APPENDIX B

Committee on Standard Jury Instructions in Criminal Cases
The Honorable F. Rand Wallis, Chair
Report 2017-03

COMMENT ON PROPOSED INSTRUCTION 25.7

RICHARD SANDERS, Palm Harbor, FL

I agree with the proposed changes to instruction 25.7. I write to comment on the elimination of 1) the concepts of actual and constructive possession and 2) the "possession" inferences.

PROBLEMS WITH THE DISTINCTION BETWEEN ACTUAL AND CONSTRUCTIVE POSSESSION

The current instruction first defines possession as meaning the defendant ("D"): 1) *knew of the presence of the substance* (the "presence-knowledge" component); and 2) *exercised control or ownership over the substance* (the "control" component). The instruction then tells jurors there are two types of possession (actual and constructive), and there are two types of constructive possession, both of which require both presence-knowledge and either

> a. *ability to control* drugs, if D had control-over-place-drugs-were-in
>
> b. *exercised control or ownership* over drugs, if D did not have control-over-place-drugs-were-in

Thus, to prove possession, the *exercise* of control over the drugs must be proven; and that can be (constructively) proven if D 1) *has* control over the place-drugs-were-in and 2) has the *ability* to control the drugs found there. Jurors could understand this to mean D must actually *have* control over that place but need only have the physical *ability* to control drugs found there, regardless of whether D ever intended to, or did, actually exercise control

over the drugs (and if D has *actual* control-over place, then it would seem that, by definition, D has the physical *ability*-to-control any drugs found there).

With the second definition of constructive possession (used if D did not have control-over-place-drugs-were-in), the State must prove presence-knowledge plus *exercised control over drugs*. The instruction clearly indicates that the definition of constructive possession changes depending on whether D had control-over-place-drugs-were-in. If ability-to-control (used if D had that control-over-place) is synonymous with exercised-control (used if D didn't have control-over place), there would be no need for two definitions for constructive possession. This conclusion is reinforced by noting that two definitions for presence-knowledge are used when constructive-possession is defined, *aware of presence* (if D had control-over-place), and *knew were within presence* (if D did not have control-over-place).

The concept of control-over-place-drugs-were-in raises two questions: What is the relevant *place;* and what is meant by *control over* that place? The instruction provides no guidance.

Further, when lawyers use the adjective *constructive*, 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). Using the term *constructive* possession may lead some jurors -- particularly those with some

knowledge of how the law generally uses the term constructive -- to conclude that presence-knowledge-plus-control need not be proven-in-fact in constructive-possession cases, because the law will assume that these components exist in fact even if they do not.

Finally, 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 possess the drugs]." *United States v. Nevils*, 548 F.3d 802, 806 (9th Cir. 2008), *modified on other grounds 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 [issues of presence-knowledge and control]." *Id.; see also Campbell v. State*, 577 So. 2d 932, 935 (Fla. 1991) ("for [D] to be in actual or constructive possession[, the drugs] must have *come under [D's] control*") (emphasis added); *G.G. v. State*, 84 So. 3d 1162, 1164 (Fla. 2d DCA 2012) ("Under either theory of possession, [the] State must prove [D] *had control* of the [drugs]") (emphasis added); *United States v. Brown*, 724 F.3d 801, 804-05 (7th Cir. 2013) ("[The] formulas do not explain clearly the difference between actual and constructive possession, or the utility of drawing the distinction"; "Once one recognizes that 'possession' is not limited to holding something in one's hand, the occasions for invoking the term 'constructive possession'

diminish.").

