460 (Fla. 4th DCA 2015), *D.M.C. v. State,* 869 So. 2d 575 (Fla. 2d DCA 2003), *Green v. State*, 667 So. 2d 208 (Fla. 2d DCA 1995), *and T.W. v. State,* 666 So. 2d 1001 (Fla. 5th DCA 1996).

controlled the entire residence. *Bennett*, 46 So. 3d at 1184. But in one constructive-joint residence case, the court held the evidence was sufficient based on D's "control *over the immediate area where the drugs were found in plain view*," which was proven by the fact that D, the homeowner, "was standing *alone* in the doorway of the bathroom where the [drugs were] found." *State v. Reese*, 774 So. 2d 948, 950 (Fla. 5th DCA 2001) (emphasis partially added). In another constructive-joint residence case, the court held D could be convicted for possessing drugs hidden in a box in a closet in the bedroom D shared with his wife because that evidence, "while not sufficient to demonstrate [D] had *exclusive possession of either the residence or the closet* in which the [drugs were] found, was certainly sufficient to show [D's] control *over the box* bearing his name and its contents." *Wale v. State*, 397 So. 2d 738, 740 (Fla. 4th DCA 1981) (emphasis added).

This latter case indicates that the relevant place-where-drugs-were-found can be the actual container that contains the drugs. But other cases hold the evidence is insufficient to prove D possessed drugs hidden in a personal container that undeniably belonged to D but to which others *may* have had recent access, such as a purse, wallet, or backpack. *P.M.M. v. State*, 884 So. 2d 418, 419 (Fla. 2d DCA 2004) (drugs found in D's backpack at school which she left it unattended for some time earlier that day); *N.K.W. v. State*, 788 So. 2d 1036, 1038 (Fla. 2d DCA 2001) (drugs

found in D's wallet, which is found on closet shelf in another's home during a party attended to D and others; wallet had been "accessible to several people"); *Cook v. State,* 571 So. 2d 530, 531 (Fla. 1st DCA 1990) (drugs found in D's purse, which she left on bar while she danced; D "obviously did not have exclusive control over the bar [and] people sitting at or near the bar had access to [D's] purse during the confusion that ensued after the police entered").

One court defined "'exclusive,' in the possession context, to mean 'vested in one person alone.'" *Gartrell v. State,* 609 So. 2d 112, 114 (Fla. 4th DCA 1992), *quashed on other grounds,* 626 So. 2d 1364 (Fla. 1993). But this doesn't advance the ball beyond the line of scrimmage. What exactly needs to be *vested in one person*? What does *vested* mean and how is it proven? Vested is generally defined in law as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." Black's Law Dictionary, *Vested*, (10th ed. 2014). Surely, Cook, P.P.M., and N.K.W. all had a vested interest in their personal items that contained the drugs, and it seems those interests were exclusive, in the sense that there were no co-owners of those items. But despite this exclusive vesting, all these cases were analyzed as constructive-joint cases because others had access (albeit unauthorized) to the place-where-drugs-were-found (even though there was no direct evidence that someone

else had actually entered the place-where-drugs-were-found). Thus, whether D had some vested interest in the place-where-drugs-are-found, although highly relevant in a property-based civil action (replevin, ejectment), is of little (or, at best, merely factually-contingent) relevance in a drug-possession case.

As to the *common-area, in-presence,* and *in-plain-view* elements, all this language comes from the 1983 *Brown* case, where the Court held that "joint occupancy, with or without ownership of the premises, where contraband is discovered in plain view in the presence of the owner or occupant is sufficient to [prove] constructive possession." 428 So. 2d at 252. Brown was present when officers searched his house and found drugs "in the living room, the kitchen, the family room, the garage, and one bedroom[,] literally scattered throughout the house and much of [it] in plain view." *Id.* at 251. The Court said these facts proved presence-knowledge "because the contraband was in plain view in common areas throughout the house," and exercise-control was proven "because Brown, as resident owner of his home, had control over the common areas." *Id.* at 252.

However, although the Court uses the phrase "owner or occupant" for this inference, *occupant* cannot be read literally. Dictionary definitions of *occupant* include a "person who occupies [or] is in a space," with *occupy* being defined to include one "located in" a space. *The Oxford Desk Dictionary and Thesaurus*, p.

545 (1997 ed.). But post-*Brown* cases make it clear that *occupant* doesn't necessarily include all present -- *located in the space* -- when drugs are found; visitors, guests, vehicle passengers, and the like are not *occupants* for this purpose. *E.g.*, *Sundin v. State*, 27 So. 3d 675 (Fla. 2d DCA 2009); *J.S.M. v. State*, 944 So. 2d 1143 (Fla. 2d DCA 2006); *Jean v. State*, 638 So. 2d 995 (Fla. 4th DCA 1994). Further, it is not always clear how we distinguish occupants, to whom this constructive-joint inference can be applied, from non-occupants, to whom it cannot be applied.

