



# Supreme Court of Florida

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September 28, 2017

The Florida Bar News Editor  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, Florida 32399-2300

In Re: Standard Jury Instructions in Criminal Cases - Report 2017-03,  
Case No. SC17-1652

Dear Editor:

I have provided you with a copy of the proposed Rules in the above case. Please publish said Rules in the October 15, 2017, Bar News. Please publish a statement that the Court has placed the proposed Rules on the Internet at location: **[http://jweb.flcourts.org/pls/docket/ds\\_docket\\_search](http://jweb.flcourts.org/pls/docket/ds_docket_search)**.

Any comments should be filed with the Supreme Court on or before November 14, 2017. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Florida Courts E-Filing Portal (Portal) in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment may be, but is not required to be, filed via the Portal. Comments filed via the Portal must be submitted in Microsoft Word 97 or higher. See In re Electronic Filing in the Florida Supreme Court, Fla. Admin. Order No. AOSC17-

27 (May 9, 2017). Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

Thank you for your cooperation in this matter.

Most cordially,

A handwritten signature in dark ink, appearing to be 'JAT', followed by a horizontal line extending to the right.

John A. Tomasino

JAT/sh

Enclosure

cc: Honorable F. Rand Wallis, Chair, Supreme Court Committee on Standard  
Jury Instructions in Criminal Cases  
Honorable Jorge Labarga, Supreme Court Justice Liaison  
Honorable Michael J. Higer, President, The Florida Bar  
Honorable Michelle R. Suskauer, President-elect, The Florida Bar  
John F. Harkness, Jr., Executive Director, The Florida Bar  
Bart Schneider, Committee Liaison  
Richard John Sanders, Interested Party  
Chief Judges of the District Courts of Appeal  
Clerks of the District Courts of Appeal  
Chief Judges of the Judicial Circuits  
Clerks of the Judicial Circuits  
Deborah J. Meyer, Central Staff Director

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases (Committee) has submitted to the Florida Supreme Court a report proposing amendments to jury instructions 16.10 (Possession of Material Including Sexual Conduct by a Child with Intent to Promote) and 25.7 (Possession of a Controlled Substance).

The Court invites all interested persons to comment on the proposed amendments to instruction 16.10, which are reproduced in full below, as well as online at <http://www.floridasupremecourt.org/decisions/proposed.shtml>. All comments must be filed with the Court on or before November 14, 2017, with a certificate of service verifying that a copy has been served on the Committee Chair, The Honorable F. Rand Wallis, c/o Bart Schneider, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, [schneidb@flcourts.org](mailto:schneidb@flcourts.org). A separate request for oral argument should accompany the comment if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The Committee Chair has until December 5, 2017, to file a response to any comments filed with the Court. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Florida Courts E-Filing Portal (Portal) in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment may be, but is not required to be, filed via the Portal. Comments filed via the Portal must be submitted in Microsoft Word 97 or higher. See In re Electronic Filing in the Florida Supreme Court, Fla. Admin. Order No. AOSC17-27 (May 9, 2017). Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

## **IN THE SUPREME COURT OF FLORIDA**

IN RE: STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES—  
REPORT NO. 2017-03, CASE NO. SC17-1652

### **16.10 POSSESSION OF MATERIAL INCLUDING SEXUAL CONDUCT BY A CHILD WITH INTENT TO PROMOTE § 827.071(4), Fla. Stat.**

**To prove the crime of Possession of Material including Sexual Conduct by a Child with Intent to Promote, the State must prove the following two elements beyond a reasonable doubt:**

- 1. (Defendant) possessed with intent to promote a[n] [photograph] [motion picture] [exhibition] [show] [representation] [presentation].**
- 2. The [photograph] [motion picture] [exhibition] [show] [representation] [presentation] included, in whole or in part, sexual conduct by a child less than 18 years of age.**

**The possession of three or more copies of such [photograph] [motion picture] [exhibition] [show] [representation] [presentation] may justify a finding of an intent to promote if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed.**

*Definitions.*

*Possession.*

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

*Give if applicable.*

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

*Joint possession. Give if applicable.*

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

§ 827.071(1)(d), Fla. Stat.

**“Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same.**

§ 827.071(1)(h), Fla. Stat.

**“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.**

*Give if applicable.*

**A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”**

*Give as applicable.*

§ 827.071(1)(a), Fla. Stat.

**“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.**

§ 827.071(1)(e), Fla. Stat.

**“Sadomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself.**

§ 827.071(1)(f), Fla. Stat.

**“Sexual battery” means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, “sexual battery” does not include an act done for a bona fide medical purpose.**

§ 827.071(1)(g), Fla. Stat.

**“Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.**

§ 827.071(1)(j), Fla. Stat.

**“Simulated” means the explicit depiction of “sexual conduct,” as defined above, which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks.**

**Lesser Included Offenses**

<b><u>POSSESSION OF MATERIAL INCLUDING SEXUAL CONDUCT BY A CHILD WITH INTENT TO PROMOTE — 827.071(4)</u></b>			
<b><u>CATEGORY ONE</u></b>	<b><u>CATEGORY TWO</u></b>	<b><u>FLA. STAT.</u></b>	<b><u>INS. NO.</u></b>
<u>Knowing possession of a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, was known by defendant to include any sexual conduct by a child</u>		<u>827.071(5)(a)</u>	<u>16.11</u>
	<u>Attempt</u>	<u>777.04(1)</u>	<u>5.1</u>

**Comment**

This instruction was adopted in 2008 [995 So. 2d 489] and amended in 2018.