PROBLEMS WITH THE INFERENCES

The instruction contains four *possession* inferences. Jurors are told they may infer D possessed drugs -- *knew of the drugs' presence and had power and intent to control them* -- if they find that D:

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

Fla. Std. Jury Instruct. (Crim.) 25.7. The crucial terms here leave many questions unanswered: How do we determine the relevant "place" (*e.g.*, whole-house vs. bedroom-in-house vs. chest-of-drawers-in-bedroom vs. one-drawer-in-chest vs. small-box-in-drawer[1]); what does "control over" that place mean and when is D's control-over-place joint-vs.-exclusive;[2] what do "common area,"

---

[1] *See Bennett v. State*, 46 So. 3d 1181, 1184 (Fla. 2d DCA 2010), *Evans v. State*, 26 So. 3d 85, 89 (Fla. 2d DCA 2010), *State v. Holland*, 975 So. 2d 595, 598 (Fla. 2d DCA 2008), *State v. Reese*, 774 So. 2d 948, 950 (Fla. 5th DCA 2001), *Clark v. State*, 670 So. 2d 1061, 1062 (Fla. 2d DCA 1996), *Wilcox v. State*, 522 So. 2d 1062, 1064 (Fla. 3d DCA 1988), *Wale v. State*, 397 So. 2d 738, 740 (Fla. 4th DCA 1981), and *Gaynus v. State*, 380 So. 2d 1174, 1175 (Fla. 4th DCA 1980).

[2] *Cf. Gartrell v. State*, 626 So. 2d 1364, 1366 (Fla. 1993) *with P.M.M. v. State*, 884 So. 2d 418, 419 (Fla. 2d DCA 2004); *N.K.W. v. State*, 788 So. 2d 1036, 1038 (Fla. 2d DCA 2001); and

"plain view," and "in presence" mean?

These inferences "do not provide terms sufficiently defined to adequately inform a jury as to [when] to apply the[m]"; thus, there is 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).

These inferences are also improper judicial comments on the evidence. Drug-possession cases often turn on the inferences we can draw from a variety of circumstances, including where, when, and how the drugs are found; D's (and relevant others') relation to the place where drugs are found and their reaction when they are found; any physical evidence that ties D (or others) to that place or to the drugs; indications of prior drug activity, or of consciousness-of-guilt, by D or others; *etc.* In a given case, some circumstances are quite incriminating, others less so, some may be exculpatory, and still others are ambiguous (*e.g.*, nervousness during a traffic stop may prove D knew drugs were in the car but "could [also] be attributed to the fact [D was] stopped for speeding," *Hill v. State*, 736 So. 2d 133, 133-34 (Fla. 1st DCA 1999)). Because many combinations of various circumstances can

---

Cook v. State, 571 So. 2d 530, 531 (Fla. 1st DCA 1990). *Cf. Henderson v. State*, 88 So. 3d 1060 (Fla. 1st DCA 2012), *State v. Odom*, 862 So. 2d 56 (Fla. 2d DCA 2003), *and Lee v. State*, 835 So. 2d 1177 (Fla. 4th DCA 2003) *with Bennett v. State*, 46 So. 3d 1181 (Fla. 2d DCA 2010) *and Links v. State*, 927 So. 2d 241 (Fla. 2d DCA 2006). See also the majority and dissenting opinions in *Delacruz v. State*, 884 So. 2d 349 (Fla. 2d DCA 2004).

exist in a given case, the cases cannot be catalogued with neat formulas but must be analyzed individually, in light of all their circumstances.

But the possession inferences "accord[] special status"[3] to some specific circumstances, by "intimat[ing the judge's] opinion [on] the weight [of that] evidence"[4] and "suggest[ing it] may be more important than other evidence."[5] Also, 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). Although there are no Florida cases directly on point, courts in other states recognize the problems with giving this type of instruction.[6]

Further, these instructions may encourage jurors to do what Florida courts have long disapproved: Stack inferences. *See Baugh v. State*, 961 So. 2d 198, 205 (Fla. 2007). These inferences invite jurors to stack inferences. Jurors are told that, if the predicate

---

[3] *Gutierrez v. State*, 177 So. 3d 227, 231 (Fla. 2015).
[4] *Lester v. State*, 20 So. 232, 234 (1896).
[5] *Moton v. State*, 659 So. 2d 1269, 1270 (Fla. 4th DCA 1995).
[6] *State v. Litzau*, 650 N.W.2d 177, 185-87 (Minn. 2002); *State v. Olson*, 482 N.W.2d 212, 215-16 (Minn. 1992); *State v. Hunter*, 857 N.W.2d 537, 540, 542 (Minn.Ct.App. 2014); *State v. Cheeks*, 737 S.E.2d 480, 483-84 (S.C. 2013); *State v. Shumaker*, 174 P.3d 1214, 1215-16 (Wash.Ct.App. 2007); *see also State v. Simpson*, 528 N.W.2d 627, 635 (Iowa 1995) (Ternus, J., dissenting), *receded from on other grounds, State v. Webb*, 648 N.W.2d 72 (Iowa 2002); *State v. Schmidt*, 540 A.2d 1256, 1266-67 (N.J. 1988) (Stein, J., dissenting).