For instance, one court held that, when D ran into a cottage (that was unoccupied before he entered) upon seeing officers approaching, "the evidence failed to show that [D] had control over the premises," even though some of D's personal property (driver's license, letter addressed to him) was in the cottage and he consented to a search of the cottage. *Bennett*, 46 So. 3d at 1184. The court held there was "no evidence to prove that this was [D's] residence" because the "only evidence on this topic was [D's] statement ... that he *sometimes stayed* at the cottage," which "proved at most that [he] was a *visitor*." *Id.* (emphasis added). But another court used the constructive-joint inference to affirm a conviction when deputies responding to a 911 call (not clear from whom) found D and his brother in the home and "the brothers invited the deputies to enter." *Nicholson*, 33 So. 3d at 109. Even though no evidence was presented to prove who owned the

home or the brothers' general relationship to it, and the deputies "knew [a third person] lived at the residence but was not present," the court said D's "claim that he was a mere visitor to the trailer [was] a fact issue" because "the presence of the co-defendants alone in the residence at 1:00 A.M., coupled with the 911 call and the invitation to law enforcement to search the premises, demonstrated greater authority and control of the premises than that of a visitor." *Id.* at 111.

Whether these two cases conflict may be a good question for a law school exam but for present purposes it is enough to note that, in many cases, the question of who is an *occupant* for these purposes must be determined but the cases provide no test we can use (other than that old standby, totality-of-circumstances). Further, the instruction doesn't even use the term *occupant* but rather merely requires proof that D had some *control over the place*, leaving it unclear whether guests, visitors, and passengers might ever be considered to have such control, at least over some portion of the relevant place. Also unclear is whether someone in a public space might have some control over the relevant place; if a street corner drug dealer hides her as-yet-unsold supply under a trash can in the public park that constitutes her "storefront," does she have *control over the place where the drugs were found*?

In addition to leaving the meaning of *occupant* unclear, neither *Brown* nor later cases have expounded on the meaning of

common area. Its basic meaning seems clear as applied to residences, although some cases indicate that the fact that drugs were found in a common area may actually undercut the conclusion that D possessed the drugs found there (because another resident may have put them there), even if D is the property owner. *Williams v. State*, 489 So. 2d 1198 (Fla. 1st DCA 1986); *Ellis v. State*, 346 So. 2d 1044 (Fla. 1st DCA 1977). Here, another as-yet-unanswered question arises: What if more than one person has *some* control-over-place but all clearly do not have the same degree of control, *e.g.*, D is temporarily staying at X's house because D's house was flooded; D and X are neighbors but don't know each other all that well; X allows D full access to the kitchen (or at least says nothing to D to restrict that access); and drugs are found in plain view on the kitchen counter in a candy dish that seems to belong to X.

The meaning of *common area* as applied to vehicles is even less clear.

As to *in-presence* and *in-plain-view*, the fact that both are needed to invoke the constructive-joint inference indicates that these two concepts are not synonymous. Thus, drugs hidden in an opaque package could be considered in-presence but not in-plain view. *See Nicholson*, 33 So. 3d at 110–11; *De La Cruz v. State*, 884 So. 2d 349, 351–52 (Fla. 2d DCA 2004. As to the plain-view element, it's not clear whether this requires proof that D

actually saw the drugs, or at least proof that D was in a position to see them and would have seen them if her eyes were open. Nor is it clear how this requirement applies to such complicating facts as D is blind; D has very poor eyesight and there's no evidence she was ever wearing her glasses while the drugs were in her plain view; or the drugs are found in a dark location and there's no evidence the drugs were in D's plain view when the lights were on.

Again, the cases provide little guidance. One court indicated the test is simply whether there was enough light in the location to allow D to see the drugs and the evidence is sufficient to create an inference that D was at some point in a position to see them. *Nicholson*, 33 So. 3d at 109-10. Another court affirmed a conviction when the drugs were found in plain view in the bedroom where D and another were sleeping when the officers entered, even though there didn't seem to be any evidence to prove the drugs and an awake D were ever both present in the room at the same time. *Hill v. State*, 873 So. 2d 491, 492 (Fla. 1st DCA 2004). In a third case, an informant made a controlled buy from D at D's home; officers stopped D and the informant on the way out the front door; and the officers immediately entered the home and found both a third person (D's girlfriend) and drugs in plain view on the dining room table. The court held this was sufficient to prove D possessed those drugs because they "were in plain view when law enforcement entered the residence from which [D] had departed mere

moments before the search." *Brown v. State*, 8 So. 3d 464, 466 (Fla. 2d DCA 2009).

One might ask if this latter result would change if there was no prior drug deal or if a greater amount of time elapsed between D's leaving the premises and the officers entering. Suppose officers, responded to a noise complaint, go to a home and find D coming out the front door. After talking to D for a few minutes, they enter the home and find X in the living room, with drugs in plain view on the kitchen counter. D and X are co-owners. Is this sufficient to prove the drugs were in plain view (and D saw them?) before D left the home?

Another court held a deputy did not have "probable cause to believe [D] possessed the drugs found in the car" because, although constructive possession

> can be shown when the contraband is in [D's] plain view, the deputy who found the drugs recounted only that they were in his own view; he did not testify that the drugs were in [D's] view. In fact, his description of where the drugs were located—in the driver's-side door handle of the car—implied that the drugs were not visible to [D, who was in the passenger seat]. The deputy ... did not testify that he saw the cocaine from the vantage of the passenger's side ....

Wynn v. State, 14 So. 3d 1094, 1096 (Fla. 2d DCA 2009). The clear inference here is that the State must prove, at the least, that D was at some point in a position where she could have seen the drugs. But the instruction says nothing about this.

In sum, it's not clear when jurors should be instructed on

all these control-over-place issues or exactly what these crucial phrases mean. The author believes all this control-over-place language should be eliminated, along with both the inferences and the concept of actual-versus-constructive possession.

B. PROBLEMS WITH THE INFERENCES IN THE INSTRUCTIONS

There are five inferences in the instruction. With the first four, jurors are told they may infer D possessed the drugs (*i.e., infer D was aware (or knew) of presence of drugs and had power and intention to control them*) if they find that D:

> 1. "had direct physical custody of the [drugs]";
> 2. "was in ready reach of the [drugs] and [they were] under [D's] control";
> 3. "had exclusive control of the place where the [drugs were] located"; or
> 4. "had joint control over the place where the [drugs were] located, and the[y were] in a common area in plain view and in [D's] presence"

Fla. Std. Jury Instruct. (Crim.) 25.7. The fifth inference tells jurors that they may infer nature-knowledge if they find that D possessed the drugs, *i.e.,* that D *knew of their presence and exercised control over them. Id.*

In addition to what was noted above, there are two other problems with these inferences.

1. Circularity in the In-Ready-Reach Inference: Jurors are told they can infer presence-knowledge and power-and-intent-to-control if they find the drugs were within-D's-ready-reach and under-D's-control. But if the drugs are under-D's-control, then D

not only has the *power-and-intent*-to-control them, she is already *actually* controlling them. This inference is unnecessary. But its existence could reinforce jurors' beliefs that there is a distinction between *under-control* and *power-and-intent-to-control*.

2. All the Inferences are Judicial Comments on Evidence: Florida trial judges cannot make comments to the jury that are "capable, directly or indirectly, [of] conveying any intimation [of the judge's] opinion as to the weight, character, or credibility of any evidence." *Lester v. State*, 20 So. 232, 234 (1896); Fla. Stat. §90.106 (2013). The Florida Supreme Court recently disapproved an instruction that told jurors that "a sexual battery victim's testimony need not be corroborated" because it "suggest[s that] one witness's testimony need not be subjected to the same tests for weight or credibility as [other] testimony," which in turn "bolster[s that] testimony by according it special status." *Gutierrez*, 177 So. 3d at 227, 231-32. The Court has also disapproved instructions that told jurors they may infer consciousness-of-guilt from such things as flight, refusals to be fingerprinted, and inconsistent exculpatory statements. *Instructions in Criminal Cases*, 652 So. 2d 814 (Fla. 1995); *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992); *Whitfield v. State*, 452 So. 2d 548 (Fla. 1984). Further, it is "well established that [D's] knowledge is an issue of fact for the jury to determine based on the evidence," and trial courts "should not charge a jury

with respect to a matter of fact." *Owens v. State*, 94 So. 3d 688, 689-90 (Fla. 4th DCA 2012) (citing *Wright v. State,* 586 So. 2d 1024, 1030–31 (Fla. 1991)).