facts are proven, they "may infer that [D] was [*both*] aware of [or knew of] the presence of the substance *and* had the power and intention to control it." Fla. Std. Jury Instruct. (Crim.) 25.7 (emphasis added). But presence-knowledge is a necessary-but-not-sufficient-condition for -- a necessary-lesser-included of -- the control component, because presence-knowledge "is normally a prerequisite to exercising control": One "ordinarily would not be deemed to exercise 'control' over an object about which he is unaware."[7] Florida district courts have long recognized this inference-stacking problem in drug-possession cases.[8]

---

[7] *Dawkins v. State*, 547 A.2d 1041, 1046 (Md. 1988); *accord, Harbison v. State*, 790 S.W.2d 146, 149 (1990) ("[D] must have knowledge of the presence of the object [because] the essence of 'possession' is dominion and control, and those do not exist absent knowledge."); *People v. Gory*, 170 P.2d 433, 436 (Cal. 1946) ("knowledge of the existence of the object is essential to 'physical control thereof with the intent to exercise such control' and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control."); *State v. Burns*, 457 S.W.2d 721, 724 (Mo. 1970) (following and quoting *Gory*); *State v. Harris*, 632 S.E.2d 534, 536 (N.C.App.Ct. 2006) ("Necessarily, power and intent to control [drugs] can exist only when one is aware of [their] presence."); *Commonwealth v. Thompson*, 428 A.2d 223, 224 (Pa.Super.Ct. 1981) ("A necessary pre-requisite of intent to control is knowledge of the [drugs'] existence and location").

[8] *See Rangel v. State*, 110 So. 3d 41, 46 (Fla. 2d DCA 2013); *State v. Snyder*, 635 So. 2d 1057, 1058 (Fla. 2d DCA 1994); *Moffatt v. State*, 583 So. 2d 779, 781 (Fla. 1st DCA 1991); *Thompson v. State*, 375 So. 2d 633, 635-37 (Fla. 4th DCA 1979); *Frank v. State*, 199 So. 2d 117, 119, 121 (Fla. 1st DCA 1967); *see also Edison v. State*, 954 So. 2d 1235, 1238 (Fla. 2d DCA 2003); *D.M.C. v. State*, 869 So. 2d 575, 577 (Fla. 2d DCA 2003); *Davis v. State*, 761 So. 2d 1154, 1158 (Fla. 2d DCA 2000); *Green v. State*, 667 So. 2d 208, 212 (Fla. 2d DCA 1995).

My only concern with the proposed instruction is in the following sentence: "Control can be established by proof that (defendant) had *direct physical power* to control the substance or the present *ability to direct its control by another.*" "Direct physical power" and "ability to direct" may not adequately explain the nature of the control component, because they do not include any element of an intent to exercise control over the drugs. Perhaps some additional language here:

"Control can be established by proof that (defendant) **both intended to control the substance and also** had **either** direct physical power to control the substance or the present ability to direct its control by another."

For what it might be worth, here is a proposed instruction from an article I recently published on this subject:

> 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 existence of the substance and 2) had the power to, the ability to, and the intent to exercise control over the substance.
>
> To prove that D knew of the existence 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 that substance existed or knew that another person possessed it for D or on D's behalf.
>
> D's power and ability to control the substance is not

proven by the mere fact that the substance was in close physical 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 and ability over the substance even though it is too far away for D to reach out and grab it. If D has some right 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 and ability to control the substance.

The fact that D has some power and ability 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 on D's behalf. 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, either by taking control himself or by 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, ability, 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. However, it need not be proven that D was in fact the owner of the substance or the owner's agent.