Although there are no Florida cases directly on point, the inferences in the drug-possession instruction are equally improper.[14] Many drug-possession cases turn on the inferences we can draw from many circumstances, including where, when, and how the drugs are found; D's (and others') connection to that location; D's (and relevant others') reaction when the drugs are found; any physical evidence (clothing, fingerprints), or lack of same, that ties D (or others) to the location or to the drugs; any indications of drug use or consciousness-of-guilt by D or others; *etc.* But the inferences in the instruction "accord[] special status," *Gutierrez,* 177 So. 3d at 231, to some types of circumstantial evidence and "intimat[e the judge's] opinion [on] the weight [of that] evidence," *Lester,* 20 So. at 234, by

[14] In *State v. Cheeks*, 737 S.E.2d 480, 483-84 (S.C. 2013), the court held that an instruction that "[D's] knowledge and possession can be inferred when a substance is found on property under [D's] control" was an "improper ... expression of the judge's view of the weight of certain evidence" because it "converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug [and] largely negates the mere presence charge."

In *Gatlin v. State*, 556 So. 2d 772 (Fla. 1st DCA 1990), the court held the following instruction did not violate federal constitutional due process principles: "If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed." Rejecting D's argument that this instruction "was a mandatory presumption" that "shifted the burden to [D] to prove that he did not know of the presence of the [drugs] in his pocket," the court said the instruction was a permissive inference and it was "unlikely that the jury ... construed [it] as shifting to [D] the burden of persuasion." *Id.* at 774-75. This case is irrelevant to the issue of judicial-comments-on-evidence, which is a matter of state law, not federal due process.

"suggest[ing it] may be more important than other evidence." *Moton v. State*, 659 So. 2d 1269, 1270 (Fla. 4th DCA 1995). And the jury is told to focus on the predicate-fact evidence to prove crucial elements of the offense, elements for which the State often has no direct proof.[15]

The four possession inferences are also troublesome because, as discussed above, they "do not provide terms sufficiently defined to adequately inform a jury as to [when] to apply the[m]," which means we have no "meaningful standard for assessing what type of evidence merits the giving of [the] instruction." *Barfield v. State*, 613 So. 2d 507, 508 (Fla. 1st DCA 1993) (citing *Fenelon*, 594 So. 2d at 295). These inferences should be eliminated.[16]

C. PROBLEMS WITH THE DISTINCTION BETWEEN ACTUAL AND CONSTRUCTIVE POSSESSION

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[15] In *Walker v. State*, 896 So. 2d 712, 719 (Fla. 2005), a 5-2 Court held that an instruction on possession of recently stolen property, given in a burglary case, was not an improper comment on evidence because it concerned matters that are "inextricably intertwined with the crime itself." *Fenelon, et al.*, were distinguished because the instructions disapproved in those cases concerned matters that "are extrinsic to the crime," *i.e.*, "matters that occurred outside the parameters of the crime itself." *Id.* The author believes *Walker* is wrongly decided and the dissent has the better argument. *See* Richard Sanders, *The Stealthy Entry Jury Instruction*, 24 *The Florida Defender* 49, 51-53 (2012). *Walker* was not cited in *Gutierrez*, so it's not clear whether the Court believed that corroboration of a victim's testimony was something that was *inextricably intertwined with the crime* or was *extrinsic to the crime*. *Gutierrez* did quote with approval from *Lester*: "All matters of fact, and all testimony adduced, should be left to the deliberate, independent, voluntary, and unbiased judgment of the jury, wholly uninfluenced by any instruction, remarks, or intimation, either in express terms or by innuendo, from the judge, from which his view of such matters may be discerned." 177 So. 3d at 231.

[16] The nature-knowledge inference created by section 893.101 presents a special problem, beyond the scope of this article. Unlike in the other cases noted above, the legislature has expressly directed trial courts to give, when applicable, the instruction on the nature-knowledge inference. §893.101(3). It is not clear how this legislative mandate affects the judicial-comment issue. The answer probably turns primarily on the extent to which the no-judicial-comments rule is based on constitutional, rather than common-law, principles.

Much of the instruction distinguishes actual and constructive possession. It is well-recognized that these two concepts "often so shade into one another that it is difficult to say where one ends and the other begins." *Stead*, 232 U.S. at 67. Courts "have at best established ill-defined guidelines as to [what] constructive possession [means]." *United States v. Holland*, 445 F.2d 701, 703 (D.C. Cir. 1971) (Tamm, J., concurring). This is hardly surprising; there is something illogical about the whole notion of constructive possession.

When lawyers add the adjective *constructive* to a legal term, they generally mean something that "exist[s] by virtue of legal fiction though not existing in fact." Black's Law Dictionary, *Constructive*, (10th ed. 2014). Thus, many courts say constructive possession refers to a "relationship between [D] and the [drugs such] that it is reasonable to treat [D's] control *as if it were actual possession*." *Jackson v. State*, 995 So. 2d 535, 539 (Fla. 2d DCA 2008) (emphasis added). Here, constructive possession is viewed as the legally fictitious equivalent of actual possession.

But drug statutes do not outlaw only *actual* possession. Facts that prove what we call constructive possession prove *the possession offense itself*, not a fiction-based analogue to the statutory offense of actual-possession.

This is seen more clearly if we say that drug-possession statutes outlaw the *real* possession of drugs. Based on common fact

patterns, the law has come to divide this real-possession offense into two types, actual and constructive, both of which are then further subdivided into different forms. But all these forms are *real* possessions: D *does in fact* have both presence-knowledge and exercise-control as to the drugs.

If we use this real-possession paradigm, no legal fiction need be invoked. The distinction between the actual and the constructive is based, not on a legal fiction, but on real existing-in-fact differences regarding the physical distance between D and the drugs. As that distance goes from the in-hand/on-person scenario to distances measured in feet, yards, and beyond, we go from the actual to the constructive. But the possession remains *real*; regardless of that physical distance, the State must prove D did in fact have both presence-knowledge and exercise-control as to the drugs.

The instruction should not use the term constructive possession because jurors (particularly those with some general knowledge of law) might interpret that term to mean that the law will assume the existence of presence-knowledge or exercise-control even though they were not proven to exist in fact. But if either of these two things are not proven to exist in fact, then *real*-possession is not proven; and D must be acquitted.

In sum, the "tenuous distinction between actual and constructive possession is not analytically useful" because,

"[u]ltimately, possession-of whatever type-requires a showing that [D did in fact possess the drugs]." *United States v. Nevils*, 548 F.3d 802, 806 (9th Cir. 2008), *modified on other grounds on rehearing en banc,* 598 F.3d 1158 (9th Cir. 2010). "[R]ather than attempting to sort [a] case as an actual or constructive possession case, we [should] focus on the dispositive requirements of knowledge and ability and intention to control." *Id.* One court recently said the "formulas do not explain clearly the difference between actual and constructive possession, or the utility of drawing the distinction"; and, as a result, courts

> have lost sight of the basic question of whether [D] did in fact possess the [drugs] and have applied the terminology of constructive possession as if it were a talisman to be used without reference to the interaction of the particular facts of each case....
>
> We don't deny the utility of the distinction—though it would be clearer, certainly to a jury, if the terms "actual possession" and "constructive possession" were replaced by "custody" and "possession"—when the physical possession is by [D's] agent ....
>
> These are cases in which custody and possession are divided[,] which strikes us ... as a clearer articulation of the distinction than "actual" versus "constructive" possession....
>
> ... Once one recognizes that "possession" is not limited to holding something in one's hand, the occasions for invoking the term "constructive possession" diminish.

United States v. Brown, 724 F.3d 801, 804-05 (7th Cir. 2013); *see also State v. Adkins*, 96 So. 3d 412, 425 (Fla. 2012) (Pariente, J., concurring) (asserting the State "bears the burden of proving [D's] knowledge of presence in order to [prove both] actual or

constructive possession"); *Maestas v. State*, 76 So. 3d 991, 995 (Fla. 4th DCA 2011) (same); *N.H. v. State,* 111 So. 3d 950, 952 (Fla. 2d DCA 2013) ("whether the State proceeds under an actual, ready-reach, possession theory, or under a constructive possession theory, it must prove that the [drugs were] under [D's] control"); *State v. McNeil,* 617 S.E.2d 271, 279 (N.C. 2005) ("This ambiguity [in the meaning of actual and constructive possession] is likely attributable to the fact that both actual and constructive possession will support a finding of 'possession' within the meaning of our statutes, making it unnecessary to distinguish between the two in many instances."). But, "[a]lthough constructive possession [may be seen as] a legal fiction, it can lead to real convictions," *United States v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012), including of innocents, if jurors misinterpret its meaning. *See Williams v. State,* 184 So. 3d 623 (Fla. 3d DCA 2016), discussed below. Dividing the already amorphous concept of possession into the various types of actual and constructive possession is cumbersome, if not confusing, especially for jurors who are wrestling with all this for the first time. The instruction should not use these terms.

V. CONCLUSION

The purpose of an instruction like 25.7 is to give jurors guidance in determining whether the evidence is sufficient to prove all the elements of the offense. Given the many combinations

of circumstances we might find in drug-possession cases, the default test for evidence-sufficiency -- totality of the circumstances -- seems unfocused and unsatisfactory. But giving jurors a more focused guidance can be troublesome as well. We can tell jurors that the evidence may be sufficient to convict if D *had exclusive control of place where drugs were found* (and then affirm their decision to convict if those basic facts are proven). But what if a single cocaine rock is found on the floor behind the driver's seat when D is the sole occupant, and D is a mechanic taking the car for a test drive after working on it; or it's a used car D just bought or a rental car D just picked up; or a taxi and D is one of several regular drivers? What if it's D's car and she just had it detailed at the carwash? Are we truly comfortable with an instruction that tells jurors they may convict in such cases simply because D *had exclusive control of the place where drugs were found*?

These are not mere abstract concerns. In a recent case where drugs were found hidden in a jointly occupied car, jurors came back with a question after being given the then-extant standard instruction: "Are there legal exceptions for 'possession of cocaine' if [D] was not aware of drugs in the car?" *Williams*, 184 So. 3d at 627. The logical flaw in the question is patent: Because presence-knowledge is part of the definition of possession, if D *was not aware of drugs*, then he did not *possess* them. But, as

these jurors understood the law, they seemed to believe D *did* possess the drugs despite his lack of presence-knowledge. And this troubled them enough to ask if there was a *legal exception* to the conclusion -- D's conviction -- that, they believed, their (mis)reading of the instruction required.

It is not clear how often such misunderstandings occur. But jurors continue to convict -- and appellate courts continue to reverse -- in cases with facts that have been held, many times over many years, to be insufficient to prove drug-possession. One recurring fact pattern -- the one in the *Williams* case just noted -- involves drugs hidden in a jointly occupied vehicle that cannot be directly tied to a particular occupant. For years, Florida district courts have held such basic facts are insufficient to prove possession. The first reported case is *Harris v. State*, 307 So. 2d 218 (Fla. 3d DCA 1974). Since then, courts have regularly issued opinions that both hold such evidence is insufficient and collect the ever-expanding body of "well-settled case law" that supports that conclusion.[17]

A similar history has developed with regard to the stationary analogue to these vehicle cases, *i.e.*, D is convicted of drug-

[17] *Green v. State*, 667 So. 2d 208, 211 (Fla. 2d DCA 1995); *see also Williams v. State*, 110 So. 3d 59, 63 (Fla. 2d DCA 2013); *S.E.B. v. State*, 994 So. 2d 1216, 1217 (Fla. 2d DCA 2008); *J.M. v. State*, 839 So. 2d 832, 834-35 (Fla. 4th DCA 2003); *Earle v. State*, 745 So. 2d 1087, 1089 (Fla. 4th DCA 1999); *Murphy v. State*, 511 So. 2d 397, 399 (Fla. 4th DCA 1987). The author has a research file containing about 60 Florida cases that reverse convictions where the basic facts could be classified as a joint-constructive vehicle case.

possession when the basic facts show both D and others are present in a residence when drugs are found there. For over 40 years now, Florida courts have reversed convictions in dozens of such cases.[18]

In most of these vehicle and residence cases, other incriminating evidence was also presented, such as evidence of recent drug use or sales by D or others from that location; some drugs or paraphernalia found in plain view in that location, sometimes accompanied by D's admitting to possessing those items; the hidden drugs are found near D or in a location tied to D (*e.g.*, under the car seat D was sitting in or in a bedroom dresser

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[18] *E.g.*, *Smith v. State*, 279 So. 2d 27 (Fla. 1973); *Tucker v. State*, (Fla. 2d DCA 2016); *Temple v. State*, 150 So. 3d 1265 (Fla. 1st DCA 2014); *Smith v. State*, 125 So. 3d 359 (Fla. 1st DCA 2013); *Nicholson v. State*, 33 So. 3d 107 (Fla. 1st DCA 2010); *Evans v. State*, 32 So. 3d 188 (Fla. 1st DCA 2010); *M.D. v. State*, 30 So. 3d 650 (Fla. 4th DCA 2010); *Brown v. State*, 8 So. 3d 464 (Fla. 2d DCA 2009); *Santiago v. State*, 991 So. 2d 439 (Fla. 2d DCA 2008); *Robinson v. State*, 975 So. 2d 593 (Fla. 2d DCA 2008); *Edmond v. State*, 963 So. 2d 344 (Fla. 4th DCA 2007); *Harris v. State*, 954 So. 2d 1260 (Fla. 5th DCA 2007); *Wagner v. State*, 950 So. 2d 511 (Fla. 2d DCA 2007); *J.S.M. v. State*, 944 So. 2d 1143 (Fla. 2d DCA 2006); *Diaz v. State*, 884 So. 2d 387 (Fla. 2d DCA 2004); *De La Cruz v. State*, 884 So. 2d 349 (Fla. 2d DCA 2004); *Watson v. State*, 877 So. 2d 914 (Fla. 4th DCA 2004); *Hill v. State*, 873 So. 2d 491 (Fla. 1st DCA 2004); *N.K.W. v. State*, 788 So. 2d 1036 (Fla. 2d DCA 2001), *disapproved on other grounds, Knight v. State*, 186 So. 3d 1005 (Fla. 2016); *McKinney v. State*, 736 So. 2d 750 (Fla. 2d DCA 1999); *Span v. State*, 732 So. 2d 1196 (Fla. 4th DCA 1999); *Clark v. State*, 670 So. 2d 1061 (Fla. 2d DCA 1996); *Hampton v. State*, 662 So. 2d 992 (Fla. 2d DCA 1995); *Allen v. State*, 622 So. 2d 526 (Fla. 2d DCA 1993); *Broers v. State*, 606 So. 2d 480 (Fla. 2d DCA 1992); *Watts v. State*, 569 So. 2d 889 (Fla. 1st DCA 1990); *Wade v. State*, 558 So. 2d 107 (Fla. 1st DCA 1990); *Williams v. State*, 529 So. 2d 1234 (Fla. 1st DCA 1988); *Stemm v. State*, 523 So. 2d 760 (Fla. 1st DCA 1988); *Brooks v. State*, 501 So. 2d 176 (Fla. 4th DCA 1987); *Cortez v. State*, 488 So. 2d 163 (Fla. 1st DCA 1986); *Green v. State*, 460 So. 2d 986 (Fla. 4th DCA 1984); *Giddens v. State*, 443 So. 2d 1087 (Fla. 2d DCA 1984); *Clark v. State*, 402 So. 2d 43 (Fla. 4th DCA 1981); *Coley v. State*, 393 So. 2d 60, 60 (Fla. 3d DCA 1981); *Hall v. State*, 382 So. 2d 742 (Fla. 2d DCA 1980); *Johnson v. State*, 381 So. 2d 342 (Fla. 3d DCA 1980); *Gaynus v. State*, 380 So. 2d 1174 (Fla. 4th DCA 1980); *Thompson v. State*, 375 So. 2d 633 (Fla. 4th DCA 1979); *Clark v. State*, 359 So. 2d 458 (Fla. 3d DCA 1978); *Norris v. State*, 351 So. 2d 729, 729 (Fla. 3d DCA 1977); *Willis v. State*, 320 So. 2d 823 (Fla. 4th DCA 1975); *Taylor v. State*, 319 So. 2d 114 (Fla. 2d DCA 1975); *Mosley v. State*, 281 So. 2d 590 (Fla. 4th DCA 1973); *Torres v. State*, 253 So. 2d 450 (Fla. 3d DCA 1971).

drawer that contains other items with D's name on it); consciousness-of-guilt evidence from D; *etc.*

Florida courts also regularly reverse convictions because the possession element was not proven in cases where 1) the contraband is found, sometimes hidden, sometimes in plain view, in a public area (street, park); 2) D is close to the contraband, sometimes with others nearby and sometimes not; and 3) D engages in suspicious behavior upon seeing the officers.[19]

In short, there is probably no offense for which convictions are so often reversed on grounds of simple evidence insufficiency; several opinions come out every year that hold the State failed to prove the possession element of a possession-based offense.[20] Part

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[19] *N.H. v. State*, 111 So. 3d 950 (Fla. 2d DCA 2013); *F.Q. v. State*, 98 So. 3d 783 (Fla. 4th DCA 2012); *G.G. v. State*, 84 So. 3d 1162 (Fla. 2d DCA 2012); *Doles v. State*, 990 So. 2d 1213 (Fla. 1st DCA 2008); *Foster v. State*, 969 So. 2d 1202 (Fla. 1st DCA 2007); *Tarver v. State*, 961 So. 2d 1094 (Fla. 2d DCA 2007); *J.G. v. State*, 881 So. 2d 25 (Fla. 4th DCA 2004); *J.J.N. v. State*, 877 So. 2d 806 (Fla. 5th DCA 2004); *King v. State*, 817 So. 2d 935 (Fla. 5th DCA 2002); *Lindsey v. State*, 793 So. 2d 1165 (Fla. 1st DCA 2001); *Scruggs v. State*, 785 So. 2d 605 (Fla. 4th DCA 2001); *O.L.M. v. State*, 767 So. 2d 617 (Fla. 3d DCA 2000); *Davis v. State*, 761 So. 2d 1154 (Fla. 2d DCA 2000); *Isaac v. State*, 730 So. 2d 757 (Fla. 2d DCA 1999); *Williams v. State*, 573 So. 2d 124 (Fla. 4th DCA 1991); *Edwards v. State*, 532 So. 2d 1311 (Fla. 1st DCA 1988); *Agee v. State*, 522 So. 2d 1044 (Fla. 2d DCA 1988); *Smith v. State*, 519 So. 2d 750 (Fla. 4th DCA 1988); *Collier v. State*, 509 So. 2d 971 (Fla. 2d DCA 1987); *D.K.W. v. State*, 398 So. 2d 885 (Fla. 1st DCA 1981); *Tanksley v. State*, 332 So. 2d 76 (Fla. 2d DCA 1976).

[20] At least 22 such opinions issued from district courts between January 1, 2011 and January 1, 2016. *Smith v. State*, 175 So. 3d 900 (Fla. 1st DCA 2015); *R.C.R. v. State*, 174 So. 3d 460 (Fla. 4th DCA 2015); *Whiting v.* State, 169 So. 3d 273 (Fla. 4th DCA 2015); *Kemp v. State*, 166 So. 3d 213 (Fla. 1st DCA 2015); *Williams v. State*, 154 So. 3d 426 (Fla. 4th DCA 2014); *Temple v. State*, 150 So. 3d 1265 (Fla. 1st DCA 2014); *Finley v. State*, 139 So. 3d 940 (Fla. 4th DCA 2014); *Smith v. State*, 125 So. 3d 359 (Fla. 1st DCA 2013); *Smith v. State*, 123 So. 3d 656 (Fla. 2d DCA 2013); *Stevens v. State*, 120 So. 3d 1258 (Fla. 3d DCA 2013); *B.B. v. State*, 117 So. 3d 442 (Fla. 2d DCA 2013); *N.H. v. State*, 111 So. 3d 950 (Fla. 2d DCA 2013); *Williams v. State*, 110 So. 3d 59 (Fla. 2d DCA 2013); *Rangel v. State*, 110 So. 3d 41 (Fla. 2d DCA 2013); *Miller v. State*, 107 So. 3d 498 (Fla. 2d DCA 2013); *F.Q. v. State*, 98 So. 3d 783 (Fla. 4th DCA 2012); *Porter v. State*, 88 So. 3d 1074 (Fla. 1st DCA 2012); *G.G. v. State*, 84 So. 3d 1162 (Fla. 2d DCA 2012); *Ylomon v. State*, 76 So. 3d 18 (Fla. 4th DCA 2011); *Cordero-Artigas*

of the problem here, no doubt, is the inherent difficulty in defining possession and applying that definition in purely circumstantial cases that reek with suspicious inferences but present little direct proof of guilt. And the problem here isn't just that jurors (and trial courts, in bench trials) continue to convict even though the possession element wasn't proven. Before that can even happen, a prosecutor must make a charging decision and a trial court must decide to allow the case to go to the jury. Thus, even the professionals, who (presumably) are both familiar with this weighty body of case law and well-schooled in these complexities, keep making the same mistakes.

Because making the standard instruction more complex hasn't alleviated the problem, the author suggests we simplify and offers the following a starting point; except as noted earlier, the author sees no problem with the instruction on the nature-knowledge defense:

> D is charged with possession of X. To prove this offense, the State must prove two elements:
>
> 1. D possessed a substance;
> 2. The substance was X.
>
> To prove D possessed a substance, the State must prove D 1) knew of the presence of the substance and 2) had the power to, and the intention to, exercise control over the

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v. State, 75 So. 3d 838 (Fla. 2d DCA 2011); *Gizaw v. State*, 71 So. 3d 214 (Fla. 2d DCA 2011); *Butera v. State*, 58 So. 3d 940 (Fla. 2d DCA 2011).

One might wonder how bench and bar would react if, every year, for ongoing decades, 2-4 robbery convictions were reversed because the evidence was insufficient to prove the "force" element of that offense; or 2-4 burglary convictions were being reversed because the "entry" element wasn't proven.

substance.

To prove that D knew of the presence of the substance, it is not necessary for the State to prove that the substance was within D's immediate presence, or that D knew exactly where the substance was. It is sufficient that D knew of the substance's existence or knew that another person possessed it.

D's power to control the substance is not proven by the mere fact that the substance was in close proximity to D, such that D could reach out and grab the substance if he chose to do so. On the other hand, D can have power over the substance even though it is too far away for D to reach out and grab it. If D has some power or authority to go to the location and take control over the substance, or to direct others to do something with the substance, then D has some power to control the substance.

The fact that D has some power over the substance must be coupled with an intent on D's part to exercise some control over the substance, either by exercising that control himself or by directing another to exercise control over the substance. It need not be proven that D did in fact exercise any control over the substance. It is sufficient that D could have exercised some control over the substance if he chose to do so, by either taking control himself or directing another person to take control. But if it is not proven that D did exercise some control over the substance, then it must be proven that D intended to exercise some control over the substance, either personally or through another.

In effect, the power and intent 